USAID
NGA POPUJUJI AMERIKAN
OD AMERIČKOG NARODA

SYSTEMS FOR ENFORCING AGREEMENTS AND DECISIONS (SEAD) PROGRAM IN KOSOVO

STREAMLINING ENFORCEMENT OF CONTRACTS:

REPORT AND RECOMMENDATIONS REGARDING COMMERCIAL CASE PROCEDURES AND ENFORCEMENT OF JUDGMENTS

April 30, 2010

This Report is made possible by the support of the American people through the United States Agency for International Development (USAID).

SYSTEMS FOR ENFORCING AGREEMENTS AND DECISIONS (SEAD) PROGRAM IN KOSOVO:

Streamlining Enforcement of Contracts: Report and Recommendations Regarding Commercial Case Procedures and Enforcement of Judgments

Submitted by:

Checchi and Company Consulting, Inc.

Submitted to:

USAID

Contract No.: DFD-I-00-04-00170-00 TO 03

DISCLAIMER

The contents are the sole responsibility of Checchi and Company Consulting, Inc. and the author's views do not necessarily reflect the views of United States Agency for International Development or the United States Government.

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

ADR	Alternative and Dispute Resolution
BA	Business Associations
CBK	Central Bank of Kosovo
CLIR	Commercial Legal and Institutional Reform
ECK (KEK)	Energetic Corporation of Kosovo
KCA	Kosovo Chamber of Advocates
KJI	Kosovo Judicial Institute
LEP	Law on Executive Procedure
PMC	Pristina Municipal Courts
PTK	Post and Telecommunications of Kosovo
SEAD	Systems for Enforcing Agreements and Decisions
TAK	Tax Administration of Kosovo
UNMIK	United Nation Mission in Kosovo
USAID	United States Agency for International Development
VAT	Value Added Tax

INTRODUCTORY NOTE TO SEAD PROGRAM REPORT AND RECOMMENDATIONS

The objective of this report is to describe the strategy, approach, and processes for implementing the SEAD Program tasking. This document also gives the team an opportunity to share knowledge obtained to date, and initial ideas for solutions that will support the development objectives of the project. Numerous reports and assessments have been prepared over the years by several organizations, including USAID. In some areas this report draws on previous work, in particular USAID's previous CLIR assessments. As an assessment, however, it must be understood that the intent of this document is to provide an assessment and recommendations for the SEAD Program's work; it is not a general assessment of Kosovar systems, except as related to specific program objectives.

METHODOLOGY

This report is based on multi-faceted research and assessment that has provided insight into the Kosovo systems for contracts, for adjudication of commercial disputes (in particular on the potential for alternative means of dispute resolution (ADR)), and for the enforcement of judgments. The assessment included:

- A wide range of interviews of the Courts, judges, execution clerks, lawyers, donors, associations of lawyers, Business Associations, Chambers of Commerce, University faculty and Administration, training institutions (e.g., the Kosovo Judicial Institute), utilities, and others.
- Written surveys of courts, business associations, and lawyers.
- Focus Groups.
- Review of the current and draft legislation, including Laws on Obligations, Arbitration, Mediation, Contested Procedures, Execution Procedures, Pledge, and others.
- Analysis of systems, curricula, and institutions.

INTRODUCTION
Executive Summary/SEAD Program Overview

The SEAD program will focus on improving the ability of citizens, businesses and the judicial system to use and enforce contracts and obligations; and to enforce court judgments in a timely and just manner. The project has three components – support to institutions to increase the use of, and quality of, contracts; assistance to improve processes for enforcing court judgments and reduce the backlog of cases resolved but not yet enforced; and development of institutions to provide reliable alternative means for resolving contract disputes through both commercial arbitration and mediation of select commercial cases. The project design also anticipates a rather active public education and outreach campaign to raise awareness and understanding of contract law and modern business practices with regard to contracts, and to increase demand for better public, and private services related to the use of contracts.

The Current Situation in Kosovo

The use of contracts is fundamental to the operation of a modern market economy. Contracts act to distribute risk among the parties to a transaction, and to comprehensively define the parties' expectations and memorialize these expectations with respect to each other's roles in the transaction. The use of contracts enables the parties to minimize or avoid misunderstandings surrounding the obligations they have agreed to, and to establish clearly the rights and responsibilities they have assumed. Contracts enable merchants to craft the "best deals" and to most efficiently and productively engage in commerce; they are part of the societal fabric which optimizes economic activities. Well drafted contracts also assist judges in adjudicating contract disputes, and in more efficiently providing remedies for breaches of contract.

In Kosovo, although businesses and people engage in transactions and commerce every day, and therefore enter into many contracts, effective and modern *written* contracting practices are generally not used. The contracting practices that do exist do not rise to the level of international practice, putting Kosovar businesses at a disadvantage vis-à-vis foreign trading partners. Ultimately, this disadvantages Kosovo itself in relation to other countries given the highly competitive nature of the global economy. The impact on economic growth, and on Kosovo's future ability to integrate into Europe and have a competitive and vibrant economy, is genuinely undermined. Moreover, a failure to "buy-in" to and use formal structures and mechanisms generally undermines the Rule of Law and weakens the relationship between the State and the individual.

A number of factors contribute to the current low use of contracts. Historical factors - the period of repression and war, when Kosovar entrepreneurs were by necessity operating outside of formal structures – as well as the legacy of Socialism, and cultural values—the notion of "Besa": oath or promise, all operate to influence current business practices and attitudes. But the most serious reasons are rooted in current conditions:

State systems are simply unable to efficiently enforce contracts. Kosovo Government institutions are not equipped to deal with the burden of an ever expanding demand to adjudicate disputes and enforce judgments. The fledgling Court system struggles as a result of being under-resourced, and execution clerks are even more overburdened than the courts. An enormous backlog of execution cases languishes - backlogs can result in a delay of several *years* before execution even begins. The information and institutional infrastructure to enable efficient enforcement is not present: cadastral records, pledge and business registries, etc., are not well enough developed to readily enable the identification and location of judgment debtor property. To make this essentially broken process more effective; in order to more nimbly and effectively provide just results for businesses that have disputes; and to address an enormous backlog of unenforced judgments, will require genuine and coherently planned effort on the part of government institutions to address a range of systemic deficiencies.

Because of the inability of state institutions to perform the role of neutral arbiter of private disputes, businesses ultimately see no incentive to using formal mechanisms to enforce their agreements:

> "As to why businesspeople do not use contracts that much, most of the business people pointed out to the weak and doubtful system that enforces those contracts; hence they see it as a waste of their time to invest in making an agreement that most likely will not get enforced anyway." - Summary of Focus Group Responses, from Focus Groups conducted for the SEAD Program by MDA Consulting.

This quote is a clear illustration that business recognizes the profound disincentives to the adoption of modern contracting practices. This is in fact quite rational behavior on the part of business. There is simply too little benefit to justify the cost: Businesses conclude that, as they cannot enforce arms-length transactions through the courts, they are better off dealing only with known parties, where the agreements are largely oral, and based on relationship and custom. In these transactions, written contracts are deemed unnecessary, or even offensive to the other party (perceived as conveying at least the implication of a lack of trust).

There are certainly exceptions to this general picture, particularly in banking and insurance, where written contracts are common. Generally, however, widespread use of written agreements in the normal course of business is the exception.

A further offshoot of these conditions is a virtually non-existent system for Alternative Dispute Resolution (ADR). Although laws on commercial arbitration and mediation are in place, and shells of the institutions to provide ADR exist, so long as business avoids the use of contracts, these services cannot develop organically – their use presumes either an ADR clause in a contract, or the effective enforcement of an ADR agreement. The establishment of an accessible and effective alternative dispute resolution system able to provide efficient, reliable and respected mediation and arbitration services can serve to minimize the burdens of seeking redress through the Courts. Availability of an efficacious alternative to the Courts will also instill and grow an understanding of the advantages to using contracts generally. This alternative to the State system of resolving disputes (i.e., the Court system) should be made available to the business community as an attractive choice when circumstances merit and businesses seek it. Much of the foundation for growing the use of ADR is in place. It is clear, however, that developing the service providers, and increasing knowledge about and demand for ADR is needed to stimulate the use of alternatives.

An additional problem which arises in this climate is a lack of legal services to the business community, which can be traced to low or no demand for such legal services, and to legal and business education. Law faculties and business schools do not focus much attention on providing their graduates with practical skills, including contracting skills or an understanding of the importance of contracts. Further, there is limited and inconsistent continuing legal education available to help practitioners upgrade their skills and knowledge, (although mandatory Continuing Legal Education for lawyers, scheduled to begin in 2010, should operate to begin to address this issue). A related problem is because there is little demand; there is a dearth of legal information available to business, courts, and lawyers on the use of contracts and contracting practices outside of general theory and basic legislation. Even if widespread use of contracts were to suddenly arise, the ability to use contracts effectively would be hampered significantly by a lack of plain guidance on standards for using them. As a result, business continues as usual – a low level of sophistication as compared to modern market economy practices in transactions and contracting.

Finally, proposed legislative changes contribute to the current situation. The basic framework legislation for contract law is the 1978 Federal Republic of Yugoslavia Law on Obligations (as amended). As the basic contract law, notwithstanding that it was inherited from Yugoslavia and supplemented by the UNMIK regulation on Contract on Sale, it seems to function fairly well. Nevertheless, a replacement law has been drafted, largely based on German law, and passage of this draft is planned for 2010. The draft has not been analyzed vis-à-vis current practices, nor has there

been an analysis of the cost to business should the law be passed and adopted by business (a question, given the foregoing observations; nevertheless, legislation must be both positively and normatively evaluated based on the assumption that it will be fully complied with). This has created general uncertainty on the part of business and bar alike, and further exacerbates the situation.

The use of contracts is a fundamental component of the Rule of Law generally. Law, and the observation and adherence to it by private parties, is crucial to predictability and order. In particular, the use of contracts, assuming an effective system for adopting and enforcing them, is a stabilizing force tying public systems and private parties together, and contributes to increased economic development. But Rule of Law requires that private parties "buy-in" to systems, and conversely that systems serve the public's needs. For so long as the private sector shuns the use of formal systems and structures for commercial activity, a state of disconnectedness will continue, and the Rule of Law "fabric" will remain weak in Kosovo. An effective Rule of Law and increased, sustainable economic development are directly related and equally important for the future of Kosovo. Accordingly, the general aim of this program will support ongoing rule of law reforms by improving justice system foundational structures that also support greater economic development.

SEAD Program Goal

The overarching goal of the new USAID "Systems for Enforcing Agreements and Decisions" (SEAD) Program is to improve the rule of law foundational structures that provide the basis for increased foreign and domestic economic investment and generally lead to an improved business-friendly environment.

SEAD Program Purpose

The USAID Kosovo Systems for Enforcing Agreements and Decisions (SEAD) Program works to enhance the foundations of contract law in order to strengthen the broader rule of law in Kosovo. This program is designed to strengthen the legal systems in Kosovo available to citizens and businesses for 1) the enforcement of contracts and obligations; 2) the enforcement of civil (commercial) judgments; and 3) the use of alternative dispute resolution mechanisms.

SEAD Program Activities

Component 1 – Means and Mechanisms to Enforce Contracts

This component of the SEAD Program will focus on assisting the government to finalize the development of the draft Law on Obligations; develop standard form contracts for common transactions, with commentary and usage notes; support the Kosovo Judicial Institute (KJI) and Kosovo Chamber of Advocates (KCA) to develop training materials for ongoing, sustainable training programs in contract law; assist the University of Pristina Law Faculty to develop and launch an LL.M. Program in Contract and Commercial Law; and develop specific legal information materials on the application of contract law for judges and lawyers.

Component 2 – Enforcement of Judgments

This component of the SEAD Program will focus on assisting the government to streamline enforcement procedures, including the development of new or amended legislation; develop possible alternative policy directions to establish a more effective and efficient system for enforcing judgments; and assist in reducing the backlog of cases awaiting execution, with a particular emphasis on utilities cases.

Component 3 – Alternative Dispute Resolution

This component of the SEAD Program will focus on assisting the Government and private institutions to develop reliable, effective, and sustainable alternative dispute resolution system, including Commercial Arbitration, and Mediation in commercial cases.

PUBLIC EDUCATION, OUTREACH, AND MEDIA RELATIONS

The SEAD Program will engage in a wide-ranging campaign through a variety of media to increase knowledge and awareness of the advantages of using written contracts and to stimulate demand for improved legal services and ADR.

ENFORCEMENT OF CIVIL JUDGMENTS IN KOSOVO: AN ASSESSMENT

Executive Summary

Kosovo faces a serious crisis in the ability of its courts to enforce civil judgments. Nearly 100,000 cases sit in the dockets of enforcement agents across the country awaiting implementation, many thousands of them five years old or more. In many courts, new execution titles will wait years, literally years, before they are even delivered to the judgment debtor informing them of the judgment, and will wait more years before any effort, however unsuccessful, is made to collect the judgment debt. Businesspeople across the country believe that they cannot bring their business disputes to court because the courts cannot or will not enforce the judgments that are eventually rendered, and it will take years to try. They see contracts as a waste of time and effort because the courts will not ultimately be able to provide any remedy for the damages they suffer, and therefore don't bother to enter into transactions that require contracts, restricting the growth of the economy and denying jobs to Kosovo citizens. Across the country, many thousands of ordinary citizens refuse to pay their utility bills, because they rightly believe that the utility companies cannot really force them to pay, at least not for many years. Foreign and domestic investment in the economy of Kosovo has fallen in the last year, in part because investors worry that they will be able to receive no remedy in court if their assets are wrongfully taken. This is a real crisis, one that does grave injury to the lives of Kosovo's citizens, and serious action to deal with this crisis is required.

The failure of courts to enforce their judgments is pervasive. Fewer than 4% of civil enforcement cases in court dockets were completed in 2009, and many courts were able to enforce fewer than 1% of their civil enforcement cases. The explanations reach across virtually all the systems that are needed to enforce judgments successfully. The courts are in a state of starvation for resources, and the court enforcement offices are among the most undernourished components. Court enforcement agents, though they represent an intrinsically imperfect institution and are provided essentially no incentives whatever to perform their jobs effectively, are in most cases swamped with work and are so deprived of manpower, supervision, and resources that they simply cannot effectively handle the workload that has been placed on them. It is nearly impossible to seize most kinds of assets that might be used to pay judgments because the systems designed to seize them are broken, suffering from lack of information, poor incentives, mismanaged public agencies, and a pervasive willingness to flout the authority of courts. Indeed, it is often impossible even to find information about the assets of judgment debtors, again because the systems for that purpose do not work or do not exist, and there is little that prevents judgment debtors from finding ways to hide their assets from their creditors. There seems to be a pervasive unwillingness by courts, prosecutors, and others to impose consequences on those who disobey the orders of courts.

At the heart of this crisis lies the gigantic backlog of utility cases, consisting of tens of thousands of unenforced authentic documents cases, typically involving very modest amounts of money. Judgments were rendered years ago in many thousands of those cases. In many cases, enforcement has never even been attempted. In others, initial attempts at enforcement have been stymied by a combination of ineffective enforcement systems and the facts of social reality, including high rates of unemployment, poverty, and the movement of population. Though in many cases enforcement has proven futile, still the cases sit in the courts' enforcement dockets, un-dismissed though they can never be collected, because the law provides no means to force the creditors to dismiss them and every reason for the creditors to keep them alive. Because the law of enforcement procedure demands that priority be given to cases filed earlier, enforcement agents are required to try repeatedly to achieve the impossible with older cases while new cases go untouched. The backlog grows larger, the likelihood of enforcement of new judgments grows dimmer, and the value of court judgments grows smaller. As the usefulness of court judgments falls, the chances that new investment will provide growth and employment falls as well. The utility case backlog is a serious obstacle to the development of the Kosovo economy.

1. The Backlog of Authentic Documents Cases

To deal with the huge backlog of authentic document cases, it is critical to recognize that enforcement officers simply are not able to deal with their workload. This is in part true because of inadequate manpower in those offices, but also because of inadequate management and incentives. We propose the creation of specialized teams within enforcement offices, staffed largely by new hires and devoted specifically and solely to the resolution of authentic document cases until the backlog is brought to manageable proportions. These teams should be evaluated and compensated based on their success in moving authentic document cases to a conclusion, either through dismissal, suspension, or completion. These teams should be buttressed with additional computer support, especially case tracking software that allows agents to understand immediately the status and requirements of a case and that facilitates evaluation of progress on the overall caseload.

To facilitate the work of these teams, we propose a working partnership between the authentic documents teams in court enforcement offices, representatives of the major creditors in authentic documents cases, and major donor groups, especially USAID. This working partnership would function on several levels. First, courts and creditors would work together to amend both new and existing execution documents to ensure that information is accurate and that it includes data quite useful for collection but not legally mandated, especially debtors' or defendants' personal identification numbers or business registry numbers. Second, representatives of courts and creditors would work together regularly to visit debtors' locations to serve notices or engage in asset seizures incorrect address or asset information would result quickly in either revision of the execution documents or suspension or dismissal of the case. USAID would support this working relationship with planning and case tracking assistance, as well as limited capital investments to facilitate the process.

In addition, we propose a simplified adjudicatory approach to authentic documents cases below a modest monetary value. This approach would feature a careful initial evaluation of execution proposals for completeness and accuracy; allowing objections based only on a well-defined list of criteria; prepayment of the claim as a precondition to the objection, with later credit back in the event the defendant prevails in the objection hearing; and a short, speedy, and simplified hearing to decide the validity of the objection, resulting in final adjudication without appeal.

To facilitate asset seizures in authentic document cases, we will work to create relationships between the courts and key governmental agencies, including the Central Bank of Kosovo, the Pension Fund, and the Tax Administration. By working with these agencies, and with the additional information to be supplied by creditors on execution proposals, we believe it is possible to collect funds in satisfaction of judgment on a significant number of cases.

If cases cannot be collected, they should move towards suspension or dismissal. To achieve this goal, we propose a major revision of the court fee schedule for enforcement cases. This would change dramatically the incentives facing both creditors and courts. We also suggest significant changes in tax law and accounting practices that will alter the incentives of creditors to maintain uncollectable cases. Finally, we suggest a number of changes to the Law on Executive Procedures to facilitate moving uncollectable cases to suspension or dismissal.

2. The Courts and the Institutional Structure of Enforcement

Enforcement needs to be improved, not just for authentic documents cases, but for the civil justice system more broadly. We believe critical reforms need to be made both in the way courts are managed, and in the way the enforcement process is structured.

We urge that the management structure of courts be reconsidered, to allow decentralization of management, combined with meaningful standards of performance, accountability, and evaluation.

We believe the development of meaningful performance incentives and high standards of accountability, evaluation and performance are absolutely of critical importance to achieving an

improved enforcement system. There are two possible paths to achieving this; while we believe that the first is preferable, policymakers should be aware that the second is also an option, so long as some key principles are followed – again relating to incentive, performance, accountability, and evaluation..

The first option is to adopt a system of private enforcement agents, which we advocate with some significant caveats. Private enforcement agents will, in all likelihood, produce a high level of performance and efficiency, if the example of Kosovo's regional neighbors is of relevance. However, that approach must be combined with, first, a serious, well-designed, and effectively implemented program of monitoring and control to ensure compliance with law and prevent corruption; second, meaningful competition; and third, broader reform of the methods of enforcement and procedures.

The second alternative, in many ways a more difficult and uncertain path, involves the retention of court enforcement agents, combined with dramatic reforms of their incentive structure, training, staffing procedures, evaluation, oversight, and management.

3. Methods and Objects of Enforcement

Because of a number of critical failings, none of the usual methods of enforcement of judgments works well. These failings include serious obstacles embodied in the Law on Executive Procedure; a misconception of the relative responsibilities of courts and creditors in the enforcement process; a failure to take advantage, mostly because of unnecessary procedural obstacles, of information and assets available within the system; and unwillingness to require compliance with the orders of courts.

Seizure of debtors' bank accounts by creditors works badly in Kosovo. We propose revision of procedural rules that impede seizure of bank accounts and that make it difficult for courts to acquire evidence of non-compliance by banks with court orders. We also propose using the Central Bank's powers of supervision and regulation over commercial banks to facilitate this process.

Wage garnishment, or the seizure of a portion of a debtor's earnings to satisfy the claims of his creditor, also works badly here. Though there is significant unemployment in Kosovo, however, we believe wage garnishment can be made an effective tool. The Pension Fund of Kosovo and the Tax Administration both have a significant amount of information available to facilitate garnishment, but it is difficult to use because of some ill-considered procedural obstacles. We propose new procedures and the development of a link with these agencies that should greatly facilitate this process.

We also would facilitate satisfaction of judgments by using the licensing or title transfer of automobiles, the most significant piece of movable property in the hands of most debtors. In addition, taking advantage of the pledge registry's information to report pledges to the Department of Motor Vehicle Licensing, would enhance the meaningfulness of pledges and make the collection process easier.

Auction and sale of both movables and immovable property could achieve better prices for debtors and creditors by revised requirements and enhanced marketing and information.

Finally, we believe it is of great importance to improve compliance with court orders generally. We believe that there is reluctance to require compliance with court orders as a result of sympathy for debtors and others impacted by those orders. Even more, however, we believe that compliance with court orders is impeded by the inability of enforcement officers, using current methods of record-keeping, to keep track of those court orders and to follow up with creditors, debtors, and third parties to ensure compliance. We propose the development of an alternative method of keeping records of court orders, and suggest that creditors (or more generally, the party on whom the loss falls when the compliance does not occur) be empowered to enforce court orders by bringing a claim for damages as allowed by the Law on Executive Procedure, rather than waiting for the order to be enforced by the enforcement agent, the prosecutor, or the court, none of whom have any direct interest in whether compliance occurs.

4. INFORMATION POLICY

Information is critical to the enforcement process. One critical source of information for judgment enforcement is direct testimony by the judgment debtor as to its assets. Methods to obtain information from the debtor are entirely lacking in the 1978 Execution Procedure Law, a serious obstacle for collecting the many cases still governed by that law. The situation was somewhat improved by the 2008 revisions of the procedure law, but remain inadequate. We suggest further revisions to the 2008 Law that would considerably improve the process, including the right to depose the debtor, the right to require access to tax and business records, and the right to compel information from related parties.

Concerning information registries, the most important failure for judgment enforcement purposes lies with the requirements of the Business Registry. That agency requires little of registered legal entities in revealing company information, either in terms of annual reports or, most critically, at the time the company goes out of business and ceases its registration. We propose a variety of reforms in this area, including an expanded process for withdrawal of registration including certification from relevant courts as to the absence of litigation or outstanding judgments and an audited statement of assets at the time registration is withdrawn. We also suggest that claims brought under the Paulian[1] action provisions of the Law on Obligation can be brought as supplementary to existing litigation, rather than requiring that a new claim be brought; the purpose is to simplify the use of the Paulian provisions by reducing the time and cost required to make such a claim.

Finally, we suggest the importance of credit-relevant information to avoiding litigation altogether by allowing business decisions to be more fully informed, and examine the Draft Law on Protection of Personal Privacy for its relevance to this issue.

[1] Paulian actions are a Roman law cause of action which has, in one form or another, been carried into most versions of the civil law. It permits the recovery of assets of a debtor or defendant that have been fraudulently transferred to another party through a legal revocation of the tranfer. .

I. INTRODUCTION

Kosovo faces a serious crisis in the ability of its courts to enforce civil judgments. Nearly 100,000 cases sit in the dockets of enforcement agents across the country awaiting implementation, many thousands of them five years old or more. In many courts, new execution titles will wait years, literally years, before they are even delivered to the judgment debtor informing them of the judgment, and will wait more years before any effort, however unsuccessful, is made to collect the judgment debt. Businesspeople across the country believe that they cannot bring their business disputes to court because the courts cannot or will not enforce the judgments that are eventually rendered, and it will take years to try. They see contracts as a waste of time and effort because the courts will not ultimately be able to provide any remedy for the damages they suffer, and therefore don't bother to enter into transactions that require contracts, restricting the growth of the economy and denying jobs to Kosovo citizens. Across the country, many thousands of ordinary citizens refuse to pay their utility bills, because they rightly believe that the utility companies cannot really force them to pay, at least not for many years. Foreign and domestic investment in the economy of Kosovo has fallen in the last year, in part because investors worry that they will be able to receive no remedy in court if their assets are wrongfully taken. This is a real crisis, one that does grave injury to the lives of Kosovo's citizens, and serious action to deal with this crisis is required.

The failure of courts to enforce their judgments is pervasive. Fewer than 4% of civil enforcement cases in court dockets were completed in 2009, and many courts were able to enforce fewer than 1% of their civil enforcement cases. The explanations reach across virtually all the systems that are needed to enforce judgments successfully. The courts are in a state of starvation for resources, and the court enforcement offices are among the most undernourished components. Court enforcement agents, though they represent an intrinsically imperfect institution and are provided essentially no incentives whatever to perform their jobs effectively, are in most cases swamped with work and are so deprived of manpower, supervision, and resources that they simply cannot effectively handle the workload that has been placed on them. It is nearly impossible to seize most kinds of assets that might be used to pay judgments because the systems designed to seize them are broken, suffering from lack of information, poor incentives, mismanaged public agencies, and a pervasive willingness to flout the authority of courts. Indeed, it is often impossible even to find information about the assets of judgment debtors, again because the systems for that purpose do not work or do not exist, and there is little that prevents judgment debtors from finding ways to hide their assets from their creditors. There seems to be a pervasive unwillingness by courts, prosecutors, and others to impose consequences on those who disobey the orders of courts.

At the heart of this crisis lies the gigantic backlog of utility cases, consisting of tens of thousands of unenforced authentic documents cases, typically involving very modest amounts of money. Judgments were rendered years ago in many thousands of those cases. In many cases, enforcement has never even been attempted. In others, initial attempts at enforcement have been stymied by a combination of ineffective enforcement systems and the facts of social reality, including high rates of unemployment, poverty, and the movement of population. Though in many cases enforcement has proven futile, still the cases sit in the courts' enforcement dockets, un-dismissed though they can never be collected, because the law provides no means to force the creditors to dismiss them and every reason for the creditors to keep them alive. Because the law of enforcement procedure demands that priority be given to cases filed earlier, enforcement agents are required to try repeatedly to achieve the impossible with older cases while new cases go untouched. The backlog grows larger, the likelihood of enforcement of new judgments grows dimmer, and the value of court judgments grows smaller. As the usefulness of court judgments falls, the chances that new investment will provide growth and employment falls as well. The utility case backlog is a serious obstacle to the development of the Kosovo economy.

Many observers hope to find a quick fix to this array of problems by adopting some version of a private enforcement agent system, similar to those that have been adopted by many of Kosovo's

neighbors in the Balkans and across Europe. We support the adoption of a well-designed private agent system as an integral part of the solution to Kosovo's problems with civil judgment enforcement. However, treating a private enforcement agent system as a panacea that eliminates the necessity for fundamental structural reforms would be a serious mistake. Other reforms must be adopted simultaneously with, or before, the implementation of a private agent system.

The reason is simple. Though private enforcement agents can solve some problems, they cannot solve others without legislative or other policy intervention. Unless there are realistic means of seizing the funds in debtor bank accounts or locating a debtor's place of employment to levy against his earnings, or to find and seize a debtor's other assets, there is little a private enforcement agent can do to enforce a judgment. Unless a debtor's assets can be found, those assets cannot be seized to pay the judgment. Unless debtors can be prevented from hiding their assets, or transferring them to others to keep them out of the hands of creditors, judgments will not be satisfied. Unless there is some means of ensuring that court orders will be obeyed, assets can be seized, and information about debtors obtained, the private enforcement agent cannot be effective.

To a considerable degree, these critical elements of the enforcement system do not work adequately in Kosovo today. In short, enforcement reform must proceed across a broad front of issues to be effective. Enforcement reform must be systemic.

II. THE BACKLOG OF AUTHENTIC DOCUMENTS CASES

The existence of the vast backlog of authentic documents cases – almost entirely utility bills – has been widely discussed, and its general character is well understood.

The Statistical Office of the Kosovo Judicial Council reports that, as of the end of 2009, there were some 62,277 authentic documents executions cases unresolved at the end of 2009 in all the municipal courts in Kosovo, two-thirds of the total of 95,306 pending execution cases in municipals courts. Of these 62,000 authentic documents cases, about 40,000 cases were attributable to KEK and PTK alone, by far the most persistent litigants in the Kosovo courts.[2] Another 12,000 were attributable to heating, water, and garbage collection utility companies. While there have been no definitive studies of the makeup of the backlog, defined as cases pending for 24 months or longer, one study that drew a sample based on four municipal courts found that more than 85% of the cases in that category were authentic documents cases. While authentic documents cases represent two-thirds of pending caseload, this study also found that they represent only 7% of the value of outstanding claims, and the median outstanding claim is less than Euro150.[3]

A. Factors Preventing Resolution of Backlogged Cases

The major part of the development of the backlog of authentic documents cases took place in the context of the middle years of the last decade, in the wake of the difficult situation following the end of the war in 2000. But whatever the reasons for the development of the backlog of authentic documents cases in those years and its ongoing accumulation in the years since, it is clear today that there are powerful forces that make it difficult to eliminate the backlog and resolve the outstanding cases at this time. The following is an analysis of some of the major factors that contribute to the persistence of the authentic documents backlog.

1. Insufficient Resources, Improper Incentives, and Minimal Oversight

First, it appears there are insufficient resources in the enforcement offices of municipal courts even to begin addressing backlogged utility cases. There are too many other cases in the enforcement offices that are assigned a higher priority than civil enforcement cases, those cases consume a high proportion of the available time of enforcement agents and other resources, and as a result most civil enforcement cases are not even handled.

The situation in Pristina Municipal Court is instructive. In that court, the enforcement office has approximately seven agents on its staff.[4] The court claims that this staff is capable of handling approximately 2000 cases per year.[5] Yet every year a total of over 10,000 new cases arrive in the office for enforcement. Of those new cases, a number of categories of cases apparently have priority over monetary enforcement cases. First, the annual inflow of cases includes non-monetary cases, and those that deal with custody or support of children take priority over nearly everything else in the docket.[6] Second, and far more importantly in terms of caseload size, the enforcement office reportedly

---

[2] Kosovo Judicial Council Statistics Office, "Ekzekutimet Civile Per Vititn 2009."

[3] USAID Kosovo Justice Support Program, "Civil Execution Caseload Report: Analysis of Pending Caseload in Select Municipal Courts," 2008, p.16.

[4] Though Pristina Court representatives have told us repeatedly that there are seven enforcement officers on their staff, the Kosovo Judicial Council has reported that there are nine officers. We do not know the cause of the discrepancy. Kosovo Judicial Council, "Emrat E Krytareve to Gjykatave Komunale Si Dhe Gjyqatrve Exzekutues Civil Dhe Referntave Te Exzekuteuses Civil," March 2010.

[5] Again, we do not know the basis for this estimate; since this works out to approximately one case per agent per day (assuming 7 agents and 260 workdays per year), it suggests a rather slow rate of performance for enforcement agents.

[6] The study cited earlier found that, while 67% of authentic documents cases in the four surveyed courts were still awaiting execution more than 24 months after filing, between 60% and 90% of cases filed for the collection of expenses of criminal proceedings are pending for two years or less, depending on the court. USAID Kosovo Justice Support Program, "Civil Execution Caseload Report: Analysis of Pending Caseload in Select Municipal Courts," 2008, pp. 9, 13.

receives over 4,000 cases for the collection of expenses of criminal cases. In these cases, a fine must be collected or the debtor may face prison time, and those are therefore treated as a priority.[7] As a result, the enforcement office representatives claim the working time of enforcement officers is completely taken up with these priority cases, and they simply do not have the time to deal with conventional civil judgment enforcement at all. Thus, all new conventional civil cases are simply added to the backlog, including all new authentic documents cases. The backlog is not being reduced, in part, because no one seems to be available to work on it.

Whatever the literal accuracy of these numbers, the general point seems accurate. For example, the SEAD project has begun to work with representatives of some of the major utility companies and Pristina Municipal Court to find ways to address authentic documents cases that are part of the backlog. When we accompanied these teams into the field to locate judgment debtors, we found that enforcement proposals first filed in 2007 were for the first time being delivered to judgment debtors. While there may be some authentic documents cases that have been worked on that are newer than that, this certainly suggests to us that there are many cases in the backlog that have never been touched by enforcement agents.

The following table illustrates this point:

[7] We were informally told this number by court staff, and have been unable to obtain independent confirmation of the number from the Kosovo Judicial Council or elsewhere.

Cases in all Municipal Courts in Kosovo 2009				Unsolved cases at beginning of reporting period	Cases received during the period	Total number of cases in process	Disposition decision					Total (sum of columns 1 - 5)	Cases unsolved at end of reporting period
							Decision for execution	Procedure suspended	Proposals withdrawn	Cases directed to civil contest	Other dispositions		
a	b		c				1	2	3	4	5	6	
I	**Execution of authentic documents (rows 1 - 6 below)**			**50481**	**16275**	**66756**	**1043**	**1610**	**525**	**1066**	**235**	**4479**	**62277**
	1		KEK	7981	3509	11490	74	107	19	494	60	**754**	10736
	2		PTK	21706	9140	30846	595	196	343	338	123	**1595**	29251
	3		Heating	3435	870	4305	75	955	23	144	0	**1197**	3108
	4		Water	6661	2355	9016	180	301	67	14	18	**580**	8436
	5		Garbage	471	213	684	46	26	61	34	17	**184**	500
	6		Other authentic document cases	10227	188	10415	73	25	12	42	17	**169**	10246
II	**Collection of all other executive titles**			**24619**	**15398**	**40017**	**4688**	**1250**	**261**		**789**	**6988**	**33029**
	1		Collection of all non-monetary titles	**3645**	**1355**	**5000**	**471**	**73**	**67**		**42**	**653**	**4347**
		A	Recovery of possession	146	45	191	47	9	4		8	**68**	123
		B	Verification of ownership	541	983	1524	320	43	15		16	**394**	1130
		C	Evictions from dwellings	83	66	149	18	1	0		2	**21**	128
		D	Selling of immovable property	26	16	42	5	1	0		2	**8**	34
		E	Selling of movable property	50	110	160	2	7	45		6	**60**	100
		F	**Other non-monetary executions**	2799	135	2934	79	12	3		8	**102**	2832
	2		Monetary requirements, collection of court expenses, collateral, mortgages	20974	14043	35017	4217	1177	194		747	**6335**	28682
			Total (sum of rows I and II	**75100**	**31673**	**106773**	**5731**	**2860**	**786**	**1066**	**1024**	**11467**	**95306**

Table 1 Source: Statistical Office, Kosovo Judicial Council

This is surely in part because of inadequate manpower in enforcement offices. But the resource problems reach beyond just manpower to an array of other matters as well, from computers and software to transportation to training. Most fundamentally, however, managements systems in

enforcement offices are seriously inadequate. Enforcement officers are severely under-incentivized, and their work is not subjected to adequate evaluation. There is little real accountability for the productivity of enforcement offices. This management and compensation structure is of central importance.

2. Problems Finding Debtors

A second reason for the persistence of the backlog, the reason most commonly mentioned, is the difficulty of finding judgment debtors. Since the enforcement agents, when they work on these cases, are just now delivering enforcement notices of cases originally filed nearly three years ago, it is not surprising that addressees may have moved, but of course during the early years of the decade there were apparently considerable population movements. For a variety of reasons, therefore, many judgment debtors no longer reside where they did when they were first sued.

It appears that neither the court nor the creditor have any easy means to find them. The Civil Registry, which in theory can be accessed by the court,[8] is the only available source of information about the status of the population, but it does not actually contain information on the current addresses of individuals; though requests for this information are often sent to the Civil Register, the local officials responsible for maintaining the Register reportedly do not accept requests for information from courts.[9] The Civil Registry thus offers no assistance with this problem. The Civil Registry is apparently making efforts to rectify this oversight, and reportedly will be able to provide address information in the next year or so, but it is not presently available. In any case, a frequent explanation for the lack of success of the enforcement officers at enforcing authentic document execution cases is that the debtors have moved and cannot be located.

3. Problems Finding and Seizing Assets

A third reason backlogged enforcement cases are not successfully enforced is that seizure of assets is problematic. In many utility bill cases, there is apparently literally nothing to seize because the judgment debtor is without assets – to use the U.S. expression, the debtor is judgment-proof. This is a meaningful problem in a country, like Kosovo, that has high rates of unemployment and poverty. The significant amounts of property exempt from seizure under both the 1978 Law on Executive Procedure[10] makes it difficult for the enforcement agents to seize much in the way of movable property, in the typical case against individuals; this has been reduced to more viable levels in the 2008 revision of the Law on Executive Procedure, but the 1978 law still applies to many authentic document cases.

Furthermore, even if there were significant movable assets to seize, enforcement agents lack both transportation and warehousing facilities, and unless the creditor provides those facilities, enforcement agents regard it as impossible to seize any movable property that can be found; and even if the debtor's movable property could be seized, it is unlikely that much value could be realized by sale, yielding little benefit to the creditor.[11] As we argue later in this assessment, creditors are generally not willing to provide such facilities. If movable property cannot be seized on the spot, then there is not much incentive on the debtor to pay the debt to the enforcement agent with any available cash. Automobiles can easily be moved to avoid detection, and Kosovo lacks effective means to facilitate their discovery and seizure. Bank accounts and employment income have also proven

[8] Law on Civil Registers, Article 14, states: "The right to access the civil register is held by the following: . . . (d) other official person based upon reason sustained by the general interest and the law."

[9] Though courts are entitled to access the Civil Register, still the Civil Register frequently refuses to answer requests from courts for address information. Law on Civil Register, 2004, Art. 14(4). Since the Civil Register is not required to maintain address information and does not do so, refusal to answer court requests is apparently because they do not have the information courts usually request.

[10] 1978 Law on Executive Procedure, Article 71; 2008 Law on Executive Procedure, Article 78.

[11] The Law on Executive Procedure makes it possible to sequester property but leave it in the custody of the judgment debtor. This procedure, though legally available, is not much used in Kosovo.

problematic, as will be discussed later in this assessment. In short, there is little possibility to enforce judgments against typical debtors, even when the debtor can be found.

4. Unwillingness to Dismiss Unenforceable Cases

Yet another reason for the persistence of the backlog is unwillingness on the part of creditors to dismiss cases. When enforcement agents are unable to find a debtor even after repeated attempts; when, upon finding the debtor, it is clearly highly unlikely that funds will be found to pay the debt; and when the case has dragged on for a period of years over a small amount of money, a reasonable reaction from the judgment creditor might be to dismiss the case. It would seem that a great many cases in the enforcement backlog are ripe for dismissal, because the costs of continued efforts to collect the judgments far outweigh any likely payoff. Yet the reality is that the major utility companies have generally refused to dismiss cases, preferring that they remain in the court docket even though there is no realistic possibility of collection.

The following table illustrates this point:

Kosovo Municipal Courts 2009	Number execution agents	utility cases awaiting execution	total execution cases awaiting execution	utility cases per execution agent	total execution cases per execution agent
December 31, 2009					
Gjilan	4	3368	4592	842.0	1,148.0
Viti	1	982	2302	982.0	2,302.0
Prizren	5	5961	9329	1,192.2	1,865.8
Dragash	1	160	257	160.0	257.0
Maliseve	2	268	805	134.0	402.5
Rahovec	1	1158	1832	1,158.0	1,832.0
Suhareka	1	916	1438	916.0	1,438.0
Peja	7	9649	11127	1,378.4	1,589.6
Decan	1	1894	3571	1,894.0	3,571.0
Gjakova	6	7735	10009	1,289.2	1,668.2
Istog	1	1719	2180	1,719.0	2,180.0
Klina	2	937	2062	468.5	1,031.0
Pristina	9	17008	26886	1,889.8	2,987.3
Ferizaj	5	5025	7008	1,005.0	1,401.6
Sterpce	1	11	104	11.0	104.0
Gllogovc	1	432	1001	432.0	1,001.0
Lypian	2	988	2344	494.0	1,172.0
Podujeve	1	1770	4111	1,770.0	4,111.0
Vushtrri	1	807	1476	807.0	1,476.0
	52 total	**60,788** total	**92,434** total	**975.9** average	**1,659.9** average

Table 2 Source of data: Statistical Office, Kosovo Judicial Council. Courts with no enforcement clerks, or with no enforcement cases, have been excluded from the table.

Since cases in the "backlog" are, by conventional definition of the term, more than two years old, they were all filed before the adoption of the 2008 Law on Executive Procedure. New cases coming in to the caseload, so far as we can tell, are generally not being worked on at all, and are thus of little relevance. For that reason, the new 2008 Enforcement Procedure Law is generally not much used and is of little relevance to the backlog problem.[12] Under Article 303 of that statute, all execution proposals filed before the implementation of the 2008 statute are to be treated under the earlier 1978 Enforcement Procedure statute. While the 2008 law allows broad grounds for ex officio dismissals of claims as "impossible,"[13] the 1978 law does not allow for dismissal on that basis, but only if the underlying executive title is terminated or otherwise declared legally not operational; mere impossibility is not grounds for dismissal by the court.[14]

a. Court Fees

There are a number of reasons for creditors' unwillingness to dismiss. First, there is no reason that the creditor should dismiss – keeping the case alive costs the creditor nothing. Court fees in Kosovo are determined and paid "at the time of filing an application."[15] No additional fee is assessed at any time after that initial payment, under the fee schedule, unless the value of the case was initially calculated incorrectly. The "value of the case," for the purpose of determining the fee, is based on the monetary amount of the demand, that is, the claimed amount, in civil enforcement cases.[16] Once filed, the case can sit in the court's enforcement docket indefinitely, with no additional fee, no matter how many times enforcement is attempted and without regard for the actual costs of the actions demanded by the creditor. The creditor is allowed to withdraw the case and amend it, requesting additional means and objects of enforcement, even correcting incorrect information originally supplied that may have been the basis of initial delivery or enforcement attempts, all without incurring additional costs. Why should the creditor ever agree to a dismissal, when permitting the court's enforcement office to keep working on the case indefinitely costs the creditor nothing at all?

b. Tax Accounting

A second reason for refusing to dismiss cases stems from the tax law. The business value-added tax (VAT) in Kosovo works on an accrual basis – that is, tax is paid at the time of billing, not at the time of the actual collection of funds (though some companies, such as KEK, reportedly have agreements with the Tax Administration that allow VAT payments at the time the claim is actually collected). Once the utility company bills the customer for services, a tax is due to the government on the billed amount, which the utility must pay.

If the customer does not pay the bill, then there was no real value collected and the company should be repaid the VAT that was collected on that billing. In fact, though, the government is reluctant to allow a deduction from subsequent tax bills or to repay VAT previously paid, even if the taxpayer is arguably entitled to that deduction or reimbursement. In order to persuade the government that reimbursement is really due, in Kosovo practice, the taxpayer should have an ongoing court case against the non-paying customer; arguably this demonstrates to the government that the business really has not collected the debt. Once the claimant dismisses the case, the government assumes that the debt was paid, and thus deductions that were claimed when the suit was filed have to be repaid to the government. If, on the other hand, the lawsuit is maintained, then the company can argue that the debt remains unpaid and thus there is no need to repay the deduction. That gives an incentive to the

[12] For example, all standardized letters and forms that we found in use in enforcement offices were written to be in compliance with the 1978 Enforcement Procedure Law, not the 2008 revision.

[13] 2008 Law on Executive Procedure, Article 71.3.

[14] 1978 Law on Executive Procedure, Article 68, states: "[E]xecution will be suspended upon official duty if the executive document is validly terminated, altered, revoked or put out of power, i.e. if receipt on carrying out is terminated."

[15] Kosovo Judicial Council, "Administrative Direction No. 2008/02 On the Unification of Court Fees," Nov. 2008, Section 3.1.

[16] Id., Section 10.1.

company to continue the case in the hopes of avoiding payment of the tax amounts previously deducted.[17]

c. Privatization

Finally, a third reason dismissals are against the interests of the creditors is that many of the major utility companies are in the process of privatization. As long as uncollected billings remain viable claims in court, they remain assets on the balance sheets of the utility company, arguably increasing the book value of the company and the price that it may eventually receive in the privatization process. Dismissal of the claim forces an accounting realization of the loss, which must then be reflected on the company's balance sheet, arguably reducing the sales price which the company may eventually be able to realize. On the other hand, if the claim is not dismissed, it remains "potentially" collectable, even though in practical terms it really may be uncollectable and have zero value; as a potentially collectable claim sitting as an asset on the company's balance sheet, the buyer of the privatizing company may incorrectly attribute a higher book value to the company than it deserves, and thus pay a higher price in the privatization. Dismissal immediately imputes a zero value to the claim; maintaining the case permits the attribution of a positive value to the claim, even when the utility company has no expectation that the claim will be paid. That may sound like a fraud against the potential buyer – but of course, whether the collection of a specific claim is truly impossible is something that is unknowable. If the utility company cannot say with certainty that the bill will never be paid, how could anyone say that there was a knowing fraud?

Recommendations

This discussion suggests an approach to reducing the backlog that is focused on three general strategies: altering the management of the enforcement process, improving the methods by which judgment debtors can be found, and their assets found and seized; and encouraging dismissals.

1. Additional Manpower and Improved Management in Enforcement Office Teams Devoted to Authentic Documents Cases

It is clear that additional resources must be brought to bear on the problem of enforcement generally, and authentic documents cases in particular. For all municipal courts in the country, there was at the end of 2009 a total caseload of some 95,306 cases, according to the Kosovo Judicial Council. When all the resources of the enforcement office of the largest first instance court in the country are devoted to dealing with a single category of cases, that is, the penal/criminal cases, while tens of thousands of other cases wait for years for enforcement notices even to be delivered to debtors, that strongly suggests the level of resources is inadequate. Additional manpower is clearly needed to handle these cases.

However, care should be taken to ensure that these additional workers will be focused exclusively on the handling of these authentic document cases, at least until the backlog is dramatically reduced. It is startling, and a source of concern, that the enforcement office where the greatest share of authentic documents cases are located apparently does not address these cases at all, when governmental discussion about enforcement has focused for years on the problem of an intractable backlog of authentic documents cases. Additional resources should be mandated to be directed at this problem in particular. If additional manpower resources are devoted to this problem, regular inspections of enforcement officers should be planned to ensure the proper usage of that additional manpower. It does not seem possible to create this focus within the existing management structure of enforcement

[17] This may be the key reason that PTK, which does not have an agreement with the government for alternative treatment of billings, has so many more cases in the court backlog than does KEK, which reportedly has an informal agreement with the Tax Administration to allow tax payment at the time of collection rather than the time of billing. The tax treatment that PTK faces much more strongly favors filing suit and discourages dismissals, as compared to the tax treatment facing KEK.

offices, given that so little energy has been devoted to these cases over the last few years. For that reason, we suggest a separate subdivision within existing enforcement offices be created, with separate management and the obligation to report directly to the Judicial Council, with success and accountability measured by the effectiveness of this subdivision in clearing existing authentic documents enforcement cases.

This new subdivision within existing enforcement offices should be combined with managerial changes, including improved supervision and evaluation for enforcement officers, as well as incentive pay for officers. Systems should also be implemented to allow case tracking, for example to ensure that garnishees respond timely to court orders and to permit cases to be identified that are eligible for suspension or other procedural actions.

The enforcement statutes give a preference to treating cases in the order in which they are received. Some might argue the need to treat cases in strict order of filing precludes any special divisions within enforcement offices, because that might alter the order in which cases are handled. But strict priority based on filing is in fact far from the current practice; and besides, the statutory language clearly justifies deviations from strict priority to deal with "special circumstances."[18] The current practice is that, at least in some courts, almost all cases are enforced together according to neighborhood, not age, so that old and new cases will be dealt with simultaneously as enforcement agents go to specific neighborhoods. A problem that prevents many cases from being executed at all, and that forces a delay of years onto virtually all cases, clearly constitutes a "special circumstance" that requires special treatment. Thus, priority based on filing date should not be an obstacle to creating a special "authentic documents" division within the enforcement offices of a few municipal courts.

2. A Separate Adjudicatory Approach Within Basic or Municipal Courts Focused on Authentic Documents Cases, Incorporating Expedited Procedure and Limited Appeals

We suggest, given the unique situation of authentic documents cases and the extraordinary number of such cases, that a special set of procedures be devised within courts to deal with them. We suggest the designation of a specialized judge or judges within first instance courts to deal with the adjudication of authentic documents cases of small monetary value (perhaps 500 Euros maximum, to match the provisions of the Law on Contested Procedures small claims procedures[19]). We suggest that the objections provisions of the 2008 Law on Executive Procedure[20] be modified for authentic documents cases of small monetary value, to create an adjudication procedure for objections that will include the following components:

- objections should be based on a defined list of grounds, to which clear standards of evaluation can be applied in the adjudicatory process;
- payment of the amount in controversy prior to objection, with provisions for later credit back to the defendant in the event the defendant ultimately prevails; and
- a short, speedy, and simplified hearing to decide the validity of the objection, resulting in final adjudication without appeal.

Objections should be based on a limited set of possible failings in the original claim to facilitate rapid and routine determination as to the sufficiency and validity of the objection. Since the hearing should be adequate to determine truth or falsity of the claim and the validity of the objection, full trial procedures should not be required in these small cases based on utility bills. Once a decision is reached, appeals should not be possible. Once the hearing is completed and a ruling made, the case should move to enforcement promptly, and authentic documents cases for a sum below a certain maximum amount (say, 500 Euros), the case should be enforced through a special division of the enforcement office for dealing with such cases.

[18] Id.

[19] Law on Contested Procedures, Articles 484 et. seq.

[20] 2008 LEP, Articles 58, 61.2.

3. USE THE CENTRAL BANK OF KOSOVO TO BRING SPEED AND CERTAINTY TO BANK COLLECTIONS

The Central Bank, through its financial supervisory powers over banks can assist creditors, through the courts, in identifying debtors' bank accounts to satisfy judgments against them. It can under current law require that banks report to the Central Bank the receipt of an order from a court to seize the funds in an account, and that it provide the Central Bank with sufficient transactions information to ensure the Central Bank that the commercial bank has complied fully with the court order and has not permitted and enabled the depositor to remove funds from the bank in violation of the court order. Eventually, we believe that it will be possible to develop a current database of account holders within the Central Bank, and develop the facilities to transfer funds between accounts within the Central Bank itself, eliminating the need for any independent action by the commercial banks to comply with court orders to transfer funds between debtors and creditors. This approach has worked well in some of Kosovo's regional neighbors.

The Central Bank of Kosovo is the ideal agency to implement court orders concerning bank accounts. This process has proven problematic under current procedures. Under its statutory powers to supervise and regulate commercial banks,[21] the Central Bank can implement requirements by its own regulatory decision that should be sufficient to ensure compliance by banks with court orders. [22] Longer term, the transfer of funds between bank accounts to satisfy court orders can be brought to a new level of speed and certainty by bringing the transfer process within the Bank itself. Doing this will require a higher level of technological input, including good security systems and the considerable upgrading of court information technology systems, and the creation of a centralized database of bank accounts linked to personal identification numbers or business registry numbers of account holders; it may also benefit from explicit statutory authorization. [23]

Thus, we suggest the following:

- Until more permanent solutions can be implemented, we urge that the Central Bank adopt, under its bank supervisory authority, adopt a regulation requiring that banks forward to it all court orders, including requests for information about debtor bank account numbers as well as account debit and transfer orders, and that all such forwarded material include at least a thirty day history of account transactions backdated to thirty days prior to the issuance of the court order.
- The Central Bank should also provide staff to examine these forwarded court orders and account histories to ensure bank compliance with the court orders, and should use its supervisory and licensing authority to sanction consistent non-compliance by banks with court orders.
- In the longer term, the Central Bank should establish a Division of Enforced Collections, including a bank account database in which accounts are identified and searchable by Personal Identification Numbers, or, for legal entities, the Business Registry Number. The Division of Enforced Collections of the Central Bank should receive information inquiries and account debit or transfer orders directly from courts by secure electronic transmission, and directly implement those orders.

These proposals are explored in more detail later in this Assessment.

---

[21] Law on the Central Bank of Kosovo, Article 42.

[22] Article 98, 1978 LEP; Article 111.2, 2008 LEP. These provisions entitle the creditor to request that the court demand the relevant information from the bank.

[23] Account information is provided to the court and not to the creditor. There is no need for bank account numbers to be passed to the creditor; the court itself can supply that information in complying with the creditor's request in the execution proposal for enforcement against the debtor's bank account. Concerns about account confidentiality therefore are misplaced.

4. Take Advantage of Key Information Held By Other Agencies to Locate Debtors and Their Assets

We also recommend that the courts establish a mechanism to request employment and address information directly from the Tax Administration, the Pension Fund, and other agencies (including the Business Registry, the Cadastre and property title registry, and the Department of Motor Vehicle Registration and Licensing) that have information useful in the handling of cases.

We believe that it is in many cases possible to locate both the current addresses and the current employment of judgment debtors through the use of information sources thus far little used in Kosovo: through court requests to government agencies including the Central Bank, the Tax Administration of Kosovo, and the Pension Fund of Kosovo.

The Tax Administration of Kosovo receives tax payments on behalf of over 300,000 individuals, normally forwarded by the individual's employer. The place of employment of each individual is recorded and is searchable based on the individual's Personal Identification Number assigned to each individual by the Kosovo government, and employment records are current if the employer in fact forwards to the agency the income taxes that are due on behalf of individuals. The Tax Administration has noted to SEAD that, if these records are requested by a court, it is the obligation of that agency to respond to the court order by providing the necessary information.

Similarly, the Pension Fund of Kosovo has pension fund accounts for approximately the same number of individual persons in Kosovo. Included in their records for each individual account holder is the individual's place of employment, because funds are normally forwarded to the Pension Fund from the Tax Administration, who receives funds from the employers of individuals. Also included in their records are the current addresses of account holders, because it is necessary for the Pension Fund to forward regular statements of the accounts to their owners. Individuals report their addresses to their employers, along with their PIN's, and that information is forwarded to the Tax Administration, which in turn forwards it to the Pension Fund. The Pension Fund informs us that address records are not 100% complete, but are generally thought to be reliable. Again, the Pension Fund has noted that it must comply with court orders requesting information about accounts and account holders. Problems relating to obtaining information from these sources are discussed later in this assessment, in the discussion of methods of asset seizure.

Again, this would work best in the form of a direct secure electronic link from each court to the agencies to facilitate communications, though ordinary mail would also accomplish this purpose. Article 42 of the 2008 Law on Execution Procedure justifies these requests for information to a government agency for cases filed under the 2008 statute.[24] As to cases brought prior to enactment of the 2008 Law, the Law on Contested Procedure allows courts to seek information from any government agency.[25]

5. Establish a Formalized Working Relationship Between Enforcement Offices of Courts and Major Authentic Documents Creditors

We also propose a joint working relationship between the courts, the utility companies that are major creditors on authentic documents cases, and USAID, to ensure that authentic documents cases receive the attention they need to move them to completion. This relationship would:

- provide oversight to ensure that enforcement agents spend time working on authentic documents cases;
- require that creditors retrieve relevant information that is in their account files but not reflected on execution proposals (such as the PIN numbers or Business Registry numbers of

[24] Article 42.1 of the 2008 Law on Executive Procedure states: "Execution proposer . . . might request from the court that, before issuing the decision on execution, to request from the debtor and . . . bodies or administrative services, or other institutions, [the] providing of data about the wealth of the debtor. . . ."

[25] Article 14 of the 1978 Law on Executive Procedure states that "In the procedure of execution and provision, the provisions of the Law on Contested Procedure are applied. . . ."

judgment debtors), and that they amend execution proposals to take full advantage of that information;

- require that necessary requests for information and court orders be sent to appropriate institutions, pursuant to courts' execution decisions;
- require that joint visits comprising representatives of courts and the major utility companies be arranged to deliver execution notices to debtors and perform seizures of movable property when possible;
- require that creditors provide necessary equipment such as transportation and warehousing to make such seizures feasible;
- require that the court's execution office provide a reliable written schedule by which joint teams will make visits to the field to locate and deal with debtors; and
- require that creditors will agree to dismissal of cases that have repeatedly proven uncollectable.

Representatives of Pristina Municipal Court and some of the major authentic document creditors have already agreed in principle to this type of agreement; with USAID's assistance and support, this interactive, regular and scheduled involvement of interested parties pursuant to a written agreement and schedule can begin to impact the backlog over time. This agreement should be embodied in an agreement between the parties, and could be supported by an agreement from major donor organizations such as USAID to enhance the technological capabilities of enforcement offices.

6. ENCOURAGING DISMISSALS: COURT FEES AND OTHER ISSUES

Because many authentic document cases are uncollectable, for a variety of reasons, the most effective way to reduce the number of outstanding cases would seem to be through case dismissals. Yet the major creditors have proven surprisingly reluctant to dismiss cases, even when the claim appears to be uncollectable.

A. Revise Court Fee Schedules

One key reason creditors are unwilling to dismiss cases is that they bear no cost from allowing a case to stay in the court's docket indefinitely, even without any realistic chance of eventual collection. But keeping the case alive is not costless to society. The right strategy here would simply be to make the creditor bear the full cost of keeping a case in the docket.

That is not, however, what is reflected in the court's fee schedule. The current fee schedule imposes no incremental cost on the creditor, no matter how many times enforcement is attempted. Kosovo has adopted a strategy of charging a single fee at a rate proportional to the size of the claim, and then charging no additional fees no matter how much effort is involved in the collection process.

We recommend altering the current fee schedule as follows.

- We recommend an initial filing fee of fixed amount to cover the costs of initiating the case and undertaking the initial notification to the debtor required under the statute, as well as the first attempt to collect the judgment from the debtor.
- Second, fixed incremental fees should be charged to the creditor (for later reimbursement by the debtor) to ensure that the creditor is charged for each successive action in the enforcement process, after an initial set of activities involved in starting the case and the initial attempt at delivery of notice and collection. As one example, a separate resumption charge should apply each time a case is brought out of suspension by the creditor's request. Each additional collection service or event should be charged a fee, including the court's efforts to collect information from other government agencies. Other fees should be charged for each additional agent visit to the debtor's premises or to locate the debtor; and for additional services such as changes in the method or object of execution, for forwarding cases to

different enforcement officers because of the requirements of territorial jurisdiction following a change in method, and so on.[26]

- In addition to an initial filing fee and incremental costs for requested actions beyond a core set of case initiation activities, we also suggest a third component of total fees – a success fee. Current charges for execution cases are proportional to the amount awarded by the judgment; we suggest that be altered to be completely independent of the amount of the judgment, but to depend instead only on the amounts actually collected. The success fee should constitute a major part of the total fees collected in the typical case. We also suggest, first, that the success fee should be back-weighted, so that a disproportionately large share of the success fee is due upon collection of the last portion of the amount due (to create an incentive to collect the entire amount, rather than just an initial portion); and second, that the success fee be divided between the court and the enforcement agent who works on the case.

Incremental charges should correspond accurately to costs. Those costs include, first, the direct cost of each incremental action taken by the creditor; second, the cost of the case continuing to sit in the docket and taking up space in court offices; and third and most significantly, the congestion cost imposed on other potential litigants that slows down other cases and deters other potential litigants from filing their cases. This is the true cost to society: maintaining needless cases effectively disables the legal system because real, current cases are crowded out, and cannot be enforced.[27] The first two components are probably modest in monetary value, though for litigants like major utilities that have thousands of cases in court dockets, a cost that is small in each case surely need not be small in aggregate. However, the congestion cost is probably more substantial.

Incremental charges, or fees for separate services, are commonplace in many countries' enforcement systems, including the Netherlands and Bulgaria. They force the creditor, not society, to bear the cost of the enforcement. Again, in dealing with thousands of cases, the deterrent effect of incremental charges on a creditor's willingness to stay with cases indefinitely could be quite substantial, leading to a significant number of voluntary dismissals on cases with a low probability of collection.

The reason for our proposed success fee is simple. Creditors care fundamentally about the outcome of the collection process. At present, the government of Kosovo, the courts, and the Judicial Council have no incentive to care about the outcome of that process for the ordinary litigant. Their fees currently are collected completely at the beginning of the process, based on the amount claimed, and they will earn no more whether the collection process is successful or not. The Judicial Council has chosen to invest minimally in the collections process, providing an inadequate number of enforcement agents, an inadequate number of enforcement judges (a number of courts have no enforcement judge at all, placing the court president in the position of having to perform those tasks in addition to the president's other duties), virtually no training apart from that provided by outside donor groups, and a drastically inadequate level of capital expenditures. In general, the court system in general, and the enforcement system in particular, is treated by the government as a source of funds that generates fees, but with no need to make the expenditures necessary to actually make the system work. No wonder that frequent creditors, like the utilities companies, complain bitterly about their expenditures on court fees that produce little result. Basing the bulk of the fee on the amount actually collected for the client (and eliminating the fee based on the size of the claim) is totally consistent with international practice, indeed is regarded as the norm in private bailiff systems, and should be applied here as well.[28]

---

[26] One concern about implementing incremental fees is verification of the agent's actions, particularly in notification attempts. We suggest applying the incremental fee only to enforcement actions after notification has taken place and the first attempt at actual enforcement has failed. We believe unsuccessful notification efforts may be particularly hard to verify.

[27] This is analogous to highway tolls imposed in peak traffic periods because each car on the highway slows the travel time of all the others.

[28] Some observers complain that the major utilities companies treat the courts as their collection agency, as if the companies should be asked to take their business elsewhere. The reality is that they have nowhere else to take their business. That business generates substantial revenue for the government of Kosovo. It is not the fees collected that these observers complain about; it is the expectation that the services promised will actually be delivered, that seems to generate resentment.

B. Revise VAT Provisions Dealing With Uncollected Receivables

The second reason for creditors' unwillingness to dismiss even hopeless cases, apart from the fee schedule, has to do with the tax code. Kosovo has, in line with common international practice, adopted an accrual accounting system for its value-added tax: VAT liabilities are due at the moment of billing rather than at the moment of collection. One effect of this system, however, is that when billed services are not later paid for by the customer, the business that provided the service will have overpaid its actual tax liabilities. In Kosovo practice, the supplier's only chance to qualify for recovery of the overpayment is to file a lawsuit against the non-paying customer and maintain that suit until the tax overpayment is returned by the government. As a result, businesses like utilities that have numerous non-performing customer accounts involving substantial receivables have a serious motivation to sue on every account and to keep those lawsuits active until either payment or tax recovery occurs. That motivation is the recovery of the overpaid tax amounts.

To address this problem, we strongly suggest that experts in tax collection law and practice be consulted to ensure that Kosovo's treatment of tax overpayments stemming from business losses, as well as its treatment of ongoing lawsuits as the definitive evidence of non-payment, comports with best international practices. One possible approach to resolving this problem is that the Tax Administration alter its practice of using the ongoing existence of a lawsuit for payment of outstanding debts as the essential element of proof in claims for recovery of tax overpayments.

C. Audit Receivables on Balance Sheets of Companies Undergoing Privatization

Finally, a third reason utility companies avoid dismissing the execution cases, even when those cases are hopeless, is that those receivables, an accounting asset, enhance the utility company's value in the privatization process. We urge that the government of Kosovo contract with an independent outside auditor for the purpose of auditing the claims included on the books of utility companies contemplating sale or privatization to place a realistic value on those claims, given the realistic odds of actual collection. We suggest the results of the audit be made public to ensure that potential buyers have an accurate understanding of the value of those potential receivables, and to avoid potentially being affected by misunderstanding or deception as to the value of those outstanding lawsuits. We also recommend that potential buyers of privatized companies carefully assess for themselves the real value of receivables on the balance sheets of the companies they consider buying.

We also recommend that the agency responsible for planning the privatization and the major utility companies re-examine the rationale for maintaining uncollectable cases in the enforcement docket. To the extent that potential buyers understand the uncollectibility of the claims, they cannot add to the value of the company. On the other hand, if potential buyers wrongly attribute a real chance of collecting debts that actually are not collectible, then there is a risk of committing fraud against the buyers. It is hard to see where the value of the company can be increased by continuing to press uncollectable claims, if potential buyers are fully informed of the nature of the collection problems; and if buyers are not fully informed, there may be claims against the seller on the grounds that information was wrongly withheld.

D. Agreements to Dismiss Uncollectable Cases in MOU's with Authentic Document Creditors

In addition to these approaches to reducing the backlog, SEAD has worked with some of the major creditors of backlogged utility cases, along with the staff of Pristina Municipal Courts, to develop joint cooperation for resolving backlogged cases, described earlier. One component of that tentative agreement is that the creditors involved have tentatively agreed voluntarily to dismiss cases when it becomes apparent that such claims are uncollectable after attempts at enforcement have been made: if, for example, the debtor cannot be found, or if the absence of funds is apparent. In addition, these creditors have agreed in principle to dismiss claims below some minimum monetary value under the

---

The court system of Kosovo is dependent on the fees these litigants pay; the resentment seems to come from an expectation that those fee payments will produce some results.

principle of debtor forgiveness. We urge that this agreement move to full implementation and that the creditors cooperate fully by considering such dismissals.

E. Prepayment as a Pre-Condition for Objections

To limit the number of future authentic documents cases coming for enforcement, and to facilitate enforcement should an authentic documents case move to judgment, we suggest a modification of the existing procedural statute. It is quite easy for a defendant in an authentic documents case to offer an objection to the claim.[29] When a defendant in an authentic documents case objects to the decision to allow the claim to move to execution, considerable delay may be introduced into the procedure because the case then is converted into a claim under the Law on Contested Procedure and becomes a full civil trial.[30] However, once the claim reaches judgment, it may be quite difficult to enforce against the judgment debtor, as is the case with many authentic documents claims. We propose that, as a precondition to filing an objection to an authentic documents claim, the defendant pay to the creditor the full amount of the claim plus court costs, up to a monetary limit (perhaps 1000 Euros). The money paid to the creditor remains the property of the debtor until a final judgment is reached in the case. Should the judgment be in favor of the creditor, the retained funds would be used to pay the judgment. On the other hand, should the judgment be in favor of the debtor, the debtor would have the right to request the return of the funds, but if no request is submitted, the retained funds would remain in the possession of the creditor as a deposit against future charges on the account of the debtor.

The virtues of this proposal are two. First, it would discourage objections unless well-founded, because the debtor would gain little by making ill-founded objections for the purpose of obstruction; the funds are already paid, so delay is of little value. Second, it would ensure that enforcement is facilitated, obviating difficulties of collection at the time of final judgment.

F. Facilitate Dismissals Within Existing Procedural Codes

Finally, it would be highly desirable to amend the 2008 Law on Executive Procedure to apply it to all cases in the court system, whenever filed; and specifically to apply the new provisions on termination of the enforcement procedure (Articles 71.3, 72, and 73 of the new law) to cases filed under the prior 1978 law (in other words, those cases in which the execution proposal was filed with the court prior to the implementation of the new law), if that is legally possible. These provisions allow the court to terminate the execution procedure when execution becomes impossible or otherwise inapplicable, for example when the judgment debtor or its assets simply cannot be found. The prior execution law was never intended to allow judgment creditors to immobilize the entire enforcement system for extended periods, and for many years it did not work that way; it was only in the early to middle 2000's that a backlog developed under the old law. Under the current system, the viability of the enforcement system, and ultimately of the courts themselves, has been left in the hands of a few major litigants. The huge backlog of enforcement cases was never contemplated under the old law, and could not have arisen under the legal and economic arrangements of the time. We can find nothing in the Constitution of Kosovo that seems to us to rule out the application of new rules to existing cases. The exclusion of previously-brought cases from the new law is a matter of legislative decision, under Article 303 of the new law, and that provision can be amended.

But such retroactive application is simply not necessary, because the 1978 Law on Executive Procedure itself directly addresses the problem of un-findable debtors and assets. Article 35 of that law states: "In the proposal for execution, there must be indicated the creditor, the debtor, the executive or authentic document, the debtor liability, the means and object of execution, and other data necessary for execution to be carried out." When the debtor address supplied by the creditor turns out to be incorrect, so that the delivery to the debtor that is mandated under the statute[31] cannot be

[29] See Article 58, 2008 Law on Execution Procedure.

[30] Id., Art. 58.4.

[31] Article 39, Par. 1, 1978 LEP.

carried out, or when the stated "means and object of execution" cannot be found, making it impossible for execution to be carried out, it seems reasonable to argue that the creditor has failed to satisfy the requirements of filing a valid execution proposal, and therefore the case should be dismissed, because the "data necessary for execution to be carried out" has not been provided.[32] Similarly, Article 38 of the 1978 Law on Executive Procedure states exactly the same requirements for the court's execution decision. When an execution decision turns out not to contain the "data necessary for the execution to be carried out," that execution decision should be regarded as invalid, and revoked. We urge that the courts begin more vigorous application of the terms of Article 35 of the 1978 Executive Procedure Law.

We suggest that, upon suspension of the case, the creditor be required to come forth within 15 days with new information about the address of the debtor or the means or object of execution, whichever had turned out to be inaccurate in the original execution proposal. If the creditor fails to return the execution proposal for refiling within the allowed 15 days, then the case should be dismissed. Furthermore, if the refiled proposal does not contain substantially new information, then the case should be dismissed. This will require an amendment of the Law on Executive Procedure to put this in place. Further, in accord with our fee proposal described earlier, each re-submission of the executive proposal should be subject to an additional filing fee, because examining and implementing each one requires additional examination and approval time by the court and additional efforts to achieve notification to the debtor.

The 1978 Law calls for suspension of enforcement procedure under those circumstances. Article 68 of the 1978 Law on Executive Procedure allows suspension of the execution *ex officio* if the executive document is "validly . . . revoked or put out of power," which is exactly what happens when the court discovers that the elements of the execution proposal or the execution decision have turned out to be false. The execution decision should be revoked if the underlying information is not correct, and therefore the case should be suspended under Article 68. The current practice implicitly suggests that the execution proposal need have none of those elements, but will still be regarded as valid so long as *the plausible appearance* of those elements appeared on the face of the execution proposal at the time it was filed – seemingly a clear misinterpretation of the letter of the statute.

[32] 1978 LEP, Art. 35.

III. ENFORCEMENT AGENTS AND THE MANAGEMENT OF THE COURTS

A. The System of Court Enforcement Agents

The current system of enforcement agents, working within the structure of municipal courts and under the broad supervision of the Kosovo Judicial Council, is fundamentally inadequate, and should be revised. It is inadequate in a number of critical ways.

1. Resources Within Enforcement Offices

First, the enforcement offices are simply starved for resources. As we have already emphasized, there are simply an inadequate number of agents to deal with the caseload that they face. But in fact, the starvation for resources goes well beyond manpower. It extends also to virtually every element of non-labor input that enforcement offices might use. Transportation of seized movable assets – or even transportation of agents to their daily assignments – is not provided by the office; agents are expected to take the bus, or walk, to reach the locations of debtors to perform their enforcement duties, a waste of the time of a very limited number of enforcement agents. Similarly, the courts do not provide warehousing for seized movables, therefore agents have nowhere to store those movables, and as a result they cannot be seized unless warehousing is provided by the creditor -- something that rarely happens. One interviewee with whom we spoke alleged that court budgets do not even provide for pencils and paper, which must be supplied by the clerks themselves.

Each agent in the offices we visited had literally thousands of cases in their dockets, far more than any individual could handle in a timely manner without assistance. Yet enforcement agents work almost entirely without assistance. Each agent has his or her own workload, handled largely without the assistance of anyone, including other enforcement agents. They have little secretarial help and no file clerks to help them deal with the massive amount of paper they deal with in their everyday work; no training, no driver, no receptionist, no telephone answering equipment, no reliable source of legal or technical information except the colleague at the next desk, and little supervision.

Computers are in many offices (perhaps all) simply non-existent or, in any case, not in use. This is a serious liability, completely unnecessary in this era of cheap computing power. For example, agents are not able to print standardized forms and letters that are an integral part of their daily work, relying instead on pre-printed copies supplied by a donor agency; they generate requests, orders and notices by hand, and have no copy of the documents sent out. They have no case management system for keeping track of their cases, to remind them of deadlines on cases and to ensure that case requirements are met. As a result, it is difficult for agents to stay abreast of developments in individual cases. This is a key reason for delays in moving the enforcement process forward – it is simply difficult to keep track of that much detail in so many cases.

2. Management and Financial Structure of Courts

A second critical failing in the current arrangement of enforcement offices is the inadequate management and financial structure of courts generally. Because the courts that work with the enforcement agents every day no longer have the authority or budget to manage, pay, hire, or fire enforcement agents, enforcement agents no longer view the court president as the relevant authority figure who can direct their activities – instead, that responsibility has been assumed by the Kosovo Judicial Council, and agents have come to see the court president as largely irrelevant to their work. Yet formal, titular responsibility for managing enforcement agents, and the enforcement process, remains on the courts: the court president has at least formal responsibility, but almost no power whatsoever. The court in which enforcement agents work has no authority to make decisions about the number of agents, about who those agents are, or what they do, or about their budget or what that budget gets spent on. It is the court president who is present on the scene, who sees the activities and performance of the agents and the situation they face; yet the court president has little or no authority over the enforcement agents. This authority now rests in the Judicial Council, which now makes all

budgetary and personnel decisions dealing with courts, but which has no direct agent on the premises of courts on a daily basis to ensure that work proceeds appropriately, and has no system of evaluation in place.

This structure seems not to work well, either for enforcement or for courts more broadly. From the point of view of enforcement offices, the Judicial Council does not have a sufficient and effective structure in place to directly manage or supervise those enforcement agents. As a result, those enforcement offices largely work without meaningful outside supervision.

This situation presents the possibility of corruption, because enforcement agents have little accountability, minimal outside supervision, minimal formal pay, a huge number of cases that they cannot possibly handle, and yet they are indispensable personnel in collecting judgments which in some cases represent very large amounts of money. Whether accurate or not, there is a widespread public perception in Kosovo that corruption is a significant issue in the courts generally.

Though it is well-designed to produce corruption, this management structure is clearly not designed to produce successful work outcomes. Since agents often have no responsibility for individual cases, and indeed no one seems to pay attention to results in individual cases, blame for unsuccessful performance can be readily passed to other agents in the office, to the court management, or to life in general. There is little doubt that this hierarchical structure, in which all authority rests in the hands of an outside agency that engages in minimal direct observation and supervision of courts and enforcement agents, is a contributing factor to the poor performance of enforcement offices.

3. Incentives and Evaluations for Enforcement Officers

A third problem in the current environment for enforcement officers is the complete lack of incentives they are provided to perform their jobs. Enforcement officers receive stunningly low pay, yet face difficult conditions of work and overwhelming workloads. So far as we can tell, no one places meaningful performance standards on them or evaluates their work based on successful performance of enforcement tasks.

Significantly, enforcement officers receive no pay incentives whatever for completion of work on any case – a situation that is highly unusual by international standards. Enforcement officers are paid Euro 225 per month, independently of how many years they have been on the job or whether their tenure on the job has been successful or not. They receive absolutely no incentive pay at all, either based on performance in individual cases or for overall performance. Though at one time there was a practice of allowing creditors to give small amounts of money to enforcement officers to improve performance, that practice has been discouraged recently; however, it has not been replaced by any formal incentive pay whatever.

In international practice, enforcement officers almost always receive some incentive pay. Across Western Europe and the United States, incentive pay comes in the form of fee for service, a recognition that an enforcement agent is a professional with a difficult job who should be compensated for successful performance; besides, these private enforcement officers have the additional incentive of facing competition from other officers, and quality service is a key competitive asset. Almost universally, the same approach has been adopted across Central and Eastern Europe as well, almost always with good results. Even in Russia, Ukraine, and other states from the former Soviet Union, though enforcement agents remain state employees, their pay includes an element of incentive compensation for successful completion and collection of enforcement cases.

The reason for incentive pay for enforcement officers is straightforward. Collection of money judgments often requires significant personal attention to the enforcement case, and that attention and motivation often makes the difference between success and failure. Dealing with debtors who do not want to pay their judgments is difficult and sometimes dangerous. Finding the debtor and, even more, his assets, often requires sustained effort and attention. Enforcement agents often have significant caseloads – certainly in Kosovo they do – and the creditor in each case demands the attention of the agent. Yet the agent himself gets nothing for his efforts, and has no reason to have any personal interest in the outcome of a case. The low status sometimes assigned to enforcement agents, negative social attitudes towards debt collection, and indeed the difficulty of the work itself, has for some

created the impression that agents should receive very little for their efforts, and should be so grateful for their jobs that no incentive pay is necessary. This is false; their work is critically important to the operation of the legal system, and incentive pay makes a major difference in job performance. For those reasons, it has become the international norm, and should be applied to enforcement agents in Kosovo. We have earlier suggested that the major share of court fees for enforcement cases should take the form of a success fee, a significant portion of which should be paid to the responsible enforcement agents when collection occurs.

4. Shortage of Enforcement Judges

Finally, it should be noting that under the present system, judges are actively involved in the enforcement process: first, because an enforcement judge is required for a range of activities that are not fundamentally judicial in nature; and second, because judges are responsible for managing the courts and have at least formal responsibility for managing enforcement offices.

The issue of judicial involvement is an important one in Kosovo. An enforcement judge is required for a number of enforcement activities under Kosovo law, most importantly the seizure and sale of immovable property. Yet many courts do not have a specialized enforcement judge. In those circumstances, the usual solution seems to be for the court president to assume those duties. However, there is already a great shortage of judges in Kosovo courts. Staffing has declined dramatically over the last decade. At the present time, the number of cases per judge, and the size of municipal populations as compared to the number of judges in municipal courts, has grown dramatically over the last twenty years. As a result, courts also function inefficiently and are seriously understaffed. Court presidents are typically the busiest judges in the local courts because they handle a full caseload as well as managing the court. The lack of available judges to handle the tasks that are assigned exclusively to judges in the enforcement process is a significant barrier to completing enforcement cases, and waiting for a judge to have the time to look at a case adds significantly to delay in enforcement.

To sum up: officers have huge formal workloads, yet no one seems to evaluate their performance based on whether they successfully complete work in any dimension at all. They receive no financial incentive to do that work with any sense of personal involvement whatsoever. This is a prescription for lackluster performance, which by coincidence is what most characterizes Kosovo's enforcement system.

B. Private Enforcement Agents and the Alternatives

1. The Rationale for Private Enforcement Agents

Properly structured, a private enforcement agent system offers a solution to almost all the problems just described. Because their personal income and professional reputation rest directly on how well they handle their enforcement caseload, private enforcement agents tend to be highly motivated and professional in their work, and offer a high level of service and competence to ensure their competitive success. Because they have direct control over the management of the offices they run and benefit personally from its performance, they generally bring a high level of responsibility to issues such as hiring and firing, budgeting, information technology systems to support their work, and office management.

In addition, because the enforcement process becomes a private business rather than a public function, the cost of equipping and maintaining enforcement offices and of training agents and their employees is entirely removed from the state budget, though the state does retain most of the cost of monitoring enforcement agents to ensure the legality of their operations, and disciplining them when necessary. Private enforcement offices in other European countries tend to be well equipped, technologically sophisticated, and well managed, with minimal cost to the government.

The private enforcement system also has the advantage of removing from judges and the courts the responsibility of managing the enforcement process and of participating in it. All of those responsibilities are devolved onto the private agents. The role of the courts becomes simply judicial

review and oversight: normally, parties who believe that the private agent has abused their rights in some way can in some countries seek redress for the injury by seeking a damage award of some kind in court. However, direct, day-to-day involvement of judges in the enforcement process comes to an end, leaving judges to their core responsibilities of judging legal disputes between parties and removing from them the burdensome managerial responsibilities that often consume a significant portion of their time.

For these reasons, enforcement systems based around private enforcement agents have become the standard in most of Western Europe and in the former Socialist states in Central and Eastern Europe. It is also fair to say that the United States (as well as most other common law countries) has a private enforcement system as well, though at least in the U.S. it is structured quite differently than European variants. It works approximately as well in the United States as it does in most European countries.

Not all countries have made this choice, however. A number of countries, such as Germany, Austria, and the Scandinavian countries, have retained public enforcement systems, generally because of constitutional limitations on the delegation of what is in those countries considered a public function. Given that constitutional limitation, these countries have carefully designed their public systems to provide good management and employee incentives, and have also achieved good performance and reliable enforcement. It is by no means impossible to achieve an effective enforcement system with enforcement agents employed by the state or by public courts, but that requires careful design and attention to management and incentives. Most observers believe that a competitive market in professional services like enforcement works better than a governmental structure to provide that purpose, but with sufficient care it can work reasonably well.

Thus, the advantages of a private enforcement system are, first, that it provides a highly motivated cadre of enforcement agents, who are likely to be interested in achieving a high standard of professionalism in their work and in ensuring that the overall enforcement system works well and has high public credibility; second, it provides significant consumer choice to litigants if the system is structured with a reasonable degree of competition; third, it can drastically reduce the governmental budgetary expense associated with enforcement; and fourth, it can largely relieve the courts of the non-judicial function of supervising and participating in the enforcement process.

2. Risks and Requirements of a Private Enforcement Agent System

The requirements of a private system for enforcing civil judgments are these.[33] First, there must be a strong system for monitoring and controlling the activities of private agents to ensure that they comply with the law, which requires in turn that there be some effective and reliable government institution to provide that monitoring and control. Second, there should be a reasonably effective system of enforcement for the private bailiffs to operate: this means systems for finding information about the location and assets of debtors, and mechanisms for seizing those assets consistent with law. And third, of course, as in any private system, there should be clearly aligned incentives, sufficient transparency that customers can evaluate work performance, and a competitive market structure.

The risk of adopting a private system without achieving those preconditions is this: Highly motivated individuals, whose incomes depend on providing enforcement services, may not be able to achieve effective enforcement because they lack adequate information and seizure mechanisms. There are two possible results of this situation. On the one hand, the demand for enforcement services will decline drastically, if agents have no legal means to implement the service they offer; agents will go out of business, and the enforcement system will fail, with increased public distrust and pessimism. On the other hand, agents may find ways to enforce judgments that go outside the law; this outcome will eventually also result in collapse of the private enforcement system, and a reversion to an alternative, along with increased distrust of the law. Obviously, both are undesirable outcomes, and this suggests

[33] It is important to understand that private enforcement systems apply only to civil or commercial cases, and do not apply in cases involving criminal or administrative matters. For the latter categories of cases, we do not propose any changes whatever from the current system of courts and enforcement.

that we should ensure both generally operational enforcement systems, an effective monitoring and control system, and incentives and competition designed to ensure successful performance outcomes.

The effectiveness of enforcement systems means: making it possible for debtor's accounts in banks, their immovable property, their employment income, and other assets to be found and seized by legal process. While Kosovo does not presently have effective mechanisms for seizure and finding assets, that seems likely to be an achievable goal, assuming the political will to do it. The government of Kosovo will have to decide whether the political will exists.

Monitoring and control depends on having effective governmental systems for ensuring compliance with law by private enforcement agents. This normally requires both courts and a public agency that can perform regular examinations of agent operations, reliably determine their compliance with law, and impose sanctions when necessary. A principle of checks and balances – more than one institution with independent authority and responsibility to examine operations, using different means of collecting information, operating simultaneously -- is necessary. Enforcement operations by their nature collect money, and monitoring and control of those operations could devolve into an opportunity for corruption in the absence of effective and well-managed governmental institutions to perform monitoring and control activities. The general weakness of Kosovo's governmental institutions, and the fact that many agencies have serious managerial problems, and possibly corruption problems as well, raises the question of whether Kosovo is capable at this time of implementing an effective monitoring and control system.

On the other hand, in order to improve the state- or court-based system of enforcement that presently exists, this too will require significant investments in both enforcement systems and in monitoring and control. All of these work badly now, and the results are manifest. Once Kosovo makes the decision to improve these elements, it seems clearly preferable to go the additional step and adopt a private enforcement system as part of that overall reform process.

Recommendations

1. Discretion and Accountability in Court Management

First, we strongly urge that the management structure of courts be reconsidered, to allow decentralization of management, with significant managerial discretion in the hand of court presidents. This should be combined with meaningful standards of accountability for performance. The division of responsibility between court presidents and the Judicial Council should be considered carefully. Court presidents are uniquely well situated, first, to monitor the performance and operations of their courts, and second, to understand the needs and obstacles facing their specific courts. They should have the discretion and responsibility to allocate their budgets, make personnel decisions, and otherwise manage the operations of their own courts to ensure that performance standards are met. The Judicial Council, on the other hand, is uniquely well positioned to understand the overall budgetary environment of the court system and allocate available funds appropriately between courts; and second, to determine performance standards that should be met by courts, assess whether those standards are being met, and assign appropriate rewards and sanctions to ensure that those performance standards are met. The combination of managerial discretion and high standards of assessment and accountability is intended to produce improved performance based on the respective strengths and knowledge of the parties.

2. Revise court fees to incentivize successful performance of enforcement offices

Earlier in this Assessment we suggested that court fees be significantly revised. We believe that making success fees an integral part of this reform will help to improve efficiency and performance in courts and in enforcement offices.

Current practice gives the government little incentive to make meaningful investments in courts. Both courts and enforcement offices have clearly inadequate facilities, management, and manpower, This could clearly be improved, but that would require new resources and a higher level of funding in Kosovo courts. For whatever reason, the government of Kosovo appears to be unwilling to make these

additional investments in the courts and their enforcement offices. Yet these agencies are an important source of revenue to the government. With the improved performance achievable with additional investment, revenues from the enforcement process could be significantly higher. Far more importantly, however, an improved court system, and improved performance in enforcement collections, would lead to a significant and sizable increase in Kosovo's economic performance, which in turn would lead to higher revenues both from taxes and fees such as court fees. By denying important resources to the courts, Kosovo in fact is choosing a far lower level of government revenue than it could have.

By making a significant portion of revenue from enforcement dependent on successful performance, the government of Kosovo will have a direct incentive to make the investments necessary to improve performance. As it is, budget planners are treating the courts as a source of revenue, which is implicitly assumed to require no expenditure to produce those revenues. Making revenues directly dependent on performance will provide the incentives necessary to make investments that will enhance performance, and in the longer run will also enhance total government revenues.

Just as governments respond to incentives, so too do government employees. Because enforcement is by its nature an activity that requires significant effort and involvement on the part of enforcement personnel to be successful, almost all countries have eventually found it useful to provide incentives to enforcement personnel. Numerous countries, such as France, the Netherlands, Bulgaria and countries throughout Europe and the world have private bailiff systems, that directly reward enforcement officers as a kind of legal practitioner. Other countries, such as Germany, Austria, and Slovenia, provide incentives to officers who work within the context of courts. Without incentives to officers, it is fair to say that the enforcement system simply will not work effectively. For that reason, we suggest that, so long as Kosovo retains the system of court enforcement officers, that they be partially compensated by receiving a small portion of the success fee collected based on the results of the enforcement process.

3. Private Enforcement Agents, With Some Caveats

Second, Kosovo must decide whether it intends to move in the direction of a private enforcement agent system, retain the system of court bailiffs that it presently has, create a mixed system combining those two approaches, or develop some other alternatives. It is clear that preserving the current system, in an unchanged state, is entirely unacceptable. We suggest, with some caveats, that a private bailiff system is likely to be Kosovo's best option.

Those caveats are basically two: first, Kosovo must create, as an integral part of the private enforcement agent system, a well-designed and effective system of monitoring and control for private agents to ensure compliance with law; and second, it really must undertake at the same time to improve significantly the overall environment in which enforcement takes place. We believe that a private enforcement system can work in Kosovo, but we would stress that finding solutions to these issues is a critical part of making that system work.

We are generally of the view that a dual system is unnecessary and is a less desirable choice than a pure private enforcement agent system, assuming that the caveats expressed above are satisfied. The dual agent system should be unnecessary to achieve the benefits of competition and consumer choice, since the private agent system should be designed to permit considerable competition among private agents without the benefit of a public agent system. The experience of other countries in the region that have adopted a dual system is that almost all cases involving private litigants have been given to private agents, and the remaining public agents have been forced to seek a legal monopoly over cases involving the state as a litigant in order to have any business at all. The public agent system obviously requires that the state maintain a bailiff system – something that has not worked well thus far in Kosovo, and it is not clear what would be different were a dual public/private system adopted. Obviously one of the major benefits of the private system – that budgetary costs to the state from enforcement would be seriously reduced – would be questionable under a dual system, since the system is maintained as it is. Dual systems have been tried in Bulgaria and other countries, and the evidence seems to suggest that the public in those countries has developed a strong preference for

private bailiffs; at least in Bulgaria, state bailiffs have managed to stay in business by lobbying the legislature to ensure that all cases in which the state is the claimant will be filed with state agents rather than private agents, an outcome at odds with the government's own choices, until the legislation was enacted. In short, we see few benefits to creating a dual system; better to devote those resources to better monitoring and control of the private agents than to preserving a less-effective public alternative.

In the event that a private bailiff system is adopted, this will require reconsideration of a significant number of provisions of the enforcement procedure law to ensure that the procedure law will work in a private bailiff system. An example of current procedures that are incompatible with a private bailiff system is the system of territorial jurisdiction, that requires an agent located in the court district where the item to be seized is located. This requires moving cases from court to court as the intended target of seizure changes as the case evolves. While this system does not seem to elicit objection at present, the process of shifting cases between enforcement offices in different jurisdictions is certainly potentially burdensome; it appears that at present few cases require shifting. However, a private enforcement agent should be empowered to act anywhere in the country, and this will require abandoning this feature of the current procedural law. Other necessary procedure law changes include facilitating access to court assistance in obtaining information, sale procedure for movable and immovable assets, and many others.

4. Some Suggestions If Court Enforcement Agents Are Retained

Retaining a state or court-based system is certainly an option. Should that be the choice, we recommend strongly examining the enforcement systems established in Germany, Austria and the Scandinavian countries to understand better how a public or court-based system can be designed effectively. During the period of transition to a private bailiff system, should that instead be the choice made by the political leadership, the operations of court enforcement offices should be significantly upgraded and incentivized during the transition.

We would suggest particular attention to the following issues in upgrading court enforcement offices:

There should be a genuinely significant element of incentive pay to enforcement agents, as well as a meaningful increase in the overall pay scale. Effective incentives are a key to successful performance. Ideally, creditors should also be allowed real choice among enforcement offices, and offices should be allowed to retain a portion of their earnings for internal operations purposes as an incentive to attract customers. Financial auditing and controls should also be imposed.

- High standards should be employed in hiring enforcement agents, to ensure effectiveness, education, and motivation. It should not be taken for granted that existing agents will automatically be carried over into a redesigned system, but tenure should depend, both immediately and as the system continues to operate, demonstrated performance, skill, and knowledge;
- The state or the Judicial Council should be prepared to spend sufficient money to ensure that enforcement agents have the tools and systems they need to perform effectively. This means transportation and other key equipment; sufficient staff to provide support for reasonable and attainable work levels; and modern information technology to permit effective case management, reduce secretarial requirements, and permit electronic linkages to agencies that provide information and are capable of performing asset seizures, such as the Tax Administration, the Central Bank, the Cadastre, the Pension Fund of Kosovo, the Business Registry, the Pledge Registry, and other institutions;
- The management of courts, and of enforcement offices within courts, should be drastically redesigned to allow greater control and decision-making within each office, combined with high, externally-imposed standards of performance, and effective monitoring. Court efficiency is a key to making an enforcement system work better. Prescribing and enforcing deadlines can help move cases through the system more quickly. Heads of enforcement offices should be held responsible with their jobs for the success of the offices they manage in completing and collecting enforcement cases, and that performance should be measured by

objective standards and evaluated by independent external managerial staff not based within the court being evaluated

IV METHODS AND OBJECTS OF SEIZURE

A. The Importance of Asset Seizure

In order for any system of enforcement to work, it must be possible to seize debtors' assets. That is what monetary enforcement is about: requiring the judgment debtor to pay a certain sum of money to the judgment creditor, in satisfaction of the requirements of the judgment; and if the debtor does not pay voluntarily, his assets are to be seized and turned over to the debtor. If for some reason or other, a method of asset seizure does not work or is not effective, under the actual conditions facing judgment creditors, that is a serious handicap for the overall system of enforcing judgments.

Kosovo faces the unusual situation that, in fact, *none* of the methods of seizure available under the law actually work. Bank assets cannot be found, and actual collections from debtors' bank accounts are rare: allegations are widespread that banks protect their clients by refusing to follow court orders, which they manage to do because courts have no evidence of non-compliance and because available remedies are often not used. Seizure of a portion of a debtor's earnings from work does not work either: it is difficult under today's conditions to determine who is the debtor's employer, and employers often do not comply with court orders either. Seizure of movable property is rarely used; even when the debtor's residence can be found, movable property is often of little monetary value upon sale, and the financial burden of seizure and sale falls on creditors who are unwilling to lay out additional funds for the prospect of achieving little financial gain. Automobiles, the most valuable movable property in the hands of most debtors, is quite difficult to seize without the assistance of governmental agencies that normally do not participate in asset seizure. Immovable property – land and buildings – also is almost impossible to seize, for a variety of cultural, historical, and economic reasons. Stocks, bonds, and other financial assets barely exist, in the context of Kosovo, and for those that do, there is no central registry of securities to facilitate transfer. An alternative to conventional enforcement lies in secured credit – movable property (typically autos) pledged as collateral, or immovable property subject to a mortgage, to secure loans or credits, that theoretically could be seized by the creditor without reliance on conventional judicial enforcement. But the pledge registry is barely functional, rarely used, and of questionable legal status; and mortgages, enforceable through non-judicial means for the first time under the 2008 law, are scarcely used and almost never enforced outside normal court processes. In short: how exactly is a judgment creditor supposed to collect the money he is due?

B. Enforcement Problems in Kosovo Go Beyond Authentic Document Cases

Some have argued that the difficulty with enforcing judgments in Kosovo is largely a matter of small authentic documents cases, and that more conventional civil judgments, particularly those involving banks or individuals instead of utility companies, tend not to be a serious problem for Kosovo courts.[34] Arguably utilities were dealing with a mass service and tended to be less careful in selecting customers and in compiling credit information about those customers than did banks and other claimants in civil judgment cases, so this hypothesis is plausible.[35] This might suggest that methods of enforcement work reasonably well, and that reform is needed only concerning the special problems of authentic documents cases. That inference would be wrong.

---

[34] Kosovo Justice Support Program, "Civil Execution Caseload Report: Analysis of Pending Caseload in Select Municipal Courts," 2008, p. 10: "This indicates that civil judgments, especially those filed by banks and individuals, tend to be processed in a timelier manner than authentic documents."

[35] This should not be taken to mean, however, that civil judgment cases can be processed faster or more easily than authentic document cases. While authentic document cases spiked in 2004 and the years just after that, civil judgment cases did not. If all cases were enforced equally well, authentic document cases would tend to have an older profile because they are dominated by cases filed during that mid-decade spike, and not because of more difficulty of enforcement. Thus, different age profiles are an artifact of filing dates; there is no evidence of differences in enforcement.

However, it would be wrong to conclude that enforcement problems only affect small authentic documents cases. While in the KJSP[36] sample study the civil judgment cases tended to be younger than authentic documents cases, it would be wrong to conclude that business-oriented cases or civil judgments have escaped from the difficulties of collecting judgments in Kosovo. Furthermore, while enforcement problems may have been less significant for commercial cases earlier in the decade (the period studied in the KJSP study), that seems to have changed in more recent years. Enforcement seems to show a steady downward trend over the decade.

	Executed Cases in Commercial Court, Kosovo, 2000 to 2009			
	Cases set	**Executed cases**	**Non-executed**	**% of cases**
	for execution		**cases**	**executed**
2000	8	8	0	100
2001	153	147	6	96.08
2002	125	107	18	85.60
2003	209	177	32	84.69
2004	252	160	92	63.49
2005	202	140	62	69.31
2006	323	190	133	58.82
2007	462	201	261	43.51
2008	591	256	335	43.32
2009	545	109	436	20.00
Total	**2870**	**1495**		**66.48**
				average

Table 3 Source Data: Commercial Court of Kosovo

While the early years of the decade had a far smaller number of commercial cases than today, it is clear that problems with enforcement have grown dramatically in the years since, and currently affect commercial cases entirely outside the context of authentic documents cases.

Further, there seems to be little evidence that, as of 2009, the share of utility cases in a court's execution caseload had a significant influence on the court's success in completing enforcement cases. In the following table, we compare cases completed, as a percentage of each court's total execution caseload, with the share of utility cases in that court's execution caseload. After excluding courts that have a zero execution caseload, there are twenty-two courts left. There is little discernible difference in the completion rates between courts with high shares of utility cases as a share of their total execution caseload, and those with low utility case shares.

[36] The Kosovo Justice Support Program, a USAID-funded project that performed this study.

	backlogged utility cases awaiting execution	total execution cases in court docket	utility cases as % of total cases awaiting execution	Completions as % of total execution cases
Municipal Court				
Gjilan	3,368	4,592	73.34	5.12
Kamenice	319	675	47.26	6.72
Viti	982	2,302	42.66	7.05
Prizren	5,961	9329	63.90	2.54
Dragash	160	257	62.26	9.77
Malisheve	268	805	33.29	1.09
Rahovec	1,158	1,832	63.21	3.01
Suhareke	916	1,438	63.70	3.68
Peje	9,649	11,127	86.72	2.35
Decan	1,894	3,571	53.04	0.44
Gjakove	7,735	10,009	77.28	3.66
Istog	1,719	2,180	78.85	2.23
Kline	937	2,062	45.44	0.51
Pristina	17,008	26,886	63.26	1.01
Ferizaj	5,025	7,008	71.70	0.74
Shterpce	11	104	10.58	0.95
Gllogovc	432	1,001	43.16	4.74
Kacanik	690	1,576	43.78	4.44
Lypian	988	2,344	42.15	5.87
Podujeve	1,770	4,111	43.06	0.91
Skenderaj	480	621	77.29	4.95
Vushtrri	807	1,476	54.67	12.48
		Averages	56.39	3.83

Table 4 Source of data: Statistical Office, Kosovo Judicial Council. The table excludes courts with no cases.

The five courts with the highest shares of utility cases in their caseload (Peja, Gjakova, Istog, Skenderaj, and Gjilan) turned out to have an average execution completion rate of 3.66% of their total execution caseload, while the five courts with the lowest shares of utility cases in their caseload (Shterpce, Malisheve, Lypian, Viti, and Podujeve) had an average completion rate of 3.17% of their total execution caseload. The ten courts with the highest utility shares had an average completion rate of 3.55%, while the ten courts with the lowest utility shares had an average completion rate of 3.27%. At best, one might say that the share of utility cases in the caseload of a court is very weakly related to the ability of the court to complete enforcement cases – in the opposite of the predicted direction.

This seems clearly to suggest that the difficulties of enforcement in Kosovo courts are not principally a problem with authentic document utility cases, but run across both authentic document cases and civil judgment cases alike.

It is worth noting that, on average in 2009, Kosovo municipal courts' enforcement offices were able to complete a bit less than 4% of their total caseloads, far lower than international standards.

C. Enforcement Against Bank Accounts and the Problem of Compliance with Court Orders

Enforcement of claims by debiting a bank account of the judgment debtor is permitted under Article 127 of the 1978 Law on Executive Procedure, and under Articles 144 through 156 of the 2008 Law on Executive Procedure. Both of these statutes order the bank to undertake a straightforward transfer of funds from the account of the judgment debtor, either in cash to the creditor or to the creditor's own bank account. Both envision a procedure that seems direct and which should happen reasonably quickly, arguably within one or two business days of the receipt of the order from the court.

Because of the directness of the transfer, and because the proceeds are realized in cash, with no loss or complication associated with any sale of assets or with the delay that occurs with sale of movable or immovable property, bank transfers are by far the most frequently-requested method of enforcement, according to our interviews. One reason for this is the presumed relevance of banks to the cash flow of business enterprises. The law requires that all transactions of business enterprises in excess of 500 Euros have to be conducted through the bank accounts of the business enterprises, and not take place in cash; in other words, the debtor on a transaction is supposed to transfer the owed sum to the bank account of the creditor, by a transfer order placed on its own account. The result should be both a significant amount of cash in the account of a business that becomes a judgment debtor. Of course, many individuals have bank accounts as well.

Yet under neither statute have transactions taken place with the degree of frequency that one might expect – indeed, both widespread opinion and the circumstantial evidence suggests that bank transfer in Kosovo is highly ineffective and is rarely completed. For example, among adjudicated cases coming from the Commercial Court, where the debtor is a registered legal entity with a company bank account, bank transfer is almost universally requested, but cases from the Commercial Court are rarely successfully enforced. Of the 545 cases litigated to judgment at the Commercial Court in 2009, only 109, or 20%, have been enforced; about 43% of the cases litigated to judgment in 2008 and in 2007 have been enforced. In all, since 2000, approximately half of all cases in which a judgment was rendered remain unenforced to this day. Thus, though businesses are required to conduct their financial affairs through their bank accounts, and though enforcement through bank accounts is almost universally requested, the great majority of judgments cannot be enforced through those bank accounts. We conclude that bank enforcement is very frequently unsuccessful, a conclusion expressed to us by almost all the judges, enforcement agents, and litigants with whom we spoke.

1. The General Problem of Bank Non-Compliance with Court Orders

By all reports, banks are under competitive pressure to provide benefits to their customers, and one significant benefit that can be provided with little risk and cost is to make it possible for customers to withdraw funds to avoid court seizure or transfer.

Court orders to banks in this area can be of two general types. A court may order the bank to provide information about a debtor's account, either to identify the bank at which the debtor holds an account, or to identify the account number. This information is then used to place the second type of order, a transfer order to the bank to withdraw funds from the debtor's account and forward it to the court for transfer to the creditor. Bank cooperation with both types of orders seems to be problematic.

How is it possible that the bank may not comply with the court's demands? The 1978 Law on Executive Procedure demands that the bank reply "without postponing," and that the bank "must not notify the debtor that these data are sought."[37] Further, the 1978 law places meaningful sanctions on the non-compliant banks, sanctions that closely resemble those used in broad international practice.[38] Significant additional punishments are proposed in the 2008 statute: Article 155 places on the non-complying bank the full financial responsibility for any losses caused to the creditor as a result of the bank's failure to comply with the court's order, and Article 21 imposes monetary fines for disobeying court orders of up to 10,000 Euros. [39] Yet the problem with bank non-compliance remains.

The incentives for non-compliance are strong. The banks see competitive advantage in non-cooperation because it is a form of asset protection that is attractive to their clients. Having a reputation for non-compliance is a competitive asset for a bank, even with an occasional penalty. After all, a bank benefits not just from the debtor's account, but from all the other funds that are held at the bank in other parties' accounts because of the bank's reputation for protecting customers; taking an occasional hit for protecting one customer merely enhances the bank's reputation with other customers who seek that kind of service, and may attract more funds. Besides, as we will explain here, it is really hard to get caught, and the penalty provisions are almost never applied.

2. COMPLIANCE PROBLEMS WHEN BANK NAME AND ACCOUNT NUMBER ARE NOT KNOWN: THE NEED FOR AN EVIDENTIARY MECHANISM

When the creditor does not know either the name of the debtor's bank or the number of the account, or both, the creditor faces severe difficulties in finding those assets. There is no central database of accounts, no outside source to which the creditor may turn to find this information. As a result, the creditor must engage in a search for the assets by requesting that the court demand of all banks that they inform the court if any of them has an account in the name of the judgment debtor.[40]

But bank cooperation with these information requests is notoriously poor. Though at the present time no legislative basis for a claim of bank secrecy exists with respect to court orders,[41] the banks frequently assert a general principle of bank secrecy to refuse such information to the court, making it quite difficult for the creditor even to identify the bank which holds the judgment debtor's account. But often banks do not bother to make an argument on the principle of bank secrecy. In truth, banks

---

[37] 1978 Law on Executive Procedure Art. 98.

[38] Article 102 of the 1978 Law on Executive Procedure states: "Debtor's debtor is responsible to the creditor for the damage made to him by not declaring himself, or for declaring himself in an insufficient or untrue way."

[39] Art. 21, 2008 Law on Executive Procedure. However, many cases must be enforced under the 1978 Law, which lacks those provisions. Art. 303, 2008 Law on Executive Procedure. It is also a fact that many enforcement agents have been reluctant to use the new enforcement procedure law at all, enforcing all cases under the old law, because they are more accustomed to those procedures, are unsure of the differences between the old law and the new one, and because their prepared forms reflect the old law.

[40] 1978 Law on Executive Procedure Article 98: "If creditor did not list in the proposal for execution the necessary data on the savings account of the debtor, court will demand such data from the organization which has the account, and which creditor is obliged to list in his proposal. Organization is obliged to give without postponing the requested data to the court, and must not inform the debtor that these data are sought." Similarly, Article 111 of the 2008 Law on Executive Procedure proposes almost exactly the same standard: "111.2 If execution proposer in his proposal has not shown data regarding savings deposit of execution debtor, then the court will request such data from the bank in which is the savings deposit, and which bank should be indicated in execution proposer's proposal. 111.3 The bank in which is the savings deposit, has duty that without delay send to court [sic] the required data and it should not inform the execution debtor regarding the request of the concerned data from the court."

[41] Article 27, Law on Payment Transactions, states: "A bank shall be bound by confidentiality and shall not disclose any information concerning the account to anyone except to the customer, unless it is required to do so pursuant to a court order or in accordance with the applicable law or pursuant to the customer's express authorization."

do not comply with information requests because the law provides significant loopholes, and these requirements of the law are almost entirely unenforceable. The bank may decline to comply with the bank's request with near-foolproof impunity.

(a) Evidence of compliance under the 1978 Law on Executive Procedure

For cases still to be resolved under the 1978 Law on Executive Procedure (that is, cases filed before the enactment of the 2008 revision of the law), the statute contains approval for the court to request such information from the bank "which has the account,"[42] but does not by its terms give the court authority to query other banks that may or may not have accounts – indeed, by its terms, it states that "the creditor is obliged to list in his [execution] proposal" the name of the bank that has the account.[43] Thus, it appears that the court does not have explicit sanction to assist the creditor in locating the account, but only to find the exact account number.

Further, other than stating that the bank "is obliged to give without postponing the requested data to the court and must not inform the debtor that these data are sought,"[44] the 1978 statute appears to contain no mechanism whatever to provide evidentiary support to ensure that the bank complies. In other words, under the 1978 law, there is no way to tell whether the bank has fulfilled its legal obligations or not. The 1978 statute contains no requirement at all of providing any information as to transactions that have taken place in the period prior to the actual transfer, that is, between the court's inquiry and the eventual order of transfer, so the court will never know if the illicit withdrawal occurs. Thus, even if the bank has an account of the debtor but fails to report it, there is no way that the court can discover the non-compliance.

(b) Evidence of compliance under the 2008 Law on Executive Procedure

Under the revised 2008 provisions in Article 145.1, the law purports to provide a means of gathering evidence against the non-complying bank. That provision states: "The court, with the execution decision, will oblige the bank to send a notification about all changes in the debtor's account . . . Notification covers changes in debtor's account in time period of 30 days from the day of delivery of the execution decision . . . ."[45]

There are two obvious loopholes in this provision of the 2008 Law:

First, the time period from the initial request of the court for information about the location and/or account number of the debtor's bank account, and the "day of delivery of the execution decision" (which takes place after the bank has replied to the court with information, the court transmitted that to the creditor, the creditor amended his execution proposals and resubmitted the revised proposal to the court, and the court sent the letter) may well exceed 30 days. Indeed, it almost inevitably will do so, since the bank itself has control over how quickly it responds to the court's request for information – waiting a few extra days after informing the client of the court request will simultaneously give the client time to withdraw the funds and ensure that the court will not get information about the transaction, because the transaction will have taken place prior to opening of the 30-day window of scrutiny, thanks in part to the bank's strategic delay in responding to the court's inquiry. Besides, in a system flooded with cases, enforcement officers are unlikely to respond very quickly to an inquiry response from a bank in any specific case, so it is unlikely the transfer order will arrive less than thirty days from the debtor's withdrawal.

Second, if the court simply chooses not to inform the court of the debtor' account, there is little the court can do. There is no provision ordering an account history from the bank if no execution decision is ever delivered – it is ordered only if the court issues the execution order. There is no other means

[42] 1978 Law on Executive Procedure Art. 98.

[43] 1978 Law on Executive Procedure Art. 98.

[44] 1978 Law on Executive Procedure Art. 98.

[45] 2008 Law on Executive Procedure Art 145.1.

for the court to learn of the debtor's account, and there is no way for the creditor to learn of the account independently because of the bank secrecy law.[46] Thus, if the bank has not informed the court of the existence of debtor's account, there is no reason that an execution decision ever should be delivered to the court, no account history will be sent to the bank, and the court will never see the record of the illicit withdrawal.

In short, despite the efforts of the legislative drafters of the 2008 law, it is extremely unlikely that the bank will be asked to provide evidence to the court of any withdrawals by the debtor. The court will in all probability never learn of any warnings the bank might have given to its customer, and similarly will never learn of any withdrawals made by the customer in response to the warnings.

Thus, it is clear that available remedies are completely inadequate when the creditor and the court have to seek information about the account from the bank, or about the identity of the bank where the account is held.

3. COMPLIANCE PROBLEMS WHEN BOTH BANK AND ACCOUNT NUMBER ARE ALREADY KNOWN

A somewhat different set of issues arises when the creditor knows both the name of the bank and the account number of the debtor. Both those items should of course be included in the creditor's execution proposal, and that will normally result in a court order to the bank to block the account, prohibiting other withdrawals, and to transfer the owed amount to the creditor. In this case, there is no problem with the time delay between the issuance of an information request and the order to transfer funds, since there is no need for information. This should provide greater assurance of bank compliance. Unfortunately, that is not the case.

(a) The 1978 Law on Executive Procedure

Under the 1978 Law on Execution Procedure, even when both bank name and account number are known prior to the court's order to the bank, there simply is no evidentiary mechanism by which the court or the creditor can know whether the bank has acted properly. As described above, the law places no requirement whatsoever on the bank to inform the court as to account transactions *before or after* the court order arrives at the bank. Nearly all cases actually being enforced by court enforcement agents are older cases, originally filed before the enactment of the 2008 Law on Executive Procedure, and therefore under Article 303 of that law are enforced under the terms of the 1978 enforcement law, which included authority for neither the demand for a record of transactions in the debtor's bank account nor the penalties for non-compliance included in the 2008 Law.

(b) the 2008 Law on Executive Procedure

The 2008 Law on Executive Procedure, by contrast, does provide an evidentiary mechanism, though it is clearly inadequate when information must be sought from the banks. Does the 2008 law's evidentiary mechanism function adequately when there is no need to seek information from the banks, because the creditor already possesses the necessary bank account information?

Interesting though this question may be, it is at this time of little practical interest, because the 2008 Law is little used. In fact, enforcement agents have told us that the 2008 procedures are little used, and that the 1978 procedures are used in almost all cases. The provisions of the 2008 law apparently are not yet well understood by enforcement agents, and the differences between the two laws are often subtle and difficult to identify. The reality is that the vast bulk of cases being enforced today really are covered by the 1978 law, and it is apparently simply too difficult for enforcement agents to apply one set of rules for almost all cases and a completely different set of rules (that are not well understood) for a few other cases in the docket. The form letters and notices employed by the enforcement offices we visited all are derived from the 1978 law, not the 2008 law. Thus, as a practical matter, the potentially greater efficacy of the 2008 law in seizing bank accounts under the particular

[46] Article 27, Law on Payment Transactions.

circumstances presented here – that is, bank seizure is requested in the proposal, all bank and account information is known prior to (and included in) the execution proposal – is of little value.

Recommendations

1. Amend the 2008 Law to permit information gathering in pre-2008 cases from banks and others

We suggest that the 2008 law be amended to apply retroactively to pre-2008 cases the rules in Article 145 of the 2008 law, governing the seeking of information from banks and other governmental institutions, including the evidentiary requirements embodied in the 2008 law. It is difficult to see how retroactive application would undermine any legal right that the defendant or debtor has; in effect, the 1978 law makes it clear that the court is entitled to this information, and applying the 2008 evidentiary rule would merely permit the court to assist in locating the bank and in establishing an evidentiary record. Thus no legal right of the debtor is affected.

2. Amend the 2008 Law on Execution Procedures to older cases

We suggest further that the rules in Article 21 of the 2008 law be amended to apply retroactively to cases filed prior to the implementation of the 2008 law. Article 21 lays out additional sanctions for non-compliance. Again, it is difficult to see what legal rights are undermined – after all, these are not sanctions to apply against the debtor/defendant, but to a third party that already has obligations to comply with court orders, even under the terms of the 1978 law. (Article 102), and thus its rights are in no way being changed. No third party, such as a bank, could have acted in reliance on the 1978 law in establishing a bank account for someone who *subsequently* would become a debtor in a legal case, when it currently accepts identical accounts for persons who, if they became debtors as a result of a court judgment, would be entirely covered by the 2008 law.

3. Amend the 2008 Law to close evidentiary loopholes

The 2008 Law should be amended (and applied retroactively to earlier-filed cases) to close the evidentiary loopholes identified above.

- First, the account transactions history demanded of the bank should be required to be provided to the court upon the receipt of *any* court order pertaining to that account – whether the order is merely a request for information, or a request for a bank transfer.
- Even this requirement, however, cannot provide assurance of bank compliance with a request for information when the existence of the account is not known. For that purpose, we have two suggestions. First, the penalties for non-compliance imposed on a bank should be sufficiently great that a bank will be incentivized to comply to avoid the penalty that would be imposed if a deception were later discovered. Second, as laid out in Recommendation 7 below, we suggest the Central Bank develop a database of accounts that will remove the ability of banks to deceive the court.
- Second, the account history supplied to the bank should cover a longer period – not just thirty days prior to the bank's receipt of the court order, but thirty days prior to *the issuance of the court order by the court*, extending up to the very day of compliance.
- Third, a clear time limit for compliance should be imposed by statute, so that the bank or other third party should be required to answer the court's order within some defined reasonable time period, for example, twenty calendar days from issuance.

In addition, amendments to the 2008 law should be adopted that permit cases filed prior to the implementation of the 2008 law to be handled under that law with respect to information and evidentiary issues discussed here.

4. Establish court order compliance registries

All courts should be required to maintain a separate registry in which all court orders issued in pursuance of enforcement, whether to a bank or some other party, are recorded, along with

compliance results, to provide a clear record of compliance by private parties with court orders. There must be some effective mechanism by the courts to ensure that private parties, such as banks, are acting in compliance with their orders. Indeed, it is plausible to suppose that one reason compliance with orders has been so difficult to compel is simply that, given the methods enforcement officers use to keep track of activities in their cases, that no one ever really checks whether the bank or other third party has in fact complied with the court order. This must end. All enforcement offices should institute a regular mechanism to keep track of issuance and compliance with court orders, so that outstanding orders still awaiting compliance can be easily identified and followed up. Records of compliance pertaining to a litigant's case should be available for inspection by the litigant or the litigant's attorney.

5. EMPOWER CLAIMANTS TO SEEK SANCTIONS ON NON-COMPLIANT THIRD-PARTIES

The creditor should be empowered to request that the court impose sanctions on a third party when non-compliance occurs. The proceeds of the sanctions be applied to the satisfaction of the creditor's judgment. It is the creditor's interest that is at stake when non-compliance occurs, not the court's, or the enforcement agent's, or the prosecutor's. It is the creditor who will have the incentive to check the court's records on whether compliance has occurred in a timely way, and to seek sanctions when it has not.[47]

6. IMPROVE SUPERVISION OF BANKS TO ENSURE GREATER COMPLIANCE WITH ENFORCEMENT

We urge the Central Bank to apply its bank supervisory and regulatory authority to require commercial banks to forward all court orders received, whether requests for information, transfer orders, or some other order, to the Central Bank, accompanied by an account transactions history dating back at least thirty days prior to the issuance of the court order and extending to the date on which compliance occurs. The Central Bank should maintain these records in its own files, keep records as to compliance, and use its authority to impose sanctions on banks when non-compliance becomes a regular pattern for a particular bank. The Central Bank has the authority to impose penalties on the banks for non-compliance with court orders under its general regulatory authority; these penalties should be serious and meaningful, to include triple damages. Banks' concern for their licenses, which might be at risk should the Central Bank exercise the most extreme of the regulatory sanctions available to it in the case of repeat offenders, should act as a considerable deterrent to bank non-compliance.

7. CREATE AN AGENCY WITHIN THE CENTRAL BANK TO FACILITATE COLLECTION OF CLAIMS THROUGH BANK ACCOUNTS

Longer term, as discussed earlier in this Assessment in the discussion of authentic documents backlog, the Central Bank can play a central role in ensuring that creditors receive the benefit of their judgments and that banks behave in accordance with their legal responsibilities.

- We urge that the legislature include a provision in the new proposed Law on the Central Bank that will instruct the Central Bank to create a Division of Enforced Collections, which will take the place of the commercial banks in implementing court orders and other mandatory payments.
- Furthermore, whether within a hypothetical Division of Enforced Collections, or simply within the existing administrative structure, a database comprising an Account Holder Registry would be of great use for this purpose. This agency would create a database of all accounts in all banks, each identified by the account holder's Personal Identification Number or Business Registry Number, and would have the authority to effect transfer between accounts in the database. Thus, all accounts owned by an individual or legal entity would be

[47] Both the 1978 and 2008 Laws on Execution Procedure make it clear that non-compliance by the third party will result in the liability of the third party for the damages caused by its non-compliance, i.e., the amount of money that otherwise would have been obtained to satisfy the creditor's judgment.1978 Law on Executive Procedure Art. 102; 2008 Law on Executive Procedure Art. 118.

immediately identifiable. These numbers already are associated with each account in licensed banks, but have not been brought together in the form of an integrated database.

- Under this proposal, the court would forward the account inquiry and the transfer order directly to the Central Bank through secure electronic means. The Central Bank's Division of Enforced Collections would search the database to determine the accounts associated with the judgment debtor's Personal Identification Number and implement the transfer from debtor to creditor immediately through conventional bank transfer mechanisms such as the SWIFT bank transfer mechanism.

Exactly this administrative structure has already been created under the auspices of central banks in some of Kosovo's regional neighbors, and has become a highly reliable and effective component of their enforcement systems. This policy by itself would make bank transfers immediate, certain, and virtually immune to bank non-compliance. Oddly, the banks themselves, which are frequent creditors, would be among the greatest beneficiaries of this policy that would remove from them the competitive pressure to violate court orders on behalf of their clients, and would facilitate the collection of their own claims from loan clients. Enforcement of judgments would become significantly more certain and speedy.

D. Enforcement Against Wages, Salaries, and Personal Incomes

Enforcement of civil judgments by garnishing or seizing the wages or salary earned by an individual is widely used in most countries. Typically a large number of individuals have wage and salary income because they are employed and earnings are a significant source of wealth, for typical individuals they are often a far greater repository of wealth than bank accounts. But wage and salary garnishment appears to be little used in Kosovo.

The law on execution against personal incomes is straightforward. It differs little between Kosovo and most other countries, and is little changed between the 1978 and 2008 Laws on Executive Procedure.

- An execution decision is issued to the debtor's employer (who is the debtor's debtor because the employer owes wages to the employee and thus the rules on garnishment apply) by the court, requiring the employer to forward a portion of the debtor's earnings to the creditor in satisfaction of the creditor's judgment. Under Article 111 of the 1978 Law, and under Article 136 of the 2008 Law, a portion of all compensation received by the debtor for current and previous work can be seized by the court.
- Article 101 (1978 Law) allows the court to request information from the debtor's debtor (that is, the debtor's employer) regarding debts owed to the debtor (that is, compensation due to the employee). Once that information is obtained, the court sends to the employer the decision to execute on the salary of the debtor, subject to the limitations and exemptions in the law.[48]
- Once the employer receives the decision, he must immediately start to block the relevant part of the salary. The creditor's bank account is immediately transferred funds by the employer by diverting a portion of the debtor's monthly salary, or those funds are sent to the court for transfer to the creditor. [49]
- Article 102 (1978 Law) and Article 141 (2008 Law) stipulate that the debtor of the debtor is responsible for damages caused to the creditor by failing to identify itself, or identifying itself in a false or incomplete manner, once the court has made the request to the employer for information, or for failing to forward funds to the creditor as ordered.

1. Problems with Garnishment of Earnings

There are two key practical problems with these provisions, in the context of Kosovo: employers are difficult to find, and employers routinely ignore court orders after they have been found.

[48] Art. 93, 1978 Law on Executive Procedure.

[49] USAID Kosovo Justice Support Program, "Handbook for the Practical Implementation of Execution Procedures in Kosovo," November, 2007, pp. 38-39.

A. Locating Employers

First, employers are notoriously difficult to identify. Courts sometimes have contacted the Kosovo Civil Registry for information about debtors, yet in fact the Civil Registry does not at the present time have information either about the addresses or the employers of individuals generally, and currently declines to accept letters from courts seeking information, according to our sources. Apparently there are plans that the Civil Registry will begin collecting addresses of individuals when they register at some time in the future. Similarly, letters sent to the police seeking information either about addresses or employers uniformly evoke a negative response.

Thus, it is widely believed that information about a debtor's employer is nearly impossible to find. This is because the court expects the creditor to provide that information to the court; yet individuals have limited rights to request information from government agencies. The court, or the enforcement agent, has no specific mandate under either the old law or the new to request information from any other government agency on this matter, as it specifically does with respect to levy on bank accounts,[50] and thus it does not do so, though there is nothing that legally prevents the court from doing so. However, the 2008 Law on Execution Procedure does allow the creditor to request that the court seek information about the debtor and his assets before issuing a decision on execution.[51] As noted earlier, all enforcement cases filed prior to the implementation date of the 2008 Law are required to be treated under the 1978 Law[52]; and as a practical matter, the 2008 Law is generally not applied anyway, so even newer cases are handled under the 1978 Law's rules.

In fact, there are other sources of information about a judgment debtor's employer to which the court could turn. However, they require the court's participation. Every employer is required to withhold a portion of its employees' earnings to be turned over to the Tax Administration of Kosovo, to pay that employee's taxes. The Tax Administration thus has a record of every employed person's employer and address, identified by the employee's Personal Identification Number (PIN) given to that person by the government of Kosovo and uniquely identifying that individual. There are approximately 300,000 employed persons in Kosovo for whom specific individual records are held at the Tax Administration.[53] Similarly, the Tax Administration forwards funds on behalf of each employed person in Kosovo to the Pension Fund of Kosovo, held by the Pension Fund in a social insurance account in the name of each employed person, again identified by that person's PIN and indicating that person's employer. Both the Tax Administration and the Pension Fund have confirmed to SEAD that they can in fact identify an individual's employer and home address, as long as they are provided the PIN of that individual, and will do so in response to a request from the court.

While PIN's are not normally provided on execution proposals under either the 2008 or the 1978 Laws on Execution Procedure, it is very typical for the judgment creditor to have that information. SEAD has been informed by both KEK and PTK, for example, that they routinely collect that information from their account holders, and thus have that information when the account holder becomes a judgment debtor. But because the statutes do not specifically call for the PIN to be on the execution proposals, it is not normally provided to the court.[54] But it is clear from both statutes that additional information may be included in the execution proposal,[55] and the PIN number would be of

---

[50] Article 98, 1978 Law on Executive Procedure; Article 111.2, 2008 Law on Executive Procedure.

[51] Article 42, 2008 Law on Executive Procedure.

[52] Art. 303, 2008 Law on Executive Procedure.

[53] This is out of a presumed total population of approximately 2 million persons, including children and the elderly. While there is certainly a high level of unemployment in Kosovo today, it seems plausible that this 300,000 individual accounts represents a reasonably high percentage of the working-age population, though it is far from complete.

[54] Article 39 of the 2008 Law on Executive Procedure requires that execution proposals contain "claimant of execution and debtor, credit required for realization, and also the means through which the execution should be conducted, object of execution if known, and other data needed for application of execution." Article 35 of the 1978 Law on Executive Procedure requires "creditor and debtor, executive or trustworthy document, debtor liability, means and subject of execution, and other data necessary for execution carrying out."

[55] Article 35 of the 1978 Law on Executive Procedure states: "In the proposal for execution must be indicated: creditor and debtor . . . *and other data necessary for carrying out execution*." Similarly, Article 39 of the 2008 Law on Executive Procedure states: "Execution proposal should contain the request for execution in which will be shown the execution document . . . *and other data needed for application of execution*." (Italics added).

great value in making possible earned income garnishment, that is, execution against the debtor's credits when those credits constitute earned income.

B. Compliance by Employers

The second practical problem with the use of wage or salary garnishment is that there has been a tendency for employers not to respond to those requests from the courts, to simply ignore them. This is not for lack of sanctions, either under the 1978 Law or the 2008 Law. Article 124 of the 1978 law imposes damages liability upon "public legal persons" for failing to implement a court's execution decision, a term which is understood to include both public and private employers, while Article 102 imposes damages liability upon a potential garnishee for not fully or truthfully answering a court's request for information about the relationship between itself and the debtor. It is not clear why the 1978 Law, which at one time did elicit general cooperation, today does not. The 2008 Law imposes essentially identical liabilities,[56], but with one addition: it imposes additional sanctions under Article 21, which calls for monetary fines up to 10,000 Euros for non-compliance with court orders. Of course, cases filed since June 2008 are covered by these provisions, and at least some observers have suggested this new provision is resulting in improved cooperation by third party garnishees.[57]

Recommendations

1. Streamline information gathering from Tax and Pension Authorities

Reform should focus, first, on facilitating requests from the court to either the Tax Administration or the Pension Fund for the debtor's current employment information.

- Court enforcement agents should receive training that makes clear to them their power to obtain this information from the relevant agencies.
- Creditors are able to provide PINs on the execution requests, though they are not currently specifically asked for; execution request forms or handbooks should be provided that makes clear to judgment creditors that the debtor's PIN should be provided if it is available.
- Information should also be provided to creditors that instructs them that it may be possible for the court to obtain employment information from the Pension Fund of Kosovo or the Tax Administration, and that an instruction to the enforcement agent to request that information from these agencies is appropriate.

2. Create electronic linkages between enforcement offices and other government institutions

It would also be quite valuable to establish an electronic link from offices of court enforcement agents to government agencies including the Pension Fund and the Tax Administration, to make it possible to obtain this information quickly and reliably. This would require creating a secure digital link with the appropriate software and may require providing additional resources to those agencies to facilitate their ability to respond quickly and securely to these requests. Even more important, it would require that court enforcement offices be provided with computers and appropriate software to allow them to make use of this facility.

3. Assign responsibility to the court to seek information from other government institutions

Enforcement proposals may request that the court obtain data about the debtor's employer from these government agencies. The 2008 Law on Executive Procedure specifically permits such requests.[58]

---

[56] Article 141 of the 2008 Law on Executive Procedure states: "Employer who has not acted according to the decision for execution . . . is responsible for the damage which the execution proposer has suffered due to his omission."

[57] USAID Kosovo Justice Support Program, "Training Program for Execution Clerks: Administrative and Legal Issues, Assets of the Debtor," June 2009, Tab 7.

[58] Article 42.1, 2008 Law on Executive Procedure.

While the 1978 statute does not specifically instruct that the court may send such requests, it is certainly within the power of the court to request data from any government agency at any time.

- However, to ensure that the court be willing to undertake such information requests in cases currently under the authority of the 1978 LEP, the Law on Executive Procedure should be amended to make clear that it is the responsibility of the court to make information requests of government agencies to facilitate the enforcement process, as the 2008 Law currently does.

It is foolish to demand (as the 1978 Law on Executive Procedure implicitly does) that the creditor provide all information to the court, and that the court has no responsibility to assist, when that information is legally only available to the court, and not to the creditor acting without the court's assistance. All this accomplishes is to permit the debtor to evade the creditor's legitimate claim by hiding behind the court's lack of obligation to assume the duty of finding that information. No rights of the debtor are at stake: the debtor does not here have a "right" to evade the debt through keeping the identity of his employer a secret. The provisions of the 2008 Law that allow information to be sought by the court from government agencies should be made applicable to cases brought prior to the enactment of the 2008 Law; this cannot infringe on any right granted to the judgment debtor under the 1978 Law, nor can the third party employer be presumed to have acted in reliance on the 1978 Law's lack of discovery provisions in hiring an employee.

4. STREAMLINE PROCESSES FOR FILING EXECUTIVE TITLES

Under either law, that information, once obtained, will necessitate that the enforcement proposal be withdrawn, amended, and resubmitted to take advantage of this newly obtained information.[59] It would be worthwhile simplifying and speeding that process for holders of executive titles, in a future revision of the enforcement procedure statute, by eliminating the need to submit, withdraw, amend, and resubmit the enforcement request; rather, the court could be empowered to accept information requests from holders of executive titles that would allow enforcement titles to be submitted once, rather than multiple times, and be amended by the creditor without withdrawing the execution proposal from the court.

Suggestions made earlier in this Assessment in relation with bank enforcement that were intended to strengthen compliance with court orders – that is, suggested provisions that require courts to maintain registers of court orders to third parties and the compliance of the third parties, that permit creditors or their attorneys to examine the register of court orders, and that empower the creditor to initiate requests for damages under the executive procedure statutes[60] – bear repetition here.

E. Movable Property

Seizure and sale of movable property is often proposed as a method of execution in Kosovo for the simple reason that, in the great majority of authentic documents cases, the creditor is unaware of any other assets that might be seized when the creditor files the execution proposal. Both the 1978 and the 2008 Laws on Execution Procedure allow the proposal to request seizure of movable property generally, without specifying more precisely the items to be seized; whatever non-exempt items are found, are to be seized.[61] That same flexibility is not provided for other objects of execution: both execution procedure laws demand some specificity in identifying other objects of seizure. [62] Since there are no other known assets, the creditor seeks whatever movable property can be found. Seizure of movables, therefore, is normally the enforcement strategy used in the absence of any information about the debtor's assets.[63]

---

[59] Article 43, 2008 Law on Executive Procedure; Article 37, 1978 Law on Executive Procedure.

[60] 1978 Law on Executive Procedure Art. 102; 2008 Law on Executive Procedure Art. 118.

[61] 1978 Law on Executive Procedure, Art. 35, Par. 2; 2008 Law on Executive Procedure, Article 41.

[62] 1978 Law on Executive Procedure, Art. 35, Par. 1; 2008 Law on Executive Procedure, Article 39.1.

[63] That well describes the situation on many cases in the utility backlog. We were told by representatives of the utility companies (PTK in particular) that in the middle years of the last decade, many accounts were added to their business

But seizure of movables is generally not successful as an enforcement strategy in Kosovo. It is rare for movable property to be found that has any real negotiable value, and whatever is seized normally cannot be sold for much. On rare occasions, automobiles have been seized; on other occasions, business inventory or equipment have been seized. But by far the most common movable item found is household furniture and other personal effects, which generally have little or no value on resale.

Furthermore, under both the 1978 and 2008 statutes on executive procedure, seizure of movables involves additional cost to the creditor. Neither statute makes any provision for the enforcement agent to seize the movable property. Either the property is to be impounded but left in the hands of the debtor; or it is to be impounded by the creditor, and inventoried, stored, and sold at the creditor's expense.[64] The enforcement agents are not authorized to assume the cost of warehousing seized movable property. From the creditor's perspective, leaving the seized property with the debtor involves a significant risk of loss and then additional litigation to impose penalties on the debtor. Taking the seized property into the creditor's own custody involves significant expenses for transportation, storage, and sale. When the likelihood of realizing any significant payoff from the seizure is slight or nonexistent, but the cost of the seizure and sale is significant and certain, actually making the seizure is worse than recovering nothing at all.

For that reason, seizure of movables is generally more successful as a negotiating strategy than as an enforcement strategy in itself, and is usually intended as such. The goal is to persuade the debtor to pay the debt in cash, rather than lose most of his or her household items.[65] However, there are a few movable assets that might be seized that generally bring more proceeds from sale than they cost in terms of seizure, storage and sale. These include automobiles, and equipment and inventory of operating businesses.

But in most cases, actual seizure is an empty threat, frightening to the debtor but almost always of little use to the creditor. It is for that reason that actual seizure of movables rarely happens.

Recommendations

There is obviously not much that can be done to make more valuable movable assets available. Once the agent locates the residence or business of the debtor, anything saleable (outside of the list of exempt items, which contains those items believed necessary to ensure a minimum basic standard of life to the debtor) can be seized and sold, even if they are not separately identified in the execution proposal: whatever is found can be seized and sold, except for exempt items. We do, however, have a few suggestions to produce more results from enforcement against movables.

1. FACILITATE FINDING AND SEIZING OF AUTOMOBILES.

The automobile is likely to be the only movable property item of real value in the debtor's possession, if the debtor is a physical person and not a business. Automobiles tend to be highly saleable and possibly worth significant monetary value: there are well-functioning markets in used cars. For that reason, they constitute perhaps the single item of movable property actually likely to be attractive to creditors trying to collect judgments. Unfortunately for creditors, automobiles are just as easily marketed by debtors as by enforcement agents, and might be sold to prevent seizure. They also tend to be highly mobile (not all automobiles are as mobile as might be imagined, but those that are not tend to be worth less), and may not be on the premises of the debtor when the enforcement agent appears to perform an enforcement action. How can they be found by enforcement agents or creditors?

---

because they were willing to accept new customers with minimal information about their incomes or credit histories. It is probably for this reason that so many of the execution proposals in the utility case backlog request execution against movables.

[64] 1978 Law on Executive Procedure, Art. 76, Par. 1; 2008 Law on Executive Procedure, Article 83.1.

[65] 1978 Law on Executive Procedure Art. 71, Par. 1; 2008 Law on Executive Procedure, Art. 80.1.

While it remains difficult to seize automobiles physically because it is difficult to locate them, they can be impacted by enforcement agents in three ways: through their licensing, through automobile title transfer upon sale, and through the loans that debtors may take to finance their purchases.

2. Vehicle licensing and registration measures

We suggest serious consideration of modified procedures for annual licensing of automobiles and other vehicles to create incentives for payment of outstanding judgments. Limitations on title transfer and licensing increase the bargaining power that creditors have to collect payment in cash. Placing limits on title transfer or annual renewal of licenses, dependent on payment of outstanding judgments, are analogous to liens placed on the transfer of real property (immovables). This is a plausible but unconventional method of enforcement that may well be effective, but might be even more politically unpopular than most other forms of enforcement, since people often depend on their automobiles and are not accustomed to licensing and title transfer being dependent on payment of other debts. Still, this approach is worthy of serious consideration.

3. Recording of Pledges of vehicles

A more conventional element of enforcement involving automobiles would involve simply reporting of outstanding pledges by the Pledge Registry of the Ministry of Trade and Industry to the Ministry of Internal Affairs' Department of Vehicle Registration and Licensing. We suggest that the pledge registry be upgraded to permit reasonably easy public examination, and that the Ministry of Trade and Industry regularly report pledges on vehicles to be placed as a notice on the title to the vehicle, to inform buyers of the vehicle of the existence of the pledge at the time ownership of the vehicle is transferred.

This would ensure that potential buyers of automobiles are aware of the pledge, would take title to the car fully aware of the outstanding pledge, and would therefore probably pay a price reduced by the value of the prior claim recorded in the pledge registry. The effect would be to limit the marketability of pledged automobiles and therefore lend meaningfulness to the concept of the pledge; if no one is aware of a pledge, and the prior claim of the secured creditor, it is arguable that the pledge is not legally effective, since an innocent third party buyer might not be held subject to the lender's prior rights. Automobiles constitute the most common form of collateral listed in the pledge registry; thus, informing the Department of Vehicle Registration and Licensing of the pledge would make it possible for secured lenders to maintain their claims and collect on them.

4. Provide the Pledge Registry with Software and Expertise Required for Effective Operation

At present, the pledge registry is little used and does not serve the normal function of a pledge registry, because public access to the registry is not available. No buyer of any pledged collateral property can be aware of prior pledges, because it is not possible for members of the public to check the pledge registry. This compromises the legal meaningfulness of pledges. The very purpose of a pledge registry is to ensure that buyers know of the security interest, and thus take title subject to the prior claim, presumably paying a price reduced by the need to pay off the loan secured by that pledge. Buying without knowledge of the pledge means that the buyer is placed in the position of the innocent third party, buying at full price without knowledge of other claims, and therefore with quite respectable claims under the Law on Obligations to the property he has bought despite the recordation of a security interest.

In addition, it is important to make the pledge registry effectively operational by providing it with the software to make it searchable by members of the public and more widely accessible. At present, there are a small number of requests for searches on the pledge registry, but outside of the banking community few people are aware of the existence of the pledge registry or the possibility of registering collateral on loans in the registry, and for that reason it is rarely searched. For example, in 2009, there were fewer than 300 total searches on the registry. One reason for this is that the registry can only be searched in the main office in Pristina. There is currently no public access to the registry. Software is required to make this publicly accessible, but there is no available funding for that

purpose. This should be provided, and the pledge registry should be fully operationalized as soon as possible.

5. REMOVE SALES PRICE RESTRICTIONS ON AUCTIONS OF MOVABLES

Both the 1978 and 2008 Laws on Execution Procedure require that seized movable property be evaluated by either the court's enforcement agent or an expert specifically provided by the court, and that the seized movables are then to be sold at public auction. Both laws place restrictions on the sales price of the movables, restrictions that accomplish little other than eliminating the effectiveness of seizure of movables as a method of enforcement. These price restrictions should be removed.

Both statutes require that sales of movables in the first public auction be at a price not less than the appraised value assigned by the enforcement officer or the court expert. If the items fail to sell at the first auction, subsequent auctions may be held, and (under the 1978 statute) the price may be reduced by not more than one-third at those subsequent auctions.[66] The effect of these price restrictions at the first auction and (in the 1978 statute) subsequent auctions is either to have no impact at all on the sale price, or alternatively, to prevent the seized item from being sold. If the officer overestimates the price, it will not sell; if the officer underestimates, it becomes irrelevant, since there is no upper limit on sale price, and buyers will bid the price up to the real value of the movables.

Thus restricting the sale price either is meaningless, or it prevents sale. Perhaps preventing sale at an "unfair" price is the purpose of this restriction, but there can be no doubt that this undermines the effectiveness of seizure. There is an extensive list of items that are exempt from seizure under the statute; the impact of these pricing rules is to make almost everything functionally exempt from seizure. Restricting price in a way that prevents sale surely is unfair to the creditor, who has a legal right to payment of his judgment; recall that seizure of movables is likely to be the creditor's strategy of last resort, used only when no other information is available about the debtor's assets. There is little point even in seizing assets that cannot be sold, at the price demanded by the court's evaluation; sales of movable items like household goods typically occur at prices far below their original purchase price. The impact of these restrictions, then, is in most cases to eliminate the usefulness of seizure by movables and ensure that the creditor goes without any satisfaction on his judgment.

6. ELIMINATE AUCTION SALE PRICE RESTRICTIONS

We suggest removing restrictions on sale price in revision of the 2008 statute. This also eliminates the need for the appraisal by the enforcement agent or an outside expert, something which is frequently time-consuming and inaccurate. However, there is little that can be done to improve the salability of items under the 1978 law, meaning that almost all the cases currently in the process of enforcement will be unaffected.

7. PLACE MARKETING REQUIREMENTS ON SALES OF MOVABLE PROPERTY AT AUCTION

A more effective means of protecting the legitimate interests of debtors, rather than preventing sale by artificially limiting the sales price to levels higher than the seized items can actually sell for, is to ensure that the seized items are marketed for sale in a manner that is likely to maximize the price received for them.

Neither statute offers much guidance on the process of sale, except that both statutes require that items to be sold at auction be listed on the court's public notice board.[67] There is much that could be done to increase the marketability of auctioned items. Advertising public sales in local newspapers might be made mandatory. Courts might maintain web sites that list items for sale; indeed, there seems to be nothing that prevents the auctions from being held online, reaching a much wider audience than is possible in a physical sale and minimizing transactions costs. This requires that courts become much

[66] 1978 Law on Executive Procedure Article 85.

[67] 1978 Law on Executive Procedure Article 84; 2008 Law on Executive Procedure Article 92.

more technologically sophisticated than they now are, but would increase the likelihood of achieving a decent price for the seized items.

An excellent model for how this recommendation might be implemented is the Bulgarian Register of Public Sales. The Register, designed and implemented by the Chamber of Enforcement Officers, is a central database that is accessible via the Internet by any interested member of the public. All public sales, whether of movable or immovable property, is listed and the database is searchable based on user-defined criteria, including city, name of the enforcement officer, estimated value of the asset to be sold, type of asset (whether land, house or apartment, automobile, etc.), starting and end date of the sale, and key words. Though the Bulgarian version at this point includes no auction bidding procedures, that could be incorporated to facilitate the bidding and sale process. According to reports, the Register has dramatically increased the accessibility of information on public sales, thus bringing more bidders and more competition at public auctions. Such an auction system could be instituted in Kosovo as well, perhaps under the auspices of the Kosovo Judicial Council or the Agency for Management of Sequestered and Confiscated Assets under the Ministry of Justice.

8. CREATE A PUBLICLY ACCESSIBLE WEBSITE WITH AUCTION INFORMATION

We suggest that the Kosovo Judicial Council create a website, accessible to all members of the public, for the marketing of items seized for judicial sale. All enforcement agents would report seized items to the management of the website for listing there, along with appropriate information such as location, type of asset, possibly a photo, and other information relevant to sale. The services of an internet marketing expert could be provided to ensure the effectiveness of the service. This should be particularly effective for the marketing of business-related assets such as inventory and equipment. Ultimately the service should be designed to permit a bidding and sale process to take place directly through the website.

9. ADOPT ADDITIONAL RULES FOR MARKETING OF SEIZED ASSETS

Further rules for marketing of seized assets should be drafted and implemented. This should include advertising of local sales in at least two local publications in some defined period prior to sale. Implementation of a "commercial reasonableness" standard for sales should be examined, to ensure that methods of sale correspond reasonably closely to those that might be adopted by an interested owner were that party to attempt to sell those assets.

10. IMPROVE THE AVAILABILITY OF INFORMATION ABOUT OTHER ASSETS.

Seizure of movables is unquestionably hard on debtors, because it normally entails the seizure of their household items, drastically affecting their standard of living. It is also of little value to creditors, who typically use it as a last resort and who receive little benefit from it. It is normally used principally when the creditor has no other information about other assets that the debtor may have. One way to improve the situation facing creditors, therefore, is to make better information resources available to creditors to improve their ability to find other assets of debtors.

The 2008 statute allows judgment creditors to use the resources of the court to locate other assets. Its language requires the execution proposal to state "the object of execution if known."[68] Article 42 of the 2008 Law on Executive Procedure allows the execution proposer to propose that the court seek information from the debtor about its assets, and Article 43 then allows the execution proposer to withdraw, amend, and then resubmit its proposal, presumably changed to reflect the newly acquired information about the debtor's assets. This strategy is not available under the 1978 statute, and is thus of little relevance to any case currently being enforced. From the perspective of the creditor in cases brought under the 2008 statute, however, the problem with this procedure is that there is little the court actually does to increase information available to the creditor to allow execution proposals to be amended effectively for this purpose.

[68] 2008 Law on Executive Procedure Art. 39.1 .

11. APPLY THE 2008 LAW RETROACTIVELY TO OLDER CASES

We suggest that Articles 42 and 43 of the 2008 Law on Executive Procedure be retroactively applied to cases currently governed by the 1978 Law on Executive Procedure to enable creditors to seek information about debtors' assets to facilitate satisfaction of the judgment, and that the court facilitate access to information about a debtor's assets through appropriately limited access to information held at the Central Bank, the Pension Fund, the Tax Administration, the cadastre and property title registry, the Department of Motor Vehicle Licensing, and other relevant government agencies. Access to compelled testimony and submission of documents, as discussed later in this Assessment, should also be considered.

F. Immovable Property

There are a number of factors that keep immovable property from serving as an effective target for seizure in the enforcement process.

1. FACTORS LIMITING THE AVAILABILITY OF IMMOVABLE PROPERTY FOR SEIZURE

First, the cadastre and immovable property rights register are in a difficult state, with many missing records and many land titles in dispute.[69] There are conflicting systems of property rights in Kosovo's historical legacy which give rise to modern claims of ownership, from the Tapia law of Ottoman times to socially-owned property more recently. In some earlier periods of Kosovo's history, land transfers could occur with only a contract but not recordation in a land register, while in other periods, recordation was necessary; the result is that land records may not reflect transactions that may have been legally sufficient and binding at the time they were made. In the wake of Socialism, some socially-owned land was awarded to persons who had questionable legal claim to be awarded that land, and their ownership has remained in dispute. Any attempt to resolve the status of a parcel of immovable property may also have to contend with the claims of alleged heirs, and dealing with inheritance issues in Kosovo court can take several years. Seizure and sale of immovable property has also been made more complicated by a substantial amount of building over the last decade, especially in Pristina and the other large cities, that has not been sanctioned by zoning regulations and that did not receive municipal approval; most of that building could not be registered in the cadastre and actual title is in many cases unclear. A range of other issues also affect immovable property titles.

2. IMPLICATIONS FOR JUDGMENT ENFORCEMENT

This lack of clarity of property titles has greatly complicated the situation with civil judgment execution, as well as with mortgages and other land transactions. First, because of missing land records and the incomplete nature of land title records, it is often impossible to find the property of judgment debtors by searching the cadastre or the property title register.

Seizure or foreclosure has become risky business for the claimants, because those procedures can easily devolve into extended disputes over rights. Foreclosures on mortgages have become a risky enterprise for banks, for example. Banks have sometimes issued loans based on a simple contract, and discover on foreclosure that the contract has no value because the underlying property rights are not clear. Competing claimants may arise in response to apparently simple foreclosures. The result has been to make banks uncertain about making loans based on immovable property collateral. Similar problems arise with seizure and sale of immovable property under conventional enforcement procedures.

Another factor complicating land seizures is that the value that can be realized from the sale of seized or foreclosed land is often far less than its appraised value. Strong cultural attitudes tend to make the sale of such land parcels problematic, because, it is alleged, neighbors are often threatening or violent

[69] Immovable property rights are recorded in books maintained at cadastral offices. The cadastre itself contains a physical description of the land and any buildings on the land. Although the cadastre itself is not evidence of ownership of specific immovable property, it constitutes evidence of land and premises located on the land and has increasingly become an element in determining property rights.

towards purchasers of land in foreclosure or judicial sale. As a result, banks or other creditors who become owners of seized land find that they are unable to sell the land for its assessed value, because possible owners are simply afraid to buy. This seems largely to be a factor in rural areas of Kosovo, and is less relevant in urban areas, where an increasing proportion of mortgages are being given. Thus, this cultural attitude, while undeniably intimidating to buyers, may become of less relevance over time. Under Article 152 of the 1978 LEP, and Article 202 of the 2008 LEP, agricultural farmland is in some cases exempt from seizure up to the limited amount of one-half hectare.[70]

Yet another factor complicating the use of immovable property as a target for compelled enforcement are the complex and sometimes unnecessary rules governing the sale of seized land under current court rules. For one thing, enforcement judges are necessary for the sale of immovables, but many courts lack an enforcement judge, and there is a general shortage of enforcement judges. In fact, their function should be devolved to non-judicial personnel, replaced by giving the debtor a right to protest the terms of sale if it is materially unfair to the debtor.

It should be noted that the expedited procedures for sale of mortgaged property that were sanctioned in the 2002 Law on Mortgages have been little used. The Law on Executive Procedure imposes the basic condition that mortgages shall be registered in the cadastre and foreclosed upon using the procedures laid out for immovable seizure and sale defined by that law.[71] Because the law on execution procedure in most cases moves exceedingly slowly, this has made it quite difficult to foreclose on mortgages, and the process of lending is quite inhibited: in fact, bank lenders frequently require more collateral to grant a mortgage than the immovable property itself is worth – for example, the bank may require a guarantee on the loan from a third party. As a result, mortgages are rare and expensive; it is not easy to find a third party guarantor willing to take on the risk of the borrower's default. The 2002 Law on Mortgages, however, provides an alternative procedure, if both parties are legal entities and if the parties both agree to it: the borrower may agree to give the lender a power of agency to sell the collateral in the event of a default under the mortgage.[72] What is surprising is that this provision is little used; there have been at most a few such transactions since the mortgage law was enacted eight years ago. Borrowers have been unwilling to agree to these provisions, even though such an agreement would substantially lower the risk to the lender, and thus, presumably the cost to the borrower of taking the loan. The market for mortgages should be examined in more detail to identify the reasons that this provision for avoiding the pitfalls of the normal enforcement process in land. Borrowers clearly see themselves disadvantaged by this provision; the intent of the drafters to provide more efficiency in the mortgage market has not been achieved. Alternative solutions should be found that are more satisfactory to borrowers.

In addition, some observers claim that the appraised value of land is often seriously inflated as a result of the internal operations of banks when loans are made based on immovable property collateral. Banks in Kosovo have a policy of insisting on collateral the value of which is far in excess of the amount of the loan that the collateral secures. The result of this has been that bank officers consistently inflate the value of the land on which mortgages are made, to ensure that the loans meet bank lending standards for the value of collateral. Unfortunately, however, this has a consequence for the sale of the land when the mortgage goes bad. The inflated value by the seller can become the basis for the appraised value of the property that determines the basis for the selling price at auction. Since the appraised value is inflated for spurious reasons having to do with bank lending practices, often by a factor of two or more, the minimum price allowed at auction may be far above the price the property can actually bring at auction. Again, this is exacerbated by cultural practices which make purchase of land (especially rural land) at forced auction undesirable, depressing the price that buyers may be willing to offer. The result of inflated minimum selling price, and the depressed level of bids, can make land quite unsalable.

---

[70] 2008 Law on Executive Procedure Article 202. However, if the property is mortgaged, then there is no restriction on its seizure.

[71] Law on Mortgages, 2002, Section 9.

[72] Law on Mortgages, 2002, Section 10.1.

Finally, loans in general in Kosovo are given by banks only with extraordinary levels of security, and the same is true for mortgages against immovable property. Often bank lenders require levels of collateral exceeding the value of the land by a factor of two or more, in addition to other forms of security such as guarantees of repayment from third parties. Yet banks face competitive pressure to provide loans with reduced demands for collateral, and this is frequently in the interests of bank personnel, whose careers benefit from finding borrowers and completing transactions; they face pressure to ensure that collateral meets formal bank lending requirements while at the same time appealing to borrowers' desire to place as little as possible at risk. This has led to frequent overstatements of the actual market value of immovable property to ensure that the bank's lending requirements are met. The problem arises on judicial sale of the property after foreclosure. Since the property must be sold at appraised value, the bank's own appraisal is frequently used, with the result that selling prices are overstated in judicial sales and properties cannot be sold.

Recommendations

1. Revise auction sale procedures

We suggest that auction sale procedures be substantially revised.

- Minimum selling prices for immovable property at auction should be removed, and the system of multiple auctions should be ended. As we argued with movable property, price restrictions seriously interfere with the marketability of land, forcing it to be offered for sale at a price above its actual market value, resulting in no sale. The intent is to protect the debtor, but the creditor is left without a recovery, when the creditor may know of no other property that can be used to satisfy the judgment.
- The requirement of multiple successive auctions at increasingly low prices will not enhance the salability of the land or enhance the price eventually achieved, but can introduce substantial waiting periods into the process. We should not expect that execution sales will achieve the same price as appraised value, when the sales that underlie the appraisal are voluntary sales under optimum sales conditions, while forced judicial sales inevitably take place on a more abbreviated time schedule, with less chance for public examination and effective marketing. Requirements for multiple auctions with minimum bids declining from the appraised value, such as those required in Kosovo, can actually discourage bidders and encourage collusion.

2. Establish clear auction and sale guidelines and procedures

To protect the debtor without undermining the legitimate interests of the creditor, we suggest that more attention be paid to the conditions under which the property is sold – in particular, that sales be announced and advertised intensively, at the expense ultimately of the judgment debtor, to ensure the maximum sales price is achieved. A website containing a Register of Public Sales could be used to facilitate sales and reach a wider audience. In addition, residences of debtors, when they are seized for judicial sale, could be protected by homestead exemptions, or allowance of time periods for cure of default.

3. Address mortgage enforcement procedures

We also suggest a more careful look at the mortgage market to find alternative ways to avoid full enforcement procedures in event of default to improve the efficiency of mortgage markets, since it is clear that the procedures specified in the 2002 Law on Mortgages are not working. Avoiding the normal enforcement process will allow mortgage lenders to recover their funds more quickly and certainly, which is the point of secured lending through pledges and mortgages.

V. INFORMATION POLICY

Information is of critical importance to the ability to enforce judgments successfully. Unless the debtor pays his judgments voluntarily, the judgment cannot be executed without information about the location of the debtor and his assets or sources of income. The adequacy of the sources of this information and their accessibility to the persons engaged in the execution process therefore critically affect the success of the execution process itself.

The potential sources of information are basically these:

- Information held by the creditor prior to the litigation about the debtor's assets and income, usually volunteered by the debtor as a means of obtaining credit, but if it has not been collected prior to the commencement of litigation, it is probably unobtainable once execution has begun;
- Testimony from the debtor during the litigation process about its assets and income sources, usually under court compulsion;
- Information located in private credit bureaus or other private information registries that may be useful in locating the judgment debtor's assets and income sources;
- Information taken from public registries about the debtor;
- Finally, other information developed by the creditor or the creditor's agents (for example, lawyer, detective, bailiff, debt collector) as a result of investigation, which is limited by a number of significant legal protections to the disclosure of personal information.

A. Information from Testimony and other Compelled Sources

Kosovo has no specific regulations on gathering information from the debtor. Some creditors like banks, prior to approving loans, in most cases require their clients to provide balance sheets, tax returns, and ownership of immovable property. Misstatements are criminal acts, sanctioned by the Criminal Code. Creditors can officially ask cadastral offices for any data related to the debtor, since cadastral books are public documents, and verify with the pledge registry any registration of pledges. The Law on Protection of Personal Data is still in draft form, and is likely to be adopted during 2010.

The sole legal provision authorizing obtaining information about the debtor's assets or income is in the 2008 Law on Executive Procedure. Article 42.1 states: "Execution proposer in his proposal which is based in execution document might request from the court that before issuing the decision on execution, to request from the debtor and other subjects mentioned in the proposal, respectively from bodies or administrative services, or other institutions, providing of data about the wealth of debtor, if the proposer makes trustworthy the fact that mentioned subject might possess such data."

This constitutes a broad grant of a right to the creditor to use the authority of the court to obtain information from a diverse array of parties, including, for example, banks, other private parties, and government agencies, about the wealth of the debtor. There are two obvious drawbacks to this provision: first, it came into existence only with the 2008 Law and no comparable provision exists in the 1978 Law on Executive Procedure, and thus, under the terms of the 2008, does not apply to any cases filed before the implementation of the 2008 law; and second, that the authorization to use the court to obtain this information is extremely vague and specifies no procedures whatever. Because there are still very few enforcement cases that have actually been implemented under the 2008 law, the actual meaning of the law is unclear. It is quite vague and seems to depend entirely on the court to use its discretion in the implementation and interpretation of that provision.

With respect to cases brought under the 1978 Law being enforced today, the result is a serious obstacle to the enforcement process. Much critical information needed in the enforcement process is only available to the courts – for example, information from the Central Bank, the Pension Fund, and the Tax Administration. Yet the court has no authority or mandate under the 1978 law to obtain this information on behalf of the enforcement creditor. Rather, the implicit assumption under the 1978 law

is that it is the creditor's responsibility to provide information to the court under the execution proposer's obligations under Article 35 of the 1978 law; if the party proposing execution cannot provide that information, that is no concern of the court's. For much of this information, there simply is no other source of which we are aware. The effect is to make it impossible for the creditor to obtain the very information that is critical to enforcing his case.

However, this presumably can be changed retrospectively, by mandating through new legislation that the court's obligation to obtain information on behalf of creditors, and the right of creditors to request that the court obtain this information, applies to cases brought under the 1978 law as well as the 2008 law; it is hard to see how the rights of the debtor are compromised by changing the terms under which a government agency may provide information to the court.

The second problem with the terms of Article 42.1 of the 2008 Law is its extraordinary vagueness and absence of specified procedure. This vagueness includes such critical questions as the following:

- When the statute states (in English translation) that the "Execution proposer . . . might request from the court . . . to request from the debtor and other subjects. . . . ," does that literally mean that the proposer *requests* such action but may be denied by the court? And does it literally mean the court may *request* such information from the debtor or other subjects, but may not compel such information to be provided? Or does this state a right to compel the court to act, and to compel the "debtor and other subject" to comply with a demand to provide information? Article 42.5 seems to suggest the latter, at least as to the second set of requests, but it is certainly not definite, and the position of the court concerning the creditor's "request" is also far from clear. May the court impose conditions or prerequisites upon its decision to grant the creditor's request for information?
- Are there any limitations on the information that may be requested from the debtor or other parties about the debtor's wealth? Does it include documentary evidence such as tax returns; accounting books and records; receipts, invoices, and other normal business documents; bank account statements; and similar material? Is any of that material exempted by any confidentiality provisions?
- Is this information to be provided to the creditor, or only to the court? Do confidentiality provisions affect that decision? If only to the court (as, for example, bank records might be restricted to court usage by the Law on Payment Transactions, Art. 27) how is the information to be provided to the creditor or otherwise used in the enforcement process?

Article 42.1 seems not to include any right of cross-examination of the debtor or the other parties mentioned. Is this correct?

Since there is little or no experience with the application of Article 42.1, its full meaning is not clear at this time. Courts have been reluctant in the past to apply sanctions or coercive measures in other circumstances, as detailed in this assessment; presumably that will not apply to this provision.

Recommendations

1. Establish procedures to compel judgment debtors to provide information

Procedures for gathering information from debtors pursuant to Article 42.1 of the 2008 Law on Executive Procedure should be specified to ensure the creditor can make effective use of this critical information source. There is no doubt that the ability effectively to compel that information be provided is necessary to the position of the creditor, and further, that it is exactly what international norms in this area require.

2. Establish means to validate debtor provided information

Further, the creditor should be able to subject the debtor's testimony to a serious process of questioning analogous to cross-examination to ensure the accuracy and completeness of the information.

3. CLEARLY ARTICULATE IN LAW THE MEANS TO VALIDATE DEBTOR-PROVIDED INFORMATION

These characteristics of the examination process should be clear in the statute:

Creditor should have the right to depose or examine the debtor in person, in detail, on matters relating to the size, form, and location of the debtor's assets.

- The debtor should be under legal obligation to provide testimony that is accurate and complete, subject to legal penalties in the event of falsehood or incompleteness.
- It should be possible to compel the debtor to produce documentary evidence concerning his assets, including tax returns, audited business financial statements, bank statements, and similar materials. Creditor should have the right to question the debtor concerning this material after the creditor has had adequate time to examine it, and should be able to submit such material to auditors, accountants, financial advisors, and similar personnel for further examination prior to questioning the debtor.
- In addition to the debtor personally, the creditor should have the right to examine the debtor's family members, business associates, financial advisors, and similar parties, on matters concerning the debtor's finances.

This may require amending the 2008 Law to ensure that the court can provide creditor access to the information that will be necessary for the creditor to complete the enforcement process, whatever the source of that information. The Law should be amended to make these provisions applicable to execution cases already in progress before the enactment of the 2008 Law. Further, the amendments should make it clear that the debtor is responsible for providing documentary evidence, such as tax returns, business accounting data, bank statements and other financial information, subject to sanctions under Article 42.5.

B. Adequacy of Public and Private Registries

The public and private sources of information about debtors' assets and income are of considerable importance to the enforcement process because they make it possible for the creditor to find the debtor's assets. The problems of the cadastre and immovable property rights register have already been discussed.

THE BUSINESS REGISTRY

The Business Registry is a component of the Ministry of Trade and Industry. While approximately 98,000 businesses have registered since the year 2000, many of those businesses have ceased to operate with no notification to the Business Registry. Furthermore, numerous businesses have formally withdrawn their registration: According to statistics of the Business Registry, some 35,000 businesses have formally withdrawn their registration. The Business Registry is currently engaged in an effort to determine how many of the remaining formally-registered businesses in fact remain in existence today, but that study appears to be far from complete at this time. Thus, today no one really knows how many registered businesses are actual operating. Furthermore, it is clear that numerous businesses – the Business Registry will not hazard a guess, but the number appears to be large -- operate informally, without registering with the Registry.

The business registry is a potentially critical source of information about legal entities. Publicly searchable by business name, owner's personal identification number, and a separate Business Registry number assigned by the registry to provide a unique identifier, this can provide information about the registered address, the founders and owners of the company, and opening capital structure. However, no regular filings of information are made to the business registry as to the financial status of the company; and information filed with the Registry when the business is opened is in no way verified by the Registry. Further, minimal financial reporting appears to occur at all. It is clear that a tiny minority of firms make any financial report to the Registry: of the tens of thousands of formally registered businesses, some 413 were reported by the Registry to have filed a financial report during 2009.

Most critically, a company may formally close its operations and cease its legal existence by withdrawing from the Business Registry, without providing financial reports to the Registry and without proving that the business has paid its debts; all that must be proved to cease its legal existence is the payment of outstanding tax liabilities. The problem with this, of course, is that it provides a legal entity (or the owner of a legal entity) seeking to avoid a judgment the option of doing so merely by withdrawing its registration from the Business Registry, ceasing to function as a business, and taking its assets elsewhere, with no public accounting whatever of what has happened to those assets and possibly to place them beyond legal reach of the creditor as well.

The effect is to remove those assets from potential discovery by a judgment creditor. While the assets that still exist arguably are seizable if they can be found, the key problem with withdrawal from the Registry is that assets that previously were identifiable as assets of the business now are owned by some other party, perhaps but not necessarily the owners of the former business.

This disappearance but not destruction of assets seems clearly to be permitted under the rules of the business registry, given its minimal requirements for termination of registration. Though it may be as a practical matter an effort to hide assets from a creditor of the business, it does not appear to us to violate the criminal laws against fraud. Article 234 of the Criminal Code renders it illegal for a responsible person within a business organization to "cause[ ] its bankruptcy by unreasonable expenditure or resources or their transfer at gross undervalue," that seems clearly not to include a simple withdrawal of registration that makes assets disappear from public view, though a creditor may have lent or otherwise acted in reliance on those assets, in part because a business that ceases to exist is clearly not in bankruptcy. Similarly, Article 235 depends on the insolvency of the business organization and does not deal with any case not involving insolvency, as the situation hypothesized here clearly does not.

Nor does the Law on Obligations[73] provide a clear remedy. Article 280 of that law allows creditors "to refute a legal act of his debtor taken to the detriment of creditors." Yet it is not clear that the simple termination of the business constitutes a "legal act" contemplated by the statute. That provision, analogous to fraudulent transfer laws in common law countries, contemplates revocation of an act such as a transfer to another party. The withdrawal of the registration does not create such a transfer; it merely makes the assets difficult to find.

Ultimately, then, the problem with the Business Registry, from the perspective of enforcing civil judgments, is that it creates a problem of information: that assets once readily discoverable may disappear from view in a manner that it makes it difficult for creditors of the now-defunct business to locate them to satisfy debts that may still be outstanding.

Recommendations

1. MAKE BUSINESS REGISTRY INFORMATION AVAILABLE TO COURTS

We suggest that larger companies registered in the Business Registry be required to submit audited annual financial reports to the Business Registry, and smaller companies be required to submit simplified balance sheet statements. These reports should be available to the courts in the event of a judgment claim, and should be available to judgment creditors attempting to implement the judgment, upon the request of the creditor.

2. HARMONIZE ACCOUNTING STANDARDS WITH INTERNATIONAL STANDARDS

Accounting standards for legal entities should be reviewed to be sure that they are in compliance with international standards.

[73] Law on Obligations, 1978, Articles 280 et seq.

3. MAKE SETTLEMENT OF JUDGMENT DEBTS A PRECONDITION FOR WITHDRAWAL FROM BUSINESS

We suggest that legal entities registered in the Business Registry be required to settle all outstanding debts before withdrawing from business. This should be accomplished by submitting to the Business Registry an application for termination of registration which includes the following:

- an audited financial statement one month prior to the submission of the application to terminate its registration showing all outstanding debts payable as of that date, along with evidence of payment or other resolution prior to termination of the business's registration;
- statements from the Commercial Court, and from the Municipal Court in the district which is the official residence or seat of the business, listing all ongoing litigation and all outstanding judgments involving the business;
- a notice addressed to all ongoing business customers, suppliers, and employees indicating the anticipated date of termination of the business, including name and address of all intended recipients, to be forwarded to the recipients by the Business Registry;
- a notice to the Registry identifying the designated holder of remaining business assets at the time of termination.

Furthermore, assets of the business should remain available for satisfaction of later-arising litigation through suit against the responsible person of the business.

Obviously, transfers of assets made without termination of the business have the potential of violating the Paulian action provisions of the Law on Obligations, Articles 280 et seq., and are subject to revocation by legal civil action of a defrauded creditor. It would also be desirable if such action could be brought as a supplementary claim to existing enforcement litigation, rather than as a separate claim requiring treatment as an entirely new claim under the Law on Contested Procedure.

The Pledge Registry

The Pledge Registry has been in existence since 2002, yet is barely used. One reason is clear: the information in the registry can only be accessed in the office of the registry, in the Ministry of Trade and Industry, and can be searched only based on the pledge number. Thus, it cannot be searched in the location of the person who might use this information. This restriction makes the Pledge Registry nearly useless: if it cannot be searched, then the buyer of pledged property will not know of the pre-existing pledge. The pledge does not prevent sale of the collateral, and there is no way it can be traced. Despite the fact of the buyer's ignorance of the pledge, the creditor still has the right to go after the pledged property, leaving the innocent buyer only with a claim against the seller. The sold property is in most cases extremely difficult to trace, placing the creditor in the difficult position of being unable to find the object that secures his loan and having no remedy against the party who borrowed funds based on the pledged collateral.

Recommendations:

We suggest that the pledge registry forward all pledges on automobiles to the Division of Motor Vehicle Registration and Licensing, to make the buyer aware of the pledge at the time of sale.

Registries of judgments and insolvent debtors, and other forms of credit-relevant information

One element clearly missing from the information sources available in Kosovo are governmentally-provided information that can assist in avoiding bad debts, and thus enforcement claims and enforcement problems. Credit information is a key element of any commercial economy, and Kosovo has far too little of it.

Recommendations

1. Establish registries of judgments and insolvent debtors

Two possible sources of governmentally-provided data of relevance to credit decisions are a registry of judgments and a registry of insolvent debtors. Both should be publicly available. The first is a simple listing, searchable by name and identification number, of judgments awarded by courts. The purpose of this is simply to inform possible creditors of the existence of outstanding judgments against possible borrowers, to allow the creditor to assess the plausibility of recovering loaned amounts against an individual or a legal entity, whether through judicial means, conventional repayment, or any other method.

The second governmentally-provided registry of information relevant to credit decisions is a listing of all judgment debtors (whether legal or physical persons) from whom funds could not be recovered, for whatever reason. Entries are made by the court, not the creditor, either upon withdrawal of the case for non-payment or when the enforcement decision against the debtor has reached a certain age, perhaps two years. Again, the registry should be searchable by name and by identification number (business registry number in the case of legal entities).

Private sources of credit-relevant information should also be encouraged. The Draft Law on Protection of Personal Privacy should be examined carefully to be sure that it does not interfere with the creation of databases of legitimate information that can assist creditors in reaching decisions about the extension of credit. We have been informed that no private creditworthiness databases currently exist in Kosovo, but we are not sure that is accurate; however, there is great value in such databases, and it would be a mistake to place such a high value on personal privacy that normal commercial databases, widely available internationally, were rendered impossible.