

IFES RULE OF LAW WHITE PAPER SERIES

REGIONAL BEST PRACTICES:
ENFORCEMENT OF COURT JUDGMENTS

Lessons Learned from Latin America

April 2004

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The IFES Rule of Law Series is a collection of papers focused on capturing emerging global best practices and lessons learned on themes related to democratic principles, fundamental human rights and the Rule of Law. This paper was made possible by a grant from the United States Agency for International Development. It reflects the opinions of IFES and should in no way be construed as the official position of the United States Agency for International Development. Any person or organization is welcome to quote from this paper as long as proper citation is made.

**REGIONAL BEST PRACTICES
ENFORCEMENT OF COURT JUDGMENTS
LESSONS LEARNED FROM LATIN AMERICA**

Abstract: Only recently has a general global consensus emerged among development specialists that the successful, fair and effective enforcement of court judgments, both those against private parties in commercial transactions as well as those against State agencies or officials, is of critical importance to developing a Rule of Law culture and judicial independence. There is also a growing body of international jurisprudence that requires countries, under their international and regional human rights treaty obligations, as well as their own constitution, to enforce court judgments fairly and effectively and to support the independence of the judiciary. Likewise, court decisions in various countries are also beginning to articulate and enforce these closely related legal rights.

Over the last three years, IFES has undertaken extensive assessments of the system of enforcement of court judgments in Argentina, Mexico and Peru, as well as a comprehensive survey of global research on emerging best practices and international norms in this important emerging field. With an eye towards developing a comparative research paper, our assessments utilized a uniform methodology that would enable us to build upon existing research and data from a number of Latin American countries and around the world. Since most available research to date relates to simple debt collection cases, which are problematic and universal problems in virtually all countries, we too decided to focus our efforts in that area.

While IFES also undertook some research related to the enforcement of judgments against the State, time and resources did not allow us to delve as deeply into this equally important issue. However, we do highlight the issue in this paper as one that clearly needs considerably more attention, particularly from the perspective of the human rights and public procurement communities. Until judgments against the State are enforced, there is little to deter human rights abuses and public procurement violations by government officials and little governmental accountability.

What we have learned is that systems all over the world face similar enforcement problems, although the causes of and priority problems may vary from country-to-country. Indeed, in Latin America, the kinds of problems analyzed from the perspective of users of the system, including SMEs, are strikingly similar and often parallel problems in other regions. Common problems in many developing countries include: **(i) excessive legal formalism; (ii) unnecessary judicial technical oversight; (iii) undue delays; (iv) case backlogs; (v) petty corruption; and (vi) problems related to the identification and location of assets.**

Collectively, these problems translate into high costs for both the users and would-be users of the enforcement system, as well as a lack of judicial access for many powerless and impoverished citizens and businesses.

Through this research, it is now very clear that the global case backlog problem cannot be addressed without confronting efficiency issues related to the enforcement of court judgements issues since they often comprise the majority of pending court cases. This White Paper represents the first global attempt to outline the key lessons learned, emerging best practices and panoply of enforcement issues that should be analyzed in any comprehensive Rule of Law assessment. Through this global research and the assessments, we have also made an effort to develop the first set of global judicial enforcement principles for the 21st Century. While these principles and emerging best practices no doubt need more debate and research, we hope they will serve as a solid guidepost for future attention and concrete action in many countries around the world.

IFES Global Enforcement Principles and Best Practices¹

1. Clear and adequate legal and institutional framework for enforcement, including effective court oversight;
2. Clear and adequate enforcement procedures and mechanisms, including adequate, proportionate and enforceable court sanctions;
3. Clear and adequate administrative and legal requirements and procedures, including the right to judicial review;
4. Clear laws relating to the rights and obligations of the parties;
5. Transparent liquidation and payment processes, for private individuals as well as the State;
6. Well-defined and accountable roles and responsibilities of enforcement agents and enforceable codes of ethics;
7. Well-defined and accountable roles and responsibilities of judges and enforceable codes of ethics;
8. Access to justice, including the right to a lawyer and transparent, reasonable court and enforcement agency fees;
9. Effective, fair and efficient notice of court judgments and other documents;
10. Adequate resources for carrying out the enforcement process and compensating and training enforcement professionals;
11. Enforcement within a reasonable time;
12. Effective access to information.

¹ From Henderson, Keith *et al.*, *Barriers to the Enforcement of Court Judgments and the Rule of Law*. IFES: Washington D.C. 2003. Available at http://www.ifes.org/rule_of_law/enforcement.html

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LESSONS LEARNED FROM LATIN AMERICA**

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REGIONAL BEST PRACTICES ENFORCEMENT OF COURT JUDGMENTS LESSONS LEARNED FROM LATIN AMERICA

1. Introduction

a. Importance of the Fair and Effective Enforcement of Judgments

Only recently has a general consensus emerged that the fair, effective and efficient enforcement of court judgments, including judgments against the State, is of critical importance to the Rule of Law and judicial independence. Indeed, only recently has international jurisprudence, as evidenced by such courts as the European Court of Human Rights and Inter-American Court of Human Rights, given life to the legal principle that the fair and effective enforcement of judgments is required under the universal right to a fair trial. It is now also acknowledged that the timely enforcement of judgments is important to sustainable economic and political reform, democratic governance and the fight against corruption, organized crime and terrorism.

The enforcement of civil judgments has recently been recognized as an essential underpinning of, and even measure of, the Rule of Law in both developed and developing countries. Credibility of the judiciary relies on it. However, in many transition and developing countries, certain enforcement problems appear more serious and intractable than in more developed countries.

In recognition of this phenomenon, IFES has undertaken a comprehensive review of the global academic and applied research available, and conducted in-depth case studies in three Latin American countries: Argentina, Mexico and Peru. Each study endeavored to document the enforcement process in theory and practice, to identify the biggest barriers to fair and effective enforcement, and to make concrete reform recommendations. In Peru, the study also focused on presenting these issues from the perspective of small and medium enterprises (SMEs).

b. Similarities and Differences of Enforcement Systems in Argentina, Mexico and Peru

The enforcement regimes of all three countries are strikingly similar. They follow the court-controlled model that originated in Spain. Under this model, the enforcement of judgments involves heavy participation and decision-making by the judge. Every key action is court-controlled, even court-conducted.

Common Obstacles to Enforcement in Argentina, Mexico and Peru

1. Excessive procedural delays;
2. Formalistic legal requirements;
3. Difficulty to sell seized assets due to weak markets;
4. Lack of information on debtors and assets; and
5. Lack of accountability of the various enforcement actors.

Creditors seeking payment in all three countries face serious obstacles. Excessive delays are a major reason not to use the courts to enforce a judgment, and they result in huge caseloads that prevent courts from rendering justice in all cases. This problem gives true meaning to the adage that “justice delayed is justice denied.” Indeed, IFES and World Bank research in several countries in Latin America and Europe reveals that pending enforcement cases often comprises the majority of court caseload files in civil courts. Thus, addressing court backlog issues can not effectively be done without confronting this key stage of the judicial process.

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One of the major causes of delay, common to all three countries, is the excessive formalism of the enforcement process and the technical complexities of civil procedure systems in general. Even for the simplest transaction, such as collecting on a overdrawn check, a creditor must go through numerous procedural steps that requires considerable judicial involvement. At every step of the enforcement process, delays and appeals are either sanctioned under the law itself or they are allowed by the court in practice. In short, the threat of rejection or nullification of notice and other documents on technical, formalistic grounds opens the legal door widely to various procedural abuses.

Nascent economies in all three countries also means there is a limited economic market upon which to sell any seized assets, though this problem is certainly greater in Peru than in Mexico and Argentina. In all three countries there is also a significant lack of information available on the debtor and his or her assets and insufficient legal redress for debtor fraud and the hiding or transfer of assets, particularly in Peru. Likewise, there is a lack of accountability for various actors in the enforcement process and their respective roles are not entirely clear or linked-up with each other.

Differences between the enforcement systems are also noteworthy. Not only are public registries in Peru incomplete, but the law itself allows for other evidence of property ownership to supplant registry information. In contrast, in Argentina and Mexico, the registries are considered reliable and are given full faith and credit under the law. In other words, they are the authoritative source to determine property ownership rights. In Peru, frivolous objections by third-parties claiming ownership appear to often interfere in enforcement proceedings, sometimes halting or delaying it for years. Such interventions by third-parties in Argentina and Mexico are uncommon.

Recommendations for change include reducing formalism in the procedure through reduction in cumbersome procedures and reduction in appeals. Education of judges regarding the economics of judgment/debt collection, allowing them to focus on substance over form, is also crucial in ensuring that more efficient procedures enacted into law will be implemented. Property registry systems in Peru should also be enhanced. Further, systemic changes are also recommended. Most importantly, the distribution of responsibilities in enforcement actions, and incentives, should be analyzed and reformed in order to motivate actors involved to perform their duties efficiently.

In comparing the three countries, this White Paper attempts to synthesize lessons learned and to determine where a uniform policy prescription may apply and where different country circumstances merit a more tailored approach. In addition, solutions to the problems identified in these Latin American countries are presented in light of emerging best practices in Western and Eastern Europe. We now know that countries on both sides of the Atlantic face similar problems enforcing judgments, and it is instructive to investigate approaches in another region. Comparative knowledge may provide a fresh approach to the same problems in Latin America.

2. Emerging Best Practices and Standards

IFES research reveals that consensus principles regarding the key elements of efficient, effective and fair enforcement systems have emerged over the last two decades. This section presents these emerging consensus principles while the remainder of the paper explores various systems in an effort to highlight shortcomings and recommend changes to promote the implementation of these standards.

a. Emerging Standards on the Enforcement of Judgments

International and regional human rights treaties recognize the right to a fair trial by an independent tribunal in the determination of rights and obligations in civil, commercial and administrative matters. The right to a

fair trial and some of its components, including the right to trial within a reasonable time and the principle of judicial independence, is now universally accepted both in legally binding conventions and in international and regional expert guidelines and principles aimed at fleshing out the elements of each of these components.

The case law of the European Court has been evolving towards a broader recognition of enforcement requirements and principles under the right to a fair trial.² The reasoning of the European Court decisions shows that enforcement proceedings are an integral part of the trial, not only in terms of the right to timely, fair justice but also the right to access justice. Similarly, in its first case on the enforcement of court judgments, the Inter-American Court ruled that the Peruvian State had violated the right to judicial protection under article 25 of the Inter-American Convention by failing to comply with final Supreme Court judgments that ordered the payment of an adjusted pension and a Constitutional Court judgment that ordered the State to comply with a Supreme Court judgment.³

International Courts Embrace Key Regional and Global Jurisprudential Principles and Best Practices on the Right to the Fair and Effective Enforcement of Judgments⁴

1. The enforcement of judgments must take place within a reasonable time;
2. Executive or legislative branch interference with the enforcement of judgments is prohibited;
3. The right to access to justice and the right to a fair trial includes the enforcement process;
4. Legal changes, procedural requirements and case backlog in the courts are insufficient legal excuses for the State [i.e. enforcement judges and agents] not to comply with its obligation to enforce judgments fairly and effectively; and
5. Lack of funds is an insufficient legal excuse for non compliance.

b. Research on Enforcement of Judgments

The enforcement of court judgments has not been the subject of systematic study anywhere until recently. Research on the important issue of the enforcement of civil judgments is only in its preliminary stages, with significant groundbreaking studies having been undertaken in Europe and Latin America. Existing research can be divided into three types of methodologies: (i) academic desk studies; (ii) perception surveys of users; and (iii) empirical case file studies.

2 *Hornsby v. Greece*, Judgment of March 19, 1997, Eur. Cour H.R., Reports 1997-II: the European Court linked the enforcement of judgments to the right to court or to effective judicial protection of civil rights as guaranteed by the right to a fair trial under article 6(1) of the ECHR. *Horvat v. Croatia*, Judgment of July 26, 2001, Eur. Cour H.R.: the European Court found that the civil proceedings for repayment of loans had not been concluded within a reasonable time in violation of article 6(1). It went on to find a violation of article 13 “in so far as the applicant has no domestic remedy whereby she could enforce her right to a ‘hearing within a reasonable time’ in either of her cases as guaranteed by Article 6(1).”

3 *“Cinco Pensionistas” v. Perú*, Judgment of February 28, 2003, Inter-Am. Ct. H.R., Series C No. 98 (2003): the Inter-American Court held that the failure of the State to enforce judgments against it for eight years had deprived the plaintiffs of their right to an effective remedy before a competent tribunal for protection against acts violating their “fundamental rights recognized by the Constitution or laws of the State and by [the Inter-American] Convention.”

4 For more information on the case law of regional human rights tribunals regarding the enforcement of court judgments, see, HENDERSON, Keith, *Op. Cit* (Chapter 1).

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In general, much of the research in this area focuses on the desk studies of legal procedures required to enforce judgments and is not an in-depth analysis of the systems inefficiencies and practical shortcomings. Wendy Kennett, a well-known scholar on the issue, has published a number of excellent comparative articles and books on some of the enforcement systems in Western Europe, but they rely principally on country academic desk studies.⁵

The World Bank and others have undertaken empirical studies in Latin America in an attempt to quantify certain aspects of the system, such as the length of delays, the number of cases resolved and the number of steps in the process.⁶ One noteworthy aspect of these empirical studies, which analyze case files in five Latin American countries, is that they would seem to disprove some of the conclusions of some of the perception studies done in this area.⁷ Linn Hammergren's comparative work concludes that despite widespread claims that debtors often delay civil cases, the vast majority of cases studied involved little or no debtor response at all.⁸ Thus, an examination of the case files themselves reveals that many, if not the vast majority of cases, soon die on the judicial vine or are settled. Similarly, a World Bank country study in Mexico came to the conclusion that enforcement proceedings are not as inefficient as some would claim and that they often involve little debtor action.⁹ IFES studies in Argentina and Peru arrived at similar conclusions, although our Peru research, which was focused on SMEs, revealed that the time and cost of the enforcement system was disproportionately costly to SMEs and that it was a major deterrent to SMEs using the legal system at all.

The IFES Latin American case studies¹⁰ attempt to integrate the three abovementioned methodologies by building upon the World Bank's case file study analysis and by focusing on surveys and interviews of users of the enforcement process. To that end, our research in Argentina, Mexico and Peru was done with a view to providing a solid base for further empirical research and to developing global tools for purposes of analyzing enforcement problems and designing strategies and programs.

The IFES Argentina and Mexico case studies consisted of a strategic, closed-end survey questionnaire and in-depth, structured interviews with court users and actors, such as judges and attorneys. The IFES Peru case study used the same methodology but it focused primarily on a subset of court users: representatives of small and medium enterprises (SMEs). In Peru, SMEs account for 99% of businesses and hold great potential to impact economic growth, reduce poverty and address corruption. Our strategic survey of Peruvian SME representatives focused, in large part, on SMEs that had actually used the enforcement process. Our survey sample was limited, because finding SMEs with any experience in the courts was itself a huge challenge. As discussed, they rarely use courts to enforce their contracts or collect their debts.

5 KENNETT, Wendy. 2000. *Enforcement of Judgments in Europe*. Oxford University Press: United Kingdom. Kennett's book and other work is referred to throughout the paper and listed in the selected bibliography in Annex 1.

6 A list of research regarding enforcement of judgments, including the studies mentioned, is available in the selected bibliography in Annex 1.

7 There are several explanations set forth in the individual IFES reports for the seemingly contradictory results. For example, some studies reviewed civil cases overall, rather than simply enforcement cases. Additionally, the studies cannot account for abandoned cases, which could well be in response to frustration or inability to collect, filings made due bad loan tax deductibility requirements. The studies could only measure information in court records, which is only one part of the larger picture. Moreover, the position of lenders, a market measure of effective debt enforcement, supports that there are indeed significant problems with collecting from unwilling debtors, so much so that they must restrict credit.

8 HAMMERGREN, Linn. 2003. *Use of Empirical Research in Refocusing Judicial Reforms: Lessons Learned from Five Countries*. The World Bank: Washington, DC.

9 HAMMERGREN, Linn, Ana Laura Magaloni and others. 2001. *The Juicio Ejecutivo Mercantil in the Federal District Courts of Mexico: A Study of the Uses and Users of Justice and their Implications for Judicial Reform*. The World Bank/CIDE: Washington, DC.

10 The information on Argentina, Mexico and Peru in this report, unless otherwise indicated, comes from IFES reports: Henderson, Keith et al., *op cit.* and Elena, Sandra et al. IFES Occasional Papers: *Barriers to the Enforcement of Court Judgements in Peru – Winning in Court is Only Half the Battle: Perspectives from SMEs and Other Users*. IFES; Washington D.C. April 2004.

c. Four Global Models of Enforcement of Judgments

While the structure of enforcement systems can vary from country to country, some version of one of the four model categories presented below is generally followed in almost every country. In Latin America, countries generally follow the first and perhaps oldest model – the court-controlled enforcement model. While there is no consensus that one of the four systems is preferable to the others, there is growing evidence that some models operate more efficiently and effectively than others. However, the issue of effectiveness and efficiency in enforcement remains extremely multifaceted and is reliant, to some degree, on the context in which it is implemented and measured.

Four Global Enforcement Models

Differences between the four global enforcement models pertain to responsibilities and controls over the enforcement process:

1. Court-controlled enforcement;
2. Multiple-institution-controlled enforcement;
3. Public sector specialist enforcement (executive branch); and
4. Private or quasi-private sector specialist enforcement.

Court-controlled enforcement – Judicial enforcement systems grant the primary decision-making responsibility to judges, whether specialized enforcement judges [Denmark, Italy] or courts of general jurisdiction [Spain]. In a variation [Spain], judges make decisions and court officers, in a hierarchical structure of responsibility, may undertake routine decisions or formalities. Enforcement measures and decisions require an application to a court and an order issued by judge, with the implementation of enforcement measures undertaken by court officers or lower level enforcement agents. Some systems distinguish between those responsible for the attachment and sale of movable and immovable property [Italy]. Western European court-controlled systems provide examples of some of the least efficient and most costly systems [Spain] and rather efficient systems [Denmark].¹¹

Multiple-institution-controlled enforcement – Some countries have delegated the responsibility for enforcement among several actors, without granting the primary responsibility and control to any one in particular [U.S. England and Wales, Germany, Greece, Austria]. The creditor and his or her lawyer will drive the process, and play an important role in deciding which enforcement method to pursue. The creditor's decisions will be directed towards different agents depending on what he is seeking to enforce [England and Wales] or on what measures he or she is seeking [England and Wales, Germany]. The role and responsibilities of the judge remain important but represent a mix of judicial enforcement and specialist enforcement. Some countries have borrowed from the specialist enforcement systems and have placed important enforcement and quasi-judicial responsibilities upon court officers [Germany].

Public sector specialist enforcement (Executive branch) – In many countries, specialized civil servants are responsible for the collection of public law debts and claims, such as taxes or other debts owed to the State or administrative authorities [Denmark, France, Germany, the Netherlands, Spain, and Sweden]. Public-sector

11 Wendy Kennett, *Key Principles for a New System of Enforcement in the Civil Courts: A Peep over the Garden Wall*, (1999) 18 *Civil Justice Quarterly* 311-342.

specialist enforcement systems are uncommon for the enforcement of private law debts, judgments and executive titles. Sweden and Finland present interesting and unusual cases in that a State enforcement authority, under the control of the Executive branch, is responsible for the collection of public law as well as private law debts. Many countries in the Former Soviet Union and in Eastern Europe have similarly organized their enforcement systems under the control of the Executive branch. Bailiffs employed by an agency reporting to the Ministry of Justice or its equivalent are usually responsible for carrying out enforcement actions [Russia, Georgia, Ukraine].

Private or quasi-private sector specialist enforcement – There are few purely private enforcement systems. Most are quasi-private and their main characteristic is that the responsibility of enforcement rests primarily with independent and autonomous enforcement agents who operate as private entrepreneurs, subject to some form of control and regulation by the State. The degree of regulation varies, but it usually addresses issues such as entry in the profession, organization of enforcement agencies, public and professional duties and authorized enforcement acts and fees.

Several European systems are modeled after the French *huissier* [Belgium, France, Luxemburg, the Netherlands and Scottish sheriff officers]. Enforcement agents in these countries are required to remain neutral while acting on behalf of creditors. They have legal obligations to the enforcement process that supersede the interest of creditors in enforcement proceedings. Generally, they enjoy a territorially-limited monopoly over enforcement and notification of official documents. They are bound by strictly-regulated fees issued by the State and they compete with other enforcement agents within the same jurisdiction. While these agents largely operate as private entrepreneurs, in practice they are only semi-independent from the State and the courts. It is a profession is strictly regulated by the State and their jurisdiction is limited to specific court districts.

3. The Enforcement of Civil Judgments and Small Debts in Argentina, Mexico and Peru: the Court-Controlled Model

All three countries follow the court-controlled model. By law, judges largely control and drive the enforcement process. In reality, creditors design the debt collection strategy and are responsible for keeping the case active. In practice, however, creditors are largely at the mercy of the judge's timetable, and their decisions and requests are subject to extensive judicial review at every stage of the enforcement process. Perhaps the most analogous European enforcement systems are found in Spain, Italy and Portugal, although those countries appear to have reformed their systems more than the countries in Latin America. Other court officials participate in the process, but they mainly perform minor administrative and technical tasks and do not have power to drive the process. Mexico's, Argentina's and Peru's enforcement systems are all considered very slow and inefficient.¹²

a. Basic Steps of the Enforcement Process

The steps in the process to collect on a monetary civil judgment are similar in most countries. In the three Latin American countries studied, the basic process varies only slightly depending on the country and on whether movable, immovable or monetary assets are the subject of enforcement.

12 Denmark has a court-controlled system that is considered relatively effective. However, it is considered much more effective for debts being collected by the State (taxes) than private debts. Moreover, there are vast differences between the Latin American systems and Denmark. In Denmark, enforcement courts and enforcement judges are specialized, whereas in Argentina, Mexico, Peru and Spain the courts of general jurisdiction hear enforcement cases. Further, in Denmark, debtors can be and are sanctioned for fraud, sometimes with prison time and hiding assets is more difficult and leaves greater consequences to debtor for nonpayment. See, KENNETT, Wendy. *The Enforcement of Judgments in Europe*, p. 106.

Basic Steps of the Enforcement Process in Argentina, Mexico and Peru

1. **Request** – the creditor files a request for enforcement with the court; the request includes the assets identified for attachment and court judgment or executive title (mortgage, check, etc.) to be enforced.
2. **Order to pay** – the judge orders the debtor to pay creditor and simultaneously orders the attachment of the debtor’s property.
3. **Notification of the debtor** – in Argentina and Mexico, only the initial notification and a select few subsequent notifications must be delivered in person; in Peru, personal service is required for every step of the process, although personal service is satisfied if the notification is delivered at the debtor’s legal domicile.
4. **Legal attachment** – movable, immovable or monetary (bank accounts, wages) assets are attached by court order.
5. **Actual seizure of assets** – assets are physically seized or, in the case of monetary assets, the bank or employer is ordered to freeze the accounts or withhold wages.
6. **Appraisal of movable and immovable assets.**
7. **Order to sale at auction** – the judge orders the sale of the assets; the order includes the date of auction, the appointment of auctioneer and the location of sale.
8. **Notice of auction.**
9. **Auction** – the property is sold at auction by an auctioneer appointed by the judge or by the judge himself.
10. **Request for final liquidation** – the creditor files a final liquidation request with the court; the request includes the amount of the debt as well as fees and costs incurred by the creditor.
11. **Order to pay** – the judge orders the payment of the creditor.
12. **Order of registration of the new owner** – in the case of immovable or other property subject to registration (automobiles, equipment, etc.), the judge orders the registration of the new owner.

The process is similar in all three countries, but at every step of the process, there are obstacles, making enforcement complex and lengthy. Some of these difficulties are unique and have grown out of the particular legal environment and culture of the country in question.

b. Perception of Effectiveness of the Enforcement System

Mexico’s system appears to enjoy the most user confidence and, perhaps not coincidentally, is the most efficient among the three countries studied. Overall, only 20% of survey participants in Mexico believed their system was ineffective compared to 48% in Peru and 30% in Argentina. In all countries, however, the majority of survey participants found that excessive delays plague their enforcement systems.

Participants in the Mexican survey estimated that a significant proportion of a judgment, about two-thirds, can be collected through the judicial enforcement process. In Argentina, respondents expected to collect only about one-third of the judgment amount. In Peru, approximately 70% of those surveyed reasonably expected to obtain between one-fourth and half of their judgment through the judicial enforcement process.

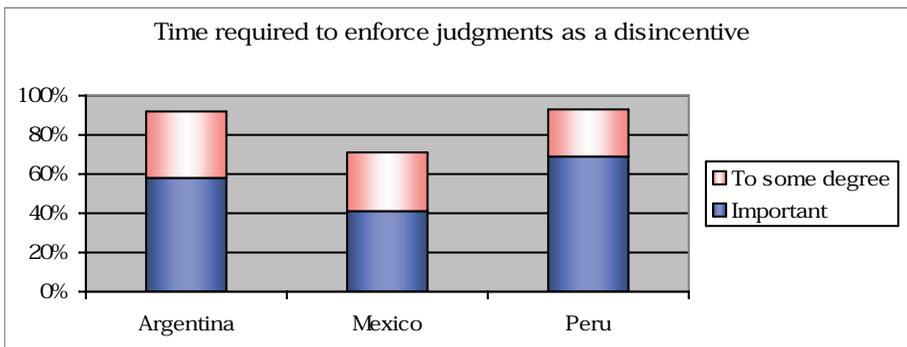
4. Obstacles to Fair and Effective Enforcement of Judgments

Five of the most important common barriers to the fair and effective enforcement of judgments:

1. **Legal, cultural and corruption problems** affecting the efficiency and integrity of the judicial enforcement and justice system;
2. **Length of time** and procedural delays required to enforce a judgment;
3. Official and unofficial **Cost** of enforcing judgments and collecting small debts;
4. Inadequate **access to information**; and
5. **Lack of political will and accountability** of the actors in the enforcement process and justice system.

a. Excessive Formalism and Delays

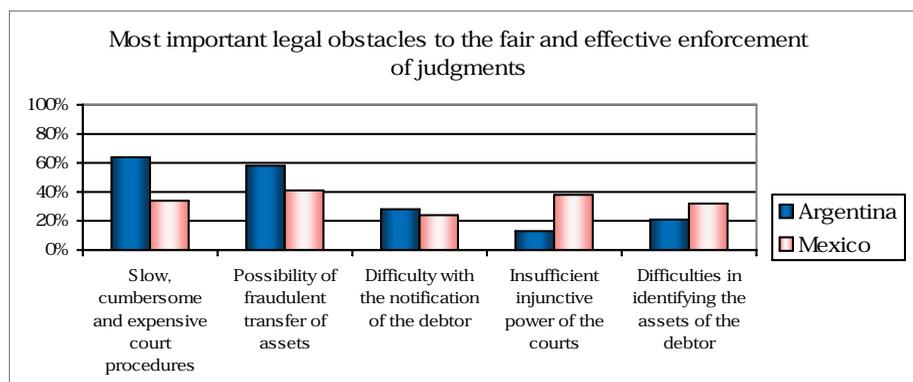
In all three countries studies, excessive delays are the most significant barrier to the enforcement of judgments. The most repeated complaint among survey participants was that the enforcement procedure involves too many opportunities for delays. In the IFES survey, 92% of those surveyed in Argentina, 71% in Mexico and 93% in Peru agreed that the amount of time necessary to enforce a judgment is a deterrent to using the courts to enforce judgments and small debts.



Excessive formalism and bureaucratic procedures lead to most delays – The IFES Argentina, Mexico and Peru case studies revealed that the enforcement systems and procedures are primarily focused on form rather than substance. In Peru, all pleadings are written, subject to rejection if they do not meet very specific requirements. Moreover, these technical requirements may be interpreted differently from court to court. In Argentina, the court may reject a request several times based on form, requiring revision by the creditor’s attorney several times before it is satisfactory and accepted. In Mexico, also, all pleadings are written, but there were fewer complaints about rejection of pleadings than in the other two countries. As indicated in the charts below, survey participants in Mexico and Argentina regarded “slow, cumbersome and expensive court

procedures”, an apt description of formalism, as one of the most significant obstacles to enforcement.

A recent World Bank study also found that greater formalism in justice systems is associated with prolonged judicial proceedings, less consistency, less honesty, less fairness, and more corruption.¹³ Criteria used to measure formalism in this study included: (i) notification procedures; (ii) number of formal court hearings or interactions with the court needed to complete the procedure; (iii) excessive appellate review; and (iv) number of steps needed to enforce a judgment. When these criteria were analyzed for Argentina, Mexico and Peru, the enforcement systems all received very high formalistic marks. The data collected in each of the three countries reinforced this conclusion and confirmed that a simple procedure such as collecting on a check was excessively long.



In Europe, courts are increasingly placing less emphasis on formalism and technical requirements, unless one of the parties suffered actual damage. For example, a technical defect in notice does not generally lead to the nullity of a legal action if the debtor knew of the proceedings and was able to prepare an adequate defense. Indeed, the thrust of the new English Civil Procedure Rules is to deal justly with the claim by determining whether the defendant was prejudiced by the defect, and whether the plaintiff acted reasonably. In France, the law also seeks to avoid undue focus on form over substance. A procedural act in France will not be nullified unless it has caused prejudice to the opposing party. In Spain, the relatively recently revised Civil Procedure Code also considers the extent to which a defendant is prejudiced by a formalistic or procedural defect. In most of these countries, the debtor must now raise procedural objections instead of the judge taking the primary responsibility of hunting for defects as is still customary in the Latin American countries studied.¹⁴

An interesting finding of the IFES Peru case study was that a large number of users were more satisfied with the enforcement system of the Justice of the Peace courts – which is a less formal process than the one required in traditional courts. Justice of the Peace courts generally have jurisdiction over small claims and family matters. Their reported advantages include: (i) a closer relationship between the judge and the parties; (ii) shorter trials; (iii) lower costs; (iv) less corruption; (v) less procedural formality; and (vi) no legal representation requirement. One logical conclusion from these findings is that less procedural formality leads to greater court user satisfaction and legal access.

13 Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, *The Practice of Justice*, World Bank, 2002, available at www.worldbank.org. The researchers examine how a plaintiff can use an official court to evict a non-paying tenant and to collect a bounced check in 109 countries. They found that even these simple disputes are resolved extremely slowly by courts in most countries, taking an average of over 200 days. They also find huge variation among countries in the speed and quality of courts. They first measured formalism of the countries' legal systems, based on various factors including flexibility/rigidity of notification procedures, appellate review, and requirements for written pleadings, among others. They then assessed the effectiveness of small debt and contract enforcement in each country. They concluded that higher formalism also predicts lower enforceability of contracts, higher corruption, as well as lower honesty, consistency, and fairness of the system.

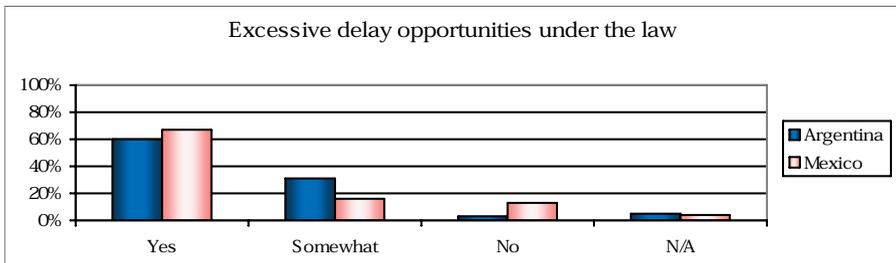
14 KENNETT, Wendy. *The Enforcement of Judgments in Europe*, pp. 180-1.

Recommendations to Reduce Procedural Formalism

- Limit judicial review by focusing more on substantive not technical objections. In cases in which the debtor has suffered little or no harm, nullification should be the exception not the rule.
- Limit judicial review of documents and actions to cases in which objections have been raised.
- Introduce oral pleadings for specific, non-controversial actions.

Excessive opportunities for the debtor to delay with objections and appeals – The availability of numerous appeals differs but appears to be abused and excessive in all three Latin American countries. In each, every stage of the enforcement process is subject to an immediate appeal. The problem is at least twofold. First, the Argentine, Mexican and Peruvian Codes of Civil Procedure allow for too many objections and appeals. Second, judges often entertain rather than summarily dismiss procedural objections and requests for appeals, even if they are patently technical or frivolous.

Indeed, under current practice, debtors are permitted to lodge objections to almost any judicial decision at virtually every key stage of the enforcement process. In Mexico and Peru, even a simple check collection case can be appealed all the way to the Supreme Court, which permits two levels of judicial review for any interlocutory appeal. Appeal opportunities are numerous during the actual execution of assets (appraisal, auction, sale, distribution of proceeds), which begins after the decision allowing execution is issued.



As the graph above depicts, a large percentage of survey respondents in Mexico and Argentina believe the law provides debtors with excessive opportunities for delay. In the IFES Peru case study, about one-fourth of the survey participants ranked “excessive legal protections for debtors” among the top three obstacles to enforcement.¹⁵ Ironically, while these measures are intended to protect the debtor’s due process rights, they often serve to deny due process to the creditor.

Ideally, only one appeal at the end of the procedure should be allowed. If this is not feasible, appeals should be restricted to specific, limited stages of the process. Funds from the liquidation, or the property itself, can be

15 A World Bank study [Gorki Gonzalez Mantilla, *op. cit.*] found that 57.5% of civil cases in Peru are default cases, in other words, the debtor does not respond or appeal. The study involved all civil cases, and not just enforcement cases, therefore did not directly refute the IFES survey data, which was based largely on those who had used the courts to enforce a judgment. Another World Bank study, Linn Hammergren, *Use of Empirical Research in Refocusing Judicial Reforms: Lessons Learned from Five Countries*, 2003, came to similar conclusions, as did a study specifically relating to enforcement of judgments in Mexico, Linn Hammergren, Ana Laura Magaloni and others, *The Juicio Ejecutivo Mercantil in the Federal District Courts of Mexico: A Study of the Uses and Users of Justice and their Implications for Judicial Reform*, CIDE, 2001—a large proportion of cases studied show no debtor action. However, in the graph provided, the question related to the opportunity provided by the law, which applies only to the debtors who *do* use the system to object and appeal. Further empirical studies on enforcement case files in Peru, if possible, are warranted to determine the exact extent of debtor objection and appeal.

held in escrow until resolution of all issues in a single appeal. Limiting appellate opportunities to one appeal at the end of the process, would expedite the entire procedure, while protecting the debtor's due process rights. Restricting appeals to one or to even limited steps in the enforcement process, would also reduce the opportunities for debtors to submit unsubstantiated claims. The lower number of appeals would also reduce caseloads in both the first instance and appeals courts.

Recommendations to Reduce Delays Related to Objections and Appeals

- Strictly limit interlocutory appeals (appeals accepted before the end of the procedure), unless the debtor can show the likelihood of success on the merits, irreparable harm or fraud.
- Refocus court review on the entire enforcement process, rather than on individual, technical steps, for fairness.
- Limit the scope of appellate review to procedural questions and gross violations of the rights of the parties.
- Reduce the incentives for debtor objections and appeals by ensuring that the objections and appeals do not suspend enforcement.

Notification procedures – In all three countries, the notification procedure is in practice needlessly burdensome, with requirements that often go beyond due process guarantees.¹⁶ In the case of a judgment in particular, it is unlikely that the debtor is unaware of the pending action, as a court has already ruled that the debt is owed to the defendant. In all three countries, notification problems were listed by survey participants as among the main reasons for delay in the process. Difficulty in locating the debtor was the main problem. From a procedural standpoint, notification is the most efficient in Mexico and the least in Argentina.

Major Obstacles to Notification

1. Difficulty in locating the debtor;
2. Formalism of the notification procedure – the required form of notification is too technical and subject to nullification for non-substantive reasons; and
3. Frequency and type of notification – summons are required for every proceeding in Peru and notification is done by service on the debtor's person in Argentina.

In practice, the notification process in Argentina takes on average 135 days, whereas, in Mexico, the same notification takes an average of 52.5 days.¹⁷ Argentina's requirements for notice are more formal and involve extensive judicial review of the notice. Moreover, service must be on the debtor's person. In Mexico, after the first failed attempt at personal service, delivery to debtor's legal domicile suffices. Similarly, in Peru only

16 One of the core principles of the right to due process is that defendants have the right to be properly notified of a lawsuit against them.

17 See, Hammargren, Linn; Magaloni, Ana Laura and others, Juicio Ejecutivo Mercantil in the Federal District Courts of Mexico: A Study of the Uses and Users of Justice and their Implications for Judicial Reform. CIDE, 2001 and Garavano, Germán C. *Los Usuarios del Sistema de Justicia en Argentina* ["Users of Justice System in Argentina"], FORES, 2000.

delivery to legal domicile rather than on the debtor’s person is required. Service there seemed to be faster than in Argentina, though an average number of days was not available.

Recommendations to Improve Notification

- Expedite the notification process by reducing formalism.
- Allow delivery of notice and documents to the debtor’s legal domicile – notification by delivery on the debtor’s person should be limited or even replaced by delivery at his or her legal domicile.
- Limit the requirement of formal summons generally only for the first notice – In all three countries, after the initial notification, notification between attorneys of the parties should suffice. Once debtor is notified of an action against him to collect a debt, he should be responsible for notifying the court of a change of attorney or notification address.

Third-party objections (*tercerías*) – Third-party objections are a major cause of delay in Peru. A third-party objection is the intervention by a third-party claiming a right to the asset, such as real estate, that is subject to execution. They may claim an ownership right or a superior right of payment from proceeds. The claim is tried on the merits in a separate proceeding and stops the execution procedure until it is resolved. Many of the Peru survey respondents believed that most of these claims were frivolous and only brought to delay enforcement. In Argentina and Mexico, third-party objections are less of a problem, primarily due to the reliability and authority of the property registries, as described in the discussion on public registries below.

b. Excessive Cost

In all three countries, survey participants considered the cost of enforcement excessive when enforcing a small debt. The following table compares the costs in Argentina, Mexico and Peru of seizing a car to pay a \$10,000 debt. The IFES Argentina, Mexico and Peru Assessments revealed that cost is overly burdensome in the case of small debts, but less so for larger debts.

	Argentina	Mexico	Peru
Amount of the debt	\$10,000		
Court fee	\$300	\$0	\$50
Certificates, property tariff, registration	\$17	\$15	\$280
Publicity in official newspaper	\$17	N/A	\$375
Publicity in official commercial newspaper	N/A	N/A	N/A
Rent of the auction’s place	\$23	N/A	N/A
Seizure and storage	\$57	\$60	\$183
Freight costs	\$11	\$30	?
Unofficial costs	\$0	\$500	\$100
Lawyers’ fee and other expenses	\$2,000	\$2,000	\$2,007
Auctioneer’s fee	\$450	N/A	\$200
Total approximated cost (\$)	\$2,875	\$2,605	\$3,195
Total approximated cost (% of the debt)	29%	26%	32%

In both Argentina and Mexico, 70% of the survey respondents considered cost an important disincentive to using the courts to collect small debts, but only 20% in Argentina and 19% in Mexico considered it an important disincentive for large debts. Seizure of an immovable significantly increases the cost. Every time a notification or the intervention of an enforcement agent or the police is required, the cost increases further.

Delays and their cost: repeated actions, loss of value of assets and value of claim – Delays involve opportunity costs for lost time, the diminution of the value of assets and the claim as well as the cost of repeated court actions. Particularly when a claim is small, its value can diminish greatly over time. Moreover, if assets are to be used to satisfy the claim, they may greatly diminish in value over time. An extreme example relates to some coffeemakers and televisions that were seized by a Peruvian bank. Many were two to three years old and kept in a warehouse. With time they had become outdated and lost most of their value. Other movables such as automobiles also lose value over time. Real estate tied up in a lawsuit or enforcement proceeding may also be unattractive to buyers overtime and will lose value due to abandonment, disrepair or general devaluation in the market. Time lost also represents an opportunity cost, a skewed use of human and financial resources that would otherwise be devoted to more productive commercial endeavors.

Bribes and facilitation payments – The cost of facilitation payment and bribes is another component of the total cost of enforcement. Many survey respondents noted that such payments were common in Mexico and Peru, but less so in Argentina. In Mexico, the estimated cost of such payments is between 3% and 7% of the claimed amount, while it is up to 10% in Peru. In Mexico and Peru, at various stages of the process, making “facilitation payments” to court staff, particularly notification officers, has become customary. In Peru, survey participants described it as routine and some lawyers expressed the view that it was fair payment for the staff doing their job on their client’s behalf. Some noted that without these illegal payments, an enforcement case would languish. In all three countries, however, interviewees did not believe that bribes to judges were significant in the enforcement process.

Alternative Dispute Resolution (ADR) mechanisms – The IFES Peru Assessment revealed that ADR mechanisms such as arbitration and mediation are vastly preferred to using the courts to resolve disputes and even to collect judgments. According to the participants, some of the major advantages are lower costs and a much higher rate of voluntary compliance with arbitral awards and mediation agreements than with court judgments. The voluntary nature of the proceedings, rather than the coerciveness of litigation, would tend to support the voluntary compliance with results.

ADR also has institutional support and has taken root in both Mexico and Argentina over the last decade. In Argentina and Mexico, survey participants were asked to rank their preferred methods of debt collection. Argentine and Peruvian respondents showed an overwhelming preference for negotiated settlements of disputes over litigation, whereas Mexican respondents indicated the opposite. Lower costs and higher voluntary compliance appear to be the key incentives for using ADR instead of the courts.

ADR should continue to be a development priority, with a focus on maintaining access and cost-effectiveness. It is particularly important for SMEs since the cost of the enforcement system, coupled with delays and strict formalism, make accessing the legal system too costly and complex for anyone with limited capital.

Recommendations to Reduce Costs

- Reducing delays in the enforcement process is the single most important factor to reducing costs in all three countries.
- Encouraging ADR.

c. Inadequate Access to Information

Bank accounts – If a creditor moves to seize a bank account, he or she may run into various problems just identifying the debtor’s accounts. In Argentina, for example, the Central Bank may not reveal information regarding bank accountholders even pursuant to a judge’s order. In Mexico, banks are bound by banking secrecy rules and will only disclose information if it is requested by the accountholder. Banks in Mexico do provide some information to a credit bureau, but credit bureaus also require a release from the debtor before they will provide the information, which is unlikely in cases that have reached the enforcement process. Other problems arise when businesses operate primarily in the informal sector, since financial institutions have little information on their assets or activities.

Public registers – While Peru has functioning registries for movable property, such as cars, vessels, airplanes and certain agricultural machines,¹⁸ and immovable property, the IFES Peru Assessment shows that the land registry is currently incomplete and that land registration is not necessarily determinative of legal ownership. For property that is not registered, creditors and potential buyers therefore encounter significant problems when determining the appropriate title for purposes of seizure and purchase.

To make legal matters even more complicated in Peru, an unregistered, extraneous private document may be used to prove ownership even for registered properties. For example, a contract that predates the registration of the current owner’s interest is valid evidence of the contract-holder’s superior interest, even if it has not been registered. This not only encourages the submission of frivolous and even forged third-party claims, but also prevents creditors from (i) locating the debtor’s assets if they are unregistered, and (ii) from determining other potential claims on the property before seizure (for registered properties). Failing to make the public registry the authoritative, legal source of property rights undermines the entire effectiveness of the entire legal system and negatively impacts the ability of many to obtain credit.

By contrast, in Mexico and Argentina, the registries for movable and immovable property are well developed and legally more sound. They enjoy full faith and credit from the courts. Accordingly, they are the final word on property ownership and the priority of claims of secured creditors. Therefore, a creditor or owner who has not recorded his interest in the registry prior to the creditor seizing the property cannot claim a superior or prior interest. Liens on properties that prevent sale are recorded successfully and used effectively to pressure debtors to pay.

The system of land registration appears to be more successful in Argentina than in Mexico. A large number of the Argentines surveyed expressed confidence that immovable property in Argentina would in fact be registered and transactions recorded. They felt that registered real property was a creditor’s best chance to seize an asset with certainty to pay a judgment.¹⁹ In Mexico, the land registries work well, but a significant amount of

18 IFES did not investigate the functioning of the movable registry.

19 In both Argentina and Mexico, the largest problem described by those surveyed was that the registries were not centralized, so that to search for assets (rather than to check the status of a particular, known asset) required searching numerous databases. This complaint is common in both developed and developing countries.

immovable property in Mexico appears to be unregistered. For such properties, ownership cannot be identified with certainty and thus a creditor may overlook valuable assets. As a practical matter, liens also cannot be used to encumber unregistered property.

Informal sector of the economy – A large portion of the Peruvian and Mexican economies are informal. In Peru, the informal sector is estimated to represent approximately 58% of the economy.²⁰ In Mexico, approximately 40-50% of the labor force is in the informal sector.²¹ Similar numbers are estimated for Argentina.²²

As with the unregistered property problem described above, assets that exist or operate in the informal sector are equally if not more difficult to identify, locate and effectively seize. They are not recorded and attempts to attach or seize them cannot be effective. Funds or wages cannot be identified or seized from a defendant if they do not have a bank account or formally-recognized employment. Informality, in ownership, business and employment contributes to the invisibility of many assets that would otherwise be available for seizure.

Debtor's compelled testimony regarding assets – It appears that a misconstrued legal doctrine grounded on the principle of self-incrimination prevails in Argentina, Mexico and Peru, and actually prevents judges from compelling debtors to provide testimony related to their assets. Thus, the location or identity of debtor's assets cannot be determined from the source best able to provide the information. The historical source of this doctrine is believed to be a misinterpretation of the prohibition of forced self-incrimination, which is well grounded principle in criminal cases but not civil cases. It is not clear why it was ever extended to civil or enforcement cases but this appears to be the practice in many courts. In enforcement cases, the rationale appears to be even less sound since there is no question as to whether the debt is owed.

At the beginning of an enforcement proceeding, debtors should be legally required to submit asset information to creditors. The information should also be made available to any other creditors with an interest in a particular asset so that a hearing to determine all of their interests can be held. The procedure should also help streamline the resolution of third-party claims. In all three countries, this may require changes to the law or a clarification of the doctrine of the right against self-incrimination.

In many Western European jurisdictions, the testimony of the debtor can be compelled in enforcement cases. Moreover, there are serious consequences for debtors who fail to testify or those who deceive. In Germany, a debtor is required to submit to hearing or provide information regarding his or her assets if the collection efforts have been unsuccessful. Failure to attend a hearing or provide information can lead to imprisonment. In addition, the court maintains a register of persons who have provided financial information or who have been imprisoned for failure to provide it. This register enables potential creditors and others to better determine debtors' creditworthiness or their unwillingness to provide financial information even if it is required by law. In countries with such mechanisms, debtors may remove their names from the registry if they comply with the law. This provides debtors a strong incentive to pay their debts and/or settle their case.

20 LOAYZA, Norman A. 1997. *The Economics of the Informal Sector*. World Bank Policy Research Working Paper 1727. The World Bank: Washington, DC.

21 The results of the first systematic attempt to measure informal economic activities in Mexico were published by the Instituto Nacional de Estadística, Geografía e Informática (INEGI, the National Institute of Statistics, Geography and Informatics) in August 2000. According to the results, the informal sector—excluding illegal activities—had a value of US\$47bn, equivalent to 12.7% of GDP, and provided 17% of the profits generated by the economy. The data also reflected that between 6% and 30% of service jobs, Mexico's largest growth sector, were informal depending on the sector, with agricultural jobs having the highest percentage of jobs in the informal sector. From Economist.com, Country briefings: Mexico, <http://www.economist.com/countries/Mexico/profile.cfm?folder=Profile-Economic%20Structure>.

22 Argentina's informal sector has been calculated at 37% of GDP and is said to be responsible for 60% of the total transactions in government figures, according to a study described in an article by Adrian Guissari, "Informal Sector Newsletter: La Argentina Informal", published by the Center for Private Enterprise in 2001 on the website, with reference to a Spanish version of the article dated 1989. <http://cipe.org/publications/fs/ert/e02/5argent.htm>

Recommendations to Improve Access to Information

- Require public registration of property interests and make the time of registration evidence of ownership or property interest (in Peru).
- Give priority in the order in which they are registered and over unregistered claims.
- Register currently unrecorded land in Peru and Mexico, with sufficient resources dedicated to it to make assets visible to creditors; this will enhance the functioning of both the enforcement and credit systems.
- Require by law the disclosure of the debtor's assets.

d. Legal Framework and Lack of Political Will and Accountability

Lack of effective sanctions for fraud or failure to fulfill legal obligations – The IFES Argentina, Mexico and Peru Assessments show evidence of significant debtor fraud or fraud by third-parties on behalf of the debtor, as well as non-substantive objections aimed at promoting unnecessary delays. While the laws of Peru, Argentina and Mexico do provide for penalties for at least fraud, these penalties appear to be rarely imposed by judges in practice, regardless of their egregiousness. There is also evidence that regardless of previous frivolous objections, some judges continue to entertain additional procedural objections from the same debtor.²³ The casual attitude toward fraud and deception in court may reflect a general lack of respect for the courts' authority and the absence of a Rule of Law culture.

While collecting court fines or penalties raises the same difficulties as collecting court judgments or debts, courts should make every effort to force parties, if necessary, to comply with and respect judicial orders and not abuse the judicial process.

Experience tells us that the imposition of penalties for fraud has a deterrent effect. For example, in Denmark, a debtor who fails to comply with a court order to submit to a hearing or provide asset information, or who deceives the creditor or the court, can be imprisoned. Debtor compliance is high.²⁴ In Macedonia, an employer who is asked to garnish wages of an employee and refuses can likewise be imprisoned. Employer compliance with garnishment is high. Similarly, criminal fines in Macedonia are collected effectively because nonpayment can lead to imprisonment. While these kinds of laws raise important privacy and due process issues that need further debate and they may need to be modified before being instituted in other countries, such as in Latin America, they at least demonstrate that effective sanctions for debtor misbehavior can improve compliance. The imposition of sufficient civil fines and contempt of court sanctions may also promote more voluntary compliance and adherence to judicial enforcement orders. Perhaps this approach is better suited for the Latin American context.

Inability to address debtor fraud – According to survey participants, debtors sometimes transfer assets to third-parties to avoid their seizure. Almost 60% of survey participants in Argentina and 40% in Mexico listed

23 In the US, in general, a judge who decides that a party is not acting in good faith is empowered to use that finding to be more doubtful of other dubious claims by that party. In fact, in certain proceedings such as bankruptcy, the judge must determine that the parties are acting in good faith in order to approve the judgment and certain payment plans.

24 KENNETT, Wendy. *The Enforcement of Judgments in Europe*. p. 106.

fraudulent transfer of assets as a significant obstacle to enforcement. While we have no survey data in Peru, the problem was described also as an obstacle.

Under current legal provisions in all three countries, fraudulent transfers to avoid payment of a debt are difficult to remedy. One common practice is to close one company and then to transfer those assets to another. The practice appears to be prevalent in all three countries. At least part of the problem is that there is no legal doctrine in any of the three countries grounded on the “constructive trust fund principle”. This is a common law legal doctrine under which the assets of a company are theoretically subjected to a lien of right by the company’s creditors. Creditors can follow the assets even when they are transferred to another company or individual.

In Argentina, the legal doctrine of “piercing the corporate veil” may be used to reach the principals of a company and hold them liable for the company’s debts, at least within the limited context of a bankruptcy. However, there is no similar legal doctrine in Mexico or Peru. A company cannot be held responsible for debts of a prior company even if it is a successor. The doctrine of piercing the corporate veil, which is widely accepted globally, should be broadened in Argentina beyond the bankruptcy context, and a similar concept should be introduced into Mexican and Peruvian law. In all three countries, successor corporations should remain liable for debts of closed companies if the successor company has essentially the same characteristics and owners, especially if it can be proven that a company was created to avoid debt.

Recommendations Related to Court Sanctions for Fraud

- Implement effective sanctions against debtors and creditors for fraud or misconduct.
- Incorporate nonpayment information into the court register of judgments.
- Introduce the legal concept of good faith so that judges can use honesty as a factor in making decisions.
- Introduce and implement effective sanctions for fraudulent property transfers and create legal mechanisms and doctrines so that creditors can reach hidden assets.
- Impose other legal penalties against fraud to discourage debtors from hiding assets.

Incentives versus responsibilities – Incentives drive much of human behavior in all facets of life, including the enforcement process. In Mexico, Peru and Argentina, the system for enforcing judgments is structured without apparent due regard for this basic principle.

The lack of appropriate incentives and distribution of responsibility must therefore be addressed in order to promote more efficiency in the enforcement process. Where possible, it is important to shift the responsibility for certain portions of the enforcement process to those who have the greatest interest and incentive for performance, the creditors. It is also important to devise systems of effective accountability where abuses to the system occur.

As discussed earlier, comparative research shows that pure court or judge controlled enforcement does not have a good track record for efficiency. In general, too much court involvement appears to slow the enforcement process. Pure court or judge controlled systems in Europe, such as Spain and Italy, tend to be inefficient

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compared to enforcement systems in neighboring countries, even when some decisions are delegated to court officers and not judges.²⁵ These inefficiencies are also manifest in some transitioning countries, such as Macedonia and Bulgaria, where the procedure also remains judge controlled. They suffer many of the same problems found in the three Latin American countries studied. In general, the enforcement system appears to be more efficient in countries where a court enforcement officer, rather than a judge, directs most of the enforcement process.

Reducing the formalism of the system and court control in Latin America may be difficult to introduce politically. Thus, the objective should be to move towards a mixed system that reduces the formality and role of the judge over time. Introducing reforms that allow greater creditor participation and efficiency incentives for enforcement actors, such as notification officers and court clerks, will help develop a system that promotes both efficiency and performance.

The key stakeholder in enforcement proceedings, the creditor, has limited opportunities under the law to expedite the enforcement process in all three countries. Virtually all of their actions must be approved by a judge or court officer who usually has little incentive, monetary or professional, to perform expeditiously. In none of the three countries studied is there an institution such as a professional enforcement agent with enough authority to drive a more efficient process. Some attorneys may specialize in collection, but they are not vested with the color of authority to undertake enforcement actions such as service, seizure or appraisal. Thus, the creditor remains largely at the mercy of the court.

In all three countries, court clerks play a crucial legal role in the physical seizure of property. In Argentina, court clerks are relatively-well compensated and receive a fixed salary with no performance-based component. Bribes or facilitation payments are unacceptable, and reportedly not as common as in Peru and Mexico. In Mexico and Peru, court clerks receive facilitation payments regularly, but their salary does not include any State-sanctioned performance-based component. In Mexico, survey respondents noted that having the attention of the court clerk was essential to moving the enforcement case forward.

In all three Latin American countries, the judge controls every aspect of the enforcement process and they address each part of the process separately. They do not manage the enforcement process as a whole and do not advance or promote a collection strategy. Judges in Argentina, Peru and Mexico are often characterized as *ad hoc* drivers of the process who contribute to making it slow and cumbersome. As one judge in Argentina told IFES, “I do not know what happens with the case between the times it appears on my desk.”

According to the IFES Argentina, Mexico and Peru Assessments, judges themselves have sometimes resisted reforms to streamline enforcement procedures. Moreover, our research revealed that very few judges appear to exercise their legal power to halt or punish frivolous delay tactics. Similarly, in Argentina, judges have previously refused to implement summary procedures which would have expedited the processing of mortgage claims.²⁶ It would appear that the general attitude of judges, which may be the natural result of their training, is to focus on the legal technicalities of the enforcement process rather than the effective enforcement of legal debts and court judgments. This may be a bigger barrier to enforcement than any defects in the law itself.

25 Denmark, which is also court-controlled, seems to be an exception. It appears to be efficient and effective. The reasons are not clear, but it may have more to do with a cultural propensity to pay debts and the effective consequences of non-payment than with the effectiveness of the enforcement system itself or the distribution of enforcement responsibilities within the courts. IFES did not study the Danish system in detail and thus cannot completely explain the difference. In any case, it is an exception, which tends to support the rule that judge-controlled systems are cumbersome, rather than disprove it.

26 The suggested summary procedures were similar to the notary procedure involving debtor’s prior agreement to collateral execution in event of payment default, recently enacted, with apparent success, in Slovakia and Macedonia.

European incentive systems – Adequate compensation and other incentives must be structured to encourage the actors in the enforcement process to perform efficiently. This is also true for the main actor driving the process, the creditor, so that he or she can recover just debts.²⁷ For example, in France, the *huissiers*, who are professional enforcement agents, are compensated for each enforcement procedure by a combination of a fixed salary and a proportional fee based on the amount collected. This practice seems to work relatively well, but it should be noted that it is working within a system composed of a well-trained, regulated enforcement profession and within a Rule of Law culture. Clearly, safeguards and oversight procedures should be built into any such system, particularly where a Rule of Law culture is absent and where judicial and business corruption is systemic.

Professional incentives may also be employed through flexible collection goals as a part of an agent’s performance evaluation. Sanctions for abuse can be an effective deterrent to overzealous collection at the expense of debtor’s rights. Although County Court bailiffs in England and Wales are not paid strictly by result, performance goals are established and meeting these goals affects future promotions and salary increases. In Ukraine, though the system has never been effective, there was a drop in effectiveness noted by State Executive Service officials, when agents lost the possibility of a year-end performance bonus.

Professionally trained enforcement agents may receive incentive pay or promotions for efficiency as long as safeguards are built into the system to prevent abuses. All fees and pay structures should be fully disclosed to reduce the amount and volume of “facilitation payments” paid under the table. However, none of these systems would likely be appropriate for judges because it might compromise his or her independence or the public’s perception of it.

Recommendations to Increase the Accountability and Incentives for Performance of Actors in the Enforcement Process and Justice System

- Allow a more active role of creditors and their attorneys while ensuring that the proper safeguards to protect debtors’ rights are in place. The legal culture will help determine which actions are acceptable.
- Structure employment terms and pay structures of enforcement agents to reward professional performance.
- Enforce laws that criminalize the payment of small bribes for expediting the process.
- Shift the responsibility of the judge from strict debt collection to more of facilitation, mediator and impartial dispute adjudicator. In general, the parties, not the judge, should drive most aspects of the enforcement process, and the judge should only intervene if serious due process issues or other abuses are raised.
- Train judges and enforcement agents adequately, particularly training related to improving the enforcement procedure and ensuring the effective implementation of the law. Training should cover areas such as regional and international best practices; the economic aspects of enforcement actions; the appropriate roles of judges and enforcement agents and respect for the creditors’ and debtors’ due process rights

27 The Council of Europe recommendations recognize (Council of Europe Recommendations, IV.7, and paragraph 53 in the Explanatory Memorandum) that adequate remuneration for enforcement agents is a necessary component of maintaining their effectiveness. In addition, the explanatory memorandum, while not specifically prescribing commissions, does state that “States should consider ways of motivating enforcement agents when deciding on the level of autonomy they may exercise in their work.” Most European systems use some form of enforcement agent, or bailiff, within their enforcement processes.

Judgments against the State: failure of political will and accountability of State actors – While the data and research collected and analyzed by IFES and others on this topic is very limited, our preliminary analysis leads us to conclude that the issue of enforcement of civil judgments against the State, including those related to contracts between private parties and State-owned enterprises, is very problematic in all three countries, perhaps even more-so than private civil or commercial judgments. In addition, when successful, the time it takes to obtain actual payment from the State appears to be longer than private judgments. The delays often lead companies to shun contracts with the State or to not seek compensation or administrative action for human rights abuses. The overall effects of this problem are multifaceted, including undermining the Rule of Law, promoting distrust of the State in general, limiting participation, competition and redress in the government procurement process and exacerbating human rights abuses.

The main obstacles to collecting judgments against the State are:

- The lack of political will of the State to pay debts;
- Minimal State resources;
- The State’s consequent failure to budget for the payment of court judgments;
- The lack of transparent, efficient administrative procedures to pay judgments; and
- The lack of accountability of State institutions and actors.

Another procedural obstacle is the legal requirement that all administrative remedies and appeals be exhausted before a judgment against the State becomes final. A number of Latin American countries, including Argentina, legally require State attorneys to appeal every judgment against the State. While these laws have historical roots, the experts we consulted believed they rarely reduced the amount ultimately owed or paid by the State; in fact, we were told that with interest accrued, it may often increase those amounts.

Selected Recommendations to Improve the Enforcement of Judgments against the State

- **Accountability:** Provide for and enforce effective sanctions against State actors for failure to pay a court judgment.
- **Transparency:** Clarify and streamline the state budgetary and payment process and enforce court judgments against State agencies and officials.
- **Guarantee prompt judicial review** of the payment process, particularly for human rights abuses and the prompt payment of government contracts.

e. Cultural, Socioeconomic and Corruption Problems

Culture of nonpayment – Interestingly, this issue was identified and described as a serious problem in all three countries. The “culture of nonpayment”, an attitude that makes it culturally acceptable to ignore legal obligations, makes it especially difficult to enforce court judgments in these countries. Some have described this attitude as a widespread cultural hostility to forced repayment of debts.²⁸ By contrast, in countries such as Denmark, the prevailing cultural norm is that debts must be paid and the failure to do so is unacceptable

28 Peter Kahn, “Ultimately, the Law Must be Coercive, Reversing the Culture of Non-Payment”, *Elections Today*, Vjol. 11, No.1-3003, an IFES publication available at www.ifes.org

and frowned upon by society.²⁹ Consequently, creditors have to resort to and rely upon the courts and the enforcement process less frequently.

While cultural attitudes are important to understanding and addressing democratic and economic development and Rule of Law issues, it is admittedly difficult to separate the effect of culture from consequences to debtor for nonpayment. For example, perhaps debtors pay in Denmark in anticipation that if they do not, the creditor will be able to legally force them to do so, or that it will harm their reputation, or both.³⁰

Did the effectiveness of the Danish system create the cultural proclivity to pay, or did the culture create the effective system? In the same vein, does the resistance of people in Peru, Argentina and Mexico to payment create an inefficient system, or does the inefficient system create resistance to payment?

Whatever the full explanation for the existence of a culture of nonpayment is, such an attitude points to a need for further inquiry on a number of related fronts, including issues concerning the adequacy and reliability of credit reporting, debtor registries, public and business reputation and overall respect for the courts. A broader analysis of other measures that would create or provide more incentives for debtors to pay and comply with court enforcement orders needs to be undertaken.³¹ In a country with a “culture of payment”, where most people pay their just debts voluntarily, they do so because they are law abiding citizens and because they know the law is effectively enforced.

Economic reasons: insolvency, lack of assets and inability to locate assets – IFES research revealed that debtor insolvency was the main socioeconomic obstacle to enforcement in Mexico and Argentina. Peru survey participants did not rank it as highly, although they also believed it was a serious problem that needed to be addressed. While actual debtor insolvency is no doubt a practical barrier to enforcement in many cases, our research clearly indicates that the problem often relates to the inability to locate the debtor’s assets. Further compounding the problem in many developing countries, such as Mexico, Argentina and Peru, is the fact that it is extremely difficult to identify or seize assets or obtain clear property titles when the informal sector or black economy looms large. Assets are easily hidden and property titles are often meaningless.

Another large obstacle to the enforcement of judgments in many countries is the simple fact that the market to sell most seized assets is quite small. This is the reason why auctions fail many times, as the price assigned to the goods is higher than the market value of those goods. Corruption within the enforcement process may also increase the cost of using the system so as to make the legal system inaccessible to many, such as SMEs. Corruption in the auction process, through “mafia” activity is also frequent. Clearly, fundamental legal issues, such as those related to the right to contract and own property and the ability to have those rights protected, needs further examination and much more attention from donors and reformers alike.

29 In Denmark, J. Kahle emphasizes the role of religious beliefs and work ethics in building a culture of compliance. See, J. Kahle, *Droit de l'exécution: Rapport Danois* [Law of Enforcement: Danish Report], in G. de Leval (ed.) *Seizure and Over-Indebtedness in the European Union*, Kluwer, 1997 [cited in Wendy Kennett, *Key Principles for a New System of Enforcement in the Civil Courts: A Peep over the Garden Wall*, (1999) 18 *Civil Justice Quarterly* 311-342.]

30 IFES did not study the Danish system, these are offered as motivations other than culture, which may make Danish people, comply, and which may be more likely in Denmark than in Peru, Argentina or Mexico.

31 A World Bank paper (Rick Messick, “Judicial Reform and Economic Development: A Survey of the Issues”, *The World Bank Research Observer*, vol. 14, no. 1 (February 1999), pp. 117-36, The International Bank for Reconstruction and Development) has noted that use of reputation as a debt enforcement mechanism has a longstanding tradition. Informal enforcement mechanisms that have drawn the most attention are reputation-based systems that permit merchants to carry on extensive trading relations over time and space in the absence of a court system that could ensure contract performance. Similar reputation mechanisms have been recorded at work in settings as diverse as the Wisconsin lumber industry, the New York diamond trading business, long-distance commerce in medieval Europe, and parts of contemporary Asia, Africa, and Latin America. The common denominator in all these examples is that the gains from repeat dealings provide the incentive necessary to ensure performance.

Key Recommendations to Address Cultural, Socioeconomic and Corruption Problems

- Provide incentives for debtors to pay voluntarily through an efficient, incentive-driven enforcement system that allows creditors to seize assets within a fair, effective legal framework.
- Provide incentives for debtors to voluntarily pay and protect their credit reputation by creating accurate, timely public judgment registries.³²
- Provide fewer opportunities for delays and corruption within the enforcement process by establishing transparent procedures and proscribed contact between court personnel and litigants.
- Make the auction process more market oriented so that the sale prices of seized assets are more realistic.
- Make the auction process more transparent and less corrupt by promoting sealed bids in advance of the sale that are only opened and announced in public.

5. Effect of Ineffective Enforcement on the Business Environment from an SME perspective

For comparative and hard data collection research purposes, IFES’ country Assessments and global research focused on enforcement issues related to debt collection cases typical to most countries worldwide. Our Peru Assessment examined these issues mainly from the perspective of SMEs.

Business climate reports regularly include the ability of companies to enforce a contract, as well as aspects of judicial efficiency, including the enforcement of court judgments. Our research on the enforcement of judgments in Peru, Mexico and Argentina led us to the following overall conclusions with regard to SMEs.

a. Limits on Contracting Ability and the Scope of Business

The IFES Peru Assessment and research revealed that SMEs often do not use formal contracts, do not operate on credit and limit the geographic scope and size of their transactions because they generally only deal with clients or suppliers they know well.

While the Assessments in Mexico and Argentina included but did not focus on SMEs, it appears many of the SME issues in Peru may be relevant in those countries as well. Since SMEs often comprise the largest percentage of the workforce and represent the largest share of any country’s Gross Domestic Product, IFES believes it is also very important to analyze judicial reform issues through their eyes. Likewise, since this sector is also often composed of many women and ethnic minorities, as well as the poor, so they are also important to include in terms of fighting discrimination and poverty. Making the justice system accessible to them and giving them the information and tools they need to enter into and enforce contracts and obtain credit is key to a country’s economic and democratic growth, reducing corruption, promoting political stability and developing a Rule of Law culture.

32 Such registries of judgments are used in Germany, the UK, and other European countries. The American credit reporting system, which includes reported judgments, is a similar example of the “shame” factor at work to promote payment.

b. Lack of Access to Credit

Barriers to the enforcement of contracts, collateral agreements and judgments results in lower access to and higher prices for credit (interest rates). The inability to enforce a judgment or debt also creates insecurity for lenders. If a debtor defaults, forcing payment or seizing collateral will be difficult and time-consuming. A system that does not effectively enforce judgments or contracts makes lending riskier for lenders and more expensive to borrowers. When they do lend, lenders will be restrictive in issuing credit and will charge more in the form of higher interest rates.

Credit transactions involve not only banks but also the internal credit that businesses extend to each other. The uncertainty of contract and judgment enforceability leads many businesses, and particularly SMEs, to restrict credit between each other. They undertake protections aimed at securing payment, such as demanding cash, or insisting on short-term agreements, that raise transaction costs. Some deal almost exclusively on a cash basis.³³ Though IFES did not survey this particular phenomenon in Argentina and Mexico, businesspeople did admit that their transactions were limited as described, and reinforced the fact that cash transactions are very common.

In many Eastern European countries, improvements in certain practices such as the enforcement on collateral, have led to an observed increase in the availability of credit to some parties. While the effect on SMEs has not been reliably studied, lawyers and bankers interviewed preferred newer, non judicial systems of creating pledges and mortgages and enforcing them. The growth of such alternative systems, which appear to have grown partly in response to market demand and partly through reform efforts funded by international donors, allows reformers to look at the judiciary, and conceive of new possibilities for reform. The message such systems send is “it can be done.”

c. Deterrents to Doing Business With the State

Recent IFES research reveals that the enforcement of judgments against the State in Peru is very poor, due, in large part, to a lack of political will and administrative failure to allocate the resources necessary to fulfill the State’s legal obligations. The poor prospect of payment or effective enforcement renders contracting with the State is too risky for many SMEs. The main reason Peruvian SMEs gave for not participating in public procurement contracts was their fear that the State would ultimately not pay them.

For many of the same reasons, many of the SMEs interviewed and surveyed in Argentina and Mexico also indicated they were likewise reluctant to participate in public contracting. The procedures for forcing payment by the State are often too unwieldy and unpredictable to make them worth the effort or cost effective.

6. Professional Enforcement Agents – an Emerging Trend

In Europe, generally, there has been a relatively strong tradition of non-judicial enforcement. In France and Belgium, the tradition of *huissiers*, independent, private but highly-regulated enforcement agents to enforce debts is a centuries-old tradition. Even where the system appears to be court-controlled, often it is an enforcement specialist rather than a judge who has the main responsibility for driving the process, although the judge is usually the ultimate guarantor of an efficient, effective and fair enforcement process. Recently, in certain transition countries of Eastern Europe, alternatives to court enforcement have also been developed. The most prevalent type of non judicial enforcement is the use of notaries to enforce collateral pledges and mortgages.

33 Alvaro Herrero and Keith Henderson, *The Cost of Resolving Small-Business Conflicts: The Case of Peru*, p. 32, Inter-American Development Bank, Washington, DC Sustainable Development Department Best Practice Series, 2003.

Notably, in Slovakia and in Macedonia, the introduction of a procedure that is overseen by a notary has greatly enhanced the execution on collateral subject to mortgages and pledges. The notary prepares the original documents. The debtor agrees in the contract that in case of nonpayment the lender has a right to seize the collateral. In case of default, the notary conducts the enforcement. Notaries are also vested with the color of authority to seize and sell property. In countries with this model, enforcement is largely non judicial, and is considered reasonably effective. In Slovakia, for example, banks reported that they almost exclusively used the notarial arrangement once it became available.

Separating the judicial and enforcement function has significant experience and theory to recommend it, at least in many countries. This separation can be accomplished even if the enforcement agent in charge is a court official, rather than a judge. However, this model would appear to represent a radical change of the systems currently in place in Argentina, Mexico and Peru, where enforcement agents are court employees. While the European models and experience are worth discussion and debate, since some of those models appear to be more efficient and effective than those in Latin America, such a fundamental change in the process should only be done after serious debate, careful thought and broad support, particularly from the legal profession and the business community.

7. General Conclusion

One of the most important steps to successful reform of the judicial enforcement system is to identify and build a broad base of support for reform among key stakeholders and to prioritize and strategically link-up these crosscutting reforms with broader reforms. As with other legal and judicial reforms, enforcement reforms are not purely technical and the participatory process by which they are undertaken is as important as the substantive reform itself. One of the best ways to develop a coalition in support of reforms is to focus on issues such as the actual costs related to the inefficiencies of the system, (including the cost of time and delays) and the legal right to access justice for all citizens and businesses.

In Peru, the Supreme Court has ruled on several occasions that the State must fulfill its obligations to enforce and adhere to court judgments, on both moral and constitutional grounds. The State's adherence to this fundamental constitutional principle is an important legal step in the right direction. Global experience tells us that the State should set the example and abide by the law itself before it can expect the public to do so.

In trying to generate political will for reform, particularly fundamental reform of the enforcement system, the economic effects should be fully assessed and supported by both the users of the legal system and those who could benefit the most if they could access it, such as SMEs and vulnerable groups. Collectively, they comprise a powerful political and economic force for change. Often the economic arguments will have a more vocal and powerful constituent base than human rights or international law.

Emerging regional and international legal obligations to establish an effective judicial enforcement system to protect human and property rights have now been well established.³⁴ In addition, the fair and effective

³⁴ The case law of the European Court has been evolving towards a broader recognition of enforcement requirements and principles under article 6(1) of the ECHR and the right to a fair trial. In *Hornsby v. Greece* (1997), the European Court linked the enforcement of judgments to the right to court or to effective judicial protection of civil rights as guaranteed by the right to a fair trial under article 6(1) of the ECHR. The European Court has also been extending its jurisprudence on the length of proceedings by adding to the violation under article 6(1) of the ECHR a violation under article 13 of the ECHR, which recognizes the right to an effective remedy for violations of human rights by the State. In *Horvat v. Croatia*, the European Court found that the civil proceedings for repayment of loans had not been concluded within a reasonable time in violation of article 6(1). It went on to find a violation of article 13 "in so far as the applicant has no domestic remedy whereby she could enforce her right to a 'hearing within a reasonable time' in either of her cases as guaranteed by Article 6(1)." *Horvat v. Croatia*, Judgment of July 26, 2001, Eur. Cour H.R.

Similarly, in its first case on the enforcement of court judgments, the Inter-American Court accepted the argument of Inter-American Commission that the Peruvian State had violated the right to judicial protection under article 25 of the Inter-American Convention by failing for eight years to comply with final Supreme Court judgments ordering the payment of an adjusted pension to the plaintiffs and a Constitutional Court judgment ordering the State to comply with the Supreme Court judgments. *Cinco Pensionistas v. Perú*, Judgment of February 28, 2003, Inter-Am. Ct. H.R., Series C No. 98 (2003).

enforcement of judgments is now considered an integral component of Rule of Law, and fundamental to promoting vibrant, business activity and economic growth.

Clearly, considerably more attention needs to be given to the important crosscutting issue of judicial enforcement. IFES hopes this paper will serve to generate a deeper understanding and appreciation for the enforcement process and that this area of reform becomes a higher priority for all countries in the age of globalization and democratization. It would be a serious economic and political mistake for any country, business or human rights activist to ignore this issue any longer.

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ANNEX 2 – COMPARATIVE TABLE

	ARGENTINA	MEXICO	PERU
Effectiveness of the judicial system to enforce judgments	<ul style="list-style-type: none"> Legal system of enforcement is generally very effective [14%] Very effective enforcement of judgments against large businesses [44%] and against small businesses [24%] Very ineffective enforcement of large judgments against individuals [44%] and of judgments against the State [39%] 	<ul style="list-style-type: none"> Legal system of enforcement is generally very effective [47.2%] Very effective enforcement of judgments against small businesses [48.8%] and of small judgments against individuals [52.8%] Very ineffective enforcement of large judgments against individuals [43.2%] and of judgments against the State [40.8] 	<ul style="list-style-type: none"> Legal system of enforcement is generally very effective [9.3%] Very effective enforcement of judgments against small businesses [44.4%] and of small judgments against individuals [33.3%] Very ineffective enforcement of large judgments against individuals [11.1%] and of judgments against the State [9.3%]
Preferred method of debt collection	<ul style="list-style-type: none"> 1st preferred method: negotiation [57%] 2nd preferred method: judicial enforcement [49%] 	<ul style="list-style-type: none"> 1st preferred method: judicial enforcement [64%] 2nd preferred method: negotiation [56%] 	<ul style="list-style-type: none"> 1st preferred method: negotiation [48.1%] 2nd preferred method: ADR [25.9%]
Frequency of collection of almost all and a very little amount of the judgment	<ul style="list-style-type: none"> 12% consider that all or almost all of the amount is almost always or usually collected 42% consider that very little of the amount is almost always or usually collected 	<ul style="list-style-type: none"> 52.8% consider that all or almost all of the amount almost always or usually collected 31.2% consider that very little of the amount is almost always or usually collected 	
Use of violence or threats, instead of legal methods of enforcement	5% note that violence is almost always or usually used instead of legal methods	10.4% note that violence is almost always or usually used instead of legal methods	3.7% note that violence is almost always or usually used instead of legal methods
Most important disincentives to the use of courts	<ul style="list-style-type: none"> Time Costs Low likelihood of enforcement 	<ul style="list-style-type: none"> Time Costs Lack of penalties for non-compliance 	<ul style="list-style-type: none"> Time Costs Judicial Inefficiency
Time and causes of delays	<p>Time is an important deterrent from using the legal system and the courts for 57% of respondents.</p> <p>The average time to enforce a judgment is:</p> <ul style="list-style-type: none"> Less than a year [13%] 1 to 2 years [41%] 2 to 3 years [24%] <p>The law provides excessive delay opportunities [60%] and the main reasons for delays are difficulties in locating the debtor, the excessive caseload and the uncooperativeness of the debtor.</p>	<p>Time is an important deterrent from using the legal system and the courts for 41.1% of respondents.</p> <p>The average time to enforce a judgment is:</p> <ul style="list-style-type: none"> Less than a year [40%] 1 to 2 years [33.1%] 2 to 3 years [16.9%] <p>The law provides excessive delay opportunities [69.4%] and the main reasons for delays are difficulties in locating the debtor and in locating his assets and the uncooperativeness of the debtor.</p>	<p>Time is an important deterrent from using the legal system and the courts for 35.2% of respondents.</p> <p>The average time to enforce a judgment is:</p> <ul style="list-style-type: none"> Less than a year [31.3%] 1 to 2 years [21.6%] 2 to 3 years [33.3%] <p>The law provides excessive delay opportunities [12%] and the main reasons for delays are difficulties in locating the debtor and in locating his assets and judicial backlog.</p>
Costs	<ul style="list-style-type: none"> Important disincentive to the use of courts to collect a small debt [70%] Somewhat important disincentive to the use of courts to collect a large debt [49%] 	<ul style="list-style-type: none"> Important disincentive to the use of courts to collect a small debt [70%] Somewhat important disincentive to the use of courts to collect a large debt [49%] 	<ul style="list-style-type: none"> Important disincentive to the use of courts [29.6%]

**ANNEX 3 – IFES ENFORCEMENT MATRIX (1) – ENABLING ENVIRONMENT, TRANSPARENCY
 AND ACCOUNTABILITY ISSUES RELEVANT TO THE ENFORCEMENT
 OF CIVIL AND COMMERCIAL JUDGMENTS**

Laws/ procedures	Debtor/ culture	ENF agents	Courts	Cost/time	Access to info.	Accountability
Clear and adequate legal and regulatory framework	Appropriate legal protection of the debtor	Incentives of judges and enforcement agents	Judicial independence	Reasonable official cost of enforcement	Access to information about the debtor and his assets	Oversight of judges involved in the enforcement
Clear and adequate procedures	Insolvency	Independence of enforcement agents	Judicial efficiency	Time required to enforce in practice	Reliable information about the debtor and his assets	Oversight of enforcement agents
ADR mechanisms	Effective payment in practice	Adequate training of enforcement agents	Willingness of judges to enforce	Extraordinary delays in the enforcement	Fraudulent transfer of assets	Effective sanctions in cases of inefficiency or corruption
Corporate, bankruptcy and insolvency laws	Likelihood of enforcement in practice	Behavior of lawyers	Court bias in favor of debtor/ creditor	Adequate anti-corruption measures	Clear property titles	Effective sanctions in cases of non-compliance with enforcement orders
Efficient notification process	Willingness of debtors to comply with court orders	Behavior of police and administrative agencies	Compelled testimony	Administrative and enforcement agent corruption	Uniform and accessible public registers (and databases)	Willingness to apply sanctions to enforcement agents
Clear and effective attachment process	Limited exemptions from seizure (assets/debtors)	Case backlog	Limited right to judicial review	Judicial corruption	Clear and adequate privacy laws	Willingness to apply sanctions to the parties and lawyers
Clear and effective auction process	Abandoned cases	Adequate budget and resources for enforcement	Procedural delays	Effective codes of ethics	Informal economy and employment	

IFES ENFORCEMENT MATRIX (2) – ENABLING ENVIRONMENT, TRANSPARENCY AND ACCOUNTABILITY ISSUES RELEVANT TO THE ENFORCEMENT OF JUDGMENTS AGAINST THE STATE

Laws/ procedures	Debtor/culture	ENF, State and other agents	Courts	Cost/time	Special regime	Accountability
Clear and adequate judicial procedures	Willingness of the State to comply	Deference of enforcement agents to the State	Judicial independence	Reasonable official cost of enforcement	Limited State immunity from enforcement	Clear and adequate civil liability of public agents/State
Clear and adequate legal and regulatory framework	Resistance of the State (uncooperativeness)	Discretionary powers of State agents and public officials	Judicial efficiency	Time required to enforce in practice	Limited State immunity from lawsuit	Clear and adequate criminal responsibility of public agents/ State
Limited formalities and prerequisites to suit and payment	Insolvency or lack of adequate resources	Executive interference with effective enforcement or payment	Jurisdiction of special courts	Extraordinary delays in enforcement or payment	Limited State immunity from seizure	Adequate penalties for non compliance with judgments
Exhaustion of administrative remedies	Requirement of budgetary provision	Legislative interference with effective enforcement or payment	Court bias in favor of the State	Administrative and executive corruption of enforcement agents	Special prerogatives and derogatory regime	Adequate penalties for non compliance with enforcement orders
Statute of limitations	Debt consolidation	Behavior of lawyers	Adequate powers of the courts to obligate the State	Judicial corruption	Special court procedures	Fair and effective implementation of penalties
			Clear and limited right to judicial review	Adequate anti-corruption measures against the State		Willingness to apply sanctions to public agents/ State

ANNEX 4 – IFES TOOL – INTERNATIONAL FAIR TRIAL OBLIGATIONS

The Right to a Fair Trial and Access to Justice Includes the Right to Fair and Effective Enforcement: International and Regional Human Rights Treaties and Obligations of Most Developing, Transition and Developed Countries

- **Universal Declaration of Human Rights*** article 10: “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*”;
- **International Covenant on Civil and Political Rights**** article 14(1): “*... in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*”;
- **European Convention for the Protection of Human Rights and Fundamental Freedoms***** article 6(1): “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*”;
- **American Convention on Human Rights****** articles 8(1) “*Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.*” and article 27(2) which prohibits any derogation from judicial guarantees;
- **African Charter on Human and People’s Rights******* articles 7(1) “*Every individual shall have the right to have his cause heard. This comprises ... (d) the right to be tried within a reasonable time by an impartial court or tribunal.*”

* *Universal Declaration of Human Rights* [“UCHR”], 12/10/1948, United Nations, G.A. res. 217A(III)

** *International Covenant on Civil and Political Rights* [“ICCPR”], 12/16/1966, United Nations, GA resolution 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force on March 23, 1976

*** *European Convention for the Protection of Human Rights and Fundamental Freedoms* [“ECHR”], 11/04/1950, Council of Europe, European Treaty Series no.5, entered into force on March 9, 1953

**** *American Convention on Human Rights* [“IACHR”], 11/22/1969, OAS Treaty Series No.36, 1144 U.N.T.S. 123, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), entered into force on July 18, 1978

***** *African Charter on Human and People’s Rights* [“ACHPR”], 06/27/1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21, 1986