

IFES RULE OF LAW OCCASIONAL PAPER SERIES

BARRIERS TO THE ENFORCEMENT
OF COURT JUDGMENTS IN PERU

WINNING IN COURT IS ONLY HALF
THE BATTLE:

Perspectives from SMEs and Other Users

April 2004

SANDRA ELENA

ALVARO HERRERO

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**BARRIERS TO THE ENFORCEMENT OF
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By Sandra Elena, Alvaro Herrero, and Keith Henderson¹

EXECUTIVE SUMMARY

I. Introduction

Only recently has the fair and effective enforcement of judgments emerged as an issue of critical importance to achieving the Rule of Law and sustainable economic and democratic reform. Yet relatively little is known, aside from limited anecdotal evidence, about how the process of enforcement works in theory and practice, how much it cost, who is responsible for it, what the major barriers to enforcement are and how to cross-over those barriers. To that end, over the last two years, IFES has undertaken an intensive comparative examination of the process of enforcement of civil judgments in several Latin American countries: Mexico, Argentina and Peru.

The Peru Assessment builds upon IFES's enforcement research in Argentina and Mexico, our small and medium enterprise research in Peru for the Inter-American Development Bank, as well as our analysis of all accessible global research and programs. The main objectives of the Peru Assessment were to identify and analyze key barriers to a fair and effective enforcement process as well as measuring the cost of accessing the enforcement process from the perspective of a subcategory of court users: small and medium enterprises (SMEs).

Many of the findings presented in the Peru Assessment reinforce those in other studies. They also simultaneously leave some questions unanswered or raise additional questions that require further examination and public debate, such as those related to the economic and legal impact of the informal SME sector, which by most accounts comprises the largest sector of the Peruvian economy. Nonetheless, the Peru findings at least confirm and shed more light upon many of the key findings in IFES's prior research as well as much of other donors such as the World Bank.

1 These three authors have been working on Rule of Law issues for more than ten years. IRIS Center Peru made significant contributions to the flow chart methodology and study. Luis Diez Canseco, Carlos Ruska, Javier Gallo and Miguel Santa Cruz are seasoned lawyers from Peru who contributed to the research and provided their expertise for the report. Angana Shah, a U.S. international development lawyer and enforcement expert, contributed to and co-edited this report. Violaine Autheman, Carlos Hamman and Luis Ramirez Daza, lawyers from France and Peru and part of the IFES Rule of Law team, participated in the design and research of the report.

Key Conclusions

IFES's analysis of all of the data and research to date leads us to at least four inter-related key conclusions:

Four key interrelated conclusions from the IFES 2004 assessment are:

1. The **time** required to enforce a judgment in both theory and practice is inordinately long and therefore costly and is the key reason SMEs do not use the enforcement process.
2. The **formality and complexity** of the enforcement process is the main cause of delays; examples include excessive legal objections and appeals, technicalities related to personal notice or service and an over-reliance on written instead of oral procedures.
3. The **poor performance and lack of accountability of judges** and other court officials is another key reason for delays; examples include judges not following the law or exercising sanctions even when flagrant dilatory tactics are undertaken, judges being perceived as being biased in favor of large debtors, the willingness of judges to entertain numerous legal objections and appeals on purely technical grounds and court officials focus on technical processes and procedures such as the formalistic notification process.
4. The **Rule of Law and the constitutional right to contract, own property and have a fair and speedy trial are seriously undermined** by the inefficiency and ineffectiveness of the enforcement process in Peru; until the laws in Peru can be enforced fairly, effectively and efficiently it will not be possible to develop public trust in the legal system or a rule of law culture.

The State of Research

From a research perspective, our review of existing country, regional and global research is revealing. First, research on the crosscutting issue of the enforcement of civil judgments is only in its preliminary stages, although important groundbreaking studies have recently been undertaken in Europe and Latin America.

Second, existing research can be divided into three types of methodologies: (i) academic desk studies; (ii) perception surveys of users; and (iii) case file studies. Our research in Latin America attempts to integrate these three approaches.

Third, two main types of studies have emerged in Latin America, and in Peru in particular. The first focuses on studying the interaction of businesses, with or without distinction based on their size, as they interact with the justice sector as a whole. These studies examine broad issues related to barriers to accessing the courts but they do not specifically cover the enforcement process. The second set of studies type focuses mostly on the enforcement process, from the perspective of all court users. The IFES Peru Assessment presents the first attempt to combine all of these factors and to examine and test these issues primarily from the perspective of SMEs who have actually used the system.

A comparative analysis of some of the key findings in this study and those mentioned above lead us to conclude that many of the general findings, issues and recommendations made in past access to justice and enforcement reports are equally if not more relevant to Peruvian SMEs. These include legal loopholes and formalistic procedures that allow for inordinate delays, numerous legal motions, frivolous appeals, excessive costs, inadequate access to information and unreliable information systems, and technical rather than substantive notification requirements. Our research also confirmed much of the conventional wisdom that exists related to

complaints with the legal system in general, such as cases taking years to resolve, delays caused by litigants and judges, and abusive use of procedural delays.

Key Lessons Learned from Latin America and Western Europe

One of the main lessons from our Peru Assessment is that these kinds of problems present almost insurmountable barriers to SMEs. The process to enforce a court judgment, either in theory or in practice, not unlike the trial process itself, is so lengthy, complex, uncertain and ultimately costly, that virtually all SMEs strive to avoid using the legal system at virtually all costs --- including the enforcement process. Indeed, SMEs' inability to access the justice system to enforce contracts, protect their property rights, or collect simple debts, is only exacerbated by the myriad barriers presented throughout every step of the enforcement process.

It is also interesting to compare some of the key findings in Peru and Latin America with those from studies in Western and Eastern Europe, where serious reform efforts are underway to create more efficient enforcement processes. Many countries in Eastern Europe have been plagued by problems that are not dissimilar to those identified in Peru, including judicial corruption, the abusive use of procedural mechanisms to delay the process, the lack of access to information, and unreliable information systems. By examining this growing body of research, including reform experiences, lessons learned and best practice guidelines from the Council of Europe, as well as many of the enforcement cases rendered by the European Court of Human Rights, we can identify global patterns and best practices which can be useful to Latin American countries as they begin to explore ways to improve their enforcement systems. Clearly, there is much each region can learn from the other and clearly some of the best practices developed in Europe are relevant to Latin America.

18 Key Recommendations for a Fair and Effective Enforcement of Judgments in Peru

1. Limit frivolous overly technical appeals.
2. Reform the notification procedure.
3. Limit formalistic requirements for written pleadings, oral pleadings.
4. Improve the auction procedure.
5. Make the auction process more transparent.
6. Avoid limitations on the number of auctions.
7. Give the property registry full faith and credit to discredit frivolous third-party objections and maintain the integrity of system.
8. Require debtor to disclose assets and deal with other creditors at one time.
9. Maintain a registry of judgments.
10. Limit the role of judges to intervention where due process has been violated.
11. Train judges on the economic aspects of enforcement actions.
12. Ideally, the process should be creditor-driven.
13. Increase and implement sanctions for fraud for debtors and third parties.
14. Third party objections should be heard in the court that is enforcing the judgment, and not in other courts.
15. Notification officers should be compensated through a transparent fee structure.
16. Streamline the process.
17. Support and promote ADR (especially arbitration and mediation).
18. Empirical studies of enforcement case court files and further research into the enforcement of State judgments would be invaluable in supplementing existing research.

IFES Methodology

IFES's methodology in the Peru Assessment was multifaceted and unique. Its main components were (i) a strategic survey of representatives of SMEs, the majority of which had actually used the enforcement process; (ii) in-depth interviews with key stakeholders such as lawyers, judges, bankers, and small businesses; (iii) a review of the available, academic and applied research and reform projects; (iv) an analysis of the key findings and recommendations of regional, global and sector experts; and (v) the development of flow chart related to the basic processes under study.

In Peru, SMEs account for 99% of the businesses and hold great potential to impact economic growth, reduce poverty and address corruption. Because few Rule of Law, anticorruption or access to justice studies and programs have been undertaken from the perspective of SMEs, we believe that this Assessment and the recommendations that flow from it are all the more important. While our survey sample was limited, finding SMEs that had had experience with the courts was itself a huge challenge because they do not often use the courts to enforce their debts or enforce oral or written contracts.

II. Problems with Peruvian Enforcement Procedure

The most repeated complaint among survey participants was that the enforcement procedure involved excessive time and delays and that it was costly. In the IFES survey, 47.9% of the participants ranked delay as one of the largest obstacles to the fair and effective enforcement of judgments. Eighteen percent ranked it as the number one obstacle.

A cursory analysis of the data reveals that the cost of the enforcement process, which 38.5% ranked among the top three obstacles, was significantly related to the cost of delays. Delay involves opportunity costs, such as lost time, diminution of the value of assets over time and the cost of additional legal procedures borne of delays. A closer analysis of the data and experts' opinion evidence revealed the main reasons for excessive delays:

A. Formalism: excessive formality and excessive judicial oversight

In the survey and expert interviews, participants continually cited formalistic, complex and bureaucratic procedures as a significant obstacle to a fair and effective enforcement process. There appear to be opportunities for raising technical procedural objections at every stage of the process, as well as often-frivolous and extensive appeals. Notification procedures focusing on form over substance and complex notification requirements prior to auction are just a few examples of an overall formalistic enforcement system in need of serious repair if not wholesale reform.

1. Excessive debtor protection: excessive objections and excessive appeals. In the IFES survey, 23.9% of those surveyed ranked "excessive legal protections for debtor" among the top three obstacles to enforcement. In the typical enforcement action involving the collection of a debt, the law provides a minimum of 13 steps required from the beginning to the end of a process. Even in the most straightforward, unassailable cases, appeals can be undertaken in five of them. The net result is that the enforcement process in practice is two to three times longer than the law contemplates. Thus, the formalities and delays in the enforcement process, not unlike those related to litigating a case, are one of the main reasons why the courts are seldom used by SMEs.

2. Notification procedures. The notification procedure is needlessly burdensome and formal, with requirements that appear to go beyond those required to ensure due process. Even a minor clerical error,

such as a misspelled name, will allow the debtor to nullify legal notice. Moreover, in Peru every notice, for each step of the procedure, must be accomplished by a formal summons. The net result is that delays based on notice may occur in virtually every step of the enforcement process.

- 3. Auction formalities and ineffectiveness.** Auctions involving appraisals, notices and the sale of assets are all supervised by the court. The majority of the experts and SMEs interviewed told us that few cases reach the auction stage and that when they do, the auction is more often than not unsuccessful. They noted that the main reasons related to the inability to attract buyers were inflated minimum bids and bid-rigging by racketeers. They also identified cost and the law that requires a *de novo* auction process when the assets have not been sold after three attempts, as other obstacles to the enforcement process.
- 4. Third party objections (*Tercerías*).** According to expert interviews, third party objections (or *tercerías*) appear to be another major cause of delay. A third party objection is the intervention by a third party claiming, for example, a right to an asset such as real estate. Under Peruvian law, such a claim must be tried on the merits in a separate proceeding which effectively brings the execution procedure to a standstill. Those surveyed believed most claims were frivolous and were used with the sole purpose of delaying the execution process. To further complicate and delay the procedure, they also noted that the third party procedure was often filed in a court other than that in which the enforcement proceeding was being conducted. Apparently, many judges permit forum shopping when they know that such a procedure is done purely for purposes of delaying further action in the court where the original action was filed.
- 5. Public property registries are not given full faith and credit.** While Peru has a functioning registry for all immovable property, private documents can also be used to prove property ownership. Entry in the registry is not necessarily determinative of legal ownership or a claim. A contract that predates the registration of the current owner's interest is valid evidence of the contract-holder's superior interest. This not only encourages the submission of frivolous and even forged third-party claims but also undermines the effectiveness of the Public Registrar and property registry system.

B. Judicial Behavior

- 1. Judges' "bad behavior".** In virtually all interviews with bankers, experts and SMEs, the judges were responsible for many of the delays and problems in the enforcement process. Judges' failure to enforce the law was the biggest obstacle to effective enforcement of judgments, according to 18.5% surveyed. When asked to be more specific, they cited a number of reasons for their answers, including: (i) judges not upholding the law; (ii) judges favoring debtors; (iii) excess judicial review even in uncontested and executive trials; and (iv) judges entertaining frivolous objections.
- 2. Judicial commentary on frivolous motions.** Judges' ability to dismiss frivolous motions is limited in practice because they believe that any attempt to limit them might be overturned on appeal on current notions of due process. In these circumstances, judges often accept frivolous claims in order to avoid the extra delay that might result from any appellate review.
- 3. Lack of sanctions for fraud, reflecting lack of respect for courts.** Many surveyed claimed that debtors often engage in fraud and deception and that they often produced forged documents as evidencing false payment, ownership and assets transfer. Many also noted that even though fines for disobeying court orders or committing a fraud on the court are allowed by law, they were rarely imposed by judges. Apparently, the prevailing attitude is that lying to the court was generally viewed as a valid defense by most judges and court users. The casual attitude toward lying to judges appears to reflect the lack of authority and respect for the courts overall and the courts' unwillingness to punish those who commit a flagrant fraud on the courts.

C. Enforcement of judgments against the State

The enforcement of judgments against the Peruvian State appears to be even more difficult than the enforcement of civil judgments against private parties. According to the SME survey, the main obstacle to collecting judgments against the Peruvian State is simply the State's lack of political will to pay its debts. Other factors noted in the survey include: (i) scarcity of available State resources, (ii) the State's consequent failure to budget for payment of judgments; and (iii) the lack of transparent, efficient administrative procedures to effect payments of judgments.

D. Effects on SMEs

The Peru study also attempted to address some of the economic consequences of a judicial system that does not adequately enforce judgments and debts. Key findings regarding the effect of a poor system for enforcement of judgments and debts on businesses, particularly SMEs, follow:

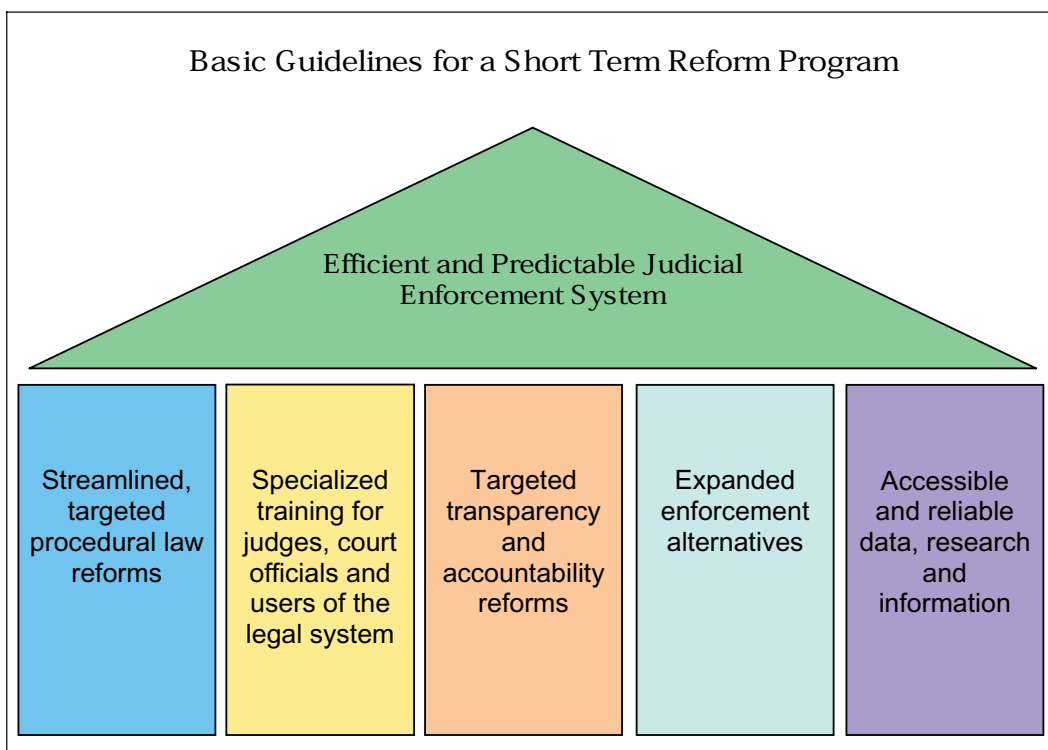
- 1. Limits on access to credit.** Inability to enforce a judgment or debt creates insecurity for lenders. If a debtor defaults, forcing him to pay or seizing his collateral will be difficult and time-consuming, if it is possible at all. Therefore, a system that does not effectively enforce judgments or contracts makes lending riskier for lenders and more expensive for borrowers. SMEs are particularly affected by a credit squeeze. When lenders become conservative, SMEs and entrepreneurs are often left without access to credit, as they are poorer credit risks than larger, more established companies. Without credit facility, they cannot absorb the risk of time delays in payment or risky investments. Consequently, their business activities become limited to short-term transactions. SME representatives in Peru admitted in surveys that lack of access to credit was a limiting factor in their businesses.
- 2. Limits on the contracting ability and scope of business activity.** In Peru, SMEs rarely use formal contracts. They tend to deal only with parties that they know and trust. SMEs surveyed expressed their inability to rely upon a written contract, in part because it could not be enforced. Contract enforceability, which relies on judgment enforceability, has been widely recognized as an integral part of the business climate in a country. Inability to contract with unknown entities severely limits the expansion of businesses. It limits healthy competition among vendors, as relationships are fixed and efficiency is not rewarded. Moreover, it restricts new market entrants who do not have established relationships.
- 3. Limited SMEs' access to the government procurement process.** Enforcement of judgments against the State in Peru is difficult and long due in part to lack of political will and administrative failure to allocate the resources necessary to fulfill the State's legal obligations. The poor prospect of enforcement renders contracting with the government too risky for many SMEs. Even though the number of SMEs is very large in Peru, they seem to be awarded a small proportion of government contracts. IFES's survey reveals that the main reason SMEs do not participate in government procurement is the fear that the State will not pay them in a timely manner. SMEs do not have the capacity, in capital or credit, to absorb such a risk. Thus government procurement, a potentially lucrative source of business, is not available to many SMEs.
- 4. Alternative dispute resolution (ADR): arbitration and mediation.** ADR has emerged in Peru to become one of the preferred methods of dispute resolution when direct negotiations fail for many businesses, including SMEs. IFES survey results show that 25.9% of those surveyed preferred ADR as a first method and 32.1% as a second choice after direct negotiation with the debtor. However, the inefficiency of judgment enforcement can undermine the efficacy of ADR. The strength of a legal claim generally supports a party's position in mediation. But without the backup threat of effective litigation, power differences between the parties, rather than rights or legal position, may determine the ADR outcome. A more reliable judgment enforcement system would provide additional support to the growing use of ADR.

5. SMEs and the inefficiency of the judiciary. One of the key findings of this report is that SMEs are significantly affected by the inefficiency of the judicial enforcement system. SMEs showed a clear aversion to using courts due to delays, excessive costs, corruption and inefficiency. However, severe obstacles to both executing “guarantees” -such as collaterals on movable and unmovable assets- and commercial papers -such as checks- are particularly worrisome because they may lead to two negative scenarios.

First, SMEs may reduce business transactions that require using “guarantees” and/or commercial papers in order to avoid the risk -and cost- of going through the enforcement system. Second, the risk of using those instruments could lead to increased transaction costs. For example, the low probability of enforcing regular bank checks through the court system generates increased transaction costs. In this respect, it is easy to understand the way in which judicial inefficiency affects the efficiency of private sector activity –in this case, SMEs transactions. Thus, the link between the enforcement system and SMEs activity cannot be neglected. Because SMEs seek to mitigate the risk of non-payment, just like any other business, they limit the geographic scope, nature and size of their transactions to those they know best.

The conflictive relationship between SMEs and the judicial system is another distressing finding. Small businesses do not trust the court system; they face problems when they try to access the courts or the enforcement system and they only resort to the judicial system when it is inescapable. The lack of an effective official, State-sanctioned dispute resolution system obviously has a negative impact on a significant amount of small businesses activity. Our findings regarding the enforcement system parallel previous research on the negative relationship between SMEs and the courts.

However, on a more positive note, IFES’s assessment highlights that a number of the causes of the enforcement system’s inefficiency are rooted within the system itself. This is an important finding because it means short term performance can be improved, at least to some degree, without waiting for more fundamental instrumental or cultural reforms to take root.



III. Recommendations and ideas for reform

IFES's focus for purposes of this report was to identify realistic short and medium term areas of reform for immediate consideration. Additional research and discussion is needed before a comprehensive set of long-term recommendations could be made, although some areas are mentioned throughout this report. Here, IFES sets-forth eighteen (18) general areas of reform that are designed to improve the efficiency of the enforcement process. Within these general areas, there are over sixty-nine (69) concrete subcategories of recommendations. IFES believes that many of them are achievable within the Peru context and that other long-term ideas should be simultaneously explored and linked to other related judicial, economic and political reforms. If implemented, most of these reforms should benefit small and large businesses as well as the international business community.

A. Less formalism in procedure

- 1. Limit frivolous overly technical appeals.** Interlocutory appeals (appeals accepted before the end of the procedure) should be severely limited. In most cases, access to appeals courts should be limited to one appeal at the end of the procedure. In an executive trial, if the appeal cannot be limited to the end of the execution, then at most one appeal at the end of the executive trial granting judgment and one after execution should suffice. Funds from the liquidation, or the property itself, can be held in escrow until resolution of all issues in a single appeal after completion of the procedure. Such a change would reduce caseloads and expedite the procedure, yet it would also protect the debtor by allowing an appeal based on any alleged violation of his rights. Further, the court would be able to focus on analyzing the entire transaction for fairness and substance rather than technicalities.
- 2. Reform the notification procedure.** A formal summons should be required mainly for the initial notice. After the initial notification, notification between attorneys of the parties should be sufficient. In most cases, once a 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 address. Objections to notice should be based only on a debtor suffering damage, and a true denial of due process due to faulty notice, not due to deficiencies in the form of notice or clerical error. At the same time, all of the suggested changes should protect the debtor's due process right to notice.
- 3. Limit formalistic requirements for written pleadings, oral pleadings.** Requirements for written pleadings should be reduced. Differences between courts should be eliminated. The basis for rejecting documents should be narrow and based only on substantive deficiencies. For many simpler proceedings, oral arguments/pleadings should be allowed to replace cumbersome requirements for written pleadings.
- 4. Improve the auction procedure.** Introduce less formality in the auction process. In order to simplify the procedure, publication should be made less formal, with fewer requirements outside the basic information and less vulnerability to nullification. One idea might be to reduce the number of days required for publication from six to three days for a first auction, and from three days to one day for subsequent auctions.
- 5. Make the auction process more transparent.** To avoid racketeers and bid rigging, the bidding should proceed with sealed bids opened in public rather than spontaneous, verbal bids. The highest bidder from the opened bids should be awarded in public (simultaneously with the bid opening).
- 6. Avoid limitations on the number of auctions.** Article 742 should be modified to remove the three-auction limit, which leads to costly and time-consuming re-initiation of appraisal and auction procedures. The version before reform may be preferable. The market as indicated by auction bids, rather than court procedures and restrictive minimum sale prices, should be the main determinant of the price at which the asset is sold.

A. Improve access to information on debtor's assets

- 1. Give the property registry full faith and credit to discredit frivolous third-party objections and maintain the integrity of system.** Registration of property interests should be required and serve as authoritative evidence of ownership or property interest. Moreover, a registered interest in a property should be given priority in order of registration, and over unregistered claims. The interests in a property (ownership interest, mortgage or pledge) should be honored in the order in which they are recorded.
- 2. Require debtor to disclose assets and deal with other creditors at one time.** Debtors should be obligated by law to disclose their assets in an enforcement action because they are in the best position to provide this information. At the beginning of a proceeding, debtor should be required to submit to an examination by creditors regarding their assets. The information should be used to notify any other creditors with an interest in a particular asset so that a hearing may be held to determine all of their interests at the same time. The procedure should also streamline the resolution of third-party interests.
- 3. Maintain a registry of judgments.** A reliable registry of judgments should be supported to maintain a record of debtors who have been adjudged to owe a debt. Debtors would be removed from the registry after they have paid their debts. The registry would serve as a resource for financial and judgment creditors wishing to determine the debtor's overall obligations and possible claims. It may motivate debtors who are denied credit after listing in the registry, to pay. It would also introduce a "shame" factor into the system that may also serve to motivate more debtors to pay.

B. Increase incentives for performance among various actors and redistribute responsibility among actors

- 1. Limit the role of judges to intervention where due process has been violated.** For example, the judges' role can also be less involved if registries are given full-faith and credit (so that judges do not have to endlessly review documents from third parties but may instead rely on interest holders' recording of their rights in the registry).
- 2. Train judges on the economic aspects of enforcement actions.** Judges must respect creditor and debtor's due process rights. They should be empowered to quickly and confidently dismiss frivolous objections. Judges should also be forbidden by law to analyze transactions underlying commercial paper cases/executive trials. The parties' bargain/contract should be respected, and the judge's job simplified.
- 3. Ideally, the process should be creditor-driven.** Creditors should be allowed to undertake more actions independently. Creditors should prepare determined documents and orders for the judge to sign. Creditors should also be allowed to prepare proof of notice to the court. Creditors should also be able to effect seizure of property, with court personnel assistance when necessary. Nonetheless, respect for debtor's rights in the process should be ensured by holding them liable for their abuse.
- 4. Increase and implement sanctions for fraud for debtors and third parties.** Currently, debtors (and any third parties who conspire with them) face virtually no sanctions for fraud in practice. When debtors engage in fraud, they should be sanctioned as the law provides. Debtors who do not pay their fines should be listed in the registry of judgments.
- 5. Third party objections should be heard in the court that is enforcing the judgment, and not in other courts.** Previous recommendations on property registry improvement may also reduce the possibility for objections by third parties.

6. Notification officers should be compensated through a transparent fee structure. A transparent fee structure and reforms geared towards quality job performance should be considered.

C. Improve enforcement of judgments against the State

Streamline the process. The system for the State making payment should be transparent and streamlined. The administrative process should be simplified, and discretionary control of administrative agents eliminated. The government’s budgetary process should include transparent procedures to account for and disburse payments. Administrative agents responsible for payment of judgments should be trained, including accounting and relevant legal skills. State actors who fail to fulfill their obligations should be held accountable. Judges should monitor the enforcement of judgments against the State.

D. Promote ADR

Support and promote ADR (especially arbitration and mediation). Appeals that lead to retrial on the merits, in contradiction to the law, and any other threats to the court’s credibility and development should be discouraged. SMEs should be trained on these mechanisms.

E. Support additional research.

Empirical studies of enforcement case court files and further research into the enforcement of State judgments would be invaluable in supplementing existing research. Possibilities for research in this area remain endless, as the enforcement of judgments involves and impacts so many disparate entities: individuals, police, financial institutions, employers, businesses and government. Regional studies, and comparisons between regions, all provide insight into the process and potential changes.

I – INTRODUCTION

1. Preliminary Considerations

This report examines the performance of Peruvian courts in the civil and commercial arena, specifically, the processes for the enforcement of judgments, including court judgments, commercial papers, and collateral agreements such as mortgages and pledges, that are handled by courts of special jurisdiction and justices of the peace in Lima, Peru. A basic assumption of this research is that the efficiency of the judiciary in the enforcement of decisions and judgments made by its courts is essential to the maintenance of the Rule of Law and in guaranteeing people's access to justice. The failure to execute contracts and court decisions in a timely manner renders the legal system unreliable and constitutes a serious disincentive for investment and commercial activity in general. The Peruvians dissatisfaction with their justice system has been documented in several opinion polls.² Although Peru is not unique in this regard, the lack of confidence in its courts has grown in recent years to truly disconcerting levels.

The process of enforcement of court decisions has not been the subject of systematic study until very recently. IFES, together with other international agencies such as the World Bank, has set up a process intended to shed light on the mechanisms by which court decisions are executed, the principal obstacles to their enforcement, and the roles of relevant actors. Research on the enforcement of judgments in Peru is also sparse. There have been empirical studies conducted by the World Bank and *Instituto Apoyo* that attempted to quantify certain aspects of the system, such as the length of delays, number of cases resolved, etc.³ IFES builds upon the existing research to develop more detailed descriptions of the procedures and specific barriers to enforcement of judgments.

IFES previously completed a study on the enforcement systems in Mexico and Argentina. Building on that experience, IFES designed this study differently in part focusing on small and medium enterprise (SMEs) representatives in the survey. The reason for the focus on SMEs is that they are a significant portion of the Peruvian economy, in number and in share of GDP. By some estimates, they comprise over 99% of business entities and are responsible for an approximate 44% share of the economy.⁴ In comparison with large companies, they are often more vulnerable to the inefficiencies of the justice system than larger actors.

The IFES Peru research enhances the existing body of work on Enforcement of Judgments combining the use of survey data and in-depth interviews to draw an accurate picture of the Peruvian system for enforcing judgments and debts, and to make informed conclusions and recommendations for reform.

2 A survey conducted by Datum.com indicates that in November 2003, the persons surveyed awarded a "grade" of 8, out of a possible 20 points, to the Judicial Branch. The media received a "grade" of 12.1 in the same survey. Furthermore, 50% of the respondents indicated that Court authorities do not contribute anything to the development of the country (i.e., they are "not at all identified" with it) www.datum.com.pe. A survey of the official managers of firms in metropolitan Lima, carried out in 2003 by *Projusticia*, a nongovernmental organization, indicates that 88.7% of the respondents have little or no confidence in the Supreme Court; while 97.2% have little or no confidence in the appellate courts; 99.1% have little or no confidence in the courts of special jurisdiction; and 92.9% have little or no confidence in the courts of the justices of the peace. Regarding the opinion concerning the Judicial Branch in settling commercial issues brought before specialized judges in civil matters, 59.2% indicated that they had a mediocre opinion; while 39.4% viewed them as poor or exceedingly poor <http://www.projusticia.org.pe/estadisticas.shtml>.

3 Appendix 2 includes a brief annotated bibliography of the few existing publications on this issue.

4 See ACTETSME, APEC Center for Technology Exchange and Training for Small and Medium Enterprises, Peru SME Profile, information current as of 1998, www.actetsme.org/peru/peru_sme_profile.htm. Perceptions gleaned from interviews confirmed that SMEs represent a significant portion of companies and share of economic activity.

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1.1 Law and Practice

This study has twin aims, descriptive and analytical. First, we carefully analyze, from a legal standpoint, the processes for the enforcement of a court decision or other enforceable commercial paper (for most purposes, through the rest of the paper, a reference to a “court decision” or “court judgment” includes such commercial paper as invoices, bills, collateral agreements, etc.). The main thrust of the study of law is an analysis of the Peruvian Code of Civil Procedure, complementary laws, court regulations and jurisprudence.⁵ Secondly, we analyze the concrete practices that the enforcement processes entail, while attempting to elucidate the barriers, obstacles, and bottlenecks that encumber and complicate the process, beyond the intent of the legislation. In this second level of analysis, the study focuses on the behavior of the main actors in the system -the judges, court staff, lawyers, and those members of the public who are the users of the system-, as well as specific cultural parameters that shape practices in proceedings held to have judgments enforced.

Main Objectives of the Study

- Valuable reference tool for designing programs to reform particular aspects of the system: detailed descriptions of the procedure and its bottlenecks, and user perceptions.
- Economic Growth Promotion: highlight the way improvement in the system may promote SME development, as an important factor in Peru’s economic growth.

1.2 Focus on Small and Medium Enterprises (SMEs)

This study, which applies a multifaceted methodology as described in Appendix 1, undertakes a thorough examination of a specific category of court users, small and medium enterprises (SMEs). This focus is based on the understanding that these firms are the parties most vulnerable to the deficiencies of the system, because they have the least access of all potential users to the legal system and face the greatest difficulties in resorting to alternative mechanisms of dispute resolution -basically, arbitration or mediation- which entail excessive costs. Representatives of smaller firms do not have the necessary training to obtain access to these alternatives mechanisms. An inefficient enforcement system leaves them without access to the courts as a fallback when alternative dispute resolution or ordinary negotiations fail.⁶ In addition, most small firms operate without contracts, and only with certain known entities, thus limiting their growth⁷.

Their large share of the Peruvian economy also gives SMEs great potential to contribute to Peru’s economic growth. They represent diverse sectors of the economy and major industries in Peru. Their importance has been recognized, as evidenced by the new Law on Small and Medium-Size Enterprises, enacted to promote their participation in government procurement activities (also a significant portion of the Peruvian economy), and thus to promote their growth.⁸

1.3 Economic Effect of Enforcement Inefficiency

In addition, we attempt an economic analysis of the problem of inefficiency in the justice system. An area of particular interest is the study of obstacles that firms encounter in seeking execution of judgments that may arise from business transactions or contracts entered into with the State.

5 The Code of Civil Procedure may be reviewed at www.leyes.congreso.gob.pe/CodigoP.htm.

6 For a detailed analysis of the issue of firms having deficient access to the courts, see Herrero, Álvaro and Keith Henderson, *El Costo de la Resolución de conflictos en la Pequeña Empresa: El Caso de Perú [The Cost of Conflict Resolution in the Small Firm: The Case of Peru]* Inter-American Development Bank, Washington, D.C., 2003.

7 Another explanation provided by interviewees in the survey was that the preference of operating without written or legal formalities was a cultural phenomenon.

8 Law 28015, *El Peruano*, 3 July 2003.

Inconsistent court decisions, and inefficient court decision enforcement, can detract from business activities in two basic ways: by contributing to uncertainty and to higher costs.⁹ Uncertainty stem from doubts over: 1) the outcome that may result from a civil suit such as a breach of contract, and, 2) whether even favorable judgments, consistent with the law, can be executed in a timely manner. Direct costs include high court costs and lawyers' fees, and indirect costs generated by malfeasance and other corrupt practices, the inability of court officers and parties to take informed and appropriate action, and excessive delays in the execution of judgments and decisions.

Indirect costs may also be created by precautions that business managers must take in order to avoid running the risk of litigation. These include expensive, extensive investigations of the credit histories of potential customers, refraining from doing business other than on a cash basis, and working with previous suppliers instead of new ones who offer better rates for intermediate goods and services.

Uncertainty and high costs are disincentives for investment and business activities, as well as one of the reasons for the elevated level of informality in the Peruvian economy.¹⁰ Thus, from the standpoint of the economy in general and small and medium-size firms in particular, a decrease in the time required to enforce contracts and court decisions would result in marked improvements in predictability, efficiency, and cost controls, leading to an increase in the overall level of business activity and ultimately greater overall growth throughout the country.¹¹

1.4 Structure of Report

Chapter 1, the Introduction, provides a general outline of the study and a background for the political, historical, judicial, and socioeconomic contexts of Peru. **Chapter 2** details the legal and institutional framework in which enforcement measures are taken with particular emphasis on the types of procedures and courts that hear cases and the actors and users in the judicial system. **Chapter 3** offers a detailed analysis of the time and associated costs required in order to participate in a civil trial, according to the law and to actual practice. **Chapter 4** examines the perceptions of the efficiency of the justice system and provides an in-depth look at the specific roadblocks that are encountered at different stages of a legal process. **Chapter 5** describes and analyzes the justice system and compares its use to alternative mechanisms for dispute resolution. **Chapter 6** observes particular problems that firms encounter with contracts and executing judgments against the State. **Chapter 7** presents the main conclusions of the research and offers programmatic recommendations for improving the system. **Annex 1** describes the research methodology that has been employed. **Annex 2** presents an annotated bibliography and a compendium of best practices and lessons learned. **Annex 3** presents the methodology employed to develop the flowcharts and a narrative description. **Annex 4** offers a supplementary bibliography for this research. **Annex 5** provides a table comparing the major findings of IFES studies undertaken in Argentina, Mexico, and Peru. **Annex 6** presents the IFES Enforcement Issue Matrices. **Annex 7** shows a chart with International Fair Trial Obligations. **Annex 8** presents IFES's global Enforcement Principles and Best Practices; and **Annex 9** includes a chart showing how business decisions may changes as a result of judicial inefficiency.

9 Sereno, Maria Lourdes, et al., *Justice and the Cost of Doing Business: The Philippines*, World Bank, Manila, 2001.

10 It is worth noting that another major source of the high level of informality in the Peruvian economy is the presence of cultural values that place a high priority on a traditional manner of doing business, based on trust and personal contact with business counterparts, which reinforces reluctance to come into contact with government institutions of the executive branch and the judiciary.

11 See Herrero, Álvaro, *op cit* 6.

2. Political, Historical, Judicial, and Socioeconomic Contexts of Peru

2.1 Constitutional Structure of Government

The **Executive Branch** is headed by the President of the Republic who is directly elected to a five-year term. The current president, Alejandro Toledo Manrique (*Perú Posible*) was elected to serve in the 2001-2006 period. Also elected on his ticket were First Vice President Raúl Diez Canseco Terry (who resigned in January 2004) and Second Vice President David Waisman Rjavinsthi. Since January 2003, Peru has been divided into 25 political regions, each of which is led by a regional president, also directly elected for a five-year term. The current trend is for resources and administrative autonomy to shift to the regions.

The **Legislative Branch** is a unicameral congress with 120 representatives, who are elected for five-year terms in Multiple Electoral Districts, by popular suffrage (or preferential votes). Legislative elections are held every five years at the same time as presidential and vice-presidential elections. The President of the Congress (the Speaker) serves for a period of one year and is chosen by majority vote among his fellow legislators.

The **Judicial Branch** consists, first, of the Supreme Court whose president who is also the chief justice, presides over the entire Judicial Branch. He is elected to a two-year term by the full panel of the Court. Next are the Higher Courts or Courts of Appeals and the Lower Courts which, in descending hierarchy, include Courts of Special Jurisdiction (in Civil, Criminal and other matters), the Courts of Qualified Justices of the Peace and the Courts of lay Justices of the Peace.

The 1993 Constitution also establishes an autonomous **Constitutional Court**, with seven magistrates, chosen by two-thirds of Congress for a five-year term of service. It hears constitutional matters and is the court of last resort in cases in which a party alleges constitutional safeguards have been denied, or in which jurisdictions come into conflict, or in other areas as expressly called for under the Constitution.

2.2 The Judicial Branch in Peru

The Judicial Branch exercises responsibility for the administration of justice. Its mission is to decide the outcomes of trials, suits, and questions submitted to it, by handing down judgments and other decisions.

2.2.1 Structure of the Judiciary

The **Judiciary** is organized by specializations into major sections or jurisdictions (civil, criminal, labor, family, agrarian). **Courts of Special Jurisdiction** are first instance courts for these specialized areas, when the first instance court is not a **Justice of the Peace court** (described below). Corresponding **Panels of Superior Courts** hear appeals of matters already heard in the Courts of Special Jurisdiction. In some provinces where there are not specialized courts, non-specialized lower courts, **Courts of Combined Jurisdiction**, hear trials and non-adversarial matters concerning an array of issues.

At the base of the judicial system, are the courts of **Qualified Justices of the Peace**, which act as the trial courts or courts of first instance for small claims and other procedures provided for under the law. Appeals from these courts are heard by **Courts of Special Jurisdiction**. In some places, an upstanding local resident who may not necessarily have a background in the law may be appointed to the bench as a **Lay Justice of the Peace**.

Anti-Corruption Courts have also been created to try cases involving the State and corruption issues. After cases of prosecutions against public officials on charges of corruption led to the downfall of the government of former President Alberto Fujimori, a Special Prosecutor's Office since 2000 has been entrusted with the interests of the State in the area of corruption.

2.2.2 Appointment of Judges

Under the Constitution, in order to be appointed as a justice of the Supreme Court, an individual must be at least 45 years of age, be a Peruvian citizen by birth, and have served either as a prosecutor or as a judge for a period of 10 years, or as an attorney or law professor for no less than 15 years. A Superior Court judge is required to be at least 32 years of age, be a Peruvian citizen by birth, and served as an Specialized or Mixed Judge, Adjunct Superior Prosecutor or Provincial Prosecutor for 5 years, or practiced law or been a university faculty member in a law related discipline, for a period not inferior to 7 years. A court of Special jurisdiction judge is required to be at least 28 years of age, be a Peruvian citizen by birth, and served as a Qualified Judge of the Peace for more than 2 years, or Secretary of the Superior Court or Adjunct Provincial Prosecutor for more than 3 years, or practiced law or been a university faculty member in a law related discipline for more than 5 years.

Once these requirements are met, candidates are evaluated by the National Judicial Council, the agency responsible for making appointments to the bench. Pursuant to Article 150 and following of the Constitution, the Judicial Council selects and appoints judges and prosecutors through public competitions and personal evaluation.¹²

2.2.3 Current Judicial Reform Status

There are currently a number of different proposals to reform the Judiciary, in response to the dissatisfaction of the citizenry with the performance of its responsibilities. To a great extent, the policy debate over judicial reform centers on the manner in which it should be carried out and whether judges themselves should take part in the reform.

The debate recently became more heated after Congress, in October 2003, and in response to an executive branch proposal, created the Special Committee for Comprehensive Reform of the Judiciary (known by its Spanish acronym *CERIAJUS*). The Committee includes members from a broad range of civil society, academia, and the three branches of government.

Another source of controversy undercutting the stability of the Judiciary and confidence in it is the mechanism for the appointment of judges. The Constitutional Court (before whom dismissed judges have lodged appeals) has issued findings that are at odds with the actions of the National Judicial Council, which is the agency responsible for the appointment of judges and prosecutors. This dispute has been aggravated in recent years by the large numbers of provisionally appointed judges.

2.3 Political Situation

Since the late 1990s, when the possibility of President Alberto Fujimori being reelected a second time was being discussed, there has been a palpable sense of political uncertainty fed by economic conditions in the country, notwithstanding significant macroeconomic progress that has taken place all the while.

12 For further information regarding Judicial Councils, see IFES' *Guidance for Promoting Judicial Independence and Impartiality*, January 2002, Technical Publication Series, USAID Office of Democracy and Governance, and Violaine Autheman and Sandra Elena. 2004. *Global Best Practices: Judicial Councils – Lessons Learned from Europe and Latin America*. IFES Rule of Law White Paper Series. WP # 2. IFES: Washington, DC. In addition to the reports, IFES also provided technical assistance to the Peruvian Judicial Council in relation to the methodology for evaluation of sitting judges.

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In strictly political terms, President Toledo's popularity has plunged considerably, along with that of most executive branch institutions and persons serving in them. Reasons for this include a lack of leadership, public posts being filled by members of the governing party, and numerous accusations that members of the current government have engaged in nepotism and corruption.

2.4 Socioeconomic Situation

By July 2003 estimates, Peru has a population of 28.4 million, about 7.9 million of which (almost one-third), reside in metropolitan Lima. The unemployment rate is 9.4%. This figure does not include the substantial portion of the economically active population that is underemployed. According to figures for 2001, the Gross Domestic Product of Peru was US\$ 60.9 billion, and the real rate of annual growth was 5.4%. The exchange rate has remained stable at 3.5 *soles* per US\$ 1.00, since mid-1999.

II – THE LEGAL AND INSTITUTIONAL FRAMEWORK OF ENFORCEMENT PROCESSES

This chapter describes the setting in which enforcement proceedings take place. Justice of the Peace Courts and Courts of Special Jurisdiction, in particular Civil Courts, are the courts largely responsible for the enforcement of judgments in the Peruvian system. We also analyze the role and perceptions of various actors such as judges, court staff, police, prosecutors, public registrar employees, attorneys and finally, the parties themselves.

1. Types of courts

In order of ascendance, the hierarchy of the five levels of courts in Peru is as follows: Courts of Justices of the Peace (previously known as lay Justices of the Peace), Courts of formally qualified Justices of the Peace, Courts of Special or Combined Jurisdiction (or Special Courts), Superior (i.e., Appeals) Courts, and the Supreme Court.¹³

The Judiciary is organized into 27 judicial circuits or court districts, which are defined by the geographic-political boundaries of the departments that make up the country. The Executive Council of the Judiciary presides over and formulates and implements the general policies and development plan of the Judiciary.

TYPES OF COURTS	POWERS
(Lay) Justices of the Peace	<ul style="list-style-type: none"> • The judge need not be an attorney and is only required to have a primary school education. • Narrowly defined area of civil jurisdiction, such as small claims. • Court hears issues mainly concerning child support payments, evictions, monetary payments, and attachment of personal property.
Formally Qualified Justices of the Peace	<ul style="list-style-type: none"> • Court cases concerning civil, family, criminal and pension matters are heard up to a specific monetary level. • In civil matters, enforcement cases may be heard concerning enforcement of debts, third-party challenges in cases under their purview, suits concerning civil and business contracts, and admission of evidence.
Courts of Special Jurisdiction	<ul style="list-style-type: none"> • Jurisdiction for a specific area of the Law (business disputes are heard by a panel of civil judges). • Cases originating with Qualified Justices of the Peace are heard on appeal.
Superior Courts ¹⁴	<ul style="list-style-type: none"> • Cases heard on appeal have already been tried before Special Courts in their area of jurisdiction. • Court of original jurisdiction for certain matters stipulated by Law.
Supreme Court	<ul style="list-style-type: none"> • Sets precedents on the scope and interpretation of substantive rules of law. • Acts as court of interlocutory appeal to stay or overturn lower court rulings (cassation). • Hears appeals of matters decided by the Superior Court. • Is organized into panels depending on the area of law.
Constitutional Court ¹⁵	<ul style="list-style-type: none"> • Agency charged with monitoring the constitutionality of rules and regulations.

Source: Peruvian National Constitution and laws.

13 Article 138 of the 1993 Political Constitution of Peru assigns responsibility for the administration of justice to the Judiciary, which by law must regulate the jurisdictional agencies and their corresponding areas of jurisdiction. Article 26 of the Organic Law of the Judicial Branch (hereinafter, the Organic Law) spells out the five-level hierarchy for the functional jurisdiction of the Court Administration.

14 Superior Courts are organized into the Special Divisions of Criminal, Civil, Labor, Agrarian, and Family Matters, pursuant to Articles 40, 41, 42, and 43 of the Organic Law. Divisions of Combined Jurisdiction may be created depending on the needs of each Judicial Circuit, as provided for under Article 37 of the Organic Law.

15 Pursuant to Article 41 of the Organic Law for the Constitutional Court (Law 26435), the Court is responsible not only for rulings on the constitutionality of laws that may contravene the Constitution, but also for serving as the panel that will hear claims to protect rights (for injunctive relief or “*amparo*,” to produce information or *habeas data*, demand compliance, and *habeas corpus*) that have been denied by either the Supreme Court or Special Panels of the Superior Court.

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IFES's examination focuses on the Courts of Qualified Justices of the Peace and the Courts of Special Jurisdiction (particularly Civil Courts, the type of Special Jurisdiction court that hears business disputes), because they are the courts of first instance for enforcing decisions. Metropolitan Lima has no Lay Justices of the Peace. The results of the survey (see Table 2) indicate that only 20% of those surveyed have ever used the Courts of (Lay) Justices of the Peace. Because of their much smaller role in enforcing judgments, an in-depth exploration of this type of court is left for future research.

1.1 Formally Qualified Justices of the Peace

Qualified Justices of the Peace are more “all-purpose” than specialized court judges and hear court cases concerning a variety of areas, such as civil, criminal, family, and labor issues¹⁶. They also hear small civil claims. The Executive Council for the Judiciary sets the monetary level that qualifies as “small claims” for the purposes of being heard by a Justice of the Peace.¹⁷ Cases filed at this level may be appealed to the Court of Special or Combined Jurisdiction with authority over the subject matter and with geographic jurisdiction, which acts as the court of last resort.

Approximately 40% of those surveyed reported frequent or occasional experience with matters in Justice of the Peace Courts (See Table 2). This percentage mirrors the percentage of those who expressed general satisfaction with these courts (See Graph 1). Further, the 54% that reported never using Justices of the Peace also mirror the 54% who found the question regarding satisfaction with the Justices of the Peace not applicable to them. Only 5.6% of survey participants found Justices of the Peace completely unsatisfactory (See Graph 1). We conclude that 40% of those surveyed found that the Justice of the Peace Courts were satisfactory, and in further examining the data, it appears that the 40% represents a majority of those surveyed that had actually used the court in question.

Table 2. Frequency with which firms use Justices of the Peace
Percentage providing an affirmative answer to frequency of use of type of Justice of the Peace

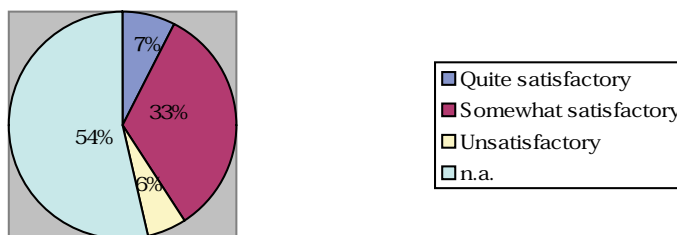
	Qualified Justices	Lay Justices
Frequently	7.4%	0%
At some time	33.3%	20.4%
Never	53.7%	70.4%
Does not know / does not know answer	5.6%	9.3%

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¹⁶ Pursuant to Article 57 of the Organic Law.

¹⁷ In civil matters, these courts can hear cases seeking to enforce judgments for payments due for debts or credits, third-party petitions filed in connection with suits on their calendars, damages sought in connection with automobile accidents, evictions, suits over breaches of contracts pursuant to the civil code or commercial contracts, and preliminary evidence hearings. In criminal matters, they try misdemeanors or minor infractions. Family court matters concern alimony and child-support payments, so long as evidence of paternity is irrefutable. In labor matters, these courts hear employment cases involving wage and salary payments, reimbursements, and other workers' rights involving amounts no greater than US\$ 914 (or 10 Procedural Reference Units, as explained in footnote 7), objections to employer-imposed sanctions, recognition of home-based workers' rights regardless of monetary amount, and any other action stipulated under the law. Here, it is important to mention that another type of case before these courts involves payments that a Pension Fund Administrator (AFP following the acronym in Spanish) should receive from worker contributions to the retirement and pension system and are withheld by an employer who then fails to fulfill its obligation to make the required payments to the AFP (Article 38 of the Act for the Single Structured Private Pension Fund Administration System). AFP cases are discussed in-depth in Chapter IV.

Graph 1: Users' Satisfaction with Justices of the Peace Courts



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1.2 Courts of Special Jurisdictions

1.2.1 Court Specialization and Appellate Review

Courts of Special Jurisdiction hear cases concerning civil, criminal, labor, agrarian, or family matters.¹⁸ Unlike the Courts of Justices of the Peace, where a judge may hear several different types of matters, a Special Jurisdiction Judge hears cases exclusively in one of the specialized areas. The Special Jurisdiction courts that deal with civil matters, the Civil Courts, settle business disputes.¹⁹ There are no commercial law courts. In addition to specialized cases, Courts of Special Jurisdiction hear cases on appeal from Qualified Justices of the Peace.

1.2.2 Courts of Combined Jurisdiction

Article 48 of the Organic Law also provides for the establishment of Combined Jurisdiction Courts in those provinces where such an effort is warranted. They would hear family matters, criminal matters, and civil/business disputes, or whatever combination of cases specified to be in their jurisdiction. Combined jurisdiction courts are created in response to lack of economic resources and the demographics in those areas. Their status and place in the hierarchy is the same as that of the Courts of Special Jurisdiction.

1.2.3. Comparison of User Satisfaction with Justices of the Peace and Courts of Special Jurisdiction

In Table 3, the data indicates that Special Jurisdiction Judges for civil matters are considered less efficient than Qualified Justices of the Peace. Only 18.5% of those surveyed reported that these civil judges were the most efficient for settling civil suits, versus 40.7% who felt Qualified Justices of the Peace were most efficient. The major problems detracting from the efficiency of these civil courts are examined in Chapter IV.

¹⁸ Pursuant to Article 46 of the Organic Law for the Judiciary.

¹⁹ A project to create Courts of Special Jurisdiction for Commercial Matters is currently being carried out by the Judiciary with support from the U.S. Agency for International Development (USAID) and other donors.

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Table 3: Most efficient courts for settlement of litigation Survey participants choose among courts	
Lay Justices of the Peace	11.1%
Qualified Justices of the Peace	40.7%
Civil Courts	18.5%
They're equally efficient	1.9%
They're equally inefficient	13%
Don't know/No answer	14.8%

IFES Enforcement of Judgments in Peru Survey 2004

2. Types of enforcement proceedings

Enforcement Proceedings, the concern of this study, are classified as three different types: (i) executive trials, (ii) collateral enforcement proceedings, or (iii) enforcement of court judgments, also called mandatory enforcement. For purposes of this study, the term “enforcement cases” refers to all three kinds of enforcement proceedings:

Table 4. TYPES OF ENFORCEMENT PROCEEDINGS IN PERU	
Name of proceeding	Description
Executive Trials (<i>juicios ejecutivos</i>)	<ul style="list-style-type: none"> Based on titles or other documents that demonstrate an obligation that is certain, definite, and payable (including invoice/check collection, rent/lease payments, and pension contributions in arrears). Commercial paper adjudication. They may be lodged before Qualified Justices of the Peace or Special Jurisdiction Judges, depending on the amount involved.
Proceedings to Enforce Collateral (<i>ejecución de garantías</i>)	<ul style="list-style-type: none"> Based on titles constituting a guarantee payable to a creditor, a pledge of collateral (real estate/immovable property mortgages/pledges or personal property/ movable property pledges). They may be lodged only before Judges of Special Jurisdiction.
Enforcement of Court Judgment/ Mandatory Enforcement Proceedings (<i>ejecución de sentencia</i>)	<ul style="list-style-type: none"> Proceeding that follows a trial in which a judgment is issued entitling one party to demand satisfaction from the other. It begins after a court order/decision has been issued.

Source: Code of Civil Procedure

Below, we provide a description of each of these three basic proceedings with the aid of flow charts. The methodology for producing the flow charts and more in-depth descriptions of these three types of processes are provided in Annex 2.

2.1 Executive Trials

In this type of proceeding, court suits are filed based on titles or other documents that demonstrate an obligation that is certain, definite, and payable, pursuant to Article 689 of the Code of Civil Procedure (hereinafter, the CCP). Thus, the proceeding assumes that there is a presumption of credibility under the law, due to the prior

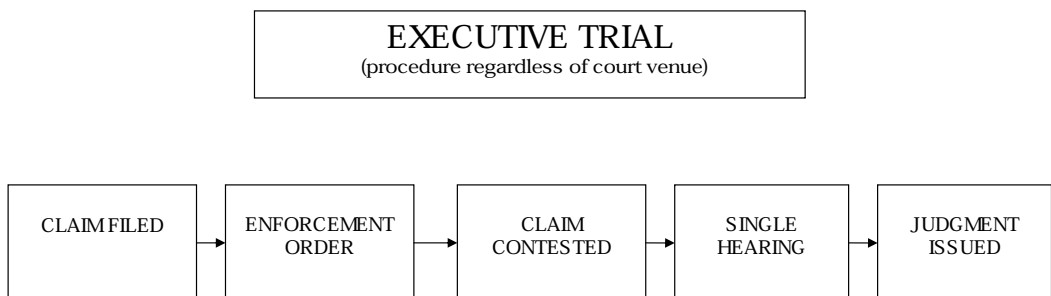
existence of a document recording an obligation.²⁰ In other words, this is the proceeding that is used to enforce commercial-paper type agreements such as invoices, bills, checks, etc.

The proper filing procedures for such claims and matters depend on the amount, so that smaller cases are filed before a Qualified Justice of the Peace and larger cases filed before a Civil Court Judge²¹ (if the amount litigated is in excess of US\$ 4,430, 15,500 soles or 50 procedural reference units or PRDs).²²

The enforcement proceedings originally filed before Qualified Justices of the Peace may be appealed to a Civil Court, which is the court of last resort. Thus, these cases can only be considered at two levels of jurisdiction. However, executive trials initiated before the Civil Court may be subject to two levels of appellate review, the Civil Panel of the Superior Court, and if a party requests further review, before a Civil Panel of the Supreme Court, allowing two chances at overturning an unfavorable decision.

2.2 Proceedings for Enforcement of Contracts Secured by Collateral

Collateral claims are filed on the basis of a contract, deed or bond that sets forth specific collateral payable to the creditor, pursuant to Article 720 of the CCP. Pledges with both movable and immovable property as collateral are enforced. Pursuant to article 720 of the CCP, the Civil Court Judge will always have jurisdiction over these proceedings, never a Qualified Justice of the Peace, even when the amount is a small claim. The procedure is similar to an executive trial, except that the property already has been identified and attached pursuant to the pledge agreement between the parties. The action is initiated by submission of the appropriate documents to the Civil Court Judge. The Civil Court Judge will make a determination of enforceability, and from there proceed as if enforcing a court judgment on that piece of collateral.



20 Enforcement proceedings, pursuant to Article 693 of the CCP, are held for claims on debts represented in credit instruments (e.g., checks, promissory notes, bank drafts, and other documents of monetary obligation, pursuant to the Law on Credit Instruments), extra-judicial exchange, rents in arrears, public securities debts, and others covered under special legislation, such as leasing payments regulated under Legislative Decree 299 and pension contributions to the System of Private Pension Agency (PFAs), as per Decree Law 25897.

21 In contrast to pension contribution matters which, regardless of the amounts at issue, can only be brought before Qualified Justices of the Peace.

22 The Procedural Reference Unit (URP, following the Spanish acronym) is 10% of the Tax Levy Unit (UIT, following the Spanish acronym) which is set each year as a monetary reference point for the payment of specific fees and/or services. (The UIT for 2004 is 3,200 soles or US\$ 914).

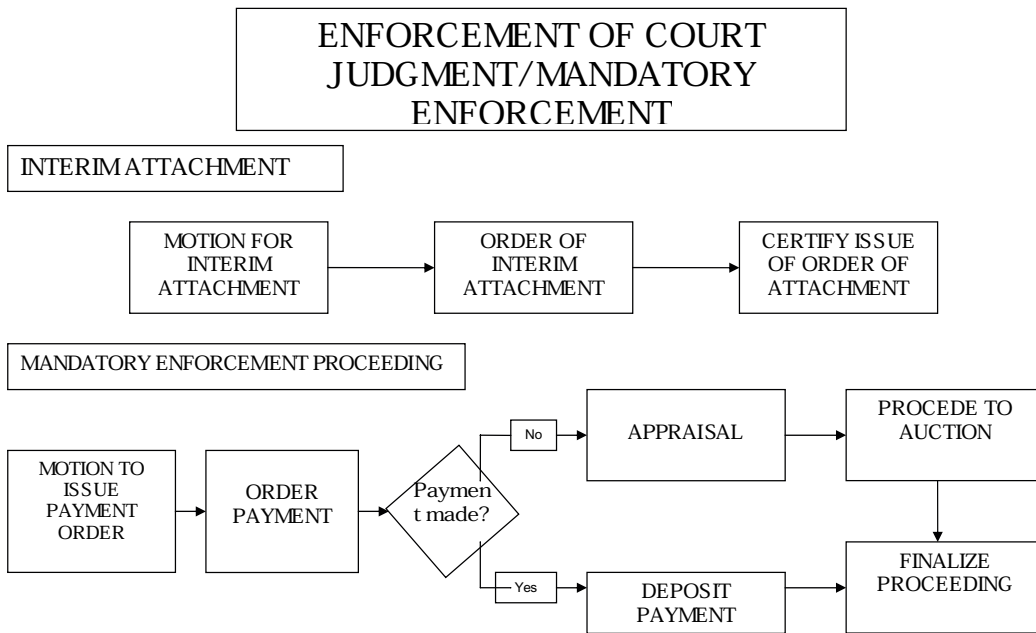
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2.3 Enforcement of Court Judgment/Mandatory Enforcement

After a trial on the merits in which a judgment was reached and in case the debtor has not voluntarily complied, the judge issues an order to begin enforcement proceedings. First, the judge orders the defendant-debtor to comply with the judgment. Then, in case the debtor fails to comply, the judge orders the seizure of assets. Finally, the property is sold, and the judge orders the final liquidation and payment to the creditor.



3. Court auction of debtor’s assets

Under the three aforementioned proceedings, if the defendant fails to comply with the court order, the case will pass, at the plaintiff’s request, to the stage of mandatory enforcement (enforcement of court proceedings). If the case involves a monetary debt, and assets have been attached, the assets will be liquidated and the creditor paid.

If the assets are movable or immovable property, the assets will be attached. The judge will next appoint experts to appraise the worth of assets and, after their appraisal has been approved, will schedule a date to auction the assets at the courthouse if real estate/immovable assets are being auctioned or, if the assets in question include movable property, will appoint a public auctioneer. After the auction has taken place, the judge will order the defendant to endorse the amount of the sale so that the balance due on the debt can be collected.

In practice few cases ever reach this stage of enforcement. Comprehensive statistics that would provide a breakdown of the quantity and types of court auctions that arise from civil and commercial cases are not available. However, institutional actors, such as judges, concur with users of the system, such as attorneys in general and bank representatives, that the proportion of cases that progress from the mandatory enforcement stage to actual auction does not exceed three to five percent (3-5%).

High costs, the level of procedural complexities, and the time investment required are disincentives to proceed with auction. Below, we describe the main procedural aspects of auctions under the law and in practice, and other reasons that discourage parties from resorting to this particular legal procedure.

3.1 Asset appraisal

Once the court case reaches the enforcement of judgment stage, the next step requires the auction of seized assets and/or collateral in order to cancel the outstanding debt or credit that is due the plaintiff from the defendant. This requires an appraisal of assets that are to be auctioned off.

For enforcement of collateral, the parties may have agreed to an appraisal as part of the original contract. The original appraisal and an updated one is to be included in the plaintiff's filing. The court may use either price. If the court deems the appraisal of the assets to be out of date, it may appoint two experts to conduct a new appraisal, pursuant to Articles 728 and 729 of the Code of Civil Procedure. The judge's decision on whether to appoint appraisers is not subject to review, regardless of whether the parties agree on the appraisal.

The appraisers present a report by the deadline set by the court. The parties are then notified by the court of the new appraisal, so that they may weigh in with any comments. If, within three days of having received notification from the court, any one of the parties registers a comment, the judge will so advise the other party and the appraisers. The court will then proceed to issue a finding either approving or rejecting the appraisal, regardless of whether the parties and appraisers concur with the judgment. If the court rejects the appraisal, it will order the appraisers to undertake a new appraisal or appoint new appraisers to perform this task. This decision by the court is not subject to review. Each appraisal requires approximately one to three months, according to experts' opinion.

After the court approves the appraisal or reappraisal, a date and time for auction must be set. Even though court approval of the reappraisal may be appealed by one of the parties, pursuant to the Civil Procedure Code, neither the proceedings nor the schedule for auction announced by the court is subject to suspension pending the appeal. In practice, since a judge will not sell a property affected by an ongoing appeal, the auction is scheduled so that the appeal will be resolved before the auction date.

3.2 Auction of assets

If the assets are movable property, the court will appoint a Public Auctioneer, who will schedule the date and time to carry out the ordered auction.

When the attached assets involve real estate, the court will announce the pertinent date and time for auction, which it will conduct in the courthouse.

The parties are advised of the auction schedule. The announcement must be published in the Official Newspaper *El Peruano* and, whenever the real estate is located outside the geographical jurisdiction of the court, in the daily newspaper responsible for publications in the property's locality.

The first announcement of an auction must be published for six (6) days in the case of real estate; for three (3) days for auctions of personal property. The announcement of subsequent auctions of real estate must be published for three (3) days for unmovables, and for one (1) day for personal property. Publication requirements are extremely formal and must meet a series of requirements, pursuant to Article 734 of the CCP. If any one of these requirements is not met, even if they are not substantive, the auction is cancelled.

Any interested parties other than the debtor may participate in the asset auction. At the appointed time and day, the Judge or Public Auctioneer will open the auction for bids at two-thirds of the value of the court-approved appraisal of the property. The property will be sold to the highest bidder. Should no qualifying bid be offered, the auction is declared null and void. In this case, the plaintiff-creditor has two options: either to request that title to the real estate be transferred as payment against the debt or to request that a second auction be held.

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If a second auction is requested, the date and time is rescheduled, and the value of the minimum qualifying bid from the first auction reduced by 15 percent. If the second auction is also voided, the plaintiff still can exercise the same two options of having another auction held or having the property transferred in payment for the outstanding debt. If the third auction is also voided and the plaintiff-creditor does not request property transfer within ten days of the last auction, the judge will appoint new appraisers to determine the value of the assets, thereby recommencing the entire auction process, including appraisal, selection of experts, etc. and following the same stages described above, until either the plaintiff-creditor or a third-party bidder has received title to the property.

3.3 Three-Auction Limit

The purpose of a recent legislative amendment which limited the number of auctions to three was to avoid extremely low minimum values resulting from repeated auctions lowering the minimum bid by 15% each time.²³ The goal was to facilitate a higher value for the sale of auctioned real estate, which would allow a greater proportion of the claimed debt to be redeemed or paid off.

The experts interviewed believed that the benefit of this amendment is limited, given that it was based on the false premise that legislation could set property prices, or ensure “proper” property valuation in a market economy. If the prices for assets are set by the free play of supply and demand, the court cannot command higher prices for the property than the market prices.

Limitation of bids appear to be an ineffective way to generate greater return from assets at auction. Legislators who are concerned that the sales prices for real estate in these cases fail to reflect market conditions should instead focus on and correct the existing auction procedural defects that prevent real and effective competition in the auctions (as is set forth in detail in Chapter 4).

3.4 Liquidation of proceeds and payment to creditor

After a successful auction, the judge must order final liquidation and payment. Interviewees did not complain about post-auction procedures. Perhaps this is a result of the lack of experience most had with the auction process. However, the debtor may object to the final liquidation, which may require that additional experts be retained to address debtor’s objection. The post-auction stage of the proceedings also poses the possibility of significant difficulty through objection and delays.

4. The institutional actors in the enforcement process

The groups of actors that take part in the process of enforcement of judgments are varied in legal status and in the roles they perform:

Court Actors: (See sections 4.1 and 4.2 of this chapter)

- **Judges**
- **Court staff**

Public employees outside the courthouse

- **Police**, who play a role in cases in which a task requires law enforcement assistance, such as the seizure of personal property, evictions, etc.
- **Prosecutors**, who have no more than a minor part in enforcement processes. For example, they prosecute instances of fraud arising from illegitimate property transfers.

23 Legislation to restrict the number of auctions to a maximum of three was enacted as Law 27740 of 29 May 2002, thereby amending Article 742 of the original Code of Civil Procedure, which set no limit on the number of auctions for a single property, but simply reduced the bidding floor by 15% from previous auctions.

- **Employees and officials of the public registrars**, who are responsible for keeping the registrar files in good condition, for the efficient circulation of necessary information on property, and for carrying out court orders concerning the registration of attachments, seizures and other procedures.
- **Experts**, who are responsible for issuing technical opinions on matters requiring informed examination, such as appraisals of assets or determinations of the authenticity of signatures or documents.

Private Actors

- **Parties**, who are the individuals or entities that initiate court cases petitioning the court to have their claims fulfilled.
- **Attorneys**, who are the legal representatives of the parties, responsible for providing legal assistance and driving the enforcement cases.

The main actors in the court system are the judges themselves and the courthouse staff. Other public employees listed also play roles in the process, although enforcement procedures may not be their primary responsibility.

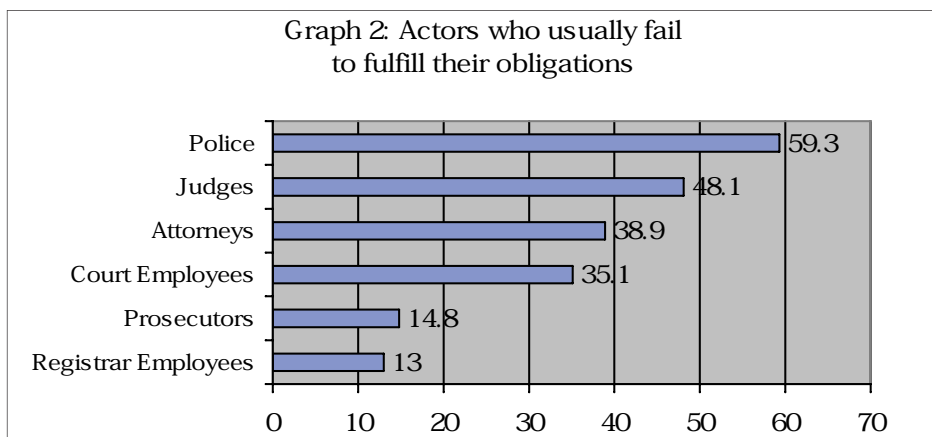
4.1 Public Perception of Various Actors

4.1.1 Police perceived as ineffective

We examined court system users' perceptions of each of the institutional actors listed by surveying the performance level of each in the discharge of their duties. The results, presented in Graph 2, indicate that 59% of those surveyed said that the police usually failed to fulfill their role. This result is consistent with the statements received in the course of the in-depth interviews. Some of those interviewed mentioned that in activities such as seizures, attachments, and evictions, the police will not act without additional payments as inducement, "facilitating payments". Furthermore if the enforcement order is issued against a "powerful" person, according to interviewees, the police prefer to play a passive role and refrain from cooperating with justice.

4.1.2 Legal personnel: judges, court staff, attorneys perceived poorly

Judges were also viewed critically by a large proportion of those surveyed. Of the survey participants, 48.1% believed that judges failed to carry out their responsibilities. A high percentage of survey participants also viewed attorneys and court staff as ineffective.



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Due to time and resource constraints and the central role of judges in the enforcement process, our analysis focuses primarily on them and the courthouse staff. However, the roles of attorneys and the police need further attention, since they are critical players in the enforcement process.

4.2 Judges

Judges are the most important actors in the process. They steer and propel the process. As expressly indicated by article 2 of the Preliminary Title of the CCP, judges themselves are responsible for maintaining the momentum of case proceedings.

4.2.1 Failure to discharge prescribed duties

4.2.1.1 Historical and legal perspective

In the previous Code of the nineteenth century, proceedings only advanced at the request of a party, the “disposition” system. Thus, the current code awards a larger, preponderant role to the judge. The reasoning behind having the court drive the process is the idea that the public discharge of responsibility is the means by which the State enforces existing law and achieves social tranquility.²⁴

In the discharge of its responsibility, the court should take whatever measures it may deem appropriate to prevent a case from grinding to a halt, pursuant to Article 50 of the CCP, including the imposition of fines on the parties in order to require them to carry out court orders, as set forth under paragraph 1, article 52 of the CCP. It is the court’s responsibility to issue judgments, orders, and findings as a means of settling issues arising in the course of a case.

4.2.1.2 Judges do not exercise initiative in moving cases forward

Notwithstanding their legal mandate, in practice the majority of judges cling to the bygone concept of “disposition” and exercise a minimal role in moving the process along. Many will not move a case forward without impetus (an “impulse” in Spanish legal terminology) from the parties.

Even when a case is active, judges do not appear to exercise their power to keep it running smoothly, or to prevent unnecessary delays or obstacles to completion. For example, the judges consulted concurred that fines are virtually never imposed when parties engage in delay tactics, obstruct proceedings, or fail to abide by court orders. Although imposing fines is discretionary, judges indicate that they are reluctant to do so, except in extreme cases. When asked why they do not exercise this prerogative in order to expedite cases, they give two reasons, one “cultural” and the other “practical.” First, the judges and the parties are not accustomed to sanctions, and secondly, even if the judges imposed sanctions, mainly monetary ones, they would face the same obstacles in enforcing payments as they do in other cases, when debtors refuse to honor payments.

Thus, from our research, it appears that judges are active neither in driving enforcement cases to successful endings, despite their legal duty to do so, nor in preventing obstacles to successful completion.

²⁴ Monroy Gálvez, Juan, “Los Principios Procesales en el Código Procesal Civil” [“The Procedural Principles in the Code of Civil Procedure”], 1992, p. 266, in *La formación del Proceso Civil Peruano. Escritos reunidos.* [The Development of Peruvian Civil Case Law: Collected Documents] Comunidad 2003, 1st Edition. Lima.

4.2.3 Deficient judicial knowledge/training

One of the major critiques of the judges voiced by attorneys and bank and business representatives in their interviews is that many of them are too poorly educated to perform their professional responsibilities. Judges are frequently recruited from the least prestigious universities, reflecting the low esteem in which the profession is held. Furthermore, their salaries are lower than in the private sector, notwithstanding significant raises in recent times.²⁵ Judges are required to have an understanding of a multiplicity of different issues and areas, while never becoming truly adept in any of them. So, for example, a civil court judge will handle enforcement proceedings, motions for stays and injunctions on constitutional grounds (*amparo*), breaches of contract, convoluted financial operations, and modern business contractual provisions, such as leasing arrangements. Business representatives complain that judges are not knowledgeable in such areas of commercial activity. Many interviewees state that judges lack the financial/economic understanding required to enforce standard clauses in banking and international trade contracts. As a result, many business people prefer to engage in arbitration to avoid falling victim to an erroneous finding by a judge.

The judges themselves echo the responses of participants, indicating that they often believe they lack the training to handle complex commercial issues.²⁶ Many of them bemoan the absence of training programs that would keep them abreast of developments in these areas. Others indicate that they are not interested in handling such matters, because their calendars are already overburdened with other types of cases. They see specialized commercial courts as a way to address the deficiency. On the other hand, several judges interviewed demonstrated considerable understanding of financial issues, and were fully aware that protraction and uncertainty in court proceedings lead to increases in the cost of loans, which ultimately threatens the interest of the same debtors that they, and especially their debtor-friendly colleagues, seek to protect.

Finally, judges' bias in favor of debtor parties is alleged by a large proportion of those interviewed. The bias appears particularly prominent when the plaintiffs are banks or other financial concerns. They note that there appears to be a tendency of courts to prolong proceedings in order to afford a debtor more time to improve his/her financial situation and thereby honor the debt. Interviewed attorneys reported that judges often stated that "banks have money and take advantage of debtors" as examples of favoritism in the courts.

4.3 Court staff/legal specialists

Previously known as Court Clerks, the paralegal staff is responsible for informing the court of litigants' pleadings and court orders. Their role is to assist with the work of the judges, providing them the documents and decisions included in filings and formulating drafts of orders that judges will issue.

In practice judges tend to sign, review, and/or amend the draft decisions proposed to them by the legal specialists. Therefore, though it is not their prescribed role, the legal specialists actually prepare the drafts of the court decisions, whether they are findings, decrees, or final judgments.

25 This salary increase for judges has encouraged some mid-career attorneys to reconsider the option of serving on the bench, although many have not been able to pass the qualifying examinations. Still, the most qualified law school graduates are discouraged from considering a career as a judge due to the poor working conditions common in the Judiciary, as compared to those in major law firms. Moreover, the private sector offers better opportunities for professional development.

26 Many interviewed acknowledge that the level of the judiciary is mediocre in metropolitan Lima, and that outside the area of the capital city, judges are even less knowledgeable and educated. One member of the Supreme Court who was consulted indicated that, although this was not their normal responsibility, justices of the Supreme Court often "have to" rule on the merits of a case, when decisions from the provinces contain very basic mistakes.

In the interviews, some judges indicated their dissatisfaction with the “specialist” staff under their supervision. They noted that the court staff needlessly augmented the requirements of parties and burdened them with superfluous conditions for their filings. In the judges’ view, the staff sought “facilitating payments” from the parties, in exchange for facilitating proceedings. According to the judges, the attitude of their staff was to perform the minimum amount of work possible, thus delaying proceedings and increasing the caseload, further bolstering the general perception that the justice system is corrupt.

Furthermore, the technical level of the staff was considered inadequate. According to the judges, most work in the court system because they did not have the opportunity to obtain employment in the private sector, due to their negligible professional qualifications. Some judges, particularly justices of the peace, actually suggested a preference for working without any such “assistance”.

4.4 Anti-corruption measures

To avoid independent relationships between staff and parties, internal procedures of courthouse organization have been streamlined to decrease the opportunity for court staff to place illegal demands on the litigants. Some judges appear to vigorously enforce the rules, in order to decrease what they see as staff interference with the proceedings and parties. However, according to some of the judges interviewed, court staff often staunchly resists reforms.

5. System users

5.1 Courts of Special Jurisdiction

The litigants who most often use the Civil Courts of Special Jurisdiction are legally incorporated entities such as banking and financial institutions. Depending on their size, they file three out of five cases on these courts.²⁷ The majority of suits filed by banks involve debt enforcement and collateral enforcement proceedings.

Special Court Judges and litigating attorneys believe that the majority of the current caseload consists of debt collection suits filed by banking and financial institutions. They attribute this fact to the economic crisis that Peru has been undergoing, which leaves borrowers unable to pay their debts to these institutions, as a cause.²⁸

Another similarly important component of their caseload, according to the judges, are proceedings that raise constitutional due process issues, especially the so-called stay orders and injunctions known as *-amparos-* that are filed by individuals.²⁹

27 González Mantilla, Gorki, Jean Carlo Serván, Luciano López, and Hernando Burgos, *El sistema judicial en el Perú: un enfoque analítico a partir de sus usos y sus usuarios [The Court System in Peru: An Analytical Perspective of Functions and Users]*, World Bank, Universidad Católica del Perú, (to be published). Note that in terms of absolute numbers there are more individual litigants than there are litigating legal entities, but the latter are party to more cases. Individuals more often join together in filing suits, whereas legal entities tend to be the sole plaintiffs to a suit.

28 This figure is confirmed by Gonzales Mantilla, *op cit.* 27, who has found that 62.26% of all plaintiffs are retail financial institutions. Marketing and service enterprises represent 20%, industrial firms only 8.02%

29 Pursuant to Law 23506, the action to seek a stay or injunction, known in Spanish as an *“amparo”* (literally, “relief” or “shelter”) is constitutionally guaranteed. It is filed for the purpose of defending the fundamental constitutional rights of any person. The aim of an *amparo* brief is to restore conditions to a previous state, prior to the violation of the constitutional rights of the plaintiff or the threat thereto. This procedure protects constitutional rights to property, inheritance, to freedom from discrimination, free association, citizenship, freedom to engage in contracts, the inviolability of one’s home, freedom of assembly, freedom to teach or profess doctrines, and due process, among others.

5.2 Courts of Qualified Justices of the Peace

According to IFES interviews with qualified justices of the peace and with representatives of Pension Fund Administrators (AFPs), the main users of their courts are the four AFPs that operate in the Peruvian market. (For a more detailed exposition of the AFPs and their cases under the jurisdiction of Qualified Justices of the Peace, see Chapter IV, Section 4.5).³⁰

The second most frequent type of cases before justices of the peace are child support lawsuits filed by individuals in front of Qualified Justices of the Peace. Following the child support litigants, banks are the most frequent, making them third in the list of common claims in front of justices of the peace.

30 The information presented here differs substantially from that obtained in a study conducted by the World Bank and the *Universidad Católica del Perú*, which found that the main user of Courts of Qualified Justices of the Peace were the Banks, with AFPs having a far smaller presence. Gonzales Mantilla, *op cit.* 27, this study calculated that in cases filed in 1998 and concluded by 2001, 55% of the plaintiffs in courts of justices of the peace were legal entities, with 85% of these being different kinds of commercial corporations. Of the legal entities in the sample, 49% were banks and other retail financial institutions, whereas 36% were AFPs. Laws and circumstances have changed considerably since that time.

One reason for this discrepancy may be that the other study examined cases filed in 1998. Since that time, conditions in the jurisdictions of Qualified Justices of the Peace have changed substantially, owing to the changes in the regulatory framework of the Private Pension System (PPS) that led to many more AFP filings. The PPS was created in December 1992, by Decree Law 25897, enacted 6 December 1992; however, its rules and regulations were not enacted until April 1998, which was when these agencies began to file civil suits on a large scale at this level of jurisdiction against employers who failed to meet their regulatory obligations under the pension system. In 1999, the AFP filings began to increase significantly to the point that these agencies are now the main litigants appearing before Qualified Justices of the Peace.

The conditions of the banking system in Peru have also been transformed. Debts claimed in Courts of Justices of the Peace until 1998 (the year the World Bank study was conducted) involved small consumer credits extended by many banks that either were in bankruptcy proceedings and ceased to operate (Serbanco, Banco Latino, Banex, Banco República, Nuevo Mundo) or were absorbed through mergers (Banco Sur, NBK Bank, among others). The surviving banking institutions ceased to extend credit to certain sectors that were unprofitable and, faced with the economic crisis that began in 1998, restructured their activities, giving priority to

III – TRIAL COSTS IN TIME AND MONEY: BY LAW AND IN PRACTICE

1. Time as a Disincentive for Resorting to the Courts

The main obstacle to the enforcement of court judgments in Peru appears to be time. It has been the subject of recurring complaints among respondents in interviews, as is also reflected in the IFES' survey results. While the law provides that the enforcement process should, in all instances, take less than one year, in practice, our research reveals that most surveyed and interviewed believe that it took up to two-to-three years.

The problem of long delays in obtaining relief through the courts is hardly unique to Peru. The literature identifies this issue as one of the most common difficulties encountered among industrialized and developing countries alike. Nevertheless, it is worth noting that many countries have managed to overcome this hurdle through measures that have led to improvements in the efficiency of their civil court systems. Furthermore, the international community has begun to condemn these excessive delays as tantamount to denial of a fair trial.³¹

Studies carried out by IFES in Argentina and Mexico produced results quite similar to those from this research; in both countries excessive delays are experienced in the enforcement of judgments and discourage use of the courts.³²

1.1 Time as Set Forth under the Law

The methodology that we have used to analyze the time required for court cases begins by calculating how long an enforcement case will take if the case is conducted according to time limits as set forth under the law. Pursuant to provisions in the law, enforcement cases should be completed within one year, beginning from the filing of a suit until the final judgment is handed down at the appeals level, assuming that the case proceeds through the various levels from civil court, to superior court, and on to subsequent appeals. In addition, one must also consider the time required for forfeiture of properties, which can continue indefinitely depending on how easily properties can be sold. A single action filed with a justice of the peace and appealed to a court of special jurisdiction would run 6 months and 12 days under existing law.

In the event that an action seeking the forfeiture and sale of collateral is sustained on appeal to the Supreme Court, it would take 11 months and 10 days from the time of the original filing and after judgment has been sustained at several levels of appeals.

31 See, inter alia, *Silvia Pontes v. Portugal*, Judgment of 23 March 1994, European Court of Human Rights, Series A No. 286-A; *Zappia v. Italy*, Judgment of 26 September 1996, European Court of Human Rights, Reports 1996-IV; *Di Pede v. Italy*, Judgment of 26 September 1996, European Court of Human Rights, Reports 1996-IV; *Hornsby v. Greece*, Judgment of 19 March 1997, European Court of Human Rights, Reports 1997-II; and *Immobiliare Saffi [Saffi Real Estate] v. Italy*, Judgment of 19 July 1999, European Court of Human Rights, Reports 1999-V.

32 Henderson, Keith, et al., 2003. *Obstacles to the Enforcement of Judicial Decisions and the Rule of Law*, op cit.

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Table 5. Legal Timeframe for Judicial Enforcement Proceedings (in days)		
Three Types of Cases*		
	Enforcement Proceedings Filed before formal Justices of the Peace**	Enforcement Proceedings Filed before civil trial courts
Filing of Action	5	5
Response of Defendant	5	5
Dismissal of Response	3	3
Order of Seizure and Auction		
Scheduling of Hearing	3	10
Hearing	10	
Judgment	5	5
Appeal	5	3
Filing of Appeal	3	3
Scheduling of Appeal Hearing	20	20
Scheduling of Oral Argument	10	10
Judgment on Appeal	30	30
Timeframe for Stay of Judgment		10
Filing of Motion to Stay Judgment		5
Hearing on Motion for Stay***		3
Admission of Stay Motion		20
Oral Argument Schedule		15
Supreme Court Judgment		50
Notification	42	67****
Total working days	141	264
Total calendar days	192	359
Months and Days	6 months & 12 days	11 months & 24 days
* Source: Peruvian Code of Civil Procedure		
** Justices of the Peace only handle small claims.		
***The Code does not expressly set a time period for the Appeal for Stay of Judgment, so by default the supplementary time period under the Code is listed.		
****The sixty-six-day time period includes one day for serving the judgment to the parties and 6 days for each one of the 11 notices of proceedings that it is estimated will be served.		

This table only presents estimates in cases in which only the final judgment is appealed. In Peru, each act of the procedure can be appealed, creating umpteen opportunities for appeals and delaying the enforcement process theoretically infinitely.

1.2 Actual Time Periods in Practice

The actual time required for an enforcement case is extremely difficult to gauge accurately. There are no official statistics tracking the time from the filing until actual payment is made by the debtor. Accordingly, we attempted to analyze a wide range of disparate information, in light of the perceptions of the main parties involved.³³

1.2.1 Length of Civil Trials/Time Required to Reach Judgment

One World Bank study estimated that the average length of civil suits in which judgments were reached was 572 days.³⁴ This particular study made no distinction among the different kinds of civil actions, so this average does not apply just to the length of enforcement proceedings, but rather to the entire length of the case, including enforcement. The study assumed that courts of special jurisdiction and courts designated to execute sentences were largely responsible for the delays in cases.

Though it is by law considered a summary proceeding, the enforcement process takes twice as long as the appeals process for most cases. In other words, the end of a civil suit – the actual enforcement of the judgment – takes twice as long as the appellate review. After the enforcement judgment is obtained, a further half-year or more is required to complete the enforcement or execution phase.³⁵

The same World Bank study found that proceedings handled by Justices of the Peace in which monetary awards are sought typically take anywhere from three months (50.74%) to six months (34.02%), while those exceeding one year are much fewer (0.29%). However, these time-spans do not take into account cases that have been appealed, nor the time required for enforcing judgments.

Justices of the Peace explained that few cases proceed to enforcement because the costs are considerable and, in relation to the sums involved, usually prohibitive for the parties seeking relief. Information on the time required for enforcing judgments was available only in 6.5% of the cases reviewed in the World Bank study. In these cases, according to the index of effective compliance, 27.72% of the cases required from one to three months, and 27.27% required a maximum of six months. However, these time periods do not include the initial proceedings necessary to obtain the original judgment or subsequent proceedings to have it confirmed on appeal.³⁶ Since this data differs significantly from that collected in the IFES surveys, much of it is not useful for comparative purposes.

1.2.2 Perceptions: IFES SME Survey Results in Peru

According to the IFES SME surveys³⁷, 33% of the respondents believe that enforcement proceedings take between two or three years; 21.6% indicate one to two years, and 23.5% indicate from seven months to one year (see, Table 6). Thus, 45% of respondents estimate that anywhere from one to three years is needed to enforce a judgment. This figure is consistent with the opinions offered by attorneys and representatives of banks, which are the source of a large number of enforcement actions.³⁸

33 See, Eyzaguirre, Hugo, et al., “La estructura de incentivos y las ineficiencias en tres procesos civiles: Juicios por títulos ejecutivos vencidos, juicios por alimentos y ejecución forzada de bienes” [The Structure of Incentives and Inefficiencies in Three Civil Cases: Trials on Expired Forfeiture Papers, Trials for Alimony, and Mandatory Property Forfeiture, Instituto Apoyo, August 2000, for another estimate of the time required for trials.

34 González Mantilla, *op. cit.* 27. This average does not take account of those cases in which no judgment had been issued at the time the survey was taken (i.e., three years after they had been filed). Accordingly, the average should presumably be a higher number.

35 *Op. cit.* 27.

36 *Op. cit.* 27. It should be noted that this study does not differentiate among the various kinds of mandatory enforcement actions, and thus does not lend itself to a thorough examination of relevant procedural bottlenecks. For example, if enforcement action involves attachment of a bank account, it is only logical that less time is required, because the need for court auction of properties would be precluded.

37 Approximately 60% of the survey sample consisted of users of the courts. All those surveyed were SME representatives.

38 See, González Mantilla, *op. cit.* 27 and IFES enforcement of judgments Peru interviews (2004).

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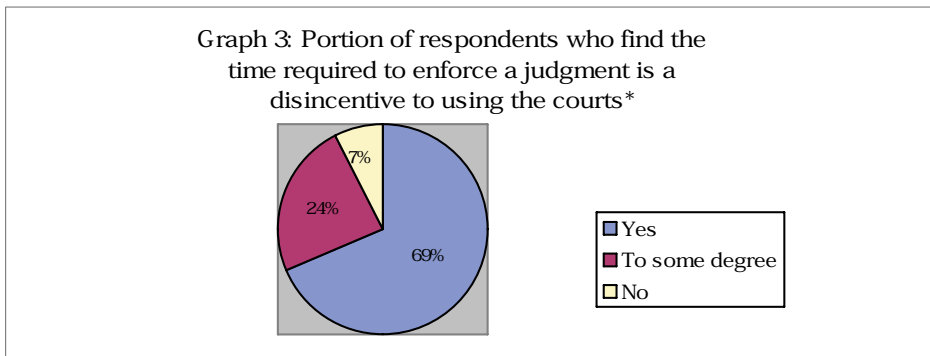
Survey respondents indicate that one of the main problems resulting from court enforcement delays is the loss in the value of the collateral. In Peru, the attachment of chattels (such as household goods or used automobiles) is frequent and the value of these items loses significant value after being idle for three years. Accordingly, even when there are properties that can be seized and auctioned, in many cases creditors decide not to do so. The incremental legal costs simply outweigh any value that would accrue from the sale of the goods. The representative of one major bank indicated that his company held in storage some 1,000 articles as collateral, including coffeepots and TV sets, in addition to some 200 immovable properties. Executing their sale is often not economically viable, because there is no market for these goods.

Table 6. Reported Average Time to Enforce a Judgment through Court Proceedings

Less than 6 months	7.8%
From 7 months to 1 year	23.5%
From 1 to 2 years	21.6%
From 2 to 3 years	33.3%
More than 3 years	13.7%

* Source: IFES Enforcement of Court Judgments in Peru Survey 2004. Judgments include court judgments, commercial paper enforced through executive trials, and enforcement on collateral.

More than two-thirds of the SMEs surveyed (68.5%) believe that the time required for enforcing a judgment constitutes a disincentive for using the court system, while 24.1% believe that it does so only to some degree (see, Graph 3). These figures are consistent with those reported in connection with preferences for alternative systems to obtain debt payments (examined in Chapter V) and in connection with the average time for enforcement (presented in Table 6). In the interviews, statements were often made along the lines of “I’d have to have very little business sense to wait three years for a court to collect 1,000 *soles* for me;” or “I prefer to negotiate directly with the debtor for six months; if he fails to pay me, I’ll write it off. But I would never waste two or three years on the matter.”



* Source: IFES Enforcement of Judgments Peru Survey (2004)

1.3 Main Causes of Delays

As previously noted, delays significantly impact the actual cost of litigation and constitute one of the main reasons why SMEs do not use the courts and the enforcement process. Third party claims can often delay an enforcement proceeding for up to three years. Notification alone may be nullified for a misspelling on the summons, which may add three months to the notification process.

Table 7 identifies and prioritizes the reasons for excessive delays in the Peruvian enforcement process. This list of reasons builds upon the research methodology employed by IFES in previous research in Argentina, Mexico and

Peru. Respondents were asked to note the three most important reasons for excessive delays in the enforcement of judgments, a ranking of which is presented below:

Table 7: Reported Reasons for Delays in Enforcement Proceedings (in Percentage of Respondents Listing Reasons)*				
	First Choice	Second Choice	Third Choice	Ranking ³⁹
Excessive caseload in the courts	24%	10%	14%	17.8%
Difficulties in locating debtor	24%	10%	8%	16.6%
Debtor resistance or lack of cooperation	14%	20%	14%	15.8%
Filing delays	10%	12%	12%	11%
Difficulties in locating debtor's properties/ income	8%	24%	6%	12.4%
Procedural requirements of the law	8%	2%	2%	5%
Excessive legal protection for debtor	6%	8%	14%	8.2%
Unjustified delays by attorneys	6%	8%	12%	7.8%
Other difficulties in process serving	0%	4%	10%	3.2%

* Source: IFES Enforcement of Judgments Peru Survey (2004)

The first reason given is “excessive caseload in the courts”⁴⁰. This indicates that the respondents strongly believe this problem is the most salient. Responses from the interviews shed some light on this problem. They reveal that caseload problems are attributed to inefficiencies in the court system and the court-delaying tactics used by debtors and their lawyers.⁴¹ Inefficiencies and systemic delays increase the courts’ caseload, which just exacerbates the problem. One deficiency is feeding the other.

2. The Cost of Litigation

Almost one-third of those surveyed cited the cost of enforcing judgments as a significant reason for not using the courts and the enforcement process (see, Table 13 in Chapter IV). Interviews provided further evidence and observations on this phenomenon. According to the IFES expert interviews, although cost becomes a significant obstacle to the collection of small debts, it is less so for the collection of larger debts. This is explained, in part, by the fact that while court costs are levied in proportion to the amount of debt, other costs are fixed. Thus, the minimal cost of collecting a small debt is sometimes so large that collection costs outweigh the benefits of collecting the debt.

Even without being prompted or asked directly, most respondents raised the time factor as one of the major costs of enforcing a judgment. Time lost in the enforcement of court decisions diminishes the value of collateral and, further, represents a lost opportunity cost, implying a skewed use of human and financial resources that would otherwise be devoted to more productive commercial endeavors.

39 In order to rank each reason, a weighted average was assigned for the respondents’ first, second, and third choices, as follows: the first reason chosen was assigned a rank of 50%, the second choice 30%, and the third choice 20%.

40 This result is consistent with Eyzaguirre *et al.*, *op. cit.* 33..

41 This analysis of responses is also consistent with Eyzaguirre, *et al.*, *op. cit.* 33.

2.1 Types of Costs

Many factors contribute to the total cost of the enforcement process. We have identified many of these in Table 8 below.

Table 8. Basic Cost of the Enforcement Process in Peru

Direct Costs:

- Court Fees
- Taxes, court surcharges, and other charges
- Publications and notifications
- Costs of obtaining documents
- Lawyers' fees
- Auction fee

Indirect costs:

- Time required for enforcement (opportunity costs)
- Illegal payments, bribes or facilitation payments given to court and administrative staff
- Cost associated with unpredictable outcomes⁴²

2.2 Estimated Actual Cost of the Enforcement Process

Table 9 below identifies the basic costs of three typical enforcement actions: (i) seizure of a bank account, (ii) seizure and sale of chattels, and (iii) seizure and sale of real estate property. The amount of debt is held constant at US\$ 10,000.⁴³

⁴² The unpredictable nature of the results may reflect several reasons, such as ambiguities in the law, inconsistent interpretations made by the judges, judges' incompetence and deficient technical understanding, favoritism toward a type of party (e.g., debtors), political interference.

⁴³ Clarifications: 1) costs are expressed in Peruvian *soles* and US dollars (US\$ 1 = 3.5 *soles*); 2) the three types of cases are basic examples that do not involve defense objections or appeals. Costs will increase with successive appeals; and, 3) the cost here does not take account of such indirect costs as lost time (an opportunity cost) or the inability to predict the outcome of a decision.

Table 9. Costs for Three Kinds of Typical Enforcement Actions in Peru*			
	Enforcement through seizure of a bank account	Enforcement through seizure and sale of an automobile	Enforcement through seizure and sale of real estate property
Amount of debt	(35,000 soles) \$10,000	(35,000 soles) \$10,000	(35,000 soles) \$10,000
Seizure fee	(640 soles) \$ 183	(640 soles) \$ 183	(640 soles) \$ 183
Notification of debtor	(7 soles) \$ 2	(7 soles) \$ 2	(7 soles) \$ 2
Court fee	(35 soles) \$ 10	(175 soles) \$ 50	(175 soles) \$ 50
Attorneys' fees	(7,000 soles) \$ 2,000	(7,000 soles) \$ 2,000	(7,000 soles) \$ 2,000
Registration fees	N/A	(105 soles) \$ 30	(105 soles) \$ 30
Property tariff	N/A	(875 soles) \$ 250	(875 soles) \$ 250
Publication (for first notice to appear)	N/A	(875 soles) \$ 250	(875 soles) \$ 250
Publications (for each subsequent notice to appear)	N/A	(437 soles) \$ 125	(437 soles) \$ 125
Auction fee	N/A	(700 soles) \$ 200	(700 soles) \$ 200
Document and copy fees	N/A	(17 soles) \$ 5	(17 soles) \$ 5
"Gratuities"	(35 soles) \$ 10	(350 soles) \$ 100**	(210 soles) \$ 60
Total approximate cost	(7,718 soles) \$2,205	(11,183 soles) \$3,195	(11,043 soles) \$3,155
Total approximate cost (as a proportion of debt)	22.05%	31.95%	31.55%

* Source: IFES Enforcement of Judgments Peru Interviews (2004)

** Includes payment to police for automobile seizure.

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The SME survey results in Tables 10 and 11 reflect the cost of enforcement as a percentage of the debt recovered. Through the research presented in these tables we can better understand the costs that discourage SMEs from using the enforcement process in Peru.

Table 10. Cost of Enforcing a Judgment as a Percentage of the Debt Recovered (Value of the Debt: US\$ 500)*				
Cost	Attorney⁴⁴	Administrative expenses/taxes⁴⁵	Court fees⁴⁶	Bribes⁴⁷
Less than 10%	9.3%	40.7%	57.4%	25.9%
Between 11% and 20%	46.3%	33.3%	14.8%	9.3%
Between 21% and 30%	24.1%	9.3%	7.4%	11.1%
Between 31% and 40%	3.7%	1.9%	1.9%	5.6%
More than 41%	9.3%	5.6%	1.9%	5.6%
Does not know/ respond	7.4%	9.3%	18.5%	42.6%

* Source: IFES Enforcement of Judgments Peru Survey (2004)

Table 11. Cost of Enforcing a Judgment as a Percentage of the Debt Recovered (Value of the Debt: US\$ 2,000)*				
Cost	Attorney⁴⁸	Administrative expenses/taxes⁴⁹	Court fees⁵⁰	Bribes⁵¹
Less than 10%	11.1%	40.7%	53.7%	20.4%
Between 11% and 20%	46.3%	33.3%	16.7%	13%
Between 21% and 30%	20.4%	9.3%	7.4%	9.3%
Between 31% and 40%	7.4%	3.7%	3.7%	5.6%
More than 41%	5.6%	1.9%	1.9%	7.4%
Does not know/ respond	9.3%	11.1%	16.7%	44%

* Source: IFES Enforcement of Judgments Peru Survey (2004)

The results in these tables are particularly revealing in that they show that the actual costs are relatively constant, regardless of whether the value of the debt is US\$500 or US\$2,000. A majority of those surveyed believed that the attorney fees and administrative expenses cost less than 20% of the debt recovered. Another notable point is the response to questions on the payment of bribes, to which 44% of the respondents either indicated that they

44 These are fees paid to attorneys for professional services.

45 This includes all expenses for photocopying, service processing, publications, rates, fees, taxes, etc.

46 Mandatory amount that must be paid to the court system.

47 Any type of illegal payment or gratuity made to any individual who intervenes in the enforcement process.

48 These are fees paid to attorneys for professional services.

49 This includes all expenses for photocopying, service processing, publications, rates, fees, taxes, etc.

50 Mandatory amount that must be paid to the court system.

51 Any type of illegal payment or gratuity made to any individual who intervenes in the enforcement process.

did not know which percentage it represents or simply fail to respond. These results may reflect either the taboo nature of discussing the issue of corruption or the fact that the respondents may not have been directly involved in bribery payments and are just unaware of cases in which they are paid. These payments also may vary, which adds to the uncertainty of enforcement costs.

The uncertainty arising from the length of time of enforcement proceedings, combined with uncertainty of corruption and of other costs, makes it difficult to predict the cost of collecting a judgment. Though the law provides for a one-year period during which judgments should be enforced, actual results are often in dramatic variance with this timetable. Indeed, two or three years to enforce a judgment are considered normal, and many judgments linger until enforcement is no longer economically viable. Uncertainty is a disincentive to providing credit and to taking certain risks. It also constitutes a drag on the economy and disproportionately affects small and medium enterprises.

IV – EFFICIENCY OF THE SYSTEM AND PRINCIPAL OBSTACLES TO ENFORCEMENT

An examination of global research related to the enforcement of judgments reveals that there is very little data available on the exact number of judgments that are ultimately enforced in Peru. One study that touches upon the issue shows very low levels of compliance in Peru; the losing party fully complies in only 11.45% of civil suits won by the plaintiff⁵². The same study shows that “surprisingly, some three years after the suits had been brought, an overwhelming 77.11% of the judgments favorable to the plaintiff still could not be enforced effectively.”

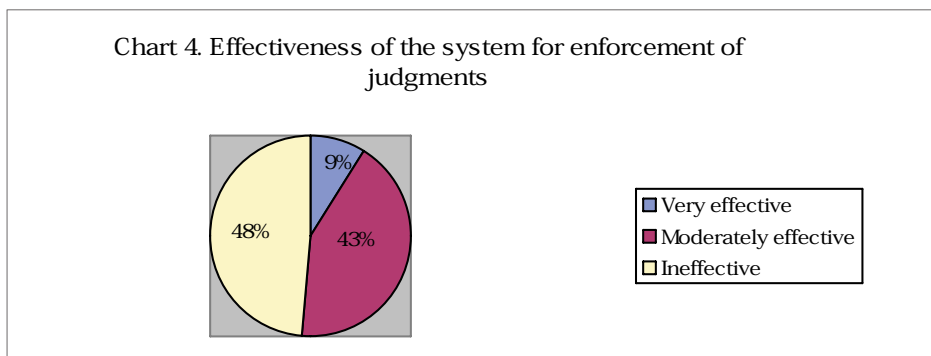
The IFES research did reveal widespread perceptions among SMEs and other users of the courts that the system is inefficient. Some of the major complaints about inefficiency are the excessive delays and excessive cost of using courts to enforce judgments. More detailed findings indicate various procedural obstacles to effective enforcement. The IFES research indicated that some of the primary procedural reasons are 1) excessive opportunities for debtor to delay proceedings, 2) the failure either to find the defendant or his assets, and 3) failure to attach defendant assets.

In this chapter, we describe deficiencies in the current system for enforcement of judgment, and set forth detailed descriptions of the obstacles to effective enforcement uncovered through the research.

1. Perception of the efficiency of the system: IFES Survey

1.1 Perceptions of Efficiency

The research results regarding SME perception of the system of judgment enforcement have been mixed but not surprising. Combined with in-depth interviews, the research reveals that a great number of respondents find the system deficient. Graph 4 shows that almost 50% of the representatives of SMEs who were surveyed consider the system of enforcement to be ineffective, whereas only 9.3% of those surveyed believe it to be very effective. A substantial number, 43%, called the system “moderately effective.” However, interviews revealed that many of those felt the system was effective despite admittedly excessive delays. The definition of “effective” is therefore subjective. The majority of interviewees consider the delays in the system excessive. For a substantial portion, the delays render the system ineffective. Therefore, the following analysis of the reasons for delay and inefficiencies in the system is supported by the survey, as all respondents agree that the delays are excessive, and that the delays are not positive.



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1.2 Perceptions of Bias

Those surveyed believed the system of enforcing court judgments was more efficient in some cases than others, although this difference was largely attributed to bias. Forty-four percent believed that the justice system will enforce its decisions more efficiently against small firms than large ones, while 33.3% believed that the system is more efficient in enforcing small judgments against individuals. Given that only 18.5% believed that judgments are enforced against large firms, it seems there may be a perception of bias in favor of large firms to the detriment of small firms (See Table 12.) This assessment merits two points of additional consideration.

Litigants, particularly defendants, naturally blame the opposing party for their problems. They are also prone to believe that they face negative bias when they lose. It may be natural, therefore, for small and medium sized firms whose representatives have been surveyed to perceive that the justice system is more efficient in enforcing judgments against them. However, their perception contradicts the consensus expressed in interviews with judges, lawyers, and legal representatives of banks which indicates that there is a bias in the courts favoring debtors (which presumably includes SMEs), as they are perceived to be the “weak” party in the equation. We may, through our analysis of the data in Table 12 and through the interviews, conclude that the unpredictability, inefficiency and corruption of the system is such that each participant believes that the system favors the other party, which perhaps would diminish if the enforcement system were transparent and efficient.

<i>Types of Cases</i>	<i>% who believe enforcement works</i>
Judgments against large firms	18.5%
Judgments against small or medium size firms	44.4%
Large judgments against individuals	11.1%
Small judgments against individuals	33.3%
Judgments against the State or its representatives	9.3%
In no case	18.5%

IFES Enforcement of Judgments Survey 2004

1.3 Barriers to Court Use/Court Access

The time and cost of proceedings are the major disincentives for turning to the courts to enforce judgments or business obligations (small debts). A third of those surveyed indicate that excessive delays are the primary reason why they do not even attempt to use the courts, while another third chose delays as their second most important reason (Table 13). Thus two-thirds of those surveyed do not use the courts for the simple reason that they cannot afford the inordinate time or high cost involved in enforcing judgments. Court inefficiency is the reason next in line. The latter reason is consistent with the findings from expert interviews that relate to the lack of operational capacity⁵³, suitability, professionalism, and administrative organization as one of the main reasons why firms prefer not to take their conflicts to the courts. Instead, most interviewees prefer direct negotiation or other alternative methods because these are ostensibly less expensive and more time efficient.

53 As in many developing countries, court resources are limited. Obtaining new furniture, sufficient so court staff all have a chair, or ensuring an adequate supply of paper are among the difficulties with securing basic necessities outside Lima.

Table 13: Reasons for not resorting to the courts for enforcement actions*

	First reason	Second reason	Third reason	Ranking⁵⁴
Excessive time or delays	35.2%	34%	15.1%	30.82%
Excessive cost	29.6%	15.1%	7.5%	20.83%
Judicial inefficiency	9.3%	18.9%	13.2%	12.96%
Judicial corruption	5.6%	9.4%	20.8%	9.78%
Lack of sanctions in cases of debtor noncompliance	9.3%	5.7%	17%	9.76%
Low probability for judgment enforcement	3.7%	7.5%	11.3%	6.36%
Unwillingness by judges to enforce judgments	5.6%	7.5%	1.9%	5.43%
Lack of information	1.9%	1.9%	9.4%	3.40%
Better alternatives to the courts	0%	0%	3.8%	0.76%

IFES Enforcement of Judgment Survey 2004

*Enforcement actions include court judgments, commercial paper (checks, etc.) enforced through executive trials, and enforcement on collateral

2. Principal obstacles to judgment enforcement

2.1 IFES Survey Ranking of Obstacles

Table 14 presents an array of obstacles to the enforcement of judgments. Respondents to the survey were asked to choose the three most important. The required time and costs associated with the enforcement process remain the main reasons most SMEs do not resort to courts for enforcement actions. It is useful to examine carefully the remainder of the obstacles chosen by participants in the survey, as well as the opinions of the experts interviewed, in order to understand the causes of excessive delays. We have seen that cost is viewed as a significant obstacle, especially if the time invested in enforcement is also included. Thus, by focusing on understanding and proposing recommendations to resolve the excessive delays, we could address the majority of problems associated with enforcement actions.

54 In order to rank each reason, a weighted average was assigned for the respondents' first, second, and third choices, as follows: the first reason chosen was assigned a rank of 50%, the second choice 30%, and the third choice 20%.

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Table 14. Obstacles to the enforcement of court judgments* ranked by participants in order of importance				
	First place obstacle	Second place obstacle	Third place obstacle	Ranking⁵⁵
Excessive delays	18.5%	19.6%	9.8%	17.09%
Excessive costs	11.1%	19.6%	7.8%	12.99%
Debtor unwillingness to pay	11.1%	9.8%	19.6%	12.41%
Judge failure to duly enforce the law	18.5%	5.9%	3.9%	11.80%
Inadequate procedures	11.1%	9.8%	7.8%	10.05%
Excessive legal protections for the debtor	7.4%	9.8%	5.9%	7.82%
Inefficiency in the courts	7.4%	3.9%	9.8%	6.83%
Corruption in the enforcement procedure	0%	7.8%	11.8%	4.70%
Difficulty in locating/ identifying the debtor's assets	1.9%	5.9%	5.9%	3.90%
Insufficient authority of courts to enforce judgments	1.9%	2%	3.9%	2.33%
Court backlog	3.7%	0%	0%	1.85%
Debtor insolvency or lack of resources	1.9%	0%	3.9%	1.73%
Difficulty in locating and notifying the debtor	0%	2%	3.9%	1.38%
Absence of sanctions on failure to comply with court orders	0%	2%	2%	1.00%
Unwillingness of the Court to impose sanctions	0%	2%	2%	1.00%
Courts' lack of independence	0%	0%	2%	0.40%
None	5.6%	0%	0%	2.80%

* Judgments include court judgments, commercial paper (checks, etc.) enforced through executive trials, and enforcement on collateral

IFES Enforcement of Judgments in Peru Survey 2004

55 The ranking of each obstacle has been calculated by weighing the percentage of those surveyed that placed the obstacle in first, second, or third place in accordance with the following scale: the placement of the obstacle in first place is ranked 50%, second place 30%, and third place 20%.

2.2 Culture of Non-Payment

The third most important obstacle to collection of court judgments is the debtor's unwillingness to pay. This involves a number of elements. Public surveys report that Peruvian cultural values do not always lend themselves to punishing those who fail to meet their legal obligations. Neither does the culture honor or otherwise reward those who meticulously fulfill their debts. Many have characterized this phenomenon as a "culture of non-payment". Regardless of culture, the inefficiency in the system of enforcement makes it advantageous to the debtor to not pay and await the result of a suit. The system provides few incentives to comply while those who fail to comply usually are not sanctioned even for flagrant defiance of court orders. One may argue that debtors who do not pay come out ahead.

2.3 Legal Framework and Judicial Application

A fourth obstacle cited by a significant number of survey respondents was that judges do not properly enforce the law. In Table 14, judges' failure to duly enforce the law is a critique of judges' application of the law. Examples of inadequate interpretation and enforcement of the law abound. For example, judges regularly admit objections that they know are groundless, and fail to comply with legal deadlines. Judges also fail to move along cases on their dockets, though the Code of Civil Procedure invests them with that responsibility. In some cases, rather than acting to uphold the law, the judges' tendencies are contraindicated by the law. Particularly, the law requires dismissal of groundless objections and indicates that a procedure should not be halted for certain objections. The judges, in some instances, are fighting, or at least weakening, existing legal provisions.

Inadequate procedures rank as the fifth most important obstacle to enforcing judgments. The IFES survey indicates that despite recent reforms of the Code of Civil Procedures, procedural law still remains unnecessarily complicated. This often leads to innumerable legal hair-splitting delays. Certain procedural stumbling blocks, such as the ability to nullify a notice for what amounts to clerical error (e.g., a misspelled name) and the opportunity to appeal and revisit every court decision, should be rectified by a change in the letter of the law. Solutions to more systemic deficiencies, such as time delay and cost, need to be developed and implemented.

As a conclusion from the survey results related to the main obstacles to the enforcement system, the following should be noted:

- i) The two most important obstacles selected, excessive delays and judges' failure to duly enforce the law are closely related and indicate that the main problem may be the behavior of judges themselves. Their willingness to overlook or accept dilatory tactics and unwillingness to pro-actively manage and properly oversee the enforcement process make it inefficient and ineffective.
- ii) Excessive cost and unwillingness to pay are also important obstacles to the efficiency of the enforcement system; these two obstacles are attributable to a culture that does not place a high value on voluntary compliance with the law or legal obligations.
- ii) Case backlogs appear to be less significant than is usually portrayed.

3. Specific Obstacles in Lima’s Qualified Justices of the Peace courts⁵⁶

Analysis of in-depth interviews conducted with Justices of the Peace indicates there is a wide range of enforcement problems, including:

Table 15. Principal Obstacles in Lima’s Qualified Justices of the Peace courts:

- a) Uneven distribution of caseloads among different courts;
- b) Procedures are too bureaucratic and rigid, not allowing the judge any margin of action that might improve the process⁵⁷;
- c) Excessive formality;
- d) Absence of oral procedures;
- e) Absence of administrative autonomy in some courts;
- f) PFA pension fund claims “suffocating” Justices of the Peace;
- g) Lack of skilled, competently trained courthouse staff;
- h) Some parties hire a separate lawyer for each document they present, lacking a legal strategy to seek enforcing a judgment;
- i) Judges may fail to be diligent and uphold the law, unnecessarily prolonging proceedings;
- j) Requests for bribes to speed up proceedings by the courthouse staff.

IFES Enforcement of Judgments in Peru Interviews 2004

3.1 Time and Costs More Efficient in Justice of the Peace Proceedings

The survey results in table 16 set forth a number of comparative efficiencies in the Justice of the Peace courts, including the shorter time and lower cost of enforcement.

Table 16. Advantages of the Courts of Justices of the Peace

	Formally Qualified	Lay judges
More direct relationship among the parties	38.9%	20.4%
Shorter trials	25.9%	5.6%
Lower costs	18.5%	20.4%
Less corruption	16.7%	16.7%
Less procedural formality	5.6%	11.1%
Attorney services not necessary	0%	5.6%

IFES Enforcement of Judgments in Peru Survey 2004

3.2 Relationship with parties and mediation by judge should be supported

Almost 40% of those surveyed stated that the biggest advantage of using the JOP courts related to the fact that they were an efficient forum for building direct relationships between the parties and the judge. Justices of the Peace themselves noted that they gave priority to dealing directly with the parties throughout the proceedings. One of the judges interviewed explained that she acted as a psychologist and mediator in addition to carrying out her role as a judge and that she attempted to help parties reach a voluntary and equitable agreement.

⁵⁶ Justices of the Peace hear small cases involving debt collection, such as executive titles (checks, etc.), family and other issues. There are 78 qualified justices of the peace courts in Lima.

⁵⁷ For example, a request for a copy of a file is a formal process, requiring an extensive form, without the possibility of receiving the copy the same day. In family cases, where the justice may know the facts, he still cannot issue an interim order but must go through a cumbersome process before being able to take action.

This is partly due to the type of trial heard by Justice of the Peace courts: enforcement of small claims on consumer loans (usually for household goods) and family court issues. Recognizing this aspect of their role, many Justices of the Peace interviewed expressed the desire for more flexibility and less procedural formality. They advocated for changes such as the admission of simpler, oral procedures, and the possibility of interim measures issued from the bench, rather than currently cumbersome formalistic written requirements.⁵⁸

4. Analysis of specific obstacles in all courts enforcing judgments

The following is an in-depth analysis of some of the obstacles that interviewed experts often mentioned as the primary causes of delays, inefficiency and corruption in the system. Some of these problems arise from the legal framework, others from the practice, or from both.

4.1 Complexity of notice or service of process

All notification in civil cases, including enforcement cases, is done through a legal summons. Each decision issued by a judge is sent to the notification office within 24 hours of its issuance. Pursuant to Article 159 of the Code of Civil Procedure, the notification process has two clearly distinguishable stages: 1) formal summons preparation by the court; and 2) process serving and distribution, during which the summons is actually delivered to the defendant. After a summons is written, it is sent to the Office of Notification. A central Office of Notification, an office of the Judiciary, actually delivers the summons.

According to the judges interviewed, the complexity of notice and length of time required to serve the summons place undue burdens on the notification process. Delays are also caused by inadequate staffing.

The notification process requires the staff of each court to prepare the summons free of error. Its essential elements include:

- i) The dates relevant to the docket, the names of the parties, the court, the docket number and a transcript of the decision to be released;
- ii) An attachment with the writ and documents presented by the other party;
- iii) Notification to the recipient of the number of attached pages, and
- iv) Identification, as well as the address of the party to be notified.

Due to the numbers of summons to go out and the lack of sufficient staff assigned to this task, issuance of a summons is a slow, tedious and formalistic process. Several judges also noted that the staff charged with the task frequently suggests small “bribes” in exchange for speeding up or slowing down their drafting and/or distribution.⁵⁹

58 One example given by judges is the desire to provide an interim order regarding alimony pending the approval of a final order through intricate bureaucratic channels. Currently such protective measures by the judge are not possible.

59 The summonses are not prepared as accurately as necessary. One lawyer showed us six summonses that had arrived at his home, which were neither addressed to him nor to any of his clients. This means that six court judgments did not have valid notification, which caused delays in the proceedings.

4.2 Frequency in the use of delay tactics: groundless objections⁶⁰ and pleas to declare null and void⁶¹

4.2.1 Frivolous claims

Delaying tactics most frequently used by debtors relate to objections and nullification requests, at almost every stage of the process⁶². Both judges and lawyers noted the persistent use of these tactics as one of the major problems with the enforcement system. It should be noted that the use of these tactics is not illegal *per se*. Indeed, objections and annulments are contemplated under the law. The main problem appears to relate to judges' unwillingness to address procedural abuses of the law.

4.2.2 Lack of sanctions

The frivolous use of annulments and objections is not penalized in the Peruvian justice system. Lawyers tend to use them indiscriminately to defend their clients, which unnecessarily prolongs the process. Ironically, the same lawyers who strongly criticize their use recognize that they themselves would employ them if their client was the debtor. Many thought that if they did not resort to those tactics they would be seen by many as poor defense counsel.

4.2.3 Judges' refusal to dismiss frivolous claims

The judges themselves also indicated that they strongly oppose frivolous claims because it greatly increases their caseload. However, they stated that they almost always sustained objections and annulments for fear they would be accused of due process violations. Similarly, judges who overruled frivolous petitions said that the superior courts often reversed their decisions, which, in turn, gave rise to further and delays. One judge went so far as to say that he "preferred to accept this type of petition, because I absolutely know that if I don't, the superior court will reverse my decision, and the time that I cause the creditor to lose will be greater if I reject the petition outright, because the petitioner will surely appeal."

4.2.4 Ability to lodge objections throughout the enforcement process

Under the Code of Civil Procedure, motions to vacate can be allowed at any stage of the proceedings, including the execution process or before or after auction.⁶³ Thus, some debtors present motions to vacate the proceedings each time a court decision is issued just to delay the process.

60 According to Article 446 of the Code of Civil Procedure, the defendant can present the following preliminary objections: lack of jurisdiction, plaintiff's incapacity, faulty or insufficient representation of the plaintiff or defendant, ambiguity or lack of clarity in the filing, failure to exhaust all administrative means, lack of legitimacy to act on the part of the plaintiff or defendant, *-lis pendens-*, double jeopardy, lapsed deadlines, and conciliation through arbitration. If any of the following objections are sustained, the judge must declare the proceedings null and void to that point and close the case: *-lis pendens-*, double jeopardy, lapsed deadlines, failure to exhaust all administrative means, time limits, lack of jurisdiction, waiver of the claim or closure of case due to conciliation or transaction. In the case of the remaining kinds of objections, the judge will order that the underlying cause of the objection be rectified.

61 Annulment of the proceedings in accordance with Article 171 of the Code of Civil Procedure occurs in two situations: when there is a rule that sanctions a procedural defect with voidance and when the proceeding lacks the necessary requirements to achieve its aim. An example of the first situation is Article 743 of the Code of Civil Procedure, which holds the auction to be null and void when the formal requirements, such as publication of auction notices in accordance with all requirements of Article 734, have not been met. The second situation is broader and it is in the judge's purview to determine when a proceeding lacks the requirements deemed necessary to achieve its purpose; for example, a proceeding would be null and void if not all the summoned parties had been served notice, or had been served without the inclusion of all of the documents offered by the opposing party, given that this undercuts the right to an adequate defense.

62 Eyzaguirre et al, *op. cit.* 33, confirms the use of delaying tactics such as appeals. It should be noted that the methodology used by Instituto Apoyo consisted of a survey of opinion and did not include analysis of judicial cases.

63 The execution process is the seizure and sale/realization on assets, and occurs after the fact that defendant-debtor is liable has been established.

Objections are particularly common when the date for the auction of the goods is being or has been scheduled. According to the expert interviews, if a motion to declare null and void is presented, the plaintiff is notified and, with or without his or her reply, the judge will make a decision. The time devoted to a procedure on a motion to vacate, which involves a response and a decision, in practice suspends the auction process, albeit momentarily. If the date has been set, but the objection is not resolved by that date, the judge will not proceed with the auction, requiring rescheduling of the date and renotification.

4.2.5 Interpreting Survey/Interview Results: Perception vs. Reality

The majority of those interviewed believed that frivolous debtor objections were one of the primary problems that caused procedural delays. However, this perception does not fully or accurately explain the reasons for lengthy delays. In Peru, a high percentage of cases appear to be default cases in which the defendant-debtor does not respond to the lawsuit.⁶⁴ World Bank studies in both Argentina and Mexico reached a similar conclusion, finding that more than 50% of the cases are default cases.⁶⁵ This finding contradicts in part the widespread opinion that defendants are extremely litigious.

4.3 Commencement of bankruptcy proceedings

Another delay tactic used by debtors is to file for bankruptcy. This prevents creditors from demanding payment or from holding auctions, in accordance with the General Act of the Bankruptcy System.⁶⁶ The administrative entity charged with evaluating the requests for bankruptcy proceedings is the Bankruptcy Commission of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI is the Spanish acronym). These requests, which can be brought by the debtor or creditor, are intended to allow creditors to evaluate the possibility of restructuring the debtor's liabilities or proceeding to their liquidation.⁶⁷

4.4 Lack of uniformity in the decisions in different courts

4.4.1 Inconsistency of decisions/results

Another significant obstacle to efficiency in the enforcement system is the lack of predictability and clear precedent in Peruvian case law. Those interviewed believed that inconsistent opinions among courts created incentives for unnecessary appeals and delays.

Case law related to the enforcement process is likewise unpredictable and chaotic. For example, there are no consistent criteria for calculating timeframes regarding the auction notification and publication process. Another significant problem is the lack of uniform criteria for sustaining objections and motions to vacate. Uniformity of criteria in these areas would contribute to a greater efficiency and discourage unnecessary appeals. It would also help establish clear lines of conduct for magistrates and litigants.

64 A World Bank study suggests that in civil suits 57.5% of the cases are tried without the defendant either responding to the suit or appearing at all during the trial. The study refers to all civil cases, not just enforcement proceedings. Gonzales Mantilla, *op. cit.* 33. In Peru there are neither official statistics nor reliable estimates as to the number of enforcement cases in default.

65 See Linn Hammergren, Ana Laura Magaloni *et al.*, *The Juicio Mercantil Ejecutivo in the Federal District Courts of México: A Study of the Uses and Users of Justice and their Implications for Juridical Reform* [World Bank Report No. 22635], CIDE, June 2001. A study of files in cases related to debt recovery in the Federal Courts of Mexico City; and . Héctor Mario Chayer and Milena Ricci, "El trámite del proceso Ejecutivo y las Nuevas Secretarías del Fuero Comercial" ["The Handling of Enforcement Proceedings and the New Secretariats in the Commercial Jurisdiction"], published in *Poder Judicial, Desarrollo y Competitividad en Argentina*, UBACYT-CONICET, Rubinzal-Culzoni, 2002. Study of court case files, proceedings of execution lawsuits filed in 1999 in the city of Buenos Aires and the province of Santa Fe.

66 Law number 27809.

67 According to Article 17 and Article 18 of Law 27809, once notice of the request to restructure has been published in the Official Newspaper *El Peruano*, the debtor's obligations may not be enforced and a suspension of the auction of his assets is ordered.

4.4.2 Implementing *Stare Decisis*

One way to alleviate this situation is the introduction of the doctrine of *-stare decisis-*. This element of the common law tradition makes judicial precedent binding or mandatory in certain courts. The doctrine requires that precedent be respected when identical questions of fact and law arise. Some experts in Peru believe that the adoption of this principle would promote a more predictable judicial system based on values such as stability, certainty, predictability, consistency, and respect of authority.

Though Peru is a civil law country, elements of *-stare decisis-* are already established in some aspects of the legal system. The Peruvian Institute for the Defense of Competition and Intellectual Property (INDECOPI) provides an example. In accordance with article 43 of Legislative Decree 807, INDECOPI's administrative court has the capacity to establish precedent, which must then be observed⁶⁸.

A similar system has been established for the Constitutional Court and the Tax Court. However, unlike the INDECOPI system, decisions in these courts are not explicitly declared to be precedent-setting. Nonetheless, the parties cite precedent-setting decisions, and those courts examine previous decisions. This has increased predictability.

4.5 Excessive Caseload Due to Pension Payment Claims

According to expert interviews, cases filed by the Pension Fund Administrators (AFP, the Spanish acronyms) have overloaded justices of the peace, leading to excessive delays. This problem affects virtually every aspect of court management, including the enforcement of court decisions. Even though official statistics are not available, representatives of AFPs interviewed indicated that in 2003 an estimated 176,000 cases were filed in connection with the Private Pensions System, 70% of which were before the courts in the Lima area. These figures indicate that AFPs may represent as much as 35% of all case filed in justices of the peace courts in metropolitan Lima in 2003.

This situation is a result of the legislation that created the Private Pension System.⁶⁹ Under the law, the AFPs are the parties legally responsible for acting in the event that employers fail to make pension contributions to them. Should a company fail to make contributions by the required deadline, the AFP is required by law to file suit.

In practice, the “life cycle” of cases filed by an AFP follows the pattern described below:

1. When the employer fails to deposit the pension contribution with the AFP before the deadline lapses, the AFP files suit before the justice of the peace, presenting the certificate of debt.
2. This certificate is an executable document (requiring only summary proceeding to enforce payment of debt); there is no hearing and instances of opposition from a respondent/debtor are extremely rare, thus judgment is obtained within an average period of three months.
3. Appeals actions are negligible, if for no other reason, than that the appeal requires the prior deposit as security of the amount of the debt.
4. If, between the time of the original filing and the moment at which the enforcement judgment is issued, no voluntary payment has been made, an interim forfeiture injunction is issued, usually leading to a withholding from third parties or from checking accounts. Property forfeitures are seldom required, and a court-imposed auction is even rarer.⁷⁰

68 It should be noted that the system varies from the Anglo-Saxon system of precedents in which all decisions from Superior Court are binding on lower courts. In INDECOPI, only those decisions expressly declared to be binding should be followed by lower courts.

69 The Private Pension System is an individual capitalization system, whereby an employee's contributions are deposited in a personal account, called the “Individual Capitalization Account” (Spanish acronym: CIC), which is also augmented each month by the contributions of all the other workers that are registered in the system. Thus, the system is made profitable by the pooling of individual investments in a common fund. The system is regulated by Decree Law 25897 of 6 December 1992.

70 Seizure and sale of assets require an operational infrastructure that most AFPs do not have available (to them only those that are backed by a bank or other financial institution).

Once the employer is sued, it often approaches the AFP to negotiate the payment. According to AFPs' estimates,⁷¹ in 50% of the cases the full debt is paid off prior to judgment. In 40% of the cases, no debt is ever recovered.

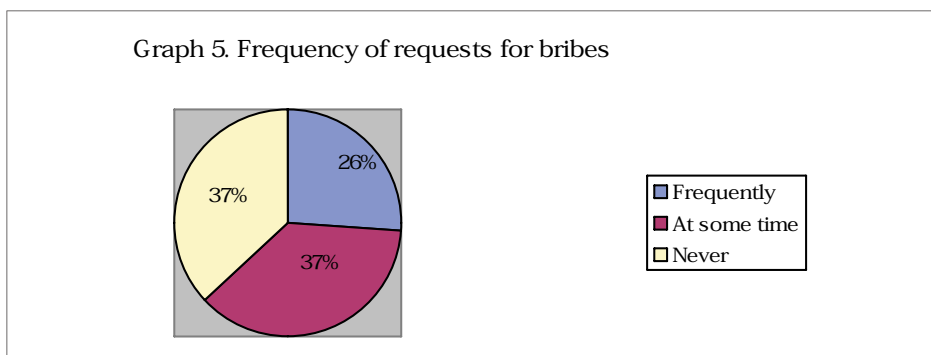
Reforms that might reduce the volume of cases filed by AFPs include:

- **Allow AFPs more time before filing suit.** Often, employers are simply caught by a liquidity squeeze, but intend to pay.
- **Give AFPs more bargaining authority.** Allow them to negotiate payments without having to resort to lawsuits.
- **Allow individual cases to be merged.** The law does not allow individual cases against a single employer to be joined together, resulting in many more cases than necessary.
- **Increase the minimum amount required to file a lawsuit.** The current amount to file suits in court is 850 *soles* (US\$ 243). It should be raised to a minimum of one UIT (3,200 *soles* or US\$ 914)⁷².
- **Stop filing suits based on the presumption of debt.** The debt should first be confirmed with the Office of the Superintendent in order to avoid unnecessary litigation.
- **Develop greater specific expertise in pension fund issues among the formal justices of the peace,** creating a special court division for pension matters to be considered.

4.6 Corruption in enforcement proceedings

According to a survey recently published by the NGO Proética, the Peruvian chapter of Transparency International, 74% believe that the most corrupt institution in Peru is the Judiciary, followed by the police with 71%.⁷³

These survey results concur with the IFES survey results. In response to the question of whether corruption exists in the justice system, particularly with regard to proceedings to obtain judgment enforcements, most respondents responded without hesitation that it was systemic. However, when asked how frequently an officer of the court solicited an illegal payment in order either to expedite a case or to determine its outcome, many respondents in the survey and in the interviews were reluctant to answer and over half were silent. Of those surveyed, 26% indicated that it happened frequently, 37% indicated that they had at some time been asked to pay bribes, and the remaining 37% indicated that they had never been asked.



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71 Data provided by the AFP *Profuturo*.

72 According to consultations with the Manager of the AFP *Profuturo* Legal Department.

73 To review the complete survey results, see http://www.transparency.org/surveys/dnld/proetica_survey_peru.pdf (5,810 persons surveyed).

IFES Rule of Law Occasional Paper Series

Barriers to the Enforcement of Court Judgments in Peru

Winning in Court Is Only Half the Battle – A Perspective from SMEs and Other users

During the in-depth interviews, we explored in more detail who receives bribes and what forms corruption takes in the courts. First, it appears that among court personnel, courthouse staff is most often involved in solicitation of illegal payments in exchange for expediting cases. The survey also supports this conclusion, indicating that after the police, they are the persons most frequently involved in taking bribes (See Table 17). While the bribes that parties must make to courthouse staff are not large in value, the practice appears to be systemic.

In general, two types of payments are typically made to courthouse staff. The first relates to payments given to courthouse staff whenever a procedure is required, such as a writ of property attachment or a notification of service. This type of payment is considered to be a “tip”. A number of those interviewed said they would “feel bad if they failed to give one, since they wanted to thank the employee for good performance”. Under these circumstances, many interviewed were uncomfortable with calling the gratuity a “bribe,” since they believed the practice to be standard and universally accepted.

Court system users objected more strenuously to the second type of payment, which is made in exchange for facilitating the procedure. Some refer to this as a “dispatch payment”. Many judges interviewed stated the practice of receiving dispatch payments should be eradicated. Some judges suggested that a judge’s failure to exercise appropriate control over what transpires in his or her courtroom is to blame for the practice of such dispatch payments. One judge said, “If I see that a document presented yesterday is on my desk today, I’m going to suspect the technical staffer has some special interest in its immediate dispatch. I’m quite alert to such machinations.” It should be noted that not all judges were so sensitive to such matters; some judges flatly denied the existence of any corruption in the justice system, including the practice of facilitation or dispatch judgments.

With regard to the level of corruption among judges, the overall response was less clear. Though many interviewed spontaneously declared that all judges were corrupt, when the issue was discussed more in detail, a number of those interviewed stated that many judges were not corrupt. Most of those surveyed and interviewed did not believe that paying bribes to judges in order for them to actually change their decision was a systematic practice in the enforcement system. However, some bankers interviewed noted that sometimes judges solicit bribes in the form of requesting materials and equipment, such as computers. Others interviewed estimated that between 15% and 20% of the judges in Lima were willing to accept bribes.

Finally, many surveyed believed that attorneys were also willing to accept bribes. It should be noted that the police, court personnel and attorneys are equally willing to accept bribes (according to the perception of those surveyed).

Table 17. Personnel involved in taking bribes according to survey respondents

	Person selected in first place	Person selected in second place	Person selected in third place	Ranking ⁷⁴
Courthouse staff	27.3%	27.3%	6.5%	23.14%
Police	30.3%	12.1%	19.4%	22.66%
Attorneys	24.2%	21.2%	16.1%	21.68%
Judges	6.1%	24.2%	32.3%	16.77%
Legal court staff	12.1%	12.1%	16.1%	12.90%
Auctioneers	0%	3%	9.7%	3.81%

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74 In order to rank each reason, a weighted average was assigned for the respondents’ first, second, and third choices, as follows: the first reason chosen was assigned a rank of 50%, the second choice 30%, and the third choice 20%.

5. Specific sources of delay in court-ordered auctions

The table below represents the main problems in court-ordered auctions. It should be noted that a majority (61.1%) of those surveyed stated they had never taken part in a court-ordered auction, so their answers are based upon perceptions rather than actual experience.⁷⁵

Table 18. Main problems in a court-ordered auction of debtor assets	
Delay in the management of the case	22.2%
Racketeering in the auctions	16.7%
Ineffective court control over the auction	14.8%
Little likelihood of recovering debt	14.8%
Difficulty in obtaining approval for the appraisal of assets to be auctioned	14.8%
Difficulty in getting the court to order the auction	7.4%
Absence of clear rules determining the priority of creditors	5.6%
Inefficiency in serving notice to interested parties	1.9%
Lack of publicity to attract broad attendance at the auction	1.9%
Have never take part in a court auction	61.1%

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5.1 Interpretation of the rules

One of the main problems is that enforcement rules related to time allowable between the publication of an auction notice in the Official Newspaper *El Peruano* and the time the actual auction is held is unclear. As a result, judges often interpret these rules differently and believe they have the legal discretion to increasing the time allotted between notice and scheduled auction.⁷⁶

At least two months elapse from the time the judge signs the order scheduling the auction until its actual date. After being served notice, the plaintiff will publish the auction announcements in the Official Newspaper *El Peruano* for six days or three days, depending on whether it is the first auction or not. In any case, there must be at least three working days between the last publication and the auction date.

The judges interviewed stated that two to three months often passes between the time a request is made to set a date and time for auction and the scheduled date of the actual auction, they noted that they often delay scheduling an auction because of their own heavy workload.

The experts interviewed believe one of the ways to address this problem would be to reduce the number of days required for publication of the auction announcement (from 6 announcements to 3 the first time an auction is called and from

⁷⁵ For an excellent analysis of the obstacles to holding court-imposed auctions, see Eyzaguirre *et al.*, *op cit.* 33.

⁷⁶ From the time an announcement of a procedural act is made and when it takes place, at least three working days must transpire, unless the Code of Civil Procedure states otherwise. When an auction is scheduled, the parties must be notified of the date it will be held and announcements of the auction listed in the Official Newspaper *El Peruano*. The court decision setting the date for auction must be announced no less than three working days in advance. So far the issue is clear. However, the vast majority of courts of different jurisdictions have held that not only must the announcement of auction be published no less than three working days in advance, but that it must be published on a working day. This interpretation is questionable; what Article 147 of the Code of Civil Procedure states is that what must be done three days in advance is the notification that schedules the auction. Publication of the auction notice does not constitute service of notice to the parties of the decisions issued by a judge; rather, it informs third parties interested in participating in the auction in order to publicize it. Thus, it should not be necessary to observe three days' advance notice for publication. Some lower and midlevel courts, however not a majority, interpret the statute accordingly.

3 announcements to 1 for the second and subsequent auctions). Another way may be to transfer the responsibility for conducting auctions to public auctioneers or public notaries because they may have lighter workloads.

5.2 Racketeers preventing open participation in the auctions

According to our interviews with judges and lawyers, racketeers often intimidate potential bidders in the auction process. Potential buyers may be coerced, through intimidation or simple pay-offs, as a way to discourage their participation in the auction. As a result, the racketeers are able to purchase properties for much less than what an open auction might have brought.

Part of the problem could be addressed by modifying the procedure for tendering bids in the Code of Civil Procedure. For example, bidders could be required to offer a final price for a property in a sealed envelope. If all bidders provided their final and only offer in a sealed envelope through a transparent process, the opportunity to fix prices would be reduced.

5.3 Third-party interventions (*Tercerías*)

One stalling tactic utilized by defendants to avoid the forced sale of assets is to have a third party file a claim for the assets. According to Paragraph 5, Article 486 of the Code of Civil Procedure, the resolution of a third-party claim is a summary process. However, in practice, the third-party procedure often prolongs the resolution of the case for two years or more. During this time the initial case is halted, and assets cannot be sold.

There are two types of third-party processes in Peru.⁷⁷ The first is a **third-party prior claim for payment**. This is a court action by which the third party who is not a party to the original proceedings asks the judge to pay him prior to paying the plaintiff. These cases often frustrate the litigation and collection of a legitimate debt to the detriment of the plaintiff-creditor. This situation often occurs in cases where the third party raises priority claims related to pensions or other workers' rights.⁷⁸ The possibility of such third party claims taking priority over the creditor only adds to the frustration and uncertainty of the litigation and collection.

The second is a **third-party right to dominion**. This is a court action through which a third-party petitions a judge to nullify an ordered auction. The allegation or rationale for this claim is that he is the real owner of the assets. These third-party actions are often filed by persons who claim to be owners of seized or mortgaged properties whose sale has never been registered in the corresponding Public Registrar. This problem stems from the fact that in the Peruvian legal system a property transfer is not consummated by the official inscription in the Public Registrar, but upon the signing of the contract of sale.⁷⁹ In other words, the transfer of an asset completes its sale –not the registration. Thus, registration cannot be used to support a first-in-time, first-in-right⁸⁰ policy regarding claims on properties, and third parties may claim prior right by a contract dated before the current creditor's or even the debtor's (ownership) interest.

5.3.1 Property Registry system is not given full faith and credit

Typically, in the dominion type of third-party intervention, the intervening party claims property through an unregistered contract. Such a contract is either a private document or one that has been filed with a Notary Public.

77 Article 533 del CPC.

78 According to art. 24 of the Political Constitution of Peru of 1993, workers' right have preference over any other employer's obligation.

79 Article 949 of the Civil Code.

80 First in time, first in right is the principle that priority for claims on property should be determined by the order in time they were acquired, the earlier acquirer having the greater claim. In many well-developed property systems, the time of registration in a reliable property registry is the measure of when the claim arose.

In matters of forfeiture or seizure, the Supreme Court has ruled that a duly registered seizure does not take precedence over a property transfer if the latter is listed in a private document predating the time of the seizure. The Supreme Court stated that because the third party acquired the asset prior to its forfeiture, when the plaintiff filed suit, the debtor was no longer the proprietor of the asset. Thus the legal grounds for attaching the property did not exist. In these cases, the Supreme Court states the real estate no longer belonged to the debtor, notwithstanding the debtor's listing as the proprietor in the Public Registrar. Experts interviewed believed that the court ruling encouraged the submission of falsified third-party claims and also undermined the effectiveness of the Public Registrar and property registry system.

5.3.2 Third Party Claims can be raised throughout the proceeding and in any court

Third Party Claims can be raised at any time during the legal procedure. There is no deadline by which such a claim must be lodged. There is also no system of identifying those who may have an interest in the property because property registration is not dispositive with regard to priority claims. In addition, there is no procedure for notifying other entities with a potential interest in the property under seizure or auction. Thus, it is not possible under Peruvian law to consolidate cases to determine and prioritize the various parties' rights. This opens the door for third parties, who may be acting in collusion with the debtor, to raise their claims and halt the proceeding at any time.

Further, the third-party procedure is often filed in a court other than that in which the enforcement proceeding is being conducted. The current effect of this procedure is to automatically suspend the main proceeding and the auction process.⁸¹

Even though the Code of Civil Procedure does not expressly state exactly which judge has jurisdiction to hear third-party interventions, its article 32 does provide that the judge who hears the principal claim must also hear ancillary claims or those that stem from the main case. In the past, courts have usually followed this practice. However, this practice has recently been questioned by the Supreme Court.⁸² In a recent ruling, the Supreme Court held that the judge who is responsible for the auction of assets is not the only one competent to consider third-party claims.

Several experts interviewed noted that because it was more difficult for them to get a third-party claim admitted before a judge who was ordering the auction of assets, many debtors had begun to forum shop.

5.3.3 Judges often do not dismiss frivolous or malicious claims

The other problem presented by third-party claims is that they are admitted even though judges often know, or believe, that the third party does not have sufficient grounds to sustain a claim. According to expert interviews, judges are reluctant to dismiss such claims because the Superior Courts often send them back for more proof or evidence. The Superior Court judges have argued that the lower court's action was a finding of fact and remanded cases back to lower courts for a trial on the merits. The experts believed this position reflects the widespread perception in the judiciary that the banking institutions or creditors in general are the stronger party, whereas the debtor is the underdog. Experts also thought that judges favored the debtor, giving more time to pay in an effort to "level the playing field".

81 As provided under Article 536 of the Code of Civil Procedure.

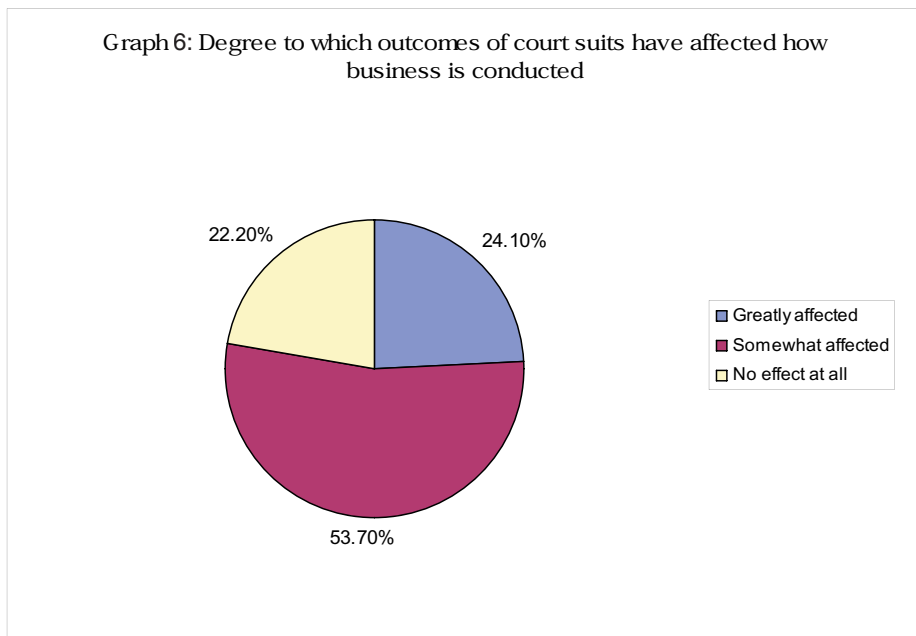
82 Exp. 33-2003. Decision of 21 November 2003, on disqualification of jurisdiction.

V – THE COURT SYSTEM VERSUS MECHANISMS FOR ALTERNATIVE DISPUTE RESOLUTION

During the 1980s and 1990s, a number of reform programs were undertaken to address inefficiencies in Latin America's judiciaries, including Peru. Many programs were aimed at reducing or eliminating delays, excessive caseloads, poor access, unpredictable outcomes, and excessive influence from the political arena. At that time, the reputation of most judiciaries in Latin America was rather low. The reform programs represented an attempt to formulate new policies that would offer trustworthy and efficient justice and court services to the citizenry. The introduction of mechanisms for alternative dispute resolution (ADR) signaled an effort to open up new avenues to resolve conflicts and improve available ADR services.

In Peru, the introduction of ADR began in the mid 1990s. Since then, the use of mediation and arbitration, the most widespread types of ADR, has proliferated, although not uniformly, among many sectors of society. Arbitration appears to enjoy greater acceptance among large firms; mediation has been used more by individuals and small firms⁸³.

Against this backdrop, this chapter will explore the advantages of ADR compared to the judiciary in connection with successful enforcement of judgments⁸⁴ in Peru. Through expert interviews and survey research, we attempt to weigh the performance of ADR against the traditional court system. We also attempt to examine the preferences of business managers among the systems, their effectiveness, and the points of contact that exist between ADR mechanisms and the judiciary for enforcement of judgments.

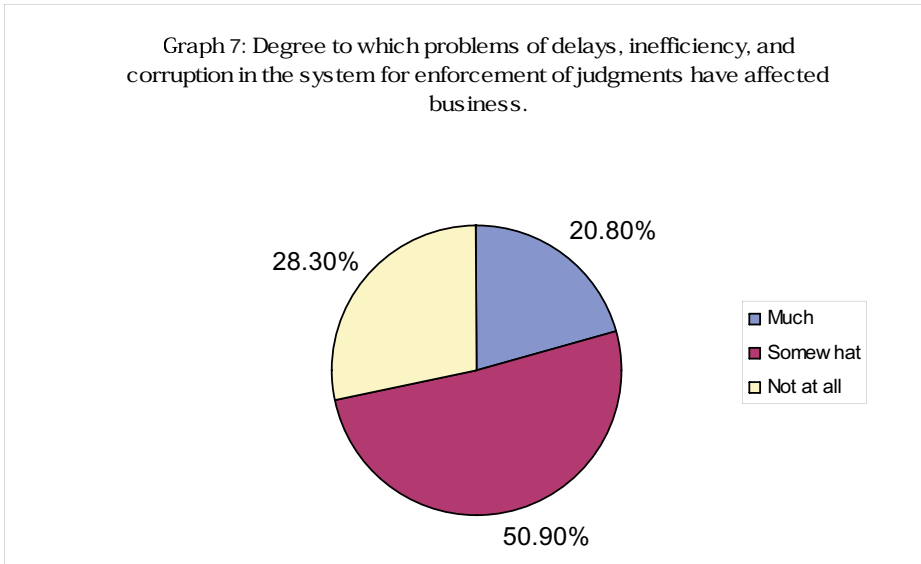


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83 The term SMEs, used throughout the report, refers to small and medium enterprises. Thus, the firms in the survey ranged from small to medium. However, in relation to arbitration, it appears that medium firms differ from small and micro firms, and do use arbitration where the smaller firms do not. Therefore, in this chapter, the reference to small and micro enterprises should be understood not to include medium-sized firms.

84 Including court judgments, commercial paper (checks, etc.) enforced through executive trials, and enforcement on collateral.

The context for exploring ADR as an alternative to the courts relates to the fact the reputation of the courts in Peru remains quite negative. The failed attempts at reform during the Fujimori administration, along with the notorious inefficiency of the courts and the constant corruption scandals in the judiciary, have tainted the judiciary’s image in the eyes of the citizenry. The business sector, for its part, hardly impervious to the popular distrust of the judiciary, has been forced to explore new ways to resolve disputes. In many cases, bad experiences and poor results from the courts have been an incentive to attempt new routes.



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1. Types of ADR Mechanisms

1.1 Mediation

Extra-judicial mediation is a mechanism for settling disputes that the parties themselves direct. Like all ADR mechanisms, mediation is based on an approach to handling disputes different from the courts. Mediation involves dialog and the search for mutually acceptable solutions with the support of a neutral, impartial third party who promotes the process of communication and mutual understanding among the parties. The goal of mediation is to reach a consensus solution to the dispute, rather than to choose a winner.

In Peru, mediation has grown in popularity since the enactment of the Law of Mediation N° 26872,⁸⁵ which declare the institutionalization and development of mediation to be of national interest. The Law makes it mandatory to request mediation before filing a lawsuit, whenever matters that can be mediated are at issue. Issues that can be mediated include all matters in which parties have freedom of decision, such as matters of owner’s equity, certain family issues, and (until they were recently suspended from this type of action) labor disputes.⁸⁶ The request for mediation should be presented to a public or private mediation center⁸⁷.

85 Published in the official newspaper *El Peruano*, November 13, 1997.

86 The requirement to attempt mediation as a prior step to filing a suit had to be imposed gradually throughout the country. It was first attempted in November 2000, with the implementation of a pilot plan in the cities of Arequipa and Trujillo and in the area known as the North Cone of Lima, which has the heaviest caseload of all Lima, if not all of Peru. Subsequently, Law N° 27398 took effect as of March 1, 2001, throughout Lima (including the North Cone) and in el Callao. It has remained in effect in Arequipa and Trujillo, but has not been extended to other parts of the country.

87 Despite the importance that the legislature attributed to the practice, the regulation was subsequently amended so that mediation became optional in all cases in which the national government was party to a dispute.

The Peruvian Law of Mediation, pursuing the direction of similar laws issued in Argentina, Colombia, and elsewhere in Latin America, was enacted in order to achieve a significant reduction in court caseloads. However, it is not clear whether mediation has achieved such a goal. One study, undertaken by Marc Perú,⁸⁸ concludes that while it is not possible to determine to what degree caseload reductions in the courthouses of the cities of Arequipa and Trujillo were attributable to mandatory extra-judicial mediation, the study does document that caseload have been considerably reduced.⁸⁹

Due to its low cost and easy access, mediation may become an appropriate mechanism for resolving conflicts over certain issues, such as capital ownership, that firms face. The search for a negotiated solution, the active participation of the parties, the use of simple language, and a process without ritualistic court formalities have the potential to make mediation a valuable and efficient alternative to the court system. However, more empirical research needs to be conducted to fully explore and justify this approach to dispute resolution, such as an evaluation recently undertaken by the IDB.⁹⁰

1.2 Arbitration

Arbitration in Peru is regulated by the General Law of Arbitration N° 26572⁹¹ (GLA). The Peruvian arbitration legislation draws on the Model Law of the United Nations for the Development of International Commercial Law (UNCITRAL). This law has two sections; the first concerns national arbitration, the second, international. In the international section, the Peruvian law goes beyond the Model Law, for example, by including the possibility of waiving the right to file a motion before the court to overturn an arbitrator's decision or of confining filings to specific kinds of international cases.

Since enactment of the General Law on Arbitration, arbitration as a practice has developed substantially. The following chart shows the number of cases coming before the Center for National Mediation and Arbitration of the Lima Chamber of Commerce. This center was created in 1993 with support from USAID, and its caseload has increased markedly since the GLA was passed in 1996.

88 Carlos Ruska, Miguel Santa Cruz and Javier Escudero, "La Conciliación Extrajudicial en el Perú: Experiencia de la Aplicación del Plan Piloto de Obligatoriedad en las ciudades de Arequipa y Trujillo". Published by Marc Perú with support from USAID, February 2002.

89 There is currently a major debate in Peru over the wisdom of upholding the mandatory status of extra-judicial mediation, and several bills are being proposed that would remove this requirement in response to the belief of some individuals that it constitutes a barrier to open access to the system of ordinary justice. What has been occurring in practice is that between 65% and 70% of the requests filed with the mediation centers result in the absence of one of the parties (usually, the party invited to attempt mediation). Nevertheless, when the parties succeed in sitting down at the table, agreements are reached through mediation in 65% of the cases, quite an encouraging proportion.

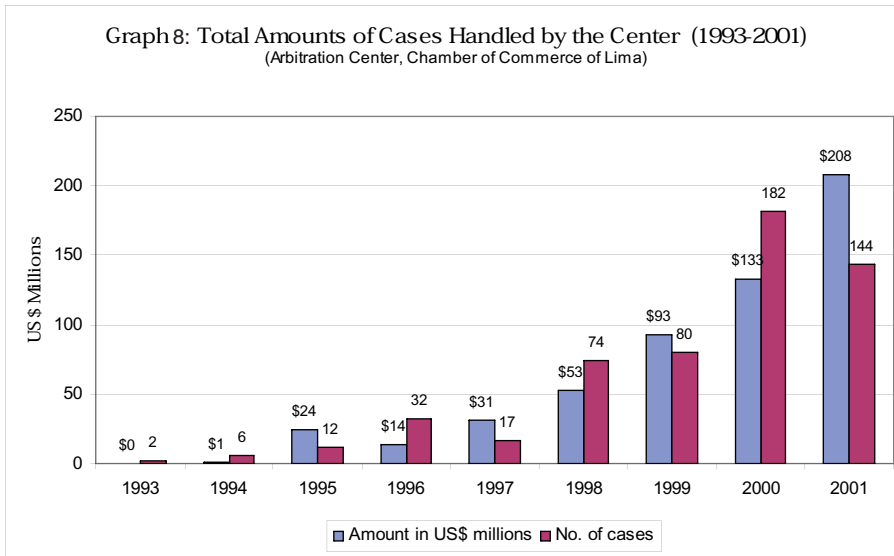
90 For an in-depth assessment of the impact of arbitration and mediation projects funded by the Inter-American Development Bank and the Multilateral Investment Fund, see IDB report "Evaluation of MIF Projects: Alternative Dispute Resolution (ADR)", MIF/GN-78-2, 2002. Alvaro Herrero participated in that preparation of that report. Available at <http://iadb.org/mif/v2/spanish/files/evalMARCspa.pdf>

91 Published in the official newspaper *El Peruano*, January 5, 1996.

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Winning in Court Is Only Half the Battle – A Perspective from SMEs and Other users



Source: Chamber of Commerce of Lima⁹²

The arbitration center of the Lima Chamber of Commerce has been geared toward handling disputes involving national and international firms of medium and large size. There is virtually no data on how cases related to micro enterprises and small firms are resolved. However, the general impression among specialists is that smaller firms do not resort to this type of dispute resolution tool most likely because of it does not fit the needs of small businesses because of its cost and the complexity of the process⁹³.

Arbitration has enjoyed substantial development, thanks to the services offered by the Lima Chamber of Commerce. However, there is a growing trend toward *ad hoc*-, unsupervised arbitration being conducted outside of the official arbitration centers. This development may pose problems for the arbitration process because arbitrators operating outside of an organization are not monitored, may not be qualified, and may produce inconsistent results. These are issues that need more attention.

Despite the fact that small and micro enterprises rarely participate in arbitration cases, they can nevertheless benefit from learning about its application in dispute resolution. Knowledge of and ability to participate in arbitration would benefit smaller firms in government procurement matters, in particular, because when the national government is a party, contracts are required by law to include an arbitration clause. Thus, a major training and outreach effort, geared toward small firms, is needed.

1.3 Direct negotiation with the debtor

Small firms address the vast majority of their business disputes through direct negotiation.⁹⁴ Small firms’ business relationships are predicated on trust among suppliers, service providers, customers, and even neighbors who operate in the same geographic confines. For small businesses, personal contact is the essential and defining element of a business relationship. A common refrain, “better a bad agreement than a good court decision,” reflects the strong preference for negotiating business dispute resolutions rather than litigating them.

92 At <http://www.camaralima.org.pe/arbitraje/datos_estadisticos2.htm>.

93 Herrero, op cit 6, pp. 18-19.

94 Herrero, op. cit 6; and Calderon, Carlos and Hugo Eyzaguirre. “Poder Judicial y Micro y Pequeña Empresa: Impacto y Posibles Soluciones” [The Judiciary and Micro and Small Enterprise: Impact and Potential Solutions]. Instituto Apoyo, 2000.

With large and medium size firms, although direct negotiation naturally features prominently in their commercial activities, firms in many cases have legal departments (staff attorneys) or legal counsel on retainer (external) who take the position that disputes should be resolved through the formal court system.

Many corporate attorneys' apparent preference for litigation can be explained in a couple of ways. First, Peruvian attorneys consider their forte to be expertise in litigation, and do not see negotiation as part of their job. They also have little training in the art of negotiation. Second, settling disputes through direct negotiation may lead the clients to decide that an attorney's services are redundant, which could lead to less business for legal professionals. Indeed, many executives and investors do not see the cost of an attorney as justified in the absence of litigation. Of course, in reality, a firm will benefit in a negotiation from having expert legal counsel explain the legal consequences of various options during the negotiations. However, given current attitudes to promote mediation, there may be a need to encourage attorneys and their clients to be more receptive to the possibility that they can be useful in direct negotiations with the debtor, and that ADR can benefit both of them.

2. Efficiency of the different systems and business preferences

Under these circumstances, business people face an array of prospects when they demand enforcement of a court order. In light of the growing use of ADR mechanisms in Peru, it would be useful to analyze the extent to which these tools may offer an effective alternative to traditional efforts to obtain the enforcement of court decisions in their cases.

2.1 Mediation

ADR mechanisms are not yet widely used by business people and let alone the population at large. However, there are indications that mediation is growing as a viable, attractive option for dispute resolution in the spheres of commercial and investment endeavors. Research conducted in late 2001⁹⁵ found that most cases coming before mediation centers in Arequipa (in the south of the country) and Trujillo (in the north) concerned business issues, payment obligations and breaches of contract. To further underscore that mediation, with other methods of ADR, is gaining acceptance, other, more recent, research has determined that small businesses prefer to resort to mediation (and other alternative mechanisms) to resolve disputes, in lieu of filing lawsuits.⁹⁶

2.2 Arbitration

Micro and small enterprises appear to use arbitration rarely, if ever. In its current format, due to its complexity, time and cost, arbitration does not meet the need of most small firms. Arbitration centers are also managed by organizations that are unfamiliar with micro and small firms. However, some experts believe it would be helpful to investigate the feasibility of a special arbitration system tailored to the needs and legal culture of small firms.⁹⁷ One reason to promote more small firm use of arbitration may be that generally arbitral awards have a higher rate of voluntary compliance than regular court judgments.

2.3 Direct negotiation for court order payment

Direct negotiation with the debtor is an option frequently used by businesses to produce compliance with a court order. The IFES survey results of representatives of micro-enterprises and small firms indicate that

95 Ruska et al, *op. cit.* 88.

96 Herrero, *op. cit.* 6..

97 This was one of the recommendations made by the panel "Proposals to Improve Commercial Dispute Resolution" at the VI Inter-American Forum on Microenterprises held 4 to 6 September 2003, in Guatemala and organized by the Inter-American Development Bank. See <http://www.iadb.org/foromic/>

informal negotiations are considered to be the most effective means to ensure compliance with a court order, followed first by alternative mechanisms and next by court enforcement. These findings reinforce those of previous research, which found that small businesses resort unfailingly to negotiation to resolve disputes, even if the dispute is payment of an undisputed court order.⁹⁸ Direct negotiation and personal contact with customers and suppliers are the foundation of Peruvian business culture, and this is reflected in how they settle business disputes and how they attempt to collect on debts even after they have been adjudicated.

Table 19: Most effective methods to obtain the enforcement of a court judgment: Percentage of respondents choosing each method

	Most preferred method	Second most preferred method	Third most preferred method	Ranking ⁹⁹
Informal Negotiation	48.1%	24.5%	18.4%	35.08%
Alternative Mechanisms	25.9%	32.1%	26.5%	27.88%
Court Enforcement	16.7%	17%	32.7%	19.99%
Fear of Harm to Business Reputation	9.3%	20.8%	18.4%	14.57%
Threats or Violence	0%	3.8%	2%	1.18%
Others	0%	1.9%	2%	0.61%

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2.4 Court adjudication

Business representatives appear to find resorting to the courts as the least desirable option for resolving disputes. This is a function not only of the enforcement problems of the courts, described in previous chapters, but also of the widespread distrust of the judiciary. This distrust is due in part to the public view, oftentimes unfair, that the judiciary is a mere tool of other political actors in the national government, rather than an institution serving the public.

Survey results regarding effectiveness of different mechanisms in the recovery of an outstanding debt (in its entirety or in part) indicate that participants believe that direct negotiation results in the highest percentage of debt recovery (see Table 20). Of the survey respondents, 61% estimated that between 75 and 100% of a debt will be recovered this way. ADR ranks second, with 66% of the respondents indicating that between 50 and 75% of the outstanding debt will be recovered. Finally, we see that those surveyed believe that resorting to the courts leads to the lowest proportion of debt recovery. Sixty percent estimated that between 25 and 50% of an outstanding debt can be recovered through the courts.

These figures appear to illustrate that the further dispute resolution occurs outside the formal system, the more the creditors expect to recover a greater portion of the debt. In other words, the effectiveness of different mechanisms is greatest when the role of government and the level of regulation are smallest. Table 19 demonstrates the same inverse relationship among effective mechanisms for achieving the enforcement of a judgment and level of formality, i.e., the further away from court adjudication a process, the more effective it appears.

98 Herrero *op. cit.* 6; and Calderón *et al. op. cit.* 93.

99 To calculate the ranking for each enforcement method, a weighted percentile average is used for survey respondents, who rank the methods in first, second, and third place along the following scale: first place receives a 50% weight, second place 30%; and third place 20%.

Table 20: Proportion of a debt recognized in a court judgment which is recovered through different mechanisms			
Proportion of the debt	Resort to the courts	Mediation and other alternative methods	Direct negotiation with debtor
100%	1.9%	5.6%	25.9%
75%	11.1%	33.3%	35.2%
50%	48.1%	33.3%	16.7%
25%	22.2%	20.4%	7.4%
0%	14.8%	5.6%	11.1%
Don't know/No answer	1.9%	1.9%	3.7%

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3. Enforcement of arbitral decisions and mediated agreements

Enforcement of arbitral awards and mediated agreements must be explored in analyzing the efficacy of these systems of dispute resolution. Those surveyed feel that ADR resolutions generally enjoy a high rate of voluntary compliance. Following is a description of the procedures involved, and analysis of the reasons for the results.

3.1 Resort to courts for enforcement

The enforcement of arbitral decisions and of mediated agreements is covered for in the Code of Civil Procedure and the General Law of Arbitration. Basically, an arbitral award or mediated agreement is an enforceable document that can then be submitted to the court for an executive trial or procedure for enforcing a court judgment. In the case of an arbitrator's decision, the General Law of Arbitration details certain aspects of the procedure that are parallel to the Code of Civil Procedure. The task, in theory, should be simple. Nevertheless, in practice it is held up whenever the debtor refuses to pay, in the same way that payment on a court judgment with an unwilling defendant is held up. Regardless of the method of resolving the dispute, implementing the resolution, collecting payment, from an unwilling debtor is subject to a mandatory enforcement procedure through a court enforcement procedure.

Thus, the advantages of using ADR, particularly in terms of expediting results, are undermined in the event it becomes necessary to resort to enforcement through the formal justice system. In the absence of a debtor's willingness to comply with the voluntary agreement or arbitral decision, the "winner" will have no other option than to make use of the formal system in place for the enforcement of court judgments, which involves incurring the delays and difficulties described in the preceding chapters.¹⁰⁰

3.2 Voluntary compliance with ADR results

There is a notable absence of statistics on the number of enforcement proceedings for mediated agreements and arbitral decisions in the hands of the Judiciary. However, the perception is that the majority of successful ADR

100 The final document from the National Forum for Competitiveness, entitled "Impedimentos Institucionales para el Desarrollo Empresarial en el Perú" [Institutional Obstacles to Entrepreneurial Development in Peru] (drafted by the same working group of Hugo Eyzaguirre, Gabriel Ortiz de Zevallos, and Namasté Reátegui, for the National Council on Competitiveness) indicates that on the basis of a study by the authors, it is found that all the stages of a mandatory enforcement of liquidation of debtor's property would take approximately 10.8 months, counting from the time a suit is filed until payment is obtained from the debtor, and that it will cost an average of US\$ 608.00. This affords us a valid basis on which to conclude that mandatory enforcement is a true problem for creditors who require urgent action, and one that begs for urgent correction.

efforts are voluntarily carried out by the parties, without resort to court intervention. Such a conclusion may reflect that the parties themselves have willingly subjected themselves to the dispute resolution procedure, have played leading roles in settling their own disputes (as in mediation), or that they have confidence in the experts who have weighed in on the matter (arbitration). Empirical assessment of the reported observations would be helpful in confirming that results from ADR result in more voluntary compliance than court judgments, and therefore represent more enforceable results.

4. Further changes in infrastructure needed to support ADR

4.1 Special Panels and Courts

Arbitration may need the traditional, formal justice system as a support to enforce arbitral award and in certain other areas. The Eighth and Ninth Complementary and Transitional Resolutions of the General Law of Arbitration (GLA) provide for the creation of Special Panels and Courts to enforce arbitral awards. Though at the time the GLA was passed in 1996, such courts and panels were not needed since there were too few cases of arbitration to justify such infrastructure. Today, their creation is vital. Training for judges and court staff is also needed so that they can discharge their responsibilities satisfactorily. These Panels and Special Courts would also be appropriate venues for enforcing mediated settlements.

4.2 Appeals

A specific problem negatively affecting arbitration is the abusive use of appeals which seek to overturn arbitral awards. While there are virtually no accessible data, the Center for National Mediation and Arbitration of the Lima Chamber of Commerce has appealed 37 cases to the judicial system.¹⁰¹ Some interviewed experts note that judges appear to be reviewing the merits of the cases in these arbitral decisions, in violation of the plainly enumerated, limited, and procedural reasons provided in the General Law of Arbitration for nullifying an arbitral award.

They also note that judges' willingness to revisit substantive issues settled in arbitration threatens the credibility of arbitration. Using arbitration to avoid court formalities will be meaningless if arbitral awards can not be enforced in the courts or when an appeal results in numerous retrials.

101 These 37 cases were appealed to the Judiciary in the period between 2000 and 2003. Consultation with responsible officials at local arbitration centers (Association of Engineers of Peru, la Pontificia Universidad Católica del Perú, the Office of the Superintendent of Health Care Providers, and the Peruvian American Chamber of Commerce) reveals that arbitral decisions of these groups had not been appealed, possibly because these centers were created more recently than the Lima Chamber of Commerce center. It should also be noted that 37 is a low number in comparison to cases overall, and reflects the fact that most arbitral awards enjoy voluntary compliance.

VI – ENFORCEMENT AGAINST THE STATE EFFECT ON SMALL AND MICRO ENTERPRISE (SME) PARTICIPATION IN PROCUREMENT

The enforcement of judgments against the State is an area of vital importance, impacting both the public and private spheres. According to IMF statistics, in Peru, government (central and local) expenditure for public works and state-owned enterprises is equivalent to 20.4% of the GDP, making the State particularly important economic actor. The State is also a unique entity with different accountability than a private actor; it has responsibility toward the public, including accountability for responsible budgeting and use of public funds, and responsibility to protect public property. The State's inherent characteristics make enforcement against it very difficult at best. Essentially, the plaintiff is often asking a State entity, such as the courts, to force another state entity to pay a debt or damages. Enforcement through attachment and seizure is particularly difficult. For example, State assets in the public domain, such as government buildings and parklands, cannot be seized (this is the case in many countries).

Similarly, enforcing injunctions and enforcing criminal laws against State officials is generally problematic. Collecting fines or damages for government human rights abuses may take years, if it is possible at all. Overall, the failure of the State to pay its debts and voluntarily comply with administrative or court decisions does not set a good Rule of Law example to the public or business community. If the State does not adhere to the Rule of Law itself, others will likely follow its lead.

The complexity and magnitude of this important issue warrants a separate study. The study's scope was too limited to thoroughly analyze the multidimensional problems attendant to enforcing judgments against the State. However, the issue is of such importance to the commercial sector, particularly in the area of government procurement/contracts, and so closely tied to the thrust of this study, that several related questions were included in the survey and analyzed below.

1. Obstacles to enforcement of judgments against the State

1.1 Results of IFES Survey

The results of the survey indicated that the main obstacle to collecting judgments against the Peruvian government is simply the State's lack of political will to pay its debts. The State regularly demonstrates its unwillingness through simple inaction and through failure to allocate the resources necessary to fulfill its legal obligations.

The second most significant obstacle is the scarcity of available State resources and the State's decision that it has other, higher budgetary priorities. This situation reflects the country's poor economic performance. When resources are scarce, the prevailing tendency is to indefinitely postpone paying judgments against the State.

The third most significant factor is delay, most often caused by the lack of transparent, efficient administrative procedures to effect payments of judgments. The main problem is the rules that determine the steps to be taken and the standards to be followed to effective and efficient compliance with decisions of the court are unclear. Some questions that may remain open when rules are unclear include:

- 1) Which agency is responsible for a particular payment?
- 2) Who in the agency is responsible for making sure the payment is made?
- 3) Who authorizes payment disbursement?
- 4) How is the amount to be budgeted?

This regulatory vacuum is exacerbated by the striking absence of internal mechanisms to hold public servants accountable to the law or judges.

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	First obstacle	Second obstacle	Third obstacle	Ranking¹⁰²
Lack of public resources	18.9%	8.9%	8.9%	13.9%
Unwillingness of government to pay	17%	22.2%	17.8%	18.72%
Excessive delays	13.2%	11.1%	11.1%	12.15%
Inadequate procedures	9.4%	6.7%	6.7%	8.05%
Immunity to enforcement proceedings	7.5%	6.7%	13.3%	8.42%
Lack of independent judiciary	5.7%	4.4%	8.9%	6.83%
Excessive Costs	3.8%	15.6%	11.1%	8.80%
Insufficient authority to effect enforcement	3.8%	2.2%	4.4%	3.44%
Corruption in the enforcement procedure	1.9%	8.9%	2.2%	3.11%
Absence of sanctions for failure to comply with court orders	1.9%	0%	0%	0.95%
Lack of respect for the courts	0%	2.2%	2.2%	1.10%
Inefficiency in the courts	0%	2.2%	2.2%	1.10%
Unwillingness of courts to impose sanctions	0%	8.9%	6.7%	4.01%
None	15%	0%	0%	7.05%

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1.2 Constitutional Court Addresses Obstacles to Enforcement of Judgments Against the State

The three most important obstacles to enforcing judgments against the State, as revealed in the IFES survey, were also examined in a recent judgment handed down by the Constitutional Court of Peru.¹⁰³ The holdings addressed the three obstacles uncovered in the IFES study.

¹⁰² In order to rank each reason, a weighted average was assigned for the respondents first, second, and third choices, as follows: The first reason chosen was assigned a rank of 50%, the second choice 30%, and the third choice 20%.

¹⁰³ File No 015-2001-AI/TC. El Peruano, 1 February 2004.

The Court, referring in its decision to unjustified delays in State payment of judgments, wrote:

“...the principle of budgetary legality should be made consistent with effective enforcement of a court judgment. Upholding of the first does not justify ignoring or irrationally delaying compliance with judgments. Consequently, priority should be accorded to the payment of the oldest debts and of the interest that has accrued due to the unjustified delays in payment.”

This means that the budget rule establishing that any payment made by the State should be drawn from the budget line allocated for its declared purpose. But this rule may not be used to prolong unreasonable and endless refusal to enforce court judgments against the State.

The Court further elaborated:

“...It is neither reasonable nor constitutional to defy court judgments that have been issued more than five years earlier that were not budgeted for under legislation current at the time these judgments were issued...”

The Court held that in cases of notorious noncompliance, the Ministry of Public Prosecution is responsible for investigating whether the public officials who failed to budget for State obligations acted with purposeful deceit.

As for lack of resources to pay judgments, the Court acknowledged that the Peruvian government had limited revenue and often lacked the resources required to afford essential public services. But the Court holds that such a condition

“...may not also serve as a constitutionally sufficient pretext to authorize the sacrifice of the right to enforcement of court decisions, when other means and measures exist that could be taken in order to satisfy the debts ordered under final sentences.”

The Court held that

- 1) The principle of budgetary legality should be made consistent with the public’s right to effective enforcement of a court judgment;
- 2) Notorious cases of government noncompliance with judgments warrants investigation into possible wrongdoing by officials who were responsible for the nonpayment/noncompliance; and
- 3) Lack of revenue or resources is not sufficient to justify the government’s failure to pay judgments.

While the decision did not set forth a clear methodology to solve the problem, it did suggest that the law requires one.

1.3 Peruvian Multisectorial Commission Findings

The Multisectorial Commission under the purview of the Presidency of the Council of Ministers was created in 2003. It was tasked with the study and formulation of technical and regulatory proposals aimed at fostering the satisfaction of judgments by the State.¹⁰⁴ The preliminary conclusions of the Commission highlighted other structural deficiencies in the system for enforcement of court decisions against public entities. The Commission underscored the following aspects, among others:

- There is no comprehensive record of all the pending State debts related to final court judgments;
- In general, government agencies are not required to provide justification for their failure to acknowledge court orders;

¹⁰⁴ This commission was created pursuant to ministerial resolutions No. 238-2003-PCM and No. 317-2003 PCM.

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- The rules and regulations in force are unclear to the extent that the resulting problems in implementation, such as delays, have been declared unconstitutional; and
- The record of State-owned real estate assets is incomplete and inadequate to allow a party to determine whether the asset is immune from seizure.

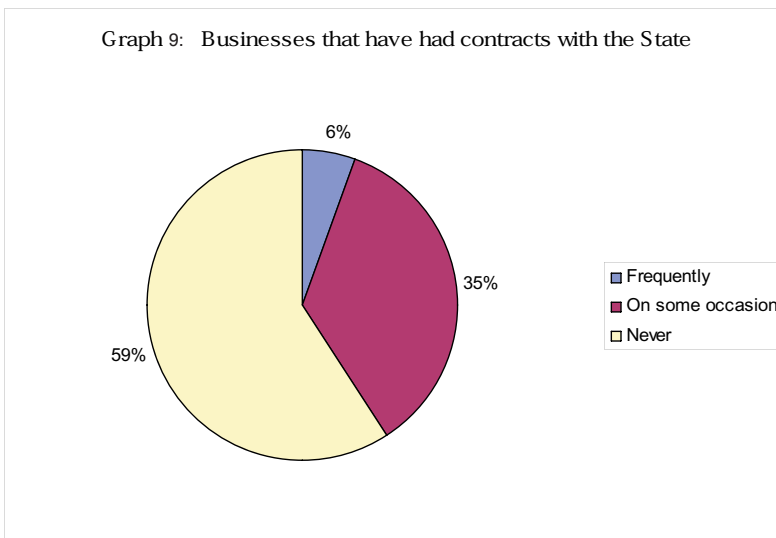
2. Micro and Small Enterprises and the Effect of Judicial Inefficiency on Participation in Government Procurement

The myriad enforcement problems described detract from businesses’ perceptions of the legal-institutional environment for doing business with the State. This is particularly problematic for SMEs¹⁰⁵. The inability of SMEs to access justice and shoulder the costs, or access credit that would allow them to deflect the effects of significant time delays before payment, pose significant disincentives and barriers to the pursuit of public procurement opportunities.

2.1 Environment for SME Participation in Government Procurement

In this section we examine the business environment for contracts and procurements with the State from the perspective of SMEs. We focus on the existing legal framework, the role of key actors, and the structural conditions that help or hinder participation of SMEs.

The starting point for analysis is the scant number of small firms that currently participate in the public procurement system. The IFES survey results indicated that only 5.6% of those surveyed (who were representatives of SMEs) engage in business with the State on a frequent basis. IFES was not able to obtain any data from any State source to test this figure. Even though the State is required to collect and provide this data, it does not do so. The public employees and experts consulted in Peru indicated they did not know the number of SMEs that are contractors with the public administration at all levels, but they concurred that there are very few.



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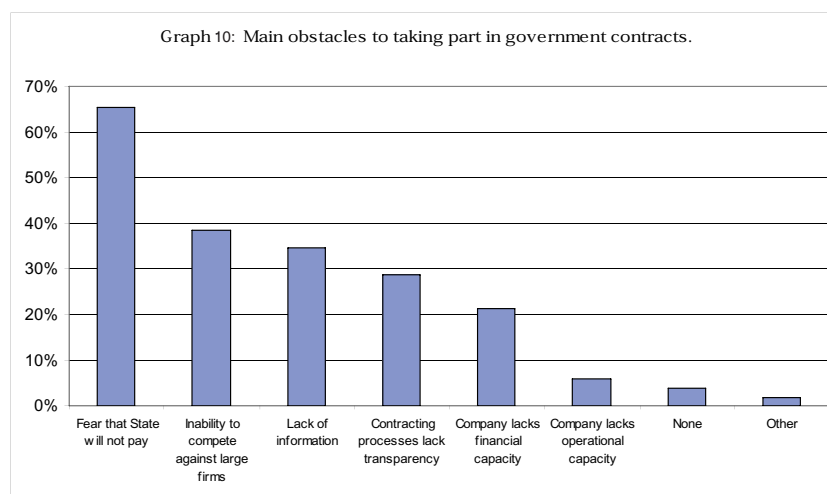
105 The Small and Micro Enterprise Act No. 27.628 (2000) defines small and micro enterprises as “business units which work under any form of business management devoted to the production, extraction, transformation, and trading of assets and services”. Under this law, a micro enterprise may not employ more than 10 persons and its sales volume may not exceed 100 tax units. A small enterprise may not have more than 40 employees and their sales should be under 200 tax units.

According to current figures, the Peruvian government's expenditures on contracts for goods, services and public works total approximately US\$ 4 billion, of which 54% is for goods, 28% for services, and the remaining 18% for public works. Approximately 850,000 national public procurement transactions occur annually which are handled by approximately 2850 local and national public entities.¹⁰⁶ Of the 850,000 contracts, 81%, or 695,000, are small-scale contract awards. Under the law these 695,000 small-scale contracts should be accessible to small firms.

Pursuant to Article 19 of the new Law on Small and Medium-Size Enterprises¹⁰⁷ (and Article 21 of the Regulations), state agencies are to set aside 40% of their overall purchases for small firms. This is a significant set aside in favor of small firms. Representatives of PROMPYME, CONSUCODE and CODEMYPE, the agencies responsible for maintaining data and promoting compliance with this law, did not have any information available that would demonstrate compliance. However, it is widely presumed that 40% of contracts are not being awarded to SMEs, that SMEs do not currently receive a substantial share of government contracts.¹⁰⁸

2.2 Link between System of Enforcement of Judgments and SME Growth through Facilitation of Increased Participation in Government Procurement

Against this legal backdrop, the question arises: why is the participation of SMEs in government purchasing so low, when there are almost 695,000 small-scale contracts awarded totaling approximately US\$ 3.2 billion? A number of factors including bureaucratic inefficiency and lack of capacity, and lack of information¹⁰⁹ partially explain this situation.



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106 Of these, 76.97% take place in Metropolitan Lima, according to Dr. Ricardo Salazar Chavez in the "International Seminar Workshop on State Contracts," Lima, December 2003.

107 Law 28015, *El Peruano*, 3 July 2003.

108 CONSUCODE monitors public sector purchases and keeps records of the volume and amounts of purchases made by the public administration. SUNAT, the tax administration agency, maintains annual company sales records. PROMPYME is a public institution devoted to the promotion of small enterprises. None could provide data on small firm contracting in government procurement.

109 Smaller firms encounter problems accessing information on contracts. Among its responsibilities, PROMPYME, a public institution devoted to the promotion of small enterprises, collects the annual purchasing plans of different government agencies in order to identify and disseminate prospective opportunities for small businesses.

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As the above graph shows, small firms are extremely apprehensive that the government will not pay. If the State fails to pay voluntarily, the process for recovering payments is protracted and complicated. SMEs cannot afford to cover the government's failure to honor its debts. Moreover, SMEs lack adequate access to external financing. This limits their ability to absorb even delays in payment (as opposed to nonpayment), which are common with State contracts.

The lack of access to credit also has the obvious limiting effects on expansion that normally result from a shortage of credit. It is in part related to the inefficient system for enforcement of judgments. The unreliability of contract/loan enforcement raises the price of credit in the market, and also makes SMEs riskier as borrowers, leading lenders to deny them credit. This lack of access to credit is a secondary effect of the current ineffectiveness of court judgments, but is yet another reason for lack of SME growth and participation in government procurement that is directly attributable to judicial inefficiency in enforcing judgments.

The problems faced by SMEs in gaining access to the system of government procurements will not be settled by legal changes alone. Deeper structural changes to modernize the system need to be introduced, including transparency criteria and better statistical records that would link procurement management to budget management and thereby ensure prompt payments within firm deadlines. Finally, mechanisms need to be established to hold public officials and public servants accountable when they fail to carry out their duties.

VII – KEY CONCLUSIONS, RECOMMENDATIONS AND OPTIONS FOR REFORM

The IFES assessment reveals that the Peruvian enforcement process has a number of serious shortcomings related to its overall transparency, efficiency and accountability. While these shortcomings present social and economic costs for the Peruvian economy in general, they have a disproportionate impact on small and medium enterprises (SMEs) in particular. Because SMEs have limited capital or access to the courts, including the enforcement process, they are not able to afford the time and cost involved in securing or executing a court judgment in Peru. Examining this issue through the eyes of SMEs is extremely important since they represent over 90% of the businesses in Peru.

A number of interrelated reforms are needed, particularly those geared towards deformalizing and streamlining the enforcement process so that it becomes more self-executing and less court driven, time consuming and costly. Since the vast majority of stakeholders and experts interviewed expressed a significant distrust in both the judicial and enforcement process, public participation in the reforms, including public outreach and access to information programs, should also be part of any reform agenda. Indeed, technical reforms on paper will have little impact in practice or on public confidence in the legal system in general unless the benefits of the reforms are broadly understood and supported.

A. Key Conclusions

Four key interrelated conclusions from the IFES 2004 assessment are:

1. The **time** required to enforce a judgment in both theory and practice is inordinately long and therefore costly and is the key reason SMEs do not use the enforcement process.
2. The **formality and complexity** of the enforcement process is the main cause of delays; examples include excessive legal objections and appeals, technicalities related to personal notice or service and an over-reliance on written instead of oral procedures.
3. The **poor performance and lack of accountability of judges** and other court officials is another key reason for delays; examples include judges not following the law or exercising sanctions even when flagrant dilatory tactics are undertaken, judges being perceived as being biased in favor of large debtors, the willingness of judges to entertain numerous legal objections and appeals on purely technical grounds and court officials focus on technical processes and procedures such as the formalistic notification process.
4. The **Rule of Law and the constitutional right to contract, own property and have a fair and speedy trial are seriously undermined** by the inefficiency and ineffectiveness of the enforcement process in Peru; until the laws in Peru can be enforced fairly, effectively and efficiently it will not be possible to develop public trust in the legal system or a rule of law culture.

Other **important findings** include:

- i) The enforcement process within the Qualified Justices of the Peace courts in Lima is seen as more efficient and reliable than the process within the civil courts of first instance;
- ii) Legislators and judges are generally seen as biased against creditors; examples include legislators passing laws favoring debtors and judges condoning the dilatory tactics of debtors;
- iii) Alternative Disputes Resolution (ADR) mechanisms or direct negotiation with debtors are preferred over using the courts;

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- iv) The rule of law is undermined by corruption in the enforcement process, such as that related to “facilitation payments” to court staff (which appears to be a widespread practice in Lima);
- v) Enforcement of judgments against the State is even more difficult than the enforcement of judgments against private companies or individuals; key reasons relate to the scarcity of available State resources, the State’s failure to budget for payment of judgments, and a lack of transparent, efficient administrative procedures to actually collect the payment. (This issue disproportionately impacts SMEs because this is a disincentive to their participation in the public procurement process and from doing businesses with the State in general); and
- vi) Uncertainty related to the payment of debts and enforcement of judgments results in higher bank interest rates. (High interest rates disproportionately impacts SMEs because this effectively prohibits most of them from borrowing capital).

The Enforcement System and SMEs

One of the key findings of this report is that SMEs are significantly affected by the inefficiency of the judicial enforcement system. SMEs showed a clear aversion to using courts due to delays, excessive costs, corruption and inefficiency. However, severe obstacles to both executing “guarantees” -such as collaterals on movable and immovable assets- and commercial papers -such as checks- are particularly worrisome because they may lead to two negative scenarios.

First, SMEs may reduce business transactions that require using “guarantees” and/or commercial papers in order to avoid the risk -and cost- of going through the enforcement system. Second, the risk of using those instruments could lead to increased transaction costs. For example, the low probability of enforcing regular bank checks through the court system generates increased transaction costs. In this respect, it is easy to understand the way in which judicial inefficiency affects the efficiency of private sector activity –in this case, SMEs transactions. Thus, the link between the enforcement system and SMEs activity cannot be neglected. Because SMEs seek to mitigate the risk of non-payment, just like any other business, they limit the geographic scope, nature and size of their transactions to those they know best.

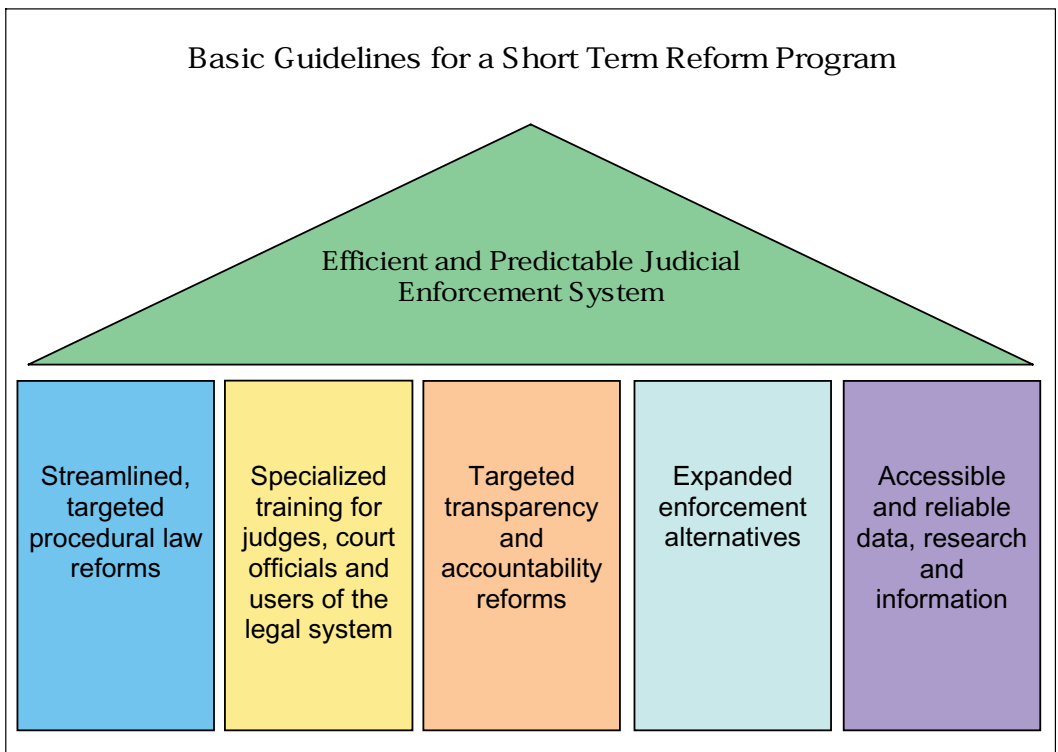
The conflictive relationship between SMEs and the judicial system is another distressing finding. Small businesses do not trust the court system; they face problems when they try to access the courts or the enforcement system and they only resort to the judicial system when it is inescapable. The lack of an official, State-sanctioned dispute resolution system obviously has a negative impact on a significant amount of small businesses activity. Our findings regarding the enforcement system parallel previous research on the negative relationship between SMEs and the courts.

However, on a more positive note, IFES’s assessment highlights that a number of the causes of the enforcement system’s inefficiency are rooted within the system itself. This is an important finding because it means short term performance can be improved, at least to some degree, without waiting for more fundamental instrumental or cultural reforms to take root.

B. Recommendations and Reform Options

IFES believes that any significant judicial reform program and strategy should include a comprehensive, participatory assessment of the judicial system, including how the enforcement system works in both theory and practice and a long-term public outreach program.

Now that we have identified and better understand many of the main barriers to an efficient and effective enforcement process in Peru, and how they relate to broader problems and reforms, the challenge at hand is how to actually implement a reform program within the political, economic, cultural and legal context at hand and how to convince the public and SMEs that they can then trust the legal system to protect their contract and property rights.



Outlined below are a number of reform ideas that merit serious consideration:

1. Streamline and clarify procedural law

- **Executive trials in the Civil Procedural Code (*procesos ejecutivos o de ejecución*):**
 - i) Prohibit through legislation the possibility of judges reassessing the underlying factual transaction in executive cases and provide judges training in this field;
 - ii) Severely limit interlocutory appeals (appeals accepted before the end of the procedure); and
 - iii) Limit requirements for written pleadings.
- **Reduce Formalism in the notification process:**
 - i) Provide through legislation a less technical and formal notification process;
 - ii) Provide in legislation that a formal, personally-served summons or notice (*cédula*) should be required only when the case is initiated;
 - iii) Provide legislation to require the parties to prepare their own notices (*cédulas*) instead of relying on court clerks;
 - iv) Provide through legislation that notification officers be more accountable through the imposition of effective sanctions; and
 - v) Provide through legislation or court rules that the litigants and the notification officers have minimum contact to make facilitation “tips” more difficult.
- **Limit exceptions, nullities and appeals:**
 - i) Clarify through a legislative amendment or court rules that all frivolous exceptions, nullities and appeals be prohibited;

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- ii) Limit opportunities for attorneys to present exceptions and nullities in executive cases through legislation or court rules;
 - iii) Provide resources for training judges on the key legal principles of the right to a fair and expeditious trial, and the economic consequences of delays and frivolous motions or actions; and
 - iv) Examine and debate issues related to reforming appellate review, including limiting the amount of time and number of appeals, as well as the types of cases that can be appealed.
- **Streamline the appraisal process:**
 - i) Require through legislation that judges accept an appraisal when there is agreement between the creditor and debtor;
 - ii) Develop clearer qualifying criteria to ensure that the experts' registry includes only highly qualified experts on whom the judge can rely to make fair and equitable appraisals;
 - iii) Establish through legislation a legal presumption of the validity of an expert's appraisal opinion (which could only be questioned by alleging fraud);
 - iv) Require judges through legislation or court rules to select experts randomly from the courts' official registry of experts; and
 - v) Impose and implement concrete judicial sanctions on experts who do not comply with the regulations governing their duties or who unnecessarily delay the process.
 - **Streamline the auction process:**
 - i) Through legislation reduce formalism in the auction process;
 - ii) Through legislation ensure that notification is not voided because of purely formal defects (ensure that it contains the minimum due process requirements);
 - iii) Through legislation clarify and simplify the rules for publication and limit the number of days for actual publication of auction notice;
 - iv) Through legislation make the auction process more transparent; to avoid racketeers and bid rigging, the bidding should be carried out by sealed bids, opened and announced in public, rather than a verbal bidding process; and
 - v) Through legislation allow for more than three auctions when necessary.
 - **Limit third-party claims (*Tercerías*):**
 - i) Through legislation require judges to dismiss third-party claims that are deemed to be frivolous; specify criteria in code for making this determination and provide a concrete list of cases followed by judicial training;
 - ii) Through legislation and court rules, clarify that third-party claims are an ancillary process and that they should be pursued only in the same court as the principal case; and
 - iii) Through legislation reform regulations related to the property registry system to ensure that the unregistered sale of property cannot prevail against an attachment or proper seizure.
 - **Make court decisions more predictable:**
 - i) Through legislation introduce the theory of *stare decisis* in order to make judicial precedents from higher courts binding; and
 - ii) Provide resources to train judges in this field.
 - **Amend law related to Pensions Funds Administrators (AFPs):**
 - i) Allow AFPs more scope and time to negotiate with employers;
 - ii) Allow AFPs to include multiple claims in a single court filing;
 - iii) Require debt verification before a case is filed; and

- iv) Provide resources to train specialized judges on pension matters and assign them the responsibility for handling these cases.

- **Implement anti-corruption measures:**

- i) Provide resources to professionalize and train court staff in reforms;
- ii) Through court policy utilize law students as law clerks in order to promote a generational and cultural change;
- iii) Through legislation and court policy create a public registry of corrupt judges and corrupt court staff within the Judicial Council;
- iv) Through legislation and court policy, make the investigation and prosecution of corrupt judges and court staff a top law enforcement priority;
- v) Through legislation publicly disclose a list of judges and court staff who have more than three complaints of corruption against them;
- vi) Through legislation or court rules implement a clear and efficient assets disclosure mechanism for judges and key court officials, make it public and enforce it;
- vii) Provide resources for a campaign among lawyers and court officials to establish a clear, simple and anonymous mechanism for denouncing the solicitation or offer of tips; and
- viii) Provide resources to train the police in its duties and obligations in the enforcement process.

2. **Promote transparent and accountable enforcement institutions**

- **Role and incentives of main actors:**

- i) Explore limiting the role of judges in straightforward, uncontested cases;
- ii) Explore making the process more creditor-driven instead of judge-driven;
- iii) Increase and implement sanctions for fraud undertaken by debtors, their lawyers and third parties; and
- iv) Consider providing commissions or career incentives for notification officers and court specialists for successful performance of their duties.

- **Justices of the Peace court reform:**

- i) Develop a case management system for fairly distributing cases;
- ii) Simplify procedures and provide judges more discretion for oral and evidentiary hearings;
- iii) Require judges to comply with the rule which provides that they should render judgment directly following the hearing;
- iv) Provide for administrative and budgetary autonomy of the courts; and
- v) Promote judicial training in conciliation and mediation.

- **Specialized courts or judicial panels:**

- i) Explore the idea of creating specialized commercial courts or a specially trained team of judges capable of handling complex commercial and enforcement cases;
- ii) Improve the recruitment process in order to ensure high quality judges;
- iii) Provide the resources to train judges on the basic economic theories embedded in economic laws; and
- iv) Create a statistical data base containing reliable information that facilitates reform programs based on the law in practice, not in theory or perception.

3. Promote access to information:

• **Public registries**

- i) Through legislation provide full faith and authoritative evidence of ownership to public property registries; and
- ii) Through legislation create a registry of judgments that maintains a record of debtors who have been adjudged to owe unpaid debts.

• **Disclosure of information:**

- i) Through legislation debtors should be legally obligated to disclose their assets in an enforcement action.

4. Promote alternative dispute resolution mechanisms:

- i) Through legislation or court rules, promote the intensive use of negotiation and conciliation in the enforcement process among the parties and judges;
- ii) Provide the resources necessary to stimulate wider use of negotiation and conciliation among small businesses through SME private associations and SME-oriented public agencies (such as PROMPYME and CODEMYPE); and
- iii) Design special arbitration procedures adapted to the needs of SMEs (particularly in terms of time and cost).

5. Promote SMEs access to the public procurement process:

- i) Provide the resources for designing comprehensive mechanisms and “how to” tools for encouraging SME participation in public procurement;
- ii) Through legislation make the public procurement process more transparent and accountable to SMEs;
- iii) Provide the resources to implement monitoring tools to identify and follow up SME participation in government purchases;
- iv) Provide the resources for training programs designed to promote collective instruments such as production networks, joint purchases and joint sales to improve competitiveness in the SME sector vis a vis larger companies;
- v) Provide the resources to disseminate regulations for public procurement participation and training for SMEs;
- vi) Through legislation streamline the public procurement payment system to assure the State’s timely compliance with legal obligations related to SMEs;
- vii) Provide the resources to promote more public procurement transparency through the creative use of technology (lessons learned from innovative Latin American public procurement programs); and
- viii) Provide the resources to develop a “how to” guidebook for SMEs and government agencies aimed at assisting SMEs (access to justice, participation in the public procurement system, microcredit financing, etc.).

6. Promote a broad-based participatory reform program and a long-term public outreach campaign:

- i) Provide resources for workshops with key stakeholders to discuss and prioritize proposed reforms;
- ii) Implement a consultation mechanism with key actors including bar, judges’ banks’ and SMEs associations and State agencies involved in public procurement process and in assisting SMEs to report on and monitor the reform process; and

ANNEX 1 – RESEARCH METHODOLOGY

This work was carried out by an interdisciplinary team of Latin American and U.S. professionals. One of the main goals of the study was to examine all of the key legal infrastructure issues related to enforcing court judgments from an SME and other “users” perspective. Thus, we have studied, collected and analyzed, step by step, the laws and regulations and then the practices of the main actors in the enforcement process.

Issues examined include:

1. The legal framework for enforcing judgments;
2. The role of the courts, including court staff and judges;
3. The routine practices of the actors who actually use the system;
4. The institutional framework;
5. Related laws affecting enforcement actions;
6. The transparency of enforcement proceedings; and
7. Main obstacles to enforcing judgments.

The major methodological problem that our team of professionals faced in carrying out this assessment was related to our persistent attempts to obtain reliable data and information on past enforcement cases. Official data usually consist of general statistics related to the total number of judgments and collateral enforcement cases; however, these figures do not provide us with an in-depth picture of how cases are managed or the rationale for whatever action, if any, was taken. Indeed, we found it impossible to obtain the data necessary to determine the average length of contested and uncontested debt recovery proceedings or the types of parties involved. In addition, very few statistics are available as to the degree to which microenterprises and small firms use the courts for enforcement processes. The two State agencies concerned with SMEs, CODEMYPE and PROMPYME, indicated that neither has the information necessary to determine the percentage of State contracts awarded to SMEs.

The lack of statistical data significantly impacted the methodology we were able to employ in the assessment. At the end of the day, we had to rely on a combination of resources to undertake the task, including: i) SME surveys; ii) structured and open interviews with key actors in the system, including judges and attorneys; and, iii) legal and economic experts’ opinions.

The World Bank, through the Pontificia Universidad Católica (Pontifical Catholic University) of Peru, recently completed a study focused on collecting and analyzing statistical information from court files. Unfortunately, the final report of that study has not been released, although we were fortunate to have been given access to the data for purposes of preparing this report.¹¹⁰

It should also be noticed that we only examined issues related to qualified justices of the peace in Lima, and not to lay justices of the peace, who all operate outside Lima. Thus, our study related primarily to the enforcement system in Lima and not the whole country.

The elements of our research methodology include:

Bibliography: We examined a wide range of publications local and international, relevant to enforcement, access to the courts, microenterprises and small firms, along with publications on the general context of Peru.

Flow Chart: The judicial enforcement process has been clearly outlined in two different diagrams. The

110 Gonzales Mantilla, *op. cit.* 27..

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methodology used to create these diagrams is detailed in Appendix 2. They allow us to visualize each step involved for three typical enforcement proceedings.

Interviews with Key Actors: During the fieldwork, a team of IFES experts and local consultants carried out interviews with 25 key actors in the enforcement system. These respondents consist of academics, judges and court staff, attorneys, business managers and investors, legislators and public servants. The interview methodology employed a semi-structured discussion of issues that allowed respondents ample time to ask questions and enumerate their answers. Everyone was also asked to provide background materials on statistical data, bibliographical materials, and any other materials relevant to our research. The results from these interviews were then used to support the observations made in the corresponding chapters of this report.

Surveys of Representatives of Microenterprises and Small Firms: A written survey was conducted to elicit the opinions of small business representatives who had prior experience with the court system, particularly those who have filed enforcement petitions for court consideration.¹¹¹ The Peruvian NGO MARC Perú was enlisted to support the fieldwork, because of its survey, business and ADR expertise. In collaboration with local consultants, IFES developed a questionnaire that enabled us to build upon and compare results with our previous studies in Argentina and Mexico.

Basic Survey Characteristics:

Metropolitan Lima	
Sample	54 cases
Questionnaire	Structured and limited
Administration	Questionnaire administered personally
Sample	Random
Survey Interviewers	University students specially trained for survey
Date	January 2004
Organization	MARC

a. **Comparative Analysis:** The study attempts to build on and integrate the work of previous IFES research projects in Argentina and Mexico related to the enforcement of court judgments. To this end, a consistent research methodology has been largely followed for all three countries, without totally ignoring the individual traits of each country. Appendix 5 provides a chart comparing the main findings in the three countries.

111 The cases included in the sample are from the following districts: 1. North Cone: Districts of Comas, Carabayllo, San Martín de Porras, and Independencia (the majority of the survey respondents); 2. Constitutional Province of el Callao (first port); 3. South Cone: districts of Chorrillos, Miraflores, Barranco, Villa El Salvador; and 4. East Cone: District of Lima Cercado.

ANNEX 2 – FLOW CHARTS OF THE ENFORCEMENT PROCEEDINGS

Methodology of the flow charts

The methodology for diagramming flow charts originated in the field of industrial engineering and has been applied in other areas, such as public administration, in order to examine and visualize stages in a process and, accordingly, detect problems, bottlenecks, and solutions.

For this study, three flow charts are used, corresponding to the three types of proceedings constituting the major focus of this research. They are:

- a) The Executive trial (enforcement of commercial papers, such as a check);
- b) The Collateral Enforcement Proceeding (enforcement through mortgages and pledges), and
- c) The Mandatory Enforcement Proceeding (enforcement of court judgments).

The flow charts have been diagrammed in a logical, ordered sequence, which takes into account the different procedural stages set forth under the Code of Civil Procedure (CCP), beginning with the filing of a claim (lawsuit).

The diagrams make note of each and every decision that the judge is required to issue in order to carry out the proceedings. These diagrams reflect all of the actions of the parties and the court that are required in order for a case to reach its conclusion.

In addition, we have taken into account the myriad possibilities open to the court to resolve the petitions or motions of the parties, as well as the myriad possibilities open to the parties themselves to comply with the court's orders, decisions, and judgments, or to file objections to them.

These diagrams do not reflect the time involved in these procedures; rather, they merely attempt to set out what the stages or steps are that must be followed for the case to proceed or to obtain a final court judgment by which an enforcement proceeding may be concluded.

Narrative description of the enforcement proceedings

a) Executive trials:

Beginning of the process: Once the petitioner (plaintiff or claimant) has filed his or her claim, the court (judge) has five working days within which to determine whether it qualifies. If the court finds a defect in its form, the plaintiff will have three working days to correct it. If no defect is found; i.e., if the claim meets all the formal requirements demanded under the CCP, the court accepts the filing and orders that the defendant be served notice. Once the defendant is served, he or she has five days in which to respond to the claim ("contestation").

Contestation by defendant: If the defendant does not contest, the court should issue its judgment. If the defendant contests, the court will qualify the response; that is, see that it observes the formal requirements of the CCP, and will notify the plaintiff so that this party can counter the contestation. The plaintiff has three days in which to do so, as of the date notice is served.

Hearing and Judgment: Whether or not plaintiff has countered the defendant's contestation, the judge will set the time and date for the single hearing. On that day, the court will rule on any objections that have been

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filed, and if they are denied, the court will declare the proceedings to be in order and admit the proofs offered by the parties and order judgment to be issued. Only in the event that proofs have to be litigated through experts will the judge appoint them, and then the hearing is continued so that the experts are served notice, accept their charges, and issue their expert opinions. Upon issue of the required expert opinions, the judge will set a new date and time on the court calendar to hear the experts explain their reports to the parties, who may ask questions or make observations that they deem relevant. Once the expert opinion has been heard in its entirety, the judge must issue judgment. According to the CCP, the court must issue its decision within five days of the completion of the hearing. The judge issues his or her decision, either accepting or rejecting the plaintiff's claim. Either one of the parties that believes it has been unfairly harmed by the court's decision will have five working days of having received notice of the judgment within which to file an appeal.

Appeal: Once the appeal is received, the court must qualify it (ensure it is correct as to form). This means the court will accept it should it meet the requirements of the Code, reject it if the deadline has passed, or declare it inadmissible if it contains correctible errors, in which case the court sets a deadline for its correction. If the motion to appeal is accepted, the judge has 20 days within which to send the case file to the Superior Court; once the Superior Court receives the case file, the corresponding Panel will set the date and time for the hearing on the appeal and allowing the parties' attorneys to request permission to give oral arguments on the day set for the hearing of the case. Once the hearing is held, the Panel has a maximum of 30 working days in which to hand down its decision. If either of the parties deems the Panel's decision to be unjust, a petition moving that it be set aside can be filed within the 10 working days following the day that notice of the Panel's decision was served. The Superior Panel has three days in which to qualify the appeal or motion to set aside the first Panel's decision, and the Superior Panel must accept it if it meets the formal requirements of the CCP, declare it inadmissible if it contains amendable errors, or reject it if the errors committed may not be corrected.

If the last appeal is accepted, the Panel must send the entire case file to the Supreme Court. Once the Supreme Court receives the file, the corresponding Panel has 50 working days to qualify it. The qualification of the appeal or motion to set aside, pursuant to the CCP, functions as a filter, given that the Supreme Court reviews whether the Superior Panel properly ascertained that the appeal motion to set aside its judgment met all the formal requirements demanded under the CCP. If the Supreme Court finds that it does not meet all the CCP requirements, it can either deny the appeal or grant a five-working-day extension in which to correct the defects, assuming they are susceptible to correction. If the motion to set aside (cassation) is denied, the decision of the Superior Court will remain as the final judgment and must be enforced.

If the motion to set aside judgment is accepted, the Panel must set a date for a hearing of the case, at which time attorneys for the parties may make oral representations, should they so request. Once this hearing is held, the Panel has 50 working days to settle the appeal seeking to set aside the prior judgment. In its decision, the Panel will either sustain or overrule the set-aside motion (cassation appeal) or declare the entire case to be null and void if it accepts that there has been a violation of due process.

b) Collateral enforcement proceeding:

Beginning of the process: After a claim is filed, the judge has five working days in which to admit it. After receiving notice of the filing, the parties of the defense have three days in which to contest and/or file objections to the claim.

Auction of assets: If the claim goes uncontested or without objection, the court should order the auction of the assets offered as collateral. If the defendant contests the claim, the court will qualify it, with the option to admit it, reject it, or declare it inadmissible, under the same terms allowed in the enforcement proceedings mentioned above. If the judge admits the contestation or objection, he orders the plaintiff to be served notice so the latter may respond. Whether or not the plaintiff's response is forthcoming, the judge orders the conflict to

be resolved. Unlike the case of the enforcement proceeding, this proceeding does not allow for a hearing. If the judge declares the defendant's contestation to be groundless, then the court orders that the auction of collateral assets be held. If the judge finds there are grounds for the contestation/opposition, the court will declare the original claim to be groundless or without foundation, as the case may be.

Appeal: The decision that settles the contestation may be appealed by either of the parties within three days of having received notice. As in the enforcement proceeding, the judge qualifies the request for appeal, and if it is granted sends the case to the Superior Panel where the same process as in the enforcement proceeding is followed.

This court proceeding, as set forth in Article 385 of the CCP, should conclude with the decision of the pertinent Superior Panel. Nevertheless, repeatedly in jurisprudence, the Supreme Court has established that as the highest court it may review such cases, subject to an appeal moving to overturn judgment (cassation). Article 385 of the CCP provides that such an appeal to set aside judgment can only proceed under three contingencies: when expressly allowed by law, appeal of judgments issued by the Superior Courts overturning those of the first court, and when the judgments issued by the Superior Courts terminate a suit, overturning the (lower) court of first instance.

c) Mandatory enforcement proceeding (execution of court decisions):¹¹²

Judgment on the merits: Once a judgment is granted that orders payment of a debt in favor of the plaintiff's claim, or in the case of an arbitrator's decision, grant a creditor's request that the judge set the date and time for the auction of assets, the court will issue a mandamus of enforcement that includes the demand that the debtor pay the appropriate sum within three days.

Liquidation and contestation: If the judgment contains a cash amount, an interim measure is ordered to ensure the subsequent mandatory enforcement. The creditor must present the final liquidation for the court to approve. The mandamus that orders the enforcement can be contested by argument that the obligation has been fulfilled or has lapsed. The document of contestation must contain the documents offered as proofs. The court will examine these documents and decide whether to sustain the contestation or to proceed to enforcement.

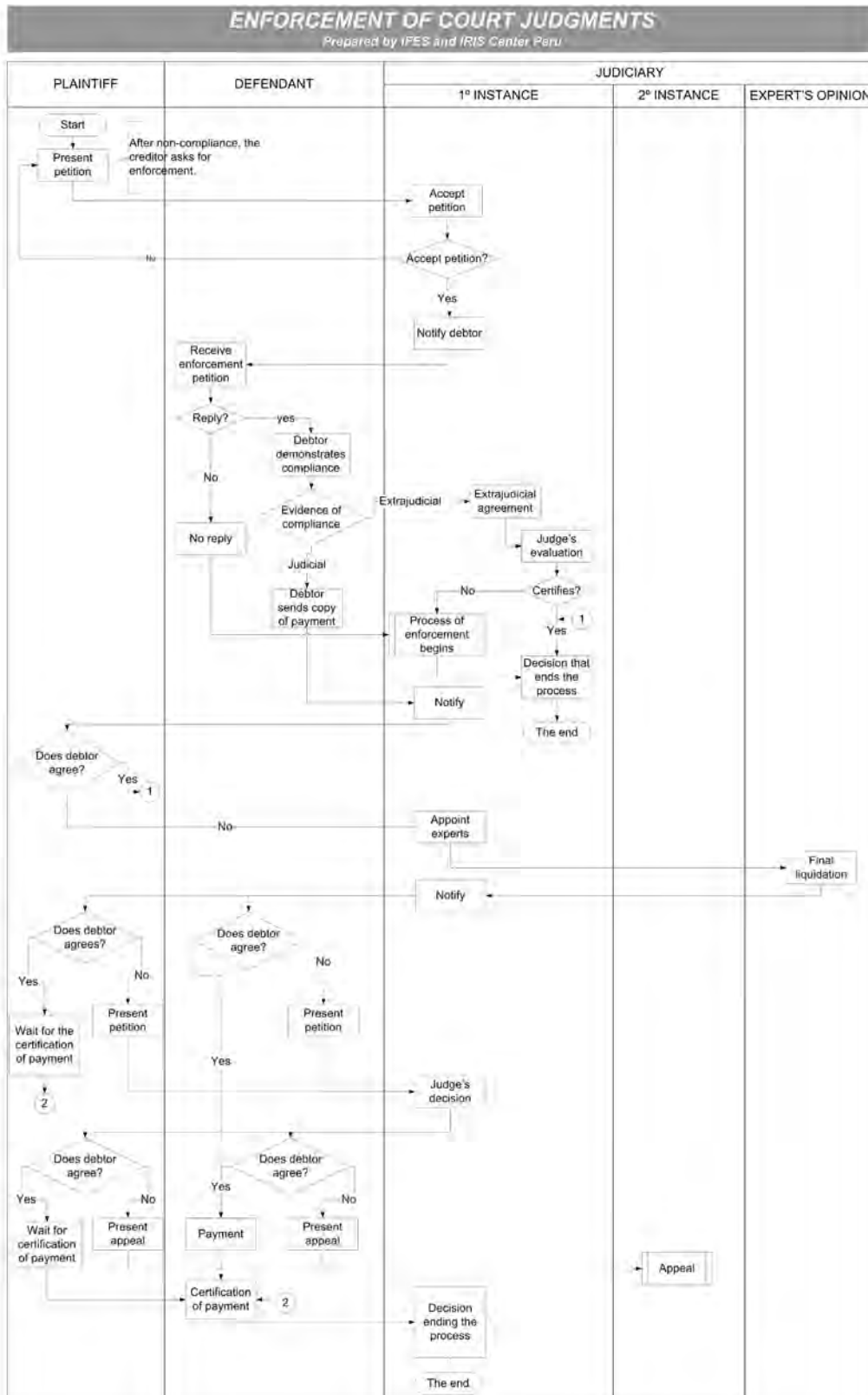
Auction of assets: If the case proceeds to enforcement, the court will order the auction of the assets, setting the date and time for it to be carried out, appointing experts to appraise the assets. In the case of movables, the auction will be carried out by a public auctioneer; with real estate, it will be conducted by the judge at the courthouse itself. The auction process is described in detail in Chapter II, sections 3.1, 3.2, and 3.3.

112 Articles 713 to 719 CPC.

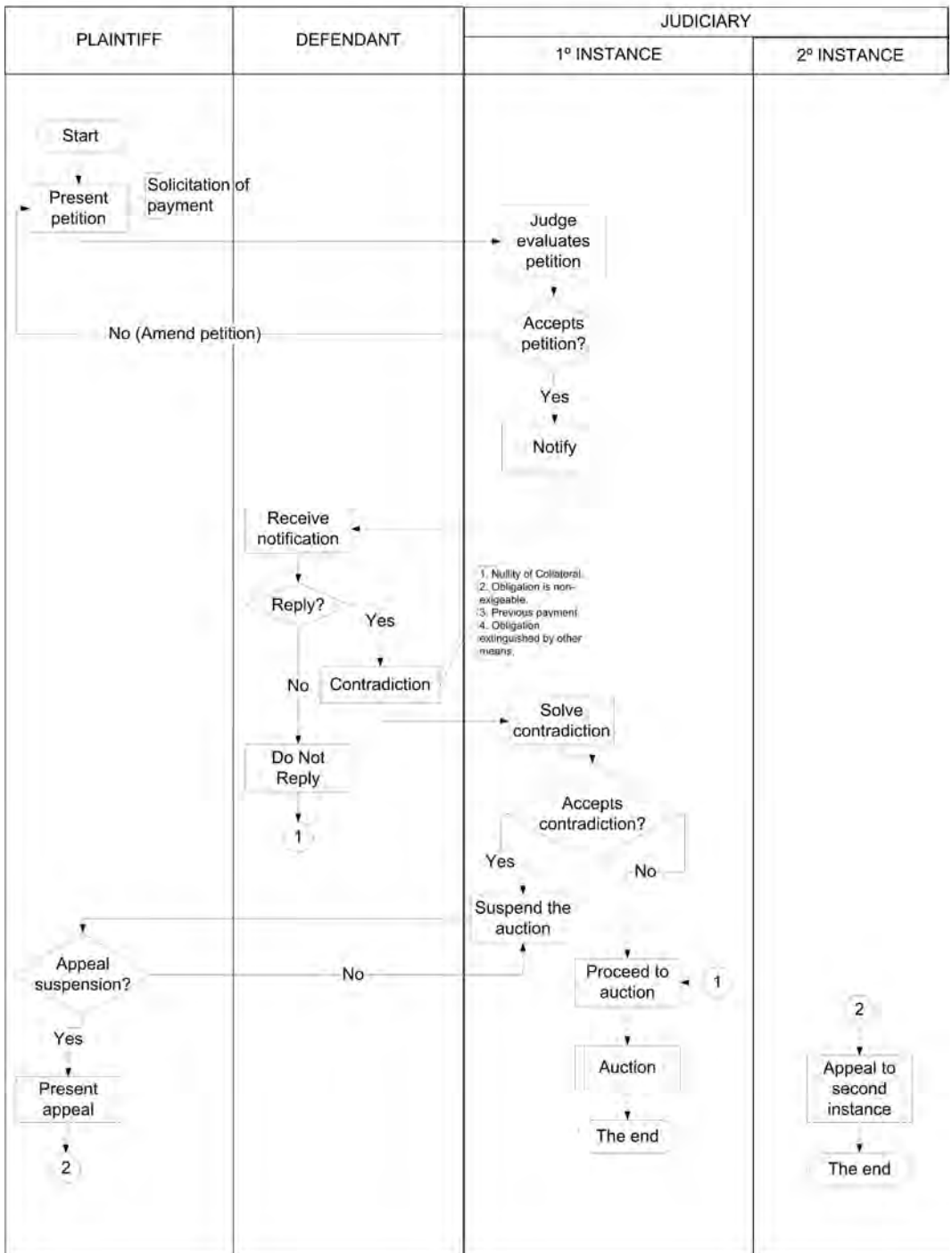
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ENFORCEMENT OF COLLATERAL



ANNEX 3 – BIBLIOGRAPHIC SUMMARY AND LESSONS LEARNED

This report references a number of works by an array of authors and institutions that touch upon enforcement issues and the relations of small and medium size firms with the justice system.

Outlined below are brief descriptions of the studies that have been the major sources for our research. A complete bibliographic list on these issues is presented at the conclusion of the study.

I. Global

Courts: The Lex Mundi Project:¹¹³ In this comparative study encompassing 109 countries, the authors try to understand how simple suits are resolved in courts; that is, how a plaintiff can use the court system to collect on a bounced check or carry out an eviction. The study also examines fundamental aspects of court operations and their effect on the quality of the formal decisions or settlements in lawsuits. Among the indicators employed are the length of proceedings, accessibility to courts, efficiency in the courts, and corruption.

The study suggests that in countries where the civil law system of justice operates greater formality is found than in countries subscribing to the common law tradition (associated with the United Kingdom and its former colonies). Greater formality opens the door to slower proceedings, greater corruption, less consistency, less honesty, and less justice. These consequences are more acute in developing countries.

Additionally, the study suggests that the most basic contracts are difficult to enforce in the courts and that economic agents probably find alternative means to use in contractual arrangements and to resolve disputes.

II. Regional

A) Europe

Western Europe Comparative Research: Reform Efforts and Best Practices: Many Western European nations have been exploring prospects to reform and improve enforcement systems. For its part, the European Union has been exploring the harmonization of civil procedure and execution proceedings and the prospects for creating a European Judicial Area. The studies carried out in Western Europe are significant for developing countries because of the strong parallels between the legal and institutional frameworks in Western European and those of Developing countries.

In *Key Principles for a New System of Enforcement in the Civil Courts: A Peep over the Garden Wall*,¹¹⁴ author Wendy Kennet finds that the range of models for enforcement systems adopted in Europe is so broad that issues cannot be defined on the basis of geography. She reflects on many non-European jurisdictions with systems derived from their colonial experience. The author reviews the efforts of the Department of the Lord Chancellor to review the system of enforcement in England and Wales and formulates reforms to improve it. She also identifies problems inherent in the current British system of enforcement, in light of certain fundamental traits and presents a comparative analysis of this system and other Western European countries. Finally, the author identifies “good practices” in connection with the legal framework and structure of enforcement.

113 Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Salines, and Andrei Shleifer, *Courts: The Lex Mundi Project*, 2002 Copy of this publication is available in electronic format on the World Bank web site.

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

In May 2002, the Department of the Lord Chancellor published “**National Standards for Enforcement Agents**”¹¹⁵ geared to spur debate, encourage good practices, and boost the professionalism of enforcement agents and institutions. The recommendations cover a broad array of aspects concerning the operations of the enforcement systems and the implementation of improvements (appropriate conduct, certification of agents, mechanisms for complaints, disciplinary procedures, and rules governing information and privileged information.)

The Department of the Lord Chancellor also published the *Green Paper “Towards Effective Enforcement: A Single Piece of Bailiff Law and a Regulatory Enforcement Structure.”* Professor Beatson of Cambridge University responded to this Green Paper in “**Independent Review of Bailiff Law**,” which offers a series of recommendations to improve the effectiveness of civil court enforcement procedures, with particular emphasis on the authority of the Bailiff and how these powers should be modified in order to improve judgment enforcement in civil matters.¹¹⁶

Lessons Learned from the Support Provided by the Council of Europe: The focus of the Council of Europe’s work on the enforcement process includes: (1) decisions from the European Court of Human Rights, which hold that the enforcement of court judgments within a reasonable time constitutes a component of the right to due process; (2) recommendations intended to promote harmonization, trade and investment in the region; and (3) technical assistance for countries of the former Eastern Bloc and former Soviet Republics (where the Council of Europe has been quite active).

Key Enforcement findings of the Council of Europe include:¹¹⁷

1. Corruption is a significant problem in the region.
2. Economic and technical resources to train agents of enforcement are scarce, and training is inconsistent.
3. There is little understanding of the role of the judge, no culture of enforcement, and no willingness to enforce judgments against the State.
4. Legal mechanisms are frequently employed as a delaying tactic.
5. The enforcement process is often controlled by the Executive Branch.
6. The inefficiency of enforcement systems has led to the use of alternative enforcement mechanisms in the informal sector.
7. Access to information on the debtor is very limited, particularly concerning real estate holdings.

Notwithstanding differences between one country and another in the barriers to enforcement, these findings are often relevant for most developing countries. Two major categories of obstacles stand out as having the greatest consequence in most countries: (1) lack of transparency in the system (especially in real estate records); and (2) a lack of incentives for enforcement agents to perform their responsibilities more efficiently.

B) Latin America

Comparative review of research undertaken in Latin America by the World Bank: In collaboration with NGOs from several countries in the region, the World Bank has conducted several studies on Commercial Law that are directly or indirectly concerned with the issue of enforcement.

115 *National Standards for Enforcement Agents* (Estándares Nacionales para los Agentes de Ejecución) Lord Chancellor’s Department, May 2002.

116 Professor J. Beatson, *Independent Review of Bailiff Law* (Revisión Independiente de la Ley de Alguaciles), University of Cambridge Center for Public Law, Report prepared for the Lord Chancellor Office, June 2002.

117 This list of selected key obstacles to the fair and effective enforcement of judgments in Eastern Europe and the Former Soviet Union is based on conversations and meetings with Council of Europe representatives and experts in the field of enforcement.

In “*Use of Empirical Research in Refocusing Judicial Reforms: Lessons Learned from Five Countries*,”¹¹⁸ Hammergren examines information collected by the World Bank and notes that many models and assumptions are perception-based; thus, the author decides to test these assumptions empirically, beginning with who uses the court systems, for what purpose, and what results are obtained. Not all the conventional assumptions tested are borne out in reality, thus the author is not surprised that court reforms have not achieved the goals they have sought.

Based on its study of case files in the city of Buenos Aires and the province of Santa Fe, FORES, an Argentine NGO, published a study titled “*Los Usuarios del Sistema de Justicia en Argentina*” [*The Users of the System of Justice in Argentina*].¹¹⁹ This study, which was undertaken at the behest of the World Bank (FORES-WB), offers important quantitative findings on the use of the court system, its users, and the attendant costs. Among the findings that most stand out, the authors find that in the majority of cases it is legal entities (corporations) who are the users of the system for debt recovery, a minimum of 50% of the cases are enforcement proceedings, a large number of cases await settlement, and small monetary amounts are often at issue.

The Mexican NGO CIDE examined case files in the Federal District of Mexico City (Mexico) and published the report “*The Juicio Mercantil Ejecutivo [Commercial Enforcement Claims] in the Federal District Courts of México: A Study of the Uses and Users of Justice and their Implications for Juridical Reform*”¹²⁰ at the behest of the World Bank (CIDE-WB). The study found that many basic assumptions about issues concerning court users, such as the time required to settle a case and the reasons for delays were unfounded. Specifically, the study ascertained that the amounts at issue in claims were generally small, in the majority of lawsuits no active defense was attempted, and that appeals are less common than generally believed.

Independently, FORES conducted a second study of case files in the city of Buenos Aires and the province of Santa Fe, titled “*El trámite del proceso Ejecutivo y las Nuevas Secretarías del Fuero Comercial*”¹²¹ [*The Handling of Enforcement Proceedings and the New Secretariats in the Commercial Jurisdiction*]. The study examined enforcement proceedings exclusively, and the FORES-WB final report is eagerly awaited.

In “*La estructura de incentivos y las ineficiencias en tres procesos civiles: Juicios por títulos ejecutivos vencidos, juicios por alimentos y ejecución forzada de bienes*,”¹²² [*The structure of incentives and the inefficiencies in three civil processes: expired executive titles, alimony and forced execution of property cases*], Hugo Eyzaguirre and his colleagues examined three basic processes: alimony, collateral and commercial papers enforcement process. They applied the economic analysis of institutions, from the perspective of studying the judicial system in itself, analyzing its structure and the behavior of its agents, in order to identify the characteristics that determined their performance. The paper suggests the existence of specific reasons referred to the behavior of the agents involved in the judicial processes. It does not take into consideration the lack of independence of the Judiciary, neither the high levels of corruption spread among judges and judicial personnel. A revision of the Civil Procedure Law is recommended in order for it to provide more rational and consistent norms, as well as furthering an effort to train judges. Increasing the penalties for introducing frivolous demands within a process in order to delay it and the evaluation of the effects of eliminating process-suspending demands are also recommended. Finally, evaluating the need of using a counter-guarantee in certain cases is also recommended.

The IFES study entitled “*Barriers to the Enforcement of Court Judgments and the Rule of Law*”¹²³ attempts to build upon and fill some of the gaps left by empirical studies that attempt to analyze data gleaned only from

118 Linn Hammergren, *Use of Empirical Research in Refocusing Judicial Reforms: Lessons learned from Five Countries*, *op. cit.*

119 Germán C. Garavano, *Los Usuarios del Sistema de Justicia en Argentina [Users of the Justice System in Argentina]*, FORES 2000. This is a study of case files and interviews with attorneys, undertaken randomly in the city of Buenos Aires and the province of Santa Fe.

120 Hammergren *et al.*, *op. cit.* 65.

121 Chayer *et al.*, *op. cit.* 65.

122 Eyzaguirre *et al.*, *op. cit.* 33.

123 Keith Henderson, *et al.*, *op. cit.* 32.

court files. Empirical explanations for the inefficiencies and delays in the justice system are examined and compared, as well as qualitative information on justice administration and the enforcement process in Mexico and Argentina. Issues tackled include the identification of key barriers to the enforcement of judgments, estimates of time, costs, number of required steps, and the effectiveness of enforcement proceedings. The report concludes with a number of recommendations for reform.

C) Jurisprudence of the Inter-American Court of Human Rights

In the case “*Five Pensioners versus Peru*,” the Inter-American Court of Human Rights has considered the issue of enforcement of judgments for the first time. The Court accepted the argument of the Inter-American Commission of Human Rights, which found that Peru violated the right to judicial protection under Article 25 of the Inter-American Convention on Human Rights because the State had failed to comply with a Supreme Court judgment ordering payment of a pension to the petitioner. The Constitutional Court, for its part, also ordered the State to comply with the order of the Supreme Court. The Inter-American Court expressed that a failure of the State to comply with a court judgment against it for an eight-year period implies a deprivation of petitioner’s right to an effective remedy before a competent court in order to protect his “fundamental right enshrined in the Constitution or the Laws of the State or the Inter-American Convention.”¹²⁴

D) The Entrepreneurial Sector and Justice

In “*El costo de la resolución de conflictos en la pequeña empresa. El Caso de Perú*”¹²⁵ [*The Cost of Dispute Resolution: The Case of Perú*], Álvaro Herrero and Keith Henderson examine the relationship between the justice system and small business people. This study broke new ground in attempting for the first time to measure the impact of court inefficiency on the development of small businesses. The authors argue that small businesses refrain, as much as possible, from appealing to formal justice, preferring to use alternative mechanisms of dispute resolution and changing their conduct of business in order to adapt to the deficient legal setting for business that prevails in Peru. The results show that the absence or dysfunction of dispute resolution mechanisms has a significant adverse economic impact on microenterprises and small businesses. This adverse impact is seen specifically in the loss of business opportunities and higher transaction and production costs, generating losses that vary within a range of 0.5% to 3.1% GDP.

The study entitled “*El Impacto del Poder Judicial en las Decisiones Empresariales en el Perú*”¹²⁶ [*The Impact of the Judiciary on Business Decisions in Peru*] analyzes the perception and response of large Peruvian businesses to the failings of the justice system. The conclusions include that, in general, the judiciary has an extremely negative image among business people; that a consensus exists among business people that the deficiencies in the administration of justice adversely affect the national economy as well as companies’ business activities; and that business people indicate the inefficiency in the judiciary is the source of problems such as higher interest rates charged by banks, less investment, and problems in selecting business partners and in contracting third party participation in the production process.

“*Poder Judicial y Micro y Pequeña Empresa: Impacto y Posibles Soluciones*”¹²⁷ [*The Judiciary and Micro and Small Enterprise: Impact and Potential Solutions*] deals with virtually the same issue as the study described above in 2, but with a focus on small businesses. The research used a survey to assess the experiences with and

124 “*Five Pensioners versus Peru*, Judgment dated 28 February 2003, Inter-American Court of Human Rights, Series C No. 98 (2003).

125 Herrero et al, *op. cit.* 6.

126 Salhuana, Roger, Raul Andrade and Hugo Eyzaguirre. “*El Impacto del Poder Judicial en las Decisiones Empresariales en el Perú*” [*The Impact of the Judiciary on Business Decisions in Peru*]. Instituto Apoyo, 1998.

127 Calderón et al, *op. cit.* 93.

perceptions of the judiciary that micro and small businesses have. The main findings indicate that the micro and small businesses have a negative image of the judiciary and that, as a result, they resort to the courts on very few occasions. Likewise, the absence of an efficient judiciary increases the risk of non-fulfillment of agreements and breaches of contracts among many actors in the market. Thus, small business people are driven, *inter alia*, to contract only with agents that they know which reduces the range of business activity. Finally, the study underscores that the incidence of noncompliance with transactions is excessive, which adversely affects the development and growth of businesses.

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ANNEX 5 – 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	<ul style="list-style-type: none"> 5% note that violence is almost always or usually used instead of legal methods 	<ul style="list-style-type: none"> 10.4% note that violence is almost always or usually used instead of legal methods 	<ul style="list-style-type: none"> 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 6 – 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	

**ANNEX 6 – 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 7 – IFES ENFORCEMENT 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* [“UHR”], 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

**ANNEX 8 – IFES’ GLOBAL ENFORCEMENT PRINCIPLES AND BEST PRACTICES
TRANSPARENCY AND ACCOUNTABILITY**

1. Clear and adequate legal and institutional framework for enforcement, including efficient and effective court oversight;
2. Clear and adequate enforcement procedures and mechanisms, including adequate, proportionate and enforceable court sanctions;
3. Clear and adequate administrative 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 and for 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 for well-trained 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 a court judgment and personal service of court action;
10. Adequate resources for executing the enforcement process and compensating and training enforcement professionals;
11. Fair and effective enforcement within a reasonable time; and
12. Effective access to information (debtor, judicial, administrative).

ANNEX 9 – BUSINESS DECISIONS THAT RESULT FROM JUDICIAL INEFFICIENCY¹²⁸

Reduction of Transactions	{ Transactions with known customers and suppliers Restricted geographic coverage Restriction in payment modes Avoid business expansion Transactions with companies of the same size Avoid doing business with the public sector
Major Costs	{ Not looking for better prices in supplies Not subcontracting Not performing joint purchases or sales Investigating credit records for customers and suppliers
Other Costs	{ Criminality / public insecurity Costs of obtaining credit Informality and precariousness of ownership rights

128 Chart from Herrero, Alvaro y Henderson, Keith. *The Cost of Dispute Resolution: The Case of Perú*, Inter-American Development Bank, Washington D.C., 2003.