



## **Court Auctions**

### Effective Processes and Enforcement Agents

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Legal Vice Presidency  
The World Bank

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# Foreword

by the Editorial Committee

Justice system effectiveness is dependent on there being reliable ways of ensuring compliance with court decisions. While the payment of criminal fines and compensation orders are often bolstered by the availability of criminal sanctions, such as the threat of imprisonment, a narrower range of mechanisms is normally available to those who seek enforcement of civil court orders, commercial debts in particular. The need for attention to those mechanisms is all the more compelling when it is considered that, in most court systems, the vast majority of all private legal proceedings will relate to enforcement of property rights or claims, whether in cash, land or trade goods. There are consequently many opportunities for improving the efficacy of any system of civil justice by looking to ways in which civil claim enforcement may be made more effective. This paper, prepared in connection with World Bank technical advisory assistance work for the Moroccan Ministry of Justice, examines the options for civil claim enforcement, with a particular emphasis on processes of seizure and sale of debtor property as a means of satisfying a court judgment debt. It offers a profile of developments in this area that are relevant to the development of civil justice enforcement reform programs in any country.

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# **Court Auctions: Effective Processes and Enforcement Agents**

**By Dr. Heike Gramckow**

## **Abstract**

This paper considers the historical origins and efficacy of enforcement of civil court judgments, with a special focus on court auctions. It reviews the procedural and practical options available to courts and associated agencies for the identification of assets that may be used to satisfy a judgment debt and the processes for court-supervised asset seizure and sale by public auction. The efficiencies of public court auction processes are considered, including the elements of enforcement systems that can produce sub-optimal returns on sold assets and higher incentives for corrupt practices. Also considered is the trend in some systems for greater use of private agents as a means by which the cost of court enforcement processes can be reduced and for overcoming sometimes lengthy delays in enforcement. The paper concludes by identifying alternatives to public auction that in some cases can offer better prospects of assuring full payment of a judgment debt.

## **1 Introduction**

The effective enforcement of civil judgments is essential to public trust in courts, whose credibility, in turn, very much depends on successful enforcement. Over the past decade, many countries have been looking for more effective solutions to often ineffective court decision enforcement processes. In the United Kingdom, for example, the realization in 2002 that 50 percent of small claims court judgments were not actually applied led to significant reforms, and several other countries in Europe have revised their enforcement laws to make the procedures more efficient, transparent, and productive (CEPEJ 2007, 122).

The sale of a debtor's assets to satisfy a judicial award is often the last but essential step in the enforcement process. In an attempt to gain a good price, this sale is generally accomplished by means of an auction, that is, the process of selling assets by offering them up for bid, taking bids, and then selling the item to the highest bidder. Public auctions are considered effective if the proceeds are close to the amount that would have been gained through normal transactions, under current market conditions. The reality in many countries, however, is that auctions, especially when they are organized by courts and other public officials, tend to result in sales significantly below the market value of the asset. In addition, the amount of money earned through public auctions depends on several factors. These include few (or no) restrictions on participation in the auction; easy access to information on public auctions more generally; timely decisions by the court in charge of such auctions; and the expeditious processing of the auction processes.

A number of studies from different countries support these assertions. For example, a review of “Doing Business” data in 2006 indicated that the length of time of the enforcement and auctioning process influences the recovery rate (Oh 2006). A study in Chile showed that judicial auctions result in a price that is between 18 and 33 percent lower than the price gained in private auctions (Paredes, Crisosto, and Martí 2009). A Japanese study revealed that the number of bidders in an auction impacts the prices: the fewer the bidders, the lower the price (Idee, Iwata, and Taguchi 2008).

In addition, for public auctions to be successful, it is important that creditors can easily find the debtor’s properties and put them up for auction. If finding hidden or uncovered properties costs time and money, the total proceeds will be far less than they should have been, even if the public auction process is efficient. Positive outcomes in auctions also require that the agents charged with conducting them be competent and effective.

Ineffective auction processes and agents are, however, just one part of the problem. Ineffective court enforcement proceedings generally lead to less effective auctions, whether because of the length of time involved or due to earlier barriers to competitive auctioning.

The problems related to the enforcement of judicial decisions are similar across the world, but their underlying causes, scope, and priority vary. A study conducted in 2004 across several countries in Latin America, for example, concluded that the main issues were: (1) excessive legal formalism, (2) unnecessary judicial technical oversight, (3) undue delays, (4) case backlogs, (5) petty corruption, and (6) problems related to the identification and location of assets (Henderson et al. 2004). Similarly, a survey conducted across European countries indicated that the main complaints were (1) excessive length of proceedings, (2) lack of effective enforcement, (3) high cost, (4) unlawful practices, (5) lack of information, and (6) insufficient supervision of operations (CEPEJ 2007, 95).

<b>Common Obstacles to Effective Enforcement of Court Decisions</b>	
<b>Argentina, Mexico, Peru</b>	<b>EU Countries</b>
1. Excessive procedural delays	1. Undue length of proceedings
2. Formalistic legal requirements	2. Lack of effective enforcement
3. Difficulty selling seized assets due to weak markets	3. Excessive cost
4. Lack of information on debtors and assets	4. Unlawful practices
5. Lack of accountability of the various enforcement actors	5. Lack of information
	6. Insufficient supervision of operations

*Source:* Adjusted from Henderson et al. 2004; CEPEJ 2007.

These issues are often reflected in each enforcement step, with the result that delays, insufficient information access, and integrity issues in earlier enforcement steps hamper the effectiveness of auctions, even if they are structured and managed well.

In addition to the above studies, there is ample research to show that excessive delays during earlier court processes and enforcement proceedings are a major reason courts are not used in the first place, leading to economic loss, dissatisfaction with the judiciary, and the potential use of nonofficial enforcement mechanisms that may result in illegal, even violent, solutions in some countries. With regard to commercial disputes, the lack of access to effective official

enforcement can limit future choice of business partners, thereby impeding economic development and investment options, particularly for small and mid-sized businesses. It can also lead to reliance—and ultimately dependence—on illicit enforcement networks.

If the judgment debtor cannot or does not voluntarily pay, the creditor has to have the support of the court in the form of various legal enforcement options, as well as the support of effective judgment enforcement agents, to avoid economic loss. The former require an adequate legal framework, the latter a functioning and accessible enforcement system; both need to be in place for the effective enforcement of court judgments and successful auctions.

## 2 Elements Needed for Effective Court Enforcement and Related Auctions

Regulation of court enforcement has a long tradition. In 1576, France was the first country that regulated the practice of auctions, including the appointment of “assessors-sellers” to seize, appraise, and sell assets through public auctions when the parties requested or the law required it (Paredes, Crisosto, and Martí 2009, 2). Since then, different court enforcement systems evolved across the globe, some more effectual and productive than others. The different approaches frequently developed as a result of local justice system structures and legal framework difference, not as a result of detailed studies of what system would work best. Not surprisingly, well functioning approaches can be found in countries with quite different systems. Identifying the elements needed for effective auctions is therefore not that easy. In 2003, the Committee of Ministers of the Council of Europe suggested that capable and effective enforcement agencies need to be in place as well as effective processes, including auction proceedings and agents (Council of Europe 2003), as both elements are required to ensure a well-functioning enforcement system.

### 2.1 Effective Court Enforcement Agencies

While the structure of court enforcement systems and authority over auction procedures varies, some version of one of four basic models is generally followed in most countries: court-controlled, specialized public official, specialized private agent, and a mixed model. The differences between these models relate mainly to the division of roles, responsibilities, and controls over the enforcement process (Henderson et al. 2004) between the court and enforcement agents. Which model a country follows until some years ago depended largely on its own legal history, rather than on what may have been the best model. A study in Latin America showed, for example, that most countries there tend to follow the court-controlled enforcement model for historical reasons (Elena, Herrero, and Henderson 2004, 22), not because it works particularly well.

#### Four Basic Court Enforcement Agency Models

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

Source: Henderson et al. 2004.

There is a growing trend, especially in Eastern European countries, which mostly had executive branch controlled court enforcement agencies, to introduce a private or quasi-private sector

specialist model. Research indicates that specialized private agent and well-defined mixed models tend to be more effective, but there is also good evidence that it is not the model *per se* that determines efficacy. The issue of the effectiveness and efficiency of these systems has many aspects and depends on the context in which they are operating and the combined stakeholder willingness to adhere to and enforce productive processes. The sections below briefly outline the differences between these models.

### **Court-controlled enforcement**

In these systems the primary decision-making responsibility rests with judges, whether specialized enforcement judges (for example, Denmark and Italy) or courts of general jurisdiction (such as Spain). In a variation, judges in Spain issue decisions and guidance and court officers then undertake routine decisions or formalities to implement the judicial decisions. In Italy, a distinction is made between those responsible for the attachment and the sale of movable and immovable property.

Comparative research shows that exclusive court- or judge-controlled enforcement does not have a good track record for efficiency, though there are exceptions. For example, such systems in Spain and Italy tend to be inefficient and costly compared to enforcement systems in neighboring countries, even when some decisions are delegated to court officers and not judges (Henderson et al. 2004). The court-controlled system in Denmark, on the other hand, is quite efficient and affordable (Kennett 1999). This is a clear indication that the overall structure of the enforcement system is not the sole key to efficiency, which instead depends on the actual implementation in a particular country (Uzelac 2002).

### **General Advantages and Disadvantages of Different Court Enforcement Models**

<b>Model</b>	<b>Court</b>	<b>Executive</b>	<b>Private</b>
Advantages	quality same standards high level of debtor protection inexpensive for consumers	fast flexible less expensive for the state rapid	efficient inexpensive for the state professional quality higher returns
Disadvantages	expensive slow rigid overformalized	lack of quality undue outside interventions corruption bureaucratization	expensive for consumers difficult to change undue interventions in selection process

*Source:* Adjusted from Uzelac 2002.

### **Public sector specialist enforcement (executive branch) of court decisions**

In several countries, specialized civil servants are responsible for the collection of public law debts and claims, such as taxes or other debts owed to the state or administrative authorities (this is the case, for example, in Denmark, France, Germany, the Netherlands, Spain, and Sweden). Exclusive public sector specialist enforcement systems are less frequently used, however, for the enforcement of private law debts. In Sweden and Finland, the State Enforcement Authority, under the control of the executive branch, is responsible for the collection of public as well as private law debts. Several countries in the former Soviet Union and Eastern Europe similarly



organized their enforcement systems under the control of the executive branch. There, bailiffs employed by an agency reporting to the ministry of justice or its equivalent were usually responsible for carrying out enforcement actions (for example, in Russia, Georgia, Ukraine). The systems in Scandinavia have a record of efficiency, whereas those previously established in Eastern Europe do not. Data from 2004 indicate that in 25 of the 47 European states or legal entities, enforcement agents had a public status, working as civil servants in a court or public administration, while 11 had a private, and nine a mixed status (CEPEJ 2007, 22).

### **Private or quasi-private sector specialist enforcement of court decisions**

As mentioned above, a trend towards the privatization of all or part of the enforcement services can be observed across Europe. Some examples include Estonia, Belgium, and Montenegro (CEPEJ 2007, 22). Still, there are few wholly private enforcement systems. Most are quasi-private and defined mainly by the fact that the responsibility for enforcement rests primarily with independent and autonomous enforcement agents who operate as private entrepreneurs, subject to some form of control and regulation by the state. The degree of regulation varies, but it usually addresses such issues as entry into the profession, organization of enforcement agencies, public and professional duties, and authorized enforcement acts and fees (Alekan 2008).

**Estonia** in 2001 introduced freelance bailiffs and the system has proved to be effective, with the number of closed cases doubling one year after the reform was implemented.  
*Source: Alekan 2008.*

Variations of this approach can be found in several European systems modeled after the French *huissier system*, including Belgium, France, Luxemburg, and Scotland, with its sheriff officers. (*Huissiers* are independent, private but highly regulated enforcement agents.) Enforcement agents in these countries or regions have a legal obligation to the process that supersedes the interest of creditors in enforcement proceedings and they generally enjoy a territorially limited monopoly over enforcement actions. In addition, they are often bound by strictly regulated fees issued by the state and may compete with other enforcement agents within the same jurisdiction (CEPEJ 2007, p.25).

### **Multiple institution-controlled court enforcement**

Some countries have distributed the responsibility for enforcement among several actors, not granting the primary responsibility and control to any one agency exclusively (for example, the United States, England and Wales, Germany, Greece, and Austria). In some cases, the mixed status is due to historical reasons, while in other countries, both coexist because of considerations of efficiency. Where the mixed status is a historical remnant, enforcement agents who recover private debts determined by a court decision generally have private status, while the enforcement of public debt tends to be the responsibility of civil servants, who are often working for the ministry of finance (for example, the French treasury bailiff or the Belgian *fisc*). In other countries, the creditor and his or her lawyer will drive the process and play an important role in deciding which enforcement method to pursue. The choice of the type of agent to involve will depend on what the creditor is seeking to enforce or what enforcement measures are preferred. The role and responsibilities of the judge remain important, but the process represents a mix of judicial and specialist enforcement.

## 2.2 Professional Court Enforcement Agents: an Emerging Trend

Continental European countries have a relatively strong tradition of nonjudicial enforcement that is nevertheless very much under the supervision of a judge. In France and Belgium, the function of the highly regulated *huissiers* to enforce debts, for example, is a centuries-old tradition.

The most prevalent type of nonjudicial enforcement is the use of notaries to enforce collateral pledges and mortgages. In Slovakia and in Macedonia, the introduction of a procedure overseen by a notary has greatly enhanced the execution on collateral subject to mortgages and pledges. The notary prepares the original contract documents and the debtor agrees to them; in case of nonpayment, the lender has a right to seize the collateral. In case of default, the notary is responsible for enforcement and has the authority to seize and sell property. This model is considered reasonably effective. In Slovakia, for example, banks reported that they almost exclusively use the notary system since it became available.

A new *Law on Enforcement* in Macedonia, enacted in 2005, also introduced private bailiffs. Turning to private enforcement agents can be a sensible solution because it relieves the country's justice sector budget. Moreover, when private agents compete based on their reputations, they need to aim for efficient and cost-effective service delivery. Nevertheless, to ensure that private entrepreneurs do not place monetary returns above a debtor's rights, this power should not be granted lightly. Countries like Estonia and Lithuania successfully implemented private bailiff systems supported by a clear regulatory system and solid professional development requirements. In Bulgaria, on the other hand, private bailiffs had to compete with the entrenched public enforcement agents, which undermined the financial incentives and resulted in confusion.

Based on these lessons learned, Macedonia ensured that its bailiff profession was well regulated and granted licenses to more experienced lawyers only. To help enforce professional rules and standards, the government also required the organization of a professional bailiff chamber. A fee schedule with proportionate but decreasing filing fees and proportionate success fees helped serve the interests of customers and bailiffs alike by assuring that even small claims would attract the attention of the bailiffs. The new *Law of Enforcement* also sets strict deadlines for enforcement processes and limits requests for delay of actions. These deadlines offer incentives for timely investigations, while allowing a debtor to resume business with limited delays. These changes were promoted through an extensive TV and radio campaign. Already in the first year of implementation, successful debt enforcements increased from 20 to 50 percent (Lorenz 2009).

## 2.3 Court Enforcement Agency Responsibilities

Independent of their organizational status, court enforcement agents have quite a broad range of responsibilities that are a mix of administrative tasks and enforcement actions that allow for and require relatively broad discretionary powers.<sup>1</sup> This range of discretion necessitates clear

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<sup>1</sup> In Estonia, for example, the bailiff's competence covers standard administrative acts, such as informing a debtor of the procedure, explaining to the parties their rights, the seizing of property and entry of notations concerning prohibition in registers, the receipt and delivery to the claimant of money from the debtor or of the sales proceeds of

regulation, capable agents, and an organizational structure and monitoring system that not only support effective operations but also limit any abuse of discretion. In order to provide guidance on how to develop such a system, as noted above, the Council of Europe issued recommendations in 2003 that outline core requirements for the establishment, organization, operation, and supervision of enforcement agencies (Council of Europe 2003). Many of the changes introduced in European countries followed these recommendations (Timmermans 2010). The organization and management of auctions are two of the key processes that require considerable flexibility and discretion on the part of the agent to be effective; the application of these recommendations is essential to ensure the needed professional capacities and integrity.

#### **Council of Europe Requirements for Effective Enforcement Agents**

1. Enforcement agents' status, role, responsibilities, and powers should be prescribed by law in order to bring as much certainty and transparency to the enforcement process as possible.
2. In recruiting enforcement agents, consideration should be given to the moral standards of candidates, as well as their legal knowledge and training in relevant law and procedure. They should be required to take exams to assess their theoretical and practical knowledge.
3. Enforcement agents should be honorable and competent in the performance of their duties and should act according to recognized high professional and ethical standards. They should be unbiased in their dealings with the parties and subject to professional scrutiny and monitoring.
4. The powers and responsibilities of enforcement agents should be clearly defined and delineated in relation to those of the judge.
5. Enforcement agents alleged to have abused their position should be subject to disciplinary, civil, and/or criminal proceedings.
6. State-employed enforcement agents should have proper working conditions, adequate physical resources, and support staff. They should also be adequately remunerated.
7. Enforcement agents should undergo initial and ongoing training according to clearly defined and well-structured aims and objectives.

*Source:* Adjusted from Council of Europe 2003.

The following sections provide examples of how these core requirements should be reflected in regulating and implementing judicial auctions.

## **2.4 Balancing Bailiff and Auction Agency Discretion, Efficiency and Effectiveness with Creditor Rights**

In order for auctions to be effective, enforcement agents have to have sufficient flexibility to work with the parties involved to first develop a realistic enforcement plan and then seek out different options to increase the potential yield of the sale of the debtor's assets. Misuse of the needed discretionary power of enforcement agents can be an actual breach of integrity in the form of bribe-taking and preferred treatment, but it can also be a violation of the principles of proportionality and equal treatment. Misuse may also be understood as discretion not complying

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property, keeping a record of receipts, etc. The bailiff also makes decisions on some issues that involve a significant range of discretionary powers: determination of the order of seizure of property, appraisal of seized property, determination of ownership in certain cases, determination of the method of sale of property outside auction, identification of the debtor's dependants and economic status, preparation of a distribution plan for received money, and decision on the necessity of suspension of proceedings. See Alekand (2008).

with the objective of law, as, for example, when a bailiff orders the seizure of assets not with a view to the speed of meeting the claim and interests of the debtor, but according to the method of sale requiring the fewest procedural acts.

Bailiff decisions or acts need to be appealable. If the reviewing court establishes a discretionary error, the court may order the bailiff to review the matter again or decide to cancel the bailiff's decision. However, unless timelines are defined in law, other enforcement regulations, or an agreed-upon enforcement plan, a court can only review the lawfulness—but not the expediency—of the action. Including realistic timelines in the legislation is important for expeditious enforcement actions but, as will be shown below, such timelines will only be helpful if they are flexible enough to consider specific circumstances, including those related to the type of asset involved and current market situation.

### **Incentives for efficient and effective actions**

Below are the various approaches that have been developed to balance the proper protection of the parties involved with the need for effective actions to yield good results in auctions.

Appropriate incentives and distribution of responsibility must be addressed in order to promote efficiency, curb corruption, and generate better results in the auctioning process. Where possible, shifting the responsibility for certain portions of the enforcement process to those who have the greatest interest in performance—that is, the creditors—is advisable. It is also important to devise systems of effective accountability to limit abuses.

European incentive systems recognize that adequate compensation for enforcement agents and other incentives must be structured to encourage all actors in the process, including the creditor, to perform well. For example, in France, the *huissiers* are compensated for each enforcement procedure through a combination of a fixed salary and a proportional fee based on the amount collected. This practice seems to work relatively well, although it should be noted that it functions within a system composed of a well-trained, regulated enforcement profession and a culture that expects equal treatment and has limited tolerance for corruption. Clearly, safeguards and oversight procedures have to be built into any such system, particularly where rule of law is weak and judicial and business corruption is common. Sanctions for abuse can be an effective deterrent to overzealous collection at the expense of debtor's rights.

Professional incentives may also be employed through flexible collection goals as a part of an agent's performance evaluation. For county court bailiffs in England and Wales, for example, while not paid strictly according to results, performance goals are predetermined and influence future promotions and salary increases. In Ukraine, an additional drop in effectiveness was noted by State Executive Service officials when agents lost the possibility of a year-end performance bonus.

It is therefore appropriate for professionally trained court enforcement agents to receive incentive pay or promotions for efficiency, as long as safeguards are built into the system to prevent abuses. All fees and pay structures should be fully disclosed to reduce the amount and volume of "facilitation payments" paid under the table.

## Disincentives

Ensuring the integrity of the process not only means focusing on the enforcement agent but also on the debtor. Disincentives to undermining the process can include criminal punishment and monetary disadvantages for not complying with laws and regulations. Illegal activities subject to criminal punishments involve hiding or destroying debtors' property, hindering public auction processes, preferentially providing economic benefits to some creditors, and fraudulently manipulating judicial debt collection processes. Monetary disadvantages to uncooperative debtors could include applying higher fee rates in cases of default and ordering damage payments caused by illegal actions. Additionally, as in the Netherlands, for example, enforcement agents could be asked to disclose all their accounts, including their private wealth and professional revenue. Special bank accounts would have to be established for the revenues and money held for third parties (Timmermans 2010).

A new law effective in South Africa in April 2011 requires that sales in execution auctions conducted by the sheriffs around the country fall under consumer protection laws that now govern the rules of practice for auctions. In many ways, the new South African auction law mirrors those of the world's largest auction nation, Australia, and creates a narrow path on which auctioneers can now operate. In Australia, the new auction laws introduced in 2008 resulted in a much more transparent process and environment; with increasing public trust, participation in auctions grew, creating a better market environment for even judicial auctions.<sup>2</sup>

### South Africa's New Auction Rules

South Africa's new consumer protection legislation came into effect on April 1, 2011 and introduced a range of new auction regulations that affect all auctions, particularly sales conducted by the sheriffs of the court.

These new rules aim to create greater openness and transparency in an industry that for a long time operated without much regulation. The Department of Trade and Industry now regulates all sheriffs' auction sales, making these judicial sales one of the world's most regulated auction environments.

These auction laws take modern business practice into account and detail what an auctioneer, including sheriffs, must say at an auction, how the sheriffs advertise, and what their contracts state. As an example, there are more than 20 rules dealing with advertising, and the regulations provide detail on what information sheriffs must disclose to the public.

Source: *The Citizen* 2011 (see n. 3).

## Quality standards for court enforcement agents

The existence of quality standards is an important guarantee of the proper enforcement of court decisions. These standards help to ensure greater efficiency of enforcement services and equality before the law; they also foster the harmonization of services across the country and establish clear performance measures that can be reflected in the education, management, and review of enforcement agents. Twenty-five European Union (EU) states have some quality standards for enforcement agents.

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<sup>2</sup> See *The Citizen*, "New Auction Regulations to Have Massive Impact on Sales in Executions." April 15, 2011, <http://www.citizen.co.za/citizen/content/en/citizen/news-auctions-announcements?oid=188055&sn=Detail&pid=181639&New-Law>.

In 2002, the United Kingdom's Lord Chancellor's Department issued National Standards for Enforcement Agents, to enable agents to share, build on, and improve existing good practices and raise the level of professionalism across the whole sector. These standards are intended for use by all enforcement agents (public and private), the enforcement agencies that employ them, and the major creditors who use their services. High standards of business ethics and practice are especially critical for improving the public's perception of enforcement agents and their actions, an important element in creating a more competitive market for auctions.<sup>3</sup>

#### **Developing Court Enforcement Agent Capacities in the Netherlands**

The Dutch Court Bailiffs' Organization introduced mandatory continuing education for its members. These rules require court bailiffs to take a certain number of education hours each year; for 2009—2010, the required number of hours was 30.

*Source:* Timmermans 2010.

### **Liability and liability insurance**

Part of the responsibilities of enforcement agents is their liability for negligent or wrongful acts, as well as omissions. There are a number of ways that such liability issues can arise in the process of judicial sales, for example, improper seizure of an asset, inadequate appraisals, failure to meet time limits, failure to publicize auctions effectively, failure to properly or timely disburse funds, and so forth. Some countries require that the agents prove that they have the financial means to compensate for improper acts or omissions. As private insurance becomes more readily available in transitional countries, requiring such protection through the insurance industry becomes more essential. In France, for example, the agent association requires members to contribute to a fund to cover professional liability (DPK Consulting 2008).

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<sup>3</sup> See HM Courts and Tribunal Service. National Standards for Enforcement Agents. Online at: <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/enforcement/agents02.htm>

## 3 Effective Court Enforcement Processes and Auctions

Effective processes are the other element that has to be in place for auctions to be successful. As mentioned above, in response to several studies, the Council of Europe issued recommendations in 2003 for enhancing enforcement processes (see box below).

### Key Elements of Efficient and Effective Enforcement and Auction Procedures

- A clear legal framework, setting out the powers, rights, and responsibilities of the parties and third parties
- Legal certainty and transparency in the process
- Foreseeable and efficient process
- A duty on the part of the parties to cooperate
- The provision by defendants of up-to-date information on their income, assets, and other relevant matters
- Mechanism to prevent misuse of the enforcement process by either party
- No postponement of the enforcement process unless there are reasons prescribed by law
- Proper balance between claimants' and defendants' interests, bearing in mind the provisions of Articles 6 and 8 of the European Convention on Human Rights (ECHR)
- The protection of certain essential assets and income of the defendant
- Clearly defined process that is easy for enforcement agents to administer
- Provision for the most effective and appropriate means of serving documents
- Reasonable enforcement fees that are prescribed by law and made known in advance to the parties
- An enforcement process that is proportionate to the claim, the anticipated proceeds to be recovered, as well as the interests of the defendant
- A system in which the necessary costs of enforcement are borne by the defendant, with the possibility that costs may be borne by other parties if they abuse the process
- Search and seizure of defendants' assets that is made as effective as possible, taking into account human rights and data protection provisions
- The prompt sale of assets while still seeking to obtain the highest market value and avoiding costly and unnecessary depreciation

*Source:* Adjusted from Council of Europe 2003.

### 3.1 The Right Procedures

The following sections outline the specific elements that apply to auction processes. Accessible, transparent, and foreseeable enforcement and auctioning processes require that:

*Sufficient notice be given regarding an auction.* The auction schedule— particularly for real estate—must be announced, at least in an official publication that can be accessed easily, and in the daily newspaper in the property's locality and/or other relevant market. Such announcements should be posted several times. Estonia, for example, requires that real estate auctions be

announced for six days, auctions of personal property for three, and other kinds of auctions, for three days or fewer.

*Any interested parties, aside from the debtor, may participate in the auction, a minimum price be set based on market value assessment, and the property go to the highest bidder.* If the auction does not yield the minimum price, it should be cancelled and either repeated or the property offered to the creditor. This option is provided in Peru, for example, where the plaintiff may either request that the title to the real estate be transferred in payment against the debt or that another auction be held. If another auction is held, the value of the minimum qualifying bid from the first auction is reduced by 15 percent. There is, however, a limit to the number of auctions that may be held to avoid manipulations of the process (Elena, Herrero, and Henderson 2004, 22).

*There are general processing timelines, and guidelines for applying them to individual cases.* This seem to be a better approach to ensuring timely auctions than strict enforcement timelines that cannot be negotiated with the parties to reflect case and asset circumstances.

*The choice of enforcement process and auction type is flexible.* More and more jurisdictions allow the parties as well as the bailiff to select and negotiate which processes will be applied and how they will go forward. This includes, for example, choice between public and private auctions, timelines for completing process steps (with some limits), and payment schedules. Strict processing deadlines established by law may not be the best solution; instead, processing frameworks should allow for tailored enforcement plans that reflect the circumstances of the case, the asset, and the current market situation.

*There are transparent and foreseeable enforcement expenses.* Transparency related to fees means that litigants have ready access to information about enforcement expenses by type and any fees payable, including any performance bonus paid to the enforcement agent. An official list should be published of the costs of different measures, beyond what is included in the code of procedure or court rules, and with explanations. This should be calculated and explained to the parties in each individual case. The costs should be easy for users to understand and clearly established in the relevant procedural documents. The majority of EU states (35 of the 42) have a system in place with similar requirements (Elena, Herrero, and Henderson 2004, 22).

#### **Timely Enforcement and Auctions— Flexible and Customized**

The new *Code of Procedure* in Romania provides an innovative example of a law that aims to make the enforcement process both flexible and timely. Combining the concept of case management and alternative dispute resolution, the Romanian code provides flexibility for calculating enforcement timeframes based on the needs of individual cases within the overall framework of timely processing. Enforcement agents are developing case specific enforcement plans with reasonable timelines for each action with the parties involved. The concept of strict deadlines for enforcement is replaced by a framework for enforcement actions that are negotiated with the parties in each case.

Source: CEPEJ 2007.

In many EU countries, most enforcement costs are paid directly by the state, so the claimant does not run any risk by seeking enforcement actions. Generally, the costs of a successful enforcement



process are borne by the defendant and if the claimant is not successful, they are borne by the state. This solution, however, calls for regulations to avoid abuse of the system by the creditor.

*There is an ability to negotiate costs.* Being able to negotiate costs, depending on the ability of the involved parties to pay them, is another important element, especially when auctions need to be repeated or if the financial situation of the claimant changes. In England, where creditors need to pay private enforcement officers for claims that exceed £600, a rate is negotiated ahead of time (CEPEJ 2007, 36).

## 3.2 The Importance of Locating Assets

A prerequisite for auctions to function is an effective system in place to identify and locate assets of the debtor, including a solid legal framework for tracing assets and reducing a debtor's opportunities to hide and transfer assets to avoid enforcement. The efficient and reliable identification of debtor assets for auctions requires the existence of well-kept asset registries and bailiff access to them, which is not always automatic, especially for private agents.

A bailiff's limited access to information about debtors' assets is one factor hampering the efficiency of proceedings in the case of, for example, English and Welsh bailiffs, who may or may not be state officials, and in the case of French freelance bailiffs.

*Source:* Alekand 2008, p. 118

While insolvency and lack of assets are often the main impediment to effective enforcement and profitable auctions, the inability to locate assets is a major obstacle to success. Research conducted in Mexico, Argentina, and Peru, as well as in the EU, indicated that the inability to locate the debtor's assets was at the core of enforcement problems (Henderson et al. 2004; Alekand 2008). Further compounding the problem in many developing countries, such as the three mentioned above, is the fact that it is difficult to identify or seize assets or obtain clear property titles when the informal sector or black economy is prominent, assets are easily hidden, and property titles often meaningless.

## 3.3 Establishing the Value of the Debtor's Property

Developing a reliable estimate of the value of a debtor's property is essential for effective enforcement and auctions. Before the auction of any asset, it needs to be appraised. Sometimes, the parties have already agreed to an appraisal in the original contract, and the contract appraisal and possibly an updated one are both included in the plaintiff's filing. That is not the case in many instances, however.

### ***The impartiality of the appraiser is essential to the appraisal process.***

The value conclusions of any appraiser must be his own and independently derived. The appraiser is legally bound to avoid any undue influence in order to arrive at a fair result, especially where third parties are concerned.

*Source:* Appraisal Standards Board 2010–2011.

Leaving the determination of value and existence of any incumencies up to the bailiff is one, though not the only, option. For example, in Slovakia, expert appraisal of property to be auctioned is required, but the use of experts is often costly and time consuming and not always needed.

When property whose market value is relatively easy to determine is involved, it is often more expedient not to engage an expert. In more complicated cases, though, the

bailiff may be empowered to decide when an expert appraisal is necessary. In Germany, bailiffs are authorized to appraise movables, unless the debtor or claimant requests the court to appoint an expert; for immovables, the court appoints an appraiser where necessary.

In many countries, the use of experts to establish the value of an asset can be a major impediment to timely proceedings and a source of debate over quality and integrity. At the same time, their services are often vital, so it is important to ensure that courts and claimants have access to reliable and efficient expertise. In countries where information to assess the value of an asset is more broadly available, such as the United States, most EU countries, and Australia, public and private records are available to identify property value without much, or with only limited, further review from experts. Where values of current private sales involving real property and other assets (for example, cars or ships) are regularly published and updated in public and private records, such as government property value assessments for tax purposes or the Kelley Blue Book,<sup>4</sup> which provides values for cars in the United States, establishing this information is relatively easy. In many U.S. jurisdictions, a range of additional alternative options exist. If the creditor is unaware of the nature and value of property in which the debtor (and other third parties) has an interest, the judgment creditor may obtain a court order that the judgment debtor appear in court for an examination of assets, conduct Lexis or WestLaw asset searches on the Internet, or hire expert firms specializing in the discovery and appraisal of assets.<sup>5</sup>

Even where other options for establishing the value of an asset are available, however, some level of expert input is still required in a number of cases. Thus, access to reliable experts who can deliver in time is essential. Some countries, such as Germany, are including expert practitioners as lay judges in judicial panels deciding certain commercial cases, which reduces the need for outside expert input. Others have supported the creation of a sophisticated expert system to provide courts with reliable value estimates.

For example, as a result of the savings and loan crisis in the late 1980s, the U.S. Congress formed the Appraisal Foundation to establish appraiser qualifications and standards, resulting in the Uniform Standards of Professional Appraisal Practice (USPAP) (Appraisal Standards Board 2010–2011). In addition to establishing qualification requirements and standards for operations, there is a strong focus on ensuring appraiser integrity. In order to avoid even the *presumption* of bias, USPAP requires that appraisers certify the following in their reports:

#### **Accreditation of Appraisers in the United States**

Most appraisers in the United States belong to a national organization that grants accreditations based on a member's level of education, experience, and background, including financial and personal integrity and the successful completion of several appraisal courses and exams. Only after all these requirements are met is the appraiser granted a specific designation in his or her specialty. Most appraisal organizations mandate their members reaccredit every five years via continuing education in order to assure that everyone is current with the most recent techniques and developments.

*Source:* Appraisal Standards Board 2010–2011

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<sup>4</sup> See [www.kbb.com](http://www.kbb.com).

<sup>5</sup> See, for example, the website of TracingAmerica at [www.tracing-america.com](http://www.tracing-america.com).

- There is no present or prospective interest in the property being appraised
- There is no personal bias with respect to the parties or property involved
- The engagement was not contingent upon developing a predetermined result
- The compensation is not contingent upon developing a predetermined result

There currently exist five core appraisal disciplines in the United States: real property, personal property, machinery and equipment, business valuation, and gems and jewelry. Each discipline has its own qualifications and standards for membership and within each discipline, subspecialties are defined. For example, machinery and equipment has several subspecialties, including aircraft, computers and high tech property, cost surveys, machinery and equipment, marine survey, mines and quarries, oil and gas, and public utilities. All real property appraisers are licensed by the states where they practice and as a condition of their license, compliance with USPAP is mandatory. Unfortunately, thus far, there are no licensing requirements for the other appraisal disciplines.

### **3.4 Getting a Good Price: Options to Increase the Success of Auctions**

For a variety of reasons, auctions will rarely, if ever, generate third-party bids equal to the fair market value of the property (the amount that a willing seller would pay a willing buyer if the seller were not compelled to sell and the buyer were not compelled to buy). There are a range of reasons for this. In some jurisdictions, such as most of those in the United States, the enforcement agent can make no warranties of quality or title with respect to the property; the agent offers the property subject to existing liens and cannot offer prospective purchasers access to real property for purposes of inspection. In addition, third-party purchasers in the United States must often pay cash for the property at the time of sale (or, in some cases, a deposit at the time of sale with the balance due shortly thereafter) and, in the case of real property, will be responsible for evicting tenants. Finally, in many U.S. jurisdictions, the debtor may redeem the property from the purchaser for a short period of time following the sale.

This differs significantly from many European jurisdictions, where property is often offered for auction free of any incumbencies. This increases the potential for a higher sales price but requires that reliable systems for registering incumbencies exist, and that existing liens and other attachments have been dealt with, which in turn requires additional effort and the availability of funds to address these incumbencies.

There are also several variations on the basic auction form that influence effectiveness, including time limits, open or sealed bidding, minimum or maximum limits on bid prices, and special rules for determining the winning bidder and sale price. Participants in an auction may or may not know the identities or actions of other participants. Depending on the auction type, bidders may participate in person or remotely through a variety of means, including telephone and the Internet.

## **Types of auction**

There are two basic designs of auctions most commonly used: the ascending auction and the first-price sealed-bid auction. In the ascending bid auction, also known as the English Auction, the price is raised successively until one bidder remains. For historical reasons, ascending auctions are the prevailing method in Latin America, for example. The literature has focused on establishing the conditions that make one type of auction better than another, but has not yielded clear results (Paredes, Crisosto, and Martí 2009).

Although little research exists on which auction types are more effective, what is available indicates that some types are easier to manipulate than others. Research in China, for example, indicates that the choice of auction format influences the likelihood that corrupt practices, such as pre-auction side deals between a favored developer bidder and the enforcement official, are flourishing (Cai, Henderson, and Zhang 2010). The study suggests that two-stage auctions (i.e. first-price sealed-bid auctions) are more corruptible, enabling a favored developer to signal in the first stage that the auction is taken, which deters entry of other potential bidders and raises the chance that the favored developer wins the auction. Other studies also suggest that, overall, sales prices are significantly lower for two-stage auctions than for English auctions (Cannon 2002).

## **Satisfying the debt**

In the United States, as in other countries and/or jurisdictions, if the sale at auction does not produce enough proceeds to satisfy the debt, the creditor may repeat the process with respect to other property of the debtor. The judgment creditor may bid at the execution sale, at which there may or may not be other bidders. In Australia, public auctions are conducted by a sheriff in one lot or in several lots, depending on which approach is likely to yield better results. If there is no bid the sheriff considers acceptable, the sheriff may sell the property by private treaty for a price that is not less than the highest bid received at the prior auction. If the judgment debt may be satisfied by selling only personal property, the sheriff must sell personal property first before selling real property.<sup>6</sup> The sheriff must also, at the request of the judgment debtor, provide a written detailed account of the sale and of the application of the proceeds of the sale.<sup>7</sup> The sheriff has a duty to act fairly when selling property and is obliged to obtain a fair price; he may also be liable for damages for failing to exercise due care.<sup>8</sup>

In the United Kingdom, sales may take place outside of court supervision and outside the insolvency laws, through the use of a “floating charge.” A secured party (a secured creditor) may obtain a blanket security interest that covers all of the debtor’s assets. Default by the debtor then gives the secured party the power to appoint a private receiver to sell the assets for the benefit of

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<sup>6</sup> Australia, *Enforcement of Judgments Act*, 1991, Section 7(5).

<sup>7</sup> Western Australian Consolidated Regulations, *Civil Judgments Enforcement Regulations 2005*, Reg 45, Account of sale under property (seizure and sale) order, [http://www.austlii.edu.au/au/legis/wa/consol\\_reg/cjer2005391/](http://www.austlii.edu.au/au/legis/wa/consol_reg/cjer2005391/).

<sup>8</sup> The Law Reform Commission of Western Australia, “Project No 67: Writs and Warrants of Execution,” Draft Report and Research Paper (Perth: The Law Reform Commission of Western Australia, 2001).

the secured party. Recent amendments to the laws in the United Kingdom, however, have reduced the power of the secured creditor to make these private appointments.<sup>9</sup>

Similarly, in the United States, a secured creditor with rights to the personal property of the debtor may engage in “self-help” repossession and sale after default, as long as there is no risk of a “breach of the peace” (that is, the potential for immediate violence). The process of taking possession of the collateral, selling it, and applying the proceeds to the debt may all be done without any court intervention or supervision.

France allows the court to transfer the title to the property to the creditor and give the creditor the right to dispose of the property as its owner. The rules that govern these public sales are intended to avoid “collusive bidding and to obtain the maximum value for the asset” (Westbrook et al. 2010, 12). These rules include the requirement of properly advertising the sale, assuring that the winning bidder is able and willing pay the bid amount, and guarantees that a buyer will obtain title completely, free and clear of competing claims. The absence of this latter rule could bring down the price of the assets. Some give the debtor the opportunity to buy prior to, or at the time of, the sale. Rival claimants to the property are left then to appropriately distribute the proceeds of the sale (according to a system of priorities among creditors in a secured credit system).

### **Ensuring public awareness**

Proper advertising is another element to ensure success at auction. In the United States, foreclosure sales often contribute to the failure to bring reasonable prices for the property sold because the sale is poorly advertised and prospective buyers are given little opportunity to inspect the property before bidding and must accept the property “as is.” Considering that the market to sell most seized assets is quite small in most countries, targeted advertising based on some market research is essential. This is one of the reasons why private, more entrepreneurial enforcement agents and auctioneers tend to get better results. They study and understand the markets for different property items and develop more targeted advertising and information strategies to reach potential bidders who are interested and willing to pay a price that is closer to the actual market value. Enforcement agents in Hawaii, for example, specifically advertise auctions in Japanese language newspapers, which sometimes attract bidders willing to pay more. The use and/or support of private auction houses for judicial sales, at least for higher end real estate and other property, is a viable and growing option used, among others, in the United States, United Kingdom, Singapore, and, more recently in the United Arab Emirates.

## **4 Conclusion**

In view of the many drawbacks of selling assets through judicial auctions, more countries now allow for more flexibility in choice of asset disposition and agents, as well as timelines for satisfying the judicial decision. Auctions might not only delay the sale, leading to devaluation of the assets, they might also not be appropriate for the type of assets involved. For example, when assets involve equipment of a specialized company, or if high-end property is involved, there

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<sup>9</sup> United Kingdom, *Enterprise Act 2002* Section 250 (applicable to England, Scotland, and Wales but not Northern Ireland); Northern Ireland, *Enterprise Act 2002* §280(2); see also Westbrook et al. (2010, 25).

may be a very small market, or “niche market,” and only limited interest in bidding. Therefore, allowing for flexibility in the choice of process and method of disposition, including permitting the creditor to take the collateral in satisfaction of the debt, is crucial (Alvarez de la Campa 2011).

The trend towards private or quasi-private enforcement agents who are well regulated, well qualified, and operate according to quality standards supports the recognition that professionalism, entrepreneurship, and flexibility are needed to ensure that the highest value is yielded through a timely process that considers the interests of all involved.

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