



ENFORCEMENT OF COURT DECISIONS AND THE WAY FORWARD TO DIGITAL ENFORCEMENT





INTRODUCTION

A healthy and attractive investment climate gives businesses trust that the judicial system will protect their legitimate interests and successfully enforce court decisions. The lack of effective enforcement mechanisms has a devastating effect on the investment climate and the rule of law, deterring local and foreign investment. One of the main problems in commercial disputes in the countries where the EBRD operates arises when a party tries to enforce a court's decision.² Previous EBRD research on judicial decisions found poor implementation of judicial rulings to be the biggest challenge, outranking even corruption. Another EBRD study of enforcement agents' systems³ identified the following elements as most problematic in terms of enforcement and proposed measures to address them:

Most problematic dimensions of enforcement

- Searching for assets
- Sale of assets
- Speed of enforcement
- Supervision
- Seizure of assets
- Cost of enforcement

Measures to promote efficient enforcement

- Initial and ongoing training for enforcement agents
- Adequate pay and incentives
- Easy and efficient access to information in property registries and databases, including bank information
- Efficient sale and auction arrangements, including online procedures
- Robust financial deterrents for debtors who hinder enforcement
- Consistency of legislation on enforcement, property registries, privacy and banking
- Clear, consistent and publicly available statistical data on past and current cases
- Robust oversight of agents' conduct



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YULIA SHAPOVALOVA¹
COUNSEL, EBRD
ShapovaY@ebrd.com

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VERONICA BRADAUTANU
PRINCIPAL COUNSEL, EBRD
BradautV@ebrd.com

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² EBRD's Judicial Decisions Assessment 2011-2012. See <https://www.ebrd.com/sites/Satellite?c=Content&cid=1395238675306&pagename=EBRD%2FContent%2FContentLayout>

³ EBRD Enforcement Agents Assessments in the Commonwealth of Independent States, Georgia and Mongolia (2014) and (in 2015) Enforcing court decisions in the Commonwealth of Independent States, Georgia and Mongolia: a comparative review in Law in transition 2014. See <https://www.ebrd.com/downloads/research/law/lit14e.pdf>; <https://www.ebrd.com/sites/Satellite?c=Content&cid=1395238675306&pagename=EBRD%2FContent%2FContentLayout>

- Public debate of reports into allegations of corruption by enforcement officers⁴

In response, the EBRD, through its Legal Transition Programme (LTP), has focused its attention on reforms to improve the effectiveness of enforcement of judgments and the role of enforcement officers.

Despite the level of development of digital technologies around the world, the Covid-19 pandemic has revealed significant shortcomings in the activities of state bodies and the judiciary, including the enforcement system – namely, the absence or insufficient level of digitalisation of activities that would make it possible to work effectively when personal contact is impossible. This situation underscores the need to introduce digital technologies in the judicial system to guarantee access to justice and in enforcement procedures as an effective means of carrying out judgments.

It is worth noting that digitalisation is one of the strategic directions of the EBRD until 2025. The LTP will pay close attention to digital aspects to improve the enforcement systems in countries where the EBRD operates.

INTERNATIONAL ENFORCEMENT STANDARDS AND INSTRUMENTS AND RECENT DEVELOPMENTS

The effective enforcement of court decisions is recognised as an integral part of the fundamental human right to a fair trial established by **Article 8 of the Universal Declaration of Human Rights**,⁵ **Article 14 of the International Covenant on Civil and Political Rights**⁶ and **Article 6 of the European Convention on Human Rights**.⁷ The European Court of Human Rights (ECHR) has linked the enforcement of judgments to the requirements of the right to a fair trial under Article 6.⁸

Until recently, the enforcement of judgments was not the subject of extensive regulation in international law or standard setting among international organisations. However, interest is growing at the global and regional levels in undertaking work in the area of enforcement.

As the table below shows, there are now several good guiding standards and studies at the European and international levels.

⁴ Ibid.

⁵ See <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

⁶ <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁷ See https://www.echr.coe.int/Documents/Convention_ENG.pdf

⁸ ECHR, 19 March 1997, *Hornsby v Greece*, req. n. ° 18357/91, § 40 See https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_18357-91_001-58020 and https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf#_ftn4

⁹ See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805df135

¹⁰ These are enforcement standards with regard to civil and commercial proceedings, comprising rules to enhance the efficiency of the enforcement process and relating to the status and the functions of enforcement agents. Para 3 in <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf>

¹¹ See <https://rm.coe.int/16807473cd>

¹² See <https://rm.coe.int/european-commission-for-the-efficiency-of-justice-cepej-good-practice-/16807477bf>

¹³ The study examines the enforcement of court decisions in civil, commercial, administrative and criminal matters and presents the trends and the main conclusions. Since 2004, the CEPEJ has regularly evaluated the judicial systems, including enforcement, of the Council of Europe member states and some observer states. See <https://rm.coe.int/cepej-specific-study-on-enforcement-agents-uihj-2018-data-en-version-2/1680a2a2d4>

¹⁴ The code provides guiding principles on enforcement, provisional and enforcement measures, and enforcement agents. See <https://www.uihj.com/downloads/global-code-of-enforcement/>

¹⁵ See <https://www.uihj.com/about-us-2/introduction/>

¹⁶ Global Code of Enforcement, *op. cit.*

1.	Council of Europe's Recommendation (2003) 17 of the Committee of Ministers to member states on enforcement (CE Recommendation), 9 September 2003 ^{9,10}
2.	European Commission on the Efficiency of Justice (CEPEJ) Guidelines for a better implementation of the existing Council of Europe's recommendation on enforcement (CEPEJ Guidelines), December 2009 ¹¹
3.	CEPEJ Good practice guide on enforcement of judicial decisions, December 2015 ¹²
4.	CEPEJ Specific Study on the Legal Professions: Enforcement Agents, 2021 ¹³
5.	Global Code of Enforcement, May 2015, ¹⁴ International Union of Judicial Officers (UIHJ) ¹⁵
6.	Global Code of Digital Enforcement, November 2021, UIHJ ¹⁶



UNIDROIT'S STANDARD-SETTING INITIATIVE ON ENFORCEMENT

The International Institute for the Unification of Private Law (UNIDROIT)¹⁷ refined the undertaking of a project on “Principles of Effective Enforcement” in 2018.¹⁸ A working group was established in 2020 and this project is given high priority on the UNIDROIT Work Programme 2020-2022. The working group is tasked with developing a set of global standards and best practices to improve the domestic law framework for enforcement in the form of a guidance document.

Several global and regional organisations with expertise in this field – including the EBRD – were invited to participate as observers in the working group. The work is divided into three areas, one of which is the impact of technology on enforcement. Preparation of a first draft of the proposed instrument is expected to be concluded in 2022.¹⁹ The Bank contributed to this initiative by providing experience and lessons learned from implementing projects in the EBRD regions over the last decade.

DIGITALISATION OF ENFORCEMENT PROCEDURES

As already mentioned, past EBRD assessments have highlighted the importance of digital technologies in enforcement procedures. Emerging digitalisation – including in the justice sector – has had a major impact on the enforcement system in recent years. Until recently, however, there were no instruments to summarise best practice and define all the necessary aspects of digitalisation to enforce judgments effectively.

As noted above, the **UIHJ Global Code of Digital Enforcement** defines universal principles that apply to all facets of digital enforcement in civil matters. It encourages states to incorporate these principles in their national legislation when regulating the use of digital technologies in

¹⁷ See <https://www.unidroit.org/about-unidroit/>

¹⁸ See <https://www.unidroit.org/work-in-progress/enforcement-best-practices/>

¹⁹ See <https://www.unidroit.org/english/documents/2021/study76b/wg02/s-76b-wg02-02-e.pdf>

enforcement procedures. While the Code also refers to substantive matters, such as issues of enforcement of digital assets, the key aspects outlined below focus on the procedural aspects (electronic enforcement):

- Ensure that **digital enforcement measures are proportional to the enforcement claim.**
- Provide for the **use of digital tools in enforcement agents' activities**, including the use of digital identity, in **compliance with data protection and confidentiality** rules.
- Enable the employment of **secured online dispute resolution** systems by enforcement agents, particularly **online mediation, in the enforcement process.**
- Ensure the necessary level of **digital literacy of enforcement agents through training.**
- Put in place **infrastructure** enabling enforcement agents **to exchange information electronically** regarding the debtor with other relevant institutions (for example, courts) and **to access data** from relevant electronic registers (for example, registers held by banks or asset registers).
- Ensure **flexibility** and allow **the switch from digital to non-digital enforcement and vice versa**, where necessary.
- Develop regulatory frameworks that **permit the use of artificial intelligence** with **minimum risks, compliance with fundamental rights and ethical principles**, and that **allow enforcement agents to control and override the decisions made by artificial intelligence.**
- Maintain a **debtor's access to offline (physical) contact with enforcement agents.**
- Ensure **reasonable, transparent and well-defined costs of digital enforcement**, which in any event should not exceed the costs of non-digital enforcement.

As discussed above, UNIDROIT intends to develop a set of global standards and best practices for the enforcement of judgments, including digital



aspects. These instruments will guide further reforms in the field of enforcement of judgments aimed at the introduction of e-enforcement procedures.

EBRD LTP SUPPORT TO IMPROVE ENFORCEMENT OF JUDGMENTS

Since 2014, the LTP has implemented several enforcement reform projects – including in Mongolia, Tajikistan, Ukraine and the Kyrgyz Republic – that mainly targeted policy, legal and institutional development and capacity building. The focus since 2018 has also encompassed the digitisation of enforcement procedures. New projects were recently initiated in Moldova, Ukraine and Azerbaijan, and another is scheduled to launch in Mongolia in 2022. Some recent initiatives are highlighted below.

The Kyrgyz Republic

The Kyrgyz judicial system has suffered from a low level of enforcement of judgments for many years.²⁰ One of the greatest challenges is the human resource capacity of the bailiff service, which lacks continuous training and has a workload that exceeds the bailiffs' ability to handle it. There is a very low ratio of enforcement agents to residents in the country by regional standards. To help the Kyrgyz authorities enhance the capacity of Kyrgyz bailiffs to enforce judgments in commercial matters, the EBRD launched **the Bailiff Service Capacity Building Project in Kyrgyz Republic** in 2015. The project was implemented in three phases, from 2015-21.

²⁰ See http://president.kg/ru/sobytiya/12774_utverghdena_nacionalnaya_strategiya_razvitiya_kirgizskoy_respubliki_na_2018_2040_godi p. 123.

Under the **initial phase (2015-16)**, the *Functional Analysis of the System of Court Enforcement in the Kyrgyz Republic* was prepared in June 2016 to identify the areas for reform and offer recommendations. The new Law on Enforcement Process and the Status of Enforcement Agents (Enforcement Law or Law No. 15) was adopted on 29 January 2017.²¹ This law introduced useful reforms, though there is room for further improvements.

The Kyrgyz Republic has a state system of court enforcement. To enforce court decisions more efficiently, the government is considering introducing a mixed system of court enforcement that would include private bailiffs, as envisaged in the **National Development Strategy of Kyrgyz Republic for 2018-2040**.²²

Under **Phase 2 (2017-21)**, the project helped the Kyrgyz authorities implement the recommendations by providing legislative and institutional development advice, training of trainers and apprenticeship. As a result, the Court Department under the Supreme Court, responsible for enforcement of court decisions, adopted a comprehensive **Strategy for the Institutional Development of the Court Enforcement Department**, accompanied by the Action Plan for 2019-2021, in 2018.

In line with the Strategy, the project helped to develop legislative amendments to strengthen the enforcement function by creating a new State Court Enforcement Service under the Supreme Court (CDES) with a doubled staff²³ and amending the Budget Code of the Kyrgyz Republic, with a focus on facilitating the financial sustainability and autonomy of the enforcement body and providing adequate incentives for bailiffs. The project further assisted by developing several drafts of secondary legislation concerning the functioning of the CDES and its staffing. The approval process of these documents was postponed because of drastic changes in the political landscape in the Kyrgyz Republic in 2020-21.

At the end of 2021, as a result of political changes and the Covid-19 pandemic, which led to a reduction in the state budget and state structures, the enforcement function was returned to the Court Department under the Supreme Court.²⁴

In view of the Kyrgyz government considering a mixed bailiff system (state and private), the project offered an opportunity to 15 Kyrgyz bailiffs to participate in an apprenticeship programme and a study visit to Ukraine.²⁵ Also under Phase 2, the project prepared the terms of reference for the development of an electronic database of debtors in 2019, in support of an EU initiative to digitise enforcement procedures and exchange of data about debtors and develop electronic auctions for the sale of debtors' assets.

Phase 3 (2018-21) provided extensive training for newly appointed bailiffs and organised a regional conference to exchange best practice. In 2019, secondary legislation on mentoring procedures of newly appointed bailiffs and guidance for formal and regular evaluation of training needs for bailiffs were drafted. Seven training e-handbooks on the key aspects of enforcement proceedings were published on the website of the Court Department and the High Justice Training Centre (HJTC). In 2020, 112 newly appointed bailiffs were trained. In addition to live training, an e-learning module on public speaking and the art of conflict management was developed and is expected to be launched on the HJTC e-learning training platform in 2022.

Overall, the project helped raise the profile of enforcement officers, highlighted the importance of their work, optimised internal processes and created a sustainable and continuous system to train bailiffs. By promoting better working conditions for bailiffs, the project helped boost their salaries and generated increased funding for enforcement agencies. It should be noted, however, that the recent return of the enforcement function to the Court Department means the number of bailiffs may be reduced, making enforcement of court decisions less effective. While the government's

²¹ See <http://cbd.minjust.gov.kg/act/view/ru-ru/111522>

²² Ibid.

²³ See the "Law on Supreme Court and Local Courts of the Kyrgyz Republic", adopted on 11 April 2020 № 39.

²⁴ By the new Law "On Supreme Court and Local Courts of the Kyrgyz Republic", adopted on 15 November 2021 № 39, see at: <http://cbd.minjust.gov.kg/act/view/ru-ru/112315>

²⁵ The visit was organised in cooperation with the Ministry of Justice of Ukraine and affiliated institutions: the Ministry's State Enforcement Service Department and the Private Bailiffs Association in Ukraine.

initiative to introduce private bailiffs may offset the bailiff shortage, it has yet to be implemented. Going forward, recent legislative changes and new internal processes must be implemented effectively. Another analysis to understand the needs of the enforcement system may be appropriate.

Moldova

The enforcement system in Moldova is fully private. Evaluations by the CEPEJ show that excessive cost, length of proceedings and lack of transparency are the top three complaints made by users about the enforcement procedure in Moldova.²⁶ To address these issues, Moldova has taken steps to digitise the enforcement processes. To this end, the National Union of Enforcement Officers developed the Information System for Evidence and Management of Enforcement Procedures (ISEMEP). The system allows bailiffs to keep electronic records of enforcement documents, debtors and creditors, terms of enforcement and costs associated with enforcement, as well as generate statistical data about the enforcement procedure. Nevertheless, the ISEMEP does not allow the exchange of data between bailiffs and other third parties (for example, public registries and banks) possessing vital information for the enforcement procedure. Such communication is currently paper-based, using postal services.

Enforcement practice shows that the overwhelming majority of document exchange is conducted between bailiffs and banking institutions to collect and monitor information about debtors' bank accounts (some 500,000 paper-based requests a year). Exchanging such data using postal services is vulnerable to delays and has become even more difficult during the Covid-19 pandemic.

While increasing the efficiency of judgment enforcement procedures is one of the priorities of the Moldovan government under the **Strategy for Ensuring Independence and Integrity of Justice**

Sector 2022-2025,²⁷ state-led actions do not cover the exchange of information between bailiffs and banks. A recently launched EBRD project called **Streamlining Enforcement Procedures in Moldova/Covid-19 Response: Digitisation of debt enforcement by bailiffs from debtor bank accounts** aims to address this issue by developing and piloting the interoperability capability of the ISEMEP. This will allow the exchange of data and electronic documents between bailiffs and Moldovan banks to request and receive information in real time about debtors' accounts, to request that owed funds in such accounts be frozen and to submit payment orders to retrieve the debt from debtors' accounts. As a result, creditors will benefit from faster enforcement while bailiffs will take part in a more transparent enforcement process.

Ukraine

In recent decades, Ukraine has faced a serious structural problem of non-enforcement or delayed enforcement of domestic judicial decisions and the lack of effective remedy, as confirmed by the ECHR in its judgment in the *Burmych* case in October 2017.²⁸ Statistics show that the unenforced debt based on court judgments amounted to more than **UAH 800 billion** (€25.7 billion), which is 30 per cent of the country's annual gross domestic product. However, only UAH 25 billion-UAH 30 billion (€805 million-€967 million) is being enforced each year, which represents **less than 4 per cent** of the total amount of debt based on court judgments in Ukraine.²⁹ In 2016, Ukraine introduced a mixed

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²⁶ See <https://rm.coe.int/en-republic-of-moldova-2018/16809fe2f2>

²⁷ See https://www.legis.md/cautare/getResults?doc_id=129241&lang=ro

²⁸ See https://www.menschenrechte.ac.at/orig/17_5/Burmych.pdf

²⁹ See <https://apvu.com.ua/europacket>



system to enforce court decisions, namely, in addition to state bailiffs, private bailiffs were allowed to practice.

The LTP launched a project in 2016 called **Bailiff Service Capacity Building - Strengthening the Enforcement of Court Decisions** to help the Ministry of Justice improve the capacity of Ukrainian bailiffs. In Phase 1 (December 2016-18), the project conducted a functional assessment of the enforcement system, identified regulatory, institutional and training problems and needs, and developed recommendations to address them. As a result, the Ministry of Justice used the functional assessment to form a policy vision and plan on further development of the enforcement of court decisions.

In September 2020, the government of Ukraine adopted the **National Strategy³⁰ and its Action Plan on Addressing the Problem of Non-Execution of Judgments until 2022 (National Strategy)³¹** to address this issue of low enforcement.

During Phase 2 (2019-20), the project produced a concept note on further development of the e-platform for bailiffs in Ukraine and developed the scope for the training programme for the Ukrainian State Enforcement Service Department. In turn, the EBRD will seek to provide further

support to the Government of Ukraine in terms of strengthening of the enforcement system.

CONCLUSION

Although the enforcement of court decisions remains a major problem in many countries, some progress has been made. Reform efforts must continue, however. The Bank will continue to support the efforts of the economies where we operate to improve enforcement mechanisms, based on lessons learned and new developments in standard setting on enforcement. Among other necessary improvements, attention will be given to the digitalisation of enforcement procedures and e-learning to ensure the sustainability of continuous education for enforcement officers.



³⁰ See <https://zakon.rada.gov.ua/laws/show/1218-2020-p#Text>

³¹ See <https://zakon.rada.gov.ua/laws/show/210-2021-p>