



Organization for Security and Co-operation in Europe
Mission to Montenegro

THEMATIC REPORT:
**“Monitoring of the Enforcement Procedure
in Montenegro”**

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1. INTRODUCTION

The OSCE Mission to Montenegro (hereinafter: Mission), with the support of the contributions kindly provided by the Netherlands, Luxembourg, France, Germany, United Kingdom and United States, in September 2011 launched the Third Phase of the Court Monitoring Project (hereinafter: Project). The Project is aimed at analyzing criminal and civil procedures in courts in Montenegro, and as of November 2012 is expanded at monitoring and analysis of enforcement procedures. This will contribute to determination of preconditions for ensuring the fair trial standards, and thus to provide support to courts in providing these preconditions, and all this with aim to contributing to the judicial reform process and thus strengthening the rule of law in Montenegro

The Project is implemented in partnership with the NGO Centre for Monitoring and Research (CeMI).

In compliance with the *Memorandum of Understanding*, which was signed between the Mission and the Supreme Court of Montenegro, the Appellate Court, the Higher Courts in Podgorica and in Bijelo Polje, as well as all basic courts in Montenegro, the monitoring activities have been extended to all courts of Montenegro and to both civil and criminal matters, but also to enforcement procedures.

This thematic report presents the results of a several-month long research undertaken by the Court Monitoring Team, in order to appraise the respect of procedural preconditions of courts in enforcement procedures, duration of procedures, respect of the right to equality, trial within the reasonable time, and to, by analyzing the cases, provide adequate conclusions and recommendations aimed at further improvement of the situation in this area. Monitoring of the enforcement procedures, out of the court jurisdiction, is performed for the first time in Montenegro, through this Project.

The Report is consisted of four parts that include relevant data collected during the research. The first part is introduction, the second part presents the methodology of the research, the third part is related to the general legal framework, the fourth part presents the analysis of indicators, consisted of legal definition of some provisions, findings from the research, observed court practice, conclusions and recommendations,

2. METHODOLOGY

2.1 Team for Monitoring of Enforcement Procedures

Monitoring of executive proceedings before courts in Montenegro started during the third phase of the Court Monitoring Project. In the third phase of the project, a team of observers is composed of an OSCE legal adviser, who is also the coordinator of the team, and five observers from the NGO CeMI. Out of five observers who are engaged by CeMI, one observer has been solely responsible for monitoring of the enforcement proceedings and is engaged at the project for three days a week. In addition to this observer, other members of the court monitoring team have been also included in the monitoring process and, within the limits of their professional, analytical and academic capacity, actively contributed to the quality of the implementation of the monitoring of enforcement procedures and thus the preparation of this report.

Co-operation between the OSCE Mission and the NGO CeMI is aimed at strengthening the capacities of local civil society organizations to monitor trials in a professional manner and in accordance with international standards, as well as at increasing the accuracy of their reporting to the relevant national and international bodies

2.2. A sample of Monitored Cases

Monitoring of enforcement procedures was carried out on 729 cases of enforcement in all basic courts in Montenegro in the first six months of the implementation of project activities during the third phase of the project (November 2012 - April 2013). During the reporting period observers analyzed enforcement cases in which motions for enforcement or security were filed in period from October 2011. The subject of the analysis were enforcements based on executive documents and authentic documents, with court signs I and IV. The following table shows the overall number of analyzed cases per courts

Table 1: Overall number of analyzed cases per courts

Court	Number of analyzed cases
Basic Court Bar	51
Basic Court Berane	50
Basic Court Bijelo Polje	50
Basic Court Cetinje	29
Basic Court Herceg Novi	32
Basic Court Kotor	34
Basic Court Nikšić	78
Basic Court Plav	40
Basic Court Pljevlja	35
Basic Court Podgorica	164
Basic Court Ulcinj	37
Basic Court Kolašin	50
Basic Court Danilovgrad	46
Basic Court Zabljak	33
Total	729

Findings, conclusions and recommendations of this report will create basis for further research and analytical work on the monitoring of the enforcement cases in the basic courts in Montenegro in order to identify and analyze the existing problems in the implementation of enforcement procedures. Based on the findings from the research, the report contains recommendations proposed for improving the implementation of enforcement procedures in Montenegro, including the proposals for amendments of the legislative and institutional framework in this area

2.3. Techniques of Monitoring of Enforcement Procedures

During the research, the observers were focused on the implementation of the enforcement process in accordance with the relevant national legislation. The research methodology is based on direct insight into the files of enforcement procedure cases in which the motion for enforcement or security has been filed from October 2011 and later. Although the method of random selection of cases was used predominantly, the research also included a number of “specific” enforcement cases related to the enforcement by submitting movable or immovable property, handing over the child and the like. These

cases will be the subject of research in the coming months of the implementation of the monitoring of enforcement procedures. Information from observed files, that were relevant for this research, were entered into standardized questionnaires, which were then analyzed by members of the observer team. The questionnaire is presented in the Annex 1 of this report.

3. GENERAL LEGAL FRAMEWORK

3.1. International Standards

Enforcement of court decisions in civil matters is an integral part of the right to a fair trial, more precisely its component related to the trial within reasonable time, in accordance with the Art. 6 of the European Convention on Human Rights and Fundamental Freedoms. This standing can be found in the relevant judgments of the European Court of Human Rights, as well as in the Council of Europe Recommendation Rec (2003) 17, which provides that an inefficient system of enforcement of court decisions in civil matters may have a negative impact on the credibility of the judicial system and public confidence in judicial system institutions. Recalling the Resolution No. 3 on General approach and means of achieving effective enforcement of court decisions in 2001, the Council of Europe Recommendation Rec (2003)17¹, is of the view that the efficient and effective enforcement of court decisions is of capital importance for all member states of the Council of Europe concerning the creation, development and strengthening of their judicial systems. According to the guidelines set out in Recommendation Rec (2003) 17, the enforcement is putting into effect of judicial and non-judicial enforceable decisions according to the legal framework in which the defendant is forced to do something or refrain from doing, or to pay something for which there is a legally enforceable court decision. This Recommendation provides definitions of terms, and the rights and obligations of participants in the enforcement procedure – enforcement agent, claimant and defendant

In addition to this Recommendation, which is predominantly related to the civil cases, by the Council of Europe adopted the Recommendation Rec (2003) 16 concerning the enforcement of judicial and administrative decisions in administrative matters.²

Jurisprudence of the European Court of Human Rights has defined a number of positions on enforcement procedures in cases in which one of the main components of the standards of fair trial, contained in the Article 6 of the European Convention on Human Rights and Fundamental Freedoms - the right to trial within a reasonable time is violated. Namely, the Court is of the opinion that Article 6 of the European Convention on Human Rights and Fundamental Freedoms guarantees everyone the right to a trial within a reasonable time and that the enforcement of the court decision should be considered as an integral part of the procedure under Article 65 of the ECHR.³ Postponement of the enforcement of the court decision can be justified only by special circumstances, but it can not be in the manner that infringes rights protected under the Article 6 of the ECHR.⁴ The European Court of Human Rights held that the state should use all available legal means to enforce a final court decision.⁵

¹ Recommendation Rec(2003)17 of the Committee of Ministers on enforcement of court decisions in civil matters

² Recommendation Rec(2003)16 of the Committee of Ministers on the execution of administrative and judicial decisions in the field of administrative law

³ *Hornsby v Greece*, Judgement from 19.03.1997

⁴ *Burdov v Russia*, Application No. 59498/00, ECHR 2002/III; *Immobiliare Saffi v Italy*, Judgement from 28.07.1999

⁵ *Fuklev v Ukraine*, Judgement from 7.06.2005

As the relevant legal framework in the field of judicial cooperation in civil matters between the Member States of the European Union a number of regulations of the *acquis* relating to the recognition and enforcement of court decisions in civil law have been adopted. Article 81 of the Lisbon Treaty, which provides for the establishment of measures aimed at ensuring the mutual recognition and enforcement of judgements and decisions in extrajudicial cases among member states of the European Union, has been recognized as a common basis for issuing various regulations in this area. Through recent accession to the EU, Montenegro will have to compile its legislative framework in the field of recognition and enforcement of court decisions with all relevant standards contained in the *acquis* regulations⁶ since all *Acquis* regulations will be directly applicable in Montenegro as of the date of the accession of Montenegro to the EU.

3.2. National Legislation

The Parliament of Montenegro adopted the **Law on Enforcement and Security**⁷ in 2011. The **enforcement procedure** (the procedure of forced implementation of claims based on domestic or foreign enforceable or a authentic document) and the procedure for securing claims is performed in accordance with this Law, if a special law provides otherwise. Enforcement procedure is initiated with the goal of exercising subjective rights of a claimant (claims) through direct or indirect coercion against the defendant who failed to comply with a final court decision. So, in order to be able to talk about the implementation of the procedure of enforcement of court decisions two criteria have to be met: first, there must be a final court decision (one that can not be denied by regular legal remedies) and the other saying that the time provided for voluntary fulfilment of obligations, i.e. realization of a subjective right of a claimant under the final court decision have passed. It is important to emphasize that the final court decision rendered in a civil procedure can not in any way be reviewed and changed in meritum, during the course of enforcement procedure. The process of enforcement of a court decision is the final stage in the process of realization of subjective civil rights. Through the parameters offered by the enforcement procedure such as the number of non-enforced court decisions and the length of the enforcement proceedings the efficiency of judicial institutions can be measured.

One of the basic novelties introduced by this Law is the institute of bailiffs – persons who are not employed in the courts and who are nominated in accordance with the separate law. **The Law on Public Bailiffs**⁸ is adopted in late 2011. This Law defines the organization of public bailiffs who perform tasks in the process of implementation of the enforcement and security, their nomination and other issues important for performance of enforcement profession. According with the basic principles of this Law, the bailiff performs enforcement profession as a public service, independently, professionally and as explicit profession, in compliance with the Law regulating enforcement and security and this Law. Also, according to the provisions of this Law, public bailiff can perform scientific, teaching, cultural, arts and sport profession and to gain incomes from copyrights, patents or other similar rights, or intellectual and industrial property.

Enforcement procedure has its own rules and specificities foreseen by the Law on Enforcement and Security, and provisions of the Law on Civil Procedure should be subsidiary applied in cases where there are no explicit provisions of this Law regulating the relations among parties.

⁶ Regulation (EU) No 650/2012; Regulation (EU) No 2201/2003; Regulation (EU) No 4/2009

⁷ “Official Gazette of Montenegro”, No 36/11.

⁸ “Official Gazzete of Montenegro“ No. 61/11 from 23.12.2011

4. ANALYSES OF INDICATORS

4.1. General Characteristics of Enforcement Procedure in Montenegro

Indicator:

4.1.1. Types of Claims

During the monitoring of the enforcement procedure, it was shown that according to the type of claim, out of 729 analyzed cases in total in 712 cases, claims were related to the financial claims, while the claims in other cases were related to the temporary measures, reinstatement, submission of immovable or moveable properties or hand over the child. The obtained data reflect the structure of the enforcement procedures in Montenegro, since that the enforcement procedure in majority of cases is initiated on the basis of financial claims.





4.1.2. Court Decisions on Motions

Court decides on motion by ruling

The Law on Enforcement and Security, in its articles 41 and 42 foresees that court, i.e. bailiffs adopts in full or partially the motions for enforcement by the ruling on enforcement. The ruling by which the motion for enforcement is totally or partially refused or rejected should be justified. According to the article 39 of the Law on Enforcement and Security, court by its decision to cancel enforcement should cancel all conducted enforcement actions, if this does not infringe the achieved rights of third persons.

Indicator:

Type of the court decision on the motion:

Entering	percentage	Total
Accepted	 76%	621
Refused	 1%	11
Rejected	 3%	24
Dismissed	 20%	163

Through monitoring of enforcement procedures observers determined number of cases in which motion for enforcement was accepted, refused, rejected or the procedure upon the motion was dismissed. In 621 cases, out of the total number of cases, the Court accepted the motion for enforcement.

Observed practice:

Example 1.

In a significant number of cases in which the motion for enforcement was revoked or is considered as revoked or the obligation stopped to exists, in the files of the case there were no rulings on dismissal of the procedure.

Example 2.

In one case the motion for enforcement was, by mistake, submitted to the court to which it was not addressed. In this case the Court has still issued ruling on enforcement.

Example 3:

In two cases in two basic courts it was observed that claimant, who was lawyer by occupation, requested from the court the compensation of lawyer's costs, although in mentioned cases he/she represented himself/herself. Courts accepted these costs.

Conclusions

- *Cases in which there is no ruling on dismissal of the enforcement procedure in the files of the case, present the examples of negative practice. Namely, failure to issue the ruling on dismissal of the procedure lead to the non-completion of cases, by which the conducted enforcement actions stay at force, and this can reflect the data in court reports on the number of non-completed enforcement cases.*
- *Issuing of ruling on enforcement by the court which is not in charge for the case is violation of the Law on Civil Procedure.*
- *Cases in which claimants are lawyers per vocation, and were represented by themselves, and Courts decided to allow them compensation of lawyer's costs, are examples of violation of relevant provisions of the Law on Civil Procedure.*

Recommendations:

- *In order to consider a case as completed one, and to inform parties about the final result of the procedure, it is necessary that Court issue a ruling by which the enforcement procedure should be dismissed, and it should be justified and regularly submitted to parties in the procedure.*
- *Courts are obliged to respect provisions of the Law on Civil Procedure related to the territorial jurisdiction of courts.*
- *Courts are invited not to allow payment of lawyer's costs in cases in which claimants are lawyers who represent themselves in enforcement procedures.*




4.1.3. Submission of Evidence

The Law on Civil Procedure, in its provisions on evidences and the presentation of evidence, it is specified that each party is required to present facts and propose evidence on which he/she based his/her claim, or by which denies the allegations and evidence of the opposing party. Proving includes all facts relevant to the decision. Party shall submit the document to which it refers the evidence for his/her allegations.

Law on Enforcement and Security, in Article 38, provides that, if the motion for enforcement is submitted to the court, which did not decided in the first instance, the motion shall be accompanied by the enforceable document, in the original or a certified copy, which includes a certificate of enforceability.

Indicator:

Whether the evidences were submitted to the court along with the motion for enforcement?

Answer	Percentage	Total
Yes	 99%	724
No	 1%	5
Total	 88%	645/729

In 724 cases parties, along with motion for enforcement, have submitted the evidence supporting the allegations for the motion.

Observed Practice:

Example 1:

In a number of cases where the parties did not submit the judgment along with the motion for enforcement, the courts have required the amendments in terms of submission of the judgment as an enforceable document, although they acted in the first instance procedure

Example 2.

During the monitoring of enforcement actions it has been observed in a number of cases that the courts accept a power of attorney by which the Podgoricka Banka represents the Employment Bureau. However, in some courts such power of attorney was not accepted, and due to the failure of a claimant to arrange proposal and submit the power of attorney as evidence, the court dismissed the case.

Conclusions:

- *Acting of the court to require from parties to submit the judgment issued by that Court in the first instance, is contrary to the provision of the Law on Enforcement and Security under which the enforcement procedure is urgent, because the court can obtain its ruling immediately, without delaying procedure by requesting the parties to submit the judgment.*
- *Above indicated cases point out to the uneven practice of courts in the same case with respect to powers of attorney filed by the same legal entities*

Recommendations:

- *It is recommended that the courts, in order to achieve the principles of urgency of enforcement proceedings, should obtain judgements on their own initiative in cases where they decided in the first instance. This will prevent the occurrence of delays caused by sending request to parties for submission of the enforceable judgement*
- *It is necessary to harmonize the actions of courts in similar cases with respect to powers of attorney filed by the same legal entities.*

4.1.4. Acting of the Court in the Procedure of Amendment or Modification of the Motion for Enforcement

According to Article 103 of the Law on Civil Procedure submissions must be understandable and include everything needed to be acted upon. Article 106 of the same Law states that if the motion is not understandable or does not contain everything needed to allow the court to act upon it, the court shall return the motion for correction or amendment. The court shall instruct the party what needs to be corrected or amended, and will set a deadline for correction or amendment of the motion, which

may not be longer than eight days. If the motion is corrected or amended and brought before the court within the period specified for completion or correction, it shall be considered as submitted to the court on the day when it was submitted at the first place.

The motion shall be considered as withdrawn, if it is not returned to the court within a specified deadline, and if it is returned without corrections or additions it will be rejected.

Law on Enforcement and Security, in its Article 27 stipulates that the enforcement should be conducted by means and over the items that are listed in the motion for enforcement. If resources and subjects of the enforcement are not listed in the motion for enforcement, the bailiff shall carry out the enforcement on assets and items that are considered to be the most convenient and will thus provide the best satisfaction of claimant.

Claimant may require from the bailiff to undertake all actions without restriction in the enforcement procedure, or to cause certain actions with their prior approval.

Claimant is required to deposit the costs of the enforcement process within the deadline set by the court or bailiff, and which can not be longer than eight days, according to the Article 34 of the Law on Enforcement and Security.

The same article further provides that the court or bailiffs may suspend the enforcement if enforcement costs are not deposited within the specified deadline, unless the claimant is exempted from paying the costs of the proceedings.

Law on Enforcement and Security, in its Article 89, provides that the claimant may, within 30 days of receipt of notification of unsuccessful list, propose to repeat a list.

Indicator:

Whether the court, either before or after issuing the ruling on enforcement, requested from claimant amendments to the motion, in terms of certain corrections, submission of evidence, or payment of costs?

Answer	Answer in numbers	percentage
No	517	70.92%
Yes	212	29.08%
Total	729	100%

One of the main aims of the monitoring was to establish whether the court requested from claimant to amend the motion, submit necessary evidence, payment of relevant taxes, some corrections or repeated submission of the motion, when it determines during the first list that defendant does not possess the assets for listing and valuation.

Results of the research show that in 212 cases out of the total number of analysed cases, the court did request certain amendments or modification of the motion or repeated submission, accordance with legal provisions. In majority of those cases, the court requested modifications in terms of address contacts and deposit of the costs of the procedure.

Indicator:

Whether the party is warned that the motion will be rejected in case of failure to act?

Answer	Answer in numbers	percentage
Yes	89%	189
No	11%	23

This indicator, which seek to determine whether the court has instructed the party of the consequences of failure to perform some procedural action, so the party would not lose some of its rights, shows that the court in 23 out of 212 cases in which the court requested amendment of the motion, did not warned the party about the consequences of missing the deadline or of irregular amendments of the motion.

Observed Practice:

Example 1:

During the research, in many cases, it was observed that the court, when it finds that the defendant does not posses the assets that would be subject to the inventory and assessment, and bearing in mind the fact that the defendant is retiree or is employed, shall issue a ruling to change the means of enforcement, without demanding from the complainant to amend the motion for enforcement in the terms of the means of enforcement.

Example 2:

In a number of cases, although the record of the inventory and assessment of things of the defendant stated that there is nothing in the list and that the defendant is unemployed, the court did not issued conclusion, nor dismissed the procedure, by which the cases remained unfinished

Example 3:

In one case, during the defining inventory and evaluation, the Court established that the defendant does not posses assets for inventory and that is a retiree. After that claimant should submit a motion to change the means of enforcement. Court acted upon the motion and issued the ruling on the enforcement, but in the case files there was no evidence about its delivery to the defendant

Example 4:

In one case, during the inventory and evaluation, Court did not found assets eligible for the inventory, and issued conclusion with the legal notice to the claimant and the deadline of 30 days to seek re-list. In the case files, observers did not find evidence that this conclusion is delivered to the claimant, nor there are evidences that in this case it was acted after the deadline (the ruling on dismissal was not issued).

Example 5:

In one case, the Court one year after the ruling on dismissal was issued, requested from claimant deposit of enforcement costs and because of the failure to meet obligations dismissed the procedure.

Example 6:

In the case files of one of the analyzed cases observers found a conclusion that the Court did not require from the claimant to deposit the costs for public announcement, if it was in the knowledge that the defendant does not live in Montenegro.

Example 7:

In one case, the Court did not require from the claimant to deposit the costs for public announcement, if it was in the knowledge that the defendant does not live in Montenegro.

Example 8.

In a significant number of cases, the Court gave the claimant a deadline of “a month” to re-submit the motion enforcement.

Example 9:

During the research, it was observed that in the same court two judges acts differently in cases in which deposit of costs is foreseen, in a way that one judge always require deposit and the other does not..

Example 10:

In significant number of cases, the Court requested from the claimant the deposit of costs for forensic expertise, without previous visit to the spot for the purposes inventory and evaluation.

Example 11:

In some of the analyzed cases, in its conclusions for determination of deposits of costs, the Court did not warn parties to the consequences of failure to act.

Example 12:

In one case, the Court, without requesting from the claimant to amend the motion for enforcement, upon learning that defendant does not live at the given address and that works in Podgorica, has delivered the mentioned ruling to the address of the company in which the defendant is working.

Conclusions:

- *Acting of the Court to change the scope of the enforcement on its own initiative and without special request of a party, is inconsistent with the provisions of the Law on Enforcement and Security.*
- *Uneven jurisprudence and imprecision of the Law on Enforcement and Security in terms of the acting of Court in the proceedings of amendments and changes of the motion for enforcement, leaves space for irregularities in the implementation of enforcement procedures.*
- *Examples in which Court failed to warn parties on the consequences of the failure to act are not examples of a good practice.*
- *Some courts, while defining the deadline for resubmission of the motion for enforcement, use the term “a month”, which is not in accordance with the legal definition of the deadline foreseen in the Article 89 of the Law on Execution and Security, saying that claimant can propose the re-listing within 30 days as of the day of receiving the notification on unsuccessful inventory*

Recommendations

- *Courts are recommended to respect the provisions of the Law on Enforcement and Security related to the modification of motions for enforcement in terms of means of enforcement, in order to avoid cases of self-initiated changes in the scope of enforcement done by the courts.*
- *It is necessary to harmonize the actions of the courts in the procedures of amending or modifying motions for enforcement.*
- *Courts should assess the need for deposit of enforcement procedure costs by the claimant, prior to its delivery to the defendant and performed inventory of the assets. This does not include the costs that are needed for the court to go to the spot. The courts should ask for costs of inventory and evaluation after the successful delivery of the ruling to the defendant.*
- *Courts should require from the claimant the deposit for costs of the forensic expertise, when it is determined that the defendant lives at the given address and that there are things for inventory and evaluation. In this way it can be avoided creation of new disputes between the same parties.*
- *Courts should warn parties to the consequences of failure to act upon the conclusions and of missing deadlines or inappropriate amendments of the motion.*
- *When setting the deadline for the re-submission of motions for enforcement, the courts should use the legal definitions - because in this case the proposed deadline of one month may be longer or shorter than 30 days, depending on the number of days in the month. Using the legally defined deadline of 30 days will prevent possible arbitrariness and inaccuracies in the interpretation of terms*

4.1.5. Objections and Decisions on Objections

Law on Enforcement and Security, in chapter 5 contains provisions on the objections.





Objection can be lodged against the ruling on enforcement, ruling on rejecting or refusing the motion for enforcement, within 5 days as of the day of receipt of the ruling. The objection shall be lodged before the court or the bailiff who has decided on the motion. The objection against the ruling on enforcement, ruling on rejecting or refusing the motion for enforcement made by the court, shall be decided by the panel of the same court in the second instance. The Panel shall decide on the complaint within 15 days.

Article 49 of the Law on Enforcement and Security provides that the objection shall not postpone enforcement, unless the law provides otherwise.

The analysis of the indicators listed below intended to determine whether and to what extent the parties used their right to lodge the objection and what were court decisions on lodged objections.




Indicator:

Whether someone and if yes, who lodged objection ?

Answer	Percentage	Total
Yes, complainant	 2%	12
Yes, defendant	 6%	46
No	 92%	671
Total	 100%	729/729

Indicator:

What was the decision of the Court panel on the objection ?

Answer	Percentage	Total
Adopted	 27%	15
Rejected/refused	 73%	40
Total	 8%	55/729

In a very few number of cases, parties have lodged the objections – claimant in 12 cases and defendant in 46 cases. In 15 cases in which the objections were lodged, Court panel decided that the objection is grounded

Observed Practice:

Example 1:

In one case, a Court panel decided on the lodged objection after 9 months from the date when the objection was lodged (the court was awaiting the decision of the Supreme Court on the extraordinary legal remedy).

Conclusions:

- *The provision of the Law on Enforcement and Security stating that the objection does not postpone enforcement can be seen as a violation of the right to equality of arms, since, if it is proved that the objection is grounded, the procedure should be carried out again, a new ruling should be issued, and funds from the defendant's account, which are removed at the discretion of the court, can be returned only in through the procedure of ruminantion of the clause or final decision or compensation, which puts defendant in the disadvantage position, because it force him/her to initiate the proceedings for the return of wrongfully seized assets. In these cases there is no balance between efficiency and urgency of the procedure and equality of claimant and defendant.*
- *Example in which the Court decided on the objection 9 months after its logging, presents isolated case pointing to the non-compliance with the principle of urgency of enforcement procedures.*

Recommendations:

- *In order to achieve a balance between protecting the rights of the claimant and defendant, it should be considered possibility for amendments to the Law on Enforcement and Security relating to the provision of the Article 49.*
- *Courts are required to adhere to the principles of urgency of enforcement procedure*




4.2. Trial within Reasonable Time

4.2.1. Timeframe for Issuing Ruling on Enforcement

The execution procedure, because of its importance in the administration of justice must be administered as soon as possible. In that sense all deadlines given for the actions of courts and parties should be short. Law on Enforcement and Security, in its Article 40, provides that a court or the public bailiffs shall make a decision on a motion for enforcement within 5 days of submission. In this section, monitors, through the research, have analyzed whether courts acted within the legally defined timeframes when making rulings on enforcement.

Indicator:

Whether the ruling was issued within the legally defined timeframe ?

Answer	Percentage	Total
Yes	 78%	569
No	 22%	160
Total	 100%	729/729

Based on the data of the date of submission of the motions for enforcement to the courts and the date of issuing the ruling on enforcement, the results of the analysis show that in the 569 analyzed cases the ruling has been issued within the legally defined period of 5 days. In 160 cases the courts have not acted in accordance with law, and violated the deadline for issuing the ruling on enforcement. It is important to point out that in this analysis monitors took into account the fact whether the court requested from parties certain amendments to the motion, before it issued ruling, so in that sense, a period of 5 days is counted as the deadline for issuing the conclusion on certain corrections or amendments.

Observed Practice:

Example 1:

In one analyzed case, the ruling on enforcement, without amendments, was issued 6 months after the motion for enforcement was submitted.

Example 2:

In several cases in one courts, there were no entrance stamp at the motions for enforcement, so the monitors were not able to determine whether the ruling was issued within the legally defined deadline.

Conclusions:

- *Out of 729 analyzed cases in total, in 160 cases the ruling on enforcement was not issued within legally define period of 5 days as of the day o submission of the motion for enforcement..*
- *Example in which the Court issued the ruling on enforcement 6 months after its logging, presents isolated case pointing to the non-compliance with the administering of the enforcement procedure in accordance with the principle of trial within the reasonable time..*

- *Cases in one court in which the entrance stamps couldn't be founded at the motions for enforcement, present the examples of negative practice of the acting of that Court upon the receipt of the motion for enforcement.*

Recommendations:

- *Courts are invited to respect provisions of the Article 40 of the Law on Enforcement and Security, stipulating that the Court is obliged to decide on the motion for enforcement within 5 days from the date of filing the motion. for execution. If there are no objective reasons that prevent the court to issue a ruling on enforcement in a due time, the court is obliged to respect the principle of a trial within a reasonable time, and decide on the motion of the party as soon as possible.*
- *It is recommended that the courts, when receiving the motion for enforcement, be sure to use an entrance stamp containing information on the date of receipt, which is important for the follow-up of timeframes for court actions*

4.2.2. Informing Parties and Delivery of Submissions

The Court shall inform the opposite party about the undertaken procedural actions of the court and parties and about the filled submissions by delivering those submissions. Chapter 11 of the Law on Civil Procedure defines the issues of delivery of submissions to the parties in the procedure. Namely, Article 136 of the Law on Civil Procedure prescribes the obligation of the court to deliver the ruling that can be appealed, in personally to the party in the procedure, his/her legal representative or attorney.




The research was also dealing with the period of time passed till the first delivery of the ruling to the defendant.

Indicator:

How much time passed until the first delivery of the ruling to the defendant?
(This indicator has been considered qualitatively rather than quantitatively).

Indicator:

Is the ruling properly delivered to parties ?

Answer	Percentage	Total
Yes	 82%	550
No	 18%	119
Total	 92%	669/729

Data obtained in the survey show that out of 669 analyzed cases in which there was delivery of ruling on enforcement, in 550 cases ruling was properly delivered to parties, which is a positive example of the work of courts. The difference between 729 analyzed cases in total and 669 cases represents the number of cases in which there was no delivery

Observed Practice:

Example 1:

The courts in smaller territorial units have generally delivered rulings to defendants in a shorter period of time

Example 2:

During the research it was observed that in some cases time period longer than 6 months have passed till the first delivery of the ruling to the defendant. In one case, the deadline was one year, while in a number of examples it was observed that rulings were delivered within eight, nine and ten months.

Example 3:

The conclusion of the inventory and assessment of assets of the defendant was completed and delivered to the claimant five months after the inventory and assessment was done.

Example 4:

In one case the evidence on delivery of rulings to the parties were not founded in the case files.

Example 5:

In one case it was determined that in the first attempt of the delivery, it was established that defendant have moved from the given address. Despite to that Court has created conclusion ordering the visit to the spot and paying deposit for that purpose, without giving any legal instruction.

Conclusions:

- *Examples in which the period of time longer than 6 months passed till the ruling on enforcement was delivered for the first time to the defendant represent the examples of negative practice.*
- *Law on Enforcement and Security does not define the deadline for the delivery of acts, but having in mind territorial organization of Montenegro, and the principle of efficiency that should be obeyed in the enforcement procedure, the longer period of time for delivery of rulings and submissions to parties should be considered as a violation of the principle of urgency and thus the principle of efficiency of the procedure.*

Recommendations:

- *Delivery of submissions to the parties of the procedure should be done in accordance with the provisions on the delivery, defined by the Law on Civil Procedure.*
- *Delivery services are obliged to keep the accurate records of the enforcement procedure and to inform the President of the Court or the enforcement Judge about potential problems in the delivery, in cases where working conditions permit that, and bearing in mind the number of enforcement cases, the number of judges and bailiffs*

4.3. EQUALITY OF PARTIES




4.3.1. Right on Reply

In the Law on Civil Procedure, Article 136 is envisaged, inter alia, that the decision against which a separate appeal, legal remedy, is allowed, will be delivered to a party personally or to its legal representative or attorney.

In Article 106 of the same Law is envisaged that the submission, which is incomprehensible or does not contain everything what is needed to allow the Court to act accordingly, will be sent back by the Court for corrections or additions.

Indicator:

Whether the parties had the right to respond on the allegations of the opposite party?

Answer	Percentage	Total
Yes	 85%	550
No	 15%	119
Total	 86%	669/729

The results of this indicator show that in 535 of 628 cases the parties had the right to respond on the allegations of the opposite party, which means that in these cases they were duly summoned. The difference between the total number of analyzed cases (729) and cases in which the right to respond on the allegations of the opposite party was ensured (628), applies to cases in which the parties were not duly summoned.

Observed Practice:

Example 1:

In a significant number of examples was observed an inconsistent court practice considering that in some courts the rulings are delivered to the defendants on the day of inventory and evaluation of assets, while in some courts rulings are delivered before inventory and evaluation of assets.

Example 2:

In limited cases, even though the ruling was not delivered to the defendant, the court sent the case for enforcement to the Central Bank.

Example 3:

In most cases, the courts have delivered the ruling for enforcement to the Central Bank prior to deliver it to the defendant.

Example 4:

In a significant number of analyzed cases, at the first delivery the ruling is not personally delivered to the defendant, but to a family member or employer.

Example 5:

In some cases, it was observed that the courts determine the inventory and evaluation of assets by the conclusion, even though the ruling on enforcement is not previously delivered to the defendant.

Example 6:

In one case, it was observed that in the case file there was the submission delivered to the defendant's employer, although in the motion for enforcement there was no information about who the employer is and how the court came in possession of that information.

Example 7:

In one analyzed case, the ruling for enforcement was duly delivered to the defendant, while delivery to the employer was improper. The Court did not inform the defendant about that.

Example 8:

In one case, it was observed that the evidence about not finding defendant at the provided address, or the non-reception of the ruling for enforcement by the defendant exists, while the same case file contains records on inventory and evaluation of assets in which it was stated that there were no assets for inventory.

Conclusions:

- *In a significant number of examples was observed the inconsistent court practice in relation to the time of delivery of the ruling for enforcement to the defendant.*
- *The practice of the court to deliver a ruling to the Central Bank, the employer, or the Pension Fund before it is delivered to the defendant, constitutes a violation of the right to equality, because to the defendant is not given the possibility to verify the legality of the ruling for enforcement by lodging a legal remedy, prior conducting the enforcement.*
- *Some courts do not comply with the provisions of the Law on Civil Procedure relating to personal delivery of the rulings for enforcement.*
- *Imprecision of the relevant legal provisions relating to the delivery of the rulings for enforcement can be the cause of inconsistency of the court practice in this section.*
- *In cases where the court fails to notify the claimant on the impossibility of enforcement due to improper delivery, the right of a claimant to attend hearing is violated.*

Recommendations:

- *It is recommended that the delivery of submissions is performed in accordance with the provisions of the Law on Civil Procedure relating to the delivery of documents.*
- *It is necessary to pay attention on the consistency of the court practice regarding the delivery of documents to the parties in the enforcement proceeding.*
- *It is recommended the Court to notify the claimant on every action that leads to the impossibility of enforcement and thus enable him to exercise the right to attend hearing.*

ANNEX 1

**LIST OF INDICATORS FOR MONITORING OF IMPLEMENTATION OF
THE LAW ON ENFORCEMENT AND SECURITY**

- GENERAL DATA ON CASE -

1. Court:
2. Case No.:
3. Name of the Judge:
4. Claimant:
5. Citizenship:
6. Permanent residence:
7. Was claimant represented by him/herself or by legal representative, i.e. attorney ?
8. Defendant:
9. Citizenship:
10. Permanent residence:

11. Is he/she represented by him/herself or by legal representative, i.e. attorney ?
12. Date when the motion for enforcement is filled to the court:
13. Type of the motion for enforcement depending on the type of claims:
14. Date when the ruling on enforcement is issued:
15. Is the motion based on enforceable document or authentic document ?
16. Is the motion for enforcement discussed at the hearing ?
17. Whether the court, either before or after issuing the ruling on enforcement, requested from the claimant to amend the motion, in terms of certain corrections, submission of evidence or payment of costs ?
18. What period of time was left for these activities ?
19. Is the party warned that the motion will be rejected if failure to act ?
20. Did party act upon the warning of the court and within which deadline ?
21. What was decision of the court on the motion ?
22. Did party change the motion for enforcement on its own initiative or upon the court proposal ?

23. For what reasons and within which deadline ?
24. What was decision of the court on the new motion ?

- INDICATORS IN THE PROCEDURE OF DECIDING ON OBJECTION -

25. Did and who submit the objection ?
26. Was the objection accompanied by relevant evidences ?
27. Was the objection submitted for reply to other party and within which deadline ?
28. What was decision of the court panel on the objection ?
29. Did court stopped the enforcement till the ruling on objection is issued ?

- EQUALITY OF PARTIES/TRIAL WITHIN A REASONABLE TIME -

30. Was the ruling on enforcement issued within the legal deadline ?
31. Whether the ruling delivered properly to parties in the procedure ?
32. How was the ruling delivered to parties ?

<p>33. Did the decision contain the justification ?</p>
<p>34. Did parties have ensured right to respond on the allegations of the opposite party ?</p>
<p>35. Were the participants allowed to use their mother tongue in the procedure ?</p>
<p>36. Was the interpretation adequate ?</p>
<p>37. Were the evidences with the motion for enforcement submitted to the court ?</p>
<p>38. How much time passed till the first delivery of the ruling to defendant ?</p>
<p>39. Was the motion for enforcement/ruling on enforcement delivered to opposite party with all evidences ?</p>
<p>40. Did improper delivery affect the course and duration of the procedure ?</p>
<p>41. How much time passed from the improper delivery till the notification of the opposite party ?</p>
<p>42. Was the motion for enforcement accompanied with all evidences at which it was based ?</p>
<p>43. Did opposite party receive all evidences for the purpose of providing response within legally defined deadline ?</p>
<p>44. Were there objections in terms that evidences were not delivered and if yes what was decision upon them ?</p>

<p>45. Did parties propose evidences ?</p>
<p>46. Did court accept these evidences ?</p>
<p>47. If not, what are the reasons for refusal ?</p>
<p>48. Did parties ask for releasing from the payment of court expenses due to their poor financial situation?</p>
<p>49. Were the answers positive ?</p>
<p>50. Was there need for forensic expertise in the procedure and were there problems in selection of forensic witnesses? If yes cite the problems.</p>
<p>51. Was mediation proposed as alternative solution in the procedure ?</p>
<p>52. If yes, did mediation proceeding affect the duration of the enforcement procedure ?</p>
<p>53. Was the control request submitted in accordance with the Law on trial within the reasonable time ?</p>
<p>54. Comments:</p>