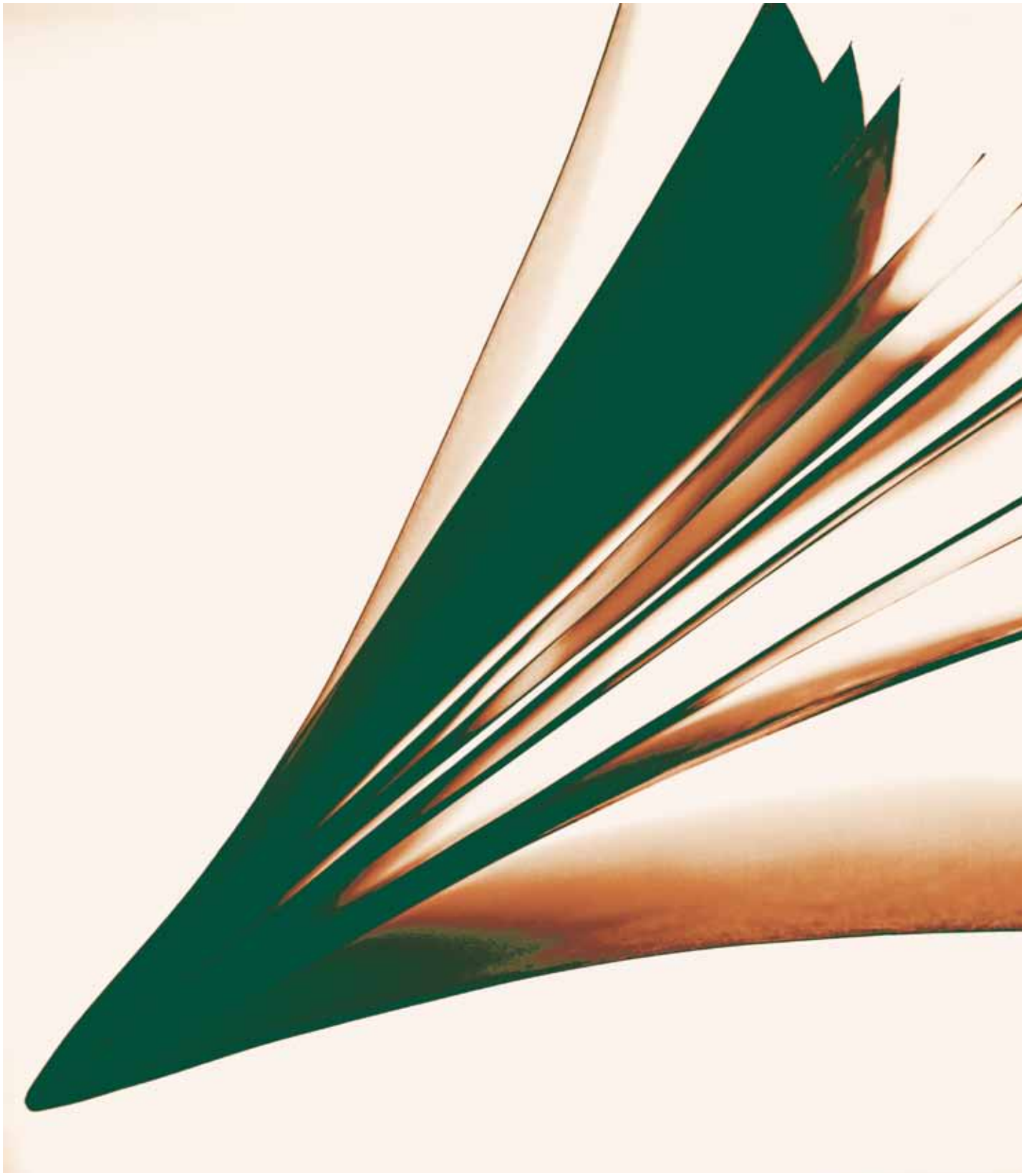
Law in transition 2011

European Bank
for Reconstruction and Development

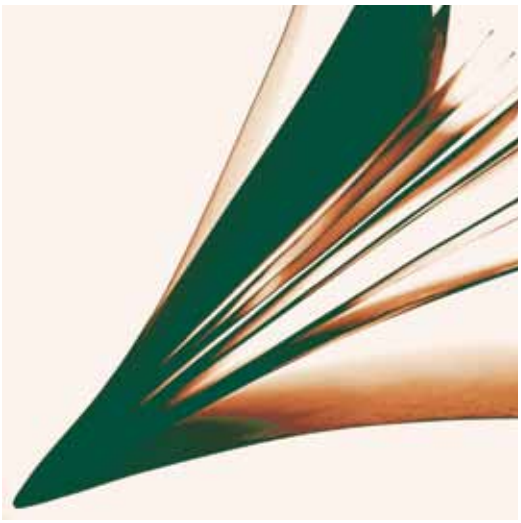
Towards better courts



The EBRD is an international financial institution that supports projects from central Europe to central Asia. Investing primarily in private sector clients whose needs cannot be fully met by the market, the Bank fosters transition towards open and democratic market economies. In all its operations the EBRD follows the highest standards of corporate governance and sustainable development.

About this report

Legal reform is a unique dimension of the EBRD's work. Legal reform activities focus on the development of the legal rules, institutions and culture on which a vibrant market-oriented economy depends. Published twice a year by the Legal Transition Programme, *Law in transition* provides extensive coverage of legal developments in the region, and by sharing lessons learned aims to stimulate debate on legal reform in transition economies.



General section

Focus section
Building judicial capacity in transition countries

Foreword

Better courts for better economies

Fair and effective courts, operating with a view to ensuring quality, form part of the bedrock of democracy and the rule of law. They also play a critical role in fostering economic development and investment. Business is attracted to countries where the players in the economy can trust the court system to enforce contracts and protect property rights. Credit flows more easily to jurisdictions where investments can be properly protected.

The judiciaries in many of the transition economies of central and eastern Europe and the Commonwealth of Independent States (CIS) continue to face many challenges. Whilst legislative infrastructure in many of these countries has improved markedly in recent years, disputes in the courts often remain fraught with difficulties. Common problems confronting the judiciary in the region include in particular a lack of technical skills and practical commercial experience; improper influences being brought to bear on judges; and inefficiencies in court management. Limited financial resources often contribute to these problems. However, in many areas judicial authorities can make great improvements if they are better equipped to monitor the performance of courts, provide appropriate training, better organise registries and establish sound case management systems.

The Council of Europe assists the governments of its member states to tackle these issues and enhance the capacity of their judiciaries. It contributes to standard-setting and monitoring activities, as well as hands-on cooperation with legal and judicial authorities. These activities are at the heart of the mission of the organisation.

One key institution charged with promoting the efficiency and quality of the judiciary is the European Commission for the Efficiency of Justice (CEPEJ). In 2010 CEPEJ published its most recent report, *Evaluating European judicial systems,* which provides a detailed review of the daily functioning of the court systems in 45 member states. It contains extensive qualitative and quantitative information as well as statistical indicators on matters which affect and reflect judicial performance, such as budget allocations, access to justice, court case flow management, public confidence in the court system, court structure and management, alternative dispute resolution, judicial salaries and

enforcement proceedings. The CEPEJ is also setting up a European observatory of timeframes of judicial proceedings and has published a detailed *Checklist for promoting the quality of justice and the courts,* which highlights over 260 factors that contribute to the quality of justice, taken from the standpoint of the national outlook, the courts and the individual judge.[1]

Another key institution is the Consultative Council of European Judges (CCJE), an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges. It is composed exclusively of judges and has set a series of important standards on such issues as the responsibility of judges, quality of judicial decisions, judicial education, funding of court management and the role and composition of Judicial Councils.[2]

There is a strong thematic and geographical affinity between the activities of the EBRD and the Council of Europe in the area of judicial capacity building. Twenty-one Council of Europe member states are EBRD countries of operations. We share a common concern to strengthen the rule of law and judicial performance.

For the EBRD, strong, competent and impartial courts are essential for the fulfilment of its mandate of fostering economic transition and supporting the development of the private sector.

This edition of *Law in transition* is devoted to the role of courts and judges in transition countries. It highlights the assessment work and technical assistance projects of the EBRD and other international organisations in the area of judicial capacity. It contains in-depth analysis of underlying causes of judicial capacity problems, how these problems relate to one another, and how they might be addressed. I believe this volume will serve as a useful resource for governments, court authorities, international organisations and others involved in justice sector reform in transition countries, and that it will contribute to the process of making sound judicial capacity a reality in all transition countries.

PHILIPPE BOILLAT

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[1] See www.coe.int/cepej (last accessed 12 January 2011).
[2] See www.coe.int/ccje (last accessed 12 January 2011).

01

Legal aspects of project finance in Kazakhstan: a lender's perspective

GANI NASSIMOLDIN AND AMIR TUSSUPKHANOV

As financing for commercial and infrastructure projects is currently scarce, legal advisers are trying to improve the security packages given to lenders. This article examines the latest developments in Kazakhstan law regarding pledges, bankruptcy and other procedures to protect creditor rights.

General section

Introduction

In the midst of a difficult post-crisis environment for infrastructure development, the legal implications of financing both public and private infrastructure projects are being tested. Government financing and private financing previously offered by commercial lenders is no longer easily available. Nevertheless, the last two decades of infrastructure in most former Soviet countries, including Kazakhstan, suffered from under-investment and significant deterioration, calling for a need for capital intensive refurbishment and new developments.

The existing concession and secured lending laws do not provide the necessary protection for investors and lenders or allow financiers sufficient control over projects. For example, if public infrastructure is involved (normally considered strategic), heightened government scrutiny affects matters like the creation of security over project assets and the investment approval process, where foreign investors' or concessionaires' projects can be rejected on the grounds of national security, as well as restricted transferability of project assets, where the government may reject the proposed transferee or exercise its pre-emption rights.

Certain infrastructure like public roads (including bridges) might be designated as "strategic" and within the exclusive domain of Kazakhstan. Investors and operators may acquire an interest in such assets only by the grant of a concession. Such assets are exclusively owned by the government so no security over them may be created; but one may pledge concession rights. Other ways of acquiring an interest in project assets could be privatisation, an investment agreement

These types of legal constraints often make it more viable to structure the majority of projects … outside of local concession financing frameworks and instead as long-term secured lending transactions with conditions similar to those used in project finance.

including a lease to operate and trust management. Special legislation imposing industry specific restrictions may also be applied, for example, regulation of electricity distribution networks, railways and so on.

These types of legal constraints often make it more viable to structure the majority of projects, including public infrastructure like municipal transportation and water and wastewater facilities, outside of local concession financing frameworks, and instead as long-term secured lending transactions with conditions similar to those used in project finance. Examples include undertakings to enter into public service contracts, entering into direct agreements and step-in rights, project support undertakings including tariffs support and so on.

Security

Most project finance lenders will have a full security package, including:

- a pledge over the project assets
- a pledge over the holding company's shares in the project company
- a direct agreement between the lenders, the special purpose vehicle (SPV), the sponsors (including the state or local authority), the major suppliers and the major off-takers
- an assignment and/or pledge of receivables and other rights under project agreements (with major suppliers and off-takers)
- an assignment of insurance
- a project support agreement with the owner of the assets (such as a local municipality).

As a result, upon a default the lenders will have the following options available to them:

- transferring the ownership of shares in the project company to the lenders if attempts at selling the shares to the public fail
- appointing an agent to take control of the project company and/or realise its assets to pay back the debt
- exercising "step-in" rights under the direct agreement to either run the project or transfer it to a new operator (SPV) or the lenders.

The law does not limit the types of security available to lenders and allows them to agree on a security structure that best suits the needs of financing. However, the Civil Code[1] contains special rules on certain classic security types like pawns, pledges, mortgages, guarantees and surety.

Guarantees and surety may be governed by foreign law and allow flexibility when structuring any cross border or international financings, but are not always available due to the quality of potential guarantors or their willingness to provide guarantees. Any mortgage is governed by Kazakhstan law.[2]

Pledge of future property

Under Kazakhstan law security interest may be established with respect to property that will be created or acquired in the future. For particular property to be used as security, a detailed identification is required. There are several court cases[3] that established a requirement that an asset must be described so as to be unequivocally identified among any other property a pledgor may own.

The law requires identifying pledged property in reasonable detail in the security documents at signing.[4] The courts will not uphold an arrangement where the pledgee is allowed to identify pledged property at the enforcement stage. If it is difficult to identify future assets to be secured, lenders may contractually agree that the borrower has to execute an additional instrument to create a security interest over such future property as soon as it becomes available.

Unlike other type of assets, uncompleted buildings are treated as movables (that is, as a combination of construction materials) and are subject to a similar reasonable identification requirement, which is often cumbersome, time consuming and expensive.

Registration of movables pledge

To create a pledge over movable property it is normally sufficient to execute a written agreement. Under the Law on Movables Pledge Registration[5] lenders may opt for voluntary

In project finance it is common to have assignment of such receivables in addition to a receivables pledge.

registration of a movables pledge. However, registration gives the lender a set priority in time when enforcing the pledge and any registered pledge prevails over any unregistered pledge.[6]

Mortgages need to be in writing and registered in an immovables register.[7] Failure to comply with these requirements would render the mortgage void.

If a project involves the construction of immovables, lenders should first consider having both a movables pledge over the building under construction and a mortgage over the construction site (the land). Once the construction is completed and duly registered, a mortgage over the site/land and the building shall be executed. The mechanics of such a transition need to be negotiated and confirmed in advance in the facility agreement.

Pledge of receivables

To comply with the identification requirement mentioned above, the pledge should contain a list of receivables, including their description by reference to particular contracts, the date of repayment and the names of relevant parties. If a particular contract is replaced and receivables are substituted during the life of the financing, such a change would have to be documented by amending the receivables pledge.

The receivables pledge is perfected by notifying the receivable payer. Failure to notify such payers would not invalidate the pledge, but create the risk of it not being enforceable.

In project finance it is common to have assignment of such receivables in addition to a receivables pledge. The advantage of this dual structure is in the flexibility of exploiting the benefits of both security instruments. A pledge has a higher ranking in the case of the bankruptcy of the borrower, whereas assignment is much easier and faster to enforce, that is, there is no need to have cumbersome enforcement proceedings including court hearings and public sale procedures.

However, Kazakhstan law does not expressly recognise the assignment of contract rights or the use of a conditional assignment as a security if it is aimed at taking receivables out of the reach of a liquidator. In a non-bankruptcy scenario of enforcement a pledge-holder becomes an assignee of the receivables,[8] which would allow them to avoid the requirement of a public sale during enforcement. In bankruptcy the position of the pledge-holder might become subject to dispute,[9] but it is most likely that the pledgee claims will rank equally with other secured creditors. Despite widespread use, the application of the receivables assignment in Kazakhstan is still uncertain. The view of most practitioners is that the assignment of receivables should be enforceable under the general principles of contract law, including the concept of an assignment and the rule that a contract may be subject to a condition subsequent.

Pledge of enterprise

The law specifically states that an enterprise or business as a going concern may be pledged. Security over the enterprise would extend to all movable property, receivables, intellectual property as well as any property acquired later. It is created by written agreement and registration in the immovables register.

Alternatively, lenders may consider obtaining security over separate elements of the enterprise, for example, through the mortgage of land, equipment, intellectual property (IP) rights and such like. The choice between the two options depends on several factors: the value of the enterprise as a whole substantially exceeds the aggregate value of its constituent parts (for example, whether splitting and selling each asset separately would diminish the price of enterprise) and flexibility in enforcing the particular transaction or type of enterprise (for example, whether it is easier to enforce against assets which can be easily split and sold separately without significant reduction of the value).

Subordination

As a general rule the priority of secured interests, like pledges, is determined by the time of their creation. The first overrides anything subsequently created. Hence, there is uncertainty as to whether creditors can determine a different priority by contract. The most common view is that such an arrangement would be unenforceable in Kazakhstan courts. In addition, all claims of secured creditors against a debtor in liquidation rank *pari passu*

Subordination agreements governed by foreign law, where, for example a senior lender agrees that shareholder loans rank junior, would not be honoured in Kazakhstan bankruptcy proceedings.

(despite any contractual arrangements providing otherwise) and subordinate to statutory preferred claims (employee compensation, copyright and other preferred categories).

In practice international lenders tend to have security sharing/intercreditor and subordination agreements that are governed by foreign law – usually English law. Normally one of the lenders may first register their security documents than have priority under Kazakhstan law. The other lenders take their subsequent ranking in security. However, the lenders would have an intercreditor agreement under foreign law where the first lender contractually agrees with subsequent lenders on *pari passu* ranking of security and share the proceeds irrespective of their priority under Kazakhstan law.

Subordination agreements governed by foreign law, where, for example a senior lender agrees that shareholder loans rank junior, would not be honoured in Kazakhstan bankruptcy proceedings. Nevertheless, in practice lenders tend to use such agreements as a negotiation tool. Such agreements might be reinforced, for example, by getting assignment or a pledge of shareholder loans to the senior lenders under a separate instrument governed by Kazakhstan law. This combination of subordination and assignment/pledge may effectively give advantage to senior lenders with respect to subordination of shareholder loans, however, such a structure has not been tested in Kazakhstan courts and if tested the outcome is uncertain.

Step in rights and direct agreements: issues in the context of Kazakhstan law

In the classic project finance structure various forms of "security like" instruments are often used in addition to the traditional forms of security. One of the key types is direct agreements containing step-in rights. A lender's step-in right would mean that in certain cases the lender (or a lender's designee) will be able to assume the project company's rights under project agreement(s) for a specified period of time, with a view to getting better control over the project cash flows and then have the opportunity to improve and/or complete the project. The step-in rights are documented by a combination of security assignments over the project agreements and a series of direct agreements between the lender, the sponsor (the owner of the asset or local authority), the project company and relevant companies.

Kazakhstan law does not have the concept of "step-in rights" or "direct agreements". Although we are aware that in certain projects such types of agreements are being entered into, from the perspective of Kazakhstan law the following considerations will be relevant (among others).

- *Conditionality of assignment:* the closest equivalent of a step-in mechanism in Kazakhstan law would be a conditional assignment, that is, the substitution of a party after a certain event has occurred. However, conditional transactions are permitted only if the occurrence of a trigger event does not depend on the will or actions of any party to the agreement. An event of default may be viewed as a condition ultimately dependent on the borrower's action, which raises enforceability issues for such an arrangement. As noted above a conditional assignment is not a security instrument under Kazakhstan law (compared with a pledge of rights, the assignment does not take priority in bankruptcy), and it is not always advisable to apply both a conditional assignment and the pledge of rights simultaneously – as the courts may interpret such an arrangement as the absence of parties' agreement on the substance.

- *Consideration for assignment:* given that assignment under the Civil Code is viewed as a payment or transfer mechanism rather than as a security instrument, there is some court practice suggesting that assignment should be for consideration. However, where the assignment is intended to be made to a designee having no other contractual link with the relevant project company, for example, there is a risk that the assignment will be classified as a gratuitous transaction which is generally prohibited for legal entities.

- *Assignability of rights generally:* there remains a general concern with respect to the assignment of rights under Kazakhstan law contracts, particularly if the lenders only want to receive a portion of the rights of the project company without incurring all or part of its obligations. Until recently there was debate about whether Kazakhstan law

Until recently there was debate about whether Kazakhstan law allowed a party to a contract to transfer its rights to a third party, while at the same time remaining liable for and obliged to perform its obligations thereunder.

Chart 1
The key stages of bankruptcy in Kazakhstan

	External supervision	Rehabilitation	Liquidation
Key players	▪ Administrator ▪ State Committee (Ministry of Finance) ▪ Creditors' Committee ▪ Company Management	▪ Rehabilitation Manager ▪ State Committee (Ministry of Finance) ▪ Creditors' Committee	▪ Liquidation Manager ▪ State Committee (Ministry of Finance) ▪ Creditors' Committee ▪ Bankrupted Company ▪ Court
Timing	▪ 3-12 months	▪ up to 36 months (+ 6 or 24 months)	▪ up to 9 months (+ 3 or 12 months)
Powers of administration	▪ approval for transfer of assets (10 per cent and more)	▪ submission of plan ▪ current management ▪ procurement of services/assets up to 25 per cent of current debt	▪ drafting a plan of assets sale ▪ acts on behalf of company ▪ terminates employment contracts, liquidates company ▪ initiates court proceedings in relation to owners of the company
Key points	▪ no transfer of assets ▪ no enforcement of awards ▪ no withdrawals from bank account ▪ no equity transfers	▪ transfer of assets through public sale only ▪ freeze for loan interests and penalties ▪ assignment of receivables through public sale only ▪ settlement should be part of plan	▪ creditors can submit claims within *two months* once the procedure is initiated ▪ assets are to be used for repayment of debts only ▪ no loan interests and penalties occur ▪ no compensation of creditors' expenses

allowed a party to a contract to transfer its rights to a third party, while at the same time remaining liable for and obliged to perform its obligations thereunder. Kazakhstan court practice also suggests that only the assignments of rights which are uncontested, had arisen before the assignment and are not conditional upon any counter-performance by the assignor, can be permitted.

The following instruments give lenders some degree of comfort with respect to taking control of a project in a problematic scenario.

- Naturally, control over the project can also be achieved through share security, such as at an offshore level, which can be a more efficient way of taking control of the holding company. However, the above direct sale enforcement procedures could be applied to the security of a Kazakhstan holding company.
- Project agreements should not contain provisions allowing unilateral termination by either party. Although even in such a case statutory grounds for termination will remain, an absence of unilateral termination clauses adds comfort in problematic scenarios.
- In principle it is possible to enter into direct agreements with counterparties to project agreements under English law – which contains certain comforting undertakings, for example, not to terminate contracts or to inform about a borrower's attempts to terminate – but that would require extensive negotiations. Any multiparty negotiations would be expensive and time-consuming for lenders and naturally incur additional costs.

The Ministry of Finance has recently launched a web site listing all insolvent entities and those subject to insolvency procedures: see www.minfin.kz.

Bankruptcy: lender's perspectives

The Kazakhstan legislature has developed a registration system which effectively allows avoiding most unpermitted transfers of pledged assets in bankruptcy. Secured creditors enjoy the third ranking (after employees and IP right owners, but before tax creditors and other creditors) and are covered by the value of the pledged property. If proceeds from enforcing security are not sufficient to repay the debt in full, then the rest of the debt would rank fifth with the unsecured creditors.

Currently Kazakhstan authorities are working to integrate several databases, including the registration of legal entities (run by the Ministry of Justice), private registrars (maintaining shareholders registers) and vehicles registers (maintained by the Ministry of Interior). This will allow creditors, courts and banks quick access to information with respect to companies' assets and liabilities, including any encumbrances. The Ministry of Finance has recently launched a web site listing all insolvent entities and those subject to insolvency procedures: see www.minfin.kz.

In general, Kazakhstan bankruptcy laws are favourable to creditors. In practice however, the qualifications and experience of the administrator and the presence of proactive creditors are the crucial elements to maximising the value of the bankrupt estate for the benefit of all creditors.

Procedures

Once the bankruptcy procedure is initiated, the existing management and shareholders are restricted and any asset transfers, execution of all court or arbitration awards is suspended, no withdrawals from bank accounts are allowed and no equity transfers shall occur. Chart 1 provides a summary of the common types of bankruptcy proceedings and the key features of each.

Conclusion

The new draft law on project finance has been widely discussed in recent years and its adoption is aimed at bringing local Kazakhstan laws in line with international standards. As such, the current draft allows companies to: assign their rights (including any obtained in the future) under contract; segregate assets project by project and use project assets as security for debt raised for project implementation; and SPVs will have a special legal regime, where the powers of shareholders and management are restricted and specific reorganisation and liquidation rules apply. Hopefully, the new law will achieve its aim and resolve at least some of the above issues so that international financiers can participate in Kazakhstan's large infrastructure projects with confidence.

Notes

[1] The Civil Code of the Republic of Kazakhstan, dated 27 December 1994 (the "Civil Code").

[2] Article 1107 of the Civil Code.

[3] Kazakhstan law is not precedent law, so court cases do not have ultimate authority, however, decisions of the Supreme Court or specialised economic courts are often referred to and can be said to have persuasive authority.

[4] Art. 307(1) of the Civil Code.

[5] The Law of the Republic of Kazakhstan, "On registration of pledges over movable property", No. 254-I, dated 30 June 1998 (the Movables Pledge Law).

[6] Art. 8(1), the Movables Pledge Law.

[7] Art. 310 of the Civil Code and Art. 5(3), Art. 7(1) and Art. 48 of Law of the Republic of Kazakhstan, "On state registration of immovable property and transactions relating to it".

[8] Art. 319(1-1) of the Civil Code.

[9] Other parties may argue that the true agreement was by assignment and pledge, hence such a creditor shall be ranked behind other secured creditors.

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02

Re-launching mortgage lending in the EBRD's countries of operations

SIBEL BEADLE

Mortgages play a crucial role in helping develop a market economy. They are key to boosting the private housing sector. Despite still being underdeveloped in most transition countries, and following a halt during the global crisis, mortgage markets have started to show signs of recovery. The EBRD is keen to assist, for example by supporting legal and regulatory reforms, as well as financing mortgage credit lines. The Bank has influenced the lending standards of many other institutions by setting up its List of Minimum Standards for Mortgage Lending.

Mortgage lending and real estate markets have received a fair amount of negative press in the recent economic crisis. Part of the reason for this negative press has been the origins of the financial crisis, which started with the subprime debt crisis in the US housing market. The crisis later spread to the financial system of Western countries via structured products leading to acute funding problems in the banking sector. Funding problems led to a liquidity crisis, eventually spreading to the financial system of the EBRD's countries of operations. Lastly, the downturn in economic activity that has accompanied this crisis was followed by a sharp drop in housing prices in many countries and an increase in non-performing loans in the mortgage portfolio of the banking sector of many countries.

It is no secret that the real estate market is cyclical. The real estate market has been this way through history and it has been cyclical in all countries. The causes and characteristics of these cycles vary, at least in some respects, but the consequences for homebuyers, home sellers and homeowners remain similar as the cycles roll by. Economic theory is full of papers that try to explain the drivers of cyclicality in real estate markets, the drivers of housing prices and the reasons for the persistence of real estate cycles. Some of the main drivers of the cyclical behaviour are due to the type of asset that real estate constitutes. In real estate markets, there is by definition high uncertainty over the future.

- First, due to lags that make adjustments on the supply side difficult, such as lags between the decision to construct a property and the sale of a property.

- Second, due to the difficulties on the demand side adjusting to a downturn, particularly in the residential real estate segment.

Owning your own home is as important in Hungary, Mongolia, Russia or Tajikistan as it is in more developed economies.

- Third, due to the illiquid nature of the asset, the lag between the decision to sell a property and the actual sale, including the uncertainty of future prices.

However, just because the real estate market is cyclical, its development is not less desirable. First, the real estate market and the construction industry are important drivers of the economy as a whole in Western countries, as well as in the EBRD's countries of operations. Second, from the perspective of the banking sector, residential mortgage lending is an important part of a bank's lending portfolio. Residential mortgage lending makes up a significant portion of a retail bank's lending portfolio in Western countries: up to 40-60 per cent. Residential mortgage lending is less risky than other types of lending such as consumer credit, credit cards or corporate lending. The property itself has collateral value and the willingness of borrowers to repay their loan is higher compared with other types of loans, particularly for owner occupied dwellings. As such, non-performing loans in residential mortgage lending are historically lower and residential mortgage portfolios are more robust (but not immune) to downturns.

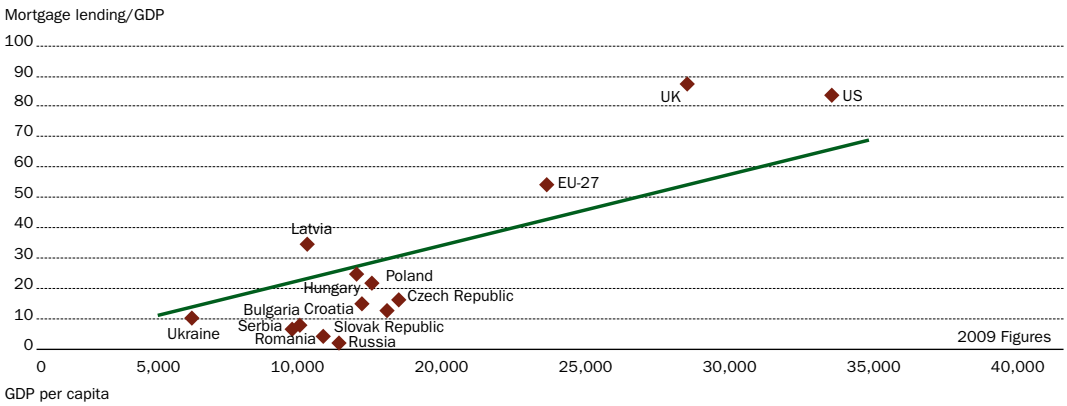
From the perspective of the end-consumer purchasing a home is one of the most important economic decisions a household makes. Owning your own home is as important in Hungary, Mongolia, Russia or Tajikistan as it is in more developed economies. In some of the EBRD's countries of operations the initial privatisation of state-owned housing to its occupants lead to high levels of home ownership. Even in these countries, however, new household formation depends on the ability of families to purchase a home. As such, the availability of long-term mortgage loans with a stable level of interest payments and an affordable down payment is important for the welfare of any country. Home equity is a key part of household savings in developed and transition markets alike. Home ownership in general and the mortgage market in particular affords families the unique opportunity of turning the provision of a basic human need into household savings.

In the EBRD's countries of operations, the real estate market is still underdeveloped. Developing the residential mortgage market is an important part of establishing fully functioning market economies. This requires a working legal framework, skilled lenders and finally the development of secondary markets to ensure sustainable funding. Even after accounting for differences in gross domestic product (GDP), many of the Bank's countries of operations still have the potential to develop their residential mortgage portfolios (see Chart 1); see for example Romania, Russia and Serbia. In addition, the tenor of lending in countries of operations is shorter than in more developed markets. As such, developing the residential real estate market and enabling residential mortgage lending is an important part of the Bank's role in the region.

Mortgage law reform in transition economies

Considerable efforts have been made to expand and modernise the mortgage markets in the EBRD region since the early 1990s. These have opened up new possibilities for mortgage financing. The challenge for transition countries is to ensure a suitable legal environment for the diversity of mortgage products (including residential mortgages) which is adapted to modern market techniques.

Chart 1
Mortgage lending in transition countries



Source: European Mortgage Federation, Covered Bond report (2010).

The crisis has definitively tested the robustness of mortgage legal frameworks.

The Bank has been assisting in the development of a legal and regulatory framework by articulating the key features that a modern mortgage law must present to support the expansion of the primary mortgage market and the development of a secondary mortgage market.[1] The EBRD standpoint is that the primary purpose of a mortgage law is economic and thus the law and institutions should play a facilitative role, conducive to a flexible and efficient market for mortgages and mortgage securities. Mortgage law needs to be compatible with mortgage securities and mortgages should become a standardised and transferable instrument.

Since the onset of the financial crisis, mortgage law reforms have slowed down in the transition countries, with the notable exception of Poland, which has significantly amended its mortgage law in order to streamline the mortgage creation process and enforcement towards a more flexible system. The new law entered into force on 20 February 2011. The credit crisis has also led a number of countries to adopt measures (legal and regulatory) to limit or prevent the enforcement of mortgages by lenders. This has been the case in Estonia and Latvia.

In some countries, recent measures have aimed at strengthening pre- and post-contractual consumer protection (for example, Kazakhstan), in line with the current concern that mortgage applicants and borrowers should be given comprehensive yet clear information before entering into the lending agreement and that amendments to the mortgage loan post conclusion should also be limited and fair (for example, it should not be possible for lenders to unilaterally amend the interest rate on the loan). Interestingly, work that was ongoing in a number of countries to update and modernise land registries and registration procedures has been pursued, in particular in Romania, Serbia, the Slovak Republic and Ukraine.

The crisis has definitively tested the robustness of mortgage legal frameworks. Mortgage creation still remains slow and expensive in many jurisdictions. Enforcement remains a major issue in almost all markets. Some countries are still legally unprepared for a secondary market (for example Serbia), whilst some are equipped but have limited experience (such as Poland, Romania and Turkey). We can thus expect further reform activities to take place, which the Bank stands ready, wherever appropriate, to support.[2]

Mortgage lending at the EBRD

The EBRD has been providing funding to partner banks for on-lending to residential mortgage customers since 1996. The Bank has always engaged in responsible mortgage lending and lending based on the Bank's financing must fulfil strict mortgage lending standards.

The Bank has been an industry leader which has influenced the lending standards

The EBRD's core principles for a mortgage law

1 A mortgage should reduce the risk of giving credit, leading to an increased availability of credit on improved terms.

2 The law should enable the quick, cheap and simple creation of a proprietary security right without depriving the person giving the mortgage of the use of his or her property.

3 If the secured debt is not paid the mortgage creditor should be able to have the mortgaged property realised and the proceeds applied towards satisfaction of his or her claim prior to other creditors.

4 Enforcement procedures should enable prompt realisation at market value of the mortgaged property.

5 The mortgage should continue to be effective and enforceable after the bankruptcy or insolvency of the person who has given it.

6 The costs of taking, maintaining and enforcing a mortgage should be low.

7 A mortgage should be available: (a) over all types of immovable assets; (b) to secure all types of debts; and (c) between all types of person.

8 There should be an effective means of publicising the existence of a mortgage.

9 The law should establish rules governing competing rights of persons holding mortgages and other persons claiming rights in the mortgaged property.

10 As far as possible the parties should be able to adapt a mortgage to the needs of their particular transaction.

... this is also an opportune time to reflect on lessons learned and incorporate them into the mortgage strategy going forward.

of many other institutions by setting up its List of Minimum Standards (LMS).

Commercial banks that receive a mortgage loan from the EBRD for on-lending to residential mortgage lending have to adhere to the LMS. The LMS has proven to be an effective tool by aiding in the standardisation of mortgage lending and risk management. Its transparency and simplicity has enabled replication and adoption beyond the EBRD's partner banks.

The Bank was active in mortgage lending prior to the onset of the financial crisis, but mortgage lending came to a complete halt in 2008 and there were no new commitments since June 2008. The current mortgage lending portfolio of the EBRD is €248 million, involving 34 transactions in 11 countries at varying stages of transition and development of mortgage markets.

In the last quarter of 2010 the demand for mortgage lending started to revive. It is important that the EBRD is present in this market and helps shape mortgage lending in countries of operations going forward. However, this is also an opportune time to reflect on lessons learned and incorporate them into the mortgage strategy. In light of this the EBRD is currently reviewing its mortgage lending strategy. While the details of this strategy are being reviewed, the principals of operations are to:

- enable responsible mortgage lending
- encourage responsible development of secondary markets that fit with the economic context
- set market friendly incentives that provide a higher profile for mortgages in local currency, recognising however the limitations resulting from undeveloped local currency capital markets.

As part of the mortgage lending strategy, the EBRD is reviewing its LMS to incorporate the lessons learned from the recent crisis and set a higher standard of mortgage lending in its countries of operations. For example, one of the important lessons learned from the crisis has been that in some countries the mortgage loans made in foreign currency have led to difficulties, particularly if the local exchange rate devalued sharply and the borrower, whose income stream was often in local currency, struggled to meet its payments to the EBRD.

Table 1
List of the EBRD Minimum Standards (LMS) for mortgage lending – comparative eligibility criteria

Terms and conditions/eligibility criteria	Current levels/provisions
1. Currency of the mortgage loan.	EUR, USD, local and other currencies
2. Owner-occupied mortgages.	Residential mortgages
3. Profile of repayments.	Repayment of interest and capital
4. Loan to value (LTV) ratio.	Max. 80%
5. Payment to income ratio (PTI).	Max. 50%
6. Life insurance and insurance of the financed real estate.	Yes
7. Buy-to-let mortgages.	Max. 80% LTV ratio and max. 50% PTI
8. Maximum amount of mortgage sub-loans.	Specified in the loan agreement
9. Security.	First rank mortgage on the real estate financed
10. Maximum maturity permitted for sub-loans	Not specified
11. Maximum age of the sub-borrower at final maturity.	Max. 70 years
12. Type of interest rate recommended for mortgage sub-borrowers.	Full flexibility
13. Written information on market risks and risk of non-repayment (a pre-contractual package of information with an illustrative example about interest and/or a depreciation move for mortgage loans).	Yes
14. Other terms and conditions of LMS.	Yes

In the Bank's countries of operations it is desirable to encourage lenders to borrow in local currency, balancing the need to provide viable mortgage financing with the need to limit the currency risk undertaken by the borrowers. However, in order to be effective, it is important to set market friendly incentives that are credible and can guide a market into the right direction rather than impose an artificial rule. Often rules that are imposed inflict more damage than good to the economy. For example, in a completely underdeveloped mortgage market, it may be more important to ensure the availability of mortgages than to try and affect the currency choice. Second, in a market where there is no credibility in the local currency and as a result nominal interest rates are high and volatile, it may just not be credible to provide mortgage loans in local currency, since these loans would be too expensive to attract demand. In light of this the LMS is being reviewed to build in market friendly mechanisms to encourage safer underwriting of foreign currency mortgages where they are in demand. One such mechanism would be to have differentiated LTV ratio values for local currency and foreign currency mortgage loans, which reflect the true underlying risks and would as such make a local currency mortgage loan relatively more attractive. Similarly, differentiated PTI ratios could also make local currency more attractive.

It is also desirable to encourage the development of secondary markets; however, this needs to be done in a responsible manner, taking in lessons learned from the experience of the Western world that has suffered from the consequences of irresponsible developments in secondary markets. The EBRD is assessing various instruments that can be promoted in its countries of operations. Possible market friendly mechanisms could be to provide incentives for certain types of behaviour, such as keeping mortgage loans on a bank's balance sheet for an initial time period to encourage responsible lending and reduce the risks of negative equity value in a mortgage portfolio and standardisation of underwriting and documentation. The Legal Transition team (LTT) will look to assist in the adoption of legal and regulatory structures required for transferability. Beyond mortgage funding, the EBRD will also look to investments that can help develop the necessary financial infrastructure for sound mortgage markets, including credit bureaus and mortgage servicing companies.

This is only the beginning but the EBRD is committed to making a positive contribution to this important area.

Notes

[1] The objectives of a mortgage law are defined and encapsulated in the EBRD's Core Principles for a Mortgage Law.

[2] For more information on EBRD mortgage law reform activities, see: www.ebrd.com/pages/sector/legal/secured.shtml

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Building judicial capacity in transition countries



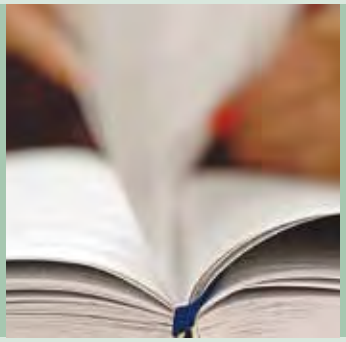

The EBRD has always placed great importance on the role of institutions in transforming legal reforms into business reality. Nowhere is this more important than the justice sector. Better courts help build better economies. However, judiciaries across the EBRD's countries of operations continue to face an array of challenges, many of which were exacerbated by the recent financial crisis. These have prevented countries from enjoying the full benefit of the legal and economic reforms of the past two decades.

In this edition of *Law in transition* specialists in the field of judicial capacity study problems and offer solutions. The first article, by Alan Colman of the EBRD, explains the results of the Judicial Decisions Assessment 2010. This was the Bank's first legal assessment dedicated to the justice sector, studying the functioning of commercial courts in Kazakhstan, the Kyrgyz Republic, Moldova, Mongolia, Russia, Tajikistan and Ukraine. The assessment focused on seven dimensions of judicial capacity, seen through the prism of selected judicial decisions in three areas of commercial law: creditor rights, property and shareholder rights, and disputes with regulators.

In the second article Michel Nussbaumer (also of the EBRD) and Irina Rabinovich (of the International Development Law Organization [IDLO]) take stock of the EBRD/IDLO Judicial Capacity Building Project in the Kyrgyz Republic, which for several years has worked to strengthen judges' ability to deal effectively with commercial law disputes. They identify challenges which were encountered and lessons learned which can be applied to future project work.

Paul Byfield of the EBRD then discusses the extent to which judicial decisions are available to judges and members of the public in selected EBRD countries of operations, an issue which has a substantial bearing on judicial capacity. And Jelena Madir

Focus section

of the EBRD explains judicial reform in Croatia, in the context of that country's bid to join the European Union.

Justice sector reform work is the focus of the next two articles. Heike Gramckow, Senior Counsel at the World Bank, considers the challenge of how to make courts more efficient, and reviews the reform experience of the Western Balkans. Jana Schuhmann, Project Manager for Legal and Judicial Reform in Central Asia at The Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), explains efforts to enhance judicial capacity through improved education and identifies procedural and other problems confronting the judiciary in the region.

The next article, by Pim Albers, Acting Advisory Member of the International Consortium of Court Excellence, focuses on the growing use of court quality policies in Europe and beyond and explains the real difference such policies can make to improving courts' performance.

Lastly, Dragos Dumitru and Diana Ungureanu, Deputy Directors of the National Institute of Magistracy in Romania (NIM), present the work of their institution and key issues which arise in structuring and delivering initial and ongoing judicial training.

03

Court decisions in commercial matters: an EBRD assessment

ALAN COLMAN

Improving the efficiency of courts remains a substantial challenge in many transition countries, a reality which affects the investment climate. The EBRD, through its Legal Transition Programme, is focusing greater attention on the practical implementation of laws and the role of the courts, and considerable emphasis continues to be placed on hard data. This article discusses the initial findings of the EBRD Judicial Decisions Assessment 2010, which examined the functioning of commercial courts in several countries of the Commonwealth of Independent States (CIS) and Mongolia. The assessment used a purposive sampling technique to select typical decisions and study seven dimensions of judicial capacity: predictability, quality of decisions, legislative context, speed, cost, implementation and impartiality.

Focus section

Judicial capacity and legal transition

A business considers an investment opportunity in a transition country. It may involve lending money to a local firm, secured by local assets, or taking an equity stake in a local company. It may require establishing a presence in the country, purchasing privatised land, hiring equipment and dealing with regulators to obtain licences. The business seeks advice from a local law firm. Can its rights as creditor, shareholder, purchaser or licensee be adequately protected in the courts in the event of a dispute? This advice will affect the decision on whether the investment is made.

The connection between enforcement of legal rights and economic development is widely accepted.[1] Studies have linked the effectiveness of the judiciary with the pace of economic growth and the cost of credit in liberalised economies.[2] However, many transition countries are yet to fully reap the economic benefits that an effective judiciary can bring. While much has been achieved in the last 20 years to develop commercial laws, their implementation in many countries remains beset by uncertainties and inefficiencies. This reality deters investors from participating in some of these markets for fear that their legal rights cannot be adequately safeguarded through the courts.

Perhaps change is around the corner. There is certain logic to the proposition that courts and legal institutions mature one step behind the development of the legal systems in which they sit and in response to the emergence of market demand.[3] This suggests that with improved commercial laws increasingly on the books and markets and demand for courts developing apace, enhancement of judicial

> **... with improved commercial laws increasingly on the books and markets and demand for courts developing apace, enhancement of judicial capacity may be the next big chapter in the story of legal transition.**

capacity may be the next big chapter in the story of legal transition. Accordingly, through its Legal Transition Programme (LTP) the EBRD has recently placed renewed emphasis on judicial capacity work. A key initiative this year was to launch the first EBRD assessment of judicial capacity in the Bank's region. Such analytical assessments have been a cornerstone of LTP's legal reform work in other sectors, ensuring that policy dialogue and project work has a firm evidentiary foundation. This article addresses some of the initial findings of the assessment.

The judicial decisions assessment: overview

The assessment examined the functioning of commercial courts, as revealed by an expert study of typical judicial decisions in three broad areas of commercial law. Local legal experts evaluated the selected decisions in respect of seven dimensions of judicial capacity. They were then asked to assess the risk associated with the dimensions for future cases, based on both the reviewed decisions and their broader experience. Lastly, they were to produce a simple composite risk index for businesses involved in commercial litigation. Local experts provided written comments and suggested possible reforms. To ensure consistency in the evaluation process, all of the work of local experts was reviewed by an independent regional panel. The assessment covered selected countries in the Commonwealth of Independent States (CIS): Kazakhstan, the Kyrgyz Republic, Moldova, Russia, Tajikistan and Ukraine, as well as Mongolia. A second phase of the assessment is planned for 2011, covering the remaining CIS countries and Georgia.[4] A commercial law firm based in the region, Wolf Theiss, was retained to conduct the assessment in collaboration with regional associates.

The objectives of the assessment were twofold. One was to provide investors in the region, including the EBRD, with a meaningful insight into key problems confronting the commercial courts in the countries concerned and the risks involved in commercial litigation. The other was to produce data which could be used to encourage and assist reform, from a commercial, end-user perspective.

Key aspects of the assessment

(a) Areas of commercial law

Decisions were drawn from three broadly-defined commercial law areas (see Box 1). Why several broad areas and not just one or two narrow areas? First, the focus of the assessment was judicial capacity, not any single legal sector. Drawing decisions from several areas was considered more conducive to identifying systemic issues that transcend particular sector-based concerns. Second, the assessment had to produce findings of relevance to each country. Different social and economic relations in countries at different stages of transition could be expected to generate a different profile of disputes coming before the commercial courts. Any narrowly defined areas for case selection would have run the risk of being relevant in some countries but not in others. In the end, the subject matter of the cases reviewed was reasonably similar, with debt recovery and shareholder and property disputes predominating.

Box 1: EBRD Judicial Decisions Assessment – areas of commercial law from which decisions were drawn

- *Protection and enforcement of creditors' rights:* this area included cases on secured and unsecured debt and insolvency proceedings.
- *Proprietary and shareholder rights:* this covered cases on corporate governance issues and shareholder disputes, joint venture agreements and land title disputes.
- *Disputes regarding dealings with regulatory authorities:* this included disputes with customs and tax authorities, and claims to invalidate privatisation transactions.

(b) Selecting the decisions

Local experts reviewed the case law[5] and from it selected at least 20 final decisions for analysis. The primary criterion for selection was that the decisions be representative of common cases and practice. Being typical decisions, they are more likely to reveal any fundamental and systemic features – problems as well as successes – in the application and interpretation of commercial law by the courts.

Decisions were selected because they were considered by experts to offer information-rich specimens of typical decisions for in-depth analysis.

On no account were the selected decisions to be aberrant. Indeed, local lawyers were required to provide a written justification for their view that selected decisions were typical of court practice. Decisions had to be legally operative and generally handed down within the past two years. Decisions from all instances and regions could be included, provided they contained a substantive examination of a commercial dispute in one of the three areas. The selection process thus employed a purposive, rather than a random sampling technique, a common approach in qualitative research.[6] Decisions were selected because they were considered by experts to offer information-rich specimens of typical decisions suitable for in-depth analysis.[7]

(c) Target dimensions

The assessment targeted seven key dimensions pertaining to the courts' output in dealing with commercial disputes (see Box 2). These included three core tenets of judicial responsibility – namely quality and predictability of decisions and impartiality – which are intimately connected with the judge's individual performance. Also measured were speed, cost, legislative framework and implementation, where courts can play an important role. All of these dimensions are referable to international standards[8] and the jurisprudence of relevant supervisory bodies. They are also reflected in the EBRD Core Principles for Effective Judicial Capacity,[9] which provide a framework for the Bank's activities in judicial capacity.

(d) Scoring and the role of the regional panel

For each dimension in each case local experts recorded a score from 1-5 (5 representing a high standard of fairness and efficiency), together with a narrative explanation of the score. These were all reviewed by the regional panel, which scrutinised the bases for local experts' opinions and sought clarifications where necessary. In some cases the panel worked with local experts to adjust certain scores to ensure consistency of approach and to provide a basis for comparative analysis. The panel then prepared the final results and a report to the Bank.

Results of the decisions analysis

The overall results of the decisions analysis in each of the seven countries is set out in Chart 1. The most positive picture emerges in relation to decisions in Russia. Here the general level of sophistication of judicial decisions is typically higher than elsewhere. Markets are more developed, creating more complex disputes to which courts have to respond. The courts have more resources and the country is at a more advanced stage of economic transition.[17] The most challenging situation overall is found in Mongolia and Tajikistan.

It should be remembered that the results relate to what experts believed were standard, typical decisions and that in particular circumstances and sectors the results for the various indicators can be quite different,

Box 2: EBRD Judicial Decisions Assessment: The seven dimensions assessed in the decisions

Predictability of decisions[10]
Is the decision broadly predictable, taking into account whether it is jurisprudentially compatible with other decisions in the same field?

Quality of decisions[11]
Does the decision comply with procedural requirements; display an understanding of the practical commercial issues being litigated; identify the relevant law(s); apply the law(s) correctly and coherently; and reach a well-reasoned, clearly expressed conclusion?

Adequate legislative framework[12]
Were there material legislative or procedural obstacles to the courts' consideration of the relevant issues? Both primary and secondary legislation were considered.

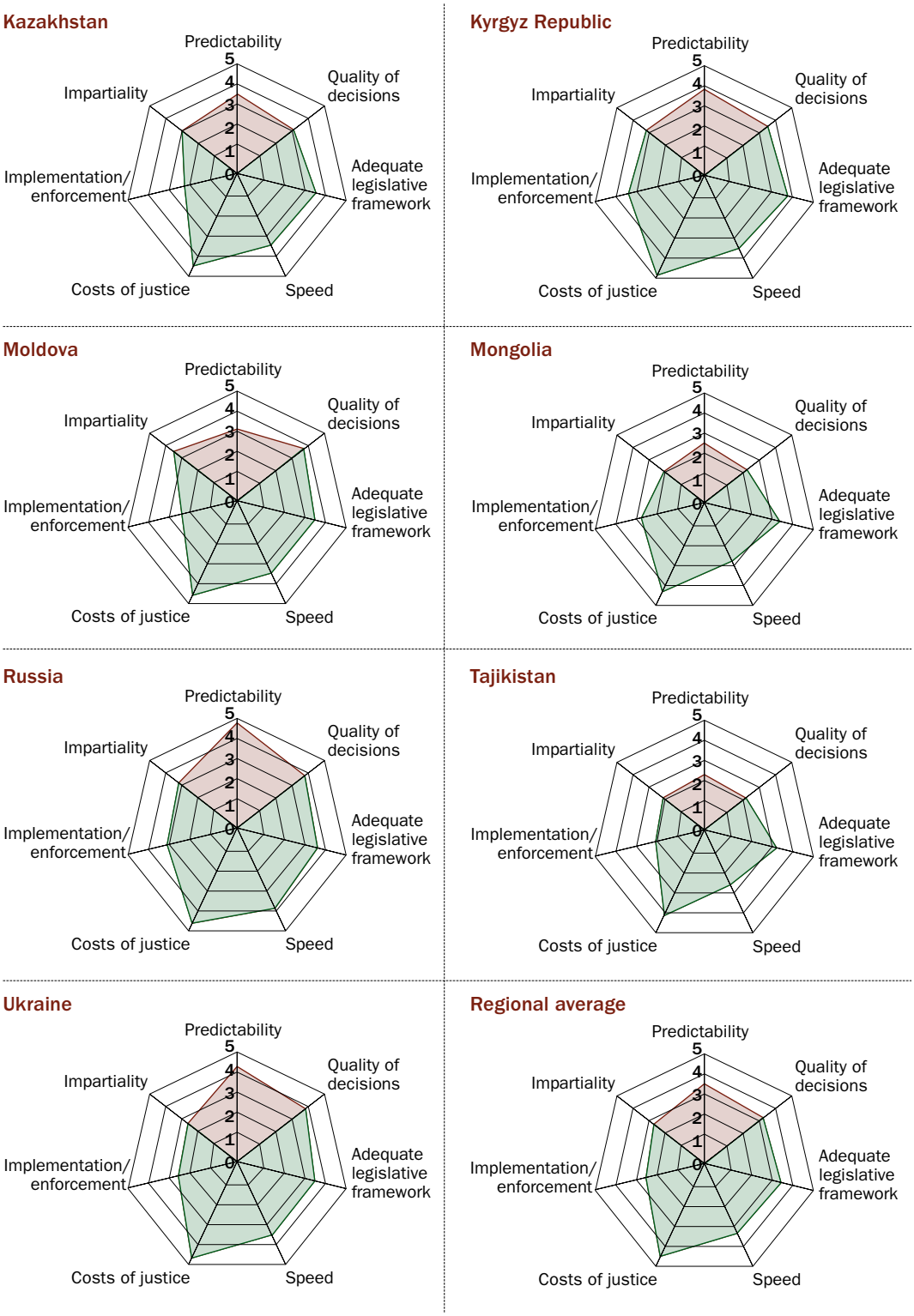
Speed of justice[13]
Did litigation proceed at a reasonable pace and in compliance with statutory deadlines? The reference period was the filing date to the final judgment date.

Costs of litigation[14]
Was the cost of litigation reasonable, considered as a percentage of the commercial value at stake in the claim? Court fees were considered, but not attorneys' fees.

Implementation/enforcement of judgment[15]
Were court orders voluntarily implemented or compulsorily enforced? Experts conducted case file follow-up and contacted litigants directly where possible.

Impartiality[16]
Did the decisions appear to afford procedural equality and give adequate weight to the parties' arguments? Were there discernable differences in courts' treatment of the parties? Experts were also allowed to consider reliably attested extraneous data, such as official reports and investigations into corruption.

Chart 1
The EBRD Judicial Decisions Assessment: overall results by country



Note: The country diagrams depict the average score given to the seven dimensions in the reviewed commercial law decisions, as assessed by local commercial law firms and a regional panel. The extremity of each axis represents an optimum score of 5, which represents a high standard of fairness and efficiency. The final diagram depicts the regional average for all dimensions. The larger the coloured area, the better the results. The three core dimensions appear in red.

Source: The EBRD Judicial Decisions Assessment 2010.

While the results point to different levels of judicial capacity in commercial law in the countries reviewed, the underlying challenges present as a spectrum, where states with a recent common socio-economic history face similar challenges but to quite varying degrees.

such as for impartiality where strategic state interests are at stake. This is discussed further below. Additionally, the assessment did not evaluate the complexity of the legal disputes that came before the court. Clearly, simple debt recovery cases are easier for courts to deal with, and can sometimes produce higher scores, than complex corporate governance cases. The scores should be read in this light.

While the results point to different levels of judicial capacity in commercial law in the countries reviewed, the underlying challenges present as a spectrum, where states with a recent common socio-economic history face similar challenges but to quite varying degrees. This is borne out by an analysis of the seven indicators, the various themes which pervade them and the relationships among them. A more detailed account of these themes and the differences in their manifestation in the various countries will be the subject of a separate report to be produced in 2011.

(a) Predictability of decisions

A measure of risk and uncertainty is in the nature of litigation; however it should be possible for investors to obtain meaningful advice about the likely outcome of commercial disputes. Decisions should show consistency in the courts' treatment of disputes of a similar kind. The judiciary should aspire to a high level of predictability in its processes and judgments and produce a coherent body of case law.[18] This is as true of civil law as it is of common law judiciaries.[19]

Overall, the assessment concluded that decisions in the region show quite varying levels of predictability (see Chart 2). In most countries local experts were able to discern patterns in the case law in each area, but with frequent divergences. Decisions were considered to be strongly predictable in Russia and Ukraine, with the least predictable decisions found in Mongolia and Tajikistan. Discussed below are various factors accounting for the different levels of predictability depicted in Chart 2.

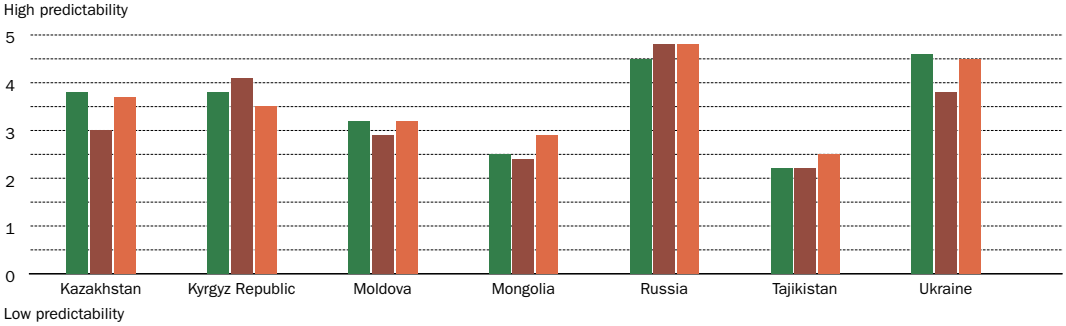
The role of legislation and quality

First, lack of predictability in a particular area was often linked to uncertainties in the relevant legislation. For example, in Moldova, it is not clear whether there is an obligation to conduct a public auction when converting state-owned land into superficies. However, the assessment found that quality of legislation is a significant but not overwhelming factor driving predictability. Decisions in some areas scored strongly for predictability, despite more moderate scores for the adequacy of the legislative framework (see results for Ukraine and Russia in Charts 2 and 4). Other decisions were unpredictable despite the relevant legislative framework being quite adequate. This indicates that lack of predictability often arises from underlying problems with judicial decision-making, a hypothesis supported by the correlation between the scores for the predictability and quality dimensions (compare Charts 2 and 3). Evidently, good quality decisions can often identify ambiguities in relevant legislation and make the best of a bad situation.

Superior court guidance

A second factor substantially contributing to greater predictability was the presence of superior court mechanisms to promote the uniform application of commercial law, such as superior court decrees, information letters, court

Chart 2
Predictability of judicial decisions, by country and legal sector



Decisions on protection of creditor rights. Decisions on property and shareholder rights. Decisions on dealings with regulators.
Note: The diagram depicts the average scores for predictability assigned to decisions in each of the three areas of commercial law, as assessed by local commercial law firms and a regional panel. The maximum score is 5, which represents a high standard of predictability.
Source: The EBRD Judicial Decisions Assessment 2010.

Greater predictability in judicial decision-making can reduce the risk of improper influences on the court.

summaries and explanations on approaches to judicial practice and interpretative issues.[20] Such instruments are present in all countries reviewed; in some countries they are binding on lower courts, in others only recommendatory in nature. In areas of law where such superior court guidance existed, predictable decisions were considered more likely.[21] In Russia, which had the best scores for predictability, such systems are well-developed. The Supreme Arbitrazh Court issues information letters and overviews in many areas, providing interpretative and procedural recommendations for the courts below. In Tajikistan such mechanisms are in place but are less well-developed. For example, superior court guidance tended to be confined to procedural issues. The quality, frequency, comprehensiveness and dissemination of such instruments were important factors. The most useful dealt with topical and difficult areas where the possibility for confusion and divergent approaches was greatest, within a framework that was easy for judges to access. In some areas such superior court guidance appeared to account for good predictability despite problems in the legislation.

Accessibility of decisions

The accessibility of judicial decisions had a strong bearing on predictability. By definition, predictability of decisions must be assessed within the known context of the broader case law. In countries where availability of decisions is limited, predictability of decisions will be inherently lower: trends in the case law, if they exist, will be less well known. The panel took this into account in finalising the scores for predictability. In Kazakhstan, Moldova, Mongolia and Tajikistan, judicial decisions, particularly of the lower courts, cannot be easily accessed by lawyers or the general public and access to case files is restricted. Important decisions are only sporadically distributed by superior court bulletins and effective databases are limited or non-existent. Thus in Tajikistan and Mongolia, where there are no such databases, experts made a substantial effort to obtain cases to consider for selection, largely through a network of local law firms. Things are improving in Moldova. A 2007 law requires courts to publish judgments on their web sites as of January 2010, but to date only the Supreme Court has done so. Lack of access to decisions makes it harder for lawyers to be fully familiar with the case law and present judges with helpful and relevant arguments. The absence of central databases makes it more difficult for judges to find such cases themselves. In contrast, in Ukraine there exists a single electronic state register of judicial decisions, although not all courts' decisions are covered and search functions are limited. In Russia commercial law decisions are widely available and searchable by subject matter on the web sites of the Arbitrazh Courts; and information about court proceedings, past and pending, is widely available.[22] A federal law mandates public access to court documents.[23] Accordingly, local experts in Russia had no difficulty in searching for, perusing and selecting the decisions for the assessment.

Lastly, there was a moderate correlation between predictability and impartiality. Greater predictability in judicial decision-making can reduce the risk of improper influences on the court. The more coherent the case law, the more divergent approaches (including those resulting from corruption) tend to stand out, inviting scrutiny.[24] This in turn can assist judges in resisting improper influences. However, predictability can of course have a negative manifestation, where particular areas or issues courts might be "predictably biased". This is discussed further in relation to the "impartiality" indicator.

(b) Quality of decisions

Ensuring the quality of judicial decision-making is an essential component of the right to a fair hearing and a key dimension of judicial capacity. Whilst the assessment of quality can be open to claims of subjectivity, it is a task that can and must be carried out. Indeed lawyers assess the quality of decisions every day when advising their clients and court management assesses quality in exercising oversight functions.

The decisions reviewed displayed variable degrees of quality (see Chart 3). The assessment concluded that overall this was the dimension posing the greatest concern across the region. The highest quality decisions were found to be in Ukraine and Russia, with the weakest in Tajikistan and Mongolia. Several thematic issues emerge from the study of decision quality.

Evidence

Many decisions were viewed as having dealt very superficially with evidence; a fulsome

In all countries there were instances of courts wrongly applying general provisions, rather than the applicable specific provisions. The impression was one of courts being more comfortable with civil codes and procedure codes than applying specific provisions of relevant commercial laws.

consideration of the evidence, if it had occurred, was not apparent on the face of the decision. This was particularly the case in Tajikistan and Mongolia, but was evident even in countries that scored better for quality overall. In a Kyrgyz case an investment firm sued a landlord for consequential loss arising from faulty power facilities, during which time it was deprived of market information and could not sell its shares when the market dipped. The plaintiff's assertions that it would have sold their shares in the relevant companies and attained their business objectives but for the landlord's failure to maintain the generators were accepted on the strength of the plaintiff's most recent business plan, which set out only estimates of its proposed trading activity. In another case, a newspaper article about a firm's financial position was used by a claimant to reopen a decided case, based on "newly discovered circumstances". Despite Kyrgyz decisions scoring rather well for quality, experts pointed to courts often not complying with the procedural requirement that the declaratory part of a decision state the full circumstances of the case, including the evidence.[25]

Applying general laws over specific laws

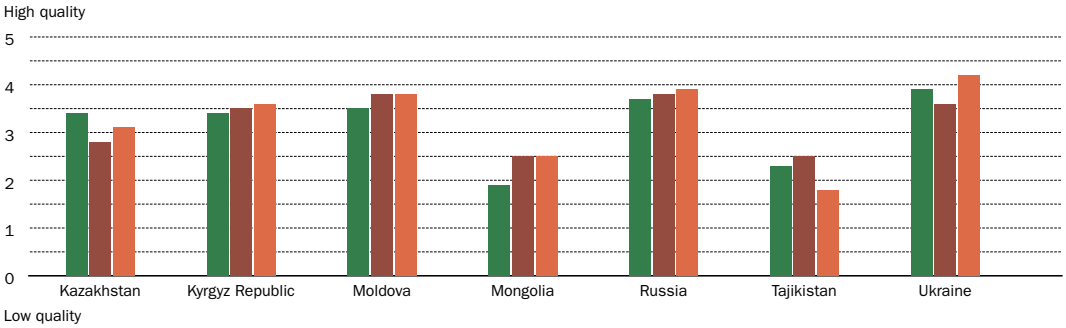
In all countries there were instances of courts wrongly applying general provisions, rather than the applicable specific provisions. The impression was one of courts being more comfortable with civil codes and procedure codes than applying specific provisions of relevant commercial laws. For example, mortgage legislation in Moldova sets out exclusive grounds for the setting aside of orders to transfer pledged property. Yet in several of the reviewed decisions such orders were set aside with reference only to general provisions in the civil code and civil procedure code, without invoking any of the relevant grounds stipulated in the Mortgage Law. The Mortgage Law is relatively new and judges were thought not to have fully assimilated its provisions. Similarly in Mongolia a challenge to the issue of a mining licence was resolved by reference to civil code provisions, without examining mandatory considerations relating to the granting of a mineral exploration licence. In Tajikistan it was common for courts to refer to general sources of jurisdiction and standard procedural provisions, rather than the substantive laws in question, particularly in the area of creditor rights, where typically judges were less familiar with the subject matter. Decisions in several countries on the invalidation of privatisations focused on general rather than specific provisions, for example, in relation to time limitations. In cases across all areas in all countries (although to varying degrees) there were examples of courts not applying the general principle of interpretation that the specific overrides the general.[26]

Interpretation

Experts commented on the prevalence of formalistic approaches to interpretation whereby judges tend to read laws literally, rather than by reference to legislative intention and a law's commercial purpose.

Further, decisions often lacked a detailed analysis of statutory or contractual provisions in circumstances where this was clearly required, suggesting judges often lacked interpretative skills. In cases that turned on the meaning of contractual provisions, key clauses in question were often paraphrased rather than cited, making it difficult to follow the reasoning. The

Chart 3
Quality of judicial decisions, by country and legal sector



Note: The diagram depicts the average score for quality of decisions assigned to decisions in each of the three areas of commercial law, as assessed by local commercial law firms and a regional panel. The maximum score is 5, which represents a high standard of quality.
Source: The EBRD Judicial Decisions Assessment 2010.

Underlying many of the above factors is a concern, particularly in "early transition" countries, about the level of judges' commercial law training and understanding of markets and business.

better cases laid out clearly the provisions in dispute and devoted proper attention to the analysis of the relevant concepts. For example, a Kazakh decision considered a claim by a mining company whose contract with the Ministry for Energy and Mineral Resources had been rescinded by the Ministry because of an alleged "substantial violation". The court laid out an analysis of this concept, and concluded that the company's shortfall in meeting the agreed extraction target could not be considered a "substantial" violation.

Identifying the interests of the parties

Decisions often did not reveal the interests of the parties and their motivations for seeking redress from the court. The "case theory" of the litigation was not apparent, for example why the shareholder was challenging the sale agreement and how their personal interests, or those of the company through which they claimed, were affected. Decisions where such interests were elucidated showed a deeper understanding of the relevant issues, analysing the case through the prism of the parties' interests rather than dealing with the matter in a purely formalistic way. Such cases inspired greater confidence in the reader that the parties' arguments had been fully dealt with.

Structure

The operative parts of courts' decisions were sometimes not well matched with the parties' arguments. This was particularly the case in the early transition countries. Often, the parties' contentions were identified in the introductory parts of the decisions, yet not substantively dealt with. Some cases displayed an overall paucity of reasoning or even a bare declaratory finding. In one Kyrgyz case some 30 lines in the judgment summarising the plaintiff's arguments reappeared verbatim in the dispositive part of the judgment, finding for the plaintiff, giving rise to a perception of partiality. In Mongolia the practice appears to be that the parties' core submissions are reproduced in the judgment; the dispositive parts of the judgments do not always assess these submissions in a way that is clear to those not involved in the proceeding.

Links with other dimensions

There were several apparent links between the quality of decisions and other indicators. Good quality decisions were associated with higher predictability, as well as the availability of judicial decisions. Judges will write a better decision if they and the advocates who appear before them have easy access to relevant cases where useful examples of valid reasoning can be found. There was an association between the quality of decisions and the legislative framework, although poor quality was often found despite the legislative framework scoring rather well. As with the predictability dimension, higher quality was associated with superior court guidance in the relevant area of law. In Russia the Presidium of the Supreme Arbitrazh Court has been very active issuing explanatory resolutions (now available on the internet), educating judges and the broader legal community on important legal issues and questions of interpretations. These have contributed to the enhanced quality of decisions.

Underlying many of the above factors is a concern, particularly in "early transition" countries, about the level of judges' commercial law training and understanding of markets and business. Judges in many cases appeared to lack knowledge of specific commercial laws and commercial law concepts. For example, Tajik experts cited a case where the judge evidently did not fully appreciate key differences between public and private companies. In other cases, judges struggled to understand the broader commercial context of the dispute. Lastly, the very large workload of judges in many countries was cited as a factor affecting the quality of decisions, particularly in Kazakhstan, the Kyrgyz Republic, Russia and Ukraine.

(c) Adequacy of legislative framework

The assessment results concluded that the legislative framework shaped the functioning of the courts in the decisions reviewed, but was not a substantial impediment to court performance (see Chart 4). It should be noted that "adequacy of the legislative framework" in the present context is ultimately about fit for purpose; does it facilitate the courts' resolution of the types of disputes that come before them? The main point of studying this dimension was to understand its relationship with other dimensions of judicial capacity.

Where legislation was seen as a problem, the relevant issues were typically endemic to particular substantive areas of law. Thus, in both Russia and Ukraine local experts

... experts in some countries considered that clearer bank lending policies and processes could have assisted in avoiding disputes between co-borrowers.

considered that bankruptcy legislation did not adequately proscribe sham bankruptcies, which permitted creditors to siphon away assets and then have themselves declared insolvent. Courts' decisions in many of these cases were considered of good quality, but they could not fill the gaps in the law. However, in some cases it was legislation governing general civil litigation and its interaction with the sector specific legislation that caused the relevant problem, such as civil procedure codes. For example, in Russia and Ukraine the law made it too easy for a party to reopen a determined case based on newly discovered circumstances. Routine bankruptcy cases were often said to be satisfactorily dealt with in these areas, then reopened and undermined in this way. In cases such as this, the civil procedure legislation sometimes appeared ill-adapted to the relevant specific legislation. Here the insolvency legislation might usefully have precluded or limited the reopening of cases based on "new evidence". In other cases, legislation had not kept pace with developments in the market, leaving gaps that courts struggle to fill, a problem affecting countries worldwide in times of significant social and economic change. In some areas, the regulation of key professional bodies was considered inadequate. For example, in Mongolia problems with the regulation of insolvency administrators cast a shadow over proceedings. The benefits of efficient legislation were underscored by legislation in Russia governing disputes over the recovery of simple debts, which was identified by local experts as very straightforward and conducive to effective court proceedings.

Secondary legislation (rules and regulations made by executive authorities) caused certain problems for courts in some areas. In one case ambiguity over the cadastre rules in Mongolia led the parties to litigate a point where there was no apparent commercial dispute – they used the court to clarify the law. And in Ukraine it was noted that extraordinary decrees of the National Bank issued during the financial crisis had created ambiguities that the courts had found difficult to resolve. Specifically, it was not clear whether the temporary moratorium on creditor claims against banks covered retail depositor-holders; ultimately courts interpreted it broadly, which according to experts was not how the decrees were supposed to work. It should also be noted that experts in some countries considered that clearer bank lending policies and processes could have assisted in avoiding disputes between co-borrowers.

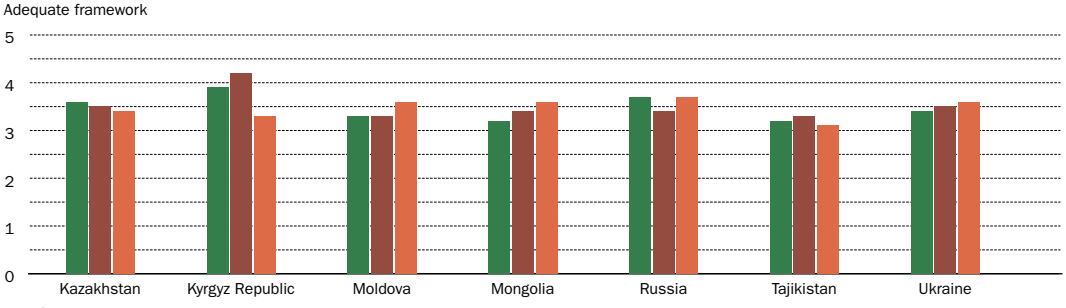
(d) Speed of justice

The speed of justice is often the focus of justice sector reform work. Indeed, substantial caseloads[27] and backlogs delay decisions in many transition countries, and adversely affect confidence in the courts. However, in the countries under review, speed of justice was generally considered not to pose a significant problem, as the results in Chart 5 indicate. The best results were in Russia and the Kyrgyz Republic. This result accords with the tenor of the results of the World Bank *Doing Business* survey 2011, which showed these two countries as the fastest of the seven countries reviewed in the assessment when it comes to enforcing contracts.[28]

Statutory timeframes for traversing three instances ranged from 7 months in Tajikistan to 14 months in Moldova; however, the assessment looked beyond the legislation to the practice. The assessment did not seek to establish average or benchmark times, but

Chart 4

Adequacy of legislative framework for functioning of the court, by country and legal sector



Note: The diagram depicts the average score for the adequacy of the legislative framework assigned to decisions in each of the three areas of commercial law, as assessed by local commercial law firms and a regional panel. The maximum score is 5, which represents the complete adequacy of the framework for litigation purposes.
Source: The EBRD Judicial Decisions Assessment 2010.

In all countries reviewed enforcement of decisions presented difficulties, and in several countries there remains a substantial backlog of un-enforced decisions of economic courts.

rather whether the time taken from filing to judgment was reasonable, in regard to the subject matter of the case. Thematic issues identified in the analysis included: legislative deadlines not always being met or enforced by the parties and the courts; some matters not having statutory limitation periods for the hearing of cases; courts struggling to deal with backlogs; an absence of alternative dispute resolution mechanisms; delays associated with the appointment of expert witnesses; and motions for adjournments being too readily granted by courts, without demanding proper justification. In some countries, such as Moldova, deficiencies in the courts' notification system contributed to delays. In the Kyrgyz Republic delays also arose through the lack of infrastructure and the time taken to physically move files from one court instance to the next.

Speed of justice is not an absolute virtue, and it can come at the expense of quality and fairness.[29] One significant issue affecting the overall duration of litigation from first to last instance is the proclivity of appeal courts to send cases back for further hearing, when in the view of local experts some cases would have warranted the appeal court substituting its own decision. In some instances this practice presented as a method for appeal courts to dispose speedily of the matter (from their own instance), to the detriment of the efficiency of the court system overall. In some instances it was suspected that judges delayed matters with a view to favouring a particular party, for example to provide the party with time to dilute assets or destroy evidence, however no hard evidence was produced of this.

(e) Costs of litigation

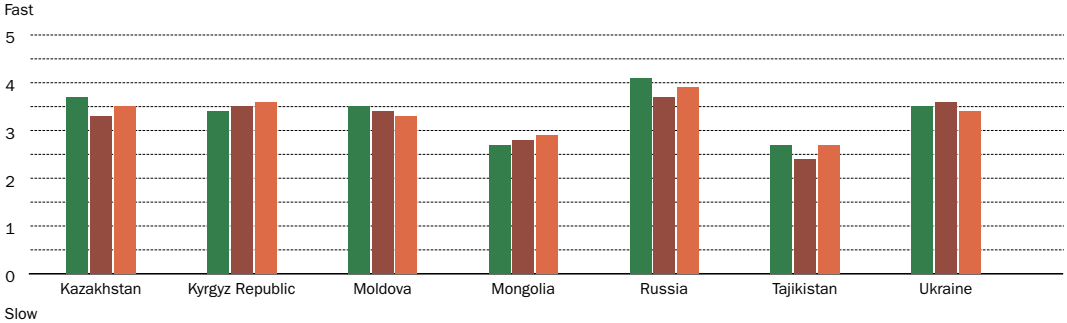
As is apparent from the data in Chart 6, the cost of litigation was generally considered to be reasonable, expressed as an approximate percentage of the value of claims and was usually predictable. Cost was therefore not viewed as a major concern in any of the countries covered by the assessment, at least for corporate litigators, which was the assessment's perspective. In some instances legislation regulating court costs could have been clearer and the categorisation of different types of disputes, which triggers different cost regimes, sometimes gave rise to disputes. However, overall local experts considered that the court fees associated with the relevant litigation were modest. These findings are compatible with other research data of international organisations.[30]

In most countries filing fees are payable, with final costs being determined and paid at the conclusion of the case. In the Kyrgyz Republic recent amendments to the legislation governing court costs have meant that no fees are payable up front. This was considered a positive change in terms of access to justice, but it carries the distinct disadvantage of removing a deterrent (albeit a small one) to vexatious or frivolous litigation.

(f) Implementation/enforcement of judgments

Business confidence depends on whether the outcome of litigation will be respected or enforced. This depends on a culture of voluntary implementation of decisions and/or effective means of coercive enforcement. In all countries reviewed enforcement of decisions presented difficulties, and in several countries there remains a substantial

Chart 5
Speed of justice, by country and legal sector



Note: The diagram depicts the average score assigned to speed in each of the three areas of commercial law, as assessed by local commercial law firms and a regional panel. The maximum score is 5, which represents reasonable speed of justice for the litigation concerned.
Source: The EBRD Judicial Decisions Assessment 2010.

> **... in some cases implementation difficulties appeared to be associated with a lack of clarity in the text of the courts' orders.**

backlog of un-enforced decisions of economic courts.[31] Notably, Moldova, Russia and Ukraine have been respondents to a large number of cases brought by businesses in the European Court of Human Rights (ECHR), alleging a breach of the right to a fair trial because of a failure by the state's parties to ensure implementation of court decisions.[32]

Of the decisions reviewed some did not require implementation as they did not contain any order requiring action from the parties. Of the rest local experts endeavoured to conduct case-file research and follow up with the parties to learn what became of the courts' orders. This met with varied success. In some countries it proved to be difficult, most notably in Kazakhstan and Tajikistan.[33] The assessment showed that implementation/ enforcement was considered easiest in the Kyrgyz Republic, followed by Russia, however none of the countries reviewed scored strongly on this dimension, which accords with common perceptions that enforcement of court orders remains a significant problem throughout the region (see Chart 7). Problems associated with enforcement fell into two broad categories.

Legislative problems

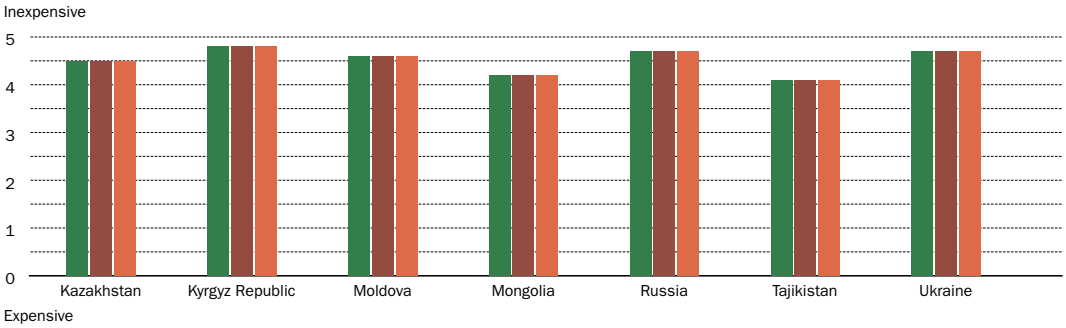
One problem was related to legislative shortcomings in the enforcement process. For example, a shareholder dispute in Ukraine resulted in a court decision finding part of a company constitution invalid; however actually giving effect to the decision and amending the constitution required formal approval by shareholders at a general meeting, which had not occurred at the time the assessment was conducted. Legislation providing for self-executing court orders would have avoided this problem. In Russia there remained a need for stronger provisions preventing respondents of commercial cases diluting or hiding assets during litigation, such as freeze orders or security for costs. In Mongolia the absence of a central charge register meant that creditors face additional risks in doing business, as debtors' ownership of collateral is difficult to verify initially and also to prove subsequently when it comes to enforcement.

Approach of the courts

Other implementation difficulties arose from the approach of judges and the functioning of courts. In particular, in some cases implementation difficulties appeared to be associated with a lack of clarity in the text of the courts' orders. Thus, in the Kyrgyz Republic, despite a Supreme Court resolution to the contrary, judgment orders are not always clear and unconditional. In Tajikistan judgment orders in cases "undoing" privatisations do not always envisage and deal with consequential and financial issues related to the invalidation (for example, a change in the value of the privatised property). Poorly crafted orders can simply be impossible to execute. Another problem is the abovementioned tendency of appeal courts too ready to remit matters for rehearing rather than dealing finally with matters where possible. Of course, this is often not at the discretion of the judge but determined by legislation. Yet where the discretion exists, it could often be more effectively exercised.

Other thematic issues arising in relation to the implementation dimension included: poor regulation of enforcement officers (Moldova); the workload of bailiffs (the Kyrgyz Republic); bailiffs delaying enforcement to seek bribes from judgment creditors (several countries);

Chart 6
Court costs, by country and legal sector



Decisions on protection of creditor rights. Decisions on property and shareholder rights. Decisions on dealings with regulators.
Note: The diagram depicts the average score for quality of decisions assigned to cost in each of the three areas of commercial law, as assessed by local commercial law firms and a regional panel. The maximum score is 5, which represents a reasonable cost regime for the decisions reviewed.
Source: The EBRD Judicial Decisions Assessment 2010.

One of the main themes to emerge was an inference of court bias in favour of the state, whether as a litigant or a regulator.

lack of personal liability of bailiffs for non-performance of their duties and the need for greater professional training (Russia); poor salaries of enforcement officers (most countries); and the need for greater court powers to punish recalcitrant judgment debtors who refuse to cooperate in the execution of court orders (for example, fines for contempt of court). Measures are being taken in several countries to address these issues. For example, in Moldova the bailiff service has been further professionalised, with incentives provided for good performance. And in Kazakhstan from 2010 a dual system of private and government bailiffs has been in operation, aimed at raising enforcement standards.

(g) Impartiality

In many transition countries a lack of judicial impartiality is often seen as the major problem affecting the courts, whether this is in the form of corruption, pro-government bias, improper influences on judges from powerful individuals in business or government, or indirectly through the court hierarchy.[34] Impartiality is a difficult dimension to measure in any categorical way through a decisions analysis, as problems with partiality typically lie below the surface. A decision itself will rarely provide hard evidence of partiality. And yet reasonable inferences can be drawn from reviewing judicial decisions. Such inferences were the principal tool for assessing this dimension in the cases reviewed. In some (limited) cases experts drew on their own knowledge and information about particular cases in scoring this dimension. The assessment results concluded that the decisions reviewed displayed a moderate level of impartiality, although scores varied considerably (see Chart 8).

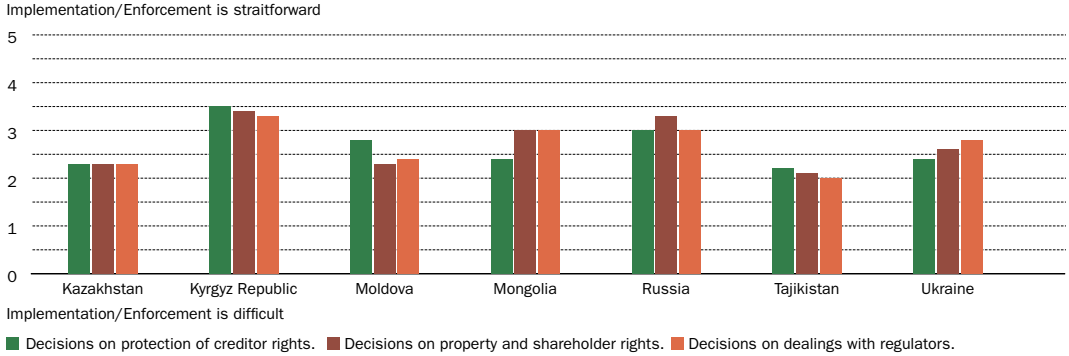
Partiality to the state

One of the main themes to emerge was an inference of court bias in favour of the state, whether as a litigant or a regulator. In many decisions there was believed to be a discernable difference in the weight given to arguments and evidence led by the state. In some countries (for example, Tajikistan), this was perceived to be more pronounced at the level of the Superior Courts. In privatisation cases, for example, experts believed courts did not always apply the same rigour and scrutiny to the arguments of state parties as they did to non-state parties. In a Moldovan case the court did not query the procurator's role in reopening a privatisation transaction, when in fact any challenge to the privatisation should have been brought by the relevant state entity, rather than the procurator. There was no discussion of this issue in the judgment. In a Kyrgyz case procedural requirements to produce original documents in evidence were disregarded, assisting the state party to succeed in its claim. In Ukraine an appeal court heard and determined an apparently trivial matter within three weeks of the decision, while other cases had been awaiting hearing for many months. This apparently special treatment, combined with the rather poor quality of the decision concerned, gave rise to inferences of partiality. Transparent case allocation and scheduling systems would be a means of dealing with such problems.

It must be said that in some cases, perceived partiality arose through a simple combination of poor reasoning (decision quality) and the state party's victory. Of course, a poorly reasoned case should not be considered biased simply because the state party won. And a losing

Chart 7

Ease of implementation/enforcement of decisions, by country and legal sector



Note: The diagram depicts the average score for the implementation of decisions assigned to decisions cases in each of the three areas of commercial law, as assessed by local commercial law firms and a regional panel. The maximum score is 5, which represents reasonable ease of implementation and enforcement of the decisions reviewed.
Source: The EBRD Judicial Decisions Assessment 2010.

In cases involving political and substantial economic interests, particularly in strategic sectors such as oil and gas, courts were considered to have a much more pronounced pro-state outlook.

party will often be inclined to complain about fairness. Yet in countries where corruption is perceived to be a significant problem and government wields great influence, such inferences will predictably be drawn. This underscores the special importance of quality decisions in cases involving state actors. Fairly or unfairly, the public will apply a higher standard of quality and probity in cases involving the state. Indeed, the perception of court bias is perhaps just as corrosive as actual bias in undermining public confidence in the courts and the investment climate.

Interestingly, the extent of the perceived bias in favour of the state varied. In an average case the involvement of the state as a party in the litigation was moderately associated with perceived bias. By no means did the state always win. Of the 43 decisions in which the state or a state body was a litigant, the state parties won on 24 occasions. Only in Tajikistan where the state won on seven out of eight cases was there a clear majority of state wins. However, in cases involving political and substantial economic interests, particularly in strategic sectors such as oil and gas, courts were considered to have a much more pronounced pro-state outlook. Such cases were almost always won by the state party.

It should be noted that in certain areas experts believed courts to have a certain disposition in favour of particular types of litigants – pro-creditor in the Kyrgyz Republic, pro-debtor in Moldova. However, it was difficult for such views to be substantiated. In the Kyrgyz Republic and Tajikistan courts were sometimes perceived as showing deference to government authorities and regulators, in part because of such bodies' better knowledge of the subject matter than either the private party or the court itself.

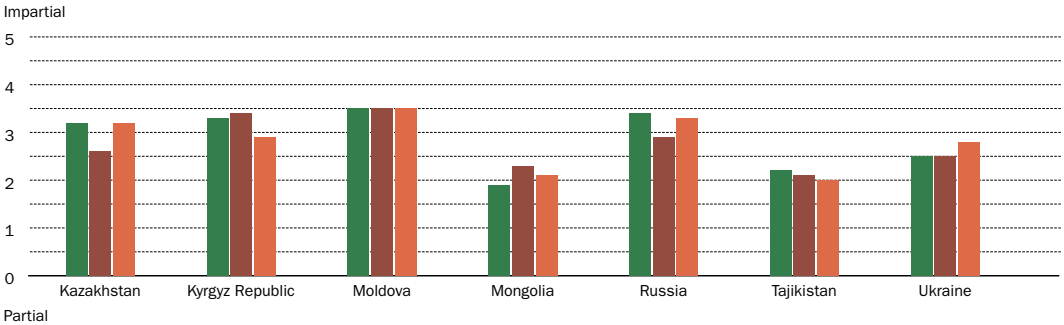
Factors contributing to perceived bias

Experts identified various factors as contributing to judges' perceived biased in some of the cases reviewed. One was concern about the practice of fixed initial terms of judicial appointment. Thus in Ukraine and the Kyrgyz Republic judges are appointed for an initial term of five years, during which they serve under the shadow of the possibility that they may not be reappointed.[35] Such arrangements contribute to a perception that judges will be wary of handing down too many decisions issued against government interests, as this may not be good for their reappointment prospects. Procedural legislation sometimes contained provisions that were ill-adapted to transparency and promoting confidence in the courts. For example, in the Kyrgyz Republic decisions of judges on whether to disqualify themselves from hearing a case due to actual or perceived conflicts of interest cannot be appealed separately from the final decision on the merits; and the consent of the court appears to be required in order to be able to record court proceedings. Lastly, low judicial salaries, particularly in Tajikistan, were considered to be making judges vulnerable to improper influence. In some countries it was believed that bribes were commonly paid to obtain judicial postings, which appointees then sought to recoup once on the bench.

Next steps for the assessment

A decisions-analysis necessarily looks into the past in an effort to draw conclusions for the future. Recent developments can alter the

Chart 8
Perceived impartiality of judicial decisions, by country and legal sector



Decisions on protection of creditor rights. Decisions on property and shareholder rights. Decisions on dealings with regulators.
Note: The diagram depicts the average score impartiality assigned to decisions in each of the three areas of commercial law, as assessed by local commercial law firms and a regional panel. The maximum score is 5, which represents a high standard of perceived impartiality in the decisions reviewed.
Source: The EBRD Judicial Decisions Assessment 2010.

Better trained judges writing better decisions in a more stable and predictable jurisprudential environment will lead to more efficient and effective courts, with judges who are better insulated from improper influences.

picture, not least in relation to the legislative framework. Further, despite selecting typical decisions, a case analysis cannot necessarily present a comprehensive picture of risk for future matters. It is of course difficult to select decisions that are truly typically of all of the relevant dimensions. The purpose of the risk analysis is to provide an estimate of the overall risk of a poor outcome in each of the seven dimensions in future commercial law cases, which can be sensitive to factors that may not have been captured by the decisions analysis. Accordingly, local experts have taken into account their scores for the cases reviewed, as well as their professional experience, considering how they would advise clients on the level of risk posed by each of the seven dimensions for future cases at the conclusion of the assessment. At the time of writing, the data on the risk evaluation were still being collated. They will be published together with a full report on the assessment in 2011.

6. Conclusion

Investors are accutely aware that legal rights, to be meaningful, must be capable of effective enforcement in the courts. In order to derive the full benefit of commercial law reform, the "law on the books" must be brought fully to life. Courts must operate effectively and enjoy business confidence.

The first of the two objectives of the assessment was to provide investors with an insight into the practical workings of the commercial courts in the countries concerned and the risks involved in commercial litigation. The results above represent the considered opinion of local and regional experts about the functioning of the courts and how able and likely they are to protect investors' rights in the event of dispute. Indeed, the assessment methodology was designed to mirror the way in which a business might seek legal advice before making an investment decision. The introduction to this article postulated a business deliberating on a potential investment and pondering its ability to protect its legal position in the courts if necessary. This hypothetical business would receive advice that, though tailored to the relevant circumstances, would be formulated against the background presented in the judicial decisions assessment. Rather than seeking opinions alone, as in some surveys, this assessment asked experts to study and evaluate the evidence – the selected decisions – in the same manner as an in-house counsel might probe external counsel's views and seek an understanding of the underlying case law.

The second objective was to produce data that could be used to encourage and assist reform] from a commercial, end-user perspective. For governments the assessment provides valuable information about how lawyers are advising their clients on the dimensions studied in the assessment. This advice is helping to shape the investment climate in their countries. Accordingly, even if governments may have grounds to disagree with the scores in a particular instance, these results should interest governments and invite further examination of the issues raised. For those involved in justice sector reform, such as the EBRD through its Legal Transition Programme, the assessment of the dimensions in the various areas and the thematic issues identified within each dimension will assist in prioritising and formulating relevant technical assistance work in the justice sector.

Most of the seven dimensions of judicial capacity studied in the assessment relate principally to court output – what courts produce and how they behave. These are of greatest interest to most court users. However, in considering possible reform activities, it is also necessary to have regard to the various "upstream factors" that affect output.[36] Judicial capacity operates within a broad social, economic, political and cultural framework. The task of reforming the quality of justice needs to consider the quality of the processes leading up to the decision.[37] These factors were not formally scored in the assessment, but many of the comments and reform recommendations made by experts lay in these areas. They included: making judicial decisions more easily available to the public and judges; fostering more efficient approaches to court management; establishing dialogue between courts, government and the business community on problems affecting commercial litigation; involving lawyers and business in the development of superior court practice notes; and strengthening the mechanisms that superior courts use to provide guidance and assistance to courts. One critical recommendation related to the need for programmatic initial and

Future project work will focus more sharply on judicial capacity issues in specific legal sectors, drawing on the results of this assessment.

ongoing training of judges in commercial law, as well as in certain judicial skills such as the preparation of decisions. This recommendation applied to all countries, but particularly to Mongolia and Tajikistan. Better trained judges writing better decisions in a more stable and predictable jurisprudential environment will lead to more efficient and effective courts, with judges who are better insulated from improper influences. Over time this will assist in improving the business climate.

The EBRD is currently focusing particular attention on judicial education in the development of its technical assistance work in the judicial capacity area. In the Kyrgyz Republic, the Bank has been assisting judicial authorities to strengthen their commercial law judicial training, with over 240 judges training in commercial law in recent years.[38] An important new phase directed at objective selection and training of new judges began recently. In 2010 the Bank commenced collaboration with judicial authorities in Mongolia and Tajikistan on strengthening commercial law judicial training. These projects will focus on enhancing judges' professional skills and engendering a greater practical understanding of markets and business disputes. In programme design, special input will be sought from the business community about the difficulties they encounter as court users. In addition, the methodology from the judicial decisions assessment will be used as a tool to measure the impact of judicial training on judges' decisions. Future project work will focus more sharply on judicial capacity issues in specific legal sectors, drawing on the results of this assessment. In this manner the EBRD hopes to assist in strengthening judicial capacity in transition countries.

Notes

[1] S. Djankov, R. La Porta, F. Lopez-de-Silanes and A. Shleifer (2002), "Courts", *Quarterly Journal of Economics,* 118, 2, 453-517; D. North (1981), *Structure and Change in Economic History,* Norton, New York; M. Weber (1927), *Wirtschaft und Gesellschaft,* Mohr, Tübingen; A. Smith (1776), *An Inquiry into the Nature and Causes of the Wealth of Nations*, University of Chicago Press, Chicago; compare with C. Milhaupt and K Pistor (2008), *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World,* University of Chicago Press, Chicago.

[2] L. Laevan and G. Mojnoni (2003), "Does Judicial Efficiency Lower the Cost of Credit?", World Bank Policy Research Working Paper 3159; R. Sherwood (1994), "Judicial Systems and Economic Performance", *Quarterly Review of Economics and Finance,* 34, Sup 1, pp. 101-16.

[3] J. Anderson and C. Gray (2007), *Transforming Judicial Systems in Europe and Central Asia,* World Bank, The Annual World Bank Conference on Economic Development, p. 331. See also: J. Anderson, D. Bernstein and C. Gray (2005), *Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future,* World Bank, Washington.

[4] Georgia withdrew from the CIS on 18 August 2008, with effect from 18 August 2009.

[5] The number of cases initially reviewed ranged from 80 to 150.

[6] See generally J. Mason (2002), *Qualitative Researching,* 2nd edition, Sage, London.

[7] By contrast, other assessment work on judicial decisions has often utilised quantitative methods, such as random sampling to achieve a small margin of error and corresponding statistical legitimacy.

[8] All dimensions are referable to the right to a fair trial in civil matters (art. 14 of the International Covenant on Civil and Political Rights (ICCPR)), to which all CIS countries and Mongolia are party.

[9] Available at: http://www.ebrd.com/pages/sector/legal/judicial_capacity/core_principles.shtml (last accessed 13 December 2010).

[10] See the discussion of predictability in Consultative Council of European Judges (CCEJ) Opinion No 11 on the Quality of Judicial Decisions, paragraph 47.

[11] *Ibid*.

[12] Principles 1 and 3, COE R (94).

[13] Art 14 ICCPR; see in particular General Comment 32 of the Human Rights Committee, paragraph 27.

[14] Reasonable costs structures for litigation are referable to the right to a fair trial under Article 14, ICCPR.

[15] This principle is referable to a fair trial under article 14 ICCPR; and the right to property, Universal Declaration of Human Rights. See also paragraph 54 of CCEJ Opinion No 11.

[16] See the *Bangalore Principles of Judicial Conduct (2002),* The Economic and Social Council; and Opinion No 3 of the Consultative Council of European Judges on the Principles and Rules Governing Judges' Professional Conduct.

[17] Office of the General Counsel (2010), "Commercial Laws of the Russian Federation January 2010: An Assessment by the EBRD", EBRD, London, Chart 2, p. 4, available at: http://www.ebrd.com/downloads/sector/legal/russia.pdf (last accessed 19 January 2011).

[18] Core Principles for Effective Judicial Capacity, Principle 7.

[19] See CCEJ Opinion No 11, paragraph 47; most Council of Europe member states are civil law countries.

[20] The Council of Europe's European Commission for the Effectiveness of Justice (CEPEJ) encourages the use of court practices and policies on internal systems for promoting consistency of jurisprudence. See "Checklist for promoting the quality of justice and courts", item II.3.1.

[21] There are various instruments and practices, variously described: постановления, обзоры, информационные письма, резолюции, обобщение [Regulations, Judicial Overviews, Informational Letters, Resolutions, Briefs].

[22] See: http://www.arbitr.ru and http://kad.arbitr.ru (last accessed 13 December 2010).

[23] Federal Law 262-FZ, "On providing access to information on courts' activities".

[24] See the speech by Mr Ivanov, Chairperson of the Supreme Arbitrazh Court of Russia, discussing this issue in the context of precedents: Speech of the Chairmen of the Supreme Arbitration Court of Russian Federation during the Third Senate Reading in Constitutional Court of Russian Federation on March 19 2010, "Speech about Precedent" Выступление Председателя Высшего Арбитражного Суда Российской Федерации на Третьих Сенатских Чтениях в Конституционном Суде Российской Федерации 19 марта 2010 года: «Речь о прецеденте», available at: http://www.arbitr.ru/press-centr/news/speeches/27369.html (last accessed 13 December 2010).

[25] Court data revealed that a significant proportion of defects identified in supervisory review by the Kyrgyz Republic Supreme Court entailed a breach of this requirement.

[26] It was noted that many judicial appointees come from the court system and have good knowledge of procedure and general principles, but lack professional experience in practical business matters.

[27] For example, in 2009 the Supreme Economic Court of Ukraine heard 25,700 cassation appeals alone, a 14.5 per cent increase on 2008.

[28] See: http://www.doingbusiness.org/data/exploretopics/enforcing-contracts (accessed 13 December 2010).

[29] See the article in this edition of *Law in transition* by Jana Schuhmann.

[30] For example, the assessment countries perform well in the World Bank *Doing Business* survey for 2011.

[31] For example, experts noted that in Ukraine it is estimated that there are some 2 million such decisions awaiting enforcement.

[32] Corporations have standing to bring claims in the ECHR; contrast the position with the UN Human Rights Committee, where only individuals have standing.

[33] Note: there was minimal data available from Tajikistan on the enforcement dimension.

[34] See for example Transparency International's 2010 Global Corruption Barometer assessed public perceptions of corruption in various institutions, from 1 (not corrupt) to 5 (very corrupt). For courts, the results were as follows: Moldova – 3.9; Mongolia – 4.1; Russia – 3.7, Ukraine – 4.4: Other assessment countries were not covered. See http://www.transparency.org/policy_research/surveys_indices (last accessed 14 December 2010).

[35] However, Supreme Court judges in the Kyrgyz Republic are appointed with tenure until retirement age.

[36] See generally: L. Hammergren (1999), *Diagnosing Judicial Performance: Toward a Tool to Help Guide Judicial Reform Programs,* World Bank, which discusses various approaches to developing judicial capacity tools.

[37] See J. Jean (2007),"La qualité des décisions de justice au sens du Conseil de l'Europe", *CEPEJ Studies*, No 4, p. 34.

[38] See the article by M. Nussbaumer and I. Rabinovich in this edition of *Law in transition.*

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04

Raising the bar for judges in Central Asia: five years of judicial capacity building in the Kyrgyz Republic

MICHEL NUSSBAUMER AND IRINA RABINOVICH

This article takes stock of five years of technical cooperation with the judicial authorities in the Kyrgyz Republic, as provided under a joint EBRD–IDLO project. The assistance focused on raising the technical skills of judges handling commercial disputes, a crucial effort to help attract foreign investment to the region. The authors take a critical look at the lessons learned and suggest constructive approaches to issues such as sustainability and local ownership.

Introduction

Building judicial capacity in transition countries has long been identified as a key element in successful transition to a market economy. Judiciaries in the region have suffered from endemic weaknesses that undermine the confidence of investors.[1] The international community has launched initiatives to remedy this situation. However, as far as the post-Soviet area is concerned, such initiatives had not focused directly on commercial law until relatively recently. There was therefore a gap to be filled, which the EBRD, together with its partner the International Development Law Organization (IDLO), sought to address. The ultimate objective was to enhance the ability of judges to deal effectively with commercial law matters, and in the longer term to improve the investment climate in the region – investors must have confidence that their rights will be upheld by local courts should the need arise.

Situation in the Kyrgyz Republic

When the EBRD and IDLO started their judicial capacity building project in the Kyrgyz Republic in 2005 there were numerous challenges. The local Judicial Training Centre (JTC), then under the Court Department of the Ministry of Justice, was a small entity with very limited funding. It organised a few seminars every year on various topics, often dictated by donor preferences. There was no systematic approach to training judges on commercial matters.

Prior to 2005 some donors had begun working with the JTC and the Ministry to bring about some improvements. The German agency Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), now called Deutsche

Thanks to very proactive support from the then JTC director, the EBRD and IDLO rapidly launched a preparatory phase including an assessment of judicial training needs in commercial law.

Gesellschaft für Internazionale Zusammenarbeit (GIZ), was conducting its programme to support legal and judicial reform in Central Asia, providing advice to the government on civil and company law reform, as well as support for judicial training activities. USAID had assisted in the establishment of the JTC and the creation of a judges' association, and had assisted in the area of commercial law reform. However, the funding for the American project was coming to an end and the German assistance was mainly focusing on matters outside the sphere of commercial law. There was a need to be met – designing a strategic approach towards raising the technical knowledge and practical skills of Kyrgyz judges in commercial law. As part of its Legal Transition Programme, the EBRD was prepared to meet this challenge. IDLO was invited as a natural partner given its strong track record of developing judicial capacity building programmes around the world.

Assessment of needs and action plan

Thanks to very proactive support from the then JTC director, the EBRD and IDLO rapidly launched a preparatory phase including an assessment of judicial training needs in commercial law. One of the first steps in 2005 was to carry out a survey of judges responsible for hearing commercial law matters. The survey included questions on how judges actually preferred to be trained and on what subject matter, as well as a test of their level of knowledge of various aspects of commercial and financial law. Based on that survey and on interviews with local stakeholders, an action plan was prepared and submitted to the Supreme Court in 2006 for endorsement. At that stage, the plan was to focus assistance on *sitting judges*, that is, those already holding judicial office.

Implementing the action plan

The action plan provided for five components. The first provided institutional support to the JTC in matters such as strategic planning, financial management and fundraising, management of people and developing a formal judicial training curriculum and structure. Various consultants spent time working on these matters with JTC staff. Some advice was better received than other. In particular, the JTC management demonstrated a great deal of improvement in implementing the project consultants' recommendations on strategic planning and curriculum development. On the other hand, the financial management adviser had a much harder time convincing the JTC leadership that they should make an effort to learn how to properly define the JTC's financial needs and to raise funds, other than by lobbying with the government. This is due to a deeply entrenched cultural and institutional bias in favour of exclusive government support.

The second component delivered classroom training to approximately 240 judges, that is, the total judicial corps involved in commercial matters in the country. A pool of some 40 local trainers, mainly senior judges, were trained in interactive teaching methodologies and asked to prepare training materials based on local legislation and practice. Ten topics were selected, taking into account the assessment of needs described above.[2] Judges were trained in groups of 25–30 participants, whereby each group would spend three days in a venue outside Bishkek to go over the theory and practice in that area. The groups were trained back-to-back so that a given topic would typically last a little over a month. Some of the topics deemed more specialised were only administered to judges of the commercial panels (up to 90 judges).

The third component saw the creation of a commercial law library for judges, the first one in the country. The facility was established in the Supreme Court building and staffed with information specialists and computers.

The fourth component included three-week internships for junior judges with leadership potential in the commercial courts of various cities across Kazakhstan and Russia. This was an opportunity for the judges to see for themselves the practice of judges in economically more advanced jurisdictions.

The fifth component was the publication of a bench book giving judges the latest on judicial theory and practice in the commercial sector. The book was published in both Russian and Kyrgyz.

Funding for the project was provided by the governments of Japan and Switzerland, as well as the EBRD Early Transition Countries Fund.[3]

It was considered that as a result of the project's work there had emerged a more homogeneous application of the law in economic cases.

Project evaluation in 2009

During 2008 the EBRD and IDLO commissioned an independent evaluation of activities to date. The evaluation was carried out primarily through interviews with stakeholders. It was encouraging to read that a positive impact had been noted by court users in the country following the Action Plan implementation. According to the evaluation,[4] the project had met a substantial demand in commercial law education for the judiciary, brought about clarification of the existing laws and contributed to enhancing the quality of judgments. It was considered that as a result of the project's work there had emerged a more homogeneous application of the law in economic cases. However, the evaluation raised some concerns, such as whether the JTC would be fully able to conduct commercial law training independently once the project was completed. It also recommended enhanced evaluation techniques to enable firmer conclusions to be drawn on whether the project was meeting its objectives – such as conducting formal analyses of judicial rulings of judges trained by the project. The recommendations were carefully studied and taken into account in defining the further work of the project.

Overall, we can say with confidence that judicial training arrangements in the Kyrgyz Republic are much improved. The project's efforts to systematise judicial training and strengthen the JTC have meant that improvements have been seen not only in relation to training in commercial law matters, but across the gamut of judicial training areas.

Subsequent actions

In 2008–09, EBRD and IDLO provided further technical assistance to the Kyrgyz Supreme Court and the Judicial Training Centre. This included training of recently appointed judges who had not had the benefit of previous seminars, and additional training on topics such as civil process judicial skills (including decision writing), administrative law and the use of information technology.

During 2009 the Kyrgyz authorities requested additional assistance to put in place a training system for newly appointed judges. This new focus corresponded to a pronounced need in the country. The EBRD and IDLO had deliberately decided at an earlier stage to address this after the initial project on sitting judges had been completed. In part this was because the legislative basis for a candidate

Table 1
Commercial law judicial capacity building project in the Kyrgyz Republic

	Situation in 2005	… and in 2010
Management of judicial training	Judicial training centre (JTC) under Ministry of Justice	JTC under the Supreme Court, more independent
	Low profile, negligible budget	Higher status, enhanced budget
	Few management skills	JTC professionalised, trained in curriculum development, strategic planning, HR, institutional management
Scheduling of judicial training	Ad hoc, donor driven	Programmatic, needs-based
		Built on strategic plans and annual plans of action
Content of training	Largely focused on public law	Substantial focus on commercial law
	Generally rule-based, lecture style	Attention to practical judicial skills, interactive methodology
Training resources	Almost no commercial law training resources	Fully resourced commercial law library at the Supreme Court Ongoing subscriptions to legal databases Handbooks and bench book on key commercial law subjects
Public perception of judges' ability in commercial matters	Very poor	Improved

... the events of both 2005 and 2010 involved an undercurrent of dissatisfaction with perceived institutional corruption, a problem which the project was recognised as combating; if not directly, then at least indirectly – raising judicial capacity helps to insulate judges from improper influences.

judge programme was not yet in place. Just as importantly, training of candidate judges is inherently politically sensitive, as it is associated with judicial selection. It was considered prudent to broach this issue only when the project had demonstrated some success and strong relationships had been forged. Thanks to the impetus provided by the Millenium Challenge Threshold Programme,[5] the authorities set about making the necessary legislative changes and earmarking funding for the initiative. At the time of writing this article, the new phase is ready to be launched, subject to final arrangements following the political changes in the country in 2010. The purpose of the new phase will be to assist the Supreme Court, the Council of Judges and the JTC in establishing and institutionalising a well functioning Initial Judicial Training Program (IJTP).

Project activities will include:

- assisting the Council of Judges and the JTC in developing the IJTP rules and procedures to enable implementation of the Regulation on Initial Training
- assisting the JTC in recruitment and training of faculty
- advising the JTC management on how to sustainably administer the IJTP
- designing guidelines for implementing a skill-based curriculum of initial judicial training in accordance with the standards of international best practice, covering judicial ethics, judicial skills and legal knowledge
- assistance to Kyrgyz authorities in providing classroom training for 20 judicial candidates in accordance with the approved curriculum
- assistance to Kyrgyz authorities in delivering internships for 20 judicial candidates at various courts and institutions as provided in the approved curriculum.

Challenges and lessons learned

During five years of project implementation, a number of challenges were encountered by the project team and the authorities. Some of the key issues and lessons learned are set out below.

Political instability

During the life of the project, no less than three presidents of the country were in office, following two “revolutions” and a number of violent events. Despite this unstable political environment, all project activities were able to be carried out. Critical to the project’s success in this regard was the perception amongst government counterparts that the project’s objectives and the project team were politically non-aligned and acting in the best interests of the country. In fact, the events of both 2005 and 2010 involved an undercurrent of dissatisfaction with perceived institutional corruption, a problem which the project was recognised as combating; if not directly, then at least indirectly – raising judicial capacity helps to insulate judges from improper influences.

Local ownership

A factor critical to success is having a dependable local partner. Throughout the life of the project there were several key counterparts and whilst all supported the project, they had varying degrees of enthusiasm and dynamism. It is almost trite to say that the most progress is made with the most enthusiastic counterparts; this was certainly the authors’ experience in implementing this project. It is important to choose one’s partners carefully. However, often one cannot choose – one’s trusted counterpart will move on in the state apparatus, or be moved on. In this regard, it mitigates risk to develop relationships with various figures and to ensure that the project has a positive, politically neutral profile at the governmental level.

JTC reporting line

The authors’ own experience was that support for the project improved demonstrably once the JTC passed under the Supreme Court’s jurisdiction, which happened as part of the 2008 institutional reform. Previously, the JTC had been placed under the Court Department, an agency reporting to the Ministry of Justice. There was a greater sense of project ownership by local judges after the change, not to mention a higher level of coordination, for example on sending judges to seminars or internships.

Creating sustainability: the eternal challenge

Technical assistance in the justice sector often raises the issue of sustainability, more

> ... judicial authorities must ensure that judges are freed from their regular court duties for a sufficient time to enable them to participate in training, and that they are strongly encouraged (and provided with incentives) to attend.

particularly so when it comprises elements of training. How can the aid provider ensure that training activities will persist once the foreign-financed project comes to an end? In the EBRD–IDLO Kyrgyz project, particular attention was paid to this aspect. First, a significant training of trainers programme was put in place, resulting in there being a large pool of future trainers for the local authorities to draw on. The trainers were assisted in preparing comprehensive, user-friendly textbooks and materials that can be updated and used in the future. There was also a great deal of know-how transfer in relation to preparing for and conducting seminars. Personnel at the JTC observed and participated in the organisational process alongside the project experts. The library and bench book are by definition items which will stay on after the project has come to end. Just as importantly, skills were developed and relationships forged with institutions in other post-Soviet states to enable the local authorities to keep these resources up to date in the future.

In addition to the above, it was critical that the project team conducted dialogue with local authorities to persuade them to allocate sufficient budgetary resources for judicial training in the future. This resulted in an improved budget and enhanced status for the JTC. At the same time, the project advised JTC officials on possible options to pursue legitimate self-funding opportunities. One example cited from Tajikistan was charging a fee for teaching lawyers to speak English.

Local trainers' remuneration

A key element of sustainability is the training of local trainers. The question inevitably arises as to what the remuneration of such trainers can be. In the course of the project there was a certain tension between the desire of the EBRD and IDLO to retain the best trainers and demand the best output, and the need to be sensitive to market conditions and the rates paid by other aid providers. Pay too little and the quality suffers; pay too much and you spoil the market. Being the first project of its kind for the EBRD, it was of particular importance that the best people be retained, and that training arrangements were of the highest quality. Thus, whilst being aware of the controversial nature of their approach, the project promoters therefore erred on the side of quality and higher rates.

Mandatory training

It is important that judicial training be compulsory. To enable this to happen, judicial authorities must ensure that judges are freed from their regular court duties for a sufficient time to enable them to participate in training, and that they are strongly encouraged (and provided with incentives) to attend. In the Kyrgyz project, this aspect was well understood by the Supreme Court which provided the necessary support.

Training of trainers: breaking with tradition

Over the years, IDLO has developed an interactive teaching methodology, which it has successfully applied to judicial training worldwide. The crux of this methodology is based on the assumption that judges are authoritarian by nature and by profession and must not be told what to do, but must instead themselves decide what is right and wrong. Therefore, they need to be patiently persuaded to consider any new notions, which, once adopted, becomes their own. They respect well founded legal and logical arguments, rather than statements to the effect that something is (or is not) "best international practice". Judges in post-Soviet states and the Kyrgyz Republic in particular, are generally sceptical about the universal applicability of internationally accepted approaches to their particular realities. This scepticism can be well-founded, such as in the case of new legislation written by well-meaning international consultants who lack understanding of the local constraints under which the legal system functions. This is the main reason the project was asked to ensure that, to the best of our abilities, training be delivered by senior Kyrgyz judges rather than international experts, and that if local expertise were found to be insufficient, experts from other post-Soviet states would be invited to participate. This is not just the issue of language (although all training participants prefer that training be conducted in their native language), but of the commonality of problems judges in post-Soviet countries have to face.

Ongoing evaluation

Technical assistance projects must be evaluated. This is required by the Paris Declaration on Aid Effectiveness.[6] It is also common sense. As noted earlier, a formal evaluation of the project was conducted in 2008–09. In December 2008 judges trained

... ongoing evaluation work is critical, especially in long projects, to ensure that a tangible impact is being felt and that work continues on the right path.

by the project were surveyed on various matters related to the project's impact on their work. Table 2 sets out some of the responses. Such ongoing evaluation work is critical, especially in long projects, to ensure that a tangible impact is being felt and that work continues on the right path.

Table 2
Data on project impact

1. How often do you apply the knowledge and skills you acquired during training in your cases?

	Total %
Never	–
Not very often	8.9
Frequently	37.6
In every case	51.5
Don't know/NA	2.0
Number of respondents	202

2. Do you still have the materials you were given during the EBRD/IDLO training courses?

	Total %
Yes	96.5
No	1.5
Don't know/NA	2.0
Number of respondents	202

3. If yes, how often do you refer to your training materials to assist in your work?

	Total %
Never	–
Not very often	16.6
Regularly	45.7
All the time	35.7
Don't know/NA	2.0
Number of respondents	199

Source: Excerpt from the IDLO/EBRD Kyrgyz Judicial Capacity Building Evaluation Report, April 2009, prepared by Vitosha Research (effective date December 2008).

Adapting the Kyrgyz model to other countries

In October 2006 the EBRD and IDLO organised a regional conference on judicial capacity building in Central Asia. Delegates attended from Kazakhstan, the Kyrgyz Republic, Mongolia and Tajikistan, sharing their experiences of promoting judicial capacity in the commercial sector.[7] This conference was the first step towards a regional approach to commercial law judicial training which both the Bank and IDLO are keen to promote. It established relationships and dialogues which led to the apprenticeship programme for Kyrgyz judges in Kazakhstan, the use of Kazakh trainers on subjects where the Kyrgyz judges had limited expertise, as well as the sharing of training materials and technical documents (for example, strategic plans for judicial training bodies). The EBRD is now moving to develop more activities in the region, deploying and adapting where relevant its materials and experience from the Kyrgyz Republic to other countries.

At the time of writing, project work is under way by the EBRD on targeted commercial law judicial training programmes in Mongolia and Tajikistan. We hope that future issues of *Law in transition* will be able to report on solid achievements in these countries.

Notes

[1] See generally, *Law in transition* (2005), "Courts and judges", especially page 39 onwards.

[2] Modules covered real estate, bankruptcy, secured transactions, arbitration, contracts (including procurement and the sale of goods), competition law, securities regulation, accounting for judges, business organisations and tax. There was also a small course organised for bailiffs on enforcement of judgments.

[3] Supported by the governments of Canada, Finland, Ireland, Japan, the Netherlands, Norway, Spain, Sweden, Switzerland, Taipei China and the United Kingdom.

[4] See: www.ebrd.com/downloads/legal/judicial/evaluate.pdf (last accessed 14 December 2010).

[5] For details of the Millennium Challenge Corporation, see mcc.gov.

[6] Text available at oecd.org (last accessed 24 January 2011).

[7] See proceedings at: www.ebrd.com/downloads/legal/judicial/bishkek.pdf (last accessed 14 December 2010).

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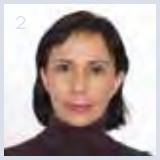
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05

The publication of commercial court decisions in the western Commonwealth of Independent States

PAUL BYFIELD

This article looks at how widespread the practice is of publishing judicial decisions in four CIS countries: Belarus, Moldova, Russia and Ukraine. The publication of judicial decisions is one of the most effective tools to curb corruption within the justice system.

Introduction

In many countries there is an accepted practice that court decisions will be published and made available to the judiciary, academia and the general public. Ready access to decisions promotes transparency and fosters better judicial decision-making. It is especially beneficial to those who invest in these jurisdictions as they can become more aware of the scope of the protection of their rights and duties. In many Commonwealth of Independent States (CIS) countries[1] there has been very limited public access to decisions. However, there is now an emerging practice in some countries regarding the publication of court decisions. This is a very positive development. The publication of judicial decisions is one of the most effective tools to curb corruption within the justice system, one that reduces corruption but also the perception of corruption.

Economic downturns in the 1990s contributed to these problems by severely limiting the resources available to judiciaries or ministries of justice to update their facilities. Very few international donors focused on judicial capacity building, and in any case most donors were not allowed to fund construction and infrastructure projects at that time. Economic resurgence since 2000 has provided more resources to national government budgets, and some portions of those resources are improving judicial systems. The World Bank and other donors are providing funding to upgrade information technology (IT) infrastructure, including web site hosting. These initiatives are supplementing existing improvement programs financed by government budgets. Courts are installing more IT equipment; they are connecting district and higher-level courts together through wide-area networks (WAN) and developing web sites for information sharing. Frameworks are being established which are most amenable to public dissemination of judicial decisions.

Where court decisions are not regularly published it can lead to uncertainty and reluctance on the part of foreign investors to choose to do business in that jurisdiction.

This article will consider the current situation in four CIS countries: Belarus, Moldova, Russia and Ukraine, in an attempt to discover how widespread the practice is of publishing judicial decisions. The four countries referred to above are all culturally and politically linked through their historic association with the Soviet Union and more recently the CIS. They have all therefore developed within the last 20 years from the former Soviet Union's legal system. This closed system was very different to the current global legal market, which is often characterised by open access to domestic, foreign and international legal institutions. Participants in the international commercial market rely on the publication of court decisions in order to know what their rights are in the jurisdictions that they operate in. Where court decisions are not regularly published it can lead to uncertainty and reluctance on the part of foreign investors to choose to do business in that jurisdiction.

In order to make comparisons one has to look at the current norms and international standards that can be applied in order to assess whether this region and the four countries in particular are adapting their approach to making court decisions available to the public.

International standards

First and foremost, international standards such as the International Covenant on Civil and Political Rights[2] guarantee the right to a fair trial. This entails the notion of equality of treatment. Clearly, open access to decisions allows courts to function in a more consistent and predictable way. However, beyond the realm of formal legal standards, various other standards and guidelines are very relevant. In particular, the ABA Rule of Law Initiative[3] has formulated its Judicial Reform Index (JRI)[4] which:

"…….. is an innovative tool developed by the ABA Rule of Law Initiative (ABA ROLI) to assess judicial reform and judicial independence in emerging democracies and transitioning states. It offers international organisations, development agencies, technical legal assistance providers and local reformers a reliable means to target judicial reform programs and monitor progress towards establishing more accountable, effective and independent judiciaries."

The JRI is comprised of 30 factors, however there are three factors (23-25), that are relevant and key to the issue of publication and transparency of decisions.

Factor 23. Public and Media Access to Proceedings
Courtroom proceedings are open to, and can accommodate, the public and the media.

Factor 24. Publication of Judicial Decisions
Judicial decisions are generally a matter of public record, and significant appellate decisions are published and open to academic and public scrutiny.

Factor 25. Maintenance of Trial Records
A transcript or some other reliable record of court proceedings is made and is available to the public.

The JRI has been in use since 2001 and these three factors quite clearly advocate the need and requirement for transparency; however, one could theorise that they should be more detailed and specify where and how court decisions should be published. It could be deemed as being too specific a requirement to designate who should publish the decisions. A more recent set of standards are found in the OSCE Kiev Recommendations on Judicial Independence in eastern Europe, the south Caucasus and central Asia ("the Kiev Recommendations"),[5] which state:

32. Transparency shall be the rule for trials. To provide evidence of the conduct of judges in the courtroom, as well as accurate trial records, hearings shall be recorded by electronic devices providing full reproduction. Written protocols and stenographic reports are insufficient. To enhance the professional and public accountability of judges, decisions shall be published in databases and on web sites in ways that make them truly accessible and free of charge. Decisions must be indexed according to subject matter, legal issues raised, and the names of the judges who wrote them. Decisions of bodies deciding on discipline shall also be published (see also para 26).

33. To facilitate public trust in the courts, authorities should encourage the access of journalists to the courts, and establish positions of press secretary or media officer. There shall be no barriers or obstacles to journalists attending trials.

> ... a relatively smaller percentage of the population has access to the internet in their homes and while the development of public access terminals is on the increase, it is not enough for the population mass that occurs in large towns and cities.

The Kiev Recommendations are more detailed in their proposals, indicating specifically that web sites should be the preferred medium to make decisions public, perhaps indicative of the fact that the Kiev Recommendations were adopted very recently (in June 2010) in an era where web-based dissemination of information is the norm. Of course in some CIS countries there are not yet the resources or infrastructure to do this.

The two sets of standards listed above are both instrumental in setting guidelines and useful reference points for further development of transparency in this region. However, neither the JRI nor the Kiev Recommendations expressly state that significant court decisions should be routinely reported in the national press. A good example here from the UK is *The Times Law Reports*. Publishing court decisions in official publications (that is, those maintained by the courts or judicial system) do make them available to court personnel and to those involved in the legal sector as a result of their close involvement in this subject, but it is unlikely that the general public will have regular access to these publications. Of course it has been said that the internet is the ideal medium for the publication of this kind of material (as it provides access to a wide audience, including internationally). This is undoubtedly true but in emerging economies access to the internet is also problematic; a relatively smaller percentage of the population has access to the internet in their homes (in comparison to western Europe, North America and so on) and while the development of public access terminals (such as those in public libraries and internet cafes) is on the increase, it is not enough for the population mass that occurs in large towns and cities.[6] In order to make court decisions more accessible to the wider public there has to be full use of all of the above types of medium available and summaries of the most significant court decisions should be published in at least one of the main national daily newspapers. This would ensure good access for a broad spectrum of the domestic population and for the international audience.

Belarus

Belarus is a country with a population of approximately 9.5 million people,[7] which is well-served by a structured and seemingly efficient online legal information system that publishes and provides access to codes and national legislation. The National Centre of Legal Information (NCLI)[8] is the state body that publishes the official legal documentation of the Republic of Belarus, both in printed and electronic form. Decisions of the Constitutional Court,[9] the Supreme Court[10] and Supreme Economic Court[11] are published in official bulletins. The national daily and weekly newspapers are also very influential domestically as most of them are state-owned or subsidised; Russian newspapers also have a significant influence in the market. However, given the strong state control over the economy and the political sphere in the country, it is noteworthy that access to judicial decisions is reasonably open. This is not the case in other CIS countries with a similar political profile to Belarus. It can be argued that, in the area of publication of judicial decisions, Belarus has made quite good progress.

Moldova

Moldova's publication of laws and court documents is not as systematic as in Belarus. The transparency of the judicial system overall is being improved, but significant challenges remain. In Moldova many cases are still examined in judges' chambers, where there is limited space for members of the public who would like to attend the hearing. This could be considered the antithesis of an openly published written decision.

In 2007 the Law on Judicial Organisation was amended to impose on all courts an obligation to publish their judgments online. The amendment was to take effect no later than 1 January 2010. To date courts appear to have complied with this requirement, however, only the site of the Supreme Court of Justice is more or less searchable by subject matter; databases of other courts are not searchable by subject matter or by name of dossier.

The Constitutional Court was founded in 1995 and the first volume of decisions was issued in 1998. The judicial system underwent some re-organisation in 2003 and this resulted in five regional courts[12] replacing the Court of Appeal. The main official source of legal publishing is the "Official Gazette" (*Monitorul Oficial*) but access to the web site was closed by the Ministry of Internal Affairs. This leaves the state controlled gazette as the only central

In Russia, as in other countries, international organisations have taken steps to engage with the state and the judiciary to implement changes.

source of legal material. The law schools in the major universities publish their own legal reviews, for example, Moldova State University has it own *Analele USM. Seria Drept* and the Free International University of Moldova *Analele ULIM. Seria Drept.* Both of these publications were first issued in 1998. As popular as these publications are however, their circulation is largely limited to current students and alumni. Additionally, the most influential Moldovan law reviews are *Private Law Magazine, National Law Magazine* and *Juristul Moldovei Newspaper* (previously *The Law Newspaper*).

Russia

Significant efforts have been undertaken recently to reform the courts and the judiciary. In Russia the government set up a network of Legal Information Centres in public libraries and other locations in the late 1990s, where the public can access information on laws and the justice system. Judiciaries were not at all open and transparent in Soviet times, and a certain legacy of minimal transparency persisted for many years.

Now Russia appears to be reacting positively to the challenge of ensuring greater publication of and access to legal and judicial information. Clearly Russia is financially better placed to provide the relevant infrastructure to do this than some of the other former republics of the Soviet Union. However, it must be acknowledged that law and attitudes have changed considerably in recent years. Laws are routinely published in the government-owned daily newspaper *Rossiiskaia Gazeta* ("Russian Newspaper") which is considered an official publication. This newspaper also publishes decisions of the Constitutional Court but less regularly, and some legal documents are published in the supplements to the newspaper.

In addition, the Supreme Court of the Russian Federation and the Supreme Arbitrazh Court of the Russian Federation regularly issue general court rulings that serve as explanations on matters of judicial practice, which are binding on the courts of the lower instances of the respective judicial branches. In practice, state authorities, companies and individuals also take these general rulings into consideration when facing relevant legal issues.

Although court decisions are not regarded as the sources of law in Russia, they usually serve as good legal guidance for legal practitioners. Decisions of the Constitutional Court[13] can be found on the web site: a selection is also in English, or has an English summary. Decisions of the Constitutional Court are also published in the *Russian Gazette* or in the official gazettes – *Bulletin of the Federal Assembly of the RF* and *Collection of Legislation of the RF*.

In Russia, as in other countries, international organisations have taken steps to engage with the state and the judiciary to implement changes. In 2006 the International Bank for Reconstruction and Development (IBRD) signed an agreement with Russia for a US$ 50 million loan to finance the Judicial Reform Support Project (JRSP)[14] with the aim of fostering transparency and the private sector by reforming the judicial system. The most relevant component of the project (Component A) relates to transparency and accountability:

(ii) research and analysis on further development of transparency, publication, openness and accessibility of judicial decisions, processes and practices, including obligatory publication of judicial decisions; and analysis on the introduction of modern information and communication technologies in judicial systems and on the further integration of the RF judicial system.

Perhaps the most important development occurred in 2008, when President Medvedev signed the Federal Law 262-FZ of 22 December 2008: "On Securing Access to Information on the Activity of Courts in the Russian Federation." Prior to the adoption of the law there had been no mechanism for the routine publication of court decisions. This was particularly a concern as the relevant Freedom of Information legislation had been considered and adopted in early 2009. Prior to this a draft law had been in circulation for some time but it had not clearly examined the problem, in fact there was a clear exemption relating to court proceedings. The new law was discussed at a round table event convened in Yekaterinburg in July 2010 where it was concluded by some who attended that the law as stated would not solve the problem of transparency and corruption. Participants concluded that a forum (involving representatives from the Judiciary and Civil Society) should be adopted to tackle this problem. This was a unique suggestion as it is one of very few occasions since 2004 that civil society has been involved with the State to address these problems.

Ukraine

In Ukraine there are certain mechanisms in place for publishing and disseminating laws and some higher court decisions (see below). However, several challenges remain and judicial reform programmes are under way in the country. Ukraine has agreed with the EU on an Association Agenda[15] in which it identifies the need to improve transparency in the judicial system. USAID, via the Millennium Challenge Corporation (MCC) has also undertaken a Combating Corruption and Strengthening Rule of Law in Ukraine (MCC UROL) Project. Proposed amendments to the Law on Access to Court Decisions were also recommended following a roundtable implemented by MCC UROL.

The capacity to deal with new cases is also a problem for the judiciary as some six million new cases enter the courts each year. These are currently handled by about 6,500 judges. The increase in demand for access to courts should also provide an increase in the availability of training and investment in judicial systems that have slowly increased their capacity. This could have a negative effect though, as those court decisions due to be published could be stalled for several months (or even years) before they are made public.

According to the Constitution, laws and other normative legal acts that determine the rights and duties of citizens shall be brought to the notice of the population otherwise they are not in force. Laws and other acts of the Supreme Council are officially published in the state Ukrainian language in the weekly *Official Bulletin of the Supreme Council* and in the daily newspaper of the Supreme Council, *Voice of Ukraine*. Courts decisions are published in special digests of law reports. *The Bulletin of the Supreme Court of Ukraine* and *The Compilation of the Resolutions of the Plenum of the Supreme Court of Ukraine* contains decisions, decrees and interpretations. The information and analytical center *Liga* maintains the fee-based online system LIGA-ZAKON[16] which provides access to all current legislative acts and draft laws in Ukrainian and Russian and a digest of economic press and court reports.

Conclusion

The apparent growth in the capacity to publish court decisions has been fuelled by the modernisation of the national court systems and a need for those systems to meet international standards in order for them to be part of the global legal community. In some circumstances the size of the market can often dictate the scope of assistance provided by international organisations; however, smaller jurisdictions with some accurately targeted funding and well run projects can produce effective reforms. Foreign investors will typically require transparency in order to invest money in an economy. While it is obvious that the region has not yet reached the required levels set by organisations such as the European Union, the steady improvement in at least some of these countries has created confidence.

Notes

[1] www.cisstat.com/eng/cis.htm (last accessed 6 January 2011).

[2] www2.ohchr.org/english/law/ccpr.htm (last accessed 6 January 2011).

[3] www.abanet.org/rol/about.shtml (last accessed 6 January 2011).

[4] www.abanet.org/rol/publications/judicial_reform_index.shtml (last accessed 6 January 2011).

[5] www.osce.org/odihr/documents/71178 (last accessed 6 January 2011).

[6] See P. Byfield (2009), "The legal aspects of internet access in central Asia", *Law in transition*, online: www.ebrd.com/downloads/research/law/lit09e.pdf (last accessed 6 January 2011).

[7] National Statistical Committee of the Republic of Belarus, http://belstat.gov.by/homep/en/census/2009/main.php (last accessed 6 January 2011).

[8] www.law.by/work/EnglSite.nsf (last accessed 6 January 2011).

[9] http://kc.gov.by/en/main.aspx?guid=1901 (last accessed 6 January 2011).

[10] www.supcourt.by/ (last accessed 6 January 2011).

[11] http://court.by/en/ (last accessed 6 January 2011).

[12] The Chisinau Court of Appeal, Balti Court of Appeal, Bender Court of Appeal, Cahul Court of Appeal, Comrat Court of Appeal and the specialised Curtea de Apel economica (Economic Court of Appeal).

[13] http://ks.rfnet.ru/ (last accessed 6 January 2011).

[14] http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/RUSSIANFEDERATIONEXTN/0,,contentMDK:21223093~menuPK:305605~pagePK:2865066~piPK:2865079~theSitePK:305600,00.html (last accessed 6 January 2011).

[15] http://eeas.europa.eu/ukraine/docs/2010_eu_ukraine_association_agenda_en.pdf (last accessed 6 January 2011).

[16] www.ligazakon.ua/ (last accessed 6 January 2011).

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06

Recent developments in judicial reform in Croatia

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In 2004 Croatia was named as a candidate for admission to the European Union. As such it has three major challenges to face: judicial reform; public administration reform; and progress in the fight against corruption and organised crime. This article focuses on recent developments in the first of these challenges – judicial reform.

Introduction

Judicial reform is a complex area, whose main goals include improving the work of judicial bodies in the country, fostering the rule of law by strengthening and modernising the judiciary, providing citizens with greater legal security and enhancing the efficiency of court administration. As well as being one of the main priorities mentioned in the European Commission's opinion (*avis*) on Croatia's European Union membership application, judicial reform was also highlighted in the decision of the European Council, which finally accepted Croatia as an EU candidate.[1] Similarly, the European Commission's Negotiating Framework for Croatia from October 2005 placed judicial reform among the key areas requiring improvement.[2]

Judicial reform strategy

Candidature for EU membership has provided a significant impulse for judicial reform. In 2005 the Croatian government adopted the Judicial Reform Strategy, together with an Action Plan for the Implementation of the Strategy, which was revised in 2008. The Strategy aims to create a more efficient judiciary by, among other things:

- dealing with the case backlog
- reducing the length of court proceedings
- modernising court administration
- introducing information technology
- rationalising the network of judicial bodies

The Ministry of Justice considers that, in view of the size and population of the country, Croatia has too many courts.

- upgrading education and professional training.

The reforms pertain to the entire court system, affecting courts of all jurisdictions.

To further these strategic goals, the government adopted a number of specific measures. These included the following:

- reorganisation of land registries and digitalisation of land records (land disputes accounting for a significant proportion of backlogged cases)
- reorganisation of enforcement procedures
- re-allocation of caseloads among courts to ensure a more even distribution of cases
- encouragement of mediation as an alternative to litigation
- preparation of a plan to rationalise the court network.[3]

Additionally, the government established a high-level body to oversee the implementation of the Strategy. The Council for Monitoring the Implementation of the Judicial Reform Strategy is composed of the Minister of Justice, the President of the Supreme Court, the Chief State Attorney, the President of the Committee on the Judiciary of the Parliament, the President of the Chamber of Notaries, the President of the Croatian Bar Association and the State Secretary of the Ministry of Justice. In addition, the Department for Strategic Planning of the Ministry of Justice follows up on the implementation and ensures coordination among the various bodies involved.[4]

Key elements of some of the measures mentioned above are discussed below. The article concludes by examining the European Commission's assessment of the judicial reform programmes in Croatia and the recent World Bank Justice Sector Support Project.

Rationalisation of the court network

The Ministry of Justice considers that, in view of the size and population of the country, Croatia has too many courts. This is inefficient, requiring "enormous financial contributions towards their work and maintenance."[5] In a public document on the rationalisation of the court network,[6] the Ministry sets out a plan to enhance its efficiency, the cornerstone of which is to merge courts of the same or similar type (that is, municipal courts and "misdemeanour" courts). The factors that will be taken into account when deciding which courts to merge are: the distance between the courts (less than five kilometres being indicative of a need to merge); the number of cases handled by individual judges at the relevant courts; and regional specificities and transportation links to the areas where the relevant courts are located (for example, each island should have at least one court). Without such special considerations, courts with the fewest judges and least cases will be the obvious candidates for being merged with bigger courts.

A premise behind this approach is that larger courts offer greater opportunities for judges to specialise. They are also believed to be more able to ensure consistency in case law, and provide more effective administration and management. Court mergers are therefore expected to contribute to greater overall efficiency in the courts and provide court users with the opportunity to receive judgment within a shorter period of time. The Ministry of Justice recognises that this process will require financial investment in the infrastructure of the courts into which smaller courts will be merged. On the other hand, the end result will be greater savings: in addition to the efficiencies mentioned above, fewer court buildings also imply lower utility and maintenance costs. Additionally, the plan is not to replace any members of the court personnel that retire, which should result in further savings.[7]

In view of these goals, a number of relevant laws have been amended to implement the objectives of the rationalisation project. In 2008 the Law on Territories and Location of Courts (*Zakon o područjima i sjedištima sudova*) was enacted with the aim of reducing the number of municipal court locations,[8] while the Law on Jurisdictions and Seats of State Attorney's Offices (*Zakon o područjima i sjedištima državnih odvjetništava*), enacted in the same year, envisaged rationalisation and consolidation of prosecutors' offices.[9] Similarly, in November 2009 the Law on Jurisdictions and Seats of Misdemeanor Courts (*Zakon o*

All candidates must undergo a rigorous examination and a selection process. The training for judicial officials lasts two years, after which the attendees may be appointed as judges or deputy state attorneys, where they will be required to remain for no less than five years.

područjima i sjedištima prekršajnih sudova) was enacted, initiating the consolidation of misdemeanour court locations from 114 to 59. This will be completed by 2017.[10]

Clearly, however, ongoing resources need to be provided from the state budget in order to fully implement this reform, consolidate the court network and improve the efficiency of the case management system.

Education and selection of judges

An important measure in the present judicial reform programme is to provide for formal ongoing education of judges, judges' clerks and state attorneys. In 2004 the Ministry of Justice established the Judicial Academy *(Pravosudna Akademija)*, which is regulated by the Judicial Academy Act *(Zakon o Pravosudnoj Akademiji)*. The Academy conducts initial training and preparation of judicial candidates. It aims to ensure the "autonomous, responsible, independent and impartial performance of judicial duties, professional training of trainees and court advisors and ongoing professional training of judicial officials."[11]

The Academy is entirely funded by the state budget of Croatia. Lecturers at the Academy are "specially trained individuals selected among the judges, state attorneys, deputy state attorneys and university professors."[12] Once a year, the Academy's steering committee is required to publish an advertisement soliciting admission applications from candidates for the positions of judge or deputy state attorney. All candidates must undergo a rigorous examination and a selection process. The training for judicial officials lasts two years, after which the attendees may be appointed as judges or deputy state attorneys, where they will be required to remain for no less than five years. In addition, the Academy organises ongoing training for judicial officials aimed at "improving [judicial officials'] professional competences and skills for purposes of professional and efficient performance of judicial duties."[13]

Recent amendments to the Courts' Act (*Zakon o sudovima*), due to come into force in 2013, prescribe that each newly appointed judge will have to undertake specialist study at the State School for Judicial Officials (*Državna škola za pravosudne dužnosnike*), which forms part of the Judicial Academy. The amendments further regulate the conditions for advancement of sitting judges based on a set of criteria. They introduce a right of Croatia to request compensation from judges if they fail to try cases within a "reasonable time frame", if such failure was caused by wilful conduct or gross negligence.[14]

Similarly, recent amendments to the State Judicial Council Act *(Zakon o državnom sudbenom vijeću)*, which will also come into force in 2013, prescribe a set of procedures for the selection of judges and grading criteria that the State Judicial Council will be expected to follow when assessing candidates applying to become judges.[15]

Organised Land Project

As part of the overall initiative to modernise court administration and increase the use of information technology, the Ministry of Justice instituted the Organised Land programme. This is a national real estate and cadastre programme, administered by municipal courts, whose main purpose is to streamline and oversee the regulation of real estate in the country. The programme is largely funded by World Bank and European Union grants. It is appropriate to see this reform not only as a development in the legal sector relating to land law, but as an initiative that will have a significant positive effective on judicial capacity.

The objective of the programme is to create better cooperation between the cadastre system on the one hand and the real estate registration system on the other. The two systems will be properly interlinked and exchange data related to real estate. This will result in numerous benefits to the public and the court system alike, including a reduction in the time needed for the public (and the judiciary) to access the necessary information and register property, and the ability to see in one place both the ownership structure of the property (the land registry) and its location (the cadastre). The programme's web site suggests that: "this system is one of the key instruments in the development of e-Croatia and entrepreneurship, as well as in securing public trust in the land registration system."[16]

Some courts continue to suffer from disproportionately large numbers of old civil cases, for example municipal courts in Zagreb, Split and Zadar.

By implementing the Organised Land Programme, the government is trying to accelerate the processing of real estate registration in both the cadastral and land registration systems and consequently increase the level of legal security in connection with real estate transactions. Without doubt, digitised land records with direct internet access to land and property registries have facilitated the acquisition of land records, while simultaneously minimising corruption risks and helping to reduce the backlog of pending real estate-related cases.[17] Naturally, though, property owners' cooperation in reporting any land and title changes to cadastral offices and land registries of municipal courts will be paramount to the maintenance of up-to-date and accurate information.

European Commission Assessment of judicial reform in Croatia and the Justice Support Project

In its November 2010 assessment of Croatia's progress towards full EU accession, the European Commission notes some positive developments on the judicial reform front. According to the assessment, in 2009 the backlog of cases had been reduced by 10 per cent. However, the assessment also notes that the backlog of cases has been reduced unevenly among various courts. Some courts continue to suffer from disproportionately large numbers of old civil cases, for example municipal courts in Zagreb, Split and Zadar. Certain categories of cases also remain problematic. The number of enforcement cases has been increasing and constitutes 40 per cent of all civil cases. While the economic crisis has triggered many bankruptcy proceedings (increased by 22 per cent since 2009), problems with the enforcement of court rulings continue to hamper the efficient working of the judicial system.[18]

The assessment report further identified some additional deficiencies and challenges.[19]

- With respect to the new criteria for the selection of judges (described in the "Education and selection of judges" section above), the assessment notes that the criteria for assessing the oral exam are vague and it is not clear how these will be applied in practice. Moreover, the State Judicial Council does not appear to have sufficient capacity to carry out its new tasks.
- Disciplinary proceedings against attorneys and judges continue to lack transparency and further improvements are needed to ensure that the accuracy of declarations of assets by judges and prosecutors are systematically checked.
- Improved publication of and access to court decisions is called for in view of the development of case law and in the interests of public dissemination.
- With respect to the rationalisation of the court network, the assessment notes that the Ministry of Justice department supervising the rationalisation process is understaffed and there is a lack of clarity as to the financial impact of court rationalisation which puts into question its implementation in practice.
- Lastly, while the assessment commands the continued work on the implementation of the Judicial Reform Strategy, as evidenced by the adoption of a large volume of new legislation and the reorganisation within the Ministry of Justice aimed at improving efficiency, it also notes that adequate monitoring of reform measures remains problematic due to limited administrative capacity. The assessment further notes that there is no systematic assessment of the impact of new measures and post-legislative scrutiny remains very weak.

The conclusion that can be drawn from this assessment is that reforms in Croatia's judiciary continue but the impact of various newly introduced measures is yet to be tested in practice. Significant challenges remain, particularly regarding the lack of transparent selection procedures for judges and prosecutors, the lack of administrative capacity at both the Ministry of Justice and the State Judicial Council to implement and monitor the newly introduced measures and in relation to efficiency issues, such as the length of proceedings and enforcement of decisions, coupled with the improved public access to court decisions. In that context, during her visit to Croatia in September 2010 the European Justice Commissioner, Viviane Reding, noted that the chapter on the judiciary and fundamental rights was "one of the most delicate and one of the most important". She insisted on seeing a comprehensive and convincing overall picture of results achieved under this chapter.[20]

Significantly, in April 2010 the World Bank approved a €26 million loan to Croatia aimed at further improving the efficiency of its justice system.

Croatia has received donor assistance from various international organisations in implementing judicial reform. Significantly, in April 2010 the World Bank approved a €26 million loan to Croatia aimed at further improving the efficiency of its justice system. The Justice Sector Support Project will support the implementation of key reform legislation related to the modernisation and upgrading of the capacity of three key elements of Croatia's justice system – the courts, the prosecution and the Ministry of Justice. Project activities will contribute to improving the efficiency of the court system through consolidation of the court network in Split, Karlovac and Pula, while at the same time modernising courts' operational information systems and strengthening case management practices. Additionally, the project will strengthen the management functions of the Ministry of Justice.[21]

Conclusion

Few now question the view that a well-performing judiciary is important for economic development. Judicial reform is doubly important for Croatia – both to underpin the rule of law needed for a better business environment and as part of the EU accession process. However, judicial reform consists of a number of interrelated elements, such as simplifying and rationalising laws and procedures, strengthening the independence of judges, improving the administration of courts, improving legal education and training, and so on. Reforming the judiciary is therefore a challenging undertaking and the Croatian government has been taking steps in the right direction, instituting a number of commendable initiatives and enacting complementary laws.

Nevertheless, the resolution of the extensive backlog of cases within Croatia's judicial system remains a serious challenge, particularly given that the economic crisis has triggered many bankruptcy proceedings which have further overburdened commercial courts. With the mounting pressure from the European Union for Croatia to speed up reforms and show concrete results, we can expect more progress in this area. Ramifications of the reforms should, in turn, be reflected in almost all aspects of Croatia's well-being as a state, given that an effective judicial system is an important precondition for the country's economic development and the promotion of investments.

Notes

[1] See European Council (17-18 June 2004), "Draft Conclusions", p. 8, which state that: "Croatia ... needs to make additional efforts on minority rights, refugee returns, reform of the judiciary, regional cooperation and the fight against corruption."

[2] See "Negotiating Framework" (3 October 2005), available at: http://ec.europa.eu/enlargement/pdf/croatia/st20004_05_HR_framedoc_en.pdf (last accessed 3 December 2010), in which the Commission stated: "The Union expects Croatia to continue to fulfil the political criteria and to work towards further improvement in the respect of principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law; to cooperate fully with the International Criminal Tribunal for the former Yugoslavia; and to make further progress in relation to minority rights, the return of refugees, *judiciary reform,* regional cooperation and the fight against corruption." (*emphasis added*).

[3] "Screening report – Croatia" (27 June 2007), Chapter 23, "Judiciary and fundamental rights", available at: http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_23_hr_internet_en.pdf (last accessed 3 December 2010).

[4] *Ibid.*

[5] Ministry of Justice (February 2008), "Rationalisation of the court network" (*Racionalizacija mreže sudova*), available at: www.pravosudje.hr/Download/2008/01/30/Racionalizacija_mreze_sudova_veljaca_2008.ppt (last accessed 3 December 2010).

[6] *Ibid*.

[7] *Ibid.*

[8] See *Zakon o područjima i sjedištima sudova,* "Official Gazette", No. 85/08, as well as the Parliament's explanatory notes thereon available at: www.sabor.hr/fgs.axd?id=12030 (last accessed 3 December 2010).

[9] See *Zakon o područjima i sjedištima državnih odvjetništava,* "Official Gazette", No. 146/08, as well as the Parliament's explanatory notes thereon available at: www.sabor.hr/fgs.axd?id=12742 (last accessed 3 December 2010).

[10] See *Zakon o područjima i sjedištima prekršajnih sudova*, "Official Gazette", No. 137/09 and Parliament's explanatory notes thereon available at: www.sabor.hr/Default.aspx?art=26099 (last accessed 3 December 2010).

[11] Article 2 of the Judicial Academy Act, "Official Gazette", No. 153/09.

[12] Article 21 of the Judicial Academy Act.

[13] Article 39 of the Judicial Academy Act.

[14] The Act on Amendments and Additions to the Courts' Act (*Zakon o izmjenama i dopunama Zakona o sudovima*), "Official Gazette", No. 153/09.

[15] The Act on amendments and additions to the State Court Council (*Zakon o izmjenama i dopunama Zakona o Državnom sudbenom vijeću*), "Official Gazette", No. 153/09.

[16] Organised Land web site at: www.uredjenazemlja.hr/cms/hr/oprojektu (last accessed 3 December 2010).

[17] See: "Commercial Laws of Croatia, July 2010, An Assessment by the EBRD", available at: www.ebrd.com/downloads/sector/legal/croatia.pdf (last accessed 3 December 2010).

[18] Commission of the European Communities: Croatia 2010 Progress Report (9 November 2010), p. 48, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/hr_rapport_2010_en.pdf (last accessed 3 December 2010).

[19] *Ibid*, pp. 47-49.

[20] See *EUbusiness*, "EU seeks concrete results in Croatia's judicial reform", 10 September 2010.

[21] See "Justice Sector Support Project" on the World Bank's web site, available at: http://web.worldbank.org/external/projects/main?Projectid=P104749&theSitePK=40941&piPK=64290415&pagePK=64283627&menuPK=64282134&Type=Overview (last accessed 3 December 2010).

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07

The challenge of making courts more efficient – recent experiences of the Western Balkans states

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The 10th anniversary of the regime change in Serbia and Montenegro was marked in 2010, as well as it being 15 years since the Dayton agreement was signed. These events also marked the beginning of significant efforts by the international community and the newly elected governments to build democratic nation states and viable economies in the region. An important part of this combined effort has been the development of an independent and effective judiciary to uphold the rule of law and good governance.

All countries in the Western Balkans states[2] have undergone significant legal reforms, often in several waves changing key laws more than once, creating a new legal framework of substantive, procedural and institutional laws and rules. Most countries in the region have developed judicial or justice sector reform strategies, often with ambitious but clear goals and objectives.[3] At the same time significant financial investments have been made to support the creation of a strong judicial sector. While government investments in the judiciary are traditionally at the lower end of funding priorities in many countries, the budgets allocated to the court systems, recorded in euros, increased in the mid-2000s in several states in the region (that is, Montenegro by 56 per cent, the Former Yugoslav Republic (FYR) of Macedonia by 40 per cent, Croatia by 37 per cent, and Bosnia and Herzegovina by 13 per cent).[4] While these increases still leave the judiciaries in these states with a much lower budget per inhabitant than judiciaries in western Europe, they are important steps.[5]

The results of several years of substantial international support for judicial reform in the Western Balkans states are neither obvious nor easily measured. The European Commission's (EC) 2010 Enlargement Strategy and Progress Report declares that reforms in several areas, especially judicial reforms, are slowing down in the Western Balkans. For FYR Macedonia the report states that several laws are still blocked, especially judicial reform, and that corruption is widespread and a serious problem. The report mentions that Croatia needs to move faster on reforming its judiciary and fighting corruption, as do Albania, Bosnia and Herzegovina, Montenegro and Serbia.[6]

The combined experiences of these different countries and regions indicate that reforming the judiciary is not an easy or quick process.

A survey published by the Gallup Balkan Monitor in November 2009, the biggest public opinion survey ever conducted in the region, found that 52 per cent of Albanians said they had had to pay a bribe in the past year. According to the 2009 index from Transparency International, Serbia is ranked 83rd with a Corruption Perception Index of 3.5, marking it as a country with a large problem with corruption.[7] Montenegro shares these problems, for all reports from the European Commission and US State Department point to corruption and organised crime as major issues. The European Commission's 2009 Progress Report on Kosovo states that, "overall, there has been limited progress in the fight against corruption, which is a key European partnership priority."[8] For Bosnia and Herzegovina the 2009 report says that the country has made little progress in its fight against corruption; there is no effective investigation, prosecution and conviction of suspects of high-level cases of corruption and judicial follow-up of cases of corruption is slow.[9]

Not surprisingly, citizens in the region do not express high confidence in the judiciaries. In December 2006 and January 2007 a regional median of only 30 per cent for Albania, Bosnia and Herzegovina, Croatia, FYR Macedonia, Montenegro and Serbia expressed confidence in their judicial systems, compared with a regional median of 47 per cent for 25 EU member countries surveyed.[10] Other more recent country level surveys indicate that these trends continue.[11]

The countries in the Western Balkans share these problems with many others – judicial reform is a complex process that takes time. Examples from other eastern European and central Asian (EECA) countries that started these reforms earlier show that this is not an easy process. EU reports for Romania and Bulgaria are very critical of the progress of judicial reform there. A statement issued by the British Ambassador to Ukraine posted in June 2010 suggests that problems with the operation of the courts and the judicial system are one of the biggest issue facing Ukraine. The judicial system is inefficient and lacks transparency and credibility, with many court decisions never being enforced.[12]

Such reports mirror what has been outlined in earlier publications reviewing judicial reform efforts in the EECA region.[13] These studies emphasise that judicial reform is a critical challenge for most transition countries. The majority of these countries have made progress in establishing independence in their judiciaries, but accountability, transparency and efficiency have lagged behind. In many transition countries public trust in the courts remains low and there is a need to focus on strengthening the fairness and honesty of their courts – which requires broad actions on many fronts, especially human resource management, transparent and participatory judicial governance, needs based budgeting, modern performance management, and infrastructure and IT systems to promote efficiency and transparency. Assessments from other regions, especially Latin America, where judicial reforms started earnestly in the mid-1990s, also show mixed results. Some countries such as Chile have made substantial progress, while others lag behind or even slide back in developing reliable, fair and efficient judicial institutions that are trusted by the people.[14]

The combined experiences of these different countries and regions indicate that reforming the judiciary is not an easy or quick process. As much as "judicial reform" sounds like simply changing how a court may operate, within the concept of democratic political systems judicial reform means changing how one branch of government, an important part of a county's power balance system, works. This means that the other branches of government have their own interests in how this "counter-balance" will function. Since courts are a part of the justice system which includes a range of executive branch agencies (that is, regulatory and licensing agencies, police, public defenders, prosecutors and Ministries of Justice) as well as other independent and private organisations (ombudsman offices, private bar associations, individual rights non-governmental organisations), this means that a broad range of external stakeholders need to support any reform efforts. And, when dealing with court reform, a country has to address not just one agency with a couple of subdivisions located across the country, but with a hierarchy of courts that have different process requirements and needs. Additionally, in most countries the actual operations of individual courts in even the most unified court system are still largely determined and influenced by the local legal culture – the

Efficient court operations achieve more than timely disposition of cases: if structured well, they provide for greater transparency and accountability...

way lawyers, court staff, judges and other court counterparts are used to operating and expect the court to operate in the future.[15]

When assessing court reform one also has to consider what this actually means and the measures we have available today to objectively gauge progress. The most widely supported goals of judicial reform include equality before the law, fairness, impartiality, independence of decision-making, competence, integrity, transparency, accessibility, timeliness and certainty.[16] Each goal has a range of meanings that will need to be interpreted within the local context. To take the "simple" example of access to justice this can mean geographic access, physical access, understanding and information access, affordability of access and cultural access differences. Even the meaning of the seemingly simple issue of geographic access will differ greatly across and even within countries. Physically getting to a court by public transportation may be easy in a country's capital where it may take a bus ride, compared with many hours on horseback in remote rural areas.

Increasing court efficiency

Considering that assessing most of the goals of judicial reform are highly value driven, dependent on many external factors and highly political, many court reforms, not just in the Balkan states, have focused on increasing the efficiency of court operations. Court efficiency lends itself to measurement and appears to be non-political. Plus, timely disposition of cases addresses a number of international standards, such as those expressed in the UN's Bangalore Principles[17] and those required by the European Union for its member states,[18] and efficient disposition of cases makes a great difference to every individual involved in court proceedings.

While the focus on increasing court efficiency has been criticised for sidestepping more controversial or highly political issues such as judicial integrity and judicial independence and for possibly compromising the quality of judicial decisions for timeliness, it is more than an "easy" solution to serious issues. Efficient court operations achieve more than timely disposition of cases: if structured well, they provide for greater transparency and accountability, important goals that are also essential for judicial independence and integrity and core requirements for more accessible and cost effective courts.[19] As experiences from a range of countries across the globe, including the Western Balkans states, indicate, even a focus on solutions to enhance court efficiency is not as easy as it may appear.

Experiences of donor supported projects to enhance court efficiency in the Balkan states

The following experiences from several Western Balkans states highlight the difficulties and time required to achieve actual reforms even only in the timely processing of court cases. The majority of the Western Balkans states were not only faced with recovering from the aftermath of the disintegration of the Yugoslav state, war and violent ethnic conflict, but had to create new judicial institutions, not "just" reform existing ones. Unsurprisingly, the change conditions across these newly evolving nations were similar, but influenced by the very specific country context and, as the experiences from Serbia and Albania show, recasting and reforming existing structures can be more difficult than creating new ones.

Bosnia and Herzegovina

Court reform experiences in Bosnia and Herzegovina (BiH) have naturally been heavily influenced by the aftermath of the wars and the continuously difficult political situation. Initial legal framework and institutional development concepts were dominated by the Office of the High Representative (OHR). Good international input was provided, however, local input into the development of essential framework legislation for the judicial sector did not necessarily mean that solid assessment of the local conditions and reflective consultations had been conducted. In 2003, for example, the book of court rules for BiH, which lays down the fundamental policies for court processes, the rules that provide the detail to the procedural laws, had been drafted by OHR staff without much local consultation nor full reflection of the fact that not one BiH judiciary would exist but four. It is perhaps not surprising that this effort did not go very far. When the newly created BiH institutions were assuming the responsibility for creating a viable judicial sector from the OHR, a number of donor projects continued to support the development of an effective judiciary. For example, in 2004 a five-year, US$ 14 million

Comprehensive case flow studies and mapping exercises have not been conducted and substantial case delays exist in all four BiH jurisdictions.

USAID project started with the ambitious aim of improving the efficiency, transparency and fairness of the justice system. Using a model court approach a number of reform methods were tested: modern records management strategies, creating a common case numbering system, providing durable file folders, delivering training in principles of court management and administration, creating a case backlog reduction plan and so on. The most immediately visible accomplishment was improved court registries and new records management techniques and in some courts disposition rates were now keeping up with filing rates reducing the threat of new backlogs. But structural reforms based on good case flow management practices are still needed.[20] In 2010 no real time or performance measurement standards are yet in place to monitor and measure court performance. Comprehensive case flow studies and mapping exercises have not been conducted and substantial case delays exist in all four BiH jurisdictions.[21]

FYR Macedonia

Somewhat more positive are the results from FYR Macedonia. A US$ 13 million court reform project supported by USAID started in 2003. Further assistance was provided by two World Bank projects[22] and an EU CARDS project – and smaller contributions by other bilateral donors. The objective to reduce backlog and delays in court processing was shared by all projects and, according to a 2009 World Bank review, partially achieved.[23] A new Law on Civil Procedure was passed that shifted the burden of proof in civil cases to the parties rather than the court and eliminated the option of unlimited requests for continuances and recusals. The country's new Law on Courts established a more effective organisation of the court system, created an Administrative Court and allowed for further specialisation within courts. In addition, Constitutional Amendments and changes in other laws allowed administrative agencies to issue misdemeanor sanctions rather than requiring court action. The Administrative Court began hearing administrative cases which freed up time and resources at the civil courts. By June 2007, 22 of the 27 basic courts recorded a reduction in backlogs. The overall backlog in civil cases fell by 9.4 per cent from June 2005 to June 2007.[24] During the same period, pilot projects supported by USAID's Court Modernization Project showed a reduction in the backlog of civil cases more than one year old of 38.3 per cent and of 57.6 per cent for cases more than three years old.[25]

Donor coordination was an issue during implementation of these projects. Duplication occurred where the Ministry of Justice received ICT assistance simultaneously from the World Bank, the European Commission CARDS programs and the first USAID Court Modernization Project (CMP). In the end it was agreed that a follow-on USAID project, the Judicial Reform Implementation Project (JRIP), would develop new case management software, while the World Bank provided the hardware for the rollout and implementation of the system. The World Bank has since been collaborating closely with USAID's JRIP to ensure that the projects' activities are complementary.[26]

Still, the European Commission's review of FYR Macedonia's progress in 2010 mentions continuing problems. While most of the courts continued to reduce their backlog and the Automated Court Case Management Information System is fully implemented in all courts, a delay in transferring over 600,000 enforcement cases from the courts to bailiffs until 2011 impeded reduction of the backlog.[27] Furthermore, the report states: "There was limited progress on judicial reform. There are concerns about the independence and impartiality of the judiciary: no further progress was made in ensuring that existing legal provisions were implemented in practice."[28]

Albania

Albania also received significant support from multiple sources. In 2000 a World Bank project (among others) began to focus on improvements in court and case management systems.[29] The project continued for five years with less than satisfactory results. A review indicated that the goal of rolling out a modern case management system to all courts was overly ambitious, because of limited capacities and the short project time frame. The World Bank supported the development of the software and laid down the groundwork for its introduction but by the end of the project the software was only operational in the Supreme Court. The review also indicated that insufficient donor coordination resulted in duplication of efforts.[30] At least one District Court began implementing

The 2010 EC Review Report for Albania indicates that while the case management system is now in place in most courts, little progress has been made in achieving even only timely case dispositions.

a different computerised case-tracking system developed with funding from other donors, and the existence of other systems complicated the unification of civil case management. The European Assistance Mission to the Justice System in Albania (EURALIUS), a project funded by the European Commission's CARDS Programme, continued the implementation of the case management system in Albanian courts in 2006.[31] The 2010 EC Review Report for Albania indicates that while the case management system is now in place in most courts, little progress has been made in achieving even only timely case dispositions: "Further efforts are needed to have a fully uniform and harmonised integrated case management system functioning in all courts. The judiciary suffers from problems of transparency and efficiency in operations. Court management is poor due to a lack of human and financial resources, in particular in first-instance district courts. There is no sound and adequate organisation and training of court administrators. The backlog of cases is problematic, court proceedings are slow and the number of trial sessions for cases is high."[32]

Montenegro

A project focusing on court reform in Montenegro, also funded by USAID, began in 2003 at a time when Montenegro was still a part of Serbia. Not unlike other former Yugoslav states, Montenegro had to create its own justice institutions. The fact that it was still a part of Serbia created particular sensitivities, an issue that was interestingly never mentioned or reflected in the final implementation report.[33] There were five major objectives for the judicial reform programme – all very broad and ambitious even if taken alone: establish new institutions; assist in the drafting and implementation of new laws; improve court administration and management practices; improve physical infrastructure, professional resources and equipment of the judiciary; increase public access to the courts; and improve court services and information dissemination.

Positive results were reported. In particular the new Administrative Court implemented 90 per cent of recommendations for case management and administration, which significantly increased the ratio of resolved versus filed cases despite an almost 100-fold increase of the total caseload. In 2005 the Administrative Court resolved 1,279 cases, or 45.85 per cent of the total cases (2,789) and in 2006, after implementation of the majority of the recommendations, the Court had resolved 10,038 cases out of a total of 11,496, or 87.39 per cent. After an initial period of 3 months of implementing a backlog reduction programme, in July 2006 the pilot court of Kotor reduced its civil case backlog by 60 per cent. The pilot court of Cetinje eliminated 36.5 per cent of its backlog. Based on these experiences plans to implement the backlog reduction program in all pilot courts were developed.[34]

The 2010 European Commission Report also casts a slightly optimistic picture but is somewhat contradictive and not as specific as one might want it to be. The report mentions a large backlog of unresolved court cases which the authorities aimed to address with new measures introduced in 2008. The report also states that data available suggest a backlog reduction of over 75 per cent on an annual basis in the beginning of 2010. However, concerns are raised as to the soundness of the approach and the transparency of the methodology used. It is furthermore noted that enforcement of both civil and criminal decisions is weak and requires improvement. The report suggests that lack of infrastructure and equipment impedes efficiency, and that efforts are being made to remedy the situation. For the envisioned reorganisation of the court system outlined in the government strategy on the reform of the judiciary, the report recommends that an objective analysis of reliable court statistics and a precise account of the current workload of the courts be conducted first, suggesting that this important base information may not yet be available for solid planning.[35]

Croatia

For Croatia the 2010 EC Report states:

"Judicial efficiency has improved with the backlog of cases before the courts further reduced by 10 per cent, including good progress on reducing the number of cases older than three years. The legal basis for a new system of administrative justice was introduced. However, the backlog of cases has been reduced unevenly across the various courts and overall remains high. Problems with enforcement of court rulings continue to hamper the efficient working of the judicial system. The handling

The prior and most recent experiences in Serbia paint a telling picture of the many different aspects and stakeholder group interests that are important to consider when court reforms are pursued.

of administrative cases continues to pose particular challenges. The infrastructure and equipment of courts, including case management systems, remains underdeveloped."[36]

This comes after several World Bank, USAID, EU and other donor projects provided support since 2001.[37] The experiences here are not significantly different from many of its neighbouring countries. The different donor projects provided equipment, training, technical assistance, software development, IT hardware and some infrastructure improvements. Donor coordination was difficult and created complications until agreements were reached. In the end, some case processing improvements were achieved but none were systemic.[38] In 2010 a new World Bank project started to further support judicial efforts to reduce case backlogs and improved case disposition in project courts and prosecution offices.[39]

Serbia

The European Commission's 2010 Report on Serbia is very much influenced by the unfortunate judicial reappointment process that occurred in 2009 but it also highlights the still significant case processing issues across all Serbian courts.[40] The fact that the number of court locations was reduced in 2009, that the number of judges, court staff and prosecutors has been reduced and that there were no provisions made to account for the time-consuming reallocation of cases to newly appointed judges and prosecutors are among the many challenges that the courts have to manage. Furthermore, while the courts and MOJ are exploring a backlog strategy, no case management standards are in place or even being developed and the current information base to develop a solid case management strategy is insufficient. Serbia's judiciary has received international donor support since 2003 to develop more efficient case management procedures and structures.

The initial project, supported by USAID, responded to the government's need to create a special War Crimes and Organized Crimes Court and Prosecution Divisions after the Dinjic assassination. Infrastructure and IT along with training were at the centre but this also meant introducing a focus on enhancing the efficiency and effectiveness of the administrative and adjudication processes to successfully handle these difficult cases.[41] The software developed to support these special divisions later provided the basis for automating the commercial courts and also some trial courts in Serbia and has just recently been rolled out to all trial courts across the country. The later USAID supported project to create special commercial divisions further advanced the case management software and created more efficient processes in these special divisions, resulting in turn in greater local capacities to take these experiences to other courts. The earlier discussions about effective and efficient process strategies were the basis for several changes to the procedural laws, the latest of which will come into effect in 2011. Earlier assistance to enhance processing at the general trial court level provided not only by USAID but by CIDA, the UN, the European Union and others that followed was less successful but added to the continuing change process that may emerge more broadly and more visibly in the coming years.

Serbia's desire to accede to the European Union also meant that, in addition to changes to the procedural codes, a multitude of legislative changes essential to court operations were introduced, such as the codes guiding the governance and structure of the judicial sector and other key areas like the provision of legal aid, were discussed and often contested. Important changes are still needed. The reappointment process for judges and prosecutors is likely to trigger further appeals in Serbia for some time and is likely to continue to influence judicial productivity. On the other hand, the good consultative process employed to develop viable options to provide broader access to legal aid and representation highlighted the need to better understand and capture the requirements of special interest groups, especially the quite influential private bar. The prior and most recent experiences in Serbia paint a telling picture of the many different aspects and stakeholder group interests that are important to consider when court reforms are pursued.

The difficulties experienced when developing more efficient court operations do not reflect a particular Western Balkans problem. While they may be exaggerated by the still transitional political environment in the region, quite similar experiences have been documented across

Case management is not intrinsically difficult, but it requires a different understanding of the role of the court in managing and controlling processes beyond what is outlined in procedural codes.

eastern Europe, Latin America, and even in the US, Canada and Australia.[42] The following sections will further address some of the core issues that contribute to the complexity and slowness of these particular reform processes.

Factors that delay case processing reforms

The above examples indicate that it takes a good three to five years – often longer – until more comprehensive and systemic case processing improvements take hold in courts. Examples from other regions support this observation. Considering that much is known today about the methods to apply to speed up court processes, reduce backlog and limit future delay, it should not take very long to develop and implement process improvements. While it is important to base the selection of appropriate techniques to streamline processes on a good assessment of the underlying causes, such assessment can be conducted in a few months. Good responses can be developed in a consultative way over another few months. Processes can be redesigned, forms and IT systems adjusted, people trained within another few months — perhaps a little longer if many courts are involved and if civil, criminal, administrative and other specialty case processes need to be addressed simultaneously.

Case management is not intrinsically difficult, but it requires a different understanding of the role of the court in managing and controlling processes beyond what is outlined in procedural codes. It requires understanding based on good management principles rather than legalistic thinking, which is often unusual to judges and others in the courts that have not been exposed to such approaches before; but it does not take that long to understand. There are often a range of issues to be tackled to increase efficiency, such as the need to get changes to the underlying legislation passed, the need to develop new skills, capacities and infrastructures to support new processing approaches. The key factors that delay these reforms are related to resistance to change from the various actors and their interests that would be impacted by processing reforms.

It is crucial to understand who has a stake in keeping processes as they are, who would benefit or lose as a result of envisioned changes and what may be the incentives for supporting or undermining reforms for internal and external stakeholders. Developing ways to address these issues is essential. Interestingly, this remains an area that is often weak in development projects. Too many court reform programmes that focus on improving processes do not begin with exploring the incentives of judges and court staff to continue existing court practices; even more rare is an exploration of other stakeholder incentives, especially the private bar, which often has a significant influence on how cases will or will not move through the system. Private lawyers and their associations are regularly consulted and involved in working groups to draft new legislation and have been part of other donor activities, such a special assistance projects to support their own development or the establishment of legal aid schemes. However, there is little indication that the case management reform projects in the Western Balkans systematically engaged this important stakeholder group in the process of determining what processing changes would be appropriate and could be achieved from their perspective.

A couple of these projects, including several of the USAID supported projects in Serbia, consisted of a review of case processing information to determine which processing changes would make a difference in timely disposition and where, but it is unclear if and how such information was used to communicate to the bar and other influential court users, such as the business community, about the benefits of the envisioned changes to court users in terms of reduced cost, time, and the potential negative outcome of not adjusting to the new processes. When such changes are considered in the US and Canada, engaging the private bar and developing their support has long been considered essential.[43]

There are also a range of other difficult issues to tackle, not all of which are under the control of the judiciary or even the government and are therefore difficult to plan for. This includes the need to pass new laws to create a supportive legal framework without which some fundamental case management techniques may not be possible. One can also not underestimate the time required to develop the needed infrastructure, capacities

Experiences across the globe also show that the greatest challenge lies in changing attitudes and expectations of judges, lawyers, staff and other court stakeholders – the local legal culture.

and resources to support and sustain new processes, especially if it involves automation.

An analysis of judicial reform programmes in the Asia Pacific region pointed to the many interlinked issues that need to be addressed differently depending on their local context.[44] These issues include, among others, leadership commitment, independence challenges, limited capacity and resources for sustainable change, creating broader system and society support, donor coordination, and a lack of data to inform and measure the reform process. The experiences in the Asia Pacific region as well as elsewhere suggest that the goals of these reform efforts need to be more clearly defined, are often overly ambitious and are not always grounded in a solid understanding of the change environment and what can realistically be achieved within a project cycle.

Experiences across the globe also show that the greatest challenge lies in changing attitudes and expectations of judges, lawyers, staff and other court stakeholders – the local legal culture.[45] A report developed by a civil justice reform working group charged with developing and implementing reform processes for the courts in British Columbia summarises the experiences many courts across the globe have had:

"Among the barriers identified by the Working Group was a resistance to change on the part of those 'inside the justice system' (defined as the judiciary, the legal profession, government and court services staff). This resistance is due to a comfort with the status quo, a resistance which persists in spite of widespread recognition of the problems of the current system."

The report noted some support for change among these insiders, but also mentioned that:

"the fear and uncertainty of changing a long established paradigm dilutes this support to one of encouraging only modest change, such as reforms around the margins or tinkering with procedures. They are not prepared to entertain or support change of a more fundamental nature."[46]

In a similar way, the Australian Law Reform Commission said that:

"significant and effective long term reform of the system of civil litigation may rely as much on changing the culture of legal practice as it does on procedural or structural change to the litigation system. Lawyers, their clients and the courts may need to change the ways in which they perceive their relationships and responsibilities."[47]

Empirical studies on the United States bankruptcy system have pointed out sharp disparities between the formal law on the books and the laws in action, as well as dramatic variations in the implementation of the laws from one locale to another. These differences were observed despite the application of a uniform federal bankruptcy regime and the lack of variation in the economic circumstances of debtors in the different localities. Scholars have attributed these disparities to the effects of the internal and local legal culture. Similar studies in Israel also support the proposition that internal legal culture has a powerful impact on the actual implementation of legislative and processing reform in the courts.[48] These issues also explain why changes in one pilot court may succeed while roll out to other courts remains a difficult task.

While it is generally understood that any organisational change is difficult, recognising the many special interests of lawyers, judges and staff in maintaining the current situation is essential to developing court reform programmes that take these particular interests into account. This requires a solid analysis of the local legal culture and the broader political economy surrounding these projects, sufficient consultation and information processes and an emphasis on change management strategies to assist those who want to move reforms forward. This is not a simple task, it requires time and ongoing commitment to communicate and sometimes adjust expectations, and even then not all resistance can be overcome. At the same time, when little attention is paid to these special interests that stand in the way of successful changes, one can hardly expect significant results.

Notes

[1] The author of this article is Heike Gramckow, PhD, Senior Counsel, Legal Vice Presidency, World Bank, with assistance of Valerie Nussenblatt. The statements in this article reflect the opinion of the author and are not representative of official World Bank policy.

[2] Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic (FYR) of Macedonia, Montenegro and Serbia.

[3] See, for example, Bosnia and Herzegovina Judicial Reform Strategy 1999 and Justice Reform Strategy 2008-2012, online: www.esiweb.org/pdf/bridges/bosnia/OHR_JudicialReform.pdf (last accessed 20 November 2010) and www.mpr.gov.ba/userfiles/file/Projekti/24__SRSP_u_BiH_-_EJ.pdf (last accessed 20 November 2010); Croatia Judicial Reform Strategy 2005,online: www.pravosudje.hr/Download/2005/11/22/Strategy_of_the_reform_of_the_judicial_system_.pdf (last accessed 20 November 2010); FYR Macedonia Judicial Reform Strategy 2005, online: http://siteresources.worldbank.org/INTECA/Resources/Macedoniastrategija.pdf (last accessed 20 November 2010); Montenegro 2007-2012 Strategy for the Judiciary, online: www.coe.int/t/dghl/cooperation/cepej/profiles/MontenegroReformStraegy_en.pdf (last accessed 20 November 2010); Serbia National Judicial Reform Strategy of 2006, online: www.mpravde.gov.rs/en/articles/judiciary/national-judicial-reform-strategy (last accessed 20 November 2010); Albania's judicial reform strategy is still pending at the end of 2010.

[4] See European Commission for the Efficiency of Justice (CEPEJ) (2010), "Efficiency and quality of justice", online: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2 (last accessed 20 November 2010).

[5] See *Ibid*, p. 35.

[6] See European Commission (2010), Enlargement Strategy and Progress Reports, online: http://ec.europa.eu/enlargement/press_corner/key-documents/reports_nov_2010_en.htm# (last accessed 9 November 2010).

[7] See Transparency International, online: www.transparency.org/policy_research/surveys_indices/cpi/2009 (last accessed 20 November 2010).

[8] See European Commission (2010), Enlargement Strategy and Progress Report for Kosovo, online: http://ec.europa.eu/enlargement/pdf/key_documents/2009/ks_rapport_2009_en.pdf (last accessed 9 November 2010), p. 11.

[9] See Gordana Igric and BIRN Team (2010) "Lack of political will thwarts anticorruption efforts", in "Accession of the Western Balkans to the EU", online: http://ec.europa.eu/enlargement/pdf/publication/20100609_att4639135.pdf (last accessed 20 November 2010).

[10] Gallup (2008), online: http://www.gallup.com/poll/104872/many-balkans-lack-confidence-judicial-systems.aspx (last accessed 20 November 2010).

[11] Ipsos Strategic Puls (2010), Public Opinion Survey, Serbia World Bank.

[12] See Leigh Turner, "Why Ukraine needs judicial reform", British Ambassador to Ukraine website, online: http://blogs.fco.gov.uk/roller/turnerenglish/entry/why_ukraine_needs_judicial_reform (last accessed 23 June 2010).

[13] See, for example, J.H. Anderson and C.W. Gray (2007), "Transforming Judicial Systems in Europe and Central Asia", World Bank; and J.H. Anderson, D S. Bernstein and C.W. Gray (2005), "Judicial systems in transition economies: assessing the past, looking to the future", World Bank.

[14] See DeShazo and Vargas (2006); *Ibid*; and L. Hammergren (2002), "Fifteen years of judicial reform in Latin America: where we are and why we haven't made more progress", UNDP, online: www.undp-pogar.org/publications/judiciary/linn2/ (last accessed 20 November 2010).

[15] For other studies about the influence of the local legal culture on court operations see, for example, B. Ostrom, R. Hanson, C. Ostrom and M. Kleiman (Spring 2005), "Court Cultures and their Consequences", *Court Manager*, 20(1), pp. 14-23.

[16] See the International Framework of Court Excellence, online: www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf (last accessed 20 November 2010).

[17] See Bangalore Principles Preamble 2 and Principle 6.5, online: www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (last accessed 20 November 2010).

[18] See Article 6(1) of the European Convention on Human Rights.

[19] See, for example, B. Ostrom (2000), "Efficiency, timeliness and quality: a new perspective from nine state criminal trial courts", *Research in Brief*, National Institute of Justice, Washington, DC.

[20] See USAID (June 2008), "Bosnia Justice Sector Development Project Evaluation", online: http://pdf.usaid.gov/pdf_docs/PDACL823.pdf (last accessed 20 November 2010).

[21] See European Commission (2010), Enlargement Strategy and Progress BiH Report, online: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ba_rapport_2010_en.pdf (last accessed 9 November 2010).

[22] See World Bank (2005), Programmatic Development Policy Loans (PDPL) (P090303) and World Bank (2006). Legal and Judicial Implementation and Institutional Support Project (LJIIS) (P089859).

[23] See World Bank (2009), Former Yugoslavia Republic of Macedonia, Programmatic Development Policy Loans, Implementation Completion and Results Report, Report No: ICR00001117.

[24] *Ibid*.

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[25] See Government of the Republic of Macedonia, Ministry of Justice (2007), Monitoring Report on the Implementation of the Project in the Judiciary 10/2006-10/2007, online: http://www.justice.gov.mk/documents/Monitoring%20report%202007.pdf (last accessed 20 November 2010).

[26] See World Bank (2009), Aide-Memoire, Macedonia: Legal and Judicial Implementation and Institutional Support (LJIIS) Project, Mid-Term Review Visit, September 9-16 and September 21-24.

[27] See Commission Staff Working Document (2010), The Former Yugoslav Republic of Macedonia, 2010 Progress Report, online: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mk_rapport_2010_en.pdf (last accessed 20 November 2010).

[28] See "Conclusions of the former Yugoslav Republic of Macedonia (2010), extract from the Communication from the Commission to the Council and the European Parliament, "Enlargement Strategy and Main Challenges 2010-2011", COM (2010) 660 final, online: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/conclusions_fyrom_en.pdf (last accessed 20 November 2010).

[29] See World Bank (2000-2005), Legal and Judicial Reform Project (P057182).

[30] In addition to World Bank, USAID and the EU provided and continue to provide significant support to the judiciary in Albania.

[31] See World Bank (2006), Albania, Legal and Judicial Reform Project, Implementation Completion Report, Report No: 35351-AL.

[32] See European Commission (2010), Analytical Report. Albania, p. 94. online: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/al_rapport_2010_en.pdf (last accessed 20 November 2010).

[33] See Checchi and Company Consulting (2007), "Justice System Reform Project Montenegro: Summary of Project Accomplishments", July 1, 2003–March 31, 2007, submitted to USAID. Online: http://pdf.usaid.gov/pdf_docs/PDACJ210.pdf (last accessed 20 November 2010).

[34] *Ibid*.

[35] See European Commission (2010), Enlargement Strategy and Progress Montenegro Report, online: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mn_rapport_2010_en.pdf (last accessed 9 November 2010).

[36] See European Commission (2010), Enlargement Strategy and Progress Croatia Report, online: http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/hr_rapport_2010_en.pdf (last accessed 9 November 2010).

[37] See World Bank (200#10), Republic of Croatia, Justice Sector Support Project, Project Appraisal Document, Report No: 51133-HR, March 3, 2010; World Bank (2007), Republic of Croatia, Court and Bankruptcy Administration Project, Implementation Completion and Results Report, Report No: ICR0000536, June 29, 2007. See also H. Gramckow (2005), "Can US-type court management approaches work in civil law systems? Experiences from the Balkans and beyond", *European Journal on Criminal Policy and Research*, 11(1), pp. 97-120.

[38] See World Bank (2007), Republic of Croatia, Court and Bankruptcy Administration Project, Implementation Completion and Results Report, Report No: ICR0000536, 29 June 2007.

[39] See World Bank (2010), World Bank Supports the Government of Croatia in Improving the Efficiency of the Croatian Justice System, online: http://www.mfin.hr/en/novosti/world-bank-supports-the-government-of-croatia-in-improving-the-efficiency-of-the-croatian-justice-system-2010-04-13-15-25-06 (last accessed 17 December 2010).

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[41] See "USAID Support Helps Special Courts Improve Administration", online: www.usaid.gov/locations/europe_eurasia/press/success/special_courts.html (last accessed 20 November 2010).

[42] See, for example, J.P. Ryan, M.J. Lipetz, L. Luskin and D.W. Neubauer (1981), "Analyzing court delay-reduction programs: Why do some succeed?", *Judicature*, 65(2), pp. 58-75.

[43] See for example, J.E. Jacoby (1994), "Expedited drug case management programs: some lessons in case management reform", *Justice System Journal,* 17(1), pp. 19-40; and D.C. Steelman (1997), "What have we learned about court delay, 'Local Legal Culture', and caseflow management since the late 1970s?", *The Justice System Journal*, 19(2), pp. 158-60.

[44] See L. Armitage (2009), *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience*, Oxford University Press, New Dehli.

[45] See for example K. Burke, F. Broccolina (2005), "Another view of local legal culture: More than court culture", *Court Manager*, 20(4), pp. 29, and J.P. Ryan, M.J. Lipetz, L. Luskin and D.W. Neubauer (1981), "Analyzing court delay-reduction programs: Why do some succeed?" Judicature, 65(2), pp. 58-75.

[46] See R. MacDonald (2005), "Civil Justice Reform Working Group", Discussion Paper, Legal Culture, Victoria, BC.

[47] Australian Law Reform Commission (1997), Issues Paper, "Review of the Adversarial System of Litigation", online: www.austlii.edu.au/au/other/alrc/publications/issues/20/ALRCIP20.html (last accessed 20 November 2010).

[48] See R. Efrat (2004), "Legal culture and bankruptcy: A comparative perspective", *Bankruptcy Development Journal*, 20, pp. 101-50.

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08

Legal education and judicial reform in Central Asia – perspectives and reality

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Investments require confidence, and legal certainty provides confidence. But how can legal certainty be achieved? The Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)[2] is tackling this task in Central Asia, together with national partners, by providing consultation on legislation and conducting specific training programmes in legal methods. There are many challenges: corruption; inadequate higher education; and laws in need of reform.

Programme background

To fight poverty[3] and to create regional security and stability it is important to make Central Asia more attractive for economic development and investment. Legal certainty and the rule of law are important preconditions for this.

GIZ's programme, "Supporting Legal and Judicial Reform in Central Asia",[4] being implemented on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ), has therefore been supporting the judicial and legal reforms in Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan and Uzbekistan by assisting partners in developing their institutional capacities since 2002. It is the only regional legal reform programme in Central Asia.

Within this framework GIZ is helping its partners to reform civil, commercial and administrative laws, to establish the rule of law and a market economy and in empowering the judiciary to apply laws to the benefit of citizens seeking legal protection. These aims can only be achieved successfully by means of a multi-level approach: assistance through ministries; intermediaries such as training centres for judges; and a civil society are needed.

To achieve these goals the Judicial Training Centre of the Kyrgyz Republic, supported by GIZ, has conducted more than 40 training sessions for over 1,800 participating judges, legal practitioners and lawyers in the Kyrgyz Republic since 2007. In Kazakhstan around 800 judges have been trained since 2004. Legal practitioners of other public institutions and lawyers also attend the seminars if they are interested in the topics offered. So far in 2010, 336 judges and 100 lawyers have gained further qualifications in Tajikistan. In

Although the basic circumstances of the countries in Central Asia are often incomparable, they all have one thing in common: a Soviet heritage which is still visible today throughout their legal systems and procedure laws.

Uzbekistan cooperation has just started with the Supreme Court concerning the education of judges. Lastly, in Turkmenistan judges and lawyers are being trained together; there were 100 participants in 2010.

This article will focus on the programme's cooperation with judges, specifically training in civil law and civil procedure law, and the respective general framework for these. Although the basic circumstances of the countries in Central Asia are often incomparable, they all have one thing in common: a Soviet heritage which is still visible today throughout their legal systems and procedure laws.

The challenges

So what are the basic challenges in the daily work of judges and the courts? There are four factors, which are closely connected with each other:

- lack of knowledge
- corruption
- inefficient procedures
- procedural laws in need of revision.

There are numerous reasons for these problems, only some of which will be discussed in detail here.

Although the countries of Central Asia have been trying to build independent judiciaries and develop modern and consistent legal systems since gaining independence at the beginning of the 1990s, they have not yet succeeded in several tasks. To start with, higher education at universities is inadequate, and modern legal literature and commentaries[5] on legal acts are missing. Judicial decisions are not made public satisfactorily, which leads to unknown jurisprudence and impedes transparency in the course of justice. Furthermore, corruption is all-pervasive in the legal system, making predictable and constitutional decision-making impossible. Civil Procedure Codes, with rules adopted from the socialist Soviet system with inflexible procedures and structures, prevent judges from working independently and efficiently.

What has GIZ learned through supporting their partners' reforms? I will try to categorise the separate difficulties, although this is virtually impossible as the problems overlap in most cases.

Lack of knowledge

Higher education at universities has clear deficits and is rarely fit for purpose. It is often the case that diploma degrees are not awarded on the grounds of knowledge and performance. Qualified experts migrate to other countries, leaving the next generation without competent teachers and mentors. New literature is rare, especially literature written in the specific national languages.

In most Central Asian countries GIZ cooperates closely with the national judicial training centres. Through especially developed judicial training programmes the partners are trying to improve this situation and to qualify young judges and legal experts. Here specialised training is helpful, for example in property rights and family law, as legal systems have to be made adaptable for an environment that is currently under change. However, this training does not get to the root of the problems. It is evident that even the basic skills of legal methodology are poorly taught at universities, if at all. Discussions with judges are not structured in most cases, specific issues cannot be accomplished and opinions cannot be justified. Although most of the procedure codes contain the basic legal terms for a claim,[6] many judges are unable to distinguish between special and general norms and their proper interpretation and application. These are, however, all necessary in order for a judge to study legal texts independently and to apply them to legal issues, to ask the involved persons the correct questions and to give reasons for a ruling.

Consequently, the most important training supported by GIZ is for judges – concerning the conduct of proceedings, the subsumption[7] of an issue under the relevant legal norm, and the writing and justification of legal decisions. Even just presenting the simple central question "Who wants what, from whom, and on which basis?" can cause surprise — however asking this question can make the judges' work easier. If a judge knows these basic skills, he or she can use them in each special field and even explore new legal fields independently.

The more detailed a judgment's justification, the more difficult it is to allow unfair motives to influence the decision.

National lecturers receive further education from GIZ, since they are able to pass knowledge of specific legal methods to their colleagues more effectively than international experts can. Moreover, in the Kyrgyz Republic GIZ has started to increase the participation of young judges in the training of trainers. On the one hand this should encourage the development of young experts, and on the other it should help to focus the training of judges on the needs of younger professionals. Participants consider the seminars, which were prepared and conducted by international and Kyrgyz experts together through "team teaching", to be interesting and helpful in their daily work.

GIZ supports this training by writing and publishing law books[8] and legal commentaries,[9] in partnership with national working groups.

Corruption

There is no global remedy for corruption, but it is possible to try to curtail or reduce it by applying certain measures.

The publication of judicial decisions is crucial, and is supported in particular in the Kyrgyz Republic, Tajikistan and Uzbekistan. Long-term cooperation with the partner nations is necessary, not just to help them understand the importance of these publications, but also to make this activity sustainable and conducted in the future by the partners themselves. Unfortunately financial aspects play an important role, because the judiciary is often afflicted by inadequate budgets.

A further way to reduce corruption is the introduction of plans for the distribution of cases. Using such a system ensures that an incoming lawsuit will be allocated to a judge according to objective and defined procedures, and will prevent the President of the Court or others from influencing this process. However, the promotion of these plans is in some cases strongly opposed by legal practitioners.

Another focus of GIZ's work is to support partner countries in enabling judges to deliver judgments that meet all juristic demands. For this purpose special training[10] in civil law is conducted. The more detailed a judgment's justification, the more difficult it is to allow unfair motives to influence the decision. Imprecise decisions without mentioning any basis for a claim and without identifying and applying the correct law to the facts make it easier to influence the final decision of the lawsuit. Although the procedure codes demand justification of decisions, the preconditions for it are in most countries merely formal.[11] Furthermore, where the judgment must be pronounced immediately at the end of the lawsuit,[12] these strict time limits impede the process of delivering fair judgments. This problem cannot be solved by requiring that the operative part (tenor) simply be pronounced first and that justification can follow later either. A judgment requires intensive study of the facts and the weighing of pros and cons by the judge; all steps that belong to the justification. But it is often the case that the preparation of cases is insufficient, and the judge faces an amount of information that he or she cannot study carefully in the time available. The consequence is often a kind of artificial postponement of the proceeding, which further restricts the efficiency of the courts.

Inefficient procedures

The inefficiency of the courts is closely connected with the need to reform the procedural codes. Many judges complain of heavy workloads and insufficient time to study the individual cases carefully. Parties and judges seek a quick and effective, as well as fair, decision of the lawsuit, and this requires comprehensive preparation of the process. GIZ and its partners are therefore implementing various activities to facilitate judges' daily work.

Here the advocates play an essential role. If a claim has been well prepared by the advocate, the judge will save time in the preparation of the lawsuit. However, in Central Asia advocates have not really recognised their importance in civil cases. Unfortunately, advocates often appear as so-called "pocket lawyers", which means that they act on financial aspects in mediation and negotiation with the judge. Advocates' training centres in Central Asian countries therefore conduct training for lawyers, with the support of GIZ, on issues of ethics and the methods of filing lawsuits, to enable advocates to contribute effectively to the process in accordance with the rule of law.

Once again the focus is on the training of judges in the preparation and conduct of proceedings. Judges should be as well prepared as possible

Judges should be as well prepared as possible when meeting the parties at the beginning of the proceeding.

when meeting the parties at the beginning of the proceeding. This requires a comprehensive study of the facts by the judge in advance, so that he/she can separate important facts from unimportant facts. This can be achieved by the so-called "relation method", which enables the judge first to recognise which of the statements made by the plaintiff are conclusive and give basis to the claim, and then to check which pleas can successfully be raised by the defendant, which facts remain to be proved, and which party bears the burden of proof. The use of this helpful method, which restricts proceedings to the essential points and consequently saves time and personnel, is impeded by the procedure codes and by the post-Soviet understanding of justice. The core problems of the Civil Procedure Code (CPC) can be illustrated as follows.

The first problem is the strict time limit: the time limit in the Kyrgyz Republic of 14 days[13] to schedule a lawsuit makes it impossible for the judge and defendant to carefully prepare themselves. The strict time limit of two months to decide the whole lawsuit also turns out to be unworkable.[14] Furthermore the defendant is not forced to answer to a complaint (defence) until the hearing. Although the defendant is able to express an opinion on the plaintiff's claim, it is not obligatory.[15] Lastly, the judge and the plaintiff are confronted with the defendant's statement and cannot respond and express their opinion accordingly. As a consequence the hearing is postponed or, even worse, the judge delivers a judgment based on insufficient knowledge.

Therefore GIZ's training aims to help participants recognise the usability of a structured method, and at least use it for the plaintiff's pleading in the preparation of the proceeding. Judges have also noticed that this method is helpful to encourage the defendant to respond as early as possible.

Although the principle of party presentation is stipulated in the CPC[16] and the different standards stipulate that only relevant evidence should be analysed and assessed (for example, article 63 para. 1, CPC of Kyrgyz Republic), in reality what occurs is a type of official investigation. These problems also form topics of training. In Uzbekistan and Turkmenistan the principle of substantive truth prevails,[17] which wastes time and resources and, in correlation to private autonomy, infringes on the freedom of the parties involved to decide on whether and when they file a lawsuit as well as the matter in dispute and the duration of the lawsuit. Another infringement of the principle is the fact that the judge is not bound by a plaintiff's application for relief[18] and can go beyond this claim.

Furthermore, the Kyrgyz Republic judge has to read out all written statements in the proceedings,[19] which takes a lot of time. It would be more efficient if these statements were exchanged between the parties before the beginning of the proceedings so that they have enough time to prepare for it.

According to the Civil Procedure Codes a court settlement can be made at any time,[20] but in practice this rarely happens. Parties need to be motivated, and be able to estimate their chances of winning the lawsuit. However, this is impeded by the fact that the judges are afraid of being considered prejudiced if they express a current opinion concerning a case. Consequently, the parties do not know whether the judge understood the parties' statements correctly and they can do nothing but wait for the surprising ruling. During study trips to Germany judges have shown how a court settlement can be conducted, and their will to change their thinking was strengthened.

If judges are able to pronounce a concrete and explicit tenor (operative part) it will make the bailiffs' work easier, and additional judgments and explanatory commentaries will not be necessary.[21] Tenors therefore make up an important part of the training concerning methods of forming judgments.

Lastly, a few words should be mentioned about review procedures and the revision of effective judicial acts on the basis of newly established circumstances. Parallel appealing and cassation procedures with unclear and contradictory procedural rules, as well as long appeal periods[22] in supervisory proceedings, delay lawsuits and cause insecurity instead of legal security. This is also true for the possibility of revision after the closure of a proceeding, as in most cases preclusion rules are missing in the CPC.[23] Here seminars can function as centres for mutual discussion, which could lead to amendments.

... emphasising dialogue among judges as well as with international experts on this topic can encourage judges to look a bit further and think about the future of law in their countries.

Procedural laws in need of revision

Other factors impede modern constitutional procedures, their usage and doctrine. The principle of party disposition is violated if withdrawal of an action, recognitions and court settlements have to be approved by the court;[24] if the prosecutor in a civil procedure has the autonomous right to file a suit;[25] if interested third parties have the right to appeal;[26] or if the judge can call a different defendant or change the defendant on his or her own initiative.[27]

Furthermore, the compulsory declaration of nullity by courts in some types of cases is outdated and needs to be reformed, as it significantly impedes private and economic transactions.

Lastly, the possibility of appeal and protest against final and absolute decisions[28] is contradictory in itself. Legal force means that these decisions should become non-appealable.

Here, training will not be effective – only amendments in the laws can solve these problems. Nevertheless, emphasising dialogue among judges as well as with international experts on this topic can encourage judges to look a bit further and think about the future of law in their countries.

Conclusion

There is a saying in Central Asia: you have the clock, we have the time. Legal and judicial reforms demand patience, endurance and a large degree of confidence. It is also important to strengthen the basic legal and methodological skills of lawyers, through the training of professionals and those studying at university. Moreover, it is necessary to create transparent and efficient decision-making processes in the judiciary to prepare the ground for investments in the region.

Notes

[1] The views and opinions expressed therein are those of the author and do not necessarily represent the views and opinions of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) or German Federal Ministry for Economic Cooperation and Development (BMZ).

[2] GIS was formed on 1 January 2011. It brings together the Deutscher Entwicklungsdienst (DED) GmbH (German Development Service), the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH (German Technical Cooperation) and Inwent – Capacity Building International, Germany. See: www.giz.de/en/home.html for more information (last accessed 26 January 2011).

[3] To fulfil the Millennium Development Goals.

[4] See the programme information at: www.gtz.de/en/weltweit/europa-kaukasus-zentralasien/26942.htm (last accessed on 23 December 2010).

[5] Kazakhstan is most progressive on this issue: law books, commentaries, legal journals and many judicial decisions have already been published.

[6] Article 132 para. 2 no. 4, 152 CPC Kyrgyz Republic (KG); 150 para. 1 no. 5 CPC Kazakhstan (KZ); 134 no. 5 CPC Tajikistan (TJ); 234 CPC Uzbekistan (UZ).

[7] As well as subordination, Lat. *sub* = under and *sumere* = to take.

[8] Law books on administrative law in Uzbekistan and Kazakhstan, a training book on legal methodology is planned in the Kyrgyz Republic.

[9] Civil procedure commentaries in Kazakhstan, the Kyrgyz Republic and Turkmenistan.

[10] In Kazakhstan, the Kyrgyz Republic and Tajikistan and partially in Turkmenistan as well.

[11] Article 210 no. 4 CPC KG; 220, 221 para. 5 CPC KZ; 202 para. 4 CPC TJ; 18, 206 CPC UZ.

[12] Article 196 CPC KG; 201-203 CPC UZ; 216, 357 para. 2, 383-22 para. 4 CPC KZ; 199 para. 1 CPC TJ.

[13] Article 148 no. 1 CPC KG; 131 CPC UZ; in Kazakhstan one month.

[14] Article 157 CPC TJ three months; art. 174 para. 1 CPC KZ two months.

[15] Article 149 CPC KG; 159 CPC UZ; but it is obligatory in Kazakhstan, art. 169-1 CPC KZ; in Tajikistan the articles are contradictory in Article 152 para. 2, 153 para. 2 CPC TJ.

[16] Article 10 CPC KG; 49 para. 1, 193 CPC KZ; 4, 5, 225, 325, 365 CPC TJ.

[17] Article 15, 57 and 164 CPC UZ; 57, 58, 70-72, 76 CPC TJ.

[18] Article 207 CPC UZ; 199 para. 2 CPC KG.

[19] Article 175 para. 2 CPC KG, not in Kazakhstan.

[20] Article 41 no. 3 CPC KG, 49 para. 1, 193 no. 4, 247, 342 and 383-11 CPC KZ, 177, 335 CPC TJ, 179 CPC UZ.

[21] Article 47 CPC KZ; 199, 206 CPC TJ; 207, 208 CPC KG; 214-215 CPC UZ.

[22] Article 337-2 no. 2, 344 CPC KG, 348-1, 350 CPC UZ.

[23] Article 381 CPC TJ, 362 CPC KG.

[24] Article 41 para. 4 CPC KG; 176, 177 CPC TJ; 49, 193 CPC KZ, article 40 CPC UZ.

[25] Article 45, 343 no. 2 CPC KG; 55 CPC KZ; 47 CPC TJ; 5 no. 2, 33, 46 CPC UZ.

[26] Article 315 no. 3, 337-1 no.3 CPC KG; 44 CPC TJ; 332 para. 4, 383-1 CPC KZ.

[27] Article 39 no. 2, 40 CPC KG; 42 CPC TJ; 39, 42 CPC UZ.

[28] Article 337-1 no. 1, 342 CPC KG; 384 CPC KZ; 365-380 CPC TJ; 311 no. 3, 5 CPC UZ.

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09

Connecting court quality hotspots in Europe: from quality initiatives to excellent courts

PIM ALBERS[1]

Several countries in Europe are introducing quality initiatives for courts. Some are utilising surveys to collect information about court users. Others are applying comprehensive court quality systems. In this article a description is given of the development of court quality policies in Europe and the use of the International Framework of Court Excellence.

Introduction

According to the latest report of the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, courts in the majority of European countries are producing annual reports about their performance and quality.[2] More countries also have monitoring systems in place to measure and manage the progress of court cases. With this information in mind it might give the impression that courts in Europe are moving towards a higher level of quality awareness. But is this really the case?

The answer seems to be mixed. It should be "no", when the number of countries with comprehensive court quality systems are taken into account. Only the Netherlands and Finland can be mentioned as best practice examples here. When the growing number of satisfaction surveys at a national or court level in several countries is mentioned though, the answer could be "yes". According to the CEPEJ evaluation, more countries are using surveys to collect information about the services delivered by courts and public trust in the judiciary.

Before going into more detail about the current developments in Europe with respect to quality, it is important to explain the different terminology that is used to define the quality of the judiciary and the quality of courts. In the traditional sense, "quality" in the judicial branch is often related to *judicial quality;* that is, the quality of a judgment or a verdict. The determination of the level of judicial quality is mostly laid in the hands of the legal professionals themselves – the judges – through a system of peer review, the existence of high courts of appeal, the legal review of judicial decisions in the academic world and judicial inspections and evaluations.

In many countries the evaluation of *judicial quality* is part of the assessment of the

It is important to note in this respect that judicial performance evaluation and judicial quality are not the same as the introduction of *quality initiatives* in the courts or the use of *court quality systems*.

performance of a judge, carried out by judicial inspections or other independent bodies. Judicial performance evaluation is focused on three aspects of a judge's work:

- performance – how many cases have been decided in a given period, the number of adjournments of court hearings and labour productivity
- interaction of the judge with the parties during court hearings
- the quality of the decisions rendered.[3]

For the last aspect assessors may select at random a number of cases to detect legal errors in judgments or review the quality of the legal reasoning and the correct application of the law. Sometimes complaints against a judge or disciplinary measures can also be included in the process of judicial performance evaluation.

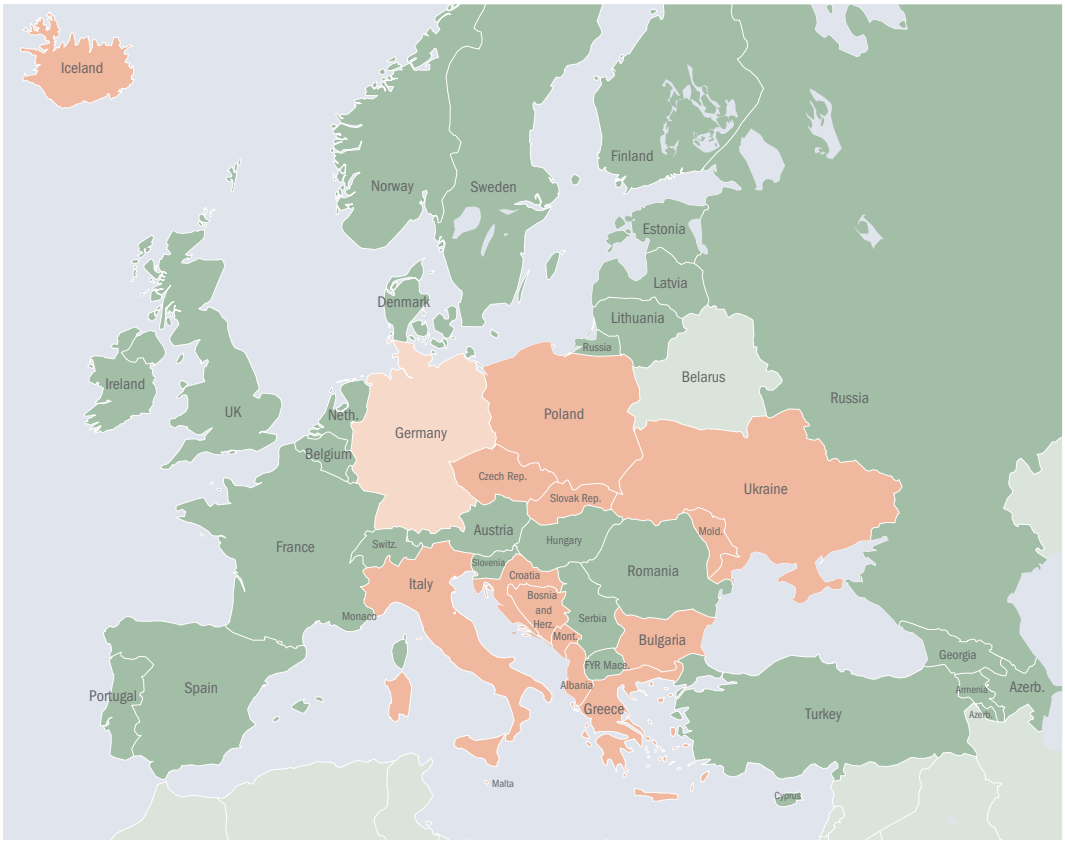
It is important to note in this respect that judicial performance evaluation and judicial quality are not the same as the introduction of *quality initiatives* in the courts or the use of *court quality systems*. *Quality initiatives* and *quality systems* are not focused on the work of an individual judge, but are aimed at improving quality in courts as a whole or departments within courts. In this article only the current state of affairs regarding quality initiatives and quality systems will be described.

Quality initiatives

In 2008 the European Network of Councils for the Judiciary (ENCJ) published an overview of quality initiatives undertaken by its members.[4] In the overview several countries indicated that measures have been introduced to solve one of the major problems in the operation of courts, *the length of proceedings*, by introducing more efficient procedural laws, new working

Chart 1

Countries where court user satisfaction surveys are applied



Countries applying court user satisfaction surveys and/or opinion polls
Countries where no (court/citizen) surveys are held
Data not provided

Source: Council of Europe Publishing, www.coe.int (last accessed 23 December 2010).

Many countries reported that the level of expertise of judges and staff is raised by investing in national judicial training institutes and the introduction of options for distance learning...

methods in the courts and the application of court technology to monitor court performance. In Denmark and the Netherlands norms have been defined regarding the acceptable duration of proceedings and in Lithuania a mechanism has been introduced to detect cases with a long duration. Another often mentioned quality initiative in the report is related to the training and education of judges and court staff. Many countries reported that the level of expertise of judges and staff is raised by investing in national judicial training institutes and the introduction of options for distance learning (see for example the Dutch Training Institute for the Judiciary, the Hungarian Judicial Academy and the National Institute of Magistracy in Romania).

Quality initiatives of the European judiciary include measures to reduce the duration of proceedings and strengthen training capacity, and the use of court user surveys and surveys at a national level to collect information about public trust in the judiciary. How these surveys are implemented, at what level and their frequency may vary from country to country. In the ENCJ report on quality initiatives several examples are provided. Some of them are focussed on measuring the general public opinion of the judiciary (in Belgium through the use of a Justice Barometer study or in Austria via a general opinion poll), while others are oriented at measuring the overall level of satisfaction of court users (for example, Denmark, Hungary, the Netherlands and Romania).

To identify the number of countries that are currently applying court surveys at a national and/or court level and their frequency it is important to take note of the results of the last CEPEJ evaluation report on European judicial systems. This report shows that at the moment 28 countries (member states of the Council of Europe) have indicated that they are conducting court or justice surveys. Conversely, 19 countries have not introduced this tool to collect information about trust and satisfaction in courts.[5]

Court user surveys can be a good starting point for enhancing the quality of justice and the introduction of court quality systems, particularly for countries in transition such as those in eastern Europe. However, the European overview (see Chart 1) shows that five central eastern European countries (Bulgaria, Czech Republic, Poland, Slovak Republic and Ukraine) and four Balkan countries (Albania, Bosnia and Herzegovina, Croatia and Montenegro) have indicated that for the reference year 2008 no surveys were conducted to measure the public trust in the judiciary or the level of satisfaction of the services delivered by the courts. Compared with eastern Europe, court user surveys or general surveys seem to be more widely applied in western Europe, when looking at the map.

It is important to note that developments in this area can be rapid. See for example the case of Croatia and Ukraine. In Croatia a user survey will be prepared as part of a Justice Sector Support Project funded by the World Bank and in Ukraine USAID is involved in the development of a Citizen Score Card for courts (see p. 84).

Regarding the target group of the surveys, various types of court users can be listed. In the countries that have indicated in the CEPEJ evaluation that they use surveys the main target group is the ordinary citizen and court visitor, followed by public prosecutors, lawyers and other clients of the courts (see Chart 2). For judges and court staff separate surveys may be developed. Eighteen countries have introduced surveys for judges and 15 countries indicated that they use a survey tool to measure the level of court staff satisfaction.

As discussed earlier, surveys can be conducted at a national level or at a court level and the frequency of application may vary from country to country. Countries tend to apply surveys more often at a national level, especially to monitor the level of public trust in the judiciary. Only a limited number of countries conduct court user surveys on a regular basis at the level of individual courts – 11 reported countries in the CEPEJ study. Nineteen countries have reported that they have implemented (on an incidental basis) a survey to measure trust at a national level.

Compared to other regions in the world ... Europe only has relatively recent experience of the use of comprehensive court quality systems and the development of quality standards.

Table 1
Citizen Report Card results for Lutsk District Court (Ukraine)

Quality measure	Maximum score	Highest score	Lutsk District Court
Physical access to court	1.00	0.94	0.79
Level of comfort in the courthouse	1.00	0.95	0.62
Access to court information	1.00	0.95	0.78
Affordability of court fees	1.00	0.78	0.75
Timeliness	1.00	0.97	0.75
Quality of performance of court staff	1.00	0.95	0.84
Quality of performance of judges	1.00	0.97	0.86
Average	1.00	0.94	0.77

Source: USAID 2010 presentation, Asia Pacific Courts Conference, Singapore, October 2010.

Case illustration of a court user survey: Citizen Report Card (Ukraine)

With the assistance of the US Agency for International Development (USAID) a pilot program, called the *Citizen Report Card,* has been developed for Ukraine. The main goal of this pilot is to introduce the tool in several courts over the period 2008-11. The idea of a Citizen Report Card was derived from the public affairs centre in Bangalore (India) for measuring citizen satisfaction with municipal services. With the use of a dedicated court survey tool, court visitors are invited to give their ratings concerning several aspects related to court proceedings and the visit of a court such as:

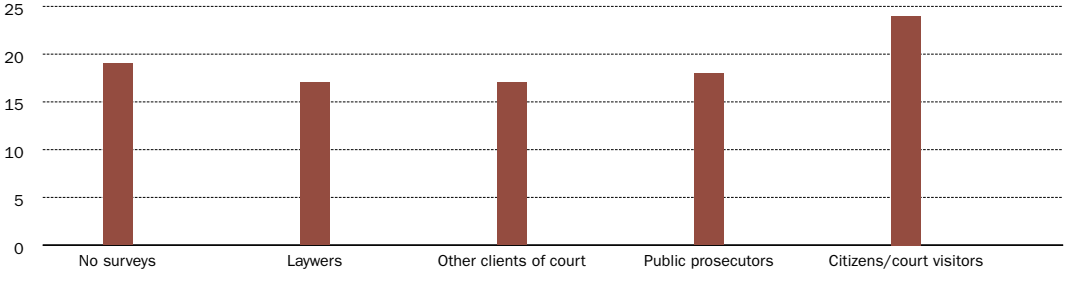
- physical access to the court
- the level of comfort of the courthouse
- affordability
- timeliness of proceedings
- the quality of performance of court staff and judges.[6]

The results of the Citizen Report Card can help detect the strong points of operation of a specific court and the areas for improvement. Table 1 shows the scoring results from the Lutsk District Court, illustrating that the level of comfort of the courthouse in particular needs more attention.

From quality initiatives to court quality systems

Compared to other regions in the world, for example, the United States (Trial Court Performance Standards and Courtools)[7] and Singapore (eJustice Scorecard), Europe only has relatively recent experience of the use of comprehensive court quality systems and the development of quality standards. In most of the member states of the Council of Europe (26 countries) there are no quality standards. Additionally, many European

Chart 2
Court user satisfaction surveys: by court user



Source: European Commission for the Efficiency of Justice (2010), p. 81.

... generally speaking in most of these models the client is considered central to determining the level of quality.

Box 1: Quality benchmarks in Finland (Rovaniemi Court of Appeal) include –

- the court process
- the decision made by the judge
- treatment of the parties and the public
- promptness of proceedings
- competence and professional skills
- organisation and management of adjudication.

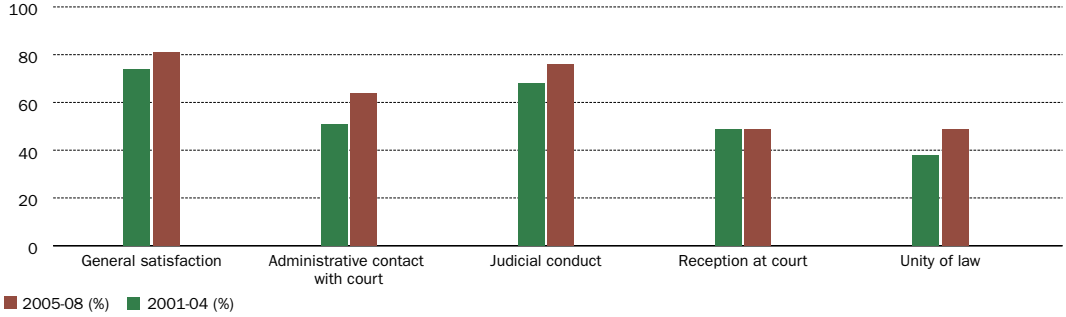
countries lack specialised court staff to assist with managing the implementation of court quality policies. The only exceptions are: Finland (Quality Benchmarks, see Box 1); the Netherlands (rechtspraaQ); and to a lesser extent, Denmark, where a general quality model (the Common Assessment Framework)[8] is applied in the courts.

If you are not accustomed to the use of the terminology associated with "quality", such as CAF (Common Assessment Framework), EFQM (European Foundation on Quality Management), Six Sigma, ISO (International Organization for Standardization) and so on, you might wonder what this is all about. Generally speaking in most of these models the client is considered central to determining the level of quality. This is also the case for the comprehensive court quality models applied by Denmark, Finland and the Netherlands.[9] As part of their quality systems information is collected on a systematic basis about the level of satisfaction of court users (lawyers, public prosecutors, other repeat players/regular parties and visitors). This can help courts identify areas of improvement concerning court quality levels.

In the Netherlands interesting information is available about developments in the levels of satisfaction of professional users and citizens/court visitors of the Dutch courts during the period from 2001 to 2008 (Chart 3). This information shows that levels of satisfaction have increased: from 74 per cent to 81 per cent for professional users; and from 66 per cent to 78 per cent for citizens.[10] This was mostly caused by an increase in the perceived level of satisfaction related to the expertise of judges, treatment of the parties involved and quality of the judgments, summarised as the conduct of the judge.

User orientation and the application of user surveys are not the only aspects taken into account in comprehensive court quality models. The management and leadership of courts, management of resources, internal procedures, quality of judges and court staff, regular monitoring of court performance and transparent presentation of results to the general public through printed annual court reports or via court websites are elements that can be found in these models too. For example the Dutch model RechtspraaQ contains: a measurement system of court quality, oriented at the quality of independence and integrity of judges, timelines of proceedings, unity of law, expertise and treatment of parties; quality regulations for courts; a peer review mechanism for judges; a complaint procedure; staff and user surveys; and a visitation protocol. The last point is important to mention, because on a four year cycle an independent visitation committee visits every court in the Netherlands to assess the various quality initiatives the courts have undertaken. On the basis of these visits a report

Chart 3
Trends in professional court user satisfaction in the Netherlands (lawyers, prosecutors, repeat players/regular court visitors)



Source: Dutch Quality Organisation for the Judiciary (PRISMA), 2010, p. 8.

However, more work needs to be done to raise awareness in European countries about the need to have a specific mechanism in place to monitor and improve the quality of courts.

is drafted concerning the current state of affairs of the quality of courts in the Netherlands.

Stimulating quality awareness in the courts

As described in the introduction, the findings of the CEPEJ report show that certain countries are applying court user surveys and that in a very limited number of countries, comprehensive court quality systems have been introduced. However, more work needs to be done to raise awareness in European countries about the need to have a specific mechanism in place to monitor and improve the quality of courts.

Already some initiatives in this respect have been undertaken. For example the CEPEJ of the Council of Europe has produced practical documentation for courts to implement court user surveys.[11] Additionally, there is a range of rich material and experience already available on the internet (see especially the Courtools web site of the US National Centre for State Courts: www.courtools.org [acessed 23 December 2010]). The European Network of Councils for the Judiciary has also produced an overview of the current quality activities in the courts in Europe that can stimulate countries to start quality projects in the judiciary. Moreover, the International Framework for Court Excellence can be a source of inspiration too.[12]

Box 2: Case study

The Land and Environment Court of New South Wales Australia was the first court to act as a pilot for the Framework of Court Excellence. In 2008 and 2009 several meetings were held with judges and court administrators to review and score the self-assessment questionnaire. Looking at the seven areas of excellence certain areas of improvement were identified, which resulted in the development of a plan of action for the court to enhance their productivity and quality. Examples of actions that have been undertaken in 2009 are: the adoption and publication of a court statement of purpose, the collection of statistics of case timeliness, targeting delayed pending cases, the preparation of a court newsletter, the upgrade of the court's computer system and the improvement of the court website (see: Land and Environment Court of NSW, *Annual review 2009*, Sydney, Australia).

The International Framework of Court Excellence

In 2007 the Singapore Subordinate courts took the initiative of inviting experts from Australia, Europe and the United States to develop a global practical tool for courts to assess and improve their quality and performance. Using the experience of the United States (Trial Court Performance Standards, Courtools), Europe (RechtspraaQ and Quality Benchmarks), Asia (eJustice Scorecard Singapore) and quality work initiated in Australia, combined with major principles of general quality models (such as the European Foundation on Quality Management, the Malcolm Baldridge Quality Awards, the Singapore Quality Award, and so on) the International Framework of Court Excellence was created. In this framework seven relevant areas of excellence are identified for assessing the performance and quality of courts, namely:

- management and leadership
- court policies
- human material and financial resources
- court proceedings
- client needs and satisfaction
- affordable and accessible court services
- public trust and confidence.

These areas of excellence are connected with the main values of a court (equality, fairness, impartiality, independence, competence, integrity, transparency, accessibility, timeliness and certainty) (see Chart 4).

In a "journey towards excellence" courts can assess their strong and weak points by making use of a self assessment questionnaire where all seven areas of excellence are included (see Box 2).[13]

The application of the Framework of Court Excellence is not limited to the court level, since the model can also be used at a national level to review the quality of a judicial system as a whole. A good example concerned a "quick scan" assessment of the judiciary of Kazakhstan conducted in 2010 as a

The general conclusion of the assessment is that the judiciary of Kazakhstan is on the right track in enhancing court quality to an international level.

part of the United Nations Development Program (UNDP) project on transparency, access to information and justice.[14]

In a report drafted for this project it was concluded that based on analysis of the situation in Kazakhstan that makes use of the seven areas of court excellence, several actions have already been undertaken to enhance the quality of the judicial system as a whole (Box 3).[15] Examples in this respect are:

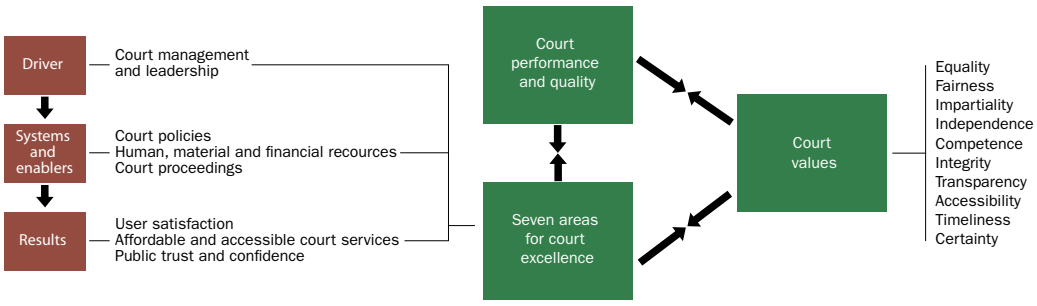
- improvements in civil procedural laws, for example, the setting of time limits for proceedings and increasing the use of a single sitting judge
- the publication of judgments on court websites
- the use of videoconferencing techniques
- alternative dispute resolution mechanisms.

Conclusion

Looking at the European judicial landscape one can conclude that in every country – to a varying degree – quality activities have been implemented, ranging from measures for strengthening the training and education of judges, improving the efficiency of judicial proceedings to the introduction of ICT in courts. The number of countries which are applying surveys at a national level to measure public trust in the judiciary and at a court level to assess court user satisfaction is growing. This must be seen as an important step for a more user oriented operation of courts, where not only is much attention given to the judicial quality (the legal quality of the judgments), but also to the quality perceptions of the general public, lawyers, prosecutors and other court repeat players/regular court users.

Another conclusion that can be made is that over a period of more than 10 years only a few countries in Europe have introduced a comprehensive court quality system (for example, Finland and the Netherlands). It is hoped that as the result of the publication of the International Framework of Court Excellence, more countries are inspired to introduce a quality system, especially as it is no longer sufficient to only define the quality of the work of judges in terms of judicial quality. As is the case in other parts of the public sector, the views and expectations of the users must also be included.

Chart 4
International Framework of Court Excellence



Source: Land and Environment Court of New South Wales, *Annual Review 2009*, Sydney, Australia, pp. 23-25.

The number of countries which are applying surveys at a national level to measure public trust in the judiciary and at a court level to assess court user satisfaction is growing.

Box 3: Assessment of court quality and judicial evaluation, Kazakhstan

In July 2010 an assessment was held in Kazakhstan initiated by UNDP. As part of this assessment the quality of the judicial system was reviewed and recommendations made in the area of the monitoring of the performance of judges. For the evaluation of the quality of the judicial system the seven areas of court excellence were taken as a reference point. Based on these areas the following observations were made.

- **Management and leadership:** much attention to this subject is given due to the presence of a court management information system and a strategic plan at the level of the Supreme Court which describes the necessary future actions to improve the judiciary in Kazakhstan.

- **Court policies:** the management of the court administration is laid in the hands of the Committee on Court Administration at the Supreme Court. As a result of this, the process of planning and control of the judiciary is rationalised. Improvements may be necessary with respect to the application of a forecast model (for forecasting the development of cases and the need for personnel and financial resources).

- **Court proceedings:** much effort has been given to increase the efficiency of court proceedings, for example by setting time limits in the proceedings and the promotion of a single sitting judge.

- **Affordable and accessible court services:** several actions have been undertaken to increase access to justice. Concrete results can be found in the area of opening court web sites (with a database of judgments), information kiosks at courts and public areas, videoconferencing facilities and the stimulation of alternative dispute resolution mechanisms.

- **Management of court resources:** looking at the current situation it is clear that this is a major point requiring the attention of the Supreme Court of Kazakhstan and several steps have been undertaken to enhance the management of resources. Points of reflection for the future are further investments in court information and communication technology (ICT) and the release of financial resources for the national training institute for judges.

- **Public trust and confidence:** the judiciary of Kazakhstan promotes openness and transparency. The general public is actively informed through written media and the television and specialised staff are available for communication with the press in high profile court cases. However, relations with the press need some reconsideration and it is expected that a new communication policy will be developed in the future.

- **User satisfaction:** only limited court user surveys are held in Kazakhstan, predominantly as part of a judicial monitoring project. Recommendations have been made to introduce this method on a nationwide basis to systematically collect information about the perceived level of satisfaction of the services delivered by the courts.

The general conclusion of the assessment is that the judiciary of Kazakhstan is on the right track in enhancing court quality to an international level. To give even more attention to this aspect it is recommended that pilot projects are selected to apply the International Framework of Court Excellence.

Areas for improvement identified in the analysis are media relations and the application of court user surveys. For the latter subject a concrete recommendation has been given for the development and implementation of a survey.

Source: Albers (2010), pp. 10-16.[15]

Notes

[1] Pim Albers is acting advisory member of the International Consortium of Court Excellence. However, he has written this article in his personal capacity.

[2] CEPEJ Council of Europe (2010), *European judicial systems — edition 2010: efficiency and quality of justice,* p. 80, Strasbourg.

[3] See: University of Denver (2006), Institute for the Advancement of the American Legal System, *Transparent Courthouse,* Denver.

[4] European Network for Councils for the Judiciary (2008), *ENCJ working group on quality management: register of quality activities*, Budapest.

[5] CEPEJ (2010), pp. 80-81.

[6] Powerpoint presentation USAID (2010), Asia Pacific Courts Conference Singapore (October 2010).

[7] See: www.courtools.org (last accessed 23 December 2010).

[8] See: www.eipa.nl/en/pages/show/&tid=69 (last accessed 23 December 2010).

[9] Ministry of Justice Finland (2005), quality project in the courts in the jurisdiction of the Court of Appeal of Rovaniemi.

[10] Dutch Quality Organisation for the Judiciary (PRISMA) (2010), *Magisterial and accessible (Gezaghebbend en toegankelijk* [Dutch]), Amersfoort, Utrecht.

[11] www.coe.int/cepej (last accessed 23 December 2010).

[12] See: www.courtexcellence.com (last accessed 23 December 2010).

[13] See: Land and Environment Court of New South Wales, *Annual Review 2009*, Sydney, Australia, pp. 23-25.

[14] Kazakhstan expressed their high level of interest in court quality systems and the international framework of court excellence as a result of the presence of a delegation of the judiciary and UNDP at at Asia Pacific Courts Conference (4-6 October 2010 Singapore). See: http://app.subcourts.gov.sg/subcourts/page.aspx?pageid=65581 (last accessed 23 December 2010).

[15] P. Albers (2010), *Report on the assessment of judicial monitoring and court quality of the judiciary of Kazakhstan,* The Hague/Astana.

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10

The National Institute of Magistracy: standards, strategies, programmes, trainers

DRAGOS DUMITRU AND DIANA UNGUREANU

The article outlines the main developments of the National Institute of Magistracy (NIM) in Romania. It discusses issues related to the future of magistrates' training in Europe, the contribution of the main Romanian judicial institutions and the roles played by the Court of Justice of the European Union and the European Court of Human Rights in the training of European magistrates.

Mission

The National Institute of Magistracy (NIM) was established in 1992 to provide Romania with a professional body of highly qualified magistrates able to properly apply the law and, consequently, to improve the overall performance of the judiciary. The first class graduated in 1992, but attendance only became a condition for entering the magistracy in 1997. The entry-level training takes two years.

The NIM is a public, autonomous institution with legal personality coordinated by the Superior Council of Magistracy (SCM) that provides initial training for judges, prosecutors and justice auditors, in-service/ continuous professional training of sitting magistrates and also the training of trainers, in compliance with legal provisions. It is organised and functions according to the following amended normative acts: Law no. 304/ 2004 regarding the judicial organisation, Law no. 303/2004 regarding the statute of judges and prosecutors, Law no. 317/2004 regarding the Superior Council of Magistracy, and the Regulation of the National Institute of Magistracy, adopted by SCM Decision no. 320/2005.

The NIM is coordinated by an independent body governing the judiciary – the Superior Council of Magistracy (SCM), the guarantor of the independence of the judiciary. Its headquarters are in Bucharest and there are also regional in-service centres in Timisoara and Sovata.

The Scientific Council decides upon all matters regarding the organisation and functioning of the Institute.

Structure and management

The Institute has the following structure:

- Director and Managing Board
- Entry-level Training department
- In-service/Continuous Training department
- Training of Trainers department
- Examinations and Public Policies department
- Financial and Administrative department.

Working out guidelines for the further development of the NIM plans and aspirations.

The management of the NIM is the responsibility of the Director, the two Deputy Directors, one Executive Director and the Scientific Council. The Pedagogical Council is an advisory body which, at the request of the Scientific Council, submits proposals concerning the NIM's educational policies (mainly regarding curriculum, syllabus and programmes for the Training departments).

The Director and the Deputy Directors are appointed by the SCM from the legal training staff of magistrates or from the academic staff of officially recognised law schools. The Director and the two Deputy Directors coordinate the current activity of the Institute.

The Scientific Council comprises 13 members as follows:

- a judge from the High Court of Justice and Cassation
- one prosecutor from the Prosecutor's Office attached to the High Court
- one judge from the Bucharest Court of Appeal
- one prosecutor from the Prosecutor's Office attached to the Bucharest Court of Appeal
- three trainers from the Law Schools of the Bucharest University, University of Iasi and University of Cluj-Napoca
- three elected representatives of the NIM training staff
- one representative of the legally established Professional Association of Judges and Prosecutors
- one representative of the Judicial Trainees
- the Director of the Institute who chairs the Council.

The members of the Scientific Council are elected for a term of three years, which can be renewed, while the term of office of the Judicial Trainees' Representatives is only one year. The Scientific Council decides upon all matters regarding the organisation and functioning of the Institute.

Entry-level Training department

Improving the selection of judicial trainees, as well as providing comprehensive entry-level training for future judges and prosecutors.

Objectives

Through the training it provides, the NIM aims to instill in magistrates:

- the necessary theoretical and practical legal knowledge
- a complete comprehension of European Court Law and the case law of the European Court of Human Rights
- ability to interpret and apply law in an unitary manner
- a logical and structural way of reasoning
- a sound command of foreign languages and information technology.

The target of the initial training curricula is to:

- provide a wider and more diverse perspective of life in contemporary society
- encourage the future magistrates to keep their minds open
- reflect the priorities that emerge from the social and political context in which the NIM works.

At the National Institute of Magistracy the study of law is mainly practical, reproducing, as much as possible, the real conditions in which a magistrate carries out his or her activity.

Judicial trainees

The NIM is solely responsible for the recruitment process, with candidates being selected by means of a competitive examination assessing their professional competence and good reputation, held with the observance of transparency, equality between the competitors and confidentiality of the tests.

Admission to the NIM is a complex process, divided into three stages, as follows.

- The first stage consists of an eliminatory 100 question multiple-choice test that covers the main branches of law: civil law, civil procedure law, criminal law and criminal procedure law. For each of these subjects there are 25 questions. In order to pass this first stage, candidates need to give 70 correct answers. The weight in the final mark average is 75 per cent.

- The second stage is a critical reasoning test – a 100 question multiple-choice assessing logical reasoning, analytical thinking and the capability to understand a complex written test. Its weight in the final mark average is 15 per cent.

- The third stage is an interview focused on assessing motivation, ethics and skills – mainly verbal and non-verbal communication. Its weight in the final mark average is 10 per cent.

Candidates pass and are admitted according to their ranking, and within the limit of available places — provided they have obtained an overall grade of at least 7/10.

Notaries, legal advisers, lawyers, judiciary assistants, legal staff assimilated to magistrates and other legal staff who have a minimum of five years experience in the field may be appointed after passing the entrance test and have to attend a six month compulsory training period. According to the latest amendments, the theoretical examination will focus on the case law of the European Court of Human Rights (ECHR) and principles of the rule of law, while the practical examination consists of resolving the given cases and writing up specific procedural documents.

Methods of training

At the National Institute of Magistracy the study of law is mainly practical, reproducing, as much as possible, the real conditions in which a magistrate carries out his or her activity. It is comprised of case studies which are carried out in small groups, under the guidance of practitioners.

One of the major objectives of the entry level training at the NIM is to provide future magistrates with comprehensive training and help them enrich their knowledge in as many branches of law as possible and extracurricular projects such as:

- multimedia law and language projects
- the *Themis* journal
- management of the law courts and prosecutors' offices attached to them
- study of the Romanian system
- the national case law collection on civil issues
- criminology
- developing information on criminal law issues.

In-service/Continuous Training department

Creating the pre-requisites for high quality performance in the field of justice by providing professional training for sitting magistrates, in order to promote confidence in the Romanian judicial system.

Objectives

The main objectives of the In-service/ Continuous Training department are:

- training the magistrates in the spirit of European law, taking into account the case law of the ECHR and of the European Court of Justice
- providing intensive training in a specific field of law
- improving the public image of the judiciary
- asking the judges and prosecutors to have a standpoint on public policy

A key role in the training of the judicial trainees is played by the trainers, who are recruited from prestigious universities, from among judges and prosecutors having a solid background of knowledge.

- developing the non-judicial skills specific to the magistrates' career
- training them in accordance with ethical and deontological norms
- creating an effective tie between magistrates and society.

The in-service training for the sitting magistrates is government-funded at the Institute and decentralised at the level of the Courts of Appeal and the Prosecutor's Offices attached to the Courts of Appeal.

The In-service/Continuous Training modules are developed throughout the country in the regional centres of Amara, Bârlad, Giroc, Sovata and Timişoara, and at the headquarters in Bucharest in order to ensure a uniform training for the magistrates of all Courts of Appeal.

Sitting judges and prosecutors

The NIM draws up the annual training programme according to a public and transparent procedure. In compliance with legal provisions, sitting magistrates are required to participate at least once every three years in in-service/continuous training programmes organised by NIM, by higher education institutions in Romania or abroad or in other types of professional development.

The continuous training provided is both a duty and a right for magistrates, being a guarantee of their independence and impartiality.

In Romania magistrates are entitled to up to 10 days a year of paid leave to participate in training sessions. Magistrates can submit their applications for training, via the internet, and the Institute will process them and plan the next year's schedule.

Besides the general duty of the magistrates to participate in training the law states the circumstances under which training is mandatory: for magistrates who get a performance rating of "unsatisfactory"; or for those who get "satisfactory" twice consecutively in evaluations; and for those who are going to work for a specialised court.

Methods of training

The in-service training is carried out by combining several methods – seminars, conferences and workshops in which there is a direct interaction between NIM trainers and the participating magistrates.

On the other hand, due to financial reasons, the NIM has conceived other types of training to replace or complete the classic formats, responding to magistrates' needs for professional development. New solutions have been found and applied, such as: distance learning; posting training materials on the NIM web site; and setting up discussion forums.

Training of Trainers department

Recruiting highly qualified teaching staff able to provide a high standard of training in all branches of law and in non-judicial areas.

The National Institute of Magistracy is guided by the following objectives:

- recruiting NIM trainers following a transparent and objective procedure
- increasing the number of full-time trainers
- training the trainers in specifically chosen fields and in teaching
- developing a network of trainers to cover all fields of training
- responding to the training needs of all the Appeal Courts and Prosecutors' Offices attached to the Appeal Courts.

A key role in the training of the judicial trainees is played by the trainers, who are recruited from prestigious universities, from among judges and prosecutors having a solid background of knowledge. Trainers should have professional and educational experience, seniority in magistracy, published works and a good command of foreign languages. The candidates are selected by a board and appointed by the Scientific Council, based on a public and transparent procedure consisting of objective criteria decided upon as a part of the trainers' recruiting strategy approved by the Superior Council of Magistracy.

The Institute's teaching staff provides entry-level training programmes, in-service/continuous training programmes for judges

The National Institute of Magistracy also started the process of including non-legal experts in the network of trainers, especially in the commercial field (accountants) and in the field of justice for minors (psychologists, sociologists and social assistants).

and prosecutors and the programmes for the training of trainers, in compliance with the established syllabus.

Methods of training

NIM regulations stipulate the obligation of trainers to attend training activities which the Institute shall provide for and be included in certain programmes to improve their teaching activities and skills. The NIM also started the process of including non-legal experts in the network of trainers, especially in the commercial field (accountants) and in the field of justice for minors (psychologists, sociologists and social assistants).

Examinations and Public Policies department

A specialised department in charge of designing public policies and organising all the contests and exams held within the NIM.

All competitive examinations for entering the magistracy — the entrance examination to the NIM, the exam to directly enter the magistrates' body, the graduation exam, the qualification exam and the exams held for promotion to executive positions — are organised by the SCM, through the NIM.

The Examinations and Public Policies department ensures that there is a well structured methodology concerning the organisation of the exams and well-trained experts in this field are involved in drawing up the tests. In addition, it focuses on the development of the current testing system, trying to configure the most accurate assessment of analysis and synthesis skills and knowledge of the law. The department is setting up a complex database (which will observe maximum security standards), continuously enriched with a great number of tests, from which, at the time of the examination, the Board of Examiners will select the ones that must be solved by the competitors.

The NIM's Managerial Plan 2007–10

Contributing to the creation and implementation of public policies, so as to adapt the judiciary to the needs of its beneficiaries.

The Managerial Plan for 2007–10 refers to the organisation of the activities available to the courts, the prosecutor's offices attached to courts, the judicial trainees, and the trainers and experts' body, within the training programmes carried out by the Institute. The strategic objectives are implemented by operational planning, which is meant to clarify what the Institute aims to achieve.
The key objectives contained in the Plan are set out below.

1. The improvement of the selection and career of judges and prosecutors:

- improving the NIM's communication and public relation activities
- developing a national and European communication policy, so as to strengthen the part played by the Institute in the judicial system: international partnerships, including the funding of an annual contest for judicial trainees in the field of the European Convention on Human Rights and European Court law.

2. The improvement of the selection and career of judges and prosecutors:

- managing the quality of the training programme
- producing a plan that analyses training needs – including drawing up the status of the trainers and an appropriate assessment system
- laying down the initial training programme, to be adapted to the needs of the judicial system
- providing trainers in company law, human rights, ethics and professional deontology of magistrates ensuring the necessary human resources and guaranteeing staff are well-trained
- improving the infrastructure related to the training process (acquisitions proposals, investment plans and so on).

3. Creating the pre-requisites for a high quality professional performance in the field of justice:

- improving the quality of in-service/continuous training programmes by developing the

Strengthening the institutional capacity to effectively apply European norms has led to the increase of hours dedicated to studying human rights.

assessment procedures of judges and prosecutors

- introducing modern methods of training such as distance learning
- developing a network of trainers for each domain in which the magistrates specialise
- improving decentralised training programmes by setting up new regional in-service/ continuous training centres and provide them with appropriate equipment
- disseminating ECHR jurisdictional studies
- providing compulsory foreign language and IT classes for judges and prosecutors.

4. Implementation of public policies, so as to adjust the judiciary to the needs of its beneficiaries:

- elaborating a communication framework with active participation from civil society
- harmonising society's and magistrates' expectations from the judiciary, through an interactive and dynamic dialogue between the magistrates and the Institute
- guaranteeing the exchange of information between SCM, the Ministry of Justice, NIM and the legally established associations of magistrates, by means of a newsletter.

The European dimension

Strengthening the institutional capacity to effectively apply European norms has led to the increase of hours dedicated to studying human rights. Equally, the study of European Community/Union law has been extended to a period of time covering a year and the NIM in-service/continuous training programme includes compulsory foreign language and IT classes. Another initiative related to the training of magistrates, from a European perspective, was to write a handbook containing basic information about EC/EU Law that is distributed electronically to all magistrates.

The Institute organises a number of extracurricular conferences for first- and second-year judicial trainees serving, as a complement to the training sessions that focus on EC Law. Future magistrates are also scheduled to go on a number of study tours to visit judicial trainees who work for the European Court of Justice in Luxembourg and the ECHR.

From 2007 the NIM has been a full member of the European Judicial Training Network (EJTN), allowing Romanian magistrates to take part in training programmes funded by the European Commission. NIM is a very active member in the Steering Committee of this Network and its working groups.

The NIM is also a member of the Permanent Bureau of Lisbon Network and has developed training and extracurricular programmes with NGOs such as: the IRZ; Konrad-Adenauer-Stiftung; the Association for the Defence of Human Rights in Romania – The Helsinki Committee (APADOR CH); the Netherlands Helsinki Committee Centre for Legal Resources; UNICEF; and the Social Alternatives Foundation.

The Institute aims to be a highly professional authority, providing training that entails an extensive understanding of different subjects, reflecting the complexity of life. Through its experience it will contribute significantly to the enhancement of justice, promoting the confidence of its beneficiaries in the judiciary.

Together with the *Portuguese Centro de Estudos Judiciaros* (CEJ), the NIM set up the *Themis* Competition in 2006. The name *Themis* was chosen for this competition as a reference to the goddess Themis from Greek mythology, who is the embodiment of divine order, law and custom. She was able to predict the future and became the goddess of divine justice. The EJTN, the Council of Europe and its Lisbon Network support this successful project.

The fifth edition of *Themis* was organised by the EJTN within the framework of its Exchange Programme. In 2010 it was absorbed into the main EJTN Programme and steps were taken to adapt and enlarge its format in order to recognise its importance in cross-border training in European law.

Themis is aimed at trainees of all institutions responsible for training the European magistracy, whether as judges or prosecutors (where the prosecutorial system forms a

National Institutions of Magistracy must have European law in their training curriculum, continuously extending and updating its scope and intensifying the training of national magistrates in the field

part of the *corps judiciaire*). It is designed to give participants an opportunity not only to enter into stimulating and competitive debate with members of similar schools, but also to meet others in training in different countries and to learn about the various systems that exist within Europe. The competition is based on the following four categories:

- international cooperation in criminal matters
- international judicial cooperation in civil matters
- interpretation and application of Articles 5 or 6 of the ECHR
- magistrates' ethics and deontology.

The last four years have seen an exponential growth of numbers participating, rising from four countries in 2006, to 11 in 2007, 15 in 2008 and 17 in 2009. The 2010 final was hosted by Romania's NIM, Bucharest (22–26 November).

Between 22–23 November 2010, the NIM organised one of the most important events of the year, a conference on the "Professional Training of the Judiciary in the European Space: Standards, Strategies, Programmes, Trainers". The conference was included in the EJTN Catalogue for 2010 and benefited from the presence of Victor Hall, Secretary General of the EJTN. It brought together major representatives of the main Romanian judicial institutions; directors and representatives of the European schools of judicial training in Belgium, Croatia, Finland, France, Germany, Latvia, Moldova, the Netherlands, Poland, Portugal and Spain; representatives of the European judicial training institutions ERA (Academy of European Law) and AEAJ (Association of European Administrative Judges); magistrates from Belgium, Denmark, France, Italy, the Netherlands, Poland and Spain as well as Romanian judges and prosecutors; and NIM trainers interested in the development of public policies in the field of justice.

The representatives of the European judicial training institutions, reunited to unify the training of European magistrates, took the first steps to drawing up a common strategy by adopting a range of principles, including the following:

- the training, by 2014, of a significant number of magistrates in the field of European law through the actual involvement of the national magistrates' training institutions having the experience and institutional capacity required
- National Institutions of Magistracy must have European law in their training curriculum, continuously extending and updating its scope and intensifying the training of national magistrates in the field
- national experience will be enriched by the added value brought about by the instruments provided by the EJTN, in an attempt to harmonise the different training programs carried out at national level
- the EJTN initiative to draw up common curricula in the field of European law is the first step towards a possible universal training culture in this field
- the EJTN's role in drawing up common training instruments, in designing and implementing training programs at a European level, considering that, through its position and mandate, the EJTN should remain the only European institution with such a harmonising mission
- the national institutions and the EJTN can play an essential role in this process, as the training provided at national level can be successfully combined with the training provided at the EJTN level
- continuing to organise visits and internships to ECHR and to the Court of Justice of the EU
- organisation of training among different categories of law professionals – judges, prosecutors, court clerks, interpreters and lawyers – in order for these professionals to be able to dialogue freely and to enjoy the benefit of unitary information in this field
- online training seminars organised either by the national authorities, or by international bodies such as the EJTN, can also constitute efficient training methods, both from the point of view of the results, and, especially, from the point of view of the costs

For mutual trust to exist between magistrates from different European states, there have to be minimum standards and a profound understanding of the different juridical traditions and methods.

For mutual trust to exist between magistrates from different European states, there have to be minimum standards and a profound understanding of the different juridical traditions and methods. The training institutes, therefore, have to identify certain standards in their activity, regarding the training content and quality, the trainers and the training methods used. In this way training at European level would be provided by national trainers who have benefited from common training standards. The training assessment process remains essential in the definition of these standards; the EJTN will have the role of identifying the common training standards, which will contribute to harmonising the training process at European level.

The participants expressed their confidence in the identification of those solutions which will successfully combine diversity and the need for a common judicial training culture, protecting national peculiarities, while constituting a step towards a real, profound union.

Conclusion

The NIM will continue its important work to develop and maintain an efficient judiciary in Romania, and to work with its European and international partners. It is hoped that the explanation of the NIM's activities above will be of both interest and practical use to other judicial training bodies in transition countries in Europe and the Commonwealth of Independent states.

Notes

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Abbreviations

ABA	American Bar Association
ABA ROLI ABA	Rule of Law Initiative
AEAJ	Association of European Administrative Judges
ERA	Academy of European Law
BiH	Bosnia and Herzegovina
BMZ	German Federal Ministry for Economic Cooperation and Development
CARDS	Community Assistance for Reconstruction, Development and Stabilization
CAF	Common Assessment Framework
CCJE	Consultative Council of European Judges
CEPEJ	European Commission for the Efficiency of Justice
CIDA	Canadian International Development Agency
CIS	Commonwealth of Independent States
CMP	Court Modernization Project
COE	Council of Europe
CPC	Civil Procedure Code
EBRD, the Bank	European Bank for Reconstruction and Development
EC	European Commission
ECHR	European Court of Human Rights
EFQM	European Foundation on Quality Management
EJTN	European Judicial Training Network
ENCJ	European Network of Councils for the Judiciary
EU	European Union
EURALIUS	European Assistance Mission to the Justice System in Albania
FYR Macedonia	Former Yugoslav Republic of Macedonia
GDP	Gross domestic product
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
ICCPR	International Covenant on Civil and Political Rights
IBRD	International Bank for Reconstruction and Development
IDLO	International Development Law Organization
IJTP	Initial Judicial Training Program
ISO	International Organization for Standardization
IT	Information technology
JRIP	Judicial Reform Implementation Project
JRSP	Judicial Reform Support Project
JRI	Judicial Reform Index
JTC	Judicial Training Centre
LMS	List of Minimum Standards
LTP	Legal Transition Programme
LTT	Legal Transition team
LTV	Loan to value
MCC	Millennium Challenge Corporation
NCLI	National Centre of Legal Information
NIM	National Institute of Magistracy in Romania
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
PTI	Payment to income ratio
SCM	Superior Council of Magistracy
SPV	special purpose vehicle
UNDP	United Nations Development Program
USAID	United States Agency for International Development
WAN	wide-area networks

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Tristan Paviot/Getty Images	Cover
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Law in transition is a publication of the Office of the General Counsel of the EBRD. It is available in English and Russian. The editors welcome ideas, contributions and letters, but assume no responsibility regarding them. Submissions should be sent to Michel Nussbaumer, Office of the General Counsel, EBRD, One Exchange Square, London EC2A 2JN, United Kingdom; or nussbaum@ebrd.com

Law in transition is printed on Chorus Lux Silk, an environmentally responsible paper which is 100% TCF (Totally Chlorine Free).

Printed in England by Fulmar Colour using environmental waste and paper recycling programmes.

7775 Law in transition 2011 (E/4,000)
ISSN: 1683-9161

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