

Case Study – Improving Commercial Case Management in Courts in the Federation of Bosnia and Herzegovina

Estudo de Caso – Melhorar a Gestão de Casos Comerciais nos Tribunais na Federação da Bósnia e Herzegovina

Marina Matic Boskovic*

Institute for Criminological and Sociological Research, Serbia

Ana Krnic Kulusi**

World Bank, Croatia

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ABSTRACT

High-performing commercial courts are essential to attract investment and maintain a healthy business climate. This article presents efforts of the Government of the Federation of Bosnia and Herzegovina (FBiH) to improve performance of courts and analytic work that ensures informed decision making during the justice reform process. Through 2016, the World Bank led an analytical Study and analyzed the performance of the FBiH courts and presented options for improving their efficiency and quality, based on quantitative and qualitative data and a highly consultative process with stakeholders. The Study offered three options, recommending the one that was found feasible in FBiH. It concluded that the establishment of specialized commercial courts is not justified in FBiH and will not lead to the improvement of court performance. Its analysis and recommendations have attracted consensus among stakeholders and, in 2016, the FBiH Government amended the Reform Agenda to accommodate the Study's findings and recommendations.

Keywords: commercial courts, case processing, case management, specialization

* Institute for criminological and sociological research, Belgrade.

** The World Bank. E-mail: mmatic@worldbank.org

RESUMO

Os tribunais do comércio de alto desempenho são indispensáveis para atrair investimentos e manter um clima empresarial saudável. Este artigo mostra os esforços do governo da Federação da Bósnia e Herzegovina para melhorar o desempenho dos tribunais e também o trabalho analítico que permite um processo de tomada de decisão informada durante o processo de reforma do sistema judicial. No ano de 2016, o Banco Mundial realizou um estudo analítico do desempenho dos tribunais da Federação da Bósnia e Herzegovina. Baseando-se em dados quantitativos e qualitativos e mantendo um processo de consultas aprofundadas com as partes interessadas, apresentou possibilidades de melhoramento da eficiência e qualidade dos tribunais. O estudo ofereceu três opções e recomendou aquela que foi considerada a mais exequível na Federação da Bósnia e Herzegovina. A conclusão do estudo foi que a instauração de tribunais do comércio especializados não é justificada na Federação da Bósnia e Herzegovina, por se considerar que não conduziria à melhoria do desempenho dos tribunais. A análise e as sugestões do estudo recolheram um amplo consenso entre as partes interessadas e, em 2016, o governo da Federação da Bósnia e Herzegovina alterou a Agenda de Reformas para se adaptar às conclusões e às recomendações do estudo.

Palavras-chave: tribunais do comércio, tratamento de processos judiciais, gestão de processos judiciais, especialização

1. Introduction

In the Federation of Bosnia and Herzegovina (FBiH)^[1] there are approximately 63,000 unresolved commercial cases clogging the courts and the amount of these pending court claims is estimated at 4.3 billion BAM^[2], representing approximately 22 percent of GDP in FBiH. Approximately 270 judges and legal associates work on commercial cases in FBiH Municipal Courts; however, few judges and associates truly specialize in commercial cases, and not all courts have separate commercial departments. Across Bosnia and Herzegovina (BiH), training on commercial law and procedure is limited and ad hoc. The 2016 Investment Climate Statement found that over the last five years, the poor business climate was the predominant cause for the stagnation of private investment in BiH. The article presents efforts of FBiH Government to improve performance of the courts and analytic work that ensures informed decision making during the justice reform process.

In recognition of this challenging situation, the Reform Agenda for BiH 2015-2018 and the Arrangement with the International Monetary Fund under the Extended Fund Facility (IMF EFF) each commit all levels of Government in BiH to deepening judicial reforms to foster a more competitive economy that will attract

1. The Federation of Bosnia and Herzegovina is one of two political entities in Bosnia and Herzegovina, and one other entity is Republika Srpska. The Federation of Bosnia and Herzegovina consists of 10 autonomous cantons with their own governments.

2. Data provided by the HJPC based on case management system (CMS) data.

private investment and create jobs. The Reform Agenda for BiH included the establishment of separate specialized commercial courts in FBiH as a measure that will improve both the efficiency and quality of the commercial justice system.

In response to described situation and planned reforms through 2016, in cooperation with the FBiH Government, the World Bank (WB) led an analytical study. The Study Improving Commercial Case in the Management Federation of Bosnia and Herzegovina^[3] analyzes the performance of the FBiH courts and presents options for improving their efficiency and quality, based on quantitative and qualitative data and a highly consultative process with stakeholders. Having in mind the constitutional setup in FBiH the Study concluded that the establishment of specialized commercial courts is not justified and will not lead to the improvement of court performance. Workloads in commercial matters do not justify the effort of establishing a new court structure, and, financially, this would not be sustainable. The Study recommends a package of reforms to improve commercial justice in FBiH: strengthen commercial departments, equalize the distribution of cases, fast-track small claims cases, and develop a comprehensive training program for judges and associates. Its analysis and recommendations have attracted consensus among BiH stakeholders, and, in 2016, the FBiH Government amended the Reform Agenda to accommodate the Study's findings and recommendations.

2. Caseloads, workloads, and resources

Jurisdiction over commercial cases in FBiH resides in ten Municipal Courts, ten Cantonal Courts, and the Supreme Court of FBiH. Only certain Municipal Courts have jurisdiction over first instance commercial cases within a Canton;^[4] commercial departments exist in Municipal Courts in Bihac, Orasje, Tuzla, Zenica, Gorazde, Travnik, Mostar, Siroki Brijeg, Sarajevo, and Livno. However, all Municipal Courts have jurisdiction over commercial enforcement cases. Commercial cases are not equally distributed between Municipal Courts or between the Cantonal Courts since caseloads obviously correlate with concentrations of economic activity in FBiH. As of December 31, 2015, there were 63,020 unresolved commer-

3. Harley, G., Svircev, S., Matic Boskovic, M., Krnic, A. & Esquivel Korsiak, V. (2016). Improving Commercial Case Management in the Federation of Bosnia and Herzegovina. Retrieved from <<http://documents.worldbank.org/curated/en/736251485261261184/Improving-commercial-case-management-in-the-Federation-of-Bosnia-and-Herzegovina-feasibility-study>>. The World Bank.

4. Article 23 of the FBiH Law on Courts determines which Municipal Courts have jurisdiction in commercial matters for each Canton. Commercial cases are disputes between legal entities or entities that carry out economic activity. Commercial cases relate to the rights and obligations arising from the trade in goods, services, securities, property rights, maritime rights, intellectual property rights, competition violation, bankruptcy and liquidation.

cial cases in FBiH. Ninety percent of these (57,565) were pending in the Municipal Courts, 4,996 at Cantonal Courts, and 459 at the Supreme Court.

At a national level, courts are not under-resourced, but resources are not allocated effectively or executed efficiently. Court expenditure in BiH⁵ is approximately 0.85 percent of GDP, which is more than double the averages in the EU (0.3 percent) and more than three times the average of Council of Europe countries (0.21), according to data from the European Commission for the Efficiency of Justice (CEPEJ). However, budgets are fragmented: courts and prosecutors’ offices are financed from 14 different budgets. As a result, courts’ resources are unpredictable, uneven and not linked to performance or needs. This problem is more severe in FBiH where capacity for planning remains weak.

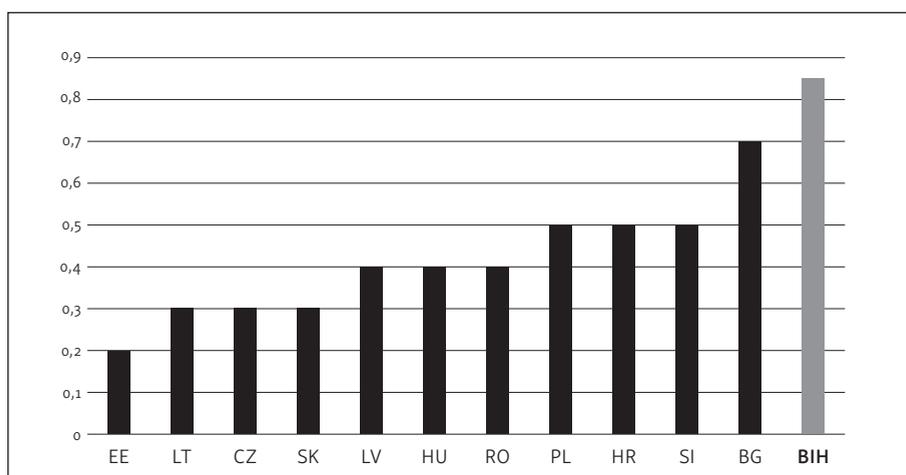


FIGURE 1. National Court Expenditure as a share GDP, BiH and EU-11 in 2014

Source: Eurostat.

2.1 Efficiency, timeliness, and productivity

In FBiH, Municipal Courts proved more efficient in resolving commercial cases than higher instance courts. Between 2012 and 2015 the number of unresolved commercial cases in FBiH decreased by six percent, largely due to resolutions at

5. Bosnia and Herzegovina is divided into two entities, Federation of Bosnia and Herzegovina and Republika Srpska, and Brcko District, each with its own government and judicial structure. Court expenditure here is given for Bosnia and Herzegovina in total.

the Municipal Courts.^[6] However, the Municipal Court in Sarajevo, which carries the largest caseload, struggled with performance: backlogs increased in all years except 2014, causing delays in case processing.^[7]

In Municipal Courts, backlogs mostly comprise utility bill enforcement (27,021 of 57,565 backlogged cases), small claims (18,184 cases) and bankruptcy (480 cases). According to the CEPEJ, the disposition time for utility bills enforcement was 8,897 days in 2012.^[8] The clearance rate^[9] in that year was only 33 percent. Occasional progress can be seen but the problem remains immense. Efficiency in Cantonal Courts and the Supreme Court of FBiH decreased from 2012 to 2015, causing a backlog and prolonging disposition times. Growing cantonal backlogs were primarily the result of appeals from Municipal Courts in litigation and enforcement cases. The Supreme Court of FBiH also experienced a growing backlog and prolonged disposition times, predominantly due to extraordinary legal remedies cases, which comprise the main share of the court's caseload. If improved performance in Municipal Courts is not mirrored by higher courts, backlogs will simply relocate to a higher court, as seen between Cantonal Courts and the Supreme Court of FBiH.

According to High Judicial and Prosecutorial Council (HJPC) data for 2015, the average duration of resolved commercial cases in Municipal Courts was 528 days.^[10] Six courts had average durations of both resolved and unresolved commercial cases of over 500 days. According to HJPC data, 269 judges and legal associates^[11] worked on commercial cases in Municipal Courts in July 2016 (compared to 317 in 2015). It should be mentioned that not all courts have separate commercial departments and judges do not always specialize in one domain. Specialization is more common in larger Municipal Courts.

6. Municipal Courts decreased their stock of unresolved cases by nine percent. By contrast, Cantonal Courts increased the number of unresolved commercial cases by 53 percent and the Supreme Court of FBiH by 37 percent.

7. When observing non-utility commercial cases in Municipal Court in Sarajevo, backlog in 2014 and 2015 was reduced. Unfavorable results are primary attributed to utility cases.

8. WB calculation based on data provided by HJPC. Disposition time is calculated by comparing the number of resolved cases during a reporting period with the number of unresolved cases at the end of that period. It measures how frequently a court turns over the cases received or how long it takes to resolve a case. CEPEJ Guidelines are available at <http://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf>.

9. WB calculation based on data provided by HJPC. Clearance rate is calculated by dividing the number of resolved cases by the number of incoming cases. It shows the ability of a court(s) to handle the inflow of cases. CEPEJ guidelines are available at <http://www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf>.

10. The average duration of unresolved cases is 602 days.

11. The total number consists of 224 judges and 45 legal associates in July 2016 assigned to at least one unresolved commercial case.

Republika Srpska (RS), as one entity of Bosnia and Herzegovina, established specialized commercial courts in 2010 in an effort to improve efficiency and quality of commercial case management. RS established five District Commercial Courts and one Higher Commercial Court in Banja Luka.^{12]} The results of specialization appear to be mixed. RS courts have been able to handle incoming cases and keep the clearance rate over 100 percent,^{13]} and in some case types, RS courts process cases more quickly than in FBiH. However, first instance litigation cases take longer in RS. From the perspective of a court user with a two-instance litigation case, the wait is equally long and frustrating while the resolution of bankruptcy cases takes twice as long in RS as in FBiH (688 days).

3. Procedural bottlenecks in case processing

The World Bank team has found that procedural bottlenecks undermine court efficiency and efficacy in BiH. Court performance is deeply affected by court management and organization, practice and procedure, and party discipline. Despite a general opinion that performance can be improved simply by hiring more judges, more significant improvements in FBiH could be achieved through procedural changes.

Delays in scheduling court hearings are a significant procedural obstacle influencing efficiency and timeliness in FBiH courts. Several years may pass (in certain cases over five years) between case filing and the first hearing, and hearings are canceled or adjourned frequently without strong justification. Case management systems available in courts should be used to monitor the efficiency of hearings and detect irregularities to enable competent authorities, such as the Court President, the HJPC, and the Federal MOJ, to respond. Often, proceedings lack clearly defined procedures, so practice is inconsistent between courtrooms and courthouses. Stakeholders report that abuse of process is extensive and that judges do little to control it. Abuses include avoiding service of process, failing to appear at hearings, requesting adjournments without sufficient justification, and interfering with witnesses prior to giving evidence. Procedural tools are available for judges to tighten control of proceedings but judges rarely deploy them. Stakeholders report that certain cases tend to take priority over others and that powerful parties find

12. As of May 1, 2010, all commercial cases in the general jurisdiction in RS were transferred to these newly established commercial courts. There are 39 appointed judges in commercial courts in RS, 32 in District Commercial Courts and 7 in Higher Commercial Court in Banja Luka. The number of appointed judges has not increased since 2010. In October 2016, the HJPC passed a decision to increase the number of judge positions in District Commercial Court in Banja Luka by 8 judges; these positions will be filled only after the budget is provided.

13. The specialized District Commercial Courts achieved clearance rates of 105 percent in 2012 and 101 percent in 2015.

ways to have their cases heard faster (or slower) as desired. Disciplinary measures against attorneys and judges are rare and ineffective. Another source of delay are expert witnesses commonly employed by judges to prevent their cases being overturned in appellate courts. However, there are instances where expert opinions add little or no value to the case and their excessive use drives up the cost of the case for the parties. Users also express frustration when related procedures are conducted in parallel without coordination which manifests most commonly in enforcement cases, where courts often fail to relate new cases to those that have already been initiated.

4. Quality and consistency in decision-making

4.1 Structural fragmentation and the use of case law harmonization tools

Effective harmonization of case law is a complex task in all court systems and is especially complex in BiH^[14] where each Canton has its own case law and practice. Not all cases are eligible to seek extraordinary legal remedies from the Supreme Court of FBiH to harmonize case law between the Cantons, and there is no supreme body to harmonize case law on similar matters between Cantonal Courts in FBiH and District Commercial Courts in RS. Although commercial departments exist in FBiH, very few judges are truly commercial law specialists, and judges move between departments. Many judges receive only a handful of commercial cases each year while also working on criminal or administrative cases. Tools for case law harmonization exist, such as departmental meetings, issuing of legal opinions, and the establishment of a Judicial Documentation Center at the HJPC, but these are not effective. Firms find this lack of harmonization particularly frustrating since their operations straddle several Cantons or both entities, and may be subject to different regimes in the same country without their knowledge. When disputes arise, firms and attorneys are often unable to predict the outcome of the case which makes it difficult for them to decide to litigate, and makes negotiation and out-of-court settlement unpredictable.

4.2 Appeals and reversal rates

The quality of decision-making in FBiH courts in commercial cases can be improved. Municipal Courts in 2015 had the lowest number of confirmed decisions in the last four years (76 percent), and had the highest number of reversed decisions (14 percent). The data points to a gradual decline in the quality of decision making.

14. In BiH, case law is not a formal source of law. By applying provisions of prior decisions in current decisions the courts give direction for the practical application of law to others. Case law then becomes an important tool for interpreting the law, filling legal gaps, and establishing rule of law and legal certainty.

In the last three years, appeals rates in Cantonal Courts in commercial cases varied between 11 and 14 percent, depending on the individual court and case type. First instance courts in both entities had appeal rates in commercial cases ranging from 6-8 percent and appeal rates in commercial cases were similar to those in non-commercial cases.^[15] However, commercial litigious cases in Municipal Courts had a higher than average appeal rate of 22 to 30 percent. In 2015, the share of confirmed decisions was between 76 and 81 percent in Municipal Courts, and between 80 and 89 percent in Cantonal Courts.^[16] The higher proportion of confirmed decisions in Cantonal cases can be explained by the fact that these cases have passed two instances of judicial consideration and not all cases are legally eligible for revision. The rate of confirmation by higher courts of RS District Commercial Court decisions is lower than in FBiH. This suggests that establishing self-standing specialized courts does not necessarily guarantee better quality decisions.

5. Training of judges, lawyers, and court staff

The quality of justice delivered by courts depends in large part on the quality and consistency of the education that judges and staff receive. In a survey of over 2,500 legal academics and practitioners by the World Justice Project, the inadequate selection and training of judges was ranked among the most serious problems facing the BiH judiciary.^[17] The quality and quantity of training for commercial cases is inadequate. In FBiH, the mandate for judicial training rests with the Public Institution Center for Judicial and Prosecutorial Training of FBiH (CJPT). Judges and prosecutors are obliged to attend at least three days of training organized by CJPT each year. However, there is no obligation to choose trainings in one's field of work. Stakeholders report that attractive training venues are often the decisive factor in selecting one. CJPT does not provide any courses on financial literacy covering the basics of accounting, finance and economics, although businesses complain that judges often lack sufficient expertise in and understanding of complex commercial transactions. Although regulations recognize that commercial law is a separate domain for educators, little progress has been made in creating a pool of expert educators for commercial matters. Training focuses on criminal

15. Municipal and Cantonal Courts presented similar confirmation rates in commercial and non-commercial civil cases. Both Cantonal and Municipal Courts retained slightly more confirmed decisions in commercial matters. There were more reversed decisions in commercial matters while in non-commercial matters more decisions were modified by a higher court.

16. The highest rate of confirmed decisions in commercial cases was recorded in 2013 in both Cantonal and Municipal Courts: 89 percent in Cantonal Courts and 81 percent in Municipal Courts.

17. See the World Bank (2015). Report on the Observance of Standards and Codes Insolvency and Creditor/Debtor Regimes Bosnia and Herzegovina, p. 11.

law, leaving commercial law on the margin; of the 202 training courses that the CJPT conducted in 2016 only eight covered commercial matters. The quality of training courses appeared to be high, but diversity and the number of trainings was considered insufficient. There is no effective quality assurance process for training, such as entrance or exit quizzes. These would enable training assessment, contribute to motivation, influence personal engagement, and could also be connected to certification.

6. Accessibility of courts for businesses

Stakeholders report that access to justice for businesses in FBiH is inadequate, particularly for MSMEs. Due to their size, MSMEs are particularly constrained by an ineffective and inefficient judicial system and cumbersome court procedures in setting up, operating, and growing a business. Unclear and/or complex requirements for Court Registry entries, inconsistent application for the opening of access to public registries, inconsistent legal practice, excessive length of proceedings, and non-compliance with legal deadlines, are only some of the factors that hinder access to justice for businesses. Small claims cases take an average of 702 days to be resolved. It would not be unusual for a court case to be adjudicated long after an MSME has been liquidated. Firms can self-represent in FBiH courts, but most firms choose to hire an attorney to represent them mainly because the relevant legal expertise cannot be found among their employees and sometimes because attorneys provide good connections within the judiciary.

Court fees are extremely complex in FBiH, making it difficult for parties to estimate likely costs. There are 14 laws on court fees and fee tariffs which apply in BiH, and which depend on court jurisdiction. For proceedings at the Supreme Court of FBiH, court fees are regulated by a special law. For proceedings under Municipal and Cantonal Courts, individual Cantonal laws are applied. Some fees are several times higher in one Canton when compared to another. The fees for decisions in merit and appeals sometimes have the same value as fees for claims, but can be up to double that amount.

6.1. Analysis of the most problematic case types

In the Study, four case types were identified as the most problematic areas in FBiH commercial justice. These are business registration, small claims, enforcement, and bankruptcy, all of which suffer from large backlogs, long processing times, low clearance rates, and unsatisfactory court service, and cause the most frustration for court users. The analysis detailed below reveals particular reasons why each of these case types under-perform.

6.2 Business registration

At FBiH level, the business registration procedure is regulated by a range of laws¹⁸ and other regulations, leading to inconsistent practice. Registration of a business entity is the responsibility of the competent court, determined by the location of the business entity. For example, business registration procedures in the Municipal Court in Sarajevo last for 25 days without any legal reason, while the Municipal Courts in Livno and Orasje resolve them in a single day. Backlog of business registration cases in courts in FBiH is probably caused by abandoned registrations, most likely because the party which initiated the procedure decided not to pursue registration leaving the case “open” in the system. It is not known whether these cases are abandoned because parties became frustrated by the complex procedure or for other reasons. Also, businesses are required to undergo the full registration procedure any time there is a change in their documentation. The quality of processing in business registration cases is declining. Few registration cases are appealed, but when they are, their confirmation rate was only 74 percent in 2015, down from a peak of 94 percent in 2014.

6.3 Small claims

FBiH applies simplified procedures to disputes involving small claims of sums up to a threshold of 1,500 EUR for persons and 2,500 EUR for legal entities.¹⁹ Small claims can be resolved through a dedicated procedure in which self-representation is allowed and appeals against judgments are limited. Small claim cases make up a decreasing proportion of commercial cases; the number of incoming small claims cases has fallen by more than 45 percent over the last four years. However, a backlog remains due to the lengthy processing times for unresolved small claim cases, which average 655 days. Small claims cases have the longest disposition time among all cases, possibly due to judicial discretion since stakeholders report that judges may be choosing to deal with the more complex cases first and not prioritizing small claims cases. Small claims cases show a relatively high percentage of confirmed decisions but the highest percentage of modified decisions (10

18. There are two laws regulating establishment of business entities in FBiH (Framework Law on Registration of Business Entities in Bosnia and Herzegovina, and Law on Registration of Business Entities in the Federation Bosnia and Herzegovina) and the Law on Companies of the Federation of Bosnia and Herzegovina. There is a separate legislation for Republika Srpska and Brcko District.

19. Disputes involving small claims also include cases that are not of a pecuniary nature for which the plaintiff has accepted a sum of money not exceeding that amount, as well as disputes relating to the transfer of property not exceeding that amount. Notably, plaintiffs can also obtain a temporary security over the defendant’s movable assets if there is a risk that assets may convey.

percent) suggests that there are opportunities for second instance courts to unify court practice and signal the correct practice to the Municipal Courts.

6.4 Enforcement

Enforcement of unpaid claims is inefficient and is one of the biggest challenges of the legal system in FBiH. Enforcement of commercial decisions needs to be streamlined, accelerated, and made more consistent. Flaws in the execution system are the result of the general economic situation, ineffective legislation, and poor implementation of execution procedures. Substantial court backlogs are mainly caused by enforcement cases, predominantly deriving from utility bills. According to the European Commission Country Report for BiH 2015, and the Doing Business 2017 Report, enforcement of commercial contracts involves 37 procedures, costs 36 percent of the claim value, and takes, on average, 595 days. Court performance data in FBiH for enforcement cases reveal that the courts demonstrate little capacity to manage the caseload. No clear progress was seen from 2012 to 2015; quite the opposite, the backlog in utility enforcement cases^[20] — which make up the majority — is increasing. Large creditors and debtors play an important role in the enforcement caseload sometimes causing double-counting and inflation of cases. Confirmation of enforcement cases by higher instance courts was in line with the average for commercial cases.

6.5 Bankruptcy

Bankruptcy proceedings in the first instance are handled by an individual judge. Although the number of bankruptcy proceedings remains quite low in proportion to total commercial cases, the number of incoming bankruptcy cases has increased by 65 percent over the last four years. One of the reasons for the backlog is the duration of unresolved bankruptcy cases in FBiH (on average 879 days). According to Doing Business 2017, most delays in proceedings are due to delays in the sale of immovable property. 88 percent of bankruptcy decisions are confirmed compared to an average of 78.5 percent for all cases. Most of the decisions that are not confirmed are sent back to the first instance court to start again, rather than amended by the appellate court. Divided competence between bankruptcy and litigation judges contributes to the delay of bankruptcy proceedings, and creates the risk of inconsistent interpretation of similar conflicts related to the same bankruptcy case.^[21] The fact that appeals usually stay the bankruptcy process can

20. Utility enforcement cases are registered under *Ip kom*.

21. The World Bank (2015), Report on the Observance of Standards and Codes Insolvency and Creditor/Debtor Regimes.

further cause significant delays. Bankruptcy judges appoint, supervise, and may remove a trustee from a particular bankruptcy case at their own discretion, but liabilities are rarely enforced. Furthermore, the lack of a clearly specified remuneration system for bankruptcy trustees in the Bankruptcy Law impedes efficiency in these proceedings.^[22] Judges use several criteria at their discretion for establishing trustee remuneration, such as the value of the bankruptcy estate, number of creditors and complexity of the case. Bankruptcy trustees come from different professions, may lack a legal background, and are not required to seek legal assistance.

7. Models of specialization and lessons from comparator jurisdictions

A growing number of countries have chosen to specialize commercial cases in one form or another. Of the 190 economies considered in *Doing Business*, 101 have a specialized commercial jurisdiction, whether in the form of dedicated stand-alone courts, specialized commercial departments within existing courts, or specialized judges within general civil courts.^[23] In 2013, the World Bank published guidance on how policymakers can determine if specialization is required and what model of specialization may be most appropriate.^[24] The 2013 World Bank Guidance reviews the available evidence on specialization and emphasizes that its impacts are not straightforward and should not be assumed.^[25] It concludes that the specialization is justified where it promotes the efficient administration of justice and ensures the quality of proceedings and judicial decisions.^[26] To determine the effects of specialization, some studies have tried to find the evidence. However, no study convincingly resolves whether specialization improves judicial performance.^[27] In addition, there are significant costs to specialization.^[28] A specialist court enhances the quality and uniformity of decisions, particularly in complex areas of law,^[29] but strict specialization has several drawbacks, which can reduce efficiency

22. Ibid.

23. The World Bank (2019). *Doing business 2019, Training for reform*. Retrieved from <http://www.doing-business.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf>.

24. Gramckow, H., & Walsh, J. (2013). *Developing specialized court services – International experience and lessons learned*. The World Bank.

25. Ibid, p. 6-7.

26. CCJE (2012). Opinion No. 15, para 30.

27. Hansford, E. (2011). Measuring the effects of specialization with circuit split resolutions, *Sanford Law Review*, vol. 63.

28. Posner, R.A. (2006). The role of the judge in the twenty-first century, *Boston University Law Review*, vol. 86.

29. CCJE Opinion No 15 assessed advantages of judge's specialization in para 8-13.

and quality of justice.^[30] There is a greater chance that specialized judges will be captured by special interests and, if this occurs, their decisions can systematically undermine the field of law. Furthermore, strict judicial specialization can also create a two-tiered system where repeat court users gain an advantage^[31] through more informal engagements which increase the risk of favoritism and corruption.^[32] It remains difficult to assess quality of specialized courts in comparison to courts of general jurisdiction, which in turn makes it challenging to provide specific support to specialization versus generalization.^[33] Although there are benefits of judicial specialization, countries should prevent situations where the judicial specialization generates confusion, conflict of jurisdiction, or even consequences for costs of justice for users.^[34] The creation of specialist chambers or courts should be strictly regulated to continue to meet all fair trial requirements set out in Article 6 of the ECHR, and to provide the same safeguards and quality.

Country specifics should be taken into consideration when policymakers are discussing judicial specialization. In former socialist countries specialization could “become a tool for political instrumentalization, an inclination to bounce cases from one court to another in an attempt to avoid final decision-making”.^[35]

7.1 Different models of specialization

Across Europe, there are different types of commercial specialization.^[36] Distinctions regarding models of specialization are important since any generalization about impacts of specialization applies more accurately to some forms of specialization than others.^[37] The assessment of comparator jurisdictions found three distinct specialization models based on comprehensiveness: a) specialized separate court; b) specialized court department or bench within a court; or c) mixed model.

30. CCJE Opinion No 15 assessed limits and dangers of judge’s specialization in para 14-22.

31. Baum, L. (2009). Probing the effects of judicial specialization, *Duke Law Journal* 58, p.1667–84.

32. Legal Resource Center from Moldova (2014). Specialization of judges and feasibility of creating administrative courts in the Republic of Moldova.

33. Oldfather, M. C. (2012). *Judging, Expertise, and the Rule of Law*, vol. 89.

34. European Commission for the Efficiency of Justice (CEPEJ), European judicial systems. Edition 2008 (data 2006): Efficiency and quality of justice, 76. Retrieved from <<https://rm.coe.int/16807477ba>>.

35. Uzelac, A. (2014). Mixed blessing of judicial specialization: The devil is in the detail, *Russian Law Journal*, 4, pp. 146-164.

36. Even in countries with only generalist judges, judges in practice tend to specialize in certain areas. See Cheng, E. K. (2008). The myth of the generalist judge, *Stanford Law Review*, vol. 61.

37. Baum, L. (2009). Probing the effects of judicial specialization, *Duke Law Journal*, 58, pp. 1673-1675.

8. Specialized departments in courts of general jurisdiction

The most widespread method of specialization is through specialist chambers or departments^[38] which can be achieved by means of internal court rules. In Europe, this model is increasingly used, but tends to follow a more formal approach, such as through amendment of the law pertaining to courts, and sometimes a change in the procedural code.^[39] Special departments can be a highly flexible way of pursuing specialization without significantly increasing administrative effort and costs. A specialized department of an existing court may be established with less formality than by special legislation, sometimes it can be done only by administrative direction or by rules adopted by the court itself.

Specialized judges may work in a specialized department or unit within the court of general jurisdiction. The division of tasks in the particular court may be invisible for the court users, as they will only be required to approach the territorially competent court, while the distribution of the cases to a specialized department or unit within the court is done internally, as a matter of administrative routine within that court. Judges may be allocated to a special department either indefinitely or as needed to meet temporary specialization needs. A good example is the Companies and Business Court which is an independent section of the Court of Appeal in Amsterdam. The cases are heard by chambers consisting of five people, three of whom are professional specialized judges. The other two have financial experience as auditors, businessmen, or labor union officials, depending on the case at hand.^[40] The experience from the Netherlands shows that having judicial assistants working together in teams can be a major advantage allowing for specialization.^[41] Ireland has also successfully applied the model of specialized commercial departments. Ireland's High Court has a commercial division which hears, exclusively, commercial disputes of high value and all intellectual property cases. Judges in commercial cases manage the litigation and impose short deadlines, allowing the court to fast-track disputes.^[42]

38. CCJE Opinion No. 15, para 42.

39. Gramckow, H., & Walsh, J. (2013). Developing specialized court services – International Experience and Lessons Learned. The World Bank, p. 11.

40. Kroeze, M. J. (2007). The companies and business court as specialized court. Retrieved from <<https://www.oecd.org/daf/ca/corporategovernanceprinciples/37188740.pdf>>.

41. Fabri, M. (2013). Exploratory study on the position of: Judicial assistants and media spokespersons in selected Council of Europe member states. Joint Program between the European Union and the Council of Europe on „Strengthening the Court Management System in Turkey” (JP COMASYT).

42. Joint project of the International Intellectual and United States Patent and Trademark Office, Property Institute Study on Specialized IPR Courts (2012). Retrieved from <<http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf>>.

8.1 Separate commercial courts

Separate specialized commercial courts can be part of the jurisdiction's general court system, or a separate hierarchy of courts that may include distinct specialized appeals courts. This form of specialization requires division of work among courts, which operate as several branches of jurisdiction with separate appellate instances, eventually meeting (or not) with other branches of jurisdiction at the top level (the level of 'supreme' court). These separate specialist courts in commercial cases are less common than other types of separate specialist courts in Europe. Specialized courts are established to better respond to differences in the procedural codes (commercial vs. civil procedural rules), or because administrative processes and internal court rules are adjusted to better address the special needs of the cases the courts handle.^[43] Specialization of this kind means not only that a special institution or individual will deal with this special type of case, but also that there may be differences in the ways cases are treated. If these methods are regulated and prescribed by law, they may grow into special procedural codes. However, there is little evidence that establishing standalone courts improves the processing of commercial cases any more than specialized departments within courts. For example, several Nordic countries that have strong economies do not specialize in commercial cases and have low average durations for contract enforcement.^[44] On the other hand, Croatia (with an economy three times larger than BiH) specializes in commercial cases but contract enforcement time is only marginally shorter at 572 days.^[45]

8.2 Mixed models

Some countries have mixed models, notably Austria and Switzerland. Often, the mixed model is in one or several specialized courts in the country's economic centers, along with specialized departments in courts of general jurisdiction in the rest of the country. In Austria, only the capital, Vienna, has specialized civil courts for commercial cases.^[46] In all other districts, commercial cases are heard by commercial departments (*Handelssenate*) within the courts of ordinary juris-

43. Gramckow, H., & Walsh, J. (2013). Developing specialized court services – International experience and lessons learned. The World Bank, p. 10.

44. For example, Norway ranks 10th on the 2016 Doing Business report at 280 days, Sweden ranks 14th at 321 days, and Finland ranks 23rd at 375 days.

45. According to the latest statistical yearbook for 2015 in Croatia, where standalone commercial courts exist, the duration in commercial litigation was 324 days (288 in F BiH), while in the bankruptcy procedures 1304 days (420 in F BiH). In Republika Srpska duration in commercial litigation was 789 in 2015.

46. These are the District Court for Commercial Matters (Bezirksgerecht für Handelssachen) and the Vienna Commercial Court (Handelsgericht Wien), which has the status of a regional court.

diction. In Switzerland, the Cantons of Aargau, Bern, St. Gallen and Zurich have each established a Commercial Court (*Handelsgericht*) to deal with national and international commercial disputes in the first instance. In other Cantons, courts of general jurisdiction are competent for commercial disputes.^[47]

9. Conclusions on feasibility of improving commercial case processing

After the analysis was conducted, the World Bank team identified three possible options on improving commercial case management, and assessed their feasibility and implications. The Study finally concludes Option 3 is feasible, and recommended a package of reforms to improve commercial justice in courts in FBiH.

OPTION 1. Establishing first-instance and second-instance Commercial Courts in each Canton

This option is not a feasible solution for FBiH. No constitutional amendment would be required. However, this option would require extensive legislative amendments at the Federal level and in each Canton. Operationally, the intensity of effort needed to implement this option in a Federation of just over 2 million people is not warranted. Dozens of courts would need to be created, and an additional 300+ judges and staff hired, along with intensive investments in ICT and infrastructure. There is not sufficient workload to justify the effort required. Financially, this option is neither viable nor sustainable. The fiscal impact on the wage bill for judges is estimated at 5.45 million BAM and for court staff at 4.72 million BAM. Significant funding would also be required to build new courts or lease office space. These investments are beyond the capacity of the federal and various cantonal budgets to absorb while the court expenditure in BiH is already higher than EU and CEPEJ averages. Furthermore, lessons from comparator states show little evidence that the establishment of separate commercial courts would ensure significantly better efficiency and quality of commercial case processing. Finally, none of the justice sector stakeholders interviewed for this feasibility study advocated for Option 1, so significant reform effort and change management would be required to generate the political will to ensure its implementation.

OPTION 2. Establishing first-instance courts in selected Cantons and a second-instance commercial court at the level of FBiH

Option 2 is also not a feasible solution for FBiH. This option would require Constitutional amendments, which is a difficult and protracted process. Option 2 would

47. <<http://www.homburger.ch/fileadmin/publications/RESCUE.pdf>>.

also require legislative amendments at the Federal and Cantonal levels. Operationally, this Option requires close and continued coordination, cost-sharing and personnel-sharing among the Cantons. This has failed in FBiH in the past and is unlikely to succeed in this case. Financially, this option would likely be as expensive as Option 1, given that the transferal of judges and staff would likely be difficult to coordinate between stakeholders, and strongly resisted by courts of general jurisdiction. As with Option 1, the cost of renovation, refurbishment, or leasing of office space would be high, and there is insufficient evidence that separate court structures would significantly improve efficiency or quality of commercial case processing.

OPTION 3. Reorganizing and strengthening existing commercial case departments without establishing separate court structures

This is the most feasible solution for FBiH. Option 3 would require only minor amendments to procedural laws to enable the equal distribution and delegation of cases between Cantons and the accreditation of specialist commercial judges. Operationally, this option has the highest likelihood of improving the efficiency and quality of work because it focuses on the substantive work involved in processing commercial cases, and targets the key bottlenecks through better management, more systematic training, and incentives for performance. This option includes a comprehensive TNA and the delivery of specialized commercial training programs for judges and staff in commercial departments, leading to an elite accreditation as commercial specialists. Option 3 causes the least upheaval, and implementation could start immediately. Furthermore, all justice sector stakeholders consulted for this Study support this option, which suggests it requires the least amount of political capital and change management, and has a higher likelihood of being successful. Financially, the medium-term cost of this option would be manageable. Hiring additional judges and court staff, with a phased approach, would cost 1.6 million BAM in the first year, and approximately 3 to 4 million BAM each year thereafter. This option would require some additional investment in court infrastructure; however, infrastructure costs would be lower than under the other options. Ultimately, Option 3 is the easiest to implement and the most cost effective available.

10. Recommendations and next steps

In conclusion, the World Bank team identified a package of reform measures for Option 3 as detailed below. The measures were designed to tackle identified challenges while taking into account all FBiH specifics. Some of the measures are applicable to Republika Srpska, and would improve commercial justice in that entity also.

The identified measures entail:

- ◆ Strengthening commercial departments which would require undertaking a series of measures to ensure they have the capacity to resolve commercial cases in a timely manner and with high quality within the existing organizational model.
- ◆ Fast-tracking the resolution of small disputes. A rudimentary system exists, but it does not operate well, and processing times for small claims are longer than for other cases. Several EU Member States have adopted high-performing systems for the fast and fair resolution of small claims, and lessons from these States should be applied to FBiH.
- ◆ Incentivizing performance using know-how of comparator countries, including how institutions can boost performance by rewarding teams through non-financial awards and recognition. By applying these lessons, the judiciary in FBiH could do more to recognize and incentivize better performance of Municipal and Cantonal Courts. Awards programs vary but often require little or no legislative change and can be implemented consistently with ethical rules. Programs require reliable and objective data, which the HJPC has, and only a small budget for prizes and plaques.
- ◆ Developing a high-quality training program for commercial judges. Comprehensive and high-quality training should be provided for judges and associates working in the commercial departments. Based on the training needs analysis, a curriculum and learning tools should be developed, adopted, and delivered. That training should then be compulsory for all judges and associates working in the commercial departments.
- ◆ Closing procedural loopholes and ease bottlenecks in case processing as described on multiple occasions in the Study.

In 2016, the FBiH Government advised the Bank that the Reform Agenda and the IMF EFF have been adjusted to accommodate the Study's findings and recommendations, and the FBiH Prime Minister requested that the World Bank support the implementation of the Study's recommendations. The Republika Srpska authorities also plan to further improve performance of already established commercial courts, and expressed their interest in a targeted sub-set of these measures. The follow up project will be delivered starting from early 2018, under the Good Governance and Investment Climate Reform Fund (GGICR) implemented by the World Bank and financed by the UK Good Governance Fund.

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