



**European Bank**  
for Reconstruction and Development

**THE EBRD JUDICIAL DECISIONS ASSESSMENT  
FOR ALBANIA, BULGARIA, BOSNIA AND HERZEGOVINA  
CROATIA, THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA,  
KOSOVO, MONTENEGRO, ROMANIA, SERBIA AND SLOVENIA**

***THE REGION SUMMARY***



Table of content

- 1. Legal transition of the Balkan’s judiciary: some general observations.....3
- 2. Legislative and institutional framework.....4
  - 2 (a) The justice systems.....4
  - 2 (b) Powers of the prosecutor’s office.....6
  - 2 (c) Accessibility to decisions.....7
  - 2 (d) Superior courts guidance.....9
- 3. Dimensions of Judicial Capacity.....10
  - 3.1 Predictability of Decisions.....10
  - 3.2 Quality of Decisions.....13
  - 3.3 Legislative obstacles (adequacy of legislative framework).....17
  - 3.4 Speed of justice.....22
  - 3.5 Cost of litigation.....26
  - 3.6 Implementation/Enforcement of judgments.....28
  - 3.7 Impartiality.....33
- 4. Risk analysis .....41
- 5. Conclusions .....47

## 1. Legal transition of the Balkan's judiciary: introductory remarks

In 2010, the EBRD engaged a consultant, Wolf Theiss (the "Consultant"), to conduct an assessment of commercial law judicial decisions (the "Assessment"). The Assessment was based largely on an expert review of selected commercial law decisions, drawing also on expert experience. The assessment was structured so as to be conducted in three phases, phases 1 and 2 were conducted in the Commonwealth of Independent States, Georgia and Mongolia. The report set forth below summarizes findings of the assessment, based substantially on the methodology employed in Phase 1 and 2 covering: *Albania, Bulgaria, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia ("Macedonia"), Montenegro, Romania, Serbia (with a separate examination of Kosovo) and Slovenia* (Phase 3). EBRD engaged a consultant, Wolf Theiss (the "Consultant"), to conduct Phase 3 assessment (the "Assessment") because the Consultant was familiar with the methodology used in two previous phases of the study and the footprint of its offices covered practically the region save Kosovo, Macedonia and Montenegro in which local experts were employed by the Consultant.

Same as in the Commonwealth of Independent States, Georgia and Mongolia the governments and private businesses of the region are competing for investments which sources are primarily the European banks, including EBRD, private equity funds, industrial strategic investors and similar variety. In all feasibility studies and legal due diligence exercises preceding project financing foreign investors normally seek an expert advice from a local law firm. Are there adequate legal remedies for exit from a project in case an SPV established to conduct a project became insolvent and bankrupt? Can the rights of a shareholder or of an acquirer of a land site for a green field plant construction be adequately protected in the courts in the event of a dispute? Could such an investor successfully challenge in administrative court levying of unreasonable tax charges by a local tax authority or an erred revocation of a business license by the government regulator?

However, the assessment in Phase 3 had its own peculiarities. While in Phases 1 and 2 the regions presented were defined rather spastically in terms of geography<sup>1</sup> the Phase 3 countries make a compact region known as the Balkans (to be referred to as the "Region") since the medieval ages. Six of these countries emerged after disintegration of Yugoslavia and in majority of them the system of courts has its roots in the justice system of the Austrian-Hungarian Monarchy. Certain parts of the Region's civil procedure have literally been taken from the Austrian sources. The impact of the communist political doctrine which reined in the Region from the end of the WWII until the fall of communist regimes in 1989-1990 still can be traced in judiciary. In some countries nepotism and cronyism taint the procedure of fresh justices' appointment to the bench. Independence of judiciary from the executive branch of power, widely recognized as a cornerstone principle of justice, paves its way through with much difficulty. Many of judges who started their carriers on the bench in old times still believe that their prime duty is to protect the interests of the state in such category of cases as disputes with regulators.

Reforms of judiciary were conducted throughout the Region by setting out the basic principle of independence of judges in the respective constitutions, revision of the civil procedure and

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<sup>1</sup> Armenia, Azerbaijan and Georgia making a trans-caucus region were thousands kilometres west of the mid-Asia states such as Uzbekistan and Turkmenistan not to mention Belarus which ethnically and culturally is more clause to Russia and Ukraine

of the laws governing formation and administration of the national court systems. In none of the countries the reforms in the area of justice were considered to be fully completed. In the countries which are already EU members (Bulgaria, Romania and Slovenia) or would acquire full membership in 2013 (Croatia) the reforms judicial branch of power were subject to strict monitoring by the relevant EU bodies and in some dimensions either meet or are quite close to the EU standards notwithstanding a number of remaining problems. In the rest of the Region's area these reforms were carried out with a varying level of success. While the Panel noted that Macedonia and Montenegro has attained a substantial progress in improving quality of its court system overall performance and in the enforcement of judgments in commercial law matters, in Serbia the situation rings the bell. According to a rather harsh assessment of the state of justice branch in Serbia given by our local experts the judiciary in this country was facing severe and fundamental crisis since disintegration of the former Yugoslavia and the panel of regional experts (the "Panel") substantially shares this critical assessment. Even finding of a representative sample of judicial decisions in this jurisdiction has turned to be extremely difficult and stressful exercise. Due to an apparent conflict between a cornerstone principle of publicity in discharge of justice and the laws on protection of personal data it took our local team almost four month to find a meaningful sample of representative decisions. Interestingly, the sustained efforts of the Wolf Theiss local team to get access to the Serbian court files finally brought about some positive changes. The situation with access to the court decisions improved in November 2012 when the Ministry of Justice of Serbia issued a special regulation how a person which is not a party to a case can apply for and obtain a copy of a judicial decision on this case from the court files.

The Panel also found the worst across the Region situation with access to the decisions and case law to be in Bosnia and Herzegovina ("Bosnia"). Within almost four month the team of local experts could not officially obtain access to the courts files in order to select a representative sample of decisions in certain areas of commercial law. The team's members' official requests were simply ignored by the courts chairpersons. Accordingly, a general conclusion can be made that in this jurisdiction the principle of publicity of court hearing, although declared in the Code of Civil Procedure, in reality exists only in the books.

The Assessment also found, by a comparative analysis of the case law and evidence provided by the local experts, a direct interaction between the level of democracy/rule of law and implementation of principle of judges' independence. In jurisdictions where the executive branch dominates over the judicial power the independence of judges as the main guarantee of impartiality may be compromised in many instances. Consequently, it appears that the courts and judges in these jurisdictions (Serbia, Kosovo and Albania) may succumb to unlawful corrupt pressures much more frequently than in the countries in which democracy and the rule of law have finally become a cornerstone principle of civil society and government.

## **2. Legislative and institutional framework**

### **2 (a) *The court systems***

The justice (courts') systems vary from country to country of the Region each separate system deeply rooted in political history and legal traditions of a country. As all the legal systems of the jurisdictions reviewed in this project belong to the Romanic-Germanic civil law family there are definitive features common to all the reviewed court systems: a typical case may go its way up through three levels of review: first instance, a court of appeals and a cassation instance. Cassation (appeal on grounds of alleged gross material violations of law by an inferior court) is performed either by a specialized commercial or

administrative court or by a supreme court as the ultimate judicial authority. The court system may be rather simple and straight forward in the countries with relatively small number of inhabitants such as Albania and Montenegro featuring a three tiered judicial hierarchical structure (1<sup>st</sup> instance, courts of appeal and the Supreme Court acting as a cassation instance) or rather complicated as in Bosnia. Notably, the cassation instances in BiH exist only at the level of two entities forming the state. As the Venice Commission rightly commented in one of its recent reports on BiH's judicial system "*another sign of the limited competences at the state level is the complete separation of the Entities' legal systems, discernible, inter alia, by the lack of an express provision for a supreme judicial institution at the state level responsible for guaranteeing uniform allocation and interpretation of law*"<sup>2</sup> Such a complex structure can be explained by a rather complicated federal political organization of this state which has four levels of federal and local governments.

The objective need for specialization of judges considering and resolving the commercial law cases was found to be a common trend throughout the Region. This trend for specialization in commercial law matters is driven by a business community demand for an increased level of quality when awarding decisions in this area of law, while in the countries with a relatively small population (Albania and Montenegro) the courts of general jurisdiction would be also forums of first instance for all commercial law cases, i.e. disputes arising predominantly between business entities.

As to how specialization of the courts imprints on the overall structural organization of a given court system, at least three different approaches were found by the panel of regional experts (the "Panel"). In *Croatia, Serbia, Slovenia, Macedonia and Montenegro* there are specialized economic (commercial) courts having a general competence to decide disputes between business undertakings arising out of commercial law acting as the first instance. In Bosnia only Republica Srpska has a commercial courts separated from the courts of general jurisdiction while in the Federation of Bosnia and Herzegovina, the other political subject of Bosnia, a specialization of judges on commercial, civil and administrative matters is in place even in the basic and municipal courts.

*Albania, Bulgaria and Kosovo* make up another group in which there are no specialized "economic courts". In Bulgaria, for instance, civil and commercial claims (including corporate law claims) are brought before either regional courts (113) or district courts (28) depending of a claim's value. District courts are also the first instance courts for insolvency cases. But the basic (general jurisdiction courts) of these three countries have divisions (panels of judges) specialized in commercial or in administrative disputes organized within one and the same court.

Notably, as important part of the judicial reforms all the justice systems of the Region have curved out the administrative justice into a separate branch of specialized (administrative) courts all way up the superior courts hierarchy. In those countries of the Regions which are now full members of the EU (*Bulgaria, Romania Slovenia*) and Croatia just on the verge of entry into the EU the administrative justice system is now aligned with the *EU Convention for the Protection of Human Rights and Fundamental Freedoms*, as it now provides for mandatory oral hearings of administrative disputes as full jurisdiction trials (not only limited to the issues of legality).

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<sup>2</sup> The Venice Commission's Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina, adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session, 15-16 June 2012)

## **2 (b) Powers of the prosecutor's office**

Public prosecutors taken as a branch of state bodies with special powers make an important constitutional pillar across the Region. It is an institution of a government which ensures implementation of the rule of law principle by specific instruments which are different from those employed by the courts. Some international organizations such as the Parliamentary Assembly of the Council of Europe in its Resolution #1604 (2003), on the *Role of Public Prosecutor in a Democratic Society Governed by the Rule of Law* and the ECHR have on several occasions recommended to bring about significant limitations of the Prosecutor's Office powers to intervene into commercial disputes in the transition countries.

Following these recommendations since the fall of communist regimes in the Region, the offices of public prosecutors went through a considerable overhaul. In the area of commercial relationship the public prosecutors functions were limited to being a defender and guardian of the rights and interests of the general public and government whenever they become a party to a criminal, civil or administrative case.

The Panel analyzed the role and powers of public prosecutors in civil and administrative process whenever a court must resolve a matter arising from various areas of commercial or regulatory law. The Panel found that in all the jurisdictions involved in the Assessment a prime constitutional duty of a prosecutor is to employ any and all legal remedies available to it under applicable law in order to protect public order, state-owned assets, the rights and legal interests of the general public and the state. In all the countries represented in the Region the role of public prosecutor with regard to civil judicial process is limited to a rather routine function of the state attorney which is summoned by default in any court hearing where the state assets are at stake (for instance, privatization disputes) or a government agency or a predominantly state-owned company stands as a party to a dispute.

In performance of these functions the scope of rights and powers of a prosecutor to initiate or intervene into a civil procedure vary from jurisdiction to jurisdiction. Some international organizations such as the Parliamentary Assembly of the Council of Europe and the ECHR have on several occasions recommended to bring about significant limitations of the Prosecutor's Office powers to intervene into commercial disputes. The laws pertaining to the role and functions of a public prosecutor generally follow this recommendation. Comparing the scope of the prosecutor's rights in a civil process the Panel found that in some countries of the Region such powers are somewhat broader by comparison with the others. In particular, the Panel found that in Slovenia a public prosecutor still enjoys a wide variety of powers. In civil matters, which include commercial matters the state prosecutors have the competence to file requests for the protection of legality against final court decisions in civil court proceedings in any cases in which the interests of the state or public interests are infringed. The prerequisite for filing this extraordinary judicial remedy, which is not at the disposal of parties to the proceedings, is the protection of the public interest. The main aim of such legal remedies is the unification of judicial practice in terms of the application of laws and/or different concepts. On the other end of the spectrum lies Bosnia where the prosecutors have no whatsoever powers to act in any capacity in civil or commercial law litigation. In the rest of the countries making up the Region the competence of a public prosecutor is more or less similar subject only to some national peculiarities.

In Romania, interestingly, the status of the prosecutor in civil litigation still remains a debated issue, but generally, its rights in the civil procedure are rather limited: a prosecutor cannot employ the rights of the party, i.e. “step into the shoes” of a party (for instance, a state-owned company) which it represents. However, there are cases under the laws of Romania where participation of a prosecutor in a trial is mandatory, for example, in such cases as (i) expropriation of property for a public utility project; (ii) appeal for the sake of the rule of law or for protection of the interests of the general public or the state and in some other cases.

Notably, the Office of General Prosecutor in Romania played a significant role in fighting corruption in judiciary which scale became quite visible 4-5 years ago when Romania was preparing for joining the EU and finally joined it in 2004. A special anticorruption unit was organized with the Office of General Prosecutor with broad discretionary authority of a law enforcement unit. The anticorruption unit was equipped with all technical means (undercover operations, secret surveillance and tapping phone conversations and the like) and corresponding powers. According to our local experts assessment (which is shared by the Panel) the unit's performance in fighting corruption within the Romanian judiciary was quite efficient and, together with other government, media and civil society sustained actions subdued considerably the level of corruption in the Romanian judiciary.

On the other side of the spectrum (minimal rights of the public prosecutor) the Panel placed Albania and Montenegro. In those two countries the powers of the prosecutor are significantly limited in several dimensions. In Montenegro the state prosecutor prior to 2011 represented the country in civil and legal matters/ disputes to which the country is a party. After 2011, amendments of the Law on State Property give rise to this role being taken over by the *Protector of Property and Legal Interests of Montenegro* (the “Protector”), a top public servant with a special status. The Protector is appointed and relieved of duty by the Government at the proposal of the Ministry of Finance, and his/her deputies are appointed (for a period of five years) and relieved of duty by the Government at the proposal of the Protector. The Protector of Property and Legal Interests of Montenegro represents the state, its authorities and public services, which were established by the government but which are not legal entities, before the courts of law and other state authorities. In Albania the competence of a public prosecutor is limited to that of an attorney for the state.

## **2 (c) *Accessibility to decisions***

As the Venice Commission stated in one of its recent opinions "publicity is one of the main requirements of legal certainty and access to legal instruments and judicial decisions should not involve hurdles"<sup>3</sup> The level of accessibility to the court decisions, especially online, is closely linked to such a dimension of judicial capacity as *predictability* of a decisions which is the main issue of any business entity appraising its chances in a hypothetical litigation irrespective of its future procedural status: a plaintiff or a defendant. A meaningful legal advice on chances of winning or losing a case would be problematic in a jurisdiction where access of practicing lawyers and of the general public to the case law is restricted or subject to certain burdensome requirements and procedures. The Codes of civil procedure in all the countries of the Region declare the cornerstone principle of *publicity* of any court hearings save trials in which some state secrets might be disclosed which are extremely rare. But in practice the rules on whether publicity goes so far as to provide on line availability to all the operative court decisions and rulings issued by all instances of are quite different. Given the 1<sup>st</sup> and 2<sup>nd</sup> phases of the EBRD Judicial Capacity Assessment Project the Panel decided to

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<sup>3</sup> Opinion On Legal Certainty and Independence of the Judiciary in Bosnia and Herzegovina, Venice 15-16,

evaluate the level of accessibility taking Ukraine as a benchmark because in this country accessibility to the civil, administrative and commercial law meets the highest standards. In Ukraine from 2007 all the decisions and procedural rulings of commercial courts and of courts of general jurisdiction are available on-line at the web site of the National Register of Court Decisions ([www.reyestr.court.gov.ua](http://www.reyestr.court.gov.ua)), and, since the Register gives full names of the business entities litigating at the economic courts, it is practically easy to find and review, for example, all the court cases in which a given entity was involved within certain time-span.

The Panel found that among the countries participating in the Phase 3 assessment only Bulgaria meets to the “Ukrainian Standard” of openness of the case law. A centralized web-based system<sup>4</sup> for publication of the acts of all courts has been developed in this country and it is now fully operational. The system allows searches by various criteria, such as the issuing court, the type, year and number of the case, the type, year and number of the act, etc. In addition to the electronic form of the court act, the system provides also basic information regarding the case, the judge and the status of the act (i.e. in force, appealed, revoked, etc.). Romania is also close to meeting this standard as its government made quite an effort in creating a large data bank named JURINDEX which can be accessed at <http://www.jurisprudenta.org/> containing a selection of decisions of importance. However in Romania, there are several limitations with regard to full accessibility to the case law, such as (a) only the judgment part of a decision is displayed on the above mentioned web-site; (b) there is still no access to all the decisions in commercial law matters because under applicable law only the parties can have access to the files from the court and to the decisions. Any individual may request and receive any case file for a review from the courts archive upon an individual permit of the court’s chairperson, provided however, that he/she proves a legitimate interest in review of the requested case file. Interestingly, local experts told us that apparently there is no criteria of what can be qualified as a “legitimate interest” and that, hypothetically, an officially registered journalist would get an access with a case file with a good deal of certainty claiming “public interest”, while a professor from the law school requesting a case file for the legal research purposes most probably would have much lesser chances to succeed.

Macedonia has also made a visible progress in the direction of making its case law publicly available. In the end of 2010, the Macedonian Parliament approved the Law on Management of the Court Files, which entered into force in the middle of 2011. By this law, the court officers are obliged to publish all decisions on the official web site of the respective court. While for the decisions which are not final (can be challenged and appealed) the court officers shall publish the decision without disclosing the data of the concerned parties. Unfortunately, this legal obligation is not yet strictly enforced.

The worst situation regarding accessibility to the full texts of the decisions the Panel found in Serbia and Bosnia. Until recently there was practically no access to the decisions of economic courts in Serbia save the decisions of the Supreme Court of Cassation because of absence of a specific law obliging at least economic and administrative courts to display their decisions on-line. In theory all such decisions should be publically available on the basis of the Law on Free Access to Information of Public Importance<sup>5</sup>. However, when the local experts in Serbia tried to get access to concrete decisions most of judges denied such an access arguing that such a disclosure would violate the country law on protection of private information. One of the concerns was that if a court allows free access to court decisions, privacy of the parties involved may be infringed as there is no mechanism in place which provides for anonymity/or

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<sup>4</sup> The web-based interface could be found at <http://legalacts.justice.bg> (currently available only in Bulgarian)

<sup>5</sup> Official Gazette of the Republic of Serbia, Nos. 116/08, 104/09, 101/2012 and 38/2012



sanitation of certain information on parties which can be found in a decision and which is considered protected on the ground of privacy. The Panel came to a conclusion that absence of a special law regulating the public access to the decisions is a real problem in a situation of an obvious conflict between the principle of publicity of judicial activity set out in the Serbian law and the laws on protection of privacy.

In Bosnia also there is practically no access to the full texts of the decisions. The situation is more complicated with respect to case law. A central case law database exists in BiH, which contains around 8 500 cases. But this database is *only accessible* to judges, prosecutors and court associates, with no access granted to other legal professionals. Although a recent decision has been made to extend the access to defense attorneys, this is currently still awaiting a decision on the fees to be charged. Other legal professionals, students and the public in general will still not have access to this database. The Supreme Courts of Republika Srpska and the Federation of BiH publish selections of their case law three times a year. Case law of the state-level courts is mostly online, sometimes also in English. Although not uncommon in other countries, this situation is particularly worrying in a country with such a level of decentralization of the judiciary as BiH. The effort of several international donor organizations to run a uniform case-law database should therefore be supported with the aim of making this database accessible to the public as soon as possible. It would also<sup>6</sup> be useful if this database were recognized and used by the courts as a central database.

The Supreme Courts of the Federation of Bosnia and Herzegovina and of the Republika Srpska are publishing on their websites some selected decisions but most of them are sentences in criminal matters. The Centre for Judicial Documentation was created but it posts out on its website only selected decisions of importance and is, in fact, a closed information system open only to the judges, court clerks and prosecutors. This database is available neither to legal practitioners nor to the general public. There are only discussions going on in the governmental circles of making this library available to all licensed legal practitioners.

Between these two extremes on the accessibility scale a mixture of approaches can be found. There is no single country within the Region which is not declaring a general principle of publicity of justice. Generally, this principle anticipates that if a trial was not closed to the public due to preservation of some state secrets any man from the street may freely enter a court room, watch the trial and hear pronouncement of a full decision or at least a pronouncement of its judgment part. But the relevant provisions of the law do not provide an answer to a rather simple question: whether a journalist, or a litigator lawyer, or just “a man in the street”, a member of the general public has the right to request a full text of a decision that was once openly pronounced without proving its legitimate interest in review of the decision or of the whole case file<sup>7</sup>.

Our local expert team in Slovenia tried, in the process of research for the Assessment, to receive from several economic courts full decisions in some specific categories of commercial law cases. The experts have substantiated their respective requests by the Slovenian Law on

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<sup>6</sup> *Opinion On Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, Adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session Venice, 15-16 June 2102, p. 14

<sup>7</sup> Mr. Leschenko, an investigative journalist well known in Ukraine, was surprised beyond any expectations when it received from the archives of the US Federal Court in California, upon just a routine request, a complete criminal case file of the Pavlo Lazarenko, the former prime-minister of Ukraine in mid-nineties, convicted in 2008 by the US Court to 14 years in jail on multiple charges money-laundering and corruptive act while in office. While studying the file the journalist had an opportunity to copy any document from the Lazarenko’s case file.

Access to Information of Public Character but eventually received a negative response from all the courts for the following reason. According to a routine pattern of the courts it is expected from any petitioner to identify the decision it wants to access by the identification number of the file. However, this number identifying a case file is usually known only to the parties in dispute and their lawyers. Our local research teams came across a similar problem also in Albania, Croatia, Kosovo, Montenegro.

The Panel arrived at an opinion that the risk of disclosure or personal data of the parties to a court case, the argument which is usually used by opponents of the full disclosure of court decisions, is based on a rather shaky ground. Nobody would defy a right of an individual or of a legal entity to privacy which scope is set forth by respective national laws on protection of personal data which exists nowadays in all the democratic European countries. But since all the European democracies recognize the principle of publicity of justice, it appears that any legal entity participating in litigation by way of civil action or by taking up the position of a defender is deemed to *waive its right to protection of personal data* by default. In any civil procedure a man from the street may enter the court room and watch the litigation including the pronouncement of a decision. A representative of the media may attend hearing of some litigation evolving between two or more business entities which might be of public interest, take note and publish an article about this case making public some facts which were presented before the court as evidence. A party may claim that a journalist disclosed some data protected by the local law on privacy but in our opinion the principle of publicity of the civil procedure overrides the norms on protection of privacy. Should a party wish to prevent a disclosure of sensitive business information in an open court trial as its top priority, then this party would rather plan to avoid open court hearing and seek an amicable settlement with the procedural adversary or negotiate an arbitration clause in a contract. Moreover, the laws of practically all the countries which adopted special statutes on making available the judicial decisions to the general public normally contain effective mechanisms designed to mitigate the risks of disclosure of the most sensitive elements of personal information. One example is a requirement no abbreviates the names of the parties to litigation if they are individuals (Ukraine) or to omit the addresses of the parties and their tax or social identification numbers in all the decisions available to the general public on-line (Macedonia).

## **2 (d) *Superior courts guidance***

In all the countries across the Region the superior court instances (the Supreme Courts) have special powers to issue from time to time court summaries, rulings in the land mark cases, information letters and opinions on certain contentious legal issues, especially in the sub-areas of law where the inferior courts have adjudicated decisions which substantially differ from one another. Such interpretative instruments are very important for eliminations and prevention of ambiguities, inconsistencies and contradictions in application of commercial law which, especially in the transition economies, is full of relatively new concepts and complicated issues.

All the countries represented in the Assessment are typical continental legal systems in which courts are not bound by the decisions of higher courts outside the scope of the case and case law is not a formal source of law. Nevertheless, the decisions of the supreme courts and their principle legal opinions have a *de facto* very important impact on the decisions issued by lower instances and eventually, on the legislative movements and general interpretation of law in a country.

In some countries such court practice guiding instructions and clarifications are mandatory for all the inferior courts (Romania, Bulgaria) in the rest of jurisdictions included in this Assessment they are considered as recommendations only but in practical terms most of the courts strictly follow these recommendations.

If a superior court activity in this particular area is systemic it brings about a greater level of predictability of the decisions. However, the level of impact of the superior court guidance instruments upon predictability of the decisions chiefly depends, in the Panels opinion, upon two factors: (1) whether all these clarification became available to the public at large and, especially, to legal practitioners; and (2) whether the initiative to develop and publish a superior court clarification may come from inside the judges community, which is the case of majority of countries of the Region, *or* come from the bar because the litigation attorneys come across the issues requiring an authoritative clarification from the top of a judicial system sometimes even earlier than a supreme court judges recognize that there is a problem requiring their attendance.

Just to illustrate number 1 of the above mentioned factors our local expert in Kosovo noted that an important decision issued by the Supreme Court of the republic in the area of mortgage enforcement is not publicly available. With respect to the number 2 factor , the Panel upholds as a very positive practice the fact that in Bulgaria the initiative to request the issue of clarification beside the judicial bodies also belongs to the Bar Association.

## 2. Dimensions of Judicial Capacity

The Assessment targeted seven key dimensions pertaining to the courts' output in dealing with commercial disputes. These are listed and explained in Box 1. All of these dimensions can be linked to international standards<sup>8</sup>, the applicable jurisprudence or relevant supervisory bodies. They are also reflected in the EBRD Core Principles for Effective Judicial Capacity,<sup>9</sup> which provide a framework for the Bank's activities in its judicial capacity.

The seven dimensions assessed in the decisions were as follows:

### Predictability of decisions<sup>10</sup>

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

### Quality of decisions<sup>11</sup>

Does the decision: comply with procedural requirements; display an understanding of the practical commercial issues being litigated; identify relevant law; apply law correctly and coherently; and reach a well-reasoned, clearly expressed conclusion?

### Adequate legislative framework<sup>12</sup>

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

<sup>8</sup> 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 the countries included into this assessment are the parties to, save Kosovo.

<sup>9</sup> Available at: [http://www.ebrd.com/pages/sector/legal/judicial\\_capacity/core\\_principles.shtml](http://www.ebrd.com/pages/sector/legal/judicial_capacity/core_principles.shtml).

<sup>10</sup> See discussion of predictability in: Consultative Council of European Judges (CCEJ) Opinion No. 11 on the Quality of Judicial Decisions, paragraph 47.

<sup>11</sup> Ibid.

<sup>12</sup> Principles 1 and 3, COE R (94).

Speed of justice<sup>13</sup>

Did litigation proceed at a reasonable pace and in compliance with statutory deadlines? The reference period was from the filing date until the final judgement.

Cost of litigation<sup>14</sup>

Was the cost of litigation reasonable, considered as a percentage of the commercial value at stake in the claim? Official duties were considered, but not attorneys' fees.

Implementation / enforcement of judgment<sup>15</sup>

Were court orders voluntarily implemented or compulsorily enforced? Experts conducted case file follow-up and contacted litigants directly where possible.

Impartiality<sup>16</sup>

Did the decisions appear to afford procedural equality and give adequate weight to the parties' arguments? Were there discernible differences in courts' treatment of the parties? Experts were also allowed to consider reliably attested extraneous data.

### 3.1 Predictability of Decisions

The Panel considers predictability of the decisions as the most integrated feature of overall capacity and effectiveness of any national judicial system. The overall level of predictability in fact comes in the practice of law as a legal advisor's assessment of a likely outcome of any hypothetical litigation his/her client may be involved into. As a dimension of an overall capacity of the judicial system this particular dimension is the most integrated one as it may be influenced by a plethora of factors. In the Panel's opinion the predictability first and foremost appears as a direct result of *openness of the case law* (accessibility to operative decisions) to the general public and, especially, to legal practitioners. Such accessibility and openness contributes to a *legal certainty*, which, together with the principle of *independence of the judiciary* make two fundamental principles of the rule of law. Taken as an important component of an investment climate, predictability of the decisions creates a fundamental layer forming a generally positive and transparent legal environment which is attracting direct foreign investment into a country. Conclusively, predictability permits a legal professional to foresee the results of a litigation with a greater amount of certainty.

Overall, the Panel concluded that decisions in the Region demonstrate quite varying levels of predictability (see **Chart 1**). Decisions were considered to be more or less predictable in Bulgaria, Romania, Slovenia and Croatia with the least predictable decisions found in Albania, BiH and Kosovo. In the rest of the jurisdictions participating in this study (Macedonia, Montenegro, Serbia) the judicial decisions were moderately predictable. The worst case in fact was BiH in which the level of predictability of judicial decisions was found to be inherently low due to absence of publicity of the courts overall performance and a virtual impossibility to carry out an independent research of case law in pre-selected area. Among countries-performers the Panel identified various factors accounting for the different levels of predictability depicted in Chart 2.

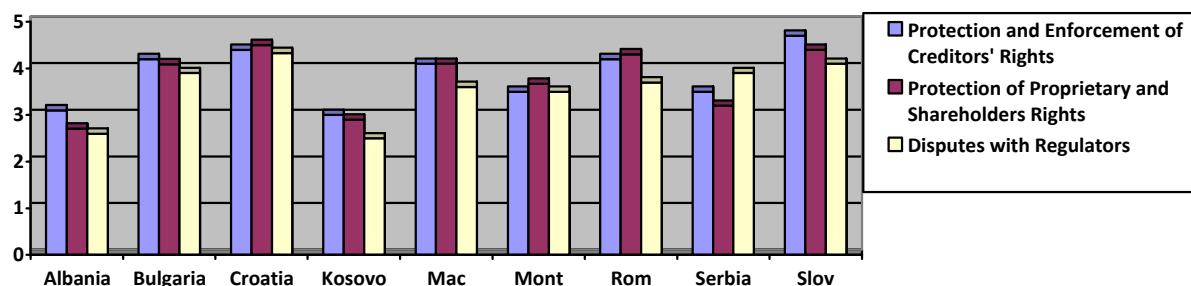
<sup>13</sup> Art 14 ICCPR; see in particular General Comment 32 of the Human Rights Committee, at paragraph 27.

<sup>14</sup> Reasonable cost structures for litigation are referable to the right to a fair trial under article 14, ICCPR.

<sup>15</sup> 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.

<sup>16</sup> See the *Bangalore Principles of Judicial Conduct (2002)*; and *Opinion no. 3 of the Consultative Council of European Judges on the Principles and Rules Governing Judges' Professional Conduct*.

*Chart 1. Predictability of judicial decisions, by country and legal sector*



The panel's and local expert's analysis of the selected decisions led to the conclusion that the judicial practice is more predictable in the first two areas of the assessment:

- protection and enforcement of Creditors' Rights within such sub-areas as (i) insolvency and bankruptcy; (ii) levying on real property mortgaged for the benefit of a creditor, *and*
- protection of proprietary and shareholder rights within such sub-areas as (i) protection of title rights of land owners; (ii) disputes between shareholders and corporate entities).

The results of the decisions evaluation depicted in Chart 1 show the judgments were less predictable in all the jurisdictions across the Region in the third area (Disputes with Regulators and State Authorities).

There are several factors contributing to a degree of predictability of the decisions.

#### *Accessibility of decisions*

In the Panels opinion the *level of accessibility* of the decisions to the general public and, especially, to legal practitioners is the overwhelming factor driving predictability. Since this factor was analysed in much detail in 2 (c) of this Assessment we would only summarize hereafter several important conclusions. The Panel noticed that predictability of an outcome in the disputes with the economy regulatory authorities is generally lesser compared to a litigations arising out of judicial cases stemming from the property rights or rights of the creditors in civil law transactions.

#### *Quality and stability of legislation*

Unstable law and frequent changes of applicable laws in critical areas such as the state regulation of natural monopolies, a constant flux in regulations of licensing terms and conditions and in similar regulatory areas lead to a lot of lawsuits pending in front of courts and to a diverse judicial practice. Since the modern commercial law meeting international standards and harmonized with the law of the EU has only 10 – 15 years of history in some narrow sub-areas of this law there is little case law, not to mention that one may encounter

judgments which are quite different from one another although the set of facts in both cases was similar. While in rather simple and typical settings of facts (collection of undisputed debts, issue of fines for various violations of administrative law) the predictability may be close to 100%, in cases where a subject-matter of the case concerns more complex cases a litigation may result in a completely unpredictable judgment.

Stability of the existing legislation and case law which must be treated as an integral part thereof also affects considerably predictability of the decisions. Such stability is a manifestation of more broad principle of *legal certainty*. The Venice Commission underlined in a number of its opinions that the principle of legal certainty plays an essential role in upholding trust in the judicial system and the rule of law and that this, in turn, is important for stable business arrangements.<sup>17</sup> If this trust is compromised by unstable law and by inconsistent decisions, business entities including investors from abroad may refrain from entering into contractual relationships with local partners and in turn renounce to economic activities that are indispensable for the economic development of the country. The existence of legal certainty (or lack of it) therefore has an important economic impact. Judicial power has to adhere to this principle when it applies legal instruments to concrete cases and in interpreting universally legal provisions.

The European Court of Human Rights (“ECHR”) repeatedly engages in the analysis of the principle of legal certainty. In confirming that this principle is “one of the fundamental aspects of the rule of law”<sup>18</sup>, the ECHR ranks among its requirements “that all law /should/ be sufficiently precise to allow the person /.../ to foresee, to a degree that is reasonable in the circumstances, the consequences, which a given action may entail”<sup>19</sup>, “that where the courts have finally determined an issue, their ruling should not be called into question”<sup>20</sup>; “that cases /.../ are dealt with in a reasonable time and that past decisions are not continually open to challenge”<sup>21</sup>, and “that /courts/ should not depart, without good reason, from precedents established in previous cases”<sup>22</sup>. [Could you please insert a reference here to the relevant decision/s]

### *Timely and to the point response of a supreme court to inconsistent practice*

It is very important that a superior court sets out a system of monitoring and discovering all events of inconsistent court practices and intervenes employing its guidance instruments. Superior court guidance is a method of promoting *consistency* and *stability* of the case law. Under the consistency requirement, legal instruments must not contradict one another or be

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<sup>17</sup> The Venice Commission's Report on the Rule of Law, paragraph 14

<sup>18</sup> ECHR, Case of Zsurtsev v. Russia, no. 67051/01, 27 April 2006, Para. 48  
[http://www.echr.coe.int/NR/rdonlyres/FA032BB2-3E3E-4674-98C0-E2825C0BECA5/0/CASELAW\\_REFERENCES\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/FA032BB2-3E3E-4674-98C0-E2825C0BECA5/0/CASELAW_REFERENCES_ENG.pdf)

<sup>19</sup> ECHR, Case of Jecius v. Lithuania, no. 34578/97, 31 July 2000, paragraph 56,  
[http://www.echr.coe.int/NR/rdonlyres/FA032BB2-3E3E-4674-98C0-E2825C0BECA5/0/CASELAW\\_REFERENCES\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/FA032BB2-3E3E-4674-98C0-E2825C0BECA5/0/CASELAW_REFERENCES_ENG.pdf)

<sup>20</sup> ECHR, Case of Brumarescu v. Romania, no. 28342/95, 28 October 1999, para. 61

<sup>21</sup> ECHR, Case of Varnava and Others v. Turkey, nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 18 September 2009, para. 156, [http://www.echr.coe.int/NR/rdonlyres/FA032BB2-3E3E-4674-98C0-E2825C0BECA5/0/CASELAW\\_REFERENCES\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/FA032BB2-3E3E-4674-98C0-E2825C0BECA5/0/CASELAW_REFERENCES_ENG.pdf)

<sup>22</sup> ECHR, case Demir and Baykara v. Turkey, no. 34503/97, 12 November 2010, paragraph 153,  
[http://www.echr.coe.int/NR/rdonlyres/FA032BB2-3E3E-4674-98C0-E2825C0BECA5/0/CASELAW\\_REFERENCES\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/FA032BB2-3E3E-4674-98C0-E2825C0BECA5/0/CASELAW_REFERENCES_ENG.pdf)

mutually incompatible. Judicial decisions must be based on legal instruments, and, correspondently, all the cases must be treated alike both within one judicial institution and as between various courts (located on either a horizontal or vertical level). *Stability* means that legal instruments must not change so often as to make the principle *ignorantia juris not excusat* impossible to be applied by an ordinary individual. The prime goal of permanent and systematic superior court guidance is to ensure that courts should not depart from a previously held interpretation of a legal instrument, unless they have a good reason to do so.

Corrections of judicial practices deviating from the standards of application of law set forth by a superior court are also extremely important for predictability and such a dependency is self-evident. The Panel noted that in Bulgaria, Romania and Slovenia, which are already the EU members, the predictability increased considerably in recent years due to coherent reforms of commercial law and judiciary. The milestones set forth by the competent EU bodies ensured, among other things, better access of the litigators in Bulgaria and Romania to the decisions of the superior courts. It allowed them to have a better estimate of the outcome in specific matters based on past decisions. By comparison, in Slovenia, as well as in the rest of the Region there is a considerable room for improvement with respect to access to decisions, as explained in detail under 2(c) above.

Arguably, the lack of predictability is mostly rooted down to sometimes low level of professionalism of judges, absence of proper education and the lack of knowledge by judges of modern commercial law. The Panel noted that this problem is especially persistent in Albania, BiH and Kosovo. By way of an example and to show the extent to which this problem is prominent in Albania a judge stated in one of the decisions included into the selection that “the branch of the foreign company gained legal personality when the Albanian court decided to register the branch with the Albanian commercial register”. This statement is still part of an operative decision which was not challenged notwithstanding that both applicable statute and the case law clearly stipulate that a branch can never be recognized as a separate legal entity. The manner in which legislation is drafted is also a problem for predictability.

The Panel found the worst situation with predictability of the decision to be in BiH. First and foremost this is due the fact that the legal and judicial system of BiH is the most complex and decentralised federal system among European countries today. As the result of such fragmented structure BiH is the only country in Europe which does not have a central judicial authority: there is no supreme court having jurisdiction in all entities of this federal state. This leads to a fragmented structure of judicial system and case law. Since each entity of this country, Republica Srpska, the autonomous Brsko District and the federation BiH has its own judicial system a lot of differences arise in the interpretation and the application by the courts of similar and even identical legal provision. In absence of a central judicial authority there is no effective instrument to remedy the apparent discrepancies in case law by a superior court guidance<sup>23</sup>.

### **3.3 Quality of Decisions**

Ensuring quality of judicial decision-making is an essential component of the right to a fair trial and a key dimension of judicial capacity. Despite potential claims of subjectivity the Panel and local experts tried to evaluate the quality of the selected decisions drawing from

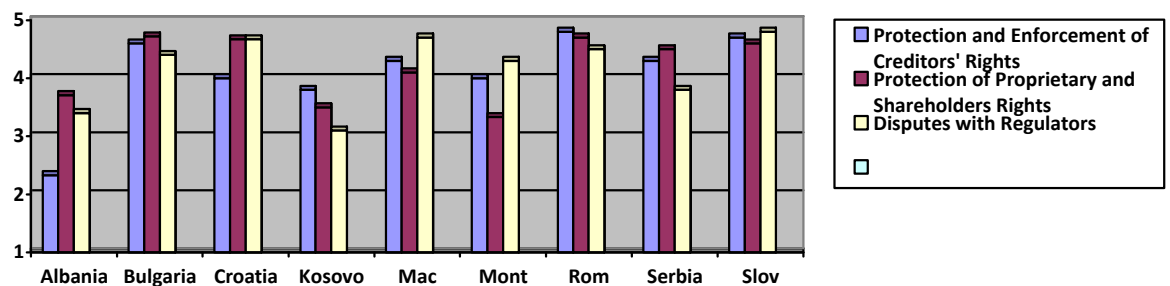
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<sup>23</sup> Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina, adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session, 15-16 June 2012, p.

their every-day experience of practicing law. Indeed the litigation attorneys while preparing and presenting to the court their client case are deemed to be rewarded, at the end of the case hearing on the merits, by an "air-tight decision" which in the litigators professional *argo* means a decision capable to withstand any challenge by appeal and any extraordinary challenge remedy such as cassation. A high quality decision will be impeccable across any criteria applied to it: a court would be expected to apply the right norm of law, demonstrate objectivity in evaluation of the facts laid down in the reasoning (substantiation) section of a decision and be exceptionally persuasive in laying down its legal arguments. The decision language should also imprint impartiality of the judge(s) which will not be subject to any perception of bias if the court will not only refer to the arguments presented by the winning party but also explain in detail why it dismissed the arguments of the party which lost the case. Moreover, from the point of legal writing the judgment part of a decision should be clear and straightforward, i.e. invoke no questions from an enforcement officer in the process of judgment implementation.

The decisions reviewed in the course of the Assessment displayed variable degrees of quality (see Chart 2). The assessment concluded that overall this was the dimension giving rise to a number of critical remarks expressed by local experts and the Panel. The relatively high quality decisions were found to be quite common in Bulgaria, Romania, Croatia, Serbia, Slovenia and Macedonia with Albania and Kosovo on the weak side of the spectrum.

Chart 2 *Quality of judicial decisions, by country and legal sector*



Several thematic issues were found by the Panel with respect to comparative study of decisions overall quality.

The general observation the Panel has made with regard to all the decisions it had reviewed is that the average quality of the decisions of the courts of first instance is much lower as compared with quality of the decisions adjudicated by the appellate instances not to mention the highest courts. This is quite natural because the best judges in terms of general experience and developed writing skills can be found in the superior courts rather than in the courts of first instance.

### *Material errors and judgment mistakes*

When a party believes that a decision in its case is erroneous and does not provide an effective remedy it may appeal. With regard to the content of the decisions, we point out that the existence of a material error in the content of a decision represents a legal ground for the annulment of a decision by an annulment contestation. However, the judges are analysing this ground with very much attention and usually dismiss the annulment



contestation considering that there was no material error but a *decision mistake*.<sup>24</sup> The fact that there are legal remedies for the situation when a decision does not have the content required by the law influences the quality of the decisions issued by the courts in Romania, Slovenia and Serbia. [I don't fully understand this – what is the difference? Is a 'judgment mistake' a minor / non-material error?]

### *Comprehensibility of decision*

Regarding comprehensibility of a decision, this feature depends mostly upon the expertise and general experience of a judge who has resolved a given case and in the Panels opinion this can be attained only by years and years of successful performance on the bench. In practice incomprehensible decisions, i.e. poorly and negligently drafted judicial instruments containing logical mistakes can be rather frequently met in the lower instance courts, especially in the early transition countries such as Albania and Kosovo. The lack of comprehensibility of decisions in many instances is typical for comparatively young and inexperienced judges and it could potentially lead to annulment of a decision by way of appeal. However, the judges from superior courts are not usually using this argument in order to annul a decision. In most cases reviewed by the Panel the incomprehensible (poorly drafted) decisions were not reversed on this particular ground by a superior instance although such a decision, especially if the judgment part thereof is not entirely clear, may create difficulties in the course of a judgment enforcement.

### *Irrevocable decisions*

There is also the Panel's general comment concerning the entire Region's jurisdiction that the quality of the decisions will decrease if the decision is an irrevocable one. With regard to irrevocable decisions a general pattern was found that the judges tend to be somewhat negligent with regard to legal writing and arguments when the decision cannot be challenged by appeal or such other remedy. In several jurisdictions this would be the case for the decisions in which a court satisfies a request of a regulatory authority for a temporary suspension of a business license. Knowing that a decision is irrevocable the judges will often neglect the requirements for the reasoning (in some cases skip it altogether) presenting only a judgment part.

### *Fulsome treatment of law and facts*

Many decisions were believed to have dealt very superficially with both proved and verified facts and applicable law. This was particularly the case in such early transition countries as Albania and Kosovo. In one Albanian insolvency case a bank lost its claim to collect proceeds of the unpaid loan (repayment one year overdue) as the court refused to open the bankruptcy proceedings against the debtor-respondent. The law regulating the issue presented was quite clear: the insolvency proceedings must be commenced against a debtor which failed to make a payment when due unless the debtor proves that it is financially able to pay the debt and actually pays it. Despite refusal of the respondent to pay the debt in full the court refused to open a bankruptcy proceeding because it has found that the debtor had closed the past three

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<sup>24</sup> A decision mistake is a non-material defect of a decision which does not affect the judgment (a remedy adjudicated by the court in order to enforce the right(s) of a claimant. In most cases a *decision mistake* constitutes some technical violations of the procedural requirements to a court decisions, such as for, example, some legal arguments of the party which lost the case were omitted in the decision, or, the remedies described in the judgment part of a decision were not entirely clear for an enforcement officer: in such a case in some jurisdictions the court has to issue an additional ruling clarifying what remedies can be applied to the judgment enforcement

proceeding financial years with profit. In such a situation, when the respondent was apparently wilfully trying to avoid fulfilment of its payment obligation the opening of insolvency proceeding was the most effective remedy to compel and motivate it to finally repay the outstanding amounts. [Please describe briefly what was so wrong with the decisions] Further, the reviewed decisions, even adjudicated by the courts of the EU member countries, sometimes fail to assess objectively all the facts necessary for a lawful decision. For instance, in Slovenia several individuals lodged a claim requesting to confirm their servitude (the right of way through a plot of land) which was recently acquired by a real estate development company. The court ignored the evidence furnished by the plaintiffs proving that the pathway through the property they were using at least for 20 years was clearly visible the court erroneously took the side of a defendant arguing that it could rely only on the certificate issued by the land cadastre in which the plot of land in dispute was described as free from any encumbrances and had no obligations to undertake its own due diligence. The Panel shares the opinion of local experts that court decision was wrong because at the time a description of the disputed plot of land was entered into the land register (cadastre) in mid-90s the recorded data was not always accurate and that it would be against the basic principle of fairness to assume that the buyer was acting in good faith at the time of the land acquisition transactions relying exclusively on the data obtained from the cadastre and not performing its own due diligence on whether the freehold title is clear from any liens and encumbrances. On several instances in different jurisdictions the Panel found decisions in which a substantiation part of the decision structure was quite difficult to comprehend, especially in some tax cases.

#### *Human factor: professionalism of judges as the main factor affecting quality of the decisions*

The level of the economic and administrative justice decisions depends primarily on a number of factors. The human factor here should be mentioned first as a good judicial decision is a direct function of the level of judges' legal education, their professionalism, personal integrity, ability to perform within tight deadlines and efficiency. All the above mentioned qualities depend in turn upon availability of modern curricula in the law schools, methods employed in selection and promotion of the legal practitioners to the bench, special training of the candidates to a judicial office not to mention the pattern of continuous professional training of the seasoned judges.

Generally, a public service at the bench still attracts thousands of young and talented legal practitioners in all the countries of the Region vigorously competing for every newly open vacancy on the bench. They do wish to endeavour into this kind of public service despite often unbearable and stressful working conditions, sometimes enormous case load, and tight statutory deadlines. A combination of these harsh conditions results in constant stress which can be withstand only by a young individual which is highly motivated and possesses strong moral integrity. This comes as no surprise because the position of a judge was traditionally highly respected and esteemed across the Region. It was noted by the Panel and local experts, that despite declarations in the national laws stating that selection of candidates for the judges positions is carried out on the merits and various objective criteria only such as, for instance, marks received at the written examinations, *nepotism* and *cronyism* were reportedly still influencing this process even in the group of countries which are the EU members, not to mention Albania, Kosovo, Macedonia and other early transition countries. In Romania, for instance, the system of promotion of judges from *judicatorie* or a *tribunal* (both are the first instance courts) to the courts of appeal is conducted through interviews and this procedure lacks objectivity and transparency.

#### *Appointment to the bench and special training institutions*

In all the countries covered by the Assessment the Panel found deficiencies and shortfalls in the system of selection, education and promotion of new appointees to the bench. For instance, in the Panel's opinion, the Romanian system of filling the vacancies on the bench is too liberal as it allows graduates of law schools to apply to and be appointed a "trainee judge" straight after he/she graduated from the law schools without any prior practical experience within the bar, clerkship at courts or the prosecutors office. Although such graduates should have a two years training at the Institute of Magistrates, they initially serve for a year as a "trainee judges," take the oath and exercise full judge's powers at a *judicatorie*, a lower instance court. A trainee judge in Romania is assigned only simple trivial cases such as collection of undisputed debt, petty offences, traffic violations and similar kind. However, according to our local experts, in Romania young and inexperienced judges once they are allowed to handle more complicated cases still fail in some instances to issue a high standard decision due to the lack of a prior experience. Once a new candidate takes the judge's oath his/her judicial duty becomes permanent. In the Panel's opinion, only lawyers which had at least a 3-year experience of practicing law either within the bar, clerkship at the courts, assistant prosecutors or as in-house legal advisers should be admitted to take exams to enter the special a judge's profession training institution.

The Consultative Council of European Judges ("CCJE") recommended that "the authorities in member States responsible for appointment and promotion of /judges/ should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency. Merit is not solely a matter of legal knowledge, analytical skills or academic excellence. It also should include matters of character, judgment, accessibility, communication skills, efficiency to produce judgments, etc".<sup>25</sup> Notably, commenting on these requirements the Venice Commission added that "it is essential that a judge have a sense of justice and fairness"<sup>26</sup>. In all the countries of the Region the governments created *Judicial Academies* (in some jurisdictions – Academies for Judges and Prosecutors, in Romania – the Institute of Magistrates which educates the fresh appointees for vacancies not only in courts but also for the offices of the General Prosecutor).

Known under various names these establishments are special schools for judges providing both basic (initial) and continuous professional training. The best of such systems, in the Panel's fair opinion, were created in Macedonia, Montenegro and Slovenia. In these countries there is a strict requirement in place that any lawyer selected as a candidate to the bench must have at least 3-year prior experience of practical work as a legal practitioner and thereafter undertake a two years special training in a judicial academy where a candidate to the bench undertakes studies following a comprehensive and practice oriented curricula. In Slovenia, for instance, a written part of the bar exam, which is a pre-requisite for pretenders to the judges' positions includes the test in drafting a legal verdict in civil and criminal matter. Notably, in the Slovenian Justices Academy there is a special curricula in place designed for court clerks. It is a common practice in Slovenia that a successful clerkship at a court is generally a "must" step for a lawyer pursuing a judge's professional carrier. The worse situation with regard to professional training of judges was found in Kosovo. Namely, it appears that unlike the court system that was in place until 1989 (prior to Yugoslavia's eventual disintegration), in the current system the judges do not have any professional support to draft, review and edit their

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<sup>25</sup> Opinion no. 1 of the CCJE, p. 25

<sup>26</sup> Report on Independence of the Judicial System, Part I: the Independence of Judges, adopted by the Venice Commission at its 82<sup>nd</sup> Plenary Session, Venice, 12-13 March 2010, p. 6

decisions. Almost all judges write their own decisions and almost in all cases such decisions are issued and published without any review, whether proofreading or other substantive review.

Notably, in Croatia, as part of the judiciary overhaul required by the terms and conditions of access to the EU the country's judiciary training system went through a radical reform and was reorganized into the State School for Judges and Prosecutors. Now this specialized institution plays a major part in the education of future public servants in judiciary and state attorneys. The reform also covered the system of selection of legal practitioners to these positions. In order to become a judge or prosecutor in Croatia after 1 January 2013, it will be necessary, in addition to demonstrating high performance at the bar or within other areas of legal profession the candidates would need to complete a two-year education program based on a merit system. Candidate selection is conducted on the basis of transparent and objective criteria: oral examination, structured interviews and final examinations. The selection of the first group was carried out in autumn 2010 (58 candidates for judicial officers) while last month the enrolment of the third generation was initiated. However, the Panel and local experts commented that the system of the appointment of judges in Croatia still raises suspicions of nepotism and cronyism to the detriment of a fair competitiveness among the candidates and should be further improved in order to reach the standards of objectivity and transparency common nowadays in the old EU member-countries.

Another factor that negatively impacts the quality of the decisions is the lack of knowledge and experience of the judges on highly specialized areas of the law, which have been introduced as a result of Kosovo's unilateral accelerated path for integration into the EU. Last but not least, the quality of decisions is also undermined by excessive workload the judges have to bear every day.

#### *Understaffing of courts and backlogs of cases*

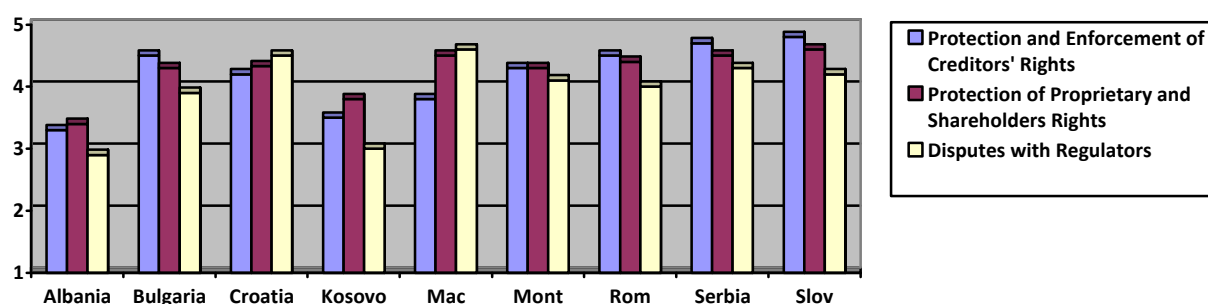
The Panel also examined and found another important factor which generally contributes to a low quality and erroneous decisions: understaffing of some courts which is quite common in the Region, and, consequently, a rather large backlogs of unresolved cases, especially in administrative courts. The judges specializing in resolution of commercial and administrative law cases, especially in courts located in industrial and urban areas, often find themselves under a rather stressful situation working under tough deadlines and have a limited time-frame dedicated to the decision drafting. Consequently, most of the decisions although lawful in substance were evaluated as being of mediocre quality because of apparent flaws in argumentation and substantiation. Even in Croatia, a jurisdiction in which there is the largest number of judges per capita of the country population, due to the overload, quality is usually neglected on the side of a favourable statistic of solved cases by an individual judge.

### **3.3 Legislative obstacles (adequacy of legislative framework)**

This particular dimension deals with the overall quality of commercial law and how it affects quality of decisions. Without a doubt vague and unclear legislation makes the judge's job more difficult. The Panel and the respective teams of local experts were analysing how various flaws in the selected sub-areas of commercial law might become a major factor negatively affecting judicial decisions. The main point of studying this dimension was to understand its relationship with other dimensions of judicial capacity, especially with quality and predictability of decisions. A likely outcome of a litigation will be more foreseeable when the legislative framework is: (a) clear and unambiguous; and (b) stable. The Assessment

results concluded that the adequacy of legislative framework has a substantial bearing upon overall performance of the courts and quality of the decisions. This general conclusion is supported by a number of the selected decisions, however, this particular dimension was not a substantial impediment to the overall quality of the courts output (see **Chart 3**). [Interestingly, when you compare ‘legislation’ (chart 3) with ‘quality’ (chart 1), there is only one country (Romania) in which the scores for the three different areas are in the same order for both dimensions. ] [I.G. Comment: This is because the regulatory part of the Romanian legislation (especially in regulation of natural monopolies, tax and customs issues) is generally worse than in the areas regulated by the civil code needs substantial reform: I learned it from the interviews taken from our local experts including Prof. Lucian Mihai, a very much respected lawyer-scholar in Romania)

Chart 3 Adequacy of legislative framework by country and legal sector



All the countries of the Region have a relatively recently adopted blocks of legislation regulating relationships between the business organizations, as well as relationships between the latter variety and the regulatory agencies especially in those businesses that require a special license. According to the Panel’s comparative assessment of the most common and frequently occurring situation was challenging by a business entity – the tax payer of levying of taxes. Among this particular category of disputes more than 50% occupy cases regarding administration of value added tax (VAT).

#### *Retardant and obsolete laws*

First of all in all the country summaries prepared by the local experts they noted that in a number of areas of commercial law the legislation is not keeping pace with market realities which become more and more complicated, leaving gaps which courts struggle to fill. This is a problem affecting countries world-wide in times of transition of centralized economies towards a free market. For instance, although the corporate laws in the countries of the Region are generally well drafted they are not free from some lacunas, such as for example, absence of a remedy to resolve a deadlock in corporate decision making if the share capital is split between two equity holders by 50/50 present.

The laws regulating bankruptcy proceedings were found to be the most unclear and controversial among the three sub-areas of commercial law encompassed in this study and there are cases from the selections illustrating the apparent defects of the relevant laws although in all the countries representing the Region the new market oriented insolvency laws were passed in compliance with modern tendencies. Notwithstanding availability of such modern insolvency laws our local experts found a number of typical decisions in which the

court was faced with an issue which lacks adequate legislative regulation. Bulgaria, Serbia and Macedonia take common positions in respect of certain matters not regulated by the law (legal gaps) by drawing general conclusions, positions and opinions. For instance, in Serbia, currently three different set of bankruptcy legislation is applicable depending on when exactly the fact of insolvency was established and the relevant court proceeding commenced. Each of these three legislative acts encompasses a completely different approach to regulation of potential financial rehabilitation of an insolvent company-debtor with different powers of a court, procedures and statutory time-frames and these controversies may lead to the erred judgments.

As another illustrative example the Law on Pledges in Montenegro is defined very vaguely and inaccurately with regard to rights of a collateral holder to a business generated cash flows such as the rights of a pledgee to the pledgor's receivables or insurance proceeds. The case law analyzed in this sub-area of law may give rise to very different interpretations.

### *Stability of the legislative framework versus continuous legal reforms*

Legislative framework in the Region's jurisdictions is still in a transition and generally unstable. In the transition economies new laws are introduced, or existing ones changed in order to adjust the legislation to *acquis communautaire*. Legal provisions are often copied from the laws of more developed economies; the process of integration of the EU directives (which is recognized by the Panel as the main driving course of the reforms of commercial law) into the national legal systems of the EU member countries (Bulgaria, Romania, Slovenia<sup>27</sup>) is still continuing and is far from been completed. The Panel notes as quite positive development profound recent changes of several important areas of commercial law in Serbia. The new Company Law passed by the Serbian Parliament in 2011 regulates the existing business associations in a more detailed and precise matter thus overcoming inadequacy of previous law. However, for the judges of commercial courts of Serbia the new Company Law is a completely new piece of legislation and, as the result, the application of the new corporate provision by various courts is far from being uniform. The Panel came to a conclusion that this is indicative of inadequate capacity of the superior courts in Serbia in timely feedback to these case law flaws by the analysis of the apparent problems and curing them by issue of effective instruments of superior court guidance. Generally, in the Panel's opinion, modernization of commercial legislation throughout the Region's jurisdictions and its harmonization with the EU law results in a number of instances in a situation when courts do not always have good grasp and understanding of the new legal concepts and sometimes issue decisions which contradict one another.

Following the review and analysis of the legislative obstacles in Croatia the Panel arrived into a conclusion that harmonization of the Croatian legal system with the EU body of laws, which was a driving force for legislative changes in the past years, although was a positive development, resulted in an overall instability of the legal environment and in unstable and uncertain case law. This uncertainty still affects in a negative way the system of land title registration, bankruptcy proceedings and late payment in commercial transactions. The Panel evaluated as a positive development the recent improvements in the Croatian legislation approved in order to improve the payment discipline. Now the parties to commercial contracts may agree upon a 60-day period for payment of monetary obligations and, under exceptional circumstances, up to 360 days if the debtor has issued a promissory note or a bill of exchange.

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<sup>27</sup> Croatia is set to acquire the full EU membership in 2013

A new Foreigners Act, which is further aligned with the *acquis communautaire*, also came into effect this year. This act remedied the problems of working permits for expats employed by the Croatian business entities.

Notwithstanding a significant progress reached in Croatia with a view of harmonization of its legal system with the EU law there are still important remaining problems that need proper attention. For example, the regulations of the security instruments are governed by complex acts which sometimes represent significant obstacles for investors to tailor their transactions as they think fit. The security legal system needs to be improved in order to be more flexible and efficient.

However, the Panel hereby expresses a general observation that constant changes of commercial law, despite being an indispensable part of legal reform and transition, nevertheless creates serious obstacles to uniform application of law by the courts across the Region. Although judges, members of the bar and other legal practitioners usually take an active part in the working groups engaged in preparation of the legislative bills, it is often the case that the draft law is changed at the last moment, which happens very often as the result of amendments submitted by members of the parliament lobbying the interests of politically influential business groups, without any knowledge and input by the legal practitioners. Such practices in a number of cases lead to appearance of legislative loopholes and technical inadequacy of the recently adopted pieces of legislation.

By comparative analysis of the country summaries and the selected decisions the Panel also came to a conclusion that legislation governing the relationships between the business entities and government authorities in the strictly regulated industries (energy, telecommunication, public utilities, defense, etc.) and in corresponding areas of law (competition, infrastructure, drugs, IP, protections of consumer rights and such other) is the most unstable and full of debatable provisions.

#### *Adaptation of foreign law to the realities of a national legal system*

In the history of development of the current legal system there are a lot of examples when a traditional society successfully adopted the Western model of civil law in order to foster modernization of a national economy and industry. Japan's adaptation (during the reforms in 70s and through 90s of the XIX century) of the BGB (the German Civil Code) and similar reform undertaken by the Ataturk in Turkey soon after the World War I are two well known historical examples. These reforms are assessed by scholars of the civil law as more or less successful. It appears that it was not the case in Albania, where, after the fall of authoritarian communist regime some Western European commercial law concepts were implanted into the Albanian legal system but the results of such a transfer were somewhat controversial. Our local experts noted that sloppy and low quality translations of model western laws into the Albanian language were in many instances the main cause for the present inconsistencies in the Albanian commercial laws. In most of the cases only selected parts of a foreign or model international statute were arbitrarily selected and mechanically introduced into the Albanian law although important references to other sources of the relevant foreign law were omitted making application by a court of such a "partially borrowed legal concept" quite problematic. In this regard the current Insolvency Law of Albania may serve as an example as this statute is literally very poor translation of its German counterpart. Thus the Albanian insolvency law contains several erred cross-references within itself. It appears that some articles of the German original law were negligently missed which led to variance between article numbers of the German Insolvency law with that of the Albanian Insolvency Law. Because the articles

containing cross-references were translated literally (following the numbers in the German original) some of the cross-references in Albanian law only make sense when one looks at the German counterpart.

A similar example of misinterpretation of a western legal term which caused inconsistent case law was found in Kosovo. By way of example, several municipal courts in Kosovo issued inconsistent decisions with respect to the status of the mortgage agreement as an executive title document, which could be enforced without further judicial review. The controversy arose out of the fact that the Law on Property and Other Real Rights states that the enforcement of the mortgage is initiated by a “judicial claim”, in accordance with the Law on Enforcement Procedure. Certain courts relied on the term “judicial claim” to support their decisions that the enforcement of the mortgage should be subject to *civil contested procedure*, while ignoring completely the fact that this reference was a poor translation of the term “motion” and the clear reference to the Law on Enforcement Procedure. This matter eventually ended up in the Supreme Court, which after extensive consultations and debates with the professional community issued a decision stating that the enforced mortgage is a title document. Unfortunately, the decision of the Supreme Court on this matter is not publically available.

#### *Fragmented structure of the BiH law as an obstacle to efficient judicial capacity*

The Panel wishes to highlight in this study that currently, due to a rather loose federal structure of BiH, four highly independent legal systems have developed in this country on largely autonomous lines over the past two decades. Accordingly, since each entity making up the state: Republica Srpska, the Brcko district and the federation of BiH has its own judicial system, differences arise in the interpretation and application by the courts of similar or even identical legal provisions. This, in turn leads to a fragmented structure on several levels: fragmentation of state powers, fragmentation of legislation and fragmentation of judicial bodies that apply the legislation. The Venice Commission noted that although in and of itself, this fragmentation is a natural result of living in a federal system the leading judges, prosecutors and legal practitioners of BiH believe that the resulting discrepancies constitute a real and persistent problem because in many instances the courts while resolving the commercial law matters are facing a necessity to resolve the conflict of law issues in the absence of clear conflict of law resolution principals and rules. This problem is further aggravated by absence of a central judicial authority in the republic.

### **3.4 Speed of justice**

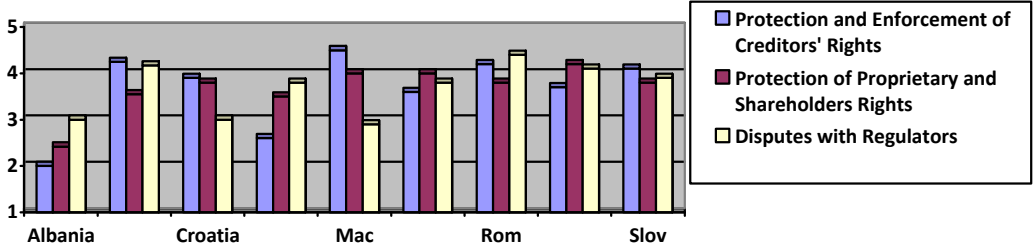
In the transition countries going through judiciary reform the average speed of justice is always among the prime issues of the reform work. The old proverb of “justice delayed is justice denied” is still considered to be among the most problematic issues across the Region. Generally, the duration of the judicial process depends on several factors: complexity of the case, the volume and type of evidence (a necessity of preparation of a witness report is especially time-consuming), the appeals and a cassation (as an extraordinary remedy) and, finally, the number of possible retrials. Of no less importance shall be more or less even distribution of pending cases between the courts of the same tier and availability of modern and efficient case management system within each individual court

The findings of our local teams of experts with regards to average direction of commercial law files are coherent in at least one point: the average time-spans between filing of a law suit until a final decision, even if it was not appealed, are in average estimation unreasonably long.



In all jurisdictions included in the Assessment the speed of justice was characterized in general terms as "a real problem", "a challenge to a judicial system" or a "most precious issue to be tackled with as a top priority". The results shown in **Chart 5** indicate that this particular dimension of judicial capacity received mediocre scores almost everywhere: in the group of earlier transition countries and in the EU member-states. However, Bulgaria, Croatia, Kosovo, Macedonia, Romania and Montenegro were doing better than the rest of the jurisdictions due to some visible efforts of the judiciary administration to tackle this problem. Still unreasonable average time-spans for duration of cases are a widely recognized problem which was not eliminated completely in any country – a part of the Region.

Chart 4 *Speed of justice, by country and legal sector*



The reasons for unsatisfactory speed of justice comprise several factors which are common across the Region. We will refer only to the most critical ones:

*The judges' workload and unreasonably large backlogs of cases*

A rather large backlog of unresolved cases and pending litigations are still a big problem even in the jurisdictions where reforms of judicial branch were assessed by the local communities and ruling elites as successful (Bulgaria, Croatia, Macedonia, Romania and Slovenia) not to mention Albania, Kosovo, Serbia, BiH and Montenegro where the reforms are still far from completion.

For instance, in Kosovo, the number of cases pending from previous years that were carried over to 2012 is 219,542 cases. In spite of these dramatic numbers, it should be noted that the commercial courts in this jurisdiction is more efficient compared to other courts in that only 2,492 cases were carried over from previous years to 2012.<sup>28</sup> The biggest problems are with first instance courts in major urban centres, such as Prishtina, while in the courts in other parts of Kosovo the efficiency of the case file processing is better. The worst situation is with municipal courts, in which 195,290 were carried over from previous years to 2012. It should be noted that in 2011 Kosovo courts received around 86,000 new cases of which around 82,000 cases were resolved. These statistical data demonstrate that the present court system in Kosovo has the capacity to increase its efficiency in terms of the speed of justice; however the biggest problem is a disposal of cases that has been accumulated since 1999.

In Slovenia, another country in which the relevant statistical records are available, the statistical data for 2011 show that it took the court of first instance less than 1 year to decide a commercial dispute in 58% cases, between 1 and 2 years in 28% cases and more than 2 years in 14% cases. According to the statistics it took less than 1 year to decide all the procedures in commercial disputes before the Higher Court (almost 85% of the cases were decided in 1 to 6

<sup>28</sup> The Judicial Council of Kosovo statistical report for 2011

months). The Supreme Court had a record of deciding 75% cases in 1 to 9 months, and 25% in 1 to 2 years in 2011.

The worst situation with the backlogs of cases was found to be in BiH. The Venice Commission was informed in the process of investigating compliance of the judiciary in BiH with the principle of legal certainty that with respect to the Federation of BiH there are a number of cantonal courts that are overrun with cases, while there are other cantonal courts that are less active, some of them almost idle. The Venice commission recommended to BiH to consider reducing the number of cantonal courts over time and providing more funding to those courts that are in need of additional funding due to heavier workloads.

In the Panel's estimation, in a rather complicated commercial cases (dispute over the material facts, insolvency, disputes with regulators requiring special expert witness reports, levying on a real estate collateral and such other complicated disputes, an average duration of the civil procedure ranges from *six months* to *two years* in the first instance, whenever a decision of the court of the appellate instance is sought by an aggrieved party and a ruling of the court reviewing a cassation plea the total process of the case review takes in average from six month to one year and a half. What should be noted is that the civil procedure may take even longer due to poor quality of court decisions when the judgements are repealed and remanded to the court of first instance for a new trial.

Large backlogs of unresolved cases in Romania is the main reason why Romania has been very often convicted by the ECHR for rather long duration of the civil and commercial disputes and unreasonably long statutory time-frames for resolving cases.

With some differentiation in all the countries of the Region local experts highlight generally similar reasons contributing to unreasonably long duration of the litigation process. In Croatia the rules of procedure often does not set clear statutory timeframes. The relevant rules only require that courts consider cases within a reasonable time and in most of the cases judges interpret the term "reasonable time" quite discretionally. The intervals between scheduled hearings are rather protracted.

#### *Absence of clear statutory time-frames*

Legislation often does not set clear statutory timeframes and procedural deadlines in most countries making up the Region. The most vivid example in this respect presents Montenegro. The rules of procedure applicable to administrative disputes in Montenegro does not prescribe specific deadlines for scheduling the hearings and with regard to reaching decisions, which means there are no deadlines within which the court must complete the procedure and issue a final judgement. The relevant rules only require that courts consider cases within a reasonable time and judges tend to interpret the term "reasonable time" in their daily routine quite discretionally.

Albania is also confronting serious problems pertaining to speed of justice. Whilst there is no formal backlog of cases waiting for the first hearing, once a case is started would typically be dragged on for years with many unnecessary short sessions to be held instead of one long session which would deal with all the matters. Although in some cases there are timeframes that need to be adhered to, the legislation does not provide adequate remedies against delays beyond timeframes. However, whenever an inference of corruption is traced a judge would appoint earlier date for a case hearing. Hence, ineffective case management and the tendency of unjustified postponements of case examination is an evident concern in Albania. One the

other hand, critical shortcoming of the legislation is the lack of any remedy for complaining about unreasonable length of proceedings,

Another reason for delayed justice which is quite common across the Region is that the intervals between scheduled hearings are rather protracted. Judges have statutory measures for tightening procedural discipline at their disposal but they rarely use them. Namely, judges may issue penalties and order reimbursement of costs if a party clearly is abusing the law by bombarding the court with frivolous motions with an obvious purpose to delay the final judgment. However, most of the judges are reluctant to use their powers in order to terminate abuse of procedural rights by applying these remedies.

#### *Judges' failure to employ all the available procedural instruments to tackle frivolous motions*

Generally, in a lot of instances the expediency of trial depends on the judge's capacity to efficiently organize a pre-trial collection of evidence necessary and appropriate to resolve a pending case and to tackle properly any abuse of procedural rights by a party acting in a bad faith manner. The local experts and the Panel pointed to an apparent failure of many judges to employ to the maximum extent possible the procedural instruments available to them which can be used for the purpose of expediting the speed of trial as an important factor affecting the average speed of trial in the Region.

First and foremost the judges are quite reluctant to apply sanctions for an implied contempt of the court when a party (a defendant in the most of such cases) is explicitly abusing its procedural rights by wilfully bombarding the court with numerous frivolous on their face pleas and motions all of which pursue one ultimate goal: to delay a final resolution of a dispute for as much time as possible.

Another negative factor contributing to delays in the civil procedure is the apparent judges' failure to force the parties to be more proactive in collection of evidence. Many judges, especially those which commenced their careers in the times of communist regimes still retain a preference of adhering to principle of so called *inquisitorial investigation* of evidence and spending too much time on collecting evidence while they should use maximum powers to oblige the litigating parties to collect and submit evidence in support of their respective claims with minimal involvement of the court.

#### *Unreasonable number of retrials following reversal by an appeal or cassation instances*

The unreasonable reluctance of the appeal instances to correct the material mistake in a case resolution committed by a lower instance court by its own decision rather than to send the case back for retrial is a typical pattern of actions of the superior courts all over the Region but especially in Albania, BiH, Kosovo, Macedonia and Montenegro. In the Panel assessment only Croatia was proactive and successful in revamping its rules of civil procedure with the aim to limit the number of retrials. In the last year's amendment to the Civil Procedure Act and Family Act Croatia introduced in commercial, labour and family litigation a statutory limitation on the number of retrials. Namely, the appellant court may annul the decision and remand the case for retrial only once. Otherwise, the appellant court will conduct the proceeding itself and bring a final decision in the case.

To unburden the courts of its workload and backlog of files, alternative dispute resolutions opportunities have been strengthened, especially in Croatia and in the countries which have already acquired full membership of the EU (Bulgaria, Romania and Slovenia) with an

emphasis on the introduction of commercial mediation. However, tangible results have not yet been seen. For instance in Croatia in from 2008 through 2011 only 3.7% of commercial litigation ended with a court settlement.

*Overview of procedural and organizational measures undertaken to speed up the “wheels of justice”.*

Among various legislative and administrative measures undertaken in the Region in order to tackle the problem of unreasonably long time-frames for a case resolution the Panel would like to highlight the following ones:

The Panel highly appreciates the sustained efforts undertaken by the Government and the Ministry of Justice of Romania to amend the legislation with the purpose of reducing the duration of a typical lawsuit. In view of this purpose, the Parliament issued in 2010 the Law no. 202 regarding some measures to accelerate the solving of the lawsuits, also called the “Small Reform”. This law amended the Code of Civil Procedure to this effect. However, although the law introduced the concept of “fast-track” procedure for relatively simple cases where the parties are disputing the main underlying facts, for more complicated matters for a number of reasons this law had not had the estimated effects on acceleration of the speed of justice in Romania.

In the Panel also highly appreciates the proactive efforts of the government of Slovenia to decrease the number of unreasonably long proceedings. In the 90s and later on ECHR has passed several decisions against Slovenia for violating the right to a fair and effective trial by unreasonable delays in final resolution of court cases. As a feedback measure in 2005 Slovenia made a much focused effort to shorten an average time-frame of litigation by adopting the Protection of Right to Trial without Undue Delay Act. This statute stipulates several rules and mechanisms aimed at more effective control over the length of court proceedings and equips the parties of a litigation with the following rights: (i.) to lodge an appeal with the request to speed up the proceedings ("*nadzorstvena pritožba*"); (ii.) to request a deadline for certain acts of the court ("*rokovni predlog*"), (iii.) to request a monetary compensation for unreasonable delay in resolution of the case ("*pravično zadoščenje*"). Every complaint of inspection filed against a judge is noted in his file and is taken into consideration when his/her overall performance is evaluated. When the superior court decides over these complaints it has to take into consideration all the circumstances of the matter in the dispute, which is supposed to be unduly delayed, the normal time of solving similar disputes, prescribed terms for composing a judgment, the way the matter was dealt with before the complaint was filed etc. All these instruments of supervision are intended to force the judges to act without undue delays and to make quality judgments.

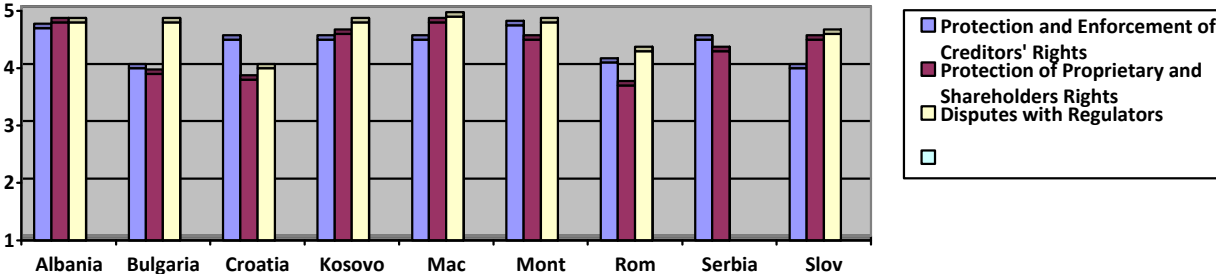
In *Macedonia* considerable improvement were attained with regard to reducing the timeframe for bringing a final decision by amending the Law on litigation proceedings. The amendments stipulated that all the disputes should finish within three hearings only. Also, the amendments provided that whenever an expert witness report is required in order to decide a case, this report should be submitted with the lawsuit itself, i.e. *prior* to the scheduled hearings. However, despite the major improvements made with respect to the speed of justice, still it cannot be said that the Macedonian judicial system has eliminated the problem with the speed of justice.

In *Croatia* until recently the bankruptcies were proceeding at a dissatisfactory pace which led to considerable backlogs of bankruptcy cases. In order to dissolve these backlogs a new bankruptcy regulation were passed which are intended to provide the courts with greater flexibility to handle such cases. Troubled companies are required to initiate a pre-bankruptcy settlement proceeding within a certain time period from the occurrence of illiquidity or insolvency reasons which may result in the troubled companies continuing their business operations without interruption with the hope that debts will be paid down from the on-going cash flow.

### 3.5 Cost of litigation

As evidenced by Chart 6 set forth below this evaluation dimension appears to be the least problematic across the Region's judicial systems.

Chart 6. Court costs, by country and legal sector



In general, the costs of litigation and administrative proceedings (excluding attorney fees) are not esteemed high across the Region and are always predictable. They are based on the prescribed tariffs and in proportion with the commercial value at stake which makes the cost risks low.

In all the jurisdictions included into this Assessment the court filing fees and decision fees are determined according to a progressive scale, except for Albania which applies a 3 percent flat rate to a claim value irrespective of its amount. However, normally each of these fees in first instance may not exceed certain amount. For instance in Montenegro the plaintiff pays the court fees for the complaint and for the verdict which may not exceed €1,500 as well as the fee for a legal remedy whereas the defendant pays only the response fee and a legal remedy fee. Another illustrative example of this concept is the Croatian regulations on the claim filing fees. The applicable tariffs are set forth in proportion with the commercial value of claim in stake but whatever amount of the claim is, there is a cap applied to the filing fee in the amount of HRK 5,000 (approximately € 666) while in appellate and revision procedures may not exceed double of that amount.

In Albania the cost of litigation is reasonable and always predictable. The fees for every set of court proceedings are clearly defined. The fee is paid prior to lodging the claim. On the whole, the judicial system of Albania does not appear to impose excessive litigation costs on the parties and the issue of litigation costs in general does not appear to constitute a problem. So, in terms of various state duties, cost of litigation is a low risk for investors, unless we are dealing with large investment disputes.

Notably in Kosovo cost of litigation continues to be rather low primarily due to a rule that the court fees are capped at € 500. According to our local team of experts there is an issue with the reimbursement of the litigation attorney's fees. The Kosovo courts do not recognize and reimburse the actual attorney's fees and rely only on the Schedule of Attorney's Fees of the Kosovo Chamber of Advocates. In Montenegro the amount of the court filing fee is charged at several percentage scales depending on the claim's amount but capped at €750 and the same amount is charged as the highest for a copy of a decision in a contentious litigation. For claims in the administrative process the fee is fixed for any claims at €30.

In Bulgaria and Macedonia the amount of the court filing fee is affordable and charged in fixed amounts in all matters concerning insolvency. Its amount is in no way related to an amount of claim. In Bulgaria, to any claims other than insolvency a flat rate of the court filing fee is applicable (4 percent) irrespective of the claim amount. The court filing fee applicable to disputes with regulators is also fixed at an insignificant amount: the equivalent of €50.

The lowest amount of the court filing fee was found to be in Macedonia. Some categories of Cost of litigation in the administrative cases is insignificant. Namely, the plaintiff is only obligated to pay court fee for the lawsuit submitted in amount of less than €10 and court fee for obtaining a copy of the decision also in amount of less than EUR 10. The court fee for remedy submitted in front of the Supreme Court is in amount of not more than €30.

Some categories of plaintiffs in the Region enjoy privileges with regard to the amount of court filing fees/: for instance in Croatia and Slovenia insolvent business entities filing for bankruptcy are exempt from paying the court fees. Furthermore, the legal framework related to free legal aid enables low-income individuals, both Croatian citizens and foreigners, to access the courts and administration institutions. Notably, in Croatia attorneys-at-law, non-for profit associations, law faculties and relevant administration offices are providers of free legal aid and each of these providers can render specific types of legal services.

The laws in the Region's jurisdiction regulating the litigation related cost stipulate that a party may be obligated to pay the *disbursement* arising out of other than the filing fee cost and expense related to actual hearing of the plaintiff's case, such as, for example, a fee payable to an expert witness, travel and accommodation cost reimbursable to the witnesses if they have to travel to in order to be interrogated in the course of the trial. The precise regulation of the disbursements is set forth in the laws of Montenegro. For instance if an expert witnesses appointed by the court is an *individual-professional* the amount to be paid ranges from €120 to €1,000, depending on the type and complexity of expert testimony. However, if the expert witness is a *specialised institution* (for example: a real estate appraiser or a specialist in identifying a person by its handwriting) the price of expert witness may amount to €5.000 depending on the pricelist delivered by the relevant institution beforehand. When the expert witnesses are institutions, the costs are almost always paid by an expert report requesting party in advance.

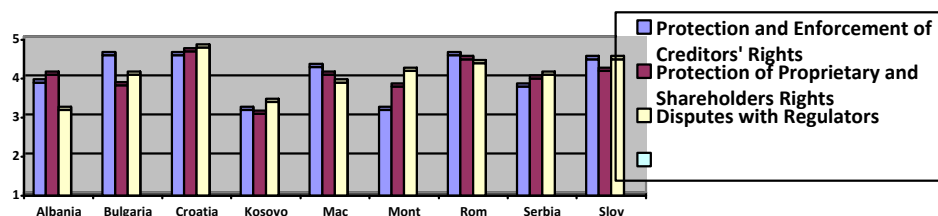
### **3.6 Implementation/Enforcement of judgments**

In commercial law cases any sophisticated business entity bringing its claim with the court would also estimate the prospects of enforcement of the judgment if it wins the case. A business confidence that most of the judgments would be enforced in a given jurisdiction is considered to be a very important element whenever international organizations are ranking the countries by investment climate. In all countries reviewed, enforcement of decisions still presented some difficulties and in several countries there remains a substantial backlog of un-enforced decisions of economic courts. Regretfully, with respect to the implementation and

enforcement of the examined court decisions there is little or no information available. In some cases no changes to the legal *status quo* were ordered and the judgment did not require any enforcement other than with respect to the payment of legal expenses. In the Panel's opinion, there are general impediments responsible for difficulties in the judgments' enforcement, such as insufficient assets of debtors, *and* lack of bidders in the action sales of mortgaged collateral, although the latter can be explained by a generally depressed real estate market of the Region.

Notably, even in the EU group (Bulgaria, Romania, Slovenia) all local experts expressed some critical remarks on status of enforceability of judgments. Set forth below is Chart 6 showing how the level of enforceability of judgments was assessed by the Panel.

**Chart 6** *Ease of implementation / enforcement of decisions, by country and legal sector*



On the basis of a comparative analysis of the current system of enforcement of judgments the Panel identified at least four different system of enforcement:

- Enforcement offices are agents of the state acting as employees of a lower instance courts (BiH, Croatia, Kosovo, Montenegro) or public servants organized as special government agency – not subordinated to the courts (Macedonia and Slovenia);
- Enforcement is carried out exclusively by certified (licensed) private bailiffs (Romania);
- The dual (state/private) system of enforcement: the state enforcement officers are organized as an independent state agency whilst private bailiffs' institution is also available which exist in parallel with the state enforcement service (Albania, Bulgaria and Serbia);

In fact the national systems of judgments' enforcement were recently subject to profound reforms in almost all the countries of the Region. These reforms were carried out with a varying level of success, but generally the Panel witnesses a significant improvement in this particular area. For instance, enforcement of judgment has been a serious problem in *Serbia* for a number of years which presented a detriment for foreign investors to invest in this country. This rather critical but objective assessment of the state of the judgments' enforcement in Serbia is compatible with evaluation of the Serbia's rating in the World Bank most current (2011) "Doing Business Report" in which Serbia stands at the bottom of the ratings list.<sup>29</sup> This report ranks Serbia 20th out of 24 Eastern Europe and Central Asia

<sup>29</sup> While assessing the ease of doing business in a given country the World Bank uses *inter alia* such a dimension as enforcement of contracts

countries and as number 103 among all the rated jurisdictions. According to the World Bank Report it takes 635 days in average to enforce a contract in Serbia.<sup>30</sup> Moreover, a significant number of cases before European Court of Human Rights filed against the Republic of Serbia are due to non-enforcement of court decisions.

In May 2011, the Law of *Serbia* on Enforcement and Security has been introduced primarily with the aim make the enforcement system as efficient as possible. Thus, the new law shortened unjustifiably long enforcement proceedings and relieves the courts of the burden of duties which do not constitute adjudication in the stricter sense of the word and which the new act entrusts also to private enforcers. The provisions on private enforcers came into effect on May 2012.<sup>30</sup> The court procedure was improved in that the court does not anymore issue a new decision for each subsequent step within the enforcement procedure. The law now provides for a streamlined notices procedure, along with giving the authority to enforcement officers to deliver the notices. The procedure for the sale of collateral is faster, more transparent and an enforcement officer may now, under its own reasonable discretion, go after any kind of liquid assets owned by a recalcitrant debtor. Detailed specification in the judgment what items of property may be seized and sold in satisfaction of the creditor's claim is no longer needed. Also procedural deadlines are now shortened and legal grounds for legal challenge of the enforcement officer deeds by an appeal limited. However, although the new Serbian enforcement law has to a certain extent made the enforcement proceedings more efficient, the local experts and the Panel identified and pointed to a number of problems in connection with its application. So far there are insufficient number of well trained and properly licensed private bailiffs available now, and the state enforcement officers are still overburdened with a number of enforcement procedures. Thus the effect on overall efficiency of the enforcement procedure is yet to be seen.

By comparison *Slovenia* is 2 years ahead of Serbia in implementing its own reform in enforcement of judgments. Enforcement procedure has improved immensely in the past few years in Slovenia. According to the judicial statistics the execution of a decision in commercial disputes took less than 1 year in 67,48% of the cases in 2011 while the average term of enforcement in the previous year's usually took more than one (1) year. Even though, the efficiency and speed of enforcement may still depend on the means of enforcement. For example the enforcement of pecuniary claims by seizing bank accounts, shares, incomes is more effective than levying on the land, where certain delays and inefficiencies may occur due to misuse of procedural rights (e.g. in public auction proceedings). The total execution proceeding most takes a little bit more than one (1) year. Enforcement of pecuniary claims by levying a land took less than 1 year in 44,43%, and more than 3 years in 26,29% of the cases. The execution department is overloaded internal reorganisation has been made in order to help preventing further delays (e.g. hiring new people, shifting legal trainees to this department).

The scores obtained by the countries participating in this study (Chart 6) with regard to enforceability of the decisions generally correspond to the ratings assigned to each of these countries in the World Bank's "Doing Business Report" for 2011. For, example, *Macedonia*, a republic of former Yugoslavia, is ranked by the World Bank's report much better as compared with Serbia and occupies position number 59 (ahead of Romania – 60; Albania – 85 and Bulgaria - 86. Since in the past *Macedonia* has faced problems with the efficient

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<sup>30</sup> The World Bank *Doing Business Report for 2011*, <http://www.doingbusiness.org/rankings>

<sup>30</sup> Serbia: NGO Report on the Follow-up to the Concluding Observations, SERBIA Follow Up Report (Belgrade Centre for Human Rights) (as of: May 2012)



enforcement of the decisions rendered in administrative disputes, the new Law on Administrative Disputes adopted in 2006, implemented provisions regarding the enforceability of the decisions issued by the administrative courts. [Same as above – please state extent to which your data lines up with the general thrust of the WB results] During the past 10 years some government bodies of Macedonia committed several politically motivated acts of sabotage towards several judgments which recognized certain government decrees null and void. These state agencies formally complied with the court order and dismissed the controversial decrees but soon thereafter passed new decrees similar with those revoked in form and substance. In order to end this practice which is, without any doubt, detrimental to the rule of law, in 2006 the Law of Macedonia on Administrative Disputes was amended and restated in order to expand the responsibility of the authorities rendering the administrative decisions as well as to strengthen the authority and powers of Administrative Court. Also the amended statute provided for the establishment of the State Administrative Inspectorate as an agency with special status subordinated to the Ministry of Justice. The Inspectorate oversees and administers *inter alia* implementation and enforcement of judgments in Macedonia and over the 5-6 years period this new government agency it secured a substantial improvement in this area of law enforcement.

By a comparative analysis of the country summaries which highlighted still outstanding issues negatively affecting enforcement, the Panel came to the following observations and conclusions\ *Problems in collection of a moneys' debt*

Enforcement of a claim for collection of debt (certain amount of moneys) confirmed by a judgment is, generally, the most simple method of enforcement. According to our local experts non-cooperation shall be a common pattern of behaviour of the debtors over the Region: only in very rare cases they will pay voluntarily the debt confirmed by an operative judgment. In such a situation the common practice shall be levying on various bank accounts if the funds had not been syphoned off in bad faith prior to delivery to the debtor's bank of the writ of judgment execution or such other enforcement document issued by the court. In Slovenia and practically in such neighbouring countries such as Croatia, Montenegro and BiH in more than 50% cases of commercial execution the enforcement is performed by seizure of bank accounts, in almost 40% it is seizure of movables and in less than 2% it is levying the land and improvements on the plot of land.

The Panel put on note that especially in *Montenegro* this procedure is applied quite efficiently and smoothly irrespective of what kind of assets are available. Law on Enforcement and Security is very clear and provides multiple possibilities for debt collection, depending on the case. If the amount of money available for seizure deposited at the bank account is not sufficient the enforcement offices would automatically (without any special plea on behalf of a creditor) switch to go after other liquid assets owned by the debtor (moveable and immovable property, cars or trucks, shares, etc.). Of course the procedure is not free from certain defects and pitfalls. For instance, the statutory deadlines set forth by allocable law in specific segments of enforcement are often not complied with because the enforcement officers in Montenegro are still overburdened with the enforcement cases. The Panel noted as a positive tendency that the commercial banks in Montenegro act efficiently and expediently in enforcing the writs of execution; there are standard internal banking procedures in place providing for seizure of funds and their transfer to the creditor(s).

#### *Enforcement of judgments ordering a specific performance*

There is still little progress in finding effective solutions of implementation of judgments requiring "specific performance", a concrete action or a refrainment from certain action. Due

to better organization of state enforcement agencies, approval of the new laws which govern the decisions' enforcement much more efficiently than in the past, the enforcement of judgments on collection of moneys becomes with each year less and less problematic. These new laws provide for multiple options for debt collection, depending on the case (seizure of bank accounts or levying on the real or movable property). The only issue would be whether the debtor has any assets of value available for seizure and subsequent sale and whether it is not wilfully hiding them away out of reach of an enforcement officer. For instance, in Slovenia 50% of the collection judgments are executed by seizure of bank accounts and about 40% - by seizure of movable property. By contrast execution of a judgment which requires a specific performance needs certain proactive action to be performed by the debtor (for instance, to demolish an improvement on the plot of land which was built in violation of urban zoning regulations) and if the debtor refuses to perform the laws of the countries of the Region still lack effective means of putting a legitimate pressure upon the debtor and to motivate him for cooperation. Administrative fines which might be levied for contempt of court are rather small and in many instances are not comparable with the claim amount at stake. Bringing criminal charges against a non-performing debtor is cumbersome as it requires additional activity from the law enforcement agencies (police, public prosecutor's office) and these bodies are very much unwilling to undertake and process such cases.

*Introduction of the private bailiffs' service as an efficient alternative.*

The Assessment has proved that implementation/enforcement of judgments was considered much more efficient from the creditor's (claimant's) position in those countries which introduced by law *a private bailiff system*. As of today a private bailiff's services were introduced in Bulgaria and Romania.[note: the scores on enforcement for Bulgaria in relation to disputes with regulators were extremely low – the lowest of any country.

In Bulgaria, where the private bailiffs commenced their work in 2006 acting on the basis of the Private Enforcement Agents Act passed in 2005. Notably, the "private: and "public" enforcement services exist in parallel provided that the public (state) enforcement officers have an exclusive competence to enforce any judgments against the government bodies. The competition between the state enforcement officers and private enforcement agents as well as competition between the "private bailiffs" resulted in a considerable improvement of the judgments' enforcement process.

In Romania the state enforcement service was abolished in its entirety and replaced with the private enforcement agents. So far this radical reform proved to be quite successful as the backlogs of failed enforcement cases decreased considerably due to proactive actions of the private bailiffs. The Panel came to a conclusion that the Romanian laws and regulations that are governing organization and functioning of the private judgments enforcement service should be taken as the model legislation across the Region. The execution of judgments in Romania is considered to be a professional activity subject to a license (setting forth licensing terms and conditions) and regulated by the Law No. 188, passed in 2000 and regulations issued by the National Union of Enforcement Officers (a self-governing professional association). The enforcement officers are allowed to carry out their duties individually (same as a solo legal practitioners) or as an associated office. According to the Law No. 188 the enforcement officers are deemed to conduct an activity of public interest and the documents issued by them have a public authority. In this respect the private bailiff's role in Romania is an analogy with the role played by public notaries in the civil law legal systems.

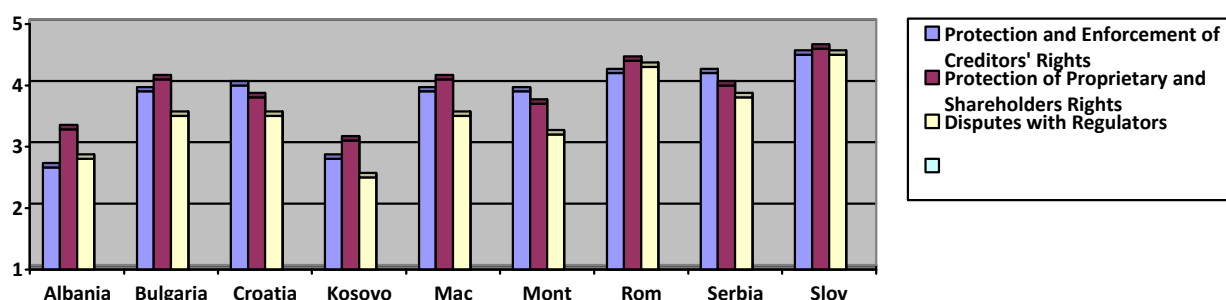
Interestingly, in Albania, a *de facto* private bailiff system was enacted. The enforcement offices in Albania still retain their status of civil servants employed by the state but instead of

a fixed salary or some other similar form of compensation they receive a *percentage of proceeds* obtained from the amount actually collected and transferred to a claimant. Our local experts in Albania informed us that after introduction of such a system of enforcement officers compensation performance of the state judgments' enforcement system has dramatically improved. Interestingly, after this system of compensation was enacted a lot of Albanian attorneys and other lawyers filled the vacant positions in the state enforcement agency. The Panel attributes the generally more efficient performance of private bailiffs in the jurisdictions where this institution was introduced to a rather high motivation as their compensation is directly linked to performance (actual collection).

### 3.7 Impartiality

The Assessment showed that lack of judicial impartiality, especially in court trials of cases where substantial economic interests of private businesses are at stake, is often seen as a major problem affecting the courts and compromising the principle of independence of judiciary. Impartiality may have multiple manifestations such as money bribes taken by some corrupt judges, pro-government bias or the presence of other improper influences on judges from powerful individuals in business or government. Much more frequent are cases of perceived unlawful pressure upon a judge through the court hierarchy. In most of the cases a court's chairperson is suspected of being a prime conduit of such a pressure. The overall ratings assigned to impartiality as assessed in the Chart 7.

**Chart 7.** *Perceived impartiality of judicial decisions, by country and legal sector*



Our local team of experts confirmed that a perceived impartiality or a court bias is a feature which is not easy to track. One can claim with certainty that the court was biased in dispensing justice if it was privy to all developments of a case (normally a party or its attorney).

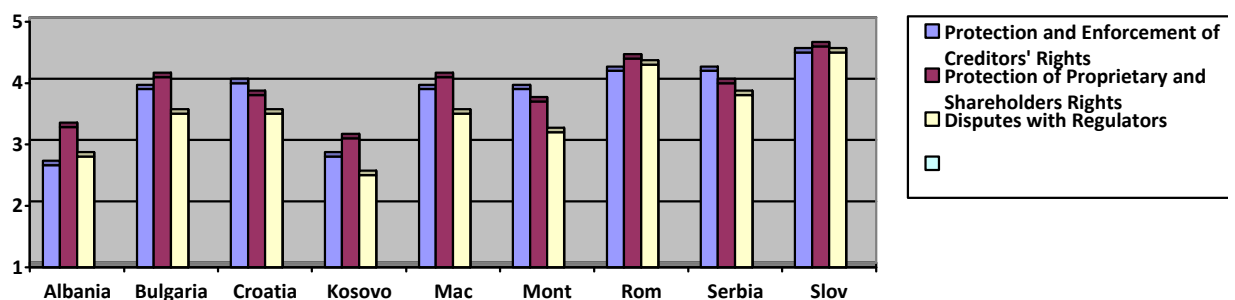
Generally, an overall level of impartiality of the courts in a given jurisdiction is closely linked to such basic principles of judicial capacity as *legal certainty* and *independence of judiciary*. As the Venice Commission rightly commented in one of its reports "the independence of judges and – as a consequence – the reputation of the judiciary in a given society depends on many factors. In addition to the institutional rules guaranteeing independence, the personal character and the professional quality of the individual judge deciding a case are of major importance. The legal culture as a whole is also important. Institutional rules have to be designed in such a way as to guarantee the selection of highly qualified and personally

reliable judges and to define settings in which judges can work without being unduly subjected to external influence".<sup>31</sup>

In light of the above cited comment it should be noted that an overall *reputation of the judiciary* and of its individual representatives especially in the transition countries is an essential element of its investment climate. Institutional rules bearing upon true independence of judges have to be designed in such a way as to guarantee the selection of highly qualified and reliable judges possessing the highest level of moral integrity which is the best barrier against temptations coming from the surroundings of every individual occupying a high office on the bench. The Panel came to an opinion that the prevention of corruption in judiciary depends primarily upon a *political will of the governing elite* adopt a strict "zero tolerance" approach to any manifestation of corruption and to undertake a number of effective measures to this end starting from creation of the system ensuring selection of the candidates for the bench on merits only.

The Panel came to a conclusion that a strong public awareness of the seriousness of the problem of corruption in judiciary should precede formation of the government policies to tackle this problem. It is not easy to line up the countries included into this study by level of corruption in the judiciary because while in some countries this issue is a subject of open public discussions (Bulgaria, Romania, Slovenia and Croatia) in some other the governments are somewhat shy to discuss this problem openly. In this respect Romania is a good example because in this country the Ministry of Justice acknowledged long before entry of this country into the EU as having a serious problem with corruption and has been under intense external and internal pressure to tackle with it. By now Romania has accumulated significant experience in implementing policies aiming at fighting this problem to be described in detail below.

**Chart 7.** *Perceived impartiality of judicial decisions, by country and legal sector*



The problem of corruption has been intensively analysed with regard to the independence of the judges and the possible sanctions against them with regard to their issued decisions. In Romania, the existing legal and institutional framework adopted in the recent years ensured

<sup>31</sup> The set of professional and personal qualifications outlined in the *Report on the Independence of the judicial system, Part 1: The Independence of Judges*, adopted by the Venice Commission at its 82<sup>nd</sup> Plenary Session (Venice, 12-13 March 2010), p.3

the effective independence of the judges, which was an important step towards a different approach of the corruption problem. However recent public opinion polls conducted by several Romanian NGOs proved there is a huge gap in the perception of the independence of the judicial system between magistrates and the public. While a recent Euro-Barometer poll from 2012 said that 93% of Romanians consider corruption as being an important problem in their country 91% of the interviewed members of general public answered the same in relation with the judiciary system. It is an obvious problem of credibility, which the authorities don't know yet very well how to address and exactly how much of it is each parties fault.

The Panel analysis of the country reports prepared by our local experts indicates that there is not a single country in the Region which could claim that corruption (in a broad sense of this term) was suppressed to an invisible level. Even in Slovenia, which scored the best in this particular dimension two cases of bribery among judiciary were recently reported. One of such cases involved three judges conducting the bankruptcy proceedings. They were accused of cooperating with the bankruptcy administrators with the aim of acquiring unlawful pecuniary benefit to the detriment of the bankruptcy estate.

In Albania, the underperformer in this dimension, the main problems negatively affecting impartiality of judiciary can be defined as corruption, especially visible as a vulnerability of judges to influence from political and commercial elites. Partiality of courts in Albania is a well-documented fact. Reportedly, this difficult situation has been evolving for years and unfortunately there were no visible improvements.

In Croatia, according to Transparency International's Global Corruption Barometer 2010/2011, the judiciary is perceived by the population to be the most corrupt institution in the country. However, officials and individuals usually do not report the occurrence of bribery. On the other hand, most companies do not find bribery to be a regular appearance among judges. The Croatian judiciary system however is struggling with more sophisticated forms of corruption – nepotism and cronyism.

The problem of impartiality of courts should not be discussed only under the angle of fighting corruption in courts. With regard to implementation of impartiality principle in every day practice of economic and administrative courts the Panel has collected enough materials (mainly selection of 20 decisions) per each jurisdiction (save Bosnia) proving that in a predominant variety of *routine cases* (collection of receivables past due and the like) the judges usually treat the adversary parties equally and equitably, i.e. complying with the highest standards of impartiality. In this respect compliance with impartiality may rather be identified in the content of the issued decision with regard to selection of proper legal grounds and impeccable evaluation of evidences. A rather good illustration of this conclusion will be a Romanian case in which a private wholesale importer of goods tried to challenge a decision of the customs' office to request payment of certain amount of the excise tax. In the process of examination of evidence the plaintiff moved to contest the amount of excise tax although this amount was evidenced by another public authority – the local department of public finances. Although under applicable law the decisions of public finance departments cannot be subject to contestation by a court, the court considering this matter sustained the plaintiff's motion for an additional audit of tax returns which, in our local expert opinion, was an express violation of the scope of the court's competence, and thus, the court has created some grounds of being suspected of bias in favor of the plaintiff.

Almost all of the local experts pointed to perceived bias in favour of the state in several disputes with regulatory authorities. However, the Panel came to a conclusion that in an

average case of this category (disputes with regulatory authorities), the involvement of the state as a party in the litigation was associated with perceived bias only to a very moderate extent. The studies performed by the local experts confirm that by no means did the state always win.

The Panel highly appreciated efforts undertaken by the governments of a number of countries of the Region strategically focused on elimination of any manifestations of corruption in judicial branch of power. The Judiciary Councils (operating under different names) which are created in all the countries of the Region now were vested with enough powers to closely monitor any allegations of corruption and are active in applying disciplinary and other measures to the judges suspected of the judges' oath violations. One good example of such activity is the Croatian Anti-Corruption Strategy, an official government policy document regulating measures for preventing and systematically combating any forms of corruption. The Panel also noted that in Bulgaria and Romania a good progress was achieved recently in ensuring impartiality in all the instances of the national court systems.

The Panel also noted that corruption within the judiciary of Romania which was quite notorious 7- 8 years ago when Romania acquired the full membership in the EU was significantly suppressed,<sup>32</sup> primarily, by employment of following instruments:

- A special anti-corruption unit was established several years ago within the Office of General Prosecutor of Romania vested with broad powers of a law-enforcement agency (tapping phone conversations; secret surveillance and video-recording; undercover operations, etc.). The prime task of this unit was to investigate any allegation of corruption within the Romanian judiciary and the unit was equipped with all necessary and appropriate technical means;
- Replacement of judges that reach a retirement age and filling in the new open positions with young [global change of 'young' to 'young'] merited law graduates and lawyers from private practice wishing to undertake a justice's carrier;
- Strengthening the legal basis for judicial accountability: In 2012 [there are a few minor editing issues, like this] the Romanian Parliament passed amendments introducing new disciplinary offences and strengthening existing sanctions; the role of the Ministry of Justice and of the General Prosecutor in the course of disciplinary proceedings was also extended whilst the independence of the Judicial Inspection was increased.

The Superior Council of Magistrates in Romania is the authorized body responsible for investigating and punishment of professional misconduct of judges. The authority has the Judicial Inspectorate, a department specialised in investigation of the alleged cases of violation of the judge's oath. A disciplinary action against an acting judge can be initiated by the following government agents: by a judicial inspector belonging to the Judicial Inspectorate, by the Minister of Justice or by the President of the High Court of Cassation. The Judicial Inspectorate can commence a preliminary inquiry "*ex officio*", for example on the basis of out of range number of reversed judgments passed by a judge or reacting on the oral or written proposal submitted by any citizen. The Superior Council of Magistrates published in 2011 on its website a statistic containing the number of disciplinary actions

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<sup>32</sup> Romania occupies position No.60 in the 2012 Report of Transparency International behind the following jurisdictions included into this study: Macedonia (59), Slovenia (56) Croatia (52) but ahead of Albania (85), Bulgaria (86), Serbia (103), BiH (120), Montenegro (135) and Kosovo (138) – <http://www.transparency.org/cpi 2012/results>

submitted between the years 1999-2010. From a total of 148 actions, 103 were accepted (meaning that judges were held accountable and punished by disciplinary sanctions) and 23 of the cases resulted in the expulsion from the magistrate profession, the ultimate among existing penalties.

At the end of 2011, Romania strengthened further the legal basis for judicial accountability. The parliament passed amendments introducing new disciplinary offences and strengthening existing sanctions; they extended the role of the Ministry of Justice and of the General Prosecutor in the course of disciplinary proceedings and increased the independence of the Judicial Inspection. According to a 2012 report issued by the European Committee<sup>33</sup>, *the Judicial inspectorate now has the opportunity to refocus on more targeted, swift and proactive disciplinary investigations, and to develop a stronger advisory capacity within the inspectorate for shortcomings of judicial organisation, procedures and practice. The SCM (the Superior Council of Magistrates) should further utilise this potential by asking the inspectorate to undertake systematic monitoring of key aspects of judicial practice, legal unification, and the adoption by court presidents of best practice in management.* The report mentioned a series of cases of wrongdoings where high level members were involved.

The response of the judicial leadership has seemed weak and timid with respect to these cases. Whereas in many Member States, there would be an expectation that those in positions of public authority accept that they must withdraw from their duties if needed, to protect the reputation of the public body concerned, in Romania this expectation was not fulfilled. The fact that judges under severe public criticism have continued to sit in court while investigations proceed has damaged the reputation of the courts. Clear rules should be established, such as the immediate suspension of magistrates under investigation for serious crimes such as high level corruption, in order to protect both the individual magistrate and the general reputation of judiciary in the Romanian society.

#### **4 RISK ANALYSIS**

As a conclusive part of the Assessment each local team of experts prepared an analysis of the risks their hypothetical client may face every time it goes to court: the risk of obtaining ill-founded decision for future commercial law cases. They prepared this analysis by drawing from professional experience of local experts for each of the three areas and sub-areas of commercial law, and overall. Scores for the risk posed by every of the seven dimensions were supported by written justifications and explanations prepared by the local experts.

The difference between the decisions dimensional analysis and risk analysis is that whilst the decision analysis looks into the recent past, the risk analysis looks forward. Local experts consider how they would advise their clients on the level of risk posed by each of the seven dimensions for future cases. Risk in this context means the risk of a poor outcome in each dimension in a future case, covering both probability and magnitude (e.g. a high risk of a severely delayed decision or a decision affected by a perceived lack of impartiality of the court). The risk of a poor result for each dimension was graded on a scale of 1 (low risk) to 5 (very high risk).. It should be noted that, whereas with the decisions analysis scores a high score is 'good', the position with the risk analysis is the opposite – high scores reflect high risk.

##### *Predictability of Decisions*

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<sup>33</sup> Report from the Commission to the European Parliament and the Council On Progress in Romania under the Cooperation and Verification Mechanism, 18.07.2012.

The level of risk in predicting a litigation outcome scored by jurisdiction vary from rather low level of risk in the countries which are already full EU members (Bulgaria, Romania, Slovenia), also the level of risk quite modest to be found in Croatia, a country which will be granted full membership with the EU, moderate (Macedonia, Montenegro, Serbia), high at the early transition countries (Albania and Kosovo the highest risk assessed in BiH due to restricted access to the case law and significant legislative obstacles arising out highly decentralized judicial system. (Our local expert team in BiH was not in a position to quantify risk in relation to any of the dimensions covered by this study, due to the fact that even local lawyers have very limited access to case law and could not review and select a representative batch of the decisions). The main factors contributing to risk of unpredictable decisions are common across the region comprising, unstable law, sometimes ambiguous contradictory and conflicting norms, and unreasonable delays in final resolution of cases, improper influence on judges and improper pressure upon judges through a chairperson of a court or other prominent members of the judiciary hierarchy. The lowest level of such risk were found in Bulgaria, Romania, Croatia and Slovenia, attributable to higher legal culture of judiciary and better guidance over the case law by superior courts. Notably, especially in Bulgaria and Romania the risk of the case law unpredictability is significantly mitigated by establishment of comprehensive electronic libraries of the decisions adjudicated in commercial cases. In Romania regarding the first two areas of commercial law, the legislation is detailed enough in order to prevent debatable issues. Also, some of the debatable issues have been regulated by the High Court of Cassation and Justice in appeals in the interest of the law. Regarding the third area, we can assess that there are many debatable issues due to the specific and technical legislation which is more difficult to interpret.

### *Quality of Decisions*

The risk of obtaining poor quality is still high in early transition countries of the Region, especially in *Albania and in BiH*. The risk of encountering unfounded and/or illegal court decision notwithstanding a strong case at hand is set at above 50% in these two countries. Such a situation is mainly conditioned by poor professionalism of judges and lack of deep understanding by too many judges of complex modern commercial issues. If we take the whole Region the excessive workload is also a factor which negatively affects the overall quality of decisions. Similarly, the judges occupying senior positions at the superior courts (appeal and cassation) and exercising a predominant influence upon formation of case law received their education in the law schools in the times of communist regimes and sometimes maintain in their minds some remnants of a pro-government bias. In addition, the majority of judges does not possess special legal writing skills and limit their reasoning to cluttered references to certain legal provisions without adhering to any logical structure, interpretation or without regarding the factual circumstances of the case. The risk that a case will end up in the hands of a judge with mediocre legal writing skills is especially high in *Albania and BiH*.

By contrast in *Romania* the Panel and local experts found the risk of low quality decision to be below the average because the content of the decision is regulated in detail by the recently amended and restated Civil Procedure Code and majority of the decisions are drafted strictly following the form as prescribed by the Code and will normally contain all the necessary elements. Also, the judges are careful with the drafting because the lack of certain mandatory element could lead to the annulment of the decision. In *Serbia*, on average, we assessed that the risk of having unfounded court decision as well as decisions not meeting certain formal criteria in commercial cases is assessed as quite moderate. In *Slovenia* analysed decisions are generally clear, precise and well-reasoned ensuring a rather low level of risk of getting an erroneous decision to be subject to reversal and compliance with of reviewed decisions with the prescribed format meets the general standards. In certain rural areas in certain smaller



circuit courts in *Macedonia* and *Slovenia*, where the level of specialization is not that high certain the risk is somewhat greater as an investor may encounter incomprehensive or inconsistent decisions in commercial matters. Same problem applies for administrative court in Ljubljana, which is competent for the disputes against the regulators and where certain judges lack the expertise from a specific field (e.g. tax, protection of intellectual property, competition). The Slovenian courts also do not tend to apply much of EU law or international conventions, which are sometimes applicable or may be used as a persuasive authority in a specific case. A similar risk is under average in *Macedonia* because in general this country does not have serious problem with the quality of the decisions. However, common for the Region is the risk of obtaining a low quality decision caused primarily by a general human factor: a judge does not have a necessary qualification to deal properly with a complicated case or is directly related to a limited time within which a judge must prepare and pronounce a full text of a decision. Limited time-frames and strict deadlines may also increase a risk of obtaining a decision with defects in reasoning section, violations of the procedural requirements evident from the decision, thus making it possible for another party to challenge a law quality decision by an appeal. This risk will be even greater if multiplied by the lack of expertise of judges in the areas of law whereby a court may deal with a rather complicated case: (tax obligations, competition and antitrust, IP, and telecommunication laws). The lack of professionalism and proper education of the court clerks (personal aids to judges) also affects the level of risk for dealing with a decision of rather low or mediocre quality.

### *Legislative Obstacles*

The risk of obtaining an ill-founded and unlawful decision caused by legislative obstacles is assessed by all the local experts and by the Panel as rather high due to the predominance of the imperative norms and extensive administrative regulation that does not always correspond to the generally recognised principles of civil law. Inadequacy of legislation as a risk increasing factor takes different forms in the countries making up the region. Regarding the first two sub-areas (insolvency and enforcement of pledge/mortgage, protection of title, shareholders' rights) in the countries that are the EU members (Bulgaria, Romania, Slovenia) or close to become a member (Croatia), the risk that a court may encounter serious legislative obstacles is much lower as compared with the rest of the Region's jurisdictions. Even if an issue presented before a court is not clearly regulated by the national law, the court may refer to the case law of ECHR. Regarding the disputes with regulatory authorities, the situation is different and the risk of obtaining of a challengeable decision based on a wrong statute is higher because the regulatory laws and the government implementation decrees are in the state of flux.

The risk to encounter legislative obstacles in the process of dealing with the commercial law disputes is under average in *Macedonia* and *Montenegro* because these two countries are in the stage of active dialogue with the EU on terms and conditions of possible membership in the future, and, simultaneously their governments are continuously working on improvement of the laws and on harmonization of Macedonian and Montenegrin laws with the EU law. Although there were many improvements made, in some areas of law further changes are needed, but taking in consideration that the process of improvement and harmonization of the legislation of these two republics is carried out continuously and systematically it is expected that the underlying risks will be decreased even more in the near future. By contrast in Serbia the Panel assessed the legislative obstacles present to create this risk factor above the average. Some pieces of legislation, especially in Albania, BiH and Kosovo often contain many loopholes and technical inadequacies. The highest risk of inadequate legislation was found to be in BiH. Although BiH's legal system is a civil law system which was greatly influenced by the legacies of the Austro-Hungarian Empire and the Socialist Federal Republic of

Yugoslavia, this state now comprises four entities of the federation and four legal systems have developed along largely autonomous lines over the past two decades. According to the study recently performed in BiH by the Venice Commission the legal orders in the entities of the federation vary in many areas of substantive and procedural law. In addition, since both entities (Republica Srpska and the Federation of BiH) which are constituent parts of BiH, the Brcko District and the BiH has its own judicial system, differences arise in the interpretation and the application of similar or even identical provisions. The fragmentation of the legal order and of the judicial system in BiH creates an ever present risk of conflict of laws and jurisdiction then a court is resolving a case between the commercial entities registered in different constituent parts of BiH<sup>34</sup>.

### *Speed of Justice*

In a rapidly changing business environment where time is often an essence a favourable outcome of litigation may lose its validity for a winning party because the justice was unreasonably delayed. For the whole Region the risks of delayed justice were assessed as above the average. The main reason for this rather low score are some flaws in legislation which in many instances does not set out clear and specific statutory timeframes. In addition the predominant procedural framework offers wide opportunities for the parties (a defendant as a general rule) to abuse their procedural rights with the sole purpose to delay the pronouncement of the final decision or ruling in the case for as much as possible .

The risk of delayed justice is moderate in *Bulgaria, Romania, Slovenia* and *Croatia*, the countries which recently made visible efforts to meet the required standards of protection of the right of a business entity to trial within a reasonable time. In *Bulgaria* and *Romania* introduction of the “fast track” procedure and further improvements in the codes of civil procedure to this effect very much decreased the level of risks of long delays in the fairly simple cases. In *Slovenia* a special remedy has been introduced by a new law – the request for protection of the right to a trial in a reasonable time. However, the procedures for the protection of right to a trial in Slovenia within a reasonable time still lacks (i) some clear procedural determinations and (ii) effective remedy, e.g., compensation of damage, in already finished cases. Finally, the national courts lack awareness of the necessity of speeding up the justice which makes the risk of delayed justice above the average. In Romania, with regard to the cases which cannot be put on the “fast track” the risk of a delay in obtaining of an operative decision is above the average mainly due to backlogs of unresolved cases The risk is lower in the cases of protection of the creditors' rights and higher in corporate and property disputes.

Speed of justice in *Serbia* presents a serious issue. The risks are higher as compared with the group of the countries above. Although recently many changes in the legislation have been introduced with the aim of speeding up the procedures, the overburdens of courts and significant caseloads have been the principal reasons for too many instances of delayed justice in Serbia. Furthermore, a constant and often frivolous adjournment of the court proceedings also remains a significant risk factor. On the other hand the risk of poor outcome of the case due to the delays in justice is moderate. Long trials in litigation proceedings are one of the biggest issues and challenges of *Slovenian* judicial system. Commercial departments, which decide on issues between undertakings have a much better success rate, however certain proceedings may still last up to three years or even more. From 2005, ECHR passed several decisions against Slovenia for violating the right to trial in a reasonable time (as part of the

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<sup>34</sup> *Opinion On Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina* adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session (Venice, 15-16 June 2012),

rights to fair and effective trial). In 2005 Slovenia has also made effort to implement effective system that would prevent lengthy proceedings by adopting the Protection of Right to Trial without Undue Delay Act ("**Act**"), which includes mechanisms for more effective supervision of the length of court proceedings and gives the parties the right: (i.) to lodge an appeal with the request to speed up the proceedings; (ii.) to request a deadline for certain acts of the court, (iii.) to compensation. Despite the effort of Slovenian state to speed up the proceedings as described above the risk of lengthy proceedings and delayed decisions remains.

There are some other types of risks that are country specific. For instance, the main problem in the judicial system of *Macedonia* is duration of the court cases in front of the Administrative Court which are lasting unreasonably long. It appears that such unreasonable delays in discharge of justice in the disputes with regulators were caused by recent transfer of competence from the Supreme Court to the newly established Administrative Court and this resulted in a greater risk that a business entity may not obtain in time an adequate remedy against an abuse of regulatory powers eventually caused by a backlog of cases. The risk of unreasonably long trials in *Albania* is caused by delays of a final case resolution caused by the frivolous motions which are sustained by most of the judges ending up in numerous hearings until a plaintiffs gets a requested remedy.

### *Cost of Litigation*

The cost of litigation was assessed as reasonable and always predictable as regulated by the respective laws such, for instance, the Slovenian Court Fees Act. All the countries of the region have available statutes which set forth a clear and detailed rules for calculation of the state duty to be paid in order to initiate a court proceeding. In all the jurisdictions included in this study the state duty must be paid prior to lodging a claim paid usually as a percentage of the value of the claim. The claimants may enjoy privileges such as forfeiture of the duty applicable to companies filing for bankruptcy (Bulgaria, Macedonia and Serbia). The amount of payable fee is increasing progressively and in proportion to the value of the matter. In the average the court fee amounts to 1-5% of the claim for the procedure in front of first instance court, which is a relatively insignificant cost. Administrative law suits are everywhere charged with a fixed fee. The disbursements related to the trial (the translation and video-recording costs, the fees payable to the expert-witnesses) are also regulated and do not represent a risk with regard to financial status of the litigating parties. Accordingly, none of the local experts admitted any risk attributable to this dimension of justice.

### *Enforcement of Judgments*

All over the Region the systemic risk of the impossibility to enforce a judgment is assessed by the Panel as generally moderate, below or above this average score depending on the country. Enforcement and implementation of the judgments has improved immensely in the past few years in some countries of the Region, especially in *Albania, Macedonia, Bulgaria, Romania* and *Slovenia* where the risks associated with this dimension of judicial capacity is moderate. In the rest of the jurisdictions this risk is above the average (*BiH, Serbia, Kosovo, and Montenegro*). This risk is systemic since any great and small problems can be dealt with by radically changing old and inefficient methods of the judgment enforcement and replacing them by radically new approaches (*Bulgaria and Romania*). Although enforcement and implementation of the judicial judgments has improved immensely in the past few years, in the Panel's opinion the risks of unenforced decisions generally remain unreasonably high. The lowest level of risks for investors with regard to implementation of judgments was found in Bulgaria and Romania because these countries replaced entirely the system of state enforcement officers which acted as employees of the lower instance courts by private

enforcement officers (bailiffs) which proved to be much more efficient. Notably, enforcement of judgements against private entities in Albania recently improved significantly due to implementation of the system under which the state enforcement officer is entitled to a percentage of the collected value of the claim only after actual collection of moneys at the bank account or seizure of the other assets of a debtor (a car or other movable property). Correspondingly, due to much more efficient performance of the enforcement officers which are highly motivated, the risk of failed enforcements of judgments with regards to disputes between the private businesses has substantially decreased. However, because this system of compensation is not applicable to enforcement of judgments against the government agencies the risk of unenforced decisions in the administrative law cases remains quite high in Albania.

On the contrary, in the countries still maintaining an old system of enforcement under which the enforcement agents work within the courts of first instance (BiH, Croatia, Kosovo, Montenegro Serbia), the courts are now being overburdened with a number of enforcement procedures.

The systemic risks of a failure to enforce a judgment in a number of individual cases can be explained by a misconduct of the debtor who is employing various tactics in order to render a judgment against him/her unenforced. The other major risks would be with respect to the decisions passed against insolvent entities. There are also a lot of cases whereby enforcement is oftentimes impossible due to the fact that the debtor does not have any assets at the time the proceedings ends. There are also country specific risks related to enforcement of judgments. For instance, in *Macedonia*, although the enforcement procedures may comply with all the legal requirements the final outcome may be negative because of insolvency of the debtors. Also in *Macedonia* and *Serbia* the Panel noted several cases in which state authorities simply ignored the decisions of respective administrative court and no measures to compel them to implement the decisions were undertaken by the prosecutors.

### *Impartiality*

Impartiality of judges and courts attracted on average the highest level of perceived risk. With regard to implementation of impartiality of courts any forward oriented prognosis is an extremely vague exercise given a rather low publicity to the cases of established corruption. The risk of a judge being impartial is lower in the jurisdictions where a transparent system of appointment of new judges to the bench and their promotion is in place based only on the merits, the principle of independence of judiciary is supported by such guarantees as an adequate salaries of judges, random (automatic) distribution of incoming cases and absence of politically motivated pressure upon judges. The countries which created a system of internal security (special anticorruption units) with the main task to detect and investigate any allegations of corruption inside the judiciary (judges and prosecutors), such as Bulgaria, Romania and Slovenia over the last 5-6 years did in fact mitigated the level of corruption in courts of these jurisdictions thus fostering impartiality in the commercial cases resolution. However, due to some factors analysed in detail in section 3 above

By contrast in Serbia although many anti-corruption measures have been lately introduced along with the policies aimed at fostering independence of judges, impartiality still remains a serious problem for *Serbian* judiciary. Accordingly, the Panel assessed that the risk of impartiality in this country as below the average scores. The recent process of re-election of judges caused by a controversial and politically motivated decision of the Constitutional Court of Serbia, added much to further politicizing of the judicial system and made judges especially vulnerable to political pressures.

Politically motivated pressure also contributes to high risk of prejudiced justice. The risks of ill-founded decision would be of low or average level in trivial cases (small amount property disputes or collection of past due receivables) with only private business entities as a parties. In disputes with the government regulating authorities the courts all over the Region adopt sometime a state supportive approach. Correspondingly, the general pattern of pro-government bias, especially in the republics of former Yugoslavia, creates some risks of impartial treatment of the business entities trying to challenge allegedly unsubstantiated assessments by the tax authorities or to dismiss an unjustified fines applied by the Antitrust regulatory authority.

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The risk analysis is important, as the advice which local counsel provides to business shapes the investment climate. Such advice is based on a prospective assessment of risk. One important conclusion from this study is that courts in the region may be somewhat better at dealing with commercial law matters than would be expected, and that litigation risks – whilst very real, and arising through a myriad of serious issues affecting all dimensions of judicial capacity – are in reality slightly lower than anticipated.

## 5 CONCLUSIONS

The findings, conclusions and recommendations above represent the considered opinion of local and panel experts about the functioning of the courts and how able and likely they are to protect investors' rights in the event of dispute. In the local and panel experts' opinion, the assessment provides valuable information for the legislatures, courts and governments about how lawyers are advising their clients on business risks related to the dimensions studied in the assessment. Accordingly, even if courts and governments may have grounds to disagree with the scores in a particular instance, these results in comparative assessment across the Region should interest judiciary and other branches of the government and invite further examination of the issues raised. Please find set forth below a brief summary of major issues negatively affecting capacity of the judicial institutions responsible for case resolution and enforcement of judgments and some recommendations as to how to resolve the outstanding problems in efficient and expedient manner.

### *Access to the case law*

Although the principle of publicity of justice is declared in all the Constitutions of the countries belonging to the Region, the centralized nationwide open electronic data base of legal decisions and rulings (providing complete content of the judicial instruments) was established only in Bulgaria. In the rest of the Region's jurisdiction a similar system is in early stage of creation (Slovenia, Croatia, Montenegro) or has material defects. For example, in Romania a centralized data web data base is available but only judgment part of a given decision is posted on the web-site open to the general public whilst the reasoning part if not available. Absence of the reasoning part makes independent analysis of the case law problematic.

The Venice Commission in one of its most recent reports stated that "*publicity is one of the main requirements of legal certainty and access to legal instruments and judicial decisions should not involve hurdles*".<sup>35</sup> Generally, our local expert teams tested in practice access to the

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<sup>35</sup> *Opinion of Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina*, adopted by the Venice Commission at its 91<sup>st</sup> Plenary Session (Venice, 15-16 June 2012) p. 16

case law in all the jurisdictions included into this assessment because they were required to review a large amount of such case law in order to find 20 representative decisions in the pre-selected narrow sub-areas of commercial law. The results of such tests were quite discouraging as they encountered, save Bulgaria and a few other countries, "hurdles" and "hurdles", especially in getting access to operative decisions of the lower instance courts in Serbia, Slovenia, Macedonia, Albania and Kosovo. The worst situation was found in BiH where our team eventually found their "mission" to be "impossible" and have given up any further attempts to independently select 20 representative decisions. It turned out that there is a central case law database in BiH, which contains around 8500 cases (most of them – criminal) but it is only accessible to judges, prosecutors, court clerks, with no access granted to other legal professionals. In Romania, a "man from the street" which is not a party to a case may request a complete case file for review provided that he/she succeeded in proving to a chairperson of the court that he/she has a "legitimate interest" for review of the case. In Serbia and Slovenia, the access to the court files is even more restricted because of apparent conflict between the principle of publicity and the relevant laws on protection of personal data.

The Panel recommends that a special statute should be adopted in all the countries of the Region guaranteeing an unrestricted access to the case law (at least an access to the full texts of any pronounced decisions in civil and commercial matters. This should be organized as a central electronic data base, administered by the government agency, containing all the pronounced decisions (full texts) with identification of the procedural status of a decision (operative, appealed, the case moved from the first instance court to the court of appeals or to the court of cassation) and powered by modern search devices with a capability to carry out on-line selection of the decisions by various criteria. In the Panel's opinion only the names of individuals should be abridged in this data base, while the names and statistical codes of the business entities mentioned in the decision should be given in full. The Panel believes that the principle of publicity of judicial proceedings should override any national laws on protection of commercial secrets and that any business entity which became a party to litigation in the state court has by default waived any of its rights or privileges as to protection of personal data or commercial secrets. Those business entities which would like to protect themselves with regard to possible disclosure of some business arrangements (confidential information contained in the contracts) always has an alternative to provide an arbitration clause thus exempting the potential dispute from the jurisdiction of the state courts.

#### *Setting forth realistic guarantees for reasonable duration of case hearing*

Practically in all jurisdiction of the Region the Panel encountered serious complaints as to unreasonable duration of litigation from the filing of the original law suit and until the final judgment in a case becomes operative and may be transferred to the enforcement agent. The Panel reviewed proposals of local legal practitioners and picked up several recommendations as to further improvements in the rules of civil procedure. First and foremost the preparatory phase of a civil procedure should be organized in such a way that the parties and their attorneys could be directed by the court to collection of evidence necessary and appropriate for establishment of all the material facts by their own efforts and means. In the Panel's opinion the rules of civil procedure existing in many common law jurisdictions such as the UK and USA (affidavits or depositions, disclosure of all the evidence collected by one party to the other party, etc.) should be taken as an example of adversarial procedure insuring availability of maximum evidence at the time of the first hearing of the case). The court's role in this process should be: (a) providing assistance to the parties in any activities aimed at gathering of evidence; (b) resolving the dispute by an "air-tight decision", i.e. a decision of exemplary quality, setting forth minimal grounds for a challenge. A fairly simple cases (collection of debt, incidental damages, compliance for specific performance of the

contractual obligations and such other) should be resolved within one or maximum two hearings. The Panel highly appraises introduction of the "fast track" procedures for trivial cases which was already adopted in Romania and Bulgaria. A standard remedy to correct material mistakes in a decision should be limited to a standard appeal procedure while a cassation should become a really extraordinary procedural instrument of a decision challenge to be used only in fairly exceptional cases. There also should be increased fines to be levied by the courts upon the parties (in most cases – debtors) acting in bad faith and wilfully delaying final resolution of fairly simple cases by filing numerous frivolous motions. All these measures could not only make the dispute resolution process more expedient, but also relieve the courts from the backlog of unresolved cases. Introduction of modern mediation procedures is also promising and highly recommended.

### *Dealing with the problems of the judgments enforcement*

Within the realm of judgments' enforcement there are some problems that cannot be resolved by simple means. Getting a wilful debtor to perform an act of specific performance is still quite a problem even in the jurisdictions with old traditions of the rule of law. Only a substantial increase of financial sanction for contempt of justice can be recommended in this very specific area of judgments' enforcement. However, there is still a lot of space for improvements in traditional directions of operative judgments implementation, such as, for instance: collection of debt; liquidation of the bankrupt company estate in satisfaction of the creditor's claims; levying on pledged collateral by means of extrajudicial sale, etc. The Panel came to a conclusion that the only way out from the backlog of the unenforced judgments should be introduction of the private bailiffs as one of the instruments (if not the main instrument) of raising the efficiency of judgments' enforcement process. The experience of Bulgaria and Romania, two countries in which the system of private bailiffs was introduced indicate that if the activity of the private bailiffs is strictly regulated (requirements for qualification of the candidates; carefully spelled out licensing terms and conditions), regulation of ethical issues by codes of professional conduct adopted in the self-governance organization uniting the representatives of this profession, the private bailiffs may become well respected and rewarded professional activity enhancing considerably the collection of debts and enforcement of judgments generally.

### *Overcoming corruption within the judiciary*

Overcoming of corruption appears to be among the most difficult problems. It takes years and years to reverse a general public perception of the level of corruption among members of the judiciary notwithstanding the government's reports of numerous successes in fighting this type of corruption. In the Panel's opinion the fight against corruption in judiciary should be led by the government and provide for the following short-term and long term measures:

- The legislatures and the governments of the Region should create a strong system of filling in vacancies in the judiciary based exclusively on the merits and young legal professionals interested in undertaking a carrier at the bench must be selected exclusively through an open, competitive and transparent procedure. A proved record of successful performance in a legal professional activity (advocate, assistant prosecutor, a public notary or a clerkship at the court) at least for three years prior to applying to undertake the judiciary position should be a pre-requisite for the initial appointment to the bench. Promotion of judges from the first instance to the vacancies open with the second (appellate courts) must also be conducted through an open competitive process.

- In all the countries across the region a special investigative police type of unit should be organized with a broad powers to follow up and investigate any and all allegations of corrupt practices committed by the members of judiciary (judges and prosecutors), with a broad powers following the successful model used in Romania.

Implementation of clear criteria for appointment, appraisal and promotion of judges will result in higher confidence of the public in the judicial profession and increase the quality of the decisions, certainty of the case law, its increased predictability and the impartiality of the judges.

*Significant improvements in the decisions' overall quality*

Another problem that is important to address is the quality of the decisions, which also impact the speed of justice. The poorly drafted decisions of low quality are almost always appealed to higher courts, which reverses such a decision and returns these cases for retrial to the lower courts and in this way double the time for the resolution of these cases. In order to address this problem, the superior court must take up their role to ensure the uniform application and interpretation of the law. Furthermore, in some early transition countries such as Kosovo, Albania and Montenegro the courts are understaffed with regard to support personnel such as judges' clerks, trial secretaries and IT specialists. Saving on salaries of the technical and secretarial support staff eventually leads to large backlogs of unresolved cases and to passing the decisions of law or mediocre quality because the judges have to spend their precious time attending to routine errands.

*Better administration and management within the court system*

Another problem which this Assessment has revealed and which needs attention is the difference in workload of different courts. The first instance courts in urban cases are usually overburdened with pending cases while the courts in the rural districts might enjoy much lesser caseload. A fair distribution of cases and revision of the old norms on the number of judges per capita of population appear to be the only methods of resolving this problem. For BiH a very special problem still remains outstanding: absence of a central judicial authority (a supreme court) for the state that would deal with the conflict of laws in case law of the entities making up this federal state.



*Attachment 1. The Dimensional scores per country*

