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Court decisions in commercial matters: an EBRD assessment

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

Focus section

Judicial capacity and legal transition

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

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

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

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

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

The judicial decisions assessment: overview

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

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

Key aspects of the assessment

(a) Areas of commercial law

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

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

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

(b) Selecting the decisions

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

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

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

(c) Target dimensions

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

(d) Scoring and the role of the regional panel

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

Results of the decisions analysis

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

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

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

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

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

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

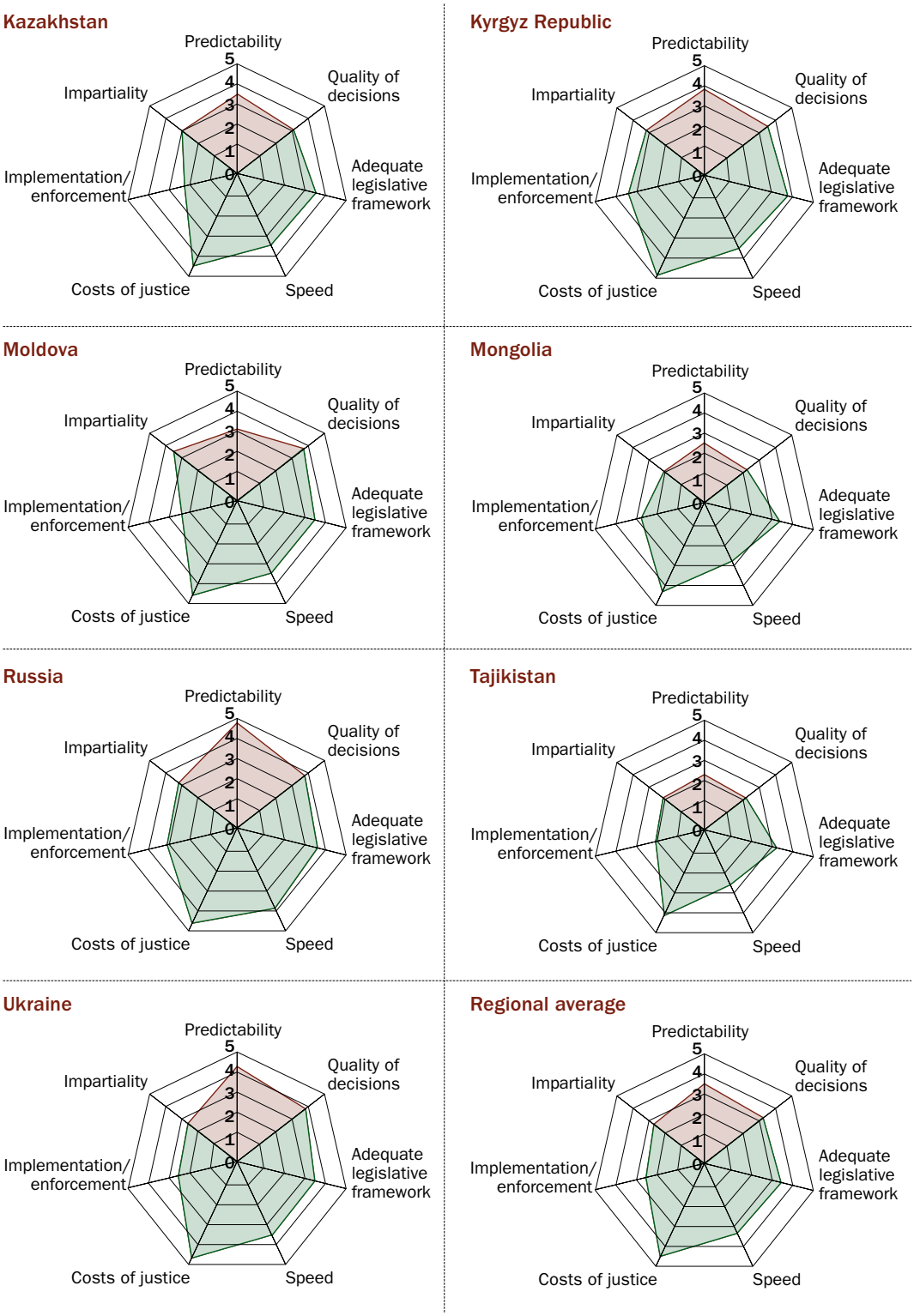
Speed of justice[13]
Did litigation proceed at a reasonable pace and in compliance with statutory deadlines? The reference period was the filing date to the final judgment date.

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

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

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

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



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

Source: The EBRD Judicial Decisions Assessment 2010.

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

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

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

(a) Predictability of decisions

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

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

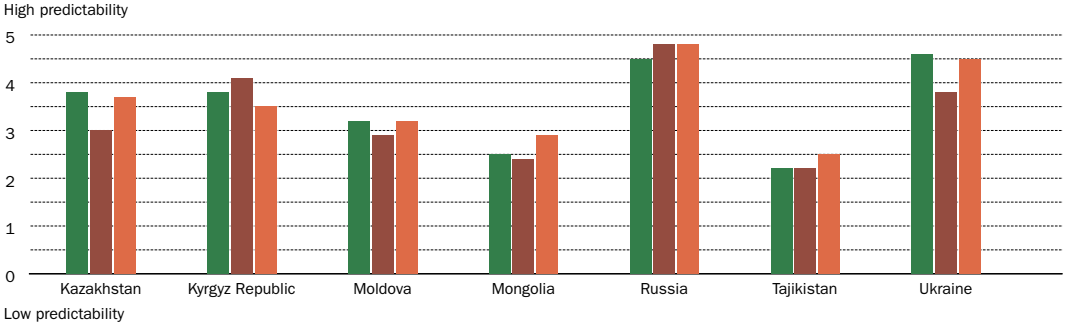
The role of legislation and quality

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

Superior court guidance

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

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



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

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

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

Accessibility of decisions

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

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

(b) Quality of decisions

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

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

Evidence

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

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

Applying general laws over specific laws

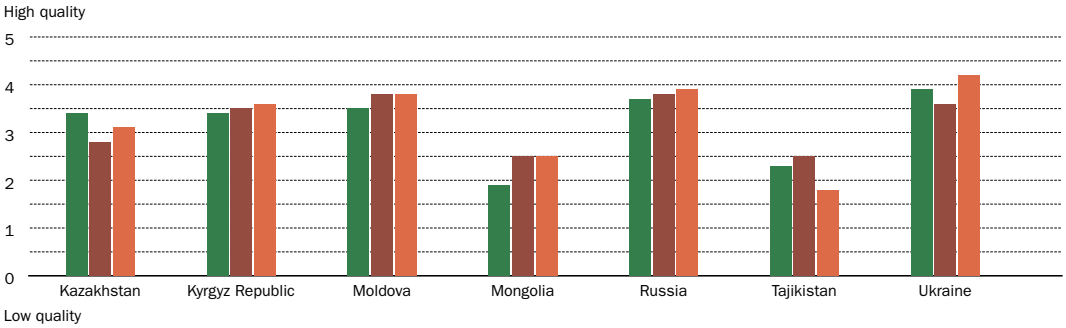
In all countries there were instances of courts wrongly applying general provisions, rather than the applicable specific provisions. The impression was one of courts being more comfortable with civil codes and procedure codes than applying specific provisions of relevant commercial laws. For example,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

Interpretation

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

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

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



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

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

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

Identifying the interests of the parties

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

Structure

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

Links with other dimensions

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

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

(c) Adequacy of legislative framework

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

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

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

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

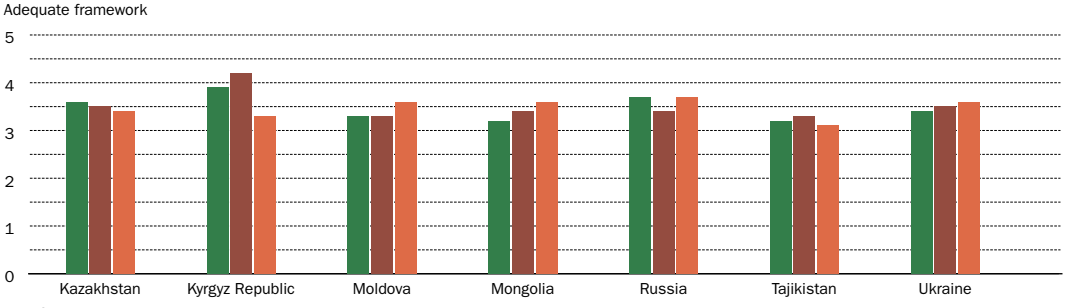
(d) Speed of justice

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

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

Chart 4

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



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

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

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

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

(e) Costs of litigation

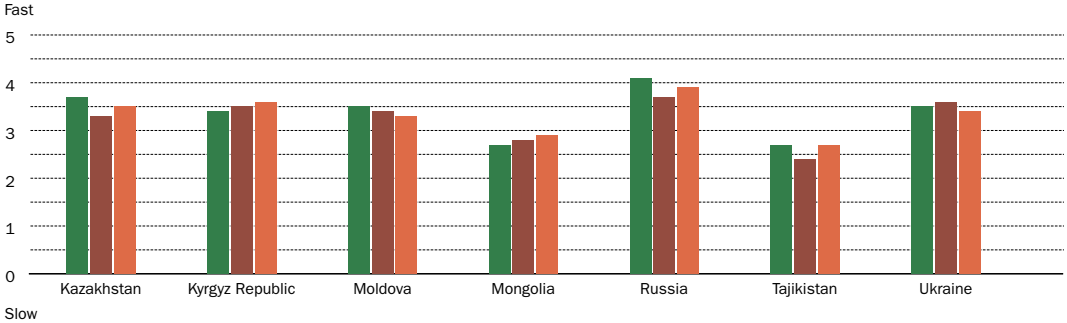
As is apparent from the data in Chart 6, the cost of litigation was generally considered to be reasonable, expressed as an approximate percentage of the value of claims and was usually predictable. Cost was therefore not viewed as a major concern in any of the countries covered by the assessment, at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

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

(f) Implementation/enforcement of judgments

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

Chart 5
Speed of justice, by country and legal sector



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

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

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

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

Legislative problems

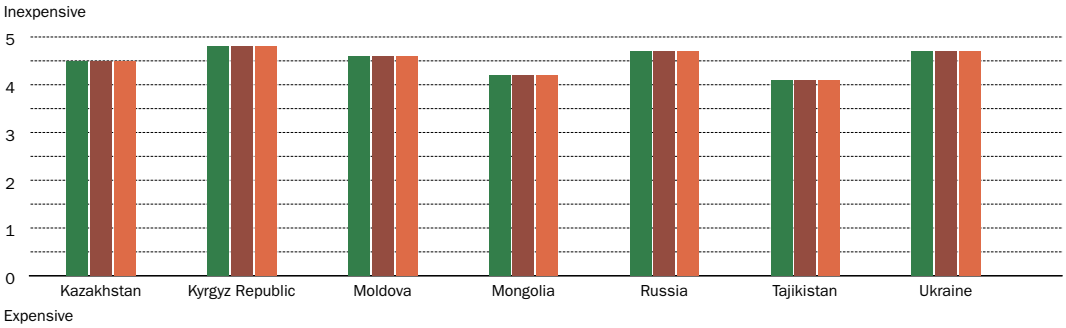
One problem was related to legislative shortcomings in the enforcement process. For example, a shareholder dispute in Ukraine resulted in a court decision finding part of a company constitution invalid; however actually giving effect to the decision and amending the constitution required formal approval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

Approach of the courts

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

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

Chart 6
Court costs, by country and legal sector



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

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

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

(g) Impartiality

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

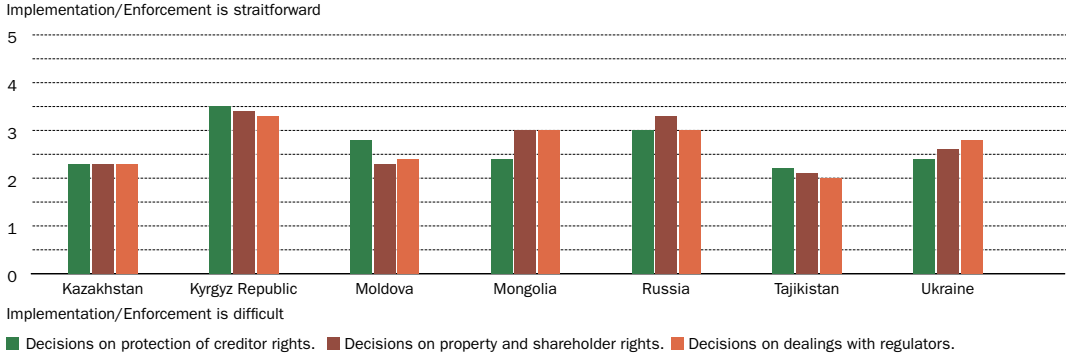
Partiality to the state

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

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

Chart 7

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



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

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

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

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

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

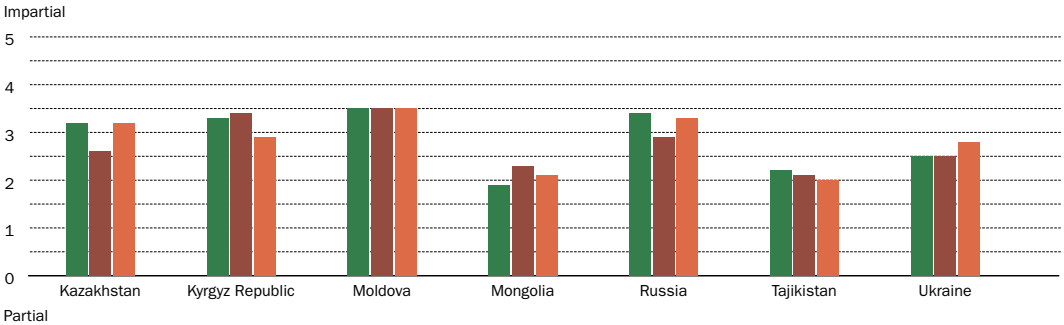
Factors contributing to perceived bias

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

Next steps for the assessment

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

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



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

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

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

6. Conclusion

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

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

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

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

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

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

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

Notes

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

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

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

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

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

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

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

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

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

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

[11] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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