



# JOINING EFFORTS TO BOOST MORE EFFICIENT COMMERCIAL DISPUTE RESOLUTION: THE EBRD-IDLO COLLABORATION



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Signing of EBRD-IDLO Framework Agreement in July 2017, by Marie-Anne Birken, EBRD General Counsel (left) and Irene Khan, IDLO Director-General (right)



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## GENESIS: BUILDING JUDICIAL CAPACITY IN CENTRAL ASIA

“Union is strength” as the saying goes. When the EBRD decided to start working on judicial capacity building in its regions in the mid-2000s, it looked for potential partners to help with the new endeavour. By that time, the Bank, through its Legal Transition Programme, had accumulated a great deal of know-how on promoting legal reforms, but there was little internal knowledge on how to build judicial capacity. Yet this was a serious bottleneck in our regions’ investment climate.

Year after year, the EBRD country strategy documents would highlight the serious deficit in appropriate dispute resolution mechanisms for investors. This was seen as a significant deterrent for attracting foreign direct investment to the EBRD regions. In other words, investors did not have confidence that they would be able to effectively enforce their legal rights in local courts. Gradually, the Bank concluded that judicial capacity building should be part of its Legal Transition Programme. The International Development Law Organization (IDLO), based in Rome, was an obvious partner for the Bank. IDLO is the only intergovernmental organisation with the exclusive mandate of promoting the rule of law as a development tool. In the 1990s, there had been some early collaboration between the Bank and the then-named International Development Law Institute training commercial lawyers in central Europe. Over the years, IDLO had acquired a solid reputation for building judicial capacity in many countries around the world. After 2001, IDLO also became renowned in particular for re-building the Afghan judiciary after the fall of the Taliban.

What made IDLO highly attractive to the Bank was their approach of adult learning, using innovative and interactive teaching methodologies. This was unheard of in our regions, where judicial training was often provided in stiff, old-fashioned, academic lecture-type courses. The IDLO approach was going to strongly modernise judicial capacity building in the EBRD regions.

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The first EBRD-IDLO judicial capacity building project started in the Kyrgyz Republic in 2006. The idea was that the Bank would contribute its country expertise and local contacts, as well as the major part of funding, whereas IDLO would source the technical expertise and implement the project in close cooperation with the Bank. In its early stages, the Kyrgyz project strongly benefited from the collaboration with the then-director of the Kyrgyz Judicial Training Centre, a very charismatic and energetic lady. There was an understanding that “judicial capacity building” was not only about training activities, but that a series of additional measures were needed to boost the commercial law skills of Kyrgyz judges. In a few years, the EBRD-IDLO partnership built capacity at the local Judicial Training Centre, conducted training of trainers, prepared a bench book on commercial law, trained more than 300 Kyrgyz judges on 10 topics of commercial law, sent junior judges on an apprenticeship programme to Russia and Kazakhstan, and established a commercial law library at the Supreme Court. For the EBRD, the learning curve was steep. There were many challenges in delivering the assistance and we learned by doing (see *Law in Transition 2011* journal, pp 38-45).

After the Kyrgyz Republic, the EBRD-IDLO collaboration continued in Tajikistan and Mongolia. Again these were large projects targeting the entire judicial population dealing with commercial cases.

## SECOND PHASE: DIVERSIFYING ACTIVITIES

The EBRD and IDLO continued to develop their collaboration in the 2010s. In particular, there was a flurry of smaller-scale projects in the Western Balkans and in the southern and eastern Mediterranean (SEMED) region. The latter had recently become EBRD economies,<sup>1</sup> following the Arab uprising and the big hopes it had generated. Table 1 lists all EBRD-IDLO projects to date.

In all those countries, the needs were different from Central Asia. Judiciaries were more advanced and had often received significant assistance from other organisations already, often in the context of their EU aspirations. Therefore, the EBRD-IDLO training projects tended to focus on highly technical matters

such as intellectual property, competition law, enforcement of arbitration awards, tax law and supporting mediation activities.

At the same time, the EBRD expanded its capacity building activities to other court professionals, in particular bailiffs who are critical to court decision enforcement. Projects were completed with IDLO in Tajikistan and Mongolia and are currently running in Ukraine and the Kyrgyz Republic. We have also helped build capacity of competition authorities (Montenegro, Ukraine and soon in Mongolia), mainly through training.

At the time, the Bank also considered addressing the constant concern that courts in the EBRD regions are overburdened. One answer to this problem was the promotion of commercial

**Table 1:** EBRD projects with IDLO (2004-present)

Country	Project title	Project dates
Armenia	Judicial Capacity Building - New Code of Civil Procedure	2018 - present
Bulgaria	Judicial Training on Implementation and Enforcement of Tax Legislation	2018 - present
Croatia	Judicial Capacity Building	2017-18
Jordan	Commercial Law Judicial Training	2015-16
	Judicial Training on Competition Law	2018 - present
	Commercial Mediation Action Plan	2018 - present
	Women Entrepreneurs' Access to Justice	2017-18
Kyrgyz Republic	Judicial Capacity Building (Phases I - V)	2004-14
	Bailiff Service Capacity Building (Phases I and II)	2015 - present
	Sustainability of Judicial Capacity Building in Kyrgyzstan	2015-17
	Promoting Commercial Mediation	2017 - present
Moldova	Promoting Commercial Mediation and Arbitration	2018 - present
Mongolia	Commercial Law Judicial Curriculum	2012-15
	Promoting Commercial Mediation	2013-15
	Strengthening enforcement of court decisions - Bailiff Service Capacity Building (Phases I and II)	2014-16
	Competition Law Capacity Building	2018 - present
Montenegro	Commercial Law Judicial Training Support	2013-17
	Agency for the Protection of Competition - Capacity Building (Phase I-II)	2014--present
Regional	Regional Forum Supporting the Leadership Role of Women Judges in the Southern and Eastern Mediterranean (SEMED) Region	2017-18
Romania	Commercial Law Judicial Training	2018 - present
Tajikistan	Commercial Law Judicial Training (Phases I and II)	2011-15
	Bailiff Service Capacity Building - Functional Analysis and Legislation Review	2016-17
	Promoting Commercial Mediation	2017-18
Tunisia	Commercial Law Judicial Training on Intellectual Property	2016 - 18
	Judicial Capacity Building on Competition Law	2018 - present
Ukraine	Bailiff Service Capacity Building (Phases I and II)	2016 - present

mediation as an alternative dispute resolution mechanism. The common wisdom is that mediation can resolve disputes in a much faster and cheaper way than courts. A project was completed in Tajikistan (follow-up projects are being considered) and more are currently running in Moldova and the Kyrgyz Republic.

Lastly, the current trend in the collaboration relates to gender. For both organisations, promoting gender parity is crucial to creating inclusive economies in the spirit of the Sustainable Development Goals. A pilot project currently running in Jordan aims at identifying obstacles for access to justice by women entrepreneurs. The project has high replication potential to other countries. The two organisations also launched a platform for women judges in the SEMED region, which had its first outing in Casablanca in December 2017.

## INSTITUTIONALISING THE EBRD-IDLO PARTNERSHIP

In 2017, IDLO and the EBRD signed a framework agreement which streamlines their collaboration. Based on the successful track record of the previous decade, the arrangement allows the two institutions to react faster to demand and to combine their respective strengths in a more efficient manner. It should be noted that previously the Bank had been contracting IDLO on the basis of the EBRD procurement rules. Gradually the two organisations concluded that a new, special arrangement was needed. When drafting it, consideration was given to IDLO's special status as an inter-governmental organisation, to its non-profit orientation, as well as to the Bank's duty, under its charter, to seek cooperation with other international organisations. Under the framework agreement, the EBRD benefits from some discounts on fees charged by IDLO, and IDLO is invited to contribute to project costs in-kind or financially, as the case may be.

As a result of the new framework agreement, the volume of projects has increased. The new partnership arrangement has allowed both organisations to exchange expertise in both directions. There are also more systematic efforts to look at results of the joint activities.

## IMPACT OF JOINT PROJECTS

Measuring the success of judicial capacity building activities is a huge challenge for aid-providing organisations. How can you establish that you have had an impact on judicial systems and the countries where they operate? Where do you put the marker? Is it about raising the technical skills of judges? Is it about improving the quality of judgments rendered by trained judges? Or is it about customer satisfaction as measured among court users? Or even the perception of court efficiency among the public?

There is no obvious yardstick to measure the effect of technical assistance in the judicial sector. Ideally, all of the above measurements should take place. The problem is that you might end up spending more time (and money!) measuring the results of your actions than delivering the activities themselves. All this to establish a truth that may go without saying, that is, that well-trained judges are likely to do a better job.

The EBRD and IDLO have tried various approaches to measure the success of their joint activities. The first project mentioned above (Kyrgyz judicial capacity building) was reviewed *ex post* by an expert who produced an evaluation report with various conclusions on its impact and a few lessons learned. This is what one could call the "impressionistic approach": by talking to a lot of stakeholders the reviewer gains an overall impression of what the project has achieved.

The Kyrgyz and Mongolian projects were also evaluated through a survey of judges conducted some time after project completion. The survey explored questions such as whether the judges applied the acquired knowledge in their daily work, whether they still had the course materials at hand, and whether they referred to these training materials. The results were very encouraging and showed continuous use of the course materials and knowledge by the Kyrgyz and Mongolian judges.

In the Tajik project mentioned above, the Bank tried to put in place a randomised impact assessment (RIA). Borrowing the approach from the health sector where it is often used to assess the efficiency of vaccination campaigns, the RIA idea is to stagger training so that a control group gets trained later than the rest of the judges, and then you can compare the quality of judicial decisions of trained and untrained judges. This is



what one could call the “Rolls Royce” of evaluation. It is extremely expensive and time-consuming. Unfortunately, the RIA was not conclusive because our researchers were faced with practical difficulties in getting access to court decisions in Tajikistan due to various constitutional limitations. However everything is in place for the evaluation to take place retroactively at a later stage if these obstacles were to be lifted.

Note that case studies or individual testimony can also be very illuminating. We all remember the Bulgarian judge who said that after the training on accounting skills for judges in insolvency matters she had several cases where she realised that she now understood how to assess the financial position of the company, and that prior to the training she had reached the wrong conclusions.

A middle way between the above approaches, that we currently use routinely is to ask the judges to fill in pre- and post-training questionnaires so that we can see the immediate effect of our activities. Sometimes there are sensitivities in the judicial system about testing judges, in which

case we only ask the judges to self-assess their knowledge pre- and post-training. Framing this as collating data on training quality, rather than judges’ knowledge, can be helpful in this regard.

Another approach that could be of interest and that we have not explored yet is the repetition of judicial decision assessments such as the one the EBRD conducted in 2011-12 (See *Law in Transition 2011* journal, pp 20-35). The assessment considered a sample of typical court decisions in the commercial sector of a number EBRD countries of operations. It helped identify the main challenges faced by litigants in those countries, such as the predictability or quality of decisions, speed of justice, costs, impartiality, enforcement issues. By repeating the exercise a few years later, one could establish if the countries where capacity building projects have taken place have improved in the assessment, thus suggesting a positive effect.



**Table 2:** Total number of individuals trained under EBRD-IDLO projects, 2004 - present



**29**

Bulgaria



**147**

Croatia



**146**

Jordan



**544**

Kyrgyz Republic



**1,493**

Mongolia



**277**

Montenegro



**46**

Regional (Jordan, Lebanon, Morocco, Tunisia, West Bank and Gaza)



**118**

Romania



**699**

Tajikistan



**107**

Tunisia



**3,606**

Grand total

## CHALLENGES AHEAD

Both the EBRD and IDLO have ambitious plans to strengthen their policy dialogue and technical cooperation activities in their zone of operations. Although progress has been made in many countries, judiciaries continue to have insufficient knowledge of commercial matters and business realities to do their jobs.

Combining the two institutions' efforts has generated economies of scale and a multiplying effect in pipeline project development. The hope is that the trend can continue in the years to come. One determining factor for this happening will be the availability of donor funding. Donor support will be crucial to this effort.

Another big challenge is the sustainability aspect. Too often once aid providers such as the EBRD or IDLO have finished implementing capacity-building activities, things tend to go back to the previous situation, in the sense that the local stakeholders do not continue trainings or other activities. The challenge is to get the local stakeholders to take ownership and continue the activities on their own. Of course it might be difficult for them to compete with the standards brought by the EBRD and IDLO, because our donor funding allows us to access experts of international calibre and to provide support in the best conditions. However we always try to lay the foundation for continuation of activities by putting in place sustainable tools such as written manuals and bench books, and also by conducting extensive training of trainers. The idea is to create a cohort of local judges who will be able to deliver training using the modern interactive approach advocated by IDLO and the EBRD.

In the Kyrgyz Republic, a follow-up project was precisely about gauging the ability of the local training centre to continue the capacity building activities. We monitored the way they were working and were thus able to come up with a number of practical recommendations to increase sustainability. The recommendations were mainly that we need long-term commitment to institutional reform to yield profound, change-making results. In particular the EBRD's commitment to supporting the Kyrgyz Judicial Training Centre over the years resulted in them eventually becoming a fully fledged High Institute of Justice with an operational budget, a core staff of trainers and a well-developed and recently updated curriculum (including in commercial law) for both sitting and new judges.

Another challenge that faces organisations working on judicial capacity building is the coordination of projects with other aid providers. Any scoping mission in a given country systematically starts with a visit to other organisations working on the topic. Very often however, we have found that commercial law is not a top priority for such projects led by others. They tend to look at criminal justice as a priority, in line with the human rights approach they often have. This leaves a huge need for organisations to focus on investor protection and commercial activity, as the EBRD-IDLO partnership seeks to do. However the need for coordination will remain a priority and we typically ask the recipient authorities to confirm that there is no duplication of our work with their other partner organisations.

## CONCLUSION

Experience has shown that IDLO and the EBRD stand stronger in their efforts to promote the Sustainable Development Goals when they combine their strengths, resources and expertise. This makes the case for upscaling joint activities in the future, perhaps even including more topics in the current strategy. For the time being, the EBRD-IDLO collaboration already has a legacy: thousands of judges, bailiffs and other justice sector actors trained in the EBRD regions, but also local institutions made more sustainable and efficient through experienced trainers, renewed curricula, manuals and bench books, and generally a spirit of renewal and proactivity among local stakeholders. Table 2 provides data on the total number of people trained under EBRD-IDLO joint activities.

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- 1 The Bank started operating in Egypt, Jordan, Morocco and Tunisia in 2012, in the West Bank and Gaza in 2017 and in Lebanon in 2017.