The European Bank for Reconstruction and Development (EBRD) is an international institution whose members comprise 60 countries, the European Community and the European Investment Bank. The EBRD operates in the countries of central and eastern Europe and the Commonwealth of Independent States committed to multiparty democracy, pluralism and market economies.

The EBRD's countries of operations are: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, FYR Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia and Montenegro, Slovak Republic, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

The EBRD works through the Legal Transition Programme, which is administered by the Office of the General Counsel, to improve the legal environment of the countries in which the Bank operates. The purpose of the Legal Transition Programme is to foster interest in, and help to define, legal reform throughout the region. The EBRD supports this goal by providing or mobilising technical assistance for specific legal assistance projects which are requested or supported by governments of the region. Legal reform activities focus on the development of the legal rules, institutions and culture on which a vibrant market-oriented economy depends.
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Foreword
Significant inadequacies in the court systems of Europe, including central and eastern Europe and the Commonwealth of Independent States, have been revealed through assessments of the legal and institutional environment and case law of the European Court of Human Rights. The lack of accessibility, integrity and professionalism within the courts remains a formidable challenge for local governments and continues to adversely affect the region’s business climate.

The independence and efficiency of the judiciary is a conditio sine qua non for the success and sustainability of institutional reforms. Only countries that can guarantee enforceability of contracts and protection of property rights are able to attract substantial investment and secure economic growth over the longer term. Hence, it is essential the standards of judicial practice throughout the region are improved.

To strengthen the efficiency of justice within Europe, the CoE established in 2003 the European Commission for the Efficiency of Justice (CEPEJ), a unique body composed of eminent judicial experts from the Council’s member states. CEPEJ is entrusted with the evaluation of European judicial systems, not merely for academic purposes, but to ensure the necessary improvements towards an increasingly efficient judicial service are made. The level of satisfaction and trust citizens have in their legal system is also evaluated.

In December 2004 CEPEJ released its first report on the judicial systems of 40 European countries. This assessment was based on a pilot-scheme designed to evaluate the efficiency of justice using both quantitative and qualitative techniques. (For further information see www.coe.int/CEPEJ.) This evaluation exercise is set to become a regular process.

In the judicial sector, the CoE has conducted, or is conducting, activities, in: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Latvia, Lithuania, Moldova, Romania, Russia, Serbia and Montenegro, the Slovak Republic, the Former Yugoslav Republic of Macedonia and Ukraine. The CoE programmes have helped these countries press ahead with their institutional and legislative reforms, and have provided training for professionals at all levels of the legal system.

Other international organisations, such as the EBRD, share the Council’s belief in the importance of legal reform work, in general, and judicial capacity building, in particular. Renewed assistance efforts by the international community and increased coordination among aid providers will be required in the years ahead to enable countries across the region to reach their set objectives.

This issue of Law in transition, devoted to courts and judges in transition countries, highlights the ways to increase the efficiency of judiciaries and secure enforceability of contracts and rights. The journal provides an in-depth analysis of judicial capacity building, through training and other means, as one of the key tools for implementing transition and fostering investments. This issue represents an invaluable contribution to the international debate on judicial reform in transition countries and draws attention to both challenges and achievements in the sector. It is my hope that it will strengthen the commitment of international organisations, local governments and civil societies to this vital process.

Guy De Vel

Foreword

Guy De Vel Director General of Legal Affairs, Council of Europe

Sustaining reforms through efficient judicial systems
What consumers of insolvency law regimes need to know
The value of an insolvency law regime can be measured by its ability to respond to the interests of its two main stakeholders or consumers – creditors and debtors. If the response is insufficient, the basic purpose of an insolvency regime is fundamentally undermined.

**Extensiveness: the assessment**

The EBRD’s assessment of insolvency legislation – in particular the extent to which such legislation complies with international standards – has been presented by the same authors elsewhere. It is worth repeating, however, that the results revealed significant legislative reform is needed throughout most of the EBRD’s countries of operations. The assessment covered 97 fields of inquiry with respect to each country’s law, and placed legislation, in accordance with their levels of basic compliance with international standards, in one of five categories. Table 1 shows the results of the assessment.

It should be noted that “very high compliance” does not necessarily denote a law that is on par with the leading national insolvency legislation. Rather, it suggests that the legislation meets the threshold tests for a modern, well-functioning insolvency law. Despite this modest standard, however, no law in the region achieved this result, while a number ranked in the “very low” category.

Against this backdrop, it was decided a further step be taken, one that has not been done before in the EBRD’s countries of operations: a comprehensive testing across all 27 countries of how well or poorly these insolvency laws, of varying quality, are implemented in practice. This measure enabled the evaluation of the effectiveness of each law.

The two appraisals of extensiveness and effectiveness provide an overall evaluation of the insolvency legal system in each of the EBRD’s countries of operations.

**Effectiveness: the Legal Indicator Survey**

An effective insolvency system represents a creditor’s most important, albeit ultimate (and, in its end result, sometimes disappointing), weapon against a debtor that fails to pay a mature debt. The great majority of creditors may never have to use this measure. However, the incidence of use of insolvency law by creditors is somewhat immaterial.

What is more important is that the insolvency law regime is known to be effective. It is this knowledge that helps to create credit discipline and encourage the payment of obligations as they mature. If the insolvency regime cannot effectively be employed by a typical creditor, it is destined to be regarded as an irrelevance. The somewhat dramatic consequence of that will be rampant ill credit discipline.

The EBRD’s Legal Indicator Survey on insolvency, and its insolvency sector assessment in 2004, provide stakeholders of insolvency cases, or “consumers” of legal systems, with a unique understanding of insolvency legal regimes in transition countries.
For debtors, if an insolvency law provides for the possibility of rescue (rehabilitation and reorganisation), an enterprise that is in financial difficulty or insolvent will have the opportunity to use, and may be encouraged to seek, that remedy. However, an equally, if not more important, question is whether the actual employment of the law in search of such a remedy is known to be effective.

For both groups of insolvency law consumers, this knowledge that the law is effective can only follow from the actual employment of the insolvency law. This is determined through cases that are brought by creditors and debtors and dealt with under the law. It was these fundamental and basic considerations that led the EBRD to test insolvency law regimes in action.

The ‘test vehicles’ were two hypothetical cases submitted to leading insolvency lawyers in each country – one using a creditor as the driver and the other using a debtor (see Box 1).

Both were expressed in simple fashion to represent uncomplicated but typical cases that might be expected in any jurisdiction. Each case required a number of questions to be answered that raised issues such as those concerning threshold access, cost, time, procedural formality/complexity and the competence of courts and judges. The aim was to evaluate basic, but critically important, procedures.

The creditor case study assessed the initiation of an insolvency case against a debtor to the point that an effective, final order was made. This order would subject the debtor to some form of formal insolvency procedure. (The case study did not, however, survey the actual administration of the debtor’s affairs or the results of the administration.)

The debtor case study surveyed the initiation of a debtor reorganisation, to the point that a debtor might obtain a formal, final order which approves or sanctions a reorganisation plan. (Again, the case study did not survey the outcome of the plan.)

This article presents the results of the survey. It also marries these results with the findings from the Assessment in order to give the reader a detailed understanding of both the extensiveness and the effectiveness of insolvency systems in the EBRD’s countries of operations.

Methodology

The methodology employed in the 2004 Legal Indicator Survey followed on from the successful methodology employed in 2003. This involved working with leading insolvency practitioners in 25 of the EBRD’s 27 countries of operations. These practitioners were provided with two hypothetical cases studies (see Box 1) and asked to answer a series of questions relating to each scenario.

To understand how effective or ineffective a legal regime is, the key users of that regime need to know how its individual elements link together to form a complete system.

Table 1 Level of compliance with international insolvency standards

<table>
<thead>
<tr>
<th>Level</th>
<th>Countries</th>
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<tbody>
<tr>
<td>Very high</td>
<td>Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Moldova, Romania, Serbia and Montenegro</td>
</tr>
<tr>
<td>High</td>
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<tr>
<td>Medium</td>
<td>Azerbaijan, Georgia, Hungary, Latvia, Slovenia, Uzbekistan</td>
</tr>
<tr>
<td>Low</td>
<td>Lithuania, Turkmenistan, Ukraine</td>
</tr>
</tbody>
</table>

Results

The survey results for each country are presented in the graphs contained in Chart 1. The fuller the “web” of each graph, the more effective the insolvency regime.

Findings and trends

Based on the results, some reasonably clear conclusions and trends can be identified:

- Only four countries (Armenia, Azerbaijan, Poland and Slovenia) have processes that could be regarded as reasonably fast by both debtors and creditors. In some countries, such as the Slovak Republic, it may take as long as one year to obtain an effective final order.
- The level of predictability and transparency across the entire region, particularly with regard to the judiciary, is extremely low.
- Only three countries (Armenia, Poland and Slovenia) achieved results that consistently demonstrate a quick, efficient and transparent system for both debtors and creditors.
- Overwhelmingly, most countries have more effective systems for debtors than creditors. This may be due, in part, to creditors having to give notice to debtors when commencing a proceeding. This makes such proceedings inherently more contentious and time consuming.
- European Union member states performed, on average, no better than non-member states (despite generally performing well in the assessment). It should be appreciated, however, that all of these member states have only recently acceded to the EU and may need time to adjust. However, these states will need to greatly improve their insolvency law regimes to respond to the challenges of EU membership (for example, implementing EU regulations on cross-border insolvency).

Scenario 1: Creditor-initiated proceedings

The client (“C”) is a local supplier of goods in your country. One of the client’s customers, a local, privately owned, limited liability manufacturing company (“D”), has failed to pay a debt due to the client in the local currency, equivalent to €10,000, as a result of cash flow problems.

The debt is more than 30 days overdue. There is no dispute regarding the underlying transaction that gave rise to the debt and the debtor has no valid defence for the non-payment of the debt.

The client now asks for your professional advice on:

- any action the client can take under the insolvency law of your country to deal with the apparent insolvency of the debtor
- the process that will be involved in obtaining an effective final order against the debtor.

Scenario 2: Debtor-initiated proceedings

The client (“C”) is a local, privately owned limited liability manufacturing company in your country. Historically, the client traded successfully for a number of years and presently employs around 100 staff. The client is now experiencing major cash flow difficulties and expects that, within the next month, it will not be able to pay debts owed to a number of its creditors as those debts become due for payment and that its financial position will continue to deteriorate.

The business is basically sound but accounting, financial and other advice is that before the client can return to a profitable position, the client will require:

- a general reduction of debt owed to all non-bank creditors (for example, a 30 per cent reduction)
- an extension of the time for payment of the reduced debts (for example, in 12 months’ time)
- a rescheduling of bank financing commitments (for example, deferring repayments of principal for 12 months and a reduction of interest payable).

Some creditors are pressing for payment and are threatening to take enforcement action. In attempting to negotiate an arrangement as indicated above, the client will require protection (for example, a stay or suspension of all legal actions against the client and its assets).

The client now asks for your professional advice on the action it can take under the insolvency/reorganisation laws of your country to get to the stage at which a formal arrangement that embraces the above proposals will take effect.

---

1 An “effective final order” means the making of an order or the pronouncement of a judgment which has the effect that the affairs of the debtor will be thereafter administered under the insolvency law, whether by way of bankruptcy, liquidation or some other form of insolvency process. It does not mean to the end of such processes.

2 A formal “arrangement” means a reorganisation/restructuring/composition or similar process and “take effect” means such court or other approval or confirmation as may be required under the country’s insolvency law.
law and its application are regarded as so ineffective that creditors, for example, leave a lot to be desired. They point to a general failure of the law to properly serve the interests of its two main consumer groups. In some instances the law and its application are regarded as so ineffective that creditors, for example, would never be encouraged to use it.

Issues for other stakeholders and participants in the insolvency system
It should be observed, of course, that creditors and debtors are not the only people interested in or affected by the performance of insolvency law systems. Two other groups call for some special comment, since the results have some direct impact and relevance for them. They are comprised of the wider commercial sector and the judiciary.

- **Wider commercial sector**
For the wider financial/commercial sector, potential credit transactions will be both considered and priced by reference to the effectiveness of, amongst other things, an insolvency law regime. It is true that the great majority of credit transactions may never resort to that law, but it would be wrong to suggest that the financial and commercial sectors never give regard, consciously or otherwise, to the possible insolvency of one of the participants in a credit transaction.

- **Judiciary**
The effectiveness of the insolvency regime will depend heavily on the judiciary’s employment of the law. Key issues relating to the judiciary highlighted in the survey, included:
- the competence of the courts to handle insolvency cases (including education and training)
- the establishment of a court and judicial system which supports the law and enables cases to be speedily and effectively handled
- the openness of the judiciary to political or other influences or corruption (thereby affecting the application of the rule of law.)

The results in Chart 1 demonstrate that, throughout the countries of operations, the judiciary is often more of an obstacle than a help to the effective functioning of the insolvency regime.

**Issues for law reformers**
Other groups of stakeholders interested in the quality of insolvency systems are governments, NGOs and international financial institutions engaged in law reform. For these groups, it is critical that they understand how the different elements of the insolvency regimes work together. The LIS results provide some interesting correlations in this regard.

- **Special courts: not so special after all**
It is a commonly held view that to speed up court processes, lessen or avoid corruptive influences in court proceedings and to promote greater transparency and predictability, a specialist court should be created to handle cases under a particular legislation. Of the 25 countries that were surveyed, 19 had established either a special bankruptcy court or a commercial court. Admittedly a commercial court is not solely dedicated to insolvency matters, but it is reasonable to expect that such a court would be better placed to handle insolvency cases than a court of general jurisdiction.

The correlations apparent from the results in Chart 1, however, do not lend credence to this view.

For example, there is no evidence that corruptive or other influences on courts and judges are lessened because of the use of a special court. This is not to suggest, however, that all such courts are prone to such influence. Of the 19 countries that had special courts, seven reported “low” corruption but, equally, of the six countries that did not have a special court, three reported “low” corruption.

Somewhat related to the issue of corruptive or other influences is the issue of predictability and transparency, particularly in relation to court proceedings and the behaviour of judges. Only five of the 19 countries with a special court recorded “high” predictability/ transparency. (One of the six countries without a special court recorded a similar score.) Hence, although there is some evidence that predictability/ transparency is enhanced through the use of special courts, it is only slight and would not justify a compelling statement to that effect.
Box 2: Factors influencing the effectiveness of insolvency regimes

Access and degree of formality
How straightforward is my entitlement to commence an insolvency proceeding?

Application of rule of law
Is the judge bound to clear and transparent rules?

Bankruptcy administration/creditor involvement/trustee competence
Are creditors generally kept well-informed and will I have a high level of confidence in the functionaries appointed during the insolvency process?

Complexity
Is this procedure going to be so complex that it will be of little value to me?

Cost
How expensive is this going to be?

Creditor involvement
Are creditors kept well-informed of the restructuring plan and are meetings of relevant stakeholders relatively easy to organise?

Court identification and experience
How easy is it to determine the court I should bring my proceeding in and how specialised are the judges who are likely to hear my case?

Debtor protection
As a debtor seeking to reorganise, will I be given some early and continuing protection from my creditors to try to arrange my affairs?

Judicial predictability and competence
Is the behaviour of a judge in determining whether or not to grant the relief I am seeking likely to be so variable and inconsistent that it will make the process highly unpredictable and uncertain? How susceptible is this process to influences such as political intervention, bribery and corruption?

Management of debtor
As a debtor seeking to reorganise, how much confidence can I have in the functionary that is likely to be appointed to oversee my restructuring?

Speed
How long will it take me to get access to the system and to obtain the relief I am seeking? How easy is it for parties adverse in interest to frustrate, unduly delay or prevent the process?

Notes
The results have been derived from stakeholder responses to questions about the practical functioning of the insolvency regime (see Box 2).

The fuller the web, the more effective the insolvency regime.

Effectiveness factors in insolvency legal regimes (continued)

- Factors in creditor-initiated insolvencies
- Factors in debtor-initiated insolvencies

**Bulgaria**

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With regards the speed of court proceedings, seven of the 19 countries with a special court reported “high” results for speed. At the same time, three of the six countries without a special court also reported “high” results for speed. Hence, the evidence again does not justify the conclusion that special courts perform with greater speed than others.

An anticipation of better and more positive results from the employment of special courts than those reflected is understandable, particularly those relating to speed and transparency/predictability. So, what reasons may explain the largely negative conclusions and the disappointment in this anticipation?

One reason is that, despite the ‘labelling’ or title of these courts, they are not much different from courts of more general jurisdiction because the judges have had little or no training and education to fit the label. Thus, their ability to handle cases, for example, more expeditiously, has not been realised nor has the potential for a greater sense of certainty and predictability.

The above issues point to the continuing need to emphasise proper training, education and experience before courts and judges can be properly expected to perform in an appropriate manner. This is an issue to which further attention is given later in this article.

In relation to corruption and other influences, there is probably no reason to suppose that a special court will be free from influences that are capable of permeating the whole of the court system. Unfortunately, corruptive influences are strongly present in many of the countries.

Notes

The results have been derived from stakeholder responses to questions about the practical functioning of the insolvency regime (see Box 2). The fuller the web, the more effective the insolvency regime.

Speed and cost: time is money
In relation to legal actions and court proceedings, there can be no doubt that the longer the process (a test of speed) the greater the cost. The results of the survey tend to confirm this statement. Of the 25 countries, 17 scored “high” for speed in both hypothetical cases. In terms of cost, nine of the 17 countries recorded relatively low cost for the proceedings. The other eight countries scored “low” for speed, of which only one (Hungary) recorded relatively low cost.

The nine countries that performed well both on speed and cost were Albania, Armenia, Azerbaijan, Estonia, Poland, Romania, Serbia and Montenegro, Slovenia and Uzbekistan. The results tend to suggest that if the process is reasonably quick, the costs of the process to the consumer will be lessened.

A number of factors can contribute to greater speed, including legislation and rules that require a court to respond within a relatively short period of time (Bulgaria is an exception, see footnote 7).

Another factor of speed is the quality of the court system in general, including the number of judges, the development of a tracking system for cases, case management handling skills of judges and general administration.

The concept of case management by judges is a technique that needs to be better developed in all countries. Properly employed, it can do two things:
- allow judges to impose a timetable, time limits and sanctions on delays and move cases along without any need for adjournments
- expose deliberate delaying tactics and enable the early dismissal of frivolous or unmeritorious defences and objections.

Unfortunately, not many of the countries appear to promote such a technique. In Bosnia and Herzegovina judges are prone to tolerating delays for a variety of excuses.

Notes
The results have been derived from stakeholder responses to questions about the practical functioning of the insolvency regime (see Box 2).

The fuller the web, the more effective the insolvency regime.

Effectiveness factors in insolvency legal regimes (continued)

Lithuania

- Access and degree of formality
- Application of rule of law
- Bankruptcy administration/trustee competence
- Management of debtor
- Creditor involvement
- Complexity
- Cost
- Speed
- Court identification and experience

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<td>Bankruptcy administration/trustee competence</td>
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<tr>
<td>Management of debtor</td>
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<td>Creditor involvement</td>
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<td>Complexity</td>
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<td>Cost</td>
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<td>Speed</td>
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<tr>
<td>Court identification and experience</td>
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</table>

Notes
The results have been derived from stakeholder responses to questions about the practical functioning of the insolvency regime (see Box 2).

The fuller the web, the more effective the insolvency regime.


Judges and bankruptcy administrators: great minds think alike

The survey assessed the general level of professionalism and competence in both judges and bankruptcy administrators. If standards are relatively high in both groups then the challenge of administering an insolvency law is regarded as a holistic exercise rather than one of piecemeal and fragmented development. It might also suggest that education, training and experience is being employed in these countries.

The survey results tend to suggest there is a high correlation between the standards in the judiciary and bankruptcy administration. Sixteen countries scored "high" in judicial predictability and competence. Of these, six also scored "high" in the area of bankruptcy administrator/trustee competence (Armenia, Bulgaria, Croatia, Estonia, Romania and Slovenia).

This result was also reflected in the survey responses to the question: "Having regard to the cost, time and predictability [of this process], how likely are you to recommend your client use the process?" In five of the six countries with high bankruptcy administrator/trustee competence the answers were positive (Croatia being the exception).

By comparison, of the nine countries that scored "low" in the area of judicial competence, eight recorded a similarly low score in the area of bankruptcy administrator/trustee competence. The majority of respondents to the case studies in those countries were also somewhat negative about encouraging clients to commence the relevant proceedings.
Comparing extensiveness and effectiveness

By compiling all of the data collected from the LIS and the assessment, the overall performance of each country can be examined. Chart 2 illustrates the comparative scores for extensiveness and effectiveness.

Two main conclusions can be drawn. First, there is a clear correlation between the relative quality of a country’s insolvency legislation and the relative effectiveness of its insolvency regime. This is particularly true of Armenia, Estonia and Poland.

This result suggests that the foundation of a good law can be a prerequisite for an effectively functioning system. Indeed, an effective regime in any area of law commences with appropriate and adequate written laws. If an adequate law is absent, implementation will likely suffer.

The second finding is that most countries have better insolvency legislation than they do the means or capacity to implement such legislation. This is commonly referred to as the ‘implementation gap’.

The implementation gap underscores the need for legal reform to go beyond legislative reform and extend into implementation-capacity assistance. This can include such varied activities as the training of insolvency judges and administrators, the development of standard-form documents or ‘precedents’ for practical use, or the creation of a secured charges registry system. Each of these forms of implementation assistance has been undertaken by the EBRD.

Effectiveness factors in insolvency legal regimes (continued)

Notes

The results have been derived from stakeholder responses to questions about the practical functioning of the insolvency regime (see Box 2).

Conclusion

The EBRD’s review of insolvency regimes aims to, among other things, help the principal consumers navigate the difficult and variable pathways of insolvency systems in the Bank’s countries of operations. The review also aims to provide law reformers, including the EBRD, with a roadmap to build better, more extensive insolvency systems that function effectively. It is clear from the Bank’s survey and assessment that far greater attention must be given to judicial systems. The most essential part of an insolvency regime (the effective commencement of procedures) depends, in every country, upon the efficient, predictable and reliable behaviour of judges.

Chart 2
Extensiveness and effectiveness of insolvency legal regimes
Extensiveness/effectiveness score (100 = highest)

Notes
The extensiveness score is based on an expert assessment of the insolvency laws in each country.

The effectiveness score refers to the findings of the Legal Indicator Survey. Scores are calculated as a percentage of the maximum score. Data for Tajikistan and Turkmenistan were not available.

Notes

1 The studies discussed in this article focus exclusively on company insolvencies and, therefore, necessarily exclude laws and legal systems as they pertain to individual insolvency.

2 For a detailed discussion, see Annex 1.1 of the EBRD Transition Report 2004.

3 Assessment is current to all laws in force as at 31 January 2004.

4 For a detailed discussion of methodology, please see EBRD Transition Report 2004, supra note 2.

5 No participants for Tajikistan were identified and insufficient experience of practitioners in Turkmenistan made it impossible to obtain reliable data. As such, results for these two countries are not available.

6 Each of the elements were measured using a series of questions related to the case studies. The responses often represent the composite result of numerous, more detailed questions.

7 Bulgaria’s poor performance in the LIS was particularly surprising given its extremely strong results in the assessment. The LIS respondents for Bulgaria indicated, however, that many of the beneficial provisions in the Bulgarian insolvency law are simply not being observed or enforced by local courts.

Publicity of security rights: setting standards for charges registries

“Any sufficiently advanced technology is indistinguishable from magic.”

Arthur C. Clarke, 2001 – A Space Odyssey
Since 2000 the EBRD has conducted a systematic review of the laws and practices relating to secured transactions in its countries of operations. This ongoing exercise has shown that much progress has been made, and continues to be made, in improving the legal provisions applicable to the taking of security rights over movable assets. However, it also shows that implementing the law often remains, at best, problematic.

Although each jurisdiction is different and generalities can be dangerous, one area where serious deficiencies persist is in the registration system. In many countries, no viable means has been established to enable a third party to find out whether assets are encumbered by security. And in others where such means do exist, the system does not operate efficiently.

The core of the problem seems to lie in the divergence between the rationale for registration as embedded in the law, and the practical results achieved through the functioning (or not) of the registry. This has convinced the EBRD of the need to develop standards, “guiding principles”, which would spell out the basic requirements for an efficient registration system and set out the benchmarks against which existing registries should be measured.

This is not the kind of advanced technology to which Arthur C. Clarke refers to in 2001 – A Space Odyssey: there is no magic associated with a charges register. The development of a sound system should be founded on a few simple, but key, principles. This article presents the genesis of the project, the approach and methodology used and some of the findings.

Genesis of the project: a problem, a need and an opportunity

The concept of a registration system (whether called notice filing, public recording, or whatever) dedicated to publicising security rights created by debtors over their movable assets has certainly gained prominence in the last 15 years or so. However, in some cases, the difficulties of turning the concept into reality appear to have been too great.

In other cases, the system has been created but has proved to be inefficient, and this seriously erodes the anticipated benefits which were the raison d’être of the reform in the first place.

In the last few years, the EBRD has been approached a number of times to assist in the development of registration systems for secured transactions. The scenario is familiar: a country reforms its legal framework for secured transactions to enable security to be granted over assets without requiring the borrower to lose possession, and, crucially, enabling him to continue using them.

The new law provides for registration to publicise the security and give the lender certainty of his rights in relation to third parties. The system is required for the large majority of movable assets, tangible and intangible, especially assets that are not already registered in an asset title registry.

The EBRD has offered assistance for the development of charges registration systems in a number of countries where it operates. In particular, the Bank has been closely involved in the development of the registries in Hungary and the Slovak Republic. Through this work the Bank has developed a certain expertise – though mostly country-specific.

Similar work has been done by other organisations elsewhere in the region.
The EBRD has produced a set of general standards which could be applied regardless of the substantive legal provisions adopted to govern secured transactions (provided the basic concept of publicity has been adopted).

Little is generally known, however, about the systems that operate in the region and their efficacy. In practice, this has meant that each country has had to ‘reinvent the wheel’, without being able to benefit from the existing experience of its neighbours.

In 2003 the EBRD undertook to produce guiding principles on the basic requirements for a registry system, together with guidelines for their implementation. This was done by drawing on work already carried out to benefit from the existing experience of its neighbours.

The idea was to produce a set of general standards which could be applied regardless of the substantive legal provisions adopted to govern secured transactions (provided of course, that the basic concept of publicity has been adopted).

These standards have deliberately been kept to the minimum necessary to achieve an effective publicity system. They do not seek to cover other issues which, although they may also seem important, in reality have little impact on the overall efficiency of the system.

The principles have been developed and proposed as a basis for designing or assessing a charges registry (see pages 22–23). Rather than focusing on the what, the approach is deliberately putting the emphasis on the why and the how. The principles are therefore guiding principles and do not seek to impose any particular solution on a country. They concentrate on the result that should be achieved – the why. Ways of achieving the result, and there may be many – the how – are discussed in the ‘Implementing Guidelines and Recommendations’ section of the guidelines. Here the relative advantages of different options are presented, with illustrative examples in the notes of how such questions have been decided in the region. An annex on the IT requirements of a charge register sets out the most important aspects of the computer system that have to be developed.

For the full text, see Publicity of Security Rights: EBRD Guiding Principles for the Development of a Charges Registry (December 2004), available on the EBRD web site (www.ebrd.com/st).

In many respects, the baseline for the principles is actually quite high: they assume, for instance, that the case for an electronic system of registration is too compelling to give serious consideration to the option of a paper-based registry. Some may see this as being too advanced for the region: we would disagree, and the experience in the region proves that this is not out of reach of transition economies.

Creating an electronic system can be both simple and cheap, and the ability to adopt an electronic filing system from the outset presents an amazing opportunity for countries in the region to leapfrog other, more advanced jurisdictions. Indeed, the West has inherited institutions which are mostly paper-based, or conceptually paper-based, and this often makes the shift to an electronic system difficult.

Central and eastern European countries, which are starting from scratch, can take full advantage of the latest technological developments. Anecdotal stories of countries like Estonia, where people can pay parking fees straight from their mobile phone, should convince anyone of this. However, it is essential that the concepts are properly defined because there is only a thin line between an efficient institution for the publicity of security rights and a red tape bureaucracy.

Focus on the Balkans

For the principles to be useful, it was essential to ensure that they were grounded in practical experience. This experience not only included the creation of registries, but also the practical reality of whether or not they have successfully served the secured credit markets. It was decided to focus the research on the Balkans.

The reasons for choosing this region were simple. In the last few years, the Balkans have experienced a high level of lending, led by the development of microfinance institutions and other SME-devoted credit lines with existing local banks. Collateral laws have been substantially reformed and six registries are already in place: Albania, Bulgaria, FYR Macedonia, Romania and Serbia and Montenegro (Kosovo and Montenegro only). These registries have been developed over a period of more than six years (the Bulgarian registry being the oldest and the Montenegrin the youngest), giving an insight into the effect of time on technology and best practices in this field. The Balkans were therefore an ideal testing ground to gain a picture of how the various theories on registration work in practice (see Table 1).

The objective was not to impose a view on what a registry should be like, or to rank the existing registries against each other. It was rather to examine whether the various initiatives have worked and how users have latched onto the new system. Adopting a comparative stand and examining the different experiences also creates a momentum within the region towards the most efficient systems. It is sometimes difficult for a country to believe that registration can be made within a
matter of minutes, or that it is technologically feasible to make the registry fully available online via the internet. Experience in the region is there, however, to prove that it is possible and that this should be the benchmark against which all registries can now be assessed.

Another important feature of the project was to focus on practical use. The relevant law and regulations constitute the backbone of the registration system but there is a need to examine the way they are translated into practice. For example, the registration forms, the documentation required, the level of fees and how these can work as a deterrent for the use of the system. It was necessary to talk to those using the registry on a daily basis to request the registration of a charge, or to search the database against the name of a potential client.

In summary, our approach was:

- to review and collect information on key features of the registration system
- to analyse the trends and best practices that emerge from the review, against previous experience in other jurisdictions (especially Hungary and the Slovak Republic)
- to derive principles and recommendations from the analysis and to formulate them in an impartial, constructive fashion.

The findings
The present article can only give a snapshot of the findings. It is, however, fair to say that despite the striking differences between the various registries in the Balkans, all of them are functioning and effective. Many people interviewed praised their respective system as one of the first public registration systems (and sometimes the only one) within their jurisdictions which actually serves their needs. The enthusiasm of those involved in making the system work effectively was also very apparent.

Yet there was little awareness (including among the registrars) of how neighbouring institutions were functioning. A country like Romania, which has developed an impressive institution, may not necessarily be aware of how successful it has been and may be hesitant to promote itself. International institutions that have contributed to the development of the registries do not necessarily actively promote the dissemination of best practices, leading to efforts being duplicated.

Considering the interest that exists in the region in such a system, there is considerable scope for developing a more systematic exchange of information and know-how.

This article focuses on four issues and seeks to analyse from the findings of the survey how the EBRD’s guiding principles can help when choosing among the various options. In particular, this article discusses:

- Who should run the registry?
- Who should apply for registration?
- What should be registered and how much documentation should be required?
- What should be the effects of registration?

Who should run the registry?
Once the principle of publicity for charges is accepted, the question of who should operate the registry often takes up a good deal of the discussions. This is clearly a decision that each jurisdiction has to take for itself. However, the lesson learned from examining different systems is that there is a wide range of options open when selecting the person who is to act as registrar and operate the registry, both in the public and private sectors. There is certainly no pattern in the region where the EBRD operates.

The Czech and Slovak Republics, Hungary and Slovenia have all appointed the Chamber of Notaries to operate the charges register, with the Ministry of Justice in charge of supervision. In Poland, the commercial courts operate...
Table 1
Survey on charges registries in the Balkans

The survey covers the operation of six registries in the region: Albania, Bulgaria, FYR Macedonia, Serbia and Montenegro (Kosovo and Montenegro only) and Romania. Information was collected from a variety of sources including the government department responsible for registration, the registration office, users of the system (particularly banks and lawyers) and, where feasible, those involved in setting up the system. The table seeks to give an overview of the six systems reviewed and to indicate the relative strengths and weaknesses of each. For the full survey results and a brief description of each system, please visit www.ebrd.com/st.

<table>
<thead>
<tr>
<th>Functions of the registry</th>
<th>Albania</th>
<th>Bulgaria</th>
<th>FYR Macedonia</th>
<th>Serbia and Montenegro (Kosovo only)</th>
<th>Serbia and Montenegro (Montenegro only)</th>
<th>Romania</th>
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<tr>
<td>Does registration make it possible for the public to find out which assets of the chargor are subject to a charge?</td>
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<td>Does registration make it possible to find out the chronological order of ranking of charges?</td>
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<td>Does registration ensure priority over unregistered charges and other claims?</td>
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<td>Can a third party rely on the absence of registration as indicating that no opposable charge exists?</td>
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<th>Registration</th>
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<th>Serbia and Montenegro (Montenegro only)</th>
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<td>Does the system facilitate charging all kinds of assets?</td>
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<td>Is the procedure for registration clearly defined?</td>
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<td>Is the procedure for registering changes to existing entries in the register clearly defined?</td>
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<th>Serbia and Montenegro (Montenegro only)</th>
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<td>Is all registered information publicly available?</td>
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<td>Is the procedure for searching clearly defined?</td>
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<td>Does a search give a readily understandable overview of the charges registered (including changes)?</td>
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<th>Robustness of the system</th>
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<th>Serbia and Montenegro (Kosovo only)</th>
<th>Serbia and Montenegro (Montenegro only)</th>
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<td>Are the duties of the registrar clearly defined?</td>
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<td>Is there an open system of supervision of the registrar?</td>
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<td>Is the method of recording information in the register designed to protect against error, abuse and fraud?</td>
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<td>Is the method of storing and accessing information in the register designed to protect against error, abuse and fraud?</td>
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<td>Is there a defined procedure for frequent back up of the data in the register and for disaster recovery?</td>
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<td>Is there evidence that the system is being used and is supporting the secured credit sector?</td>
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the register, whereas in Latvia, the registry is run by the privately operated Enterprises Registry. In Lithuania, the Hypothecary Register is operated by the state and registers security rights over movable assets as well as immovable assets. In Bulgaria, the Central Pledge Registry was created within the Ministry of Justice as a separate but dependant entity. In Albania, the Registry for Securing Charges is part of the Ministry of Finance. In Montenegro, the Registry is a specific entity, whose director is appointed by the President of the Commercial Court.

Romania and Kosovo have decided to license the register’s operator via a tendering process. In Kosovo, the bid was won by the Kosovo Credit Information System (KCIS), a private credit bureau founded by a number of microfinance institutions and organisations. In Romania, the number of licences is unlimited as long as the conditions for operating the register are met: to date, there are six operators in Romania. In FYR Macedonia, the Central Registry (which includes the Register for Pledges) was inherited from the former Payment Bureau and is supervised by several ministries via a supervisory board.

Whatever the local circumstances, the single determinant factor in this choice should be that the person or organisation appointed should have the ability and capacity to operate the system in a manner which meets the legal and regulatory requirements, and which gives optimum support to the secured credit market. Great emphasis should be placed on ensuring that whoever is appointed as registrar is given very clear and detailed guidance on the operation of the registry. At the same time, an effective system of supervision and control is needed.

As the EBRD’s guiding principle 9 sets out, the registry should be operated and managed transparently as a public service. One factor which seems to be missing in all of the registries surveyed is the availability of financial information on the registry’s revenues and expenses. In many cases, the registry’s costs are merged with other costs incurred for other functions, and there is no clear information on the allocation of revenues. There is a natural inclination on the part of users to believe that they are being overcharged and lack of transparency encourages this.

Who should apply for registration?

While seemingly simple, this question can sometimes lead to heated discussion. Traditionalists maintain that no entry can be made against the name of the chargor without his consent. Market liberals reply that the chargeholder must be able to ensure fulfilment of the requisite formalities quickly and efficiently. Both sides are right; it is merely a question of finding practical means which satisfy both criteria.

The practice is very diverse in the existing registries. In Albania and Montenegro, only the chargor can request registration. In the Slovak Republic and Hungary, it is only the chargor. In Bulgaria and Romania, either chargor or chargeholder can make the request. In FYR Macedonia, both the chargor and the chargeholder make a joint request. But in some countries one party can be represented by the other.

A pragmatic solution is required that minimises the hassle of registration and at the same time ensures adequate protection for the charger against whom the registration is being made. If the chargor’s consent to registration by the chargeholder is assumed from the mere existence of the charge agreement without further checking, then the debtor needs real protection for the case where the lender exceeds his authority.

This can take the form of a rapid remedy via the court (not always feasible) and also by a right to claim compensation. Alternatively, as in Bulgaria, evidence of the chargor’s consent may have to be produced to the registrar. Either way, any person should be given adequate protection against the wrongful registration of a charge against his name.

If registration is by the chargor, the chargeholder will want to ensure that the form and content of the registration corresponds to what has been agreed. He may do this by preparing the application form, by requesting registration on behalf of the chargor and/or by checking the entry once it is made. If the registration process is simple this should not cause significant delay or complication.

Direct electronic registration by specifically authorised users may be permitted, particularly in the case of banks and financial institutions that are frequently taking security. In that case the user will need an authorisation code and will be responsible for carrying out the tasks of the registrar. Safeguards will be needed to ensure that the user complies with appropriate registration procedures.
Guiding Principles for the Development of a Charges Registry

1. A regime for secured credit should provide for effective publicity of charges.

The development of a publicity system is essentially an economic exercise, not a legal one, where the ultimate objective is the reduction of risk.

- Charges are useful because they can reduce the risk attached to credit.
- Risk reduction is dependent upon certainty of the creditor's right in charged assets.
- Publicity enables third parties to discover that the creditor has a prior right in the asset.
- Publicity also enables the creditor to ascertain existing charges affecting charged assets.

Without publicity a creditor is unlikely to have sufficient certainty in his rights in the charged assets. The situation is different where he takes them into his possession or control, for example in the case of security over shares or bonds.

A publicity system can only operate effectively in a market economy if:
- it is simple, fast and easy for all parties to use
- it supports the needs of the whole of the credit sector and does not, for example, restrict access to only a few privileged users (for example, large domestic banks)
- the market is willing to use the publicity system
- the system actually enables the public to become aware that charges exist.

The willingness of the market to use the publicity system and the extent in practice to which the system actually enables the public to become aware that charges exist are key indicators of the effectiveness of the system.

2. As a result of publicity it should be possible to find out what charges are claimed over a person's assets and their chronological order of ranking.

The need for publicity derives from the desire to avoid the problems that arise when one person who has, or wishes to acquire, rights in an asset is not able to ascertain what rights others may have in the same asset. If this is to be achieved, the publicity system must not only identify the person who is giving the charge, but also give the means to identify the assets which are encumbered by describing them specifically or generally.

The publicity system also provides a convenient method for determining the order of ranking between competing rights claimed in the same asset:

- The order of ranking is normally determined by the chronological order of publication.
- A person with an existing charge should not find that his priority has been harmed without his consent.
- A person acquiring a right in the asset should not acquire it subject to a charge of which he had no notice.

3. Publicity is best achieved by registration, most often against the person granting the charge.

The publicity system should:

- make it possible to give notice of a charge over any asset belonging to any person; and
- render the information in the notice easily and universally accessible to the public.

The only means of publicity which permits this is some form of centrally held, publicly accessible register. The register has to be designed in a way which enables it best to fulfil this function. In particular, it should be computer-based – this will greatly increase the simplicity, speed and efficiency of recording and retrieving information as compared to a paper-based system.

There has to be a basis for primary classification (and thus later recovery) of the information:

- In theory the choice is to classify by person (as in a company or commercial register) or by asset (as in a land register).
- It is relatively easy to construct a simple and uniform method for uniquely classifying and indexing all chargors, that is the persons (physical and legal) who create charges (by reference to name, ID or commercial registration number, address, date of birth, and so on).
- It is much more difficult to do so for assets. Some assets may have a unique identification number (vehicles, machines) or other unique identity feature (works of art, but for many assets unique identification is impractical (for example, stock in trade, small equipment, grain, oil).

If a charge over the universality of the debtor's assets is to be possible, registration cannot be made against the assets.

In practice classification by person is the only solution which can be of general application.

4. Failure to publicise a charge makes it ineffective against third parties.

In some legal systems publicity is a condition for the creation of a charge, or is even the act which creates the charge.

In others it is merely the means by which the chargeholder acquires prior ranking against other persons with a claim in the charged asset.

Whatever the approach adopted, the effect in practice of a failure to publicise should be the same: no charge in the register means no security right that can be effective against third parties.

This is essential for ensuring a sufficient level of certainty for assets to be freely bought and sold, or offered as collateral.

5. The system for giving publicity and for accessing the publicised information should be simple.

Simplicity is fundamental to any publicity method. Each element of unnecessary complexity for the user or the registrar (and its agents) reduces efficiency. Respect of the principle of simplicity should pervade every aspect of the design of the registry, for example:

- Rules governing registration should be defined in clear and simple terms, any instructions, guidelines, manuals should be fully consistent.
- Procedures for registration should be kept simple and easy to follow. Any temptation to supplement the procedures with unnecessary requirements (for example, production of documents to accompany registration) should be strongly resisted.
- The nature and amount of the information to be registered, and the form in which it is registered and retrieved, should remain simple (while being useful to the public).
- An entry in the register serves only to give notice that a security right may exist over certain assets of the chargor. There is no need for anyone other than the parties to check or confirm the validity of the security right or the accuracy of the information to be publicised. The fact that information appears in the register does not 'authenticate' it or validate the security right.
- The technical structure should be made simple for the registrar (within the constraints of cost effectiveness).
- The registration service should be widely available, to ensure easy access by all citizens and businesses.
Immediately upon registration the person requesting registration should be able to obtain a print out of the information as entered into the register, confirming the entry that has been made.

Procedures for searching should be kept simple, should be clearly explained and easy to follow. There should be no requirement to justify a search.

6. The system for giving publicity and for accessing the publicised information should be fast and inexpensive.

Any person should be able to make a registration or a search without unnecessary delay or cost.

Using modern technology it should be possible for a new entry to be available in the register within a few minutes of the registration request being made. Searches should be quasi instantaneous.

The costs of registering and searching should be kept to the minimum level that is feasible. Unless the registry is subsidised the fee will have to cover the capital and operating costs of providing the registration service but it should not include any element of taxation or excessive profit for the registrar.

The capital and maintenance costs of the computer system should be carefully assessed with a cost/benefit analysis for each feature. It is desirable that the fees for the registration service are determined on a transparent basis and that the income and expenditure accounts of the registry are open to the public. This provides a means of control and also strengthens public confidence.

Ultimately the fees for registration should not deter the public from using the system, especially for smaller transactions where the role of collateral as a facilitator of credit is often at its greatest.

7. The register should be accessible for all persons and all registered information should be public.

There should be no restriction as to who can search the register. The purpose of registration is to provide information to the public, so neither the registrar nor any other person should be entitled to limit the right of access to any registered information.

The search procedures should be designed to facilitate retrieval of information. Current information in the register should be available immediately on screen and with the facility for any member of the public to obtain an immediate print out.

Searching points should be organised so that any person, wherever situated in the jurisdiction, can have easy access. The internet is likely to provide the most efficient and accessible search medium.

8. The method of recording, storing and accessing information should protect against error, abuse and fraud.

The computer system should be designed to avoid registration of incomplete, irrelevant or incompatible information and to minimise the possibility for human error (for example, by using drop down menus, compulsory fields, clear guidelines).

Search procedures should facilitate information retrieval (for example, by showing names with similar spellings, permitting the use of wild cards). The reliance placed on negative search results makes this especially important.

The computer system and its operating procedures should include adequate protection against loss or corruption of data in the registry database, whether through technical fault, unauthorised access or tampering, or occurrence of disaster. It should not be possible to register a charge over a person’s assets without authorisation, which may come from the person himself or from a judicial or administrative decision. The registration procedure may require that evidence of such authorisation be produced to the registrar or his agent. If a charge is registered without authorisation, the person against whom it is registered should be able to obtain deletion through a fast and simple procedure and to obtain compensation.

Procedures for registration of amendments and cancellation (termination) should incorporate similar protection against error, abuse and fraud. It should not be possible to cancel a charge without the chargeholder’s authorisation, or other appropriate safeguards.

Correction of factual errors directly by the registrar should be limitatively defined and duly documented.

9. The registry should be operated and managed transparently as a public service.

Operation may be delegated in whole or in part to persons in the public or private sector but the responsible government department should ensure that there is an effective system of supervision and that the registration system operates in the manner intended by the law and relevant regulations.

The ownership and licensing of the software, hardware and data must be clearly defined.

The general public should be made aware of the existence of the registry, the way it operates and the consequences of registration.

The registry should be reliable, available and operational during its defined service hours. Uncertainty as to the availability of the service, either for registering charges or searching, will quickly discourage potential users.

Standards of performance should be established, actual performance measured, and the results made publicly available.

The registrar should be required to report regularly to provide information to the supervising authority on all aspects of the operation of the registry, and to demonstrate that the registry is performing as required by law. The registry should be subject to a regular independent audit.

The duties of the registrar should be clearly defined. The rights of the government to terminate the appointment of the registrar in the case of default and to take over the operation of the registry or appoint a new registrar should also be defined.

The registry should be established in a way which ensures the sustainability of the registration system and the finance required for its continued operation and periodic upgrade.

NB: The term “register” is used to refer to the physical file or database that contains all the information that has been registered, “registry” to the institution which fulfils the registration function, and “registrar” to the person responsible for operating the registry; the term is used in practice to include the agent or the representative of the registrar with whom a user has contact.

The EBRD wishes to acknowledge the generous support given to this project by the Government of Canada and the Government of the United Kingdom.
What should be registered and how much documentation should be required?

On this issue, the EBRD message is clear: simplicity, simplicity and simplicity. Whereas experts may discuss the nitty-gritty of the registration procedure, the definitive test should be how simple, fast and cheap the procedure is for all parties (see principles 5 and 6). As a minimum it is necessary for any registered charge in the register to show the identity of the chargor and the description of the charged asset. The registry computer should also record automatically the time of registration and the identity of the person who generates the entry (the registrar or its agent) into the registry database.

The register should also show the:
- **identity of the chargeholder** - this determines the charge with greater certainty and gives a prima facie indication of the person who is entitled to enforce it. It also enables any interested third party to contact the chargeholder about the charge and/or secured claim.
- **description of the secured claim** - this enables any third party (for example, a potential purchaser of charged assets or creditor considering a lower ranking charge) to assess the extent of the charge and possibly the nature of the liability secured.

Clearly, the way this information can be displayed is closely linked to local practices. An example is the method used to provide a unique identifier for the chargor, thereby leaving no room for doubt as to who the person is, and ensuring that all charges given by the same chargor are indexed together. In FYR Macedonia and Romania, people are identified through their unique identification number, whereas such information cannot be disclosed to the public in Hungary or the Slovak Republic. In these jurisdictions, it is necessary to use the parties’ date of birth and address for unique identifying elements.

The nature of the information registered, the form in which it has to be provided and the processes used to input the information will ultimately determine whether the registration system is effective. Achieving effective publicity of charges is likely to necessitate defining strictly the items to be registered, restricting the length of entry for each item and ensuring a simple procedure for the applicant to check the information in the form that it is registered.25

Again, given the way the different registries have developed in the region, it will come as no surprise that the registration requirements and procedures are varied. All systems require the identity of the chargeholder to be publicised, but only some provide for the amount and/or other information on the secured claim to be disclosed, for example in Bulgaria, Hungary, Kosovo, Latvia, and the Slovak Republic.

In FYR Macedonia and Romania, people are identified through their unique identification number, whereas such information cannot be disclosed to the public in Hungary or the Slovak Republic. In these jurisdictions, it is necessary to use the parties’ date of birth and address for unique identifying elements.

Whatever is provided, it should be easy for the parties to provide the information and for anyone searching the register to find a person. If in order to search one has to give the tax or ID number of the person concerned, and this number is, in effect, semi-confidential and can only be obtained with difficulty, then the availability of the publicised information will be restricted.

Similarly, the need to present various documents with the registration application tends to reduce efficiency with little compensating advantage. Requirements to submit copies of the charge agreement or the agreement establishing the underlying secured claim (as exist, for example, in Latvia and FYR Macedonia) add a considerable burden to the registration process. In Bulgaria, it is necessary to produce a certificate issued by the tax authorities establishing that the chargor has no outstanding tax liabilities. This certificate can take several days to obtain and often significantly delays what is otherwise a relatively quick process.

Another area of complication and delay concerns the way the information is presented. The charges register should publicise concise information in a form that is simple and understandable to any person searching the register without reference to other documents. The issue is particularly acute for the description of charged assets: it may often not be practical or even desirable to give a specific identification of each charged asset (for example, where a pool of assets or future assets are charged). However, allowing vague general descriptions can lead to uncertainty (for example, ‘machines’, ‘assets as described in the charging agreement’).
The description should be designed to give a third party a clear and meaningful notice of what assets have been charged (for example, ‘machinery used for the production of widgets at X location’, ‘all assets of the debtor, present and future’).

The tendency in the region seems to be to include too much information. Registering voluminous annexes from a legal agreement may satisfy lawyers but will make the register undesirably opaque for the public. In Bulgaria, FYR Macedonia and Romania, there have been cases where 200 or 500 pages of description have been registered. This fundamentally undermines the objective of publicising the charge. A layman without legal expertise is likely to have difficulty in interpreting the description and even a lawyer will require quite some time.

What should be the effects of registration?

This last issue is at the core of why publicity is necessary. It is convenient to start by looking at the effect of failing to register a charge. This creates what is called ‘negative publicity’: no charge in the register means that no security right exists that is effective against third parties. More often than not this will be the information that a person searching is looking for. And he needs to be able to rely on it, otherwise the register is failing to remove the uncertainty that can be caused by ‘secret’ charges.

Although the law may be ambiguous in some jurisdictions, all users contacted by the EBRD fully understood the benefits of registration. These include ensuring the opposability of the charge to third parties (subject to exceptions, notably where the charged goods are purchased in the ordinary course of business) and also establishing the ranking order of competing charges over the same asset.

Reliance on the absence of an entry does not mean that a person should be able to rely on the accuracy of any entry that does appear. Unlike a land or title registry the register is not meant to authenticate or validate the security right or information relating to it.

An entry in the register should serve only to give notice that a security right may exist over certain assets of the chargor. This is particularly important for simplicity reasons. There is no need for the registrar to check or confirm the validity of the security right or the accuracy of the information to be publicised. That is the responsibility of the parties, and of no one else. The registrar’s job is to publicise the information that is presented to him.

Whereas all surveyed systems have adopted this approach, some requirements may cause unwanted confusion. In FYR Macedonia, for example, the notary who prepares the charge agreement is expected to check the main elements of the charge and the registrar considers the information stored in the register is legally valid. Any attempt to authenticate the information in the register places an unnecessary burden on the registration process and involves administrative (or worse, judicial) tasks that are not necessary for alerting third parties that a charge may have been given. Some minimum checking may be required, for example the identity of the person giving the charge, but beyond that it is for the creditor relying on the security to make his own enquiries. The register is there to enable him to find out about other charges that are claimed, but it does not provide a guarantee that his charge, once registered, is valid.

The charges register should publicise concise information in a form that is simple and understandable to any person searching the register without reference to other documents.

The process of entering the information can also be unduly long. In Romania, the description of the assets has to be typed by the registrar and then carefully checked by the parties. Users report that this sometimes takes up to a week. In Bulgaria, the procedure is quicker as the document providing the charged asset description is scanned. Nevertheless, the information remains difficult to search. A concise and meaningful summary of the relevant information achieves the objectives of publicity more effectively.
Conclusion

Like it or not, the charges register can be the tail that wags the dog. If it is not carefully designed and efficiently run, the whole framework for security over movables can be incapacitated. The EBRD’s guiding principles and implementing guidelines are put forward as a basis from which an efficient and effective registry can be developed. The basic requirements are actually quite simple but are fundamental. Miss them and the work is doomed.

The EBRD believes that these principles represent a fair basis against which the efficiency of existing systems can be measured, and also a solid foundation on which a new system can be developed. However, only a few systems have been assessed so far and, as mentioned above, practical experience is the crucial test.
Notes


2 For example, in Russia and a number of the Commonwealth of Independent States (CIS) countries, there is no proper system of publicity of security rights over movable property.

3 One example is Poland, where there can be severe delays in registering a registered pledge.

4 For details on the EBRD’s work on secured transactions, please visit the EBRD web site: www.ebrd.com/st.

5 Id.


7 The annex was developed with the technical expertise of the firm MacDonald, Dettwiler and Associates Ltd, British Columbia, Canada. The full text of the principles, guidelines and annex can be found at www.ebrd.com/st.

8 For a full and more nuanced picture, see EBRD (2004), Spotlight on south-eastern Europe - an overview of private sector activity and investment.

9 At the time of writing, a brand new registration system has started operating in Bosnia and Herzegovina. Unfortunately, the research took place earlier and the EBRD could not include this system in the fieldwork.

10 This was clear from the strong interest generated during the workshop held in June 2004 in Bucharest (Romania) on Collateral Registries in the Balkans. Participants included countries that were not covered by the project, such as Moldova and Georgia.

11 Over the past few years the EBRD has actively supported the development of micro and SME finance. This typically relies heavily on the availability of collateral, including movable assets that may be more appropriate to serve as collateral for loans of relatively small amounts. Also, in south-eastern Europe, microfinance has developed and, in some instances, has even led the way to more advanced types of credit.

12 For example, in Georgia, Armenia, Russia, Croatia and so on. Anecdotally, since the EBRD held a workshop on the subject earlier this year, it has been contacted by a number of organisations requesting comparative data.

13 In Kosovo, the chargor or a person on behalf of the chargor has to sign the notification statement (the person acting on behalf of the chargor has to be independent of the chargeholder). In practice, however, no signature seems to be required.

14 A separate point is that there should be a permanent record of who applied for registration. The name of the applicant may appear in the register and the evidence of identity is normally scanned or photocopied and kept by the registrar. The need to check identity means that applications by post, fax or email should be avoided.

15 We do not know of any jurisdiction where direct electronic registration is currently possible (apart from maybe Montenegro). In Romania, a large local bank has been granted the licence to act as an operator for the registrar and is therefore able to register directly all the charges it takes in the context of its operations.

16 One way to ensure the entry is correct is for the registrar to key in the information in the presence of the applicant, who is then given a print out to check. A signed copy of the print out constitutes the formal application, and registration occurs when the registrar transmits this information to the central database.

17 In Kosovo and Montenegro, in particular, the effect of unregistered charges is uncertain.

18 Other systems have not—for example, Poland, where the court led process on registration is often cited as an obstacle to the secured credit market.

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An independent regulatory authority: the sine qua non of telecommunications sector regulation
Governments throughout the globe constantly search for new ways to fuel the fires of national economic growth, thereby promoting development and increasing employment. This search can be particularly acute in those countries which are either developing their economy afresh or, like those of central and eastern Europe¹ and the Commonwealth of Independent States² (CIS), continuing the transition from a centralised command economy to a market-based economy.

As transition countries³ anxiously search for replacements for antiquated heavy industry (commonly supported by unsustainable subsidies) or attempt to reduce their reliance on the energy economy, the encouraging news is that an alternative is close to hand. Presidents and prime ministers, ministers and advisors do not need search beyond their desks to find one of today’s most critical engines of economic growth and social development – the humble telephone. Telecommunications, and the information and communication technologies (ICT)⁴ it hosts, is increasingly recognised as the key enabler in promoting knowledge-based growth, creating jobs and providing access to information and knowledge for developed, developing and transition countries.

To compete successfully and benefit from the knowledge-based society, however, a country must possess the levels of connectivity⁵ necessary to exploit telecommunications and ICT to the maximum. In addition, these countries must have an appropriate regulatory framework within which these services can be delivered. Transition countries face serious challenges in trying to achieve the necessary levels of connectivity, such as attracting the necessary private investment. Fundamental to private investment is an environment which maximises such investment; and central to maximising investment is a country’s regulatory framework.

A clear, transparent and objective regulatory framework, containing a number of standard elements such as cost-based tariffing, transparent licensing or non-discriminatory interconnection, is the cornerstone of a modern investor friendly environment. The lynch-pin of such a framework is the independent regulatory authority, arguably the sine qua non of modern sector regulation. This article looks at the essential characteristics of the independent regulatory authority and the environment within which it operates.

**EBRD sector investment and regulatory reform**

Since the foundation of the EBRD in 1991, telecommunications has been a key element of the Bank’s investment and financing portfolio. Investments by its Telecommunications, Informatics and Media Team have taken place in almost all of the Bank’s countries of operations. As of 31 December 2004, the EBRD had signed 84 projects in the sector, totalling €2.0 billion and with a total value of more than €10 billion, in 23 countries.⁶

Similar to other investors in the telecommunications sector, the EBRD has concerns regarding the nature and characteristics of each country’s sector governing bodies. However, where the EBRD differs is in its ability to leverage its status as an international financial institution and significant investor. This provides the Bank with a unique capacity to drive reform of the regulatory environment forward within its countries of operations.
The EBRD’s contribution to telecommunications regulatory reform is administered through the Telecommunications Regulatory Development Programme, run by the Bank’s Office of the General Counsel, as part of the EBRD Legal Transition Programme. To date, this programme has provided both formal and informal assistance, worth over €10 million, to 16 of the EBRD’s 27 countries of operations. The programme assists countries to adopt modern, clear and predictable regulatory frameworks and to establish regulatory institutions, with the power and means to implement the frameworks.

These initiatives have assisted many countries in central and eastern Europe and the CIS to transform their telecommunications sectors, adopt an internationally consistent regulatory framework and open the market for services to competition. This has also enabled them to gain access to vital capital necessary for the upgrade and extension of existing communications networks. In addition, the EBRD has assisted a number of its countries to adopt modern, clear and predictable regulatory frameworks and to establish regulatory institutions, with the power and means to implement the frameworks.

Current telecom and ICT status of transition countries

Access to the information and knowledge that telecommunications and ICT networks are capable of hosting can stimulate economic growth. This growth can be generated through the creation of new products, increased productivity and the promotion of new commercial/administrative methods. In addition to economic development, connectivity fosters social development, cohesion and inclusion, through its applications in education, health and increased citizen participation in civil society and government. Within Europe, the heights that telecommunications and ICT reach can be seen from the progress of the EU25 in this area over the past four years. Despite the slowdown caused by the global fall in technology stocks since 2000, telecommunications and ICT is currently valued at €277 billion and was estimated to have increased by about 4.6 per cent during 2004. Chart 1 shows the increasing value of the market for electronic communications services in the EU25 member states.

In many transition countries, however, telephone services are available only in cities and larger population centres. As a result, millions of people lack basic services and consequently have to forego the numerous opportunities for commercial, social and personal enrichment that today’s “information society” has to offer. A cursory look through many of the transition countries reveals the extent of the problem. While the United Kingdom has almost 60 telephones per 100 people and the western European average is 41, by comparison Albania has just over 8 telephones for every 100 people; Kazakhstan, 13; Armenia, 14; and Russia, 24. The average number within central Europe and the CIS is 23 telephones per 100 people.

One of the basic determining factors in providing access to telecommunications and ICT has to do with the relative disparity in telephone penetration between western Europe and those countries of central and eastern Europe and the CIS increases significantly when the urban/rural divide is examined. Russia alone claims to have some 54,000 unserved communities, which amount to in excess of 10 million households.

Harnessing the benefits

For the transition countries, the key to narrowing the disparity and harnessing the benefits that telecommunications and ICT has to offer, is the modernisation of existing telecommunications assets. This will enable them to host more sophisticated and advanced services and allow the extension of those assets to unserved and under-served areas.

Unsurprisingly, capital investment is fundamental to such development. Limited traditional financial resources (for example, central funds) have restricted the upgrade and extension of communications infrastructure. Outside of these traditional sources of funding, the next area of financing is the international capital markets. Central to attracting investors from these markets is the creation of a sector environment which is sufficiently conducive to host and sustain private investment. In essence, investors want security of investment and return on capital.
Introducing and sustaining private capital investment

Making the environment as attractive as possible to investors (domestic or foreign) is important. This is particularly the case given the increasing demand for limited resources and the wide range of sector opportunities available globally both in transition and developed countries. The global downturn in the telecommunications and ICT market since the boom of 1999/2000 has resulted in a greatly diminished pool of investment capital. With such limits, potential investors are more likely to consider projects where their concerns are best met. The fortunes of many of the potential investors in the transition countries are European operators which were hit by the global downturn. As a result, the availability of investment resources has shrunk.

Sector liberalisation and privatisation initiatives are tried and tested methods of introducing fresh capital. For these policies to work and provide the investment security and return on capital, however, there must be a legal and regulatory framework capable of supporting such an environment. A clear, transparent and objective legal and regulatory framework is the fundamental cornerstone of both international best practice and EU standards in the sector. The presence of such a framework is of critical importance to investors. This is clearly evidenced by the fact that, globally, regulated operators and potential investors commonly consider regulatory risk as a crucial factor in determining investment strategy. Foremost concern of this risk is that the appropriate regulatory instruments exist and that regulatory decisions impacting on sector investment will not be made in an independent manner on their merits, but rather as part of a fully transparent and objective regulatory process.

Chart 1
Value and growth of electronic communication services in the 25 EU member countries

![Chart 1](image1)

Source: EITO 2004 and Commission services.

Chart 2
Total telephone subscribers (fixed-line) per 100 inhabitants in western Europe, central and eastern Europe and the CIS (2003)

![Chart 2](image2)
Establishing a regulatory framework

Investors seek comfort in the presence and extent of modern market-based regulatory instruments and sound institutions. These instruments and institutions have a significant impact upon the return they can expect to receive. Modern regulatory instruments include cost-based tariffing, efficient and objective dispute resolution, non-discriminatory interconnection and licensing certainty. Sound regulatory institutions comprise independent policy formulation, regulatory and operational organisations.

Of concern to investors is the level of undue influence political authorities and sector operators have, or are perceived to have, over the regulatory process. These concerns are born of the historical circumstances attached to the telecommunications sector whereby a single government authority, usually a communications ministry, was responsible for strategic sector policy, regulatory administration and provision of service. With the onset of the new telecommunications regimes, as promoted by the EU and WTO, regulation by a single ministry relating to policy formulation, implementation and network operation is clearly inappropriate. Such concerns can be particularly acute where the state remains owner, or part-owner, of the incumbent operator. This arguably holds reform and development of the sector hostage to short-term political tinkering and undue influence from the incumbent operator, which is seeking to create a short-term economic advantage. Accordingly, the focus of sector reform should be directed towards establishing and implementing an appropriate institutional model for sector administration, addressing these concerns.

Developing an institutional model

Policy and regulatory decisions in the sector have a clear impact upon the investment environment and the opportunities available therein. Efficient, objective regulation of interconnection is a key element in attracting new investment; competent dispute resolution is essential to maintaining that investment; and, cost-reflective charges can work to attract private investment to previously unserved high cost areas by making them viable commercial propositions. At the same time, the practice of governments/regulators using their authority to auction mobile communications licenses for large advance payments significantly diminishes available investment. Similarly, the risk of unilateral decisions imposing unjustified fees/charges on operators acts as a disincentive to investment.

The challenge in this area is to construct an institutional model for sector development that balances competing interests, whilst reconciling short-term political agendas with longer term economic and social progress. Experience shows that objective, transparent and accountable regulation attracts considerable investment and can work to provide a firm basis for efficient interconnection regulation, competent dispute resolution and modern tariff regulation. At the same time, it prevents decisions often motivated by short-term political benefit which negatively impact the market.

Appropriate delineation of functions

To address investor concerns of interference in sector decision-making by political or operator interests there must be a clear delineation of functions. This should ensure that differing interests do not have undue or inappropriate influence upon regulation. The sector reform initiatives of privatisation and liberalisation have created a new market dynamic necessitating an appropriately delineated, transparent and sufficiently accountable method of regulating the sector.

The dividing line between what is policy formulation and what is regulation (and therefore delegated to regulators) will be different from country to country. Between the extremes, there is no optimum dividing line, per se, that separates policy formulation from regulatory functions. However, it is critical that the allocation of functions be clearly defined, entrenched in the sector’s primary legislation, fully observed and result in effective policy implementation. A common and acceptable model for delineation of these functions, now familiar around the globe and compatible with market-based supply of telecommunications networks and services, is shown in Table 1.
Policy formulation
In the model in Table 1, the policy function is generally reserved for the government and delegated to the relevant line ministry. This function is properly concerned with fundamental issues of long-term economic development and achievement of certain social objectives, rather than the minutiae of day-to-day regulatory implementation. In formulating policy, the government is expected to achieve agreement and reconcile broad economic and social objectives.

Regulation
A regulator’s task is to:
- implement policy formulated by the relevant government authority
- ensure adherence by operators and other sector stakeholders to broad government policy objectives
- resolve disputes between competing operators, and between operators and consumers
- advise the government on sector developments which may impact on broader policy matters.

The regulator should act as a middle ground (and in some circumstances, a referee) between operators and government, enhancing the essential delineation of functions. Whereas the operators, once removed from direct political interference that accompanies full or partial state ownership, may focus too narrowly on economic objectives, the regulator should ensure due recognition of competing social and other broader policy objectives. Central to this model is the establishment of a regulatory agency that is, and is seen to be, sufficiently independent of all other actors in the sector. (This includes separation from both operators and from day-to-day government or political influence.)

Table 1 Model for delineation of functions within the telecommunications market

<table>
<thead>
<tr>
<th>Function</th>
<th>Actor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy formulation</td>
<td>Government (usually through cabinet, commonly delegated to a telecommunications ministry)</td>
</tr>
<tr>
<td>Regulation (in essence, policy implementation)</td>
<td>Independent regulatory authority</td>
</tr>
<tr>
<td>Operation of network/ provision of services</td>
<td>Operators - commercial basis (private or public)</td>
</tr>
</tbody>
</table>

Operators
Within a modern liberalised marketplace for telecommunications, operators - in particular the incumbent former monopolist - make up the third leg of the tripartite model shown in Table 1. The core purpose of the delineation and entrenched separation here is to insulate, as much as possible, operations of the incumbent former monopolist from direct government interference. In doing so, undue influence with commercial/operational decisions, for purely political motives, are prevented.21

In this respect, the management of the incumbent should be made answerable to a corporate board that is insulated from improper day-to-day government interference. Appropriate methods of achieving such separation include the process of corporatisation or privatisation of the incumbent and the entry of additional players into the market through liberalisation.

Independent sector-specific regulatory authority
An independent sector-specific regulatory authority22 is the cornerstone of any sector reform process. Without such an authority, meaningful implementation of liberalisation and sector modernisation will remain incomplete. When potential investors first assess sector investment opportunities, they initially have three questions:
- Is an independent regulator present?
- Does it, and can it, implement policy in an objective and transparent manner, without political interference?
- How meaningful is the regulator’s “independence”? Has the regulator enough independence to resist the dominant power (“capture”) of the incumbent operator?

If the answers are positive, then political risk is assumed to be low, investment relatively secure and opportunities are worth seriously considering. If the answers are negative, then political risk is assumed to be high, and a decision must be made as to whether the investor wishes to delve into the political arena of that particular country. In the current environment, where there are multiple demands on limited investment resources, most potential investors will look elsewhere.
A critical dimension to independence is accountability, whereby the precise mandate of the regulator is clearly set out in the primary sector legislation.

The requirement for such an authority is central to the sector trade liberalisation policies of the WTO and provides a fundamental cornerstone to EU sector policies. “Independent” regulators of one form or another exist now exist in more than 119 countries.23

**Nature and extent of independence**

The nature and extent of such independence will vary depending upon the nation in question and its legal, political, technical and economic circumstances. However, it is clear that while a significant degree of independence is essential to sustain this model, no regulator has, or indeed should have, total independence. Some of the more common situations are the regulator being:

- part of another body, or government ministry/department
- semi-autonomous, though subject to ministerial review
- independent, subject to review by the government or a court of law
- fully independent, subject only to review by a court of law
- part of a self-regulatory process.

**Characteristics of an independent regulator**

Whatever the model of regulation, it is widely agreed that there are minimum characteristics that must be present for a regulator to enjoy meaningful independence.

**Appointment and removal**

Regulatory staff should be appointed on the basis of professional experience rather than political attractiveness and should enjoy strictly stated protection from arbitrary removal during their tenure.24 Rules and procedures for the appointment of the chief executive and board of a regulatory authority should be clearly set out in the framework telecommunications law. In addition, ideally, the appointment process should involve both the executive and the legislature, to ensure proper checks and balances.25

Appointing the head of the regulatory agency is a critical issue in building an effective regulatory organisation. One element influencing this is the character of the agency. If it is to be part of a government department or ministry, the usual course would be for the government to appoint the person (often from the civil service administration), perhaps on a seconded basis. However, if the regulatory body possesses meaningful independence, even if it remains structurally part of a government ministry or department, then a non-government sourced person would be more appropriate.

**Funding**

A critical element in determining the level and extent of regulatory independence is the source of financial resources. Again, for independence to be meaningful, regulatory agencies must have sufficient levels of their own resources. Relying on government budgetary transfers controlled by politicians is often viewed as a significant threat to independence. As such a budget can be manipulated to apply political pressure to perform particular tasks or make specific decisions. Tampering with a regulatory agency’s budget would be an easy way to influence operations and apply pressure to favour particular interests in a given set of circumstances. The most common method of funding independent regulatory agencies is through levies on the revenues of sector operators or on the proceeds of licence fees (one-off competitive tenders or renewable).

**Staffing**

Regulators should also have sufficient scope to recruit staff with the necessary levels of expertise. Overall, the tasks and duties of the agency should determine staff levels, not political factors. (The number of people who have lost their jobs through privatisation or current levels of unemployment should not be a consideration.) Experience has shown that overstaffing can lead to the level of interference with the commercial operation of regulated firms being over and above what is normally expected.

Staffing autonomy usually dictates exemption of regulatory office staff from standard civil service remuneration and recruitment rules. An additional dimension to this autonomy is the importance of ensuring the agency...
can retain, and pay, external consulting expertise. Where regular staff with appropriate experience and qualifications are difficult to recruit (as can be the case in newly liberalising and privatising countries), banning consulting expertise can severely restrict regulatory capacity.

Accountability

Whilst some of the key tenets of independence require sufficient autonomy and freedom from undue influence, such independence does not imply independence from government policy. Instead, it implies independence to manage without improper or undue political interference, to apply specialised skills in the implementation of regulation and to be accountable for results according to specified criteria and procedure. Thus, a critical dimension to independence is accountability, whereby the precise mandate of the regulator is clearly set out in the primary sector legislation, supplemented by regulations applying to the sector. This ensures a framework within which a regulator will be answerable for their actions. Such accountability should ideally be to the legislature, through reporting requirements or appearance before parliamentary committees to explain or defend specific decisions.

Among the desirable procedural rules are:

- rules setting deadlines for making decisions
- consultation processes ensuring all interested parties have an opportunity to make representations in public hearings and appeal decisions affecting them
- rules requiring fully reasoned decisions
- scope for intermediate (non-court based) review of decisions (non-political)
- rules for the ultimate appeal of a decision against the regulator to a court of law.

Conflict of interest

Persons within the regulatory authority with direct, indirect or perceived connections to an operator, or with political interests, can prompt investors to judge that the authority’s regulatory risk is high or that it has been “captured”. Where this is the case, any contemplated investment would likely be priced accordingly (or not made at all). To counter this threat and ensure meaningful independence, it is essential that any sector primary legislation clearly prohibits such conflicts arising.

Conclusion

The biggest challenge for ensuring the evolution of an efficient, competitive and successful telecommunications and ICT sector is ensuring that all necessary elements conducive to maximising private investment capital are in place. Private investors will only invest where they can be reasonably confident their investment will be secure and will provide an adequate return. Liberalisation and privatisation policies provide the vehicle for introducing investor capital into the sector and regulatory tools, such as interconnection and cost-based tariffing, will enable competition to take hold. However without an appropriate institutional framework to implement and administer those tools investment will unlikely be fully sustainable, or yield optimum results in terms of sector development. The lynch-pin of sector reform, modernisation and development is a clearly delineated institutional framework to implement tried and tested market reform. Central to this institutional framework is the independent regulatory authority.

Notes

1. The regional grouping “central and eastern Europe” is understood to refer to the former communist and socialist countries of central and southeastern Europe. Specifically, these countries are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, FYR Macedonia, Latvia, Lithuania, Poland, Romania, Serbia and Montenegro, Slovak Republic, Slovenia.

2. The regional grouping “Commonwealth of Independent States” (CIS) is understood to refer to a group of countries formerly members of the Soviet Union. Specifically these countries are Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz Republic, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

3. Transition countries” is understood to refer to those countries of central and eastern Europe and the Commonwealth of Independent States that are in transition from a command based economic system to a market based one. This grouping comprises the EBRD countries of operations and consists of: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, FYR Macedonia, Moldova, Poland, Romania, Russia, Serbia and Montenegro, Slovak Republic, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

4. In this article the terms telecommunications and ICTs are taken to include voice, data and video communications, delivered over fixed or wireless networks, and includes, for example telephony, broadcast transmissions and Internet use.

5. Connectivity in a telecommunications context is generally understood to refer to the nature, extent and reach of a country’s telecommunications network.

6. Further details of the EBRD’s investment and financing activities in the telecommunications and ICT sector can be found at www.ebrd.com/country/sector/telecoms.

7. The Legal Transition Programme aims to contribute to the improvement of the investment climate in the EBRD’s countries of operations by helping create an investor-friendly, transparent and predictable legal environment.

8. Further details of the EBRD’s legal and technical reform activities in the telecommunications and ICT sector can be found at www.ebrd.com/country/sector/law/telecoms.

9. Among the countries of operations which the EBRD has provided assistance in establishing regulatory authorities are Albania, Bosnia and Herzegovina, Hungary, Kazakhstan, Kyrgyz Republic and Serbia and Montenegro (Serbia only).

10. EU25 refers to the 25 nations which currently make up the European Union. (This includes the 10 new members that joined in May 2004.)
11 “Electronic communications services” is a collective term mainly used by the EU to refer to telecommunications and ICT.

12 It should be noted, that as part of accession to the European Union there have been significant increases in communications network availability in eight of the central European countries. These countries, which joined the EU in May 2004, include Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovak Republic and Slovenia.

13 The measure used in Chart 2 is fixed line penetration per 100 inhabitants.

14 Pre-May 2004 EU member states.

15 Figures taken from the Russian Ministry of Communications and Informatisation statements and ITU World Telecom Indicators 2004.


17 EU standards in this area are contained in the 2002 regulatory framework for electronic communications services, which became effective in July 2002. This framework comprises the framework directive, the authorisation directive, the access and interconnection directive, universal service directive and the data protection directive.

18 Regulatory risk refers to the risk that a regulator will change current rules or impose new rules and negatively impact investment positions already in place.

19 “Incumbent operator” generally refers to the established telecommunications network operator(s) in a given country. Normally, this is the entity that operates all or most of the public telecommunications network infrastructure in the country. Predominantly, this was the Post, Telephone and Telegraph (PTT) administration of the national government. In some countries it was, or now is, a private sector operator. In both cases, incumbent public telecommunications operators generally operated as monopolies (InfoDev McCarthy Tétrault Telecommunications Regulation Handbook, appendix C, page 7 - see www.infodev.org/projects/314regulationhandbook/appendix.pdf).

20 This includes maximisation of the telecommunications network's reach, particularly to rural and sparsely populated areas. Service to these areas is generally low or non-existent in transition countries. This is due to the cost of extending the network and maintaining service invariably exceeding cost. In such cases, the market alone will be unlikely to serve these areas and the government will pursue the achievement of service in such areas as a social policy objective.

21 A good example is the issue of tariff rebalancing. Historically, within transition countries (as elsewhere) existing telephony tariffs can be substantially out of line with the cost of the provision of service. Traditionally local call tariffs will be significantly below cost and international call tariffs will be significantly above cost. The excess of revenue yielded from international tariffs will be used to cross-subsidise below cost local tariffs. Because unbalanced tariffs are not sustainable in a competitive marketplace, they will need to be rebalanced to an appropriate level before full liberalisation, when competitive operators will “cherry-pick” lucrative areas. Rebalancing is a critical element of the reform process as the price an operator is allowed to charge its customers is the most important determinant of profitability and the ability to finance growth. Raising local call tariffs can be politically charged as these changes can seriously impact on less well-off and vulnerable members of society – often an important political constituency.


24 This situation is, arguably, somewhat analogous to that of a member of the judiciary. The regulator is expected to make judgement on a given set of facts within his/her area of authority without fear or favour of any interested parties. In doing so, the regulator should be entitled to enjoy freedom from the risk that he/she could be removed from office because of failure to yield to pressure with respect to any given decision.

25 This will generally involve nomination by the government (upon proposal by the ministry responsible for telecommunications) and discussion and approval by the legislature.

26 Notwithstanding the commonly understood characteristics of independence in relation to political participation in the regulatory process, one acceptable way of such political participation, compatible with international best practice in ministerial direction. An example of such direction can be seen in section 13(1) of Ireland’s Communications Regulation Act 2002: “In the interests of the proper and effective regulation of the electronic communications and postal markets, the management of the radio frequency spectrum in the State and the formulation of policy applicable to such proper and effective regulation, the Minister may give such policy directions to the Commission as he or she considers appropriate to be followed by the Commission in the exercise of its functions. The Commission shall comply with any such direction”.

27 A good example of such a provision is contained in section 25 of the Irish Communications Regulation Law, 2002 (see http://www.irishtatutebook.ie/ZZZ0/012002525.0.html).

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While significant efforts have been made over the past decade to upgrade the quality of commercial legislation within the transition countries, further efforts are needed to improve the implementation of laws. Today both investors and members of civil society demand more attention be paid to this area. Effective implementation will instil confidence in investors that their contractual rights will be upheld by local courts. Meanwhile, citizens want the opportunity to challenge the actions of their government before the courts. As a result of this quest for legal certainty, transparency and accountability, attention is increasingly turning to the main actors in this process, the judges.

In their day-to-day professional life, judges within the EBRD’s region – particularly in the early transition countries – are faced with numerous challenges. They must cope with complex and constantly changing rules and regulations, deal with market economy concepts that simply did not exist when they were appointed, sometimes resist attempted infringements of their integrity or independence, and in some instances make it to the end of the month on a poor salary. It is no wonder these judges struggle to fulfil their mission.

This issue of Law in transition focuses on the efforts made by key players within the region to develop better judiciaries and a more efficient administration of justice by local judges. Contributors include representatives from the international community, legal aid providers, the EBRD (an investor and policy adviser), and a representative of the judiciary.

The first article, by Michel Nussbaumer of the EBRD, examines the Bank’s own contribution to the improvement of judiciaries in the region. Through the Legal Transition Programme, the EBRD fostered training in a number of countries to accompany law drafting assistance. In addition, the EBRD has designed a self-contained judicial capacity-building programme in the commercial law sector. Judges in the Kyrgyz Republic are currently benefiting from this programme.

Russia is the focus of the second and third articles. Jason Verville, of the EBRD, examines how current Russian legislation may be improved to facilitate the enforcement of judgements. In the third article, Veniamin Yakovlev, former chairman of the Russian Supreme Arbitrazh Court, is interviewed. He reflects on the status of Russian judges, on past achievements and on the challenges ahead for Russian commercial courts.

In the fourth article, Thomas McInerney of the International Development Law Organization (IDLO) reviews the lessons learned during decades of judicial training throughout the world and examines how these lessons will apply to upcoming programmes in the EBRD region.

The next article is by Dušan Protić, Director of the Judicial Training Centre of Serbia. The author discusses the challenges of training judges in a post-conflict society, and concludes that raising professional standards is one of the most powerful tools to build an independent judiciary.

The last two articles have been written by aid providers: Eric Maitrepierre of the French National School for the Judiciary, and Julie Broome and Molly Inman of the American Bar Association Central European and Eurasian Law Initiative (ABA/ CEELI). These articles detail the approach taken by these organisations towards judicial capacity-building in the EBRD’s countries of operations. The authors highlight the need for good evaluation tools of such programmes and call for the use of international standards by local judges in order to advance their reform agenda.
Building judicial capacity in the commercial law sector of early transition countries
The legal frameworks of the transition countries have substantially improved over the past decade, but challenges remain to build the judicial capacity of the commercial law sector, an area which is crucial for investments and economic development.

Michel Nussbaumer
Head of Legal Transition and Knowledge Management Team, EBRD

In the 14 years of transition from centrally planned systems to the market economy, the legal frameworks of the countries of central and eastern Europe and the Commonwealth of Independent States (CIS) have been substantially upgraded. Since the early 1990s, the “laws on the books” have improved in quality and, in some instances, now show significant levels of compliance with international standards of best practice. This progress has been recorded by the EBRD in its various assessment projects on commercial and financial law. However, in many countries, implementing legal provisions remains fraught with uncertainties. Investors cannot rely sufficiently on the ability of local courts to uphold their contractual rights (see Chart 1). The EBRD itself, the largest single investor in the region, has from time to time encountered obstacles when relying upon local courts to settle commercial disputes. Strategy documents that the Bank publishes for each country on a regular basis highlight the need to make laws fully effective through a strengthening of the court system. What can be done to improve the ability of courts to do their job and deliver?

The EBRD’s Legal Transition Programme is focused on the areas of law that are directly relevant to investments: capital markets, concessions, corporate governance, insolvency, secured transactions and telecommunications. In these areas, the Bank has been developing, or has participated in the development of, standards of best practice. It has also conducted in-depth assessments of legal transition and delivered technical assistance to local policy makers.

Until 2004 only a small portion of resources mobilised by the EBRD have been spent on judicial capacity-building initiatives, mainly because it was felt that other organisations were already providing such assistance. The Bank does, however, share the view expressed by others that an efficient and independent judiciary has a positive impact on economic development, credit availability and foreign investment.

State of affairs
A review of the current situation in the region is revealing. Judiciaries are faced with numerous challenges, some of which are common to all judiciaries in developing and transition countries, while others are linked to the transition from a socialist society to a market economy. The different regions do not necessarily experience these challenges to the same degree. In particular, the new EU member countries are moving faster than their eastern neighbours towards judicial standards commonly found in western Europe.

Lack of technical skills
The lack of substantial knowledge of the law by local judges is perceived as an issue, particularly in the early transition countries. A large number of judges were trained under the old regime, before the concept of a market economy and its related laws and regulations were introduced. For some of them, understanding and utilising the legislation
Judiciaries are faced with numerous challenges, some of which are common to all judiciaries in developing and transition countries, while others are linked to the transition from a socialist society to a market economy.

Put in place in recent years is a challenge, not to mention the fact that such legislation tends to move at a high pace. For younger judges, the quality of their training will depend very much on the law school they attended and on their previous experience in the legal profession. Even these younger judges may not be fully familiar with international business practices and their underlying principles.

Scarce financial resources

The general budgetary constraints facing local governments also affect judiciaries. In some regions, judges have to sit in dilapidated courthouses; there are not sufficient resources to buy equipment (for example, computers); and judges receive minimal salaries. As a result, judiciaries are unable to attract qualified lawyers and to retain their best members.

Interference of the executive power

Judicial independence can be compromised when judges receive instructions from government officials about how to render their decision on a case. The practice does seem to be less common now than under the old regime, but it can still happen, especially in remote areas. As the saying goes, “old habits die hard”.

Integrity concerns

The impecunious conditions in which some judiciaries operate can make judges vulnerable to unethical practices. Corruption is reported to be pervasive in a number of the EBRD’s countries of operations, and it typically affects the judiciaries. The recent surveys conducted by Transparency International (TI) confirm that the entire EBRD region experiences levels of corruption higher than the OECD average (see Chart 2). Some countries rank at the very bottom of the TI worldwide rating.

Status of judges

Throughout the EBRD’s countries of operations, judges do not generally enjoy the same prestige as their colleagues in western Europe or the US. In some regions, they are still seen as civil servants fulfilling clerical functions. Therefore, the judicial career is not necessarily appealing to young, bright legal professionals.

Formal evaluation

In its Legal Transition Programme, the EBRD’s actions have been guided by a systematic methodology. First, the Bank aims to define what should be considered as a desirable state of legislation for a given legal area. In order to do this, it considers whether internationally recognised standards of best practice exist already, or if these need to be created. Second, the Bank makes a diagnosis for each specific country, by analysing to what extent such country’s legislation and practice comply with the relevant international standards. Lastly, the EBRD proposes and, if requested, delivers the appropriate assistance, in the form of direct technical cooperation or other direct action. The analysis of the state of judiciaries in the EBRD countries of operations used a similar methodology.

International standards

There is an impressive number of international standards defining what an efficient and independent judiciary should be like. The most relevant are those set out in the UN Basic Principles on the Independence of the Judiciary (1985) (see page 46); the UN Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary (1989); the Council of Europe Recommendation No. R(94)12 on the Independence, Efficiency and Role of Judges (1989); and the Council of Europe European Charter on the Statute for Judges (1998). These standards describe in detail how judiciaries should be set up so that judges can act in accordance with basic rules of due process. Based on international experience, they propose practical solutions for the recruitment, training, career, responsibilities and disciplinary procedures of the judiciary.

With regards judicial behaviour, reference should be made to the Bangalore Principles of Judicial Conduct (2002), recently endorsed by the United Nations. These principles propose rules of conduct for judges and describe how such rules may apply in practice. They have been referred to as “an international code of judicial conduct against which judicial officers worldwide may be measured.”
Assessment of country judiciaries

To date, the most comprehensive assessment project of judiciaries in central and eastern Europe and the CIS is the American Bar Association Central European and Eurasian Law Initiative’s (ABA/CEELI) judicial reform index (JRI). The JRI aims to assess a cross-section of factors relevant to judicial reform in emerging democracies. The assessment gauges the judiciaries in the region against international standards such as those mentioned on page 40.

Overall, the JRI confirms the urgent need for reforms in the judiciaries and judicial training structures of the countries in the EBRD’s region. Although only 14 of the Bank’s countries of operations have been surveyed by the JRI so far, the picture that emerges confirms the weakness of judiciaries throughout the region (see Chart 3). The graphs confirm that the issues faced by each country are different, but indicate that most dimensions, from transparency and accountability to appropriate financial resources, are problematic.
The JRI categories relate to the following topics:

- **Quality, education and diversity** – judicial qualification and preparation, selection/appointment process, continuing legal education, minority and gender representation
- **Judicial powers** – judicial review of legislation, judicial oversight of administrative practice, judicial jurisdiction over civil liberties, system of appellate review, contempt/subpoena/enforcement
- **Financial resources** – budgetary input, adequacy of judicial salaries, judicial buildings and judicial security
- **Structural safeguards** – guaranteed tenure, objective judicial advancement criteria, judicial immunity for official actions, removal and discipline of judges, case assignment and judicial associations
- **Accountability and transparency** – judicial decisions and improper influence, code of ethics, judicial conduct complaint process, public and media access to proceedings, publication of judicial decision and maintenance of trial records
- **Efficiency** – court support staff, judicial positions, case filing and tracking systems, computers and office equipment, distribution and indexing of current law.

Similar conclusions may be drawn from the EBRD’s own assessment work on commercial law in the region. From the Legal Indicator Surveys conducted in 2003 and 2004, which analysed the effectiveness of pledge laws and insolvency laws, local courts were seen as less efficient, on average, in the CIS than in central and eastern Europe (see Chart 4). Advanced transition countries like Estonia, Hungary and Lithuania scored the highest on the different factors (experience, predictability, integrity and reliability) considered in connection with court efficiency. At the other end of the spectrum, the most serious concerns were recorded in Albania, Moldova and Azerbaijan (see Chart 5).
International aid

The international community is aware of the challenges facing judiciaries in the regions and has already reacted. Massive judicial reform programmes were launched in the mid-1990s with assistance from various sources: the World Bank and the Council of Europe, bilateral aid from the United States and Germany. Typically, these programmes aim to support the local government’s efforts to strengthen judicial capacity, by providing direct material assistance (court buildings, equipment), advice on policy matters and twinning programmes. In many instances, these programmes also include judicial training components and support to institutions that train local judges.

Training judges

One of the critical elements for the improvement of the judiciaries’ effectiveness is the ability of local governments to train applicant and sitting judges. This training will help raise the level of their ethical standards and technical knowledge. There is a trend in the region towards the creation of judicial training centres (JTCs) in charge of training judges. Most of the time, JTCs are placed under the authority of the Ministry of Justice, but sometimes they report to the Council of Justice or another superior judicial organisation. Most JTCs are responsible for providing continuing professional education to sitting judges. Only a few also train applicant judges. In most countries, applicant judges must pass an examination before they can be appointed, but in some instances, a specific number of years spent as a lawyer or law professor can be sufficient.

Notes

The charts show the average score for each area of reform evaluated in the judicial reform index (JRI). The JRI evaluates judicial reform and judicial independence through a prism of 30 indicators in the areas of quality, education and diversity of judges; judicial powers; financial resources; structural safeguards; accountability and transparency; and judicial efficiency. The index ranges from negative to positive. The extremity of each axis represents an ideal score (all statements positive). The fuller the web, the better the system.

Source: ABA/CEELI Judicial Reform Index Database, December 2004
The training of applicant judges has, in certain countries, led to the creation of a real Judicial Academy, that is, a mandatory school programme for future judges. For example, Romania modelled its National Institute of Magistrates on the French National School for the Judiciary. The same model seems to have been a source of inspiration for Georgia and Armenia, where the laws for setting up such schools have been prepared with Council of Europe assistance and are waiting to be finalised and approved by local parliaments.

The typical model for such academies consists of a two-year programme for applicant judges, with the first year spent on theoretical classes, and the second year on practical internships. Such new institutions are a welcome improvement in the strategy to increase the professional standards of judges. A potential problem, however, is the need to sustain their financing, as they are typically set up with international assistance, but will need to carry on once this assistance comes to an end.

The EBRD’s role

To date, the EBRD has conducted a number of technical assistance projects with judicial training components. It has done so in the context of specific legislative reforms where it has provided assistance on a new law. For example, in the context of the preparation of the new Slovak secured transaction legislation in 2002 and the new Polish insolvency law in 2003, the Bank put in place training programmes for local judges (see Box 1). This type of intervention may be part of projects which include a law drafting
phase, followed by implementation activities: setting up a registry, training officials, publishing manuals and so on. The Bank intends to pursue this multi-faceted approach whenever appropriate. It is based on the belief that law reform goes well beyond simple law drafting. It encompasses a whole series of tasks enabling local government to translate the reforms on paper into real social change.

Conclusion: building judicial capacity in the early transition countries

In parallel to its ad hoc interventions in judicial training, the EBRD intends to develop a more systematic approach to make judiciaries more efficient. It is implementing a judicial capacity-building programme with a special focus on commercial law, an area insufficiently covered by other aid providers. Most judicial reform programmes put in place by other institutions tend to focus on issues such as human rights, procedure, case management relationships with the media and general legal matters. No systematic programme has been established, to the Bank’s knowledge, for improving judicial skills in the commercial law sector. Commercial law is most directly relevant to the Bank’s own experience as the largest single shareholder in the region. It is also an area where the Bank’s legal department has accumulated a wealth of knowledge and expertise.

Taking into account the existing needs and the current priorities on the international geopolitical agenda, the proposed programme will first focus on the early transition countries (ETC), a group of former Soviet countries where transition is less advanced than in other EBRD countries of operations. In particular, these countries have in common a high level of poverty. Preliminary contacts have been made with a number of local institutions in the region and some of them have asked the Bank to assist. A first project was launched in the Kyrgyz Republic in December 2004.

Box 1
EBRD training programmes for judges

<table>
<thead>
<tr>
<th>Secured transactions training for Slovak judges</th>
<th>Training Polish judges on the new insolvency law</th>
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</thead>
<tbody>
<tr>
<td>Since 2000 the EBRD has provided technical assistance to the Slovak government to prepare the new secured transactions legislation and to create a computerised registry for collateral. In collaboration with ABA/CEELI, the Bank supported a series of seminars for local commercial judges to promote understanding of the new concepts and the proper application of the law, as well as the production of supporting materials. About 70 judges participated in the programme, which benefited from the expertise of local and international speakers involved in the drafting of the law.</td>
<td>The EBRD, at the request of the Polish Ministry of Justice, helped to facilitate the implementation of the new Polish insolvency law through training and education programmes. During 2003, a total of 350 judges were trained in the cities of Białystok, Gdańsk, Kraków, Poznań, Warsaw and Wrocław. The training was delivered by commercial lawyers and academics who had worked on the legal reform. The training activities were completed when the new law came into force in October 2003.</td>
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</table>

In a first phase, the Kyrgyz project is designed to prepare an action plan for a sustainable programme enhancing judicial capacity in the field of commercial law. It includes a detailed survey of users (law firms, businesses, government officials and judges). For this project, the Bank is teaming up with the International Development Law Organization (IDLO), an international organisation which specialises in development aid to judiciaries. The detailed nature and scope of the subsequent phase will be defined by the EBRD following the completion of the initial phase. The Kyrgyz Ministry of Justice is supporting this project.

The Kyrgyz project could be replicated in other ETCs provided all the necessary criteria are met:

- local authorities are committed to implementing reforms and are ready to listen to advice from international organisations such as the EBRD
- coordination with other organisations is active on the ground to ensure there is no overlap between assistance programmes
- donor funding is available to finance the assistance.
Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.
Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Notes

1 See EBRD Legal Sector Assessments at www.ebrd.com/law.
2 A major example of this effort is the EBRD Model Law on Secured Transactions (available at www.ebrd.com/law).
5 See www.transparency.org. Out of a total of 146 countries surveyed, Tajikistan and Turkmenistan were ranked 130th, and Azerbaijan was ranked 140th, reflecting extremely high levels of corruption.
6 Examples of international standards used by the EBRD include the OECD Principles of Corporate Governance, the World Bank’s Principles and Guidelines for Effective Insolvency and Creditor Rights Regime, and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects.
7 See www.abanet.org/ceeli/areas/judicial_reform/un_basic_principles.pdf.
8 See www.coe.int/T/E/Legal_affairs/Legal_co-operation/Administrative_law_and_justice/Texts_6/Documents/Recommendation(94)12.asp.
9 See www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Legal_professionals/Judges/Instruments_and_documents/charte%20enga.pdf.
11 See Molly Inman, Julie Broome, International Standards as Tools for Judicial Reform, page 88 of this issue.
12 See www.abaceeli.org.
13 This list is non-exhaustive.
14 For example, in Croatia, Latvia, FYR Macedonia, Poland, the Slovak Republic and Uzbekistan.
15 For example, in Georgia and Estonia.
16 For example, in the Czech Republic and Romania.
17 See the draft law of the Republic of Armenia “On High School of Justice”; draft law of Georgia “On the High School of Justice of Georgia”.
18 Armenia, Azerbaijan, Georgia, Kyrgyz Republic, Moldova, Tajikistan and Uzbekistan.
19 See www.idlo.int.

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The enforcement of civil judgements in Russia
It is an axiom of jurisprudence that for every civil right there must exist an effectual remedy for its infringement. If adequate means of redressing an infringement are not provided by the law, then neither the civil right nor the remedy can be said to exist in any meaningful sense.¹ This is clearly a matter of paramount importance not just for the creation of a legal order rooted in the rule of law, but for human welfare and economic development. Uncertainty about the enforceability of lawful rights and claims will restrain growth by raising the cost of capital and weakening the competitiveness of business enterprise.

Russia’s constitution guarantees that the rights and freedoms of citizens will be defended by the state. Everyone has the right to defend his rights and freedoms in any manner not prohibited by law and everyone is guaranteed that his rights and freedoms will be defended in court.² The Russian Constitutional Court, in reviewing the constitutionality of certain provisions of the Law on Enforcement Proceedings,³ has cited these fundamental rights in support of its affirmation that “the defence of rights which have been infringed cannot be considered as effectual if the decision of the court or another authorised body is not enforced promptly”⁴.

The law suffers from four shortcomings:

1. it does not specify the basis on which legal title to assets of enforcement of decisions
2. imposes an unwarranted sanction on enforcement of decisions
3. ranks claims of secured creditors in relation to claims of other enforcement of decisions
4. it is silent on the application of set off of enforcement of decisions

### Transfer of legal title to assets sold at public auction

Neither the Law on Enforcement nor the Civil Code clarifies who is the seller of assets which are seized and sold at a public auction. The law is silent on the application of set off by the judgement debtor as a defence to enforcement of judgement debts.
sale concluded at auctions to the risk of invalidation. The law does not specify the basis on which title is transferred from the debtor to the purchaser at the auction.

According to Article 46(1) of the Law on Enforcement Proceedings, the levying of execution on the assets of a judgement debtor consists of the arrest (attachment) of the assets, their removal and their forced sale. It is the job of the bailiff to seize the asset and to arrange for the auction.

Article 54 of the Law on Enforcement Proceedings says that the sale of assets at auction must be carried out by a "specialised organisation" (специализированная организация). The government has designated the Russian Federal Property Fund as the sole “specialised organisation” entitled to sell assets in the enforcement of court decisions. 6

Article 63(2) of the Law on Enforcement Proceedings requires that the auction be conducted in line with the Civil Code. Article 447(2) of the Civil Code says that only the owner of the assets or a specialised organisation can act as the organiser of an auction. Furthermore, where a specialised organisation acts in this capacity, it does so pursuant to an agreement with the owner of the assets and on the owner’s behalf or on its own behalf.

In practice what appears to happen is that the bailiff enters into a consignment agreement with the relevant regional detachment of the Russian Federal Property Fund. On the basis of that agreement, the Russian Federal Property Fund sells the assets at the auction. 7

However, since the Russian Federal Property Fund sells assets at auction based on an agreement with the bailiff and not with the owner of the assets, it cannot be regarded as the seller. Although there is no developed court practice addressing this issue, the Supreme Commercial Court has held that, in these circumstances, the judgement debtor is the seller. 8 This seems a forced interpretation since the Russian Federal Property Fund does not enter into any agreement with the judgement debtor authorising the sale of the debtor’s assets at auction.

An alternative view is that the sale at public auction of assets pursuant to a writ of execution is a public law transaction. As a result, the bailiff is authorised to carry out the sale as part of the tasks imposed on him by the Law on Enforcement Proceedings. Based on this view, the bailiff is the seller and Article 447(2) of the Civil Code does not apply to him. 9

Given the cardinal importance of this issue in ensuring that legal title is duly and properly conveyed to the purchaser of goods sold at a public auction, it is imperative that it be clarified through an amendment to the Law on Enforcement Proceedings or the Civil Code. In the absence of such clarification, the risk that title to goods acquired at auction may be defective or voidable will likely cause bidders to bid less than they otherwise would, which harms the interests of debtor and creditor alike.

Neither the Law on Enforcement Proceedings nor the Civil Code clarifies who is the seller of assets which are seized and sold at a public auction in the enforcement of a court decision.

Failure to pay judgement debt voluntarily

Article 81(1) of the Law on Enforcement Proceedings states that where the judgement debtor fails to perform the court’s decision within the period prescribed by the bailiff, the bailiff is entitled to issue a decree obliging the judgement debtor to pay an “enforcement due” (исполнительский сбор). The enforcement due is equal to 7 per cent of the amount of the judgement debt. The Russian Constitutional Court has held that this is the upper limit which the bailiff is entitled to demand. The actual percentage assessed must be determined with reference to the particular circumstances of the case and the debtor.

Decisions of the commercial courts have held that the judgement debtor must pay this enforcement due notwithstanding the fact that payment of the judgement debt is made in full after the period fixed by the bailiff for voluntary payment. Payment must also be made if, after the expiration of that period, the judgement creditor and judgement debtor have entered into a settlement agreement in which the judgement creditor’s claims are resolved. 10

These rulings undermine the policy of deterrence which presumably constitutes the rationale for the enforcement due. Given that there is no fixed rouble cap on the actual amount which the debtor may be required to pay, the sanction will operate onerously on debtors against whom judgements for large sums are outstanding. (It may even force some into bankruptcy.) Since the enforcement due is a sanction imposed on the
judgement debtor for failure voluntarily to perform the court’s judgement, and is not designed to cover the costs of the enforcement proceedings themselves, the chief purpose of the rule seems to be to punish the debtor. This serves no useful function in a market economy.

The Constitutional Court has held that Article 77(1) of the Law on Enforcement Proceedings is unconstitutional insofar as it provides that the enforcement due must be deducted from the amount recovered from the judgement debtor.

### Priority ranking of claims of secured creditors

Articles 49 and 78 of the Law on Enforcement Proceedings, when read together with Article 334(1) of the Civil Code, seem to provide that, in cases where the debtor has no unencumbered assets against which unsecured judgement creditors can levy execution, such judgement creditors are authorised to attach and sell at public auction assets which are pledged in favour of secured creditors.13

Pursuant to Article 352(1)(4) of the Civil Code, the sale of a pledged asset at public auction will cause the pledge to terminate. However, the priority ranking of the pledgee’s claims, set out in Article 334(1) of the Civil Code, is completely emasculated by the Law on Enforcement Proceedings. This undercuts the whole point and purpose of security.

Under Article 134(4) of the Law on Bankruptcy, the position of secured creditors is much stronger. Only tort and wage claims arising prior to the creation of the relevant pledge will rank ahead of claims of the pledgee.

This discrepancy between the priority ranking of pledges under the Law on Enforcement Proceedings and the Law on Bankruptcy creates an incentive for pledgees to petition the debtor into bankruptcy whenever the debtor’s unencumbered assets are not sufficient to satisfy claims of the preferential classes of creditor.
Set off

As mentioned earlier, the Law on Enforcement Proceedings does not regulate the exercise of set off as a defence to the enforcement of judgement debts. Article 27 of the Law on Enforcement Proceedings lists the grounds on which enforcement proceedings terminate. Set off is not included among them. The general provision in the Civil Code, to the effect that set off is a permissible means of terminating civil obligations, is likewise silent as to whether set off can be asserted to extinguish a judgement debt. Russian court practice holds that set off is permissible where the judgement debtor has a cross claim against the judgement creditor. This must be supported by a writ of execution.\textsuperscript{14}

The implication of this seems to be that prior to the introduction of supervisory proceedings – which may be as long as 35 days from the date on which the bankruptcy petition was filed – set off is permitted. Furthermore, no explicit restrictions are placed on pre-petition set off, even on the eve of filing. This also applies when a creditor’s obligation to the debtor and/or his claim against the debtor (which may have been purchased at a deep discount) were acquired for the express purpose of enabling the creditor to exercise set off.

This enables creditors to strip assets out of the bankruptcy estate. It is thought, however, that set off exercised in such circumstances would be subject to invalidation pursuant to the voidable transactions provision set out in Article 103(3) of the Law on Bankruptcy if the set off occurs at any time after the date which is six months prior to the petition date.

Special enforcement regimes for particular assets and situations

The civil law of Russia lays down a series of rules stating, in essence, that creditors may not enforce their claims against specified categories of asset belonging to the debtor unless the debtor has no other assets against which execution can be levied. Among these preferred classes of asset are equity interests in limited liability companies,\textsuperscript{17} interests of partners in partnerships,\textsuperscript{18} interests of co-owners in property which is co-owned,\textsuperscript{19} and interests of participants in a joint activity in the property of the joint activity.\textsuperscript{20}

The effect of these rules is to displace pro tanto application of the provisions set out in Article 46 of the Law on Enforcement Proceedings. The execution must, in the first instance, be levied on monetary assets of the debtor and then, if these are insufficient to satisfy the claim of the judgement creditor, on the other assets of the debtor in such order as the bailiff determines.

There are also special rules restricting or precluding enforcement against assets which are the subject of particular types of transaction. For example, creditors of a lessee under a finance lease cannot levy execution against the leased asset.\textsuperscript{21} Assets transferred by the debtor to fiduciary management (дово

Russian court practice holds that set off is permissible where the judgement debtor has a cross claim against the judgement creditor. This must be supported by a writ of execution.

Set off is held not to be permissible where the judgement debtor has a cross claim which is not based on a writ of execution.\textsuperscript{15}

Why set off should be limited in this way is not clear. If the cross claim is valid, it seems wasteful to require the judgement debtor to obtain a writ of execution in order to apply a set off. Though it is beyond the scope of this article to discuss the treatment of set off in bankruptcy, it is worth bearing in mind that, pursuant to Article 63(1) of the Law on Bankruptcy,\textsuperscript{16} set off can be exercised following the introduction of the supervisory phase of bankruptcy proceedings (наблюдение) and the associated stay on creditor enforcement action. This is provided that the creditor exercising set off does not receive more than he would have under the priority rules for distribution of the debtor’s assets set out in Article 134(4) upon a bankruptcy liquidation of the debtor.
However, the unit investment certificates or mortgage participation certificates received in exchange for the transferred assets will be available for execution by creditors of the transferor and will form part of the transferor's bankruptcy estate.

The Civil Code gives to the courts general discretion to defer enforcement action by a pledgee for a period of up to one year. The Commercial Procedure Code gives commercial courts the authority, on the application of a debtor, creditor or bailiff, to defer enforcement of a judgement where circumstances hindering enforcement of the court’s judgement exist.

When discussing special enforcement regimes, brief mention ought also to be made to the stay on creditor enforcement action provided for in the Law on Bankruptcy. Supervision (наблюдение) and the concomitant stay on creditor enforcement action, pursuant to Article 63(1) of the Law on Bankruptcy, are instituted immediately when a petition filed by the debtor is accepted by the courts. If, however, the bankruptcy petition is filed by a creditor, there is a gap, which may last as long as 35 days, between the date on which the petition is filed and the date on which supervision, and the moratorium, are instituted (Article 42).

This stands in sharp contrast to the position under the 1998 Law on Bankruptcy, pursuant to which supervision, and the moratorium, were instituted as soon as the petition was accepted by the court and regardless of who filed it. The Law on Bankruptcy does not restrict creditor enforcement action during this gap period. Consequently, it appears that during that interval creditors are free to take enforcement action against the debtor. For example, creditors are able to enforce pledges, to repossess goods, to apply set off, to exercise step-in rights and to terminate or forfeit leases, licenses, franchises and contracts pursuant to ipso facto clauses providing for such termination or forfeiture upon the filing of a bankruptcy petition.

These actions may have the effect of crippling the debtor's business and its prospects for rehabilitation. This is a serious defect in the Law on Bankruptcy. It undermines two fundamental bankruptcy policies. First, it encourages a race to enforcement action (including self-help remedies) among creditors, thereby disrupting the policy of orderly and rateable distribution of the debtor's assets among its creditors. Secondly, it impedes the rehabilitation of the debtor.

Judgement proofing and fraudulent conveyances

No discussion of the enforcement of civil obligations in Russia would be complete without some passing reference to the opportunities afforded by the law itself for defeating the claims of judgement creditors.

There is no concept in Russia of a fraudulent conveyance, that is a transaction entered into by a debtor to defeat, hinder, delay or otherwise adversely affect the claims of creditors. There is, it is true, a general prohibition against the use of rights to cause harm to third persons. In addition, there is a broad-ranging rule that a transaction entered into for a purpose which is immoral or contrary to the fundamental principles of legal order is void. These general rules, however, do not furnish an adequate foundation on which to construct a body of law governing fraudulent conveyances. In any case, given the formalistic decision-making style of Russian courts, no body of judge-made fraudulent conveyance law has yet developed.

The voidable transactions article in the Law on Bankruptcy consists of a series of piecemeal rules prohibiting transfers by the debtor which occur during the six months preceding the petition date or thereafter. The rules prohibit transfers which result in the preferential treatment of some creditors compared with others or which involve distributions on equity interests in the debtor. The voidable transactions article also contains a more broadly worded provision which entitles the bankruptcy administrator to challenge any transaction entered into by the debtor with an “interested party” (i.e. a corporate affiliate, member of senior management, etc.) which harms creditors or the debtor itself.

Russian civil law states, in essence, that creditors may not enforce their claims against specified categories of asset belonging to the debtor unless the debtor has no other assets against which execution can be levied.
The limitation period for challenging these transactions is one year from the date when the bankruptcy administrator knew, or ought to have known, the facts giving rise to the action.\(^3\) Though this provision is potentially wide enough to cover fraudulent conveyances, it is only applicable to transactions with interested persons and can only be invoked if the debtor is in bankruptcy.

Fraudulent conveyances which occur outside of bankruptcy and which do not violate any specific provision of the law are, in practice, unimpeachable. Thus, asset stripping schemes could potentially be utilised to defeat the interests of legitimate creditors. Such schemes include transfer pricing within corporate groups, set off,\(^4\) transfer of assets to a captive insurance company for insurance payments of insurance premiums to a third party,\(^5\) and other dubious schemes.

**Conclusion**

In a state which lacks the necessary apparatus to ensure that court judgements are enforced routinely, the loss will tend to lie where it falls and perfectly lawful transactions, engaged in for the express purpose of allocating risks to those who are willing to bear them, will be upset.\(^6\) This undermines the commercial interests of judgment creditors and confers a windfall on wrongdoers. It is likely to stimulate a cynical disregard for legal rules and the rule of law generally. It is for these reasons that the enforcement of court decisions is a matter of transcendent importance. Development of an efficient regime for the enforcement of judgements in civil matters, adapted to the demands of a market economy, is an important prerequisite for the progress of legal reform in post-Soviet Russian.

**Notes**

1. Cf. R W M Dias (1985), jurisprudence, 5th edition, page 243, observing that a duty (the jural correlative of a claim or right stricts sensu) may exist even though the law imposes no sanction for the failure to perform it. For example, if the person subject to the duty has diplomatic immunity, the person possessing the claim is entitled to have recourse to third parties, such as insurance companies, which have collateral liability for the breach of duty.

2. Russian Constitution, dated 12 December 1993, Articles 45 and 46(1).


4. Decree No. 131, dated 29 July 2001, of the Constitutional Court. “On the case on the verification of the constitutionality of the norms of sub paragraph 7 of paragraph 1 of Article 7, paragraph 1 of article 77 and paragraph 1 of Article 81 of the Federal Law ‘On Enforcement Proceedings’“. The decree is in connection with petitions of the Commercial Court of Voronezh Region, the Commercial Court of Saratov Region and the complaint of open joint-stock company “Razrez Izhskii”, paragraph 2. (All translations from Russian are by the author.)


7. See, for example, Decree No. 1664/01, dated 23 October 2001, of the Presidium of the Supreme Commercial Court.

8. Decree No. 8924/01, dated 20 March 2002, of the Presidium of the Supreme Commercial Court.


10. Id. paragraphs 28 and 31.

11. The wording of that provision was amended by Federal Law No. 122-FZ, dated 22 August 2004. This amendment entered into force on 1 January 2005.

12. The government has decreed that the fee of the Russian Federal Property Fund is 5 per cent of the “value of the arrested property which is sold”. See Decree No. 260, dated 19 April 2002, “On the Sale of Arrested, Confiscated and other Property transferred to the Ownership of the State”, paragraph 4. If, as seems clear on a literal reading, this means that the Russian Federal Property Fund is entitled to a fee of 5 per cent of the proceeds of sale, without any cap on the aggregate rouble amount of the fee, this will result in exorbitant windfalls where high value assets are sold at auction.

14 Information Letter No. 65, dated 29 December 2001, of the Presidium of the Supreme Commercial Court, “Review of the practice of deciding disputes connected with the termination of obligations by way of set off of cross claims of the same kind”, paragraph 2; Decree No. F08-2293/2004, dated 3 June 2004, of the Federal Commercial Court of the Northern Caucasus Circuit.


18 Civil Code, Article 80.

19 Id., Article 255.

20 Id., Article 1.049.

21 Federal Law No. 164-FZ, dated 29 October 1998, “On Financial Rentals (Leasing)”, Article 23(1). Concerning the right of creditors of the lessor under a finance lease to levy execution on the leased asset, Article 23(2) seems to say that execution can only be levied by creditors on an asset under the finance lease transaction (e.g. claims of a bank lending funds to the lessor to enable it to purchase the asset or claims of an unpaid seller of the asset).

22 Civil Code, Article 1018(2)


24 Id., Articles 15(3) and 15(4).


26 Civil Code, Article 350(2); cf. the much more restrictive grounds for deferring enforcement of a mortgage set out in Article 54(3) of Federal Law, dated 9 July 1998, “On Mortgages”.

27 Commercial Procedure Code, Article 328(1).

28 Civil Code, Article 10(1).

29 Id., Article 169.

30 Law on Bankruptcy, Article 103.

31 Cf. Law on Bankruptcy, Article 19.

32 Id., Article 103(2).


34 E.g. purchasing claims against the debtor at a discount or incurring debt obligations to the debtor for the express purpose of building up a right of set off (where the counterparty is an existing creditor of the debtor).


36 Civil Code, Article 958(3).

37 Though reliable and up to date statistics are hard to come by, it seems a safe surmise that a comparatively small proportion of Russian court judgements are ever enforced. See Topolnitehnoye Proizvodstvo, supra note 12, page 59, referring to one study reporting that in 1999 roughly 60 per cent of court decisions in Russia were enforced (which marked a significant improvement from an even lower percentage for previous years).

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Reforming Russia’s judicial system
What is your assessment of the current status of the Russian judicial system?

If we cast our minds back to the assessments made four years ago at the All-Russian Judges Congress, we will see that both the judges themselves and President Putin, who attended the Congress, felt that the Russian judicial system had, in fact, already been reformed. This included the set up of an independent branch of the government – the judiciary – which continues to function well and does not require a radical shake-up or restructuring. Nevertheless, a few problems do remain, and they need to be addressed if we are to improve the operation of the courts.

In addition to our courts of general jurisdiction, we have established the Constitutional Court of Russia, as well as constitutional courts of constituent members of the country. Such courts have not existed before and these allow reforms to be delivered through a system of constitutional justice. No less important is the establishment and operation of arbitrazh courts, that are state courts dealing with commercial disputes. The effectiveness of the existing judicial system has been confirmed by the remarkably rapid increase in the number of cases referred to the courts. In arbitrazh courts alone, the number of petitions and cases dealt with has increased fivefold in the last 10 years. A similar development has occurred in courts of general jurisdiction. Russian courts are currently dealing with approximately 11 million cases a year; courts of general jurisdiction deal with up to six million civil cases, up to three million cases relating to the application of public law and up to one million criminal cases. The arbitrazh courts also deal with over a million cases a year.

Nevertheless, our society, and the Russian people as a whole, are not completely satisfied with the operation of the courts, which suggests that more work needs to be done in making justice more accessible and more effective. How significant is the actual influence of the authorities on the operation of the courts? What can be done to improve the situation?

It seems to me that during the years of legal reform we have created the main preconditions needed to neutralise the influence of the authorities on the courts, and this influence has been reduced to a minimum. Administrative court proceedings have been introduced whereby any individual or business person has the right to appeal against actions of the authorities which they regard as unlawful. (This includes the actions of the executive authorities and their personnel.) This right to appeal has been instrumental in causing the authorities to appear before courts as parties to the proceedings, rather than as entities capable of exerting unlawful influence on court decisions.

In Russia, we place great emphasis on ensuring the independence and autonomy of our courts and judges. This aim is promoted by our appointment and dismissal procedures, by the way courts are financed and in other ways.
Regrettably, it is still the case that administrative pressure is sometimes placed on courts examining specific cases. This occurs most frequently at the local level. That is why the Russian judicial system has been established and operates primarily as a system of federal courts. The federal status of courts and judges makes it easier for them to block attempts to exert unlawful influence on the workings of the courts.

Attempts of this kind should always be officially assessed in terms of the law and persons responsible for unlawful actions involving the administration of justice should be made to answer for them. Such actions should receive wide publicity, and the general public should be made aware of them.

Can judges hope for financial and institutional guarantees of their independence at a time of centralisation and consolidation of state power in Russia?

Consolidation of executive powers is not dangerous for the independence and autonomy of the judiciary. On the contrary, it will create a more favourable environment for the consolidation of the rule of law in our country. Perhaps the weakest link in our statehood is the absence of a vertical structure of executive authority. This has an adverse impact on the organisation of law enforcement and on law enforcement itself. The steps taken are intended to make executive authorities more effective, in particular so that we can organise the enforcement of both federal and regional laws, especially those relating to business.

The consolidation of executive powers is intended to make executive authorities more effective, in particular so that we can organise the enforcement of both federal and regional laws, especially those relating to business.

How do you regard the assertion that Russian judges are corrupt? How serious is this problem in your view?

The view that the Russian judiciary is corrupt is greatly exaggerated. I should not like to be among those heading a corrupt judicial system and I do not think I find myself in this situation. Since my knowledge of the judiciary and its work comes from within, I can say that an overwhelming majority of judges, if not all, are upholders of the values of the law. These judges do not conduct themselves in an unlawful way, and this includes accepting bribes.

We have developed and are putting into practice mechanisms designed to prevent corrupt practices among judges. These include personnel selection and appointment procedures involving the judiciary and a system of disciplining judges who have strayed from the straight and narrow, including early dismissal. The mechanisms also make judges criminally liable for contravening the law. To date, criminal charges have been brought against two arbitrazh court judges, at the proposal of the Office of the Prosecutor General.

It would be wrong, however, to maintain that the judiciary has been purged of all traces of bribery. The privatisation of state property, conducted at lightning speed, was accompanied by many transgressions. These included the participation of illegal businesses in the privatisation process, and criminal methods of dealing with commercial disputes, which proliferated in the early 1990s. The arbitrazh court system was actively involved in combating these processes, and as both the system and the scope of its activities expanded, so unlawful methods of conflict resolution were driven out.

This shows that the work of the arbitrazh courts has helped to drive criminal elements out of our economy and to restrict their operation. In spite of this, such elements continue to exist and to exploit the shortcomings of the law and of law enforcement practice to achieve their lawless ends. (This includes the unlawful seizure of other people’s property, failing to meet contractual obligations, tax evasion and so on.) The money that criminal businesses have is also used in attempts to bribe judges. The judiciary must, therefore, continually devote every effort to combating this menace.

It is evident that further measures will need to be developed. It seems to me that this is an area where the initiative should be taken by the judiciary itself. It should play the most prominent role in driving bribe taking out of its ranks, in identifying dishonest judges and bringing them to book. To achieve this, judicial qualifications boards must be made more effective, and the law enforcement agencies must do more to identify cases of bribery and to prosecute the guilty parties.

This is a problem that must be addressed by the joint efforts of all members of society – the law enforcement agencies, the judiciary itself and the community at large, including the business community. We must imbue business dealings with the principles of integrity, honesty and strict observance of the law and of contractual terms and conditions. This will require the cooperation of government and public institutions, including the business community. I believe this would be in the interest of all of us, and that making more tangible efforts in this direction would prove worthwhile.
In your view, what should be done to optimise the processes of law-making, law enforcement and the reform of the judicial system in Russia? Could you name two or three specific directions judicial reform should take?

I see the following as the principal tasks for today. First, bearing in mind the increasing load shouldered by the courts, we need to retain and further expand the accessibility of justice to individuals and organisations. Second, we need to make at the same time giving them greater responsibility for ensuring that justice is responsibly administered.

A third area of reform would be to offer comprehensive support to the work of judges and courts. This should include providing new court buildings, modernising and refurbishing existing ones, providing judges with the facilities and modern equipment they require, streamlining the information systems used by the judges and the courts and improving the organisation of clerical work and of court proceedings. Much has already been done in all these areas, and tremendous improvements can be seen.

One of the principal areas of reform must be the wider application of modern, flexible forms of the administration of justice. This should include various ways of achieving an out-of-court settlement, via negotiation, mediation and conciliation, as well as alternative methods of dispute resolution.

the administration of justice more efficient. By this I mean the quality, lawfulness and validity of the awards, their enforceability and actual enforcement.

One of the principal areas of reform must be the wider application of modern, flexible forms of the administration of justice. This should include various ways of achieving an out-of-court settlement, via negotiation, mediation and conciliation, as well as alternative methods of dispute resolution, such as arbitration tribunals and commercial arbitration courts.

Another area of reform would be to strengthen the judiciary. This could be done by improving professional training for judges, involving the best and most experienced members of the legal profession, and those with the highest moral standards, in the work of the courts, and providing for the continued education of judges and their further professional development. To achieve all this, we will need to address a number of problems, including improving the status and salaries of judges, while

For example, in the last four years the funding of the arbitrazh court system has grown fivefold, with a resultant improvement in working conditions. There has been a significant improvement in the acquisition and application of modern technology, which has enabled judges to cope with the ever-increasing workload without compromising the quality of their work.

The Russian Constitution provides for a system of administrative justice (Article 118), that is a system of courts that specialise in dealing with private citizens’ complaints against the actions of government authorities, and other cases in which at least one party is the government, as represented by its various agencies. What stage has the creation of this system reached?

The Constitution, including Article 118, does not directly provide for the creation of a separate system of administrative courts. What it does provide for is administrative proceedings. Administrative proceedings have been conducted in Russia, and I think quite successfully, for the past 15 years. such disputes not on the private individual or business person complaining about a legal instrument issued by a government agency, but on the agency which has issued the instrument.

However, it is true that within the system of courts of general jurisdiction there are as yet no subdivisions specialising in administrative disputes. This system has neither specialist courts nor boards. A Bill now being debated by the State Duma evidently has the aim of creating such subdivisions for the general jurisdiction courts. I believe that these proposals are entirely correct and well founded. In fact, what needs to be done now is what was done almost 10 years ago in the arbitrazh court system.

Naturally, we do not rule out establishing a special administrative court system in the future, separated both from courts of general jurisdiction and from arbitrazh courts, and handling all administrative disputes. But since this would be a major and expensive task, it is not likely to be undertaken in the immediate future. Nor have we established the necessary legal framework as yet.
The Russian legal system is in the process of widespread reform. In particular, there have been significant changes in corporate law and in securities markets legislation. What is being done to develop the expertise of the judiciary in the area of business law? Do you consider that what is being done is sufficient? What areas in your view require special attention?

This is an area of major interest for us - we are working constantly to improve our judges’ qualifications. We have established a continued learning system whereby judges are trained both locally, in all arbitrazh courts, and centrally, at the Russian Civil Service Academy attached to the Office of the President, and at the Academy of Justice, which was established especially for this purpose by the Russian Supreme Court and the Russian Supreme Arbitrazh Court.

Arbitrazh courts have whole benches and individual judges who specialise in dealing with corporate disputes and disputes relating to the operation of the securities market. This is one of the most complex areas of relationships and one of the most complex parts of our legislation. It is also one area where Russian legislation is not yet fully developed. As a result, the practice of dispute resolution by arbitrazh courts still leaves much to be desired. These are interrelated areas, and we need to devote considerable attention to them in the immediate future. As I mentioned, it may be that we ought to establish specialised benches dealing with such disputes. Maybe we need to streamline our monitoring of economic processes in this area and promote a joint effort between government authorities and the business community to eliminate undesirable events associated, for example, with so-called hostile takeovers and with the unlawful seizure of businesses through the acquisition of their shares.

What role, in your view, can and should international organisations play in the process of reforming Russia’s legal system, and in particular in professional development programmes for the judiciary? In what way can institutions such as the EBRD or the World Bank optimise their technical assistance to the process of judicial reform in Russia?

It is difficult to overestimate the contribution of international cooperation and of the application of global experience to the reform of our judicial system. The Conceptual Document on Judicial Reform in Russia reflected our needs and our own national experience. However, it also provided a careful study of the administration of justice available in the West – in advanced democracies with efficient operating markets – and ensured the application of this experience in Russia.

A highlight of the 15 years of judicial reform has been our cooperation with many institutions abroad, both national and international. It has taken the form of expert assessments of draft legislation, both dealing with commercial relations and relating directly to the work of the courts. For example, our Code of Arbitrazh Procedure was assessed by leading specialists recommended by the Council of Europe.

We greatly value the help we have had with the professional development of members of our judiciary. We have already completed a major project that involved the participation of the World Bank, the EBRD and the Council of Europe and the European Union’s TACIS programme. These professional development courses always involve the participation of leading Russian specialists, professors and judges, together with professors and judges from Europe, the US, Canada and other countries.

Our cooperation could be further enhanced by concentrating joint efforts on the most urgent problems faced in improving the administration of justice. These include the use of up to date organisational methods and facilities in the work of the courts, and the provision of information technology relating to international private and public law as well as to foreign law, in particular European law.

An overall trend in the development of our legislation is its increasing convergence with European standards. Clearly, the legal instruments now being drafted in Russia must be as close as possible to the standards of European business law. This will enable Russia, even while it remains outside the European Union, to interact and integrate with the European and world economy.

Foreign investors regard the enforcement of judicial awards in Russia as particularly important. It is no secret that an arbitrazh court award in favour of an investor frequently doesn’t mean that it will be successfully enforced. What is being done to improve the situation and to increase the effectiveness of agencies responsible for the enforcement of judicial awards?

We too regard this issue as being of major importance, since the effectiveness of the system ultimately depends on the ability to enforce judicial awards. We devote a lot of attention to the enforceability of awards, that is, to handing down awards that can actually be enforced. We have created a special service, the bailiff service, in Russia. Laws on enforcement proceedings and on the bailiff service have been drafted, adopted and put into practice, following an initiative by the Supreme Arbitrazh Court. Much remains to be done, however, to improve the situation in this area.
Equally, we need to improve the courts’ supervision of the bailiffs’ actions. We are already dealing with a large number of cases relating to the activities of bailiffs. In the first half of 2004, we dealt with 5,487 cases challenging the decisions and the actions (or failure to act) of bailiffs, and ruled in favour of the claimants in 1,573 cases. However, the service itself needs to be further strengthened, and its effectiveness and lawfulness improved.

Failures to enforce awards frequently occur for reasons beyond the control of the courts and of the state in general, because some contracts involve entities which are dishonest, or which are financially unable to assume contractual obligations. Clearly, awards made against such insolvent entities will be unenforceable. It is also evident that we must work on relationships between Russian and foreign partners, so that our mutual business interests can develop.

Do you consider the procedure for the recognition and enforcement of the awards of arbitration tribunals currently in use in Russia meets international standards? In your view, how justified or lawful is the frequent use by Russian courts of regulation on the illegality of arbitration agreements and the public order clause?

I think this procedure does meet international standards. Our arbitrazh courts and judges are very interested in revitalising arbitration tribunals and in developing the arbitration tribunal procedure. That is why we have been instrumental in drafting the statutes that will form its legal framework. An Interim Regulation on Arbitration Tribunals was adopted in 1992, at the same time as the Code of Arbitrazh Procedure. In 2002 we initiated the adoption of an updated Law on Arbitration Tribunals, which was passed at the same time as the new Code of Arbitrazh Procedure.

These two instruments are mutually complementary. There are no contradictions between them and they both conform fully to international and European standards of arbitration tribunal proceedings, and to those of commercial arbitration. In particular, they meet all the requirements of the New York Convention on the Recognition and Enforcement of Arbitration Awards.

In addition, we have a special Law on International Commercial Arbitration that also conforms to the requirements of international European standards. Consequently the key issue is the ability of the judiciary to enforce arbitral tribunal awards with regulations currently in force in Russia. We are monitoring and analysing the current practice and use both the guideline Supreme Arbitrazh Court rulings and specific awards to promote adherence of the interaction between national courts and arbitration tribunals to international standards. In particular, the new Code of Arbitrazh Procedure introduces measures to support arbitration tribunal proceedings, including providing preliminary security for the enforcement of their awards.

As to the frequency and validity of courts using the regulation on the voidability of arbitration agreements and the public policy (ordre public) clause, these are issues that we are keeping under continual scrutiny. We are trying to clamp down on cases of unlawful reversal of arbitration awards and unlawful refusals to enforce their awards when they have been made in compliance with existing regulations.

However, the work of arbitration tribunals needs further improvement. The popularity of arbitration tribunal proceedings will largely depend on the professionalism of the arbitrators, their good faith and impartiality, and on the good faith of the participants themselves. Nevertheless, occasional errors do occur in this area, especially over the unjustified use of public order clauses. This is one of the issues that continue to concern us.

Certain CIS countries (the Kyrgyz Republic and Kazakhstan) have decided to abolish arbitrazh courts and to establish an integrated court system. What is your view of the effectiveness of such measures? What is your overall assessment of the judicial reforms undertaken by former Soviet Union countries in the last 10 years?

I wouldn’t like to attempt to assess other countries’ reforms. We are actively cooperating with those countries’ legal communities, their scholars and judges. We are trying to study each other’s experience carefully, to help where necessary, and to make use of all that is best in their work. Further, we also try to avoid the mistakes others have made. In other words, there is a sense in which we are all learning from one another. That is the only standpoint from which
I might be able to analyse and give a view of what has happened in those countries. We see them as having some undoubted achievements and some failures.

The abolition of arbitrazh courts in Kazakhstan has had an obvious adverse impact, because it has resulted in Kazakhstan's judicial system losing a significant number of its best judges, who were experienced in resolving tremendously complex commercial disputes. Many of them have acquired or retained Russian citizenship during this time, and have left Kazakhstan.

Each country has its own judicial system, usually for historical reasons. It would be quite impossible to make the judicial systems of different countries conform to a single pattern, or follow a single model or design. I think that it is simply unacceptable to attempt to make all countries’ judicial systems conform to some common pattern. The complexities which arose in the Kyrgyz Republic and Kazakhstan as a result of the abolition of arbitrazh courts are undoubtedly temporary difficulties. They will gradually be resolved. As far as I know, Kazakhstan, for example, has been forced to return to the old system in some ways. It has established inter-regional courts that deal with commercial disputes, for instance. No doubt this step has made it possible to mitigate the negative impact of the abolition of arbitrazh courts.

Taking stock of your work as Chairman of the Russian Supreme Arbitrazh Court, what would you say were its main results? What do you feel you have managed and what have you not managed to achieve?

By and large, I am satisfied with what I have managed to achieve in my 14 years. 1991 was the year in which the arbitrazh court system began with the establishment of the first arbitrazh court, the Supreme Arbitrazh Court of the USSR. (This court did not, however, survive long.) We then established courts which dealt with commercial disputes, both in Russia and in its constituent members. Throughout those 14 years, the arbitrazh court system has continued to grow and to improve its procedures.

We can also be pleased with the structure of our court system. We have courts which operate fairly efficiently and I am hoping that very shortly we will have courts of appeal. These courts, like courts of cassation (courts of third instance), will be unrelated to the country’s administrative or geographic divisions, and will simultaneously serve several constituent members of Russia. This will be an important factor in ensuring the true independence and autonomy of the judiciary.

I believe that over the years we have also assembled a fine, professional judiciary. We have managed to create the conditions that the administration of justice requires – funding, financial security and providing the courts with all that they need.

We need to preserve the spirit of our court system – creativity, realism, sober judgement and well thought-out actions and decisions.

We can be pleased that our judicial system not only manages to administer justice in commercial disputes with some degree of success, but also that it is capable of continual improvement. Within a very short period of time, the laws have been updated three times to keep in step with real life, and with the tasks and problems faced within society. These laws were the Codes of Arbitrazh Procedure of 1992, 1995 and 2002.

Nonetheless, a sense of dissatisfaction remains. Not everything has been achieved, and not everything has turned out the way we had imagined and hoped. I believe the judiciary needs to be expanded and strengthened. It has, for example, proved impossible to solve the problem of granting judges the status and salaries that would enable us to appoint our country’s best and most prominent lawyers to the judiciary. We would like this situation to resemble that of other countries. It would also be good to be able to say that not a single Russian judge can be bribed. Regrettably, I don’t feel confident that I can say this at this stage.
How do you see the future of the courts in Russia? What, in your view, should your successor do to increase the effectiveness of arbitrazh courts?

I think continuity needs to be assured. It is important to continue our pursuit of constant development and self-improvement. We need to preserve the spirit of our court system – creativity, realism, sober judgement and well thought-out actions and decisions.

My successor will need to be very familiar with our court system and its operation. This is no easy task. To know the work and the system well you need to live with it. The most important thing is not to be in a hurry - you will learn more that way. If my successor comes from the Russian judicial system, it may be that he will have those qualities from the outset. But if he comes from outside, then he will need to spend quite a bit of time acquiring the knowledge and views essential to further increase the effectiveness of the arbitrazh courts. This is something they will inevitably need to do, and it will certainly be their continuing challenge.

Notes

1 “Arbitrazh courts” (арбитражные суды) are permanent state courts with a mandate to resolve commercial disputes between enterprises. They should not be confused with “arbitration tribunals” (третейские суды) which are a non-judiciary dispute settlement mechanism.

Interviewee
Veniamin F Yakovlev
Former Chairman of the Russian Supreme Arbitrazh Court

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Taking IDLO’s expertise to eastern Europe and the CIS
IDLO and the EBRD launched a pilot programme for capacity building of the Kyrgyz Republic judiciary in 2005. It is hoped that IDLO and the EBRD will be able to build on this experience and consider similar programmes in the region in the future. These programmes will help develop the capacity of the judiciaries and enable them to participate fully in society, mediating the changing relationships and conflicts associated with the maturation of market economies.

Relevance of judicial reform

In contemporary debates on economic development, new institutional perspectives hold sway. It is now widely agreed that strong public and private sector institutions are necessary for enabling conditions for economic growth. Among the consequences of this perspective is the renewed vigour with which law and development is treated in discussions of development policy.

In contrast to earlier approaches to law and development, where great emphasis was placed on getting the formal attributes of legal systems right, current efforts reflect more considered thinking on the constitutive elements of strong legal systems. It is increasingly recognised that formal instruments, while no doubt important, are in an important sense secondary to considerations of institutional performance. The shorthand way of referring to this strand in law and development thinking is rule of law.

Simply stated, rule of law advocates contend that without institutions capable of adjudicating and enforcing legal norms, legal systems cannot function. Within this context, the role of the courts has taken centre stage. Getting courts to do their jobs properly has become a – some would even say the – central concern in legal reform. Legal reform is now judicial reform and vice versa. Since embarking on this new course, the development community has gained a great deal of experience in conducting judicial reform programmes. Despite becoming a dominant theme in the law and development field, evidence suggests that legal and judicial reform is extremely difficult with success the exception rather than the rule.¹

In light of the difficulties associated with achieving successful legal and judicial reform, it is important to be as knowledgeable as possible about what works. In this sense, applying lessons gained from institutional reform activity in general and legal and judicial reform specifically is essential. This learning points to capacity building as of central importance to the success of any reform programme.²

Drawing from thinking on the role of human capital endowments to institutional performance, the development community has come to see improving human capacity in state institutions as equally important as defining formal legal attributes. The following article is set against the background of the international community’s experience in carrying out capacity building for institutional and judicial reform. It draws specifically from the experience of the International Development Law Organization and offers some lessons for future activities.

This article draws on the experience of the International Development Law Organization (IDLO) in building judicial capacity in transition countries. It highlights key training projects undertaken by IDLO, sets out challenges to reform work and offers lessons learned.
Learning on capacity development

To non-specialists, the term capacity development sounds like jargon. In reality, the notion behind the term is simple and straightforward. It relates to the practical functions or dysfunctions of an institution or individuals. According to a definition developed by the United Nations Development Programme (UNDP), capacity constitutes the ability to solve problems, perform functions and achieve goals.

When we talk about improving or building capacity, we are thus talking principally about improving the abilities of individuals and institutions to carry out purposeful activity.

Capacity requires both material resources and intangible know-how. Institutions that lack pens and paper, working buildings or research materials lack critical resources to carry out their work. Equally ineffective are institutions that lack accumulated knowledge, maintain efficient procedures, or retain managers who can direct and oversee workflows. Where either deficiency exists, institutions will not achieve their goals or solve problems.

One can conjure the case of an institution with poor management and great equipment or great management and terrible equipment and readily predict the results.

Of the two types of capacity deficiencies, material ones are, in theory, easier to solve. A donor or government could address the problem by simply procuring relevant equipment or buildings. Remediing intangible capacity deficiencies is a greater challenge. It is, according to one observer, something of a “black box”.

In other words, determining that an institution suffers from deficiencies in the way it works opens the door to a wide range of possible prescriptions. Skills development and process changes are among the options. Fortunately, recent research has begun to shed light on the nature of intangible capacity building and has provided a better understanding of how to perform this work. For the purposes of this article, reference to capacity building will relate to skills, systems or process enhancements rather than material contributions.

Most observers view capacity building as time consuming and difficult work. Because capacity building activities occur in nearly all areas of legal and institutional reform, the literature quite rightly suggests that no blueprint for successful capacity building exists. What works in one context may not work in another. The need to adopt different approaches highlights the importance of flexibility in designing these activities. While no doubt true, these observations amount to few clear guidelines. Essentially, they speak to the need for pragmatism, on which disagreement is hard to muster.

Fortunately, improved analytical work has generated more tangible lessons. Five considerations are most critical to designing appropriate capacity building programmes. First, one needs to be clear on whether individual or institutional capacity building is needed. Lack of clarity on this question leads to a failure to conduct activities on an adequate scale or to supply the counterpart with relevant content. Depending upon the focus of the engagement, different approaches will be needed.

An institutional deficiency might be remedied through technical assistance designed to improve a particular system, with follow up training for those persons charged with operating the system. Alternatively, addressing the lack of awareness of basic commercial law concepts among the entire judiciary in a country will require more individualised attention. Such a broad national need would require substantial resources and could not be remedied by training judges in one city or region.

A second point is that capacity development must be driven by domestic actors. Any programme of legal reform will need to be implemented by local stakeholders. For this to occur, reforms must be backed by political force. Meaningful change of institutions will give rise to winners and losers. Basic political logic suggests that those who are disadvantaged by reforms will seek to divert change, unless greater power can be brought to bear on the side of the reforms. Evidence suggests that fundamental change can only occur as a result of some cataclysmic societal event, such as the events of 1789 in France or 1989 in the former Soviet Union.

Third, attention must be devoted to the question of incentives. As the development economist Albert O. Hirschman noted, the problem with some institutional reforms is that the very persons charged with implementing...
the reforms are the ones who will be most disadvantaged by them. The donor approach to promoting institutional reforms in connection with lending activities may offer officials incentives to accept proposed reforms but such acceptance cannot then be considered endogenous in nature.

Moreover, agency theory suggests that this approach may be counterproductive. In this case, the donor as principal must in essence rely on the borrower government as agent to undertake reforms. Accordingly, any agreement conditioning loans on undertaking institutional reforms will generate agency costs related to non-compliance with the principal’s instructions. Even if effective monitoring mechanisms could be devised, it is clear that donors have no rigorous enforcement power in this situation. As suggested by contemporary arguments on the need for an endogenous basis of reform, the necessary resolve to institute reforms must occur locally and must be genuine.

It is important that the content of the capacity building programme responds to actual needs ... they must distinguish between tacit and explicit knowledge transfer.

Although tempting to reduce the question of incentives to financial considerations, the role of instilling professionalism on both institutional and individual levels deserves greater emphasis. From this standpoint, reform programmes may be carried forward not as the result of external pressures but through the desire among those running the state to improve the system and then work through the system once reformed. Recognition of the importance of building professionalism should not blind anyone to the reality that under conditions of scarcity, problems of poor compensation among state employees and the disproportionate benefits resulting from opportunism, may constitute powerful countervailing forces.

Fourth, it is important that the content of the capacity building programme responds to actual needs. In this sense, one needs to distinguish between tacit and explicit knowledge transfer. International providers of capacity building services have little difficulty relating explicit knowledge. One can find any number of experts to explicate the content of the US Securities Act of 1933 or the UK Financial Services Act. Such knowledge may or may not be useful to lawyers or officials in recipient countries. More challenging and potentially more useful is the process of transferring relevant tacit knowledge. Hence, the learning of a securities regulator from the United States on how firms are regulated or of prosecutors on how they have mounted successful enforcement actions against financial fraud could be relevant and supply needed knowhow.

The challenge, of course, is to relate tacit knowledge that is relevant to the circumstances of the local beneficiary. For a non-national to be in a position to speak meaningfully to a foreign audience of legal or judicial professionals requires great efforts to understand not only what those officials may legally do but also how they actually perform their functions.

Finally, for capacity building to support meaningful reforms it must be sustainable. Evidence suggests that donor-sponsored capacity building is frequently unsustainable. This is due to a lack of resources to maintain support for capacity building activities after a project concludes or a lack of political backing for continuing an activity, for example.4

As a result, donors increasingly require evidence of some “leave behind” after the conclusion of the activity.

Experience in judicial training

IDLO has provided technical assistance and capacity building to ensure sustainability in legal development in a large number of countries. It has contributed to strengthening the judiciaries in Afghanistan, Democratic Republic of Congo, East Timor, Egypt, Guinea, Kosovo, Laos, Lesotho, Mali, Mongolia, Oman, Philippines, Poland and Swaziland. Highlights of IDLO’s work in the EBRD’s countries of operations are shown in Table 1.

On the following pages are descriptions of activities in three of IDLO’s jurisdictions. Each has recently emerged from violent conflict. Due to the intense capacity building needs in these jurisdictions, they are particularly relevant case studies on conducting capacity building within the judiciary of transition countries.

IDLO activities in the EBRD’s region

Kosovo: Practical Judicial and Prosecutorial Training Programme

Following the end of the conflict between Yugoslavia and NATO in 1999, the United Nations Mission in Kosovo (UNMIK) re-established the judiciary and began re-appointing ethnic Albanian, Roma, Turk, and, with less success, Serb judges and prosecutors. Many of these judges had served as judges prior to 1989 but had not served as judges or prosecutors for almost a decade.
The newly appointed judges and prosecutors were confronted with two main challenges. First, they had never experienced the transition from a socialist to democratic form of government with an independent judiciary. Secondly, they had not functioned officially as judges or prosecutors nor practised law for almost 10 years. The challenge of providing practical skills training for this population was based on the need to change the mindset of judges, to prepare them for the new system of justice arising under UNMIK direction and to furnish them with the requisite legal skills to better perform their roles.

To rebuild capacity, IDLO commenced a programme of training and technical assistance for the judiciary in Kosovo, with the support of USAID, in 2002. The project was managed through a cooperative process in which USAID and the Kosovo Judicial Institute shared decision-making. The objective of the programme was to bring all existing judges and prosecutors to a minimally acceptable level of competence in practical skills. Specifically, the project focused on certain practical skills that are considered the cornerstones of the capacity-building process.

To design a curriculum and training programme best suited to enhancing the professional capacity of judges and prosecutors, IDLO conducted a formal needs assessment. This included qualitative and quantitative approaches. The qualitative research first consisted of desk research on social, political, legal and economic matters. Based on this background, IDLO conducted meetings with a wide range of local and international officials, judges, lawyers, prosecutors, and civil society organisations. To verify these qualitative findings, IDLO initiated a formal survey.

After IDLO drew up relevant questions, a professional survey firm was used to meet with 132 judges and 30 prosecutors from each of the five regions in Kosovo. These judges and lawyers were asked questions related to the content of their work, their daily work routines, as well as attitudes towards their jobs and what they considered their training needs to be. The results of these interviews were compiled and analysed by statisticians.

As a result of this research, IDLO mapped out the tasks required of judges and prosecutors. Through analysis of the survey data, IDLO developed a comprehensive curriculum designed to address a wide range of skills topics. In light of the terrible skill deficiency of the Kosovar Albanian judges, due to their 10 year hiatus from practice, improving basic skills was a priority.
IDLO activities outside the EBRD’s region

Afghanistan: Interim training for the Afghan judiciary

After the fall of the Taliban regime in 2001, the Afghan judiciary required massive assistance to improve legal education and its training systems. To respond to this need, IDLO launched a programme, with the support and cooperation of the Italian government, to train Afghan judges.

Under the prevailing legal education system in Afghanistan, law students studied either Sharia or secular state law. During the past two decades of conflict, Afghanistan’s legal education and training system has been significantly affected and has generally become dysfunctional. Moreover, the selection and appointment of judges has not followed the criteria provided by law. According to the United Nations Mission in Afghanistan (UNAMA), there are more than 3,000 judges and prosecutors in office, but only a third of these are educated at university level.

The current level of instruction in the Law and Sharia Faculties in Afghanistan is reportedly very low. Since approximately half of the participants have received their Bachelors degree from the Sharia Faculty with the other half from the Law Faculty, it is clear that poor basic legal education is not unique to either group.

To compensate for inadequacies in basic legal education, IDLO launched an intensive programme covering 28 topics. The training methodology IDLO used was essentially participatory and interactive. It included question-and-answer sessions; mock trials; legal drafting exercises; interpersonal communication with witnesses, practitioners, and administrative court personnel; and problem-solving case studies related to financial and organisational court management.

This training model limited the size of participants to 30, thereby ensuring active participation and effective group activities. In addition to the subject expert, a trained IDLO Course Manager was continuously present in the classroom to facilitate the task of the expert, ensure that the topics were clearly delivered and that the participatory-interactive methodology was applied. This approach was best suited to the overcome the skills deficiencies of the participants and thereby improve the level of judicial practice in the country.

In addition to deficiencies in the legal education and training system, Afghan legal literature has been largely destroyed or lost as a result of the conflicts. To address this deficiency, IDLO has assembled a comprehensive collection of Afghan laws out of extant sources. IDLO made this resource available to the international community and uses it in the training courses.

Overall the participants have significantly built capacity in terms of knowledge and understanding of both substantive and procedural law. IDLO’s assessment is that between 30 per cent and 40 per cent of the participants are now able to correctly identify the applicable laws and norms. The training has resulted in the rendering of better decisions in terms of both legal analysis and judicial drafting. Training staff noted that participants have generally gathered a deeper understanding and knowledge of the role of the judiciary and judicial ethics, fair trial principles, pretrial and trial management in civil, commercial and criminal cases, and international law and human rights standards.

It is noteworthy that participants are increasingly aware of the need for attorneys and prosecutors to take part in criminal proceedings, a development which its significance cannot be overstated. According to the UNAMA Justice Technical Annex, the IDLO training programme satisfied 42 per cent of the training needs for professionally qualified magistrates in Afghanistan in 2004.

The newly appointed judges and prosecutors were confronted with two main challenges. First, they had never experienced the transition from a socialist to democratic form of government with an independent judiciary. Secondly, they had not functioned officially as judges or prosecutors nor practised law for almost ten years.
IDLO has implemented far-reaching and ongoing programmes. Some have emphasised the improvement of basic skills, recognising that in some cases judicial training has made up for deficiencies in basic legal education.

**East Timor: Judicial Training Programme**

In 1999 East Timor voted overwhelmingly to become independent from Indonesia. After terrible post-independence violence and the restoration of order by a multinational force, the United Nations was faced with a soon-to-be-independent state with no remaining infrastructure. Accordingly, the UN Security Council Resolution 1272 mandated a new mission, the UN Transitional Administration in East Timor (UNTAET).

UNTAET was given overall responsibility for the administration of East Timor and capacity building for self-government. One of the first items on the agenda was to establish rule of law in East Timor. Rule of law was viewed as vital to the success of the mission as it “sets a precedent for the future and can be a central factor in the long-term development of democracy, economic development and respect for human rights.”

In the aftermath of the political strife, fewer than 10 lawyers remained in East Timor. No East Timorese had ever held the position of judge or prosecutor under Indonesian rule and the field of prospective attorney candidates grew to include only 60 novices. Hence, intensive training of the legal community was made a priority.

It is in this context that IDLO initiated its judicial training activities in May 2000. These were intended to rebuild capacity within the legal system from the ground up. To get participants used to working with the relevant law and developing needed skills, IDLO utilised a participatory form of training that involved simulation exercises and group discussions based on issues of particular interest. Approximately half of the courses conducted focused on criminal law and procedure, and the remaining on civil law and procedure.

The programme also drew on the applicable law in East Timor, which consisted of UNTAET regulations, Indonesian law and applicable international human rights conventions. In the course of providing the training, however, a great change occurred in the nascent Timorese legal system when an appeals court ruled that the law of Portugal, its former colonial power, applied. The ambiguity caused as a result of this decision has shaken the system profoundly.

The objective of a new phase of prosecutorial training in East Timor (February-December 2004) was to provide all prosecutors of newly independent East Timor with the required practical skills and substantive knowledge to enable them to efficiently discharge their functions. Specifically, the training programme for prosecutors was intended to ensure greater homogeneity, efficiency and coherency of prosecutorial techniques and methodology across the courts. This training should contribute to a fair, independent and predictable administration of justice in East Timor, consistent with internationally accepted human rights and fair trial standards.

**Summary of IDLO activities**

What ties these three cases together is the particularly low levels of capacity caused by individual, as well as systemic, factors. On the individual level, basic legal education in all three countries was poor and problematic. In Kosovo, judges had been trained through the federal Yugoslav system, however, local law schools reportedly had generally lower academic standards. This problem was compounded by the fact that judges had not practiced for years. In Afghanistan, the lack of normalcy in daily life for many years coupled with the diaspora of educated persons, resulted in low quality legal education for most. The split between secular and Sharia law faculties has created two different groups of legal professionals, each with a different legal background. In East Timor, the only legal culture recognised until the conflict was Indonesian. Hence, Timorese lawyers and judges had all been trained in Indonesian law and were now being asked to apply Portuguese law with which they had no familiarity.

Likewise, all systems were challenged by a great deal of legal ambiguity. In all three countries, just identifying the relevant law was a major stumbling block. Without clarity on the relevant law, it is difficult to conduct effective capacity building. In all three cases, the programmes IDLO implemented were far-reaching and ongoing. The donors supporting these programmes have recognised the depth of the capacity building needs in the judiciaries and thus supported long-term programmes. Moreover, emphasis was placed on improving basic skills, recognising that in some cases the judicial training was making up for deficiencies in basic legal education.
Lessons learned in IDLO activities

The challenges involved in improving capacity of the Kosovar, Afghan and Timorese judiciaries are significant. These experiences have helped clarify lessons learned in activities elsewhere. The following section highlights some critical lessons.

The scope of capacity building needs to be realistic.

An inherent tension in the judicial reform area is the tendency for donors to procure services and define terms of reference for service providers ex ante. Where terms of engagement have been defined with great specificity, needs assessments follow uneasily. To illustrate, where rigorous needs assessments suggest that the level of basic legal knowledge of the judiciary is rudimentary (for example, evaluation of evidence or legal reasoning), providing training on bankruptcy law will in all likelihood be wasted.

Reform efforts should reflect the broader context.

The tendency of new institutional perspectives to focus on fixing the mechanics of institutions has in turn influenced programme design. Instrumentalism is evident in the view that banking structural reform, for example, requires capacity improvement targeted to fiscal and monetary institutions or that the supply of credit can be opened through improved banking regulation. These factors may dramatically affect institutional performance. As one recent observer contends “economic problems may not be economic problems alone.”

This is not to say that individual sectors or institutions ought never be targeted specifically, but rather caution that one cannot begin building a lavish suite on the fifth floor of a building without a pre-existing foundation. It is in this sense that the question of legal and institutional reform from the comprehensive perspective of economic, social and political development should be considered.

Effective capacity building is contingent on sensible reforms.

Capacity building that follows legal or judicial reform is subsidiary to such reforms. When new systems to support restructured institutions are put in place, deficiencies in the restructuring process may render capacity improvements actually counterproductive. Creation of the right laws or institutions will ensure that the results of capacity building are positive.

Judicial instruction should be carried out by judges.

In providing training or technical assistance to judges, the status of the population dictates the required competence of trainers or advisors. In most every country, judges quite simply do not want to be instructed by non-judges.

More realistic and rigorous analysis of the requirements for sustainability should be considered at the outset of an activity.

Participatory training methodologies tend to work in any context.

Although IDLO has noted a difference in the degree of receptivity towards participatory training by culture, participants in legal and judicial reform activities are most often willing to participate. Through IDLO’s use of training facilitators to complement substantive experts, participation is maximised and diverse perspectives are drawn out.

Results-oriented programme design may be unduly rigid.

To compensate for the relative loss of control that donors are experiencing from the move towards greater local ownership and control of institutional reform programmes, donors are focusing greater attention on performance monitoring. Where capacity building is designed to improve the function of a discrete institution, such performance monitoring may be justified. However, where the focus is on raising capacity
over a broad range of matters, imposing strict performance criteria may be unfair. Performance of activities designed to improve general capacity can be hard to measure. It is difficult to conceive a methodology for evaluating the effectiveness of training judges on proper evaluation of evidence or drafting judicial decisions that will generate an unequivocal output. The most meaningful consequence of a training programme may be evident only years later. Moreover, performance measurements may not capture positive unintended consequences. How does one account for the participant who founds a judges association after participating in a general skills training course?

The sustainability issue needs to be given greater attention.

Too often, an issue appears to be addressed in a cursory manner. Providing a “training for trainers” course at the end of an intervention is a typical approach. More realistic and rigorous analysis of the requirements for sustainability should be considered at the outset of an activity. Support for judicial training academies is a popular approach to ensuring sustainable judicial reform. However, if a project involves a donor setting up a judicial training academy and operating it on a start up basis, determining what budgetary resources exist for continued funding of the academy after the conclusion of the activity should be agreed beforehand.

IDLO has responded to this need by facilitating the creation of national alumni associations relating to its programmes. IDLO has helped develop these alumni associations through small grants and financial and institutional development technical assistance. To further develop legal and governance expertise in these countries, IDLO contributes substantive expertise to locally-organised training programmes and distance learning through video conferencing. This type of activity improves the quality of IDLO activities and ensures a continued link between IDLO and the local counterparts after conclusion of an activity.

Within the EBRD region, IDLO has provided capacity building grants to its Bulgarian and Romanian alumni associations. Both have prepared three-year action plans and have begun conducting legal training programmes with IDLO backing. The Romanian association has conducted a training programme on intellectual property and has acted as lead organiser for a two-week summer school on “How to protect intellectual property in the Digital Age”. This event brought together 25 participants from Romania and Europe. The Bulgarian association has helped IDLO organise distance learning programmes in the area of corporate governance and regulation.

Later events may overtake reforms.

Capacity building to support programmes that subsequent events distort or undo is sometimes wasted. The range of factors involved in political, social and economic change generally makes predictions difficult. Examples of venal or corrupt leaders gutting state institutions are, unfortunately, many. The threshold at which point wider political factors threaten to undo earlier structural reforms is unclear. Capacity building may channel the stream on which reforms ride but cannot reverse the flow of a stream rushing down a radically different course.
Conclusion

Conducting successful judicial reform programmes is challenging. While caution is necessary, history suggests that we ought not to be overly pessimistic. First, institutions can be reformed. Examples from many different countries illustrate that institutional reform can occur and be maintained. Yet for this reform to come about, donors may need to take a back seat to domestic actors. The broad understanding that capacity building must be driven by domestic actors has complicated matters for donors wishing to improve capacity in developing and transition economies. To achieve the important goal of improving judiciaries, we must be able to distinguish the possible from the desirable and thereby dedicate the requisite commitment. It is in this sense that IDLO’s cooperation with the EBRD can have an important impact on improving judiciaries throughout the EBRD region. These activities will deepen our collective base of knowledge and thereby ensure that the activities we carry out generate long lasting improvements in the countries we assist.

Notes


3 Id.

4 UNDP, Manila report.


7 UNAMA Rule of Law Unit (2004), Securing Afghanistan’s future, considerations on criteria and actions for strengthening the justice system: proposal for a long-term strategic framework, Kabul, p.18.

8 Id. p.17.

9 See for example, ICG (2004) Building judicial independence in Pakistan, 10 November, p. 22, noting that a comprehensive judicial reform programme in Pakistan lacked any efforts for prosecution or investigation of judicial corruption.


11 D Lev, supra note 5, p. 3.


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Judicial reform in Serbia: enhancing judicial performance through training
Transition process and judicial reform in Serbia

Over the past four years, the transition process in Serbia has seen some undoubted results. The basic principles of a democratic society are now well established and the rule of law is viewed as its cornerstone. Judicial reform has been key to the establishment of this successful regime.

Judicial reform in Serbia has developed with varying degrees of success. The reform process has focused on legislation. A large number of regulations were enacted during 2001-04, mostly in the fields of judicial institutions, substance and procedural legislation. These regulations have significantly reinforced the importance and function of the judiciary, in particular its independence from executive power. New bodies such as the High Judicial Council and the High Personnel Council of the Supreme Court have been created to reinforce judicial power, especially in the appointment and dismissal of judges and prosecutors.

In addition, significant improvements have been made to the material status of judges and to court proceedings related to organised crime and war crimes. (This has included updating the technology and providing extra security for Belgrade District Court, establishing special departments for organised crime and war crime trials, and increasing the salary for judges, prosecutors and clerks involved in these cases.)

However, ensuring these principles and regulations are widely accepted, creating the material conditions for the application of these new laws, making them systematic and feasible, finding efficient anti-corruption measures and defending courts from different pressures remain challenges. In addition, the level of professionalism and effective use of resources within the judiciary need to be addressed.

Challenges to improving court efficiency and effectiveness

Establishing an efficient and effective court system, which supports the rule of law, is the basis of all reform efforts. An inefficient system and a large case backlog are often viewed as major obstacles. The old adage “justice delayed is justice denied” is more than true in this context. Effectiveness combines all of the factors required for reaching a quality court decision, which is well founded in law and applicable to society. Some major challenges to both efficiency and effectiveness still lie ahead. These fall into a number of categories including: the legal framework, institutional, the social environment, budgetary restraints and human resources.

Serbia and Montenegro’s legal framework is not supported by an adequate constitutional framework. The constitutional charter of the State Union offers certain legal instruments, primarily related to the protection of human rights. It does not, however, establish any legal instruments to support its implementation and the establishment of a consistent, modern, democratic constitutional order.

Even though all major political parties and society at large have recognised the need to further develop the constitutional framework, this challenge has thus far not been fully addressed. As a consequence, the 1990 Constitution (often termed the “Milosevic Constitution”) is still in effect. Furthermore, in the absence of an adequate constitutional framework,
the rich legislative initiatives developed over the past four years lack coherence and are often contradictory.

Constitutional provisions can be even more important to the judicial system as they provide a foundation for the judicial structure, establish the basic principles of court procedure, define the role of judicial officials and their mandate, develop relations among public authorities and set out other provisions which have a major impact on relevant legislation.

Restructuring the judiciary to make it more efficient and effective continues to be an institutional challenge. In Serbia and Montenegro, existing legislation is not being fully applied. This is because appeal courts and administrative courts, while founded in law, have not been officially established. Furthermore, the transfer of competences from the military courts to courts of general jurisdiction remains open, thereby creating an uncertain institutional framework. In addition, a comprehensive analysis of the judicial system, which would identify areas requiring reform, has never been undertaken.

There are a number of social issues associated with transitional and post-conflict societies. These include slow economic growth, damaged infrastructure, high unemployment, problems related to refugees and internally displaced persons, as well as political challenges. In Serbia, some of the political challenges include the status of Kosovo and cooperation among the International Criminal Tribunal for the former Yugoslavia. All of these factors combine to create a difficult environment from which to establish a fair and well developed judiciary.

Budgetary constraints can also affect the development of the judiciary. Without adequate funding working conditions within the courts, including salaries of both judicial officials and administration, will suffer.

Finally, greater efforts to increase the expertise and efficiency of judicial personnel need to be made. Through improvements to human resources, the level of professionalism among judges and prosecutors will increase.

It should be noted, however, good judicial tradition and reasonable legal culture exists in Serbia. Despite the many problems and obstacles, the courts are functioning and showing constant improvement during the transition period. Serbia has developed a large judicial network, has an increasing number of judges and prosecutors and a growing flow of cases (see Box 1).

Raising expertise: addressing the challenges with the available resources

Out of the public eye and often without the support of public authorities, there is an ongoing process that could change the judiciary’s image. This involves the training and professional development of people holding judicial functions.

History

Prior to the democratic changes in October 2000, there was no organised system of judicial training. There were, and still are, professional conferences for judges and other jurists, as well as organised training programmes for aspirant judges and prosecutors (assistant judges, assistant prosecutors). However, even after the democratic changes, the composition of judges remained essentially unchanged with no screening process or any kind of systematic verification of expertise introduced in accordance with the new, advanced regulations on the election of judges.

In an effort to develop judicial training, a group of judges from the Association of Judges of the Republic of Serbia and the Supreme Court established a national institution for judicial training. In December 2001, with the support of the Ministry of Justice of the Republic of Serbia and the United Nations Development Programme (UNDP), a foundation act was signed by the Minister of Justice on behalf of the Serbian government and the president of the Association of Judges of the Republic of Serbia. From this act, the Judicial Training Centre (JTC) was established,

Box 1
The judicial system in Serbia

<table>
<thead>
<tr>
<th>Judicial organisation</th>
<th>Case workload</th>
</tr>
</thead>
<tbody>
<tr>
<td>There are 138 municipal courts and 30 district courts with general jurisdiction in Serbia. (These deal primarily with civil matters and some criminal cases.) In addition, there are 17 commercial courts and the High Commercial Court which deal with commercial matters. There is also the Supreme Court, which is the court of final appeal and deals will all matters and jurisdictions.</td>
<td>Over 1.33 million new cases were launched in 2002, while 1.37 million were launched in 2003 (an increase of 3.1 per cent). With regards cases completed and pending, there were 1.32 million and 1.73 million respectively in 2002 and 1.5 million completed and 1.9 million pending in 2003. It is interesting to note the number of completed cases over this period rose by 13 per cent.</td>
</tr>
</tbody>
</table>

Judicial personnel

It is estimated there are approximately 2,400 judges, 700 prosecutors and 11,000 judicial administration staff in Serbia.
a national institution for the training and professional development of judges, prosecutors and judicial administration.

The JTC has an interesting and unusual organisational structure, even when compared with more advanced legal systems. It is a semi-public institution, which operates as a professional NGO. Both founding institutions are equally represented on the JTC’s management board, but the Ministry of Justice is obliged to nominate one judge and one prosecutor. Collectively, the management board appoints the JTC’s professional body from judges, prosecutors and eminent jurists. This body consists of the programme council and the Centre’s director, who is in charge of the management of the organisation and the performance of programme and other activities.

Based on this organisational structure, the JTC has faced a number of problems in its day-to-day administration. Being a semi-public institution is extremely rare in Serbia and there are no clear regulations in place to assist with its development. These challenges, however, do not diminish the reason for its structure. Together, the Ministry of Justice and the Association of Judges provide the JTC with a platform of government resources and policy, combined with the strong commitment of judges, to ensure the successful development of the judiciary.

The mission of the JTC is to foster the professional development of judges, prosecutors and the judicial administration, and thereby further the capacity of the judicial system.

The impact of enhanced expertise in the judiciary is enormous, not just for the adequate application of laws. A judge with professional training is more likely to have greater professional and personal integrity and be more resistant to outside influences, including corruption. In addition, a better understanding of legal developments, various new social phenomena and technical issues will increase the quality of court decisions. Furthermore, the creation of a working culture that includes continuing professional training and constant improvement of related skills is important. Combined, these factors make judicial training one of the most powerful tools for the creation of an independent and impartial judiciary.

The track record

The JTC organises judicial training through a system of programming bodies, which cover certain legal areas and user groups. The programme council, consisting exclusively of judges, determines the types of training required, develops a programme of activities and implements these training events. The programmes are supported through donor projects of the UNDP, Council of Europe, Open Society Fund, bilateral programmes (German, French, Norwegian) and the European Agency for Reconstruction (EAR).

The JTC’s track record over the past two years speaks for itself. From May 2002 to November 2004 over 230 training events were organised by the JTC, with nearly 6,000 participants. Programmes have been developed in civil law, criminal law, commercial law, human rights and other more specialised areas (see Charts 1 and 2).

The first training programmes, held in May 2002, were developed in cooperation with the Association of Judges and the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI). This training dealt with basic civil procedure issues. Over the course of that year, the training format developed from lectures to workshops and interactive case studies. The lectures were lead by senior judges and the audience comprised of judges and judges’ assistants.

It is important to note that judicial training in Serbia is voluntary, with judges under no legal obligation to participate in training programmes. Hence, the response rate recorded highlights their commitment and motivation to increase their knowledge and skills.

Results of the training programmes

The impact of the JTC’s programmes on the judiciary is currently being assessed. Whilst the results of this research will not be available until mid 2005, the following subjective results have been observed:

- judges have largely embraced the concept of professional development
- the quality of the programmes has greatly improved
- a climate which supports judicial training has emerged
Forthcoming activities and plans: building a judicial training strategy

Moving forward, the future strategy for the JTC should include:

1. Strategic partnership

To further develop judicial training, strategic partnerships between government institutions, the highest courts and prosecution bodies, professional organisations in the judiciary, trade unions, bar chambers, academic institutions, judicial administration labour unions and other relevant organisations must be built. This will provide a synergy of action and help to improve the Serbian judicial system. In addition, international programmes and bilateral aid projects should be coordinated with donors to maximise their impact and better meet the needs of beneficiaries.

2. Legal framework

A number of issues relating to Serbia’s legal framework need to be addressed. These include:

- defining the legal grounds for initial and permanent judicial training
- determining whether this training should be obligatory or voluntary
- determining the status of participants
- organising and giving authority to the national institution for judiciary training (the JTC)
- identifying the rights and obligations of beneficiaries
- establishing links between judicial institutions, the Ministry of Justice and other state bodies
- regulating the bar examination and university education.

The Ministry of Justice will be instrumental in addressing these issues and adopting the relevant regulations.

3. Development and delivery of the training programme

Further development of the training curriculum is required. This will build on the existing foundations of the JTC programme and will involve:

- standardising the training programme
- developing courses related to legal fields, judicial skills and social context
- diversifying the number of specialised courses offered
- developing methods and forms of training, for example distance training modules.

The development of training is a cyclical process and includes planning and programming, delivery and evaluation (see Chart 3).

4. Institution building

An institutional model for judicial training needs to be developed by the government. Through its policies and commitment, the government can ensure the survival of the JTC, maximise its effect and enable the development of a permanent and sustainable solution: a judicial academy (i.e. a mandatory school for applicant judges).

5. Financial plan

A dynamic financial plan featuring gradual increases from public budget subsidies, synchronised with current and forthcoming donor projects, needs to be adopted. The exit strategy of donors must also be considered when developing this plan.
6. Communications

The JTC plays an important communication role, collecting and disseminating information to the judiciary on professional development, judicial practice and the legal attitudes of selected judicial bodies. In general it provides one comprehensive communication portal to the judiciary. To improve access to information, the JTC would like to introduce some special software to monitor judicial training, develop various databases, systems of periodical, online communication and e-publications, and establish further training courses. In addition, further efforts must be made to improve relations with the press, local citizens and communities, legal occupations and all other users of judicial services.

7. International relations

Working with international bodies to develop judicial training in Serbia will benefit south-eastern Europe as a whole. Already there are international efforts to develop training programmes in European law and to standardise practice in European judicial institutions. Regional collaboration is also in an initial phase, with a number of meetings between representatives from the judicial training centres of south-eastern Europe. The creation of a regional network is expected.

A good example of international cooperation is the 2nd International Conference on the Training of the Judiciary held in Ottawa, Canada. This conference gathered representatives of judicial training organisations from 88 countries and provided not only an opportunity to exchange ideas, experiences and knowledge, but also to establish an international network.

8. Research and development activity

To date, research activity in Serbia has been limited, carried out sporadically within the context of certain international aid projects. The collected data is unreliable and analysis moderate. One of the reasons for this is the absence of an institution dedicated to research activities. The JTC provides an excellent platform for research projects in the judiciary. To develop this role further, the JTC will need to establish a comprehensive library, set up a research organisational unit and develop standard research methodology.

Conclusion

Judicial reform is moving forward in Serbia, thanks largely to the efforts of a small group of committed judges and international donor support. Further efforts, however, are needed. While the JTC has played a prominent role in developing judicial training, a global strategy is required. Moving forward, strategic partnerships must be formed, the legal framework revised and training programmes advanced through a national judicial academy. The results achieved over the past two years by the JTC have exceeded all expectations and it is only hoped that this successful track record will be maintained.

Notes

3. The UNDP has played a vital role in providing resources for the establishment of the Judicial Training Centre.
4. www.pcsrbija.org.yu
Developing judicial expertise in eastern Europe: the French National School for the Judiciary’s experience
The French National School for the Judiciary (ENM) was founded in 1959. From its inception it was responsible for the initial training of French judges and prosecutors. (The systematic training of these judges and prosecutors was not introduced until 1972.) As most of the countries formerly part of the French colony retained French law, many of their judges and prosecutors studied at the international section of the ENM. Here they underwent a training programme consisting of courses taught by French judges and prosecutors as well as internships in French courts.

At the beginning of the 1990s, however, the context of this cooperation changed. For the first time, judicial training centres were set up in Africa for judges, prosecutors and high-ranking civil servants. In central and eastern Europe, political changes led to the creation of a real judiciary separated from the executive power that was able to reform the recruitment and training of judges and prosecutors.

In addition, international financial institutions such as the World Bank, or organisations such as the Organisation for Security and Co-operation in Europe (OSCE), began focusing on the strengthening of judicial institutions and the promotion of sustainable development and political stability. Therefore, in the middle of the 1990s, many projects promoting the foundation of judicial training institutes and the training of judges and prosecutors in new areas of law were set up all over Europe.

For a number of years, the European Commission’s Phare programme has been the main tool for technical assistance granted to European Union (EU) candidate countries. Since Agenda 2000, the European Commission (EC) has extended the remit of these programmes to promote the strengthening of institutions, particularly those concerned with justice. Candidate countries must set up an effective administration with modern tools, in line with the requirements of the acquis communautaire. Their institutional and administrative capacities must be strengthened to allow them to work in the same way as other EU member states.

The European Commission’s Tacis programme is also funding projects in Russia and the Commonwealth of Independent States (CIS). These projects focus on reforming judicial structures and developing training activities for judges and prosecutors as well as judicial staff. Since the middle of the 1990s, there has been an increasing need to create, or develop, specialised judicial training structures. Balkan countries have also received funding for these types of projects under the CARDS programme.

Since 1994 the ENM has been developing projects across the region. Using EU funds, the ENM has undertaken projects in the Czech Republic (two projects), Hungary (two projects), Slovenia, the Slovak Republic and Estonia (one project each). The ENM is also involved in programmes with Russia, Romania, Kazakhstan and Croatia. On a bilateral basis, the ENM has worked with all of the countries which joined the EU in May 2004 (except Malta and Cyprus), as well as with Ukraine and Moldova. In addition, the ENM has conducted studies on creating judicial training centres, particularly in Georgia and Armenia, in partnership with the Council of Europe.

Undertaking these projects was a real challenge for the ENM, amounting to a cultural revolution in the way the school worked. But, the ENM faced this challenge as it realised the school’s
Development strategy should be based on financial diversification and project management.

The ENM had to learn how to use new cooperation tools and also to develop new capacities in management and follow-up, as well as in the assessment, mobilisation and certification of expertise. The school had to appreciate for the first time the competitive nature of this work, almost a commercial process aimed at selling expertise.

In addition, the rigorous bureaucracy of the Phare and Tacis programmes, especially the drafting of the twinning and tender covenants and the different approaches of the European Commission delegations in the beneficiary countries, meant that this adaptation was not without risks and difficulties.

This article provides three examples of completed projects implemented by the ENM under the Phare programme. It highlights the difficulties of setting up a judicial training centre from scratch and draws conclusions on the expertise the ENM has to offer. The training of judges and prosecutors, however, remains a political issue depending on the balance of power in the countries wishing to have a judicial academy.

Difficulties involved in creating a judicial training school

Since 2000 the ENM has taken part in several projects financed by the EU which either founded a judicial academy, or enabled local authorities to acquire all the technical tools to further develop existing academies.

Three of these programmes provide good examples of the difficulties involved in determining project specifications and meeting objectives against an unfamiliar political background.

Czech Republic

The objective of the project was to found a judicial academy to implement training for judges and prosecutors. This school was to replace the training offered until now by the Ministry of Justice.

Since 2000 the ENM has taken part in several projects financed by the EU which either founded a judicial academy, or enabled local authorities to acquire all the technical tools to further develop existing academies.

The ENM’s submission presented simple ideas highlighting the potential teaching expertise of the school. The ENM had worked with the Czech Republic for many years, in particular training Czech judges and prosecutors in France. The basis of the proposal was the training of tutors and the setting up of teaching teams to implement courses for diverse audiences. The ENM itself has permanent trainers who are judges or prosecutors, using different and flexible methods. From the beginning, the ENM’s position was one of experience, trust and open-mindedness.

The drafting of the twinning covenant, as specified by the twinning manual, was a long and difficult process. It needed to be very precise, acting as a guide to help the drafters employed by institutions in the member state or candidate country to detail the activities planned as simply and clearly as possible. This manual was a precious standardised tool but it did not cover many of the details concerning the EC delegation in the beneficiary country.

The drafting of the covenant took several months before being approved by Brussels. The programme started in January 2002 and, during that year, activities took place as planned in the covenant including training sessions for trainers, thematic seminars and study visits in France. In September 2002, a law creating the Judicial Academy of the Czech Republic was passed. The Czech government financed the renovation of a building to house the judicial academy in a small town 150 km away from Prague. The budget of another Phare project also allowed us to furnish the building and to purchase computers and teaching equipment.
The project has completed in February 2003. While the academy exists, with facilities, a management team and statutes, two major challenges remain:

■ Disputes between the Ministry of Justice, the beneficiary of Phare, and the other judicial institutions (including the judges’ and prosecutors’ associations) are impeding the normal functioning of the academy. Consequently, the administration board has not yet met and there is no development strategy, training programme or recruitment of a permanent or part-time teaching team. Moreover, the management team does not know what budget it has been given.

■ The site of the academy, too far away from the capital, is a barrier for the recruitment of trainers and even discourages the judges and prosecutors, who do not want to go there for training courses.

Hungary

The context of the project in Hungary was different to that in the Czech Republic. First, the Hungarian Constitution provides for an independent judicial power with, on the one hand, the public prosecutor, and, on the other, the Judicial Council. Each of these institutions has its autonomy and they have both previously benefited from Phare funds.

Second, the Judicial Council had perfected the project requirements for creating of an academy and has developed, for many years, a global strategy for the training of judges and prosecutors. This includes an initial training curriculum and continuous training activities. As a consequence, the Council had much clearer ideas about training Hungarian judges and prosecutors than those bodies in the Czech Republic.

Lastly, the twinning programme proposed in summer 2001 was designed for both institutions, the public prosecutor and the Judicial Council, and was aimed at training all judges and prosecutors and judicial court staff. The ENM, in partnership with Germany’s IRZ, won the project.

As with the Czech Republic, the drafting of the twinning covenant took longer than planned. The EC delegation in Budapest stressed the need to observe strictly the twinning manual rules, but interpreted these rules differently from the delegation in Prague. Nevertheless, the EC required the same results at the end of the programme.

With a budget of €4 million, the twinning programme started in 2002 and ended in October 2004. The objective of the project was to give judicial authorities the technical expertise necessary to open an academy by 2006-08. As a result of the programme, 3,000 judges, prosecutors and servants of the Hungarian courts have been trained via dozens of seminars throughout Hungary. The ENM also prepared feasibility studies considering two possibilities: whether to create just one academy for all judges and prosecutors (a rational and economical option); or whether two academies were needed, one for the judges and another for the prosecutors, in order to respect the separation of their powers.

A couple of challenges still remain:

■ Although almost all the judicial staff now have enough knowledge of EC law, and a group of 60 judges and prosecutors have trained to become tutors, it is difficult to say whether these tutors will be “operational trainers” as they have not practised yet, and their knowledge may become obsolete very soon.

■ While EU funding financed much training, there is no proof that these continuous training activities, focused on the evolution of domestic law, will continue. There is a substantial risk that judges and prosecutors will be disappointed by the scarcity of training seminars due to the budgetary constraints of the Hungarian government.

Slovenia

In 2003 the ENM took part in the twinning programme with a German partner. Besides regular EC law training for judges and prosecutors, given by German experts, the ENM’s expertise was required to help the Slovenian Ministry of Justice to lay down the legal and statutory basis of a future judicial academy.

At present, there is no training centre in this country. A Supreme Court department, staffed by a small number of people working part-time, organises continuous training activities according to funds it receives (mostly from foreign donors). Initial training consists of an internship in court without serious tutoring or clear assessment. This situation is worrying, especially since Slovenia – unlike other
EU countries – has a substantial number of cases that have not yet been ruled on, resulting in a malfunctioning justice system and recurring discontent among citizens.

The project required substantial consultations with other judicial institutions and with judges and prosecutors themselves. As this work was carried out with a German expert, the recommendations were the result of a synthesis of several judicial training models. Some elements belong to the French model (creating a school with the status of a public institution, and developing a training curriculum focused on vocational practice rather than the academic teaching of law) and some to the German model (setting a common curriculum for judicial staff and requiring participants to complete the “institution of the probatory judge” before final appointment). Pragmatically, the size of the country and the small number of judges favour the creation of a small structure with low operating costs.

Three conclusions can be drawn from this project:

- For a judicial training school to exist, it must not only have political will but also have a minimum consensus between the different sponsoring institutions.
- A judicial academy, as any other public institution, should have a minimum status and structure. It cannot act in too many fields right from the beginning but should focus on one or two training areas before considering more ambitious curriculum.
- For Russia and the CIS countries the situation is different as they do not face the same pressures as countries joining the EU. For the latter, the development of judicial academies is seen as a way to meet the EC’s demands concerning Section 24 of the accession report.

A single model of judicial training

The concept of a judicial training centre, that is to say a single training structure with original teaching tools, an independent budget and its own staff capacities, as has been implemented in France for 45 years with the ENM, has become a universal model. In France, the reform of the recruitment and training of judges and prosecutors was introduced with other substantial judicial reforms at the beginning of the French Fifth Republic.

Should there be a single model of judicial training? The examples in this article show that in the framework of Phare projects alone, the assumptions among three accession countries can be very different. The level of understanding and implementation of the concept is also very varied. Poland, the largest country to enter the EU in May 2004, has no school and has no plans in the short-term to create one, although in the mid-1990s a Minister of Justice said publicly that he would like one.

Russia and the CIS countries have created (Russia in 1998, Kazakhstan in 2003) or plan to create (Georgia, Armenia) academies that are more like law faculties than vocational schools. In these academies, trainees learn through academic teaching rather than via judicial practice. International law represents a minor part of the curriculum and is taught only through bilateral cooperation programmes. The main aim of these structures is to provide initial and continuous training for local judges and prosecutors in the field of domestic law.
What contribution can the ENM make to these structures? How can the value of the school’s expertise be measured? First of all, the ENM is the only judicial school in the world to have developed such extended international cooperation. Each year, it organises more than 15 seminars in France (open to judges and prosecutors whatever their nationality), undertakes 100 training missions abroad and receives about 50 delegations. It has signed more than 40 partnership conventions with similar schools and works regularly with more than 70 countries. As a consequence, the ENM has in-depth knowledge of other academies, their functioning, and their development. Since creating the European Judicial Training Network, the ENM has become the European leader in the exchange of EU judges and prosecutors.

The ENM’s expertise is based on three main principles:
- providing conceptual tools
- counselling
- passing on knowledge.

Conceptual tools
In providing conceptual tools, the ENM gives its partners the opportunity to make choices about the creation or development of both academies and curriculum. For example, when creating an academy, there are three types of standards which should be considered to ensure its successful operation:
- a legislative regulation giving the academy political and technical legitimacy
- a government regulation organising the fields of expertise, setting out the responsible entities (board of directors, director, educational board) and describing the global training content
- an internal regulation text for the academy itself, determining the conditions of training.

If the legislative regulation is too precise and detailed, the academy may be prevented from functioning. If the government regulation is incomplete, this can be a source of dysfunction. As for the internal regulation, it must be flexible and subject to adjustment with the evolving expertise. On all these points, the ENM has already made a clear synthesis to guide the countries that need assistance.

Continuous training is another area where potential conceptual difficulties may arise. The concept raises a number of questions about the purpose of training. Is it to:
- learn new regulations
- gain knowledge of foreign law
- share reflections on judicial practice with foreign judges
- develop social and cultural knowledge of your own country
- all of the above.

Before getting involved in a continuous training programme, an academy must first answer these sorts of questions, and must decide if continuous training is compulsory or optional. If it is compulsory, does it mean that a judge or prosecutor will be obliged to train in a particular area of law even if they are not interested? Alternately, it judges and prosecutors can decide the type of seminar they want to attend, this will require the academy to develop sufficiently attractive seminar topics. Again, over the last few years the ENM has gained enough experience to be able to explain the advantages and disadvantages of each choice.
Counselling

The ENM can provide partners not only with thinking tools but also with operational means for meeting their expectations. Counselling can include assistance in statute writing, even though these statutes do not resemble those of the ENM. The ENM can deal with the development of an initial or continuous training curriculum, with the training engineering and the assessment of training costs.

For example, the ENM’s current work in Bulgaria deals particularly with the concrete organisation of jurisdictional training for future judges and prosecutors. This includes:
- training assessment
- the role of the judge or the prosecutor who oversees the internship
- the type of knowledge provision to be operated
- the equal treatment of trainees, including those assigned to larger courts with different procedures.

In this area, the kind of counselling the ENM provides is wide-ranging, from minor concrete questions (who pays for transport to the training location) to crucial questions regarding the guarantee of equality of treatment among the trained staff.

Passing on knowledge

The third principle is the passing on of training expertise. As a professional academy rather than a university, the ENM always emphasises training based on practical cases, on mock trials and on putting the trainees in actual situations.

Although it is necessary to include some master lectures in the courses, priority is given to interactive training schemes. Learning does not only consist of receiving information, but students also have to be proactive in their training.

For this purpose, panels of judges/prosecutors are assigned to the ENM for six year periods. Trainees benefit from the experience these judges and prosecutors have gained during the first years of their career. These judges and prosecutors in charge of training are best placed to pass on judicial practice based on technicality and respect of ethics. The creation of original training programmes, dynamic teamwork and the regular renewal of training schemes results in a build-up of expertise that is very much appreciated by ENM’s partners. This experience has been increasingly sought after over the past few years but it is probably the most difficult thing to pass on due to cultural obstacles that are not always easy to overcome.

Unfortunately, there is not a unique model of a judicial training academy. There are as many examples of academies as countries. The Russian Academy of Justice has nothing in common with that of the Czech Republic. The statutes of the Bulgarian academy are different from those of the school of Kazakhstan. But beyond the differences, the concerns are the same, and the ENM’s skills are due to its decade of expertise, its constant evolution and its capacity to adjust to new training needs.

For the government, having an academy is a clear way of demonstrating that it is aware of the needs for training and that it wishes to satisfy them. However, the question is not merely technical, but political. The executive or the legislative power (or both) may seek to challenge or undermine a powerful judicial institution. The institutional actors, competent and well-trained judges and prosecutors, never underestimate this risk, which can generate conflict.

As a result, the creation of an academy is almost always the product of a compromise. A judicial training structure can only exist if there is political consensus. The executive and the legislative powers must demonstrate that justice is rendered in modern, decent conditions, thereby conforming with the expectations of citizens. The academy is seen as proof of the government’s efforts. The judicial power, while urging the creation of an academy (and while requesting the necessary funding) will tend to keep a hold on it. In some cases, the control of the academy obeys strategic
considerations rather than a will to make it operational. In other words, a judicial training institution will only exist if the partners involved in its development look beyond their own short-term interests.

Conclusion

It is clear that when creating a school (from a primary school to a university), three things should be considered:

■ knowledge transfer
■ specialists assigned to the passing on of knowledge
■ a recognised institution, charged with putting together, under supervision, the specialists in charge of passing on knowledge.

Each of these issues is necessary. To deny one of them is to deny the existence of the school itself. Moreover, the cessation of either one for a good or a bad reason means the disappearance of the school.

It is this message that the ENM tries to communicate with all its conviction. A judicial training institution cannot be a simple token of modernity. It cannot be reduced to a means of receiving external funding (seldom without ulterior motive). Nor is it a new bureaucratic avatar.

It is, and must remain, a modern place to pass on knowledge aimed at the strengthening of the rule of law and the democratic process.
Using international standards as tools for judicial reform
International judicial standards have become increasingly useful as tools for evaluating progress in judicial reform in the countries of south-eastern Europe (SEE). While most of these standards were developed as prescriptive guides for states, they double as benchmarks for assessing the relative success of reform efforts in countries undergoing democratic transition. Using these standards as a framework for evaluation focuses the assessment criteria and also facilitates comparisons among countries across the region. In addition, international standards can play an important role at the domestic level if judges understand and subscribe to them. Rather than only being used by the international community to evaluate the state of the judiciary, international standards can and should be transformed into tools for advocacy by judges in a domestic context.

This article examines several evaluative and training methods that seek to apply international standards to the judiciaries of SEE and that, in the process, empower judges to advocate for reform.

International standards

There have been numerous principles and standards developed which describe the elements of an independent, effective and efficient judiciary. The United Nations Basic Principles on the Independence of the Judiciary, identifying a gap between the rights of due process guaranteed in international human rights treaties and the reality in many countries, seek to create the rules and organisation to “enable judges to act in accordance with those principles”. The Council of Europe Recommendation No. R(94)12 on the Independence, Efficiency, and Role of Judges builds upon the standards enshrined in the Basic Principles and more specifically details how these should be achieved. The European Charter on the Statute of Judges is an informal agreement between 13 European countries which seeks to define the standards for “recruitment, training, career and responsibilities of judges, as well as the disciplinary system governing them”.

There are, of course, many other such charters and agreements entered into by countries throughout the world, but these are the most relevant in discussing south-eastern Europe. Most of these agreements, both those listed here and others, build upon and complement one another.

One of the foremost international documents outlining the standards of judicial behaviour is the relatively new Bangalore Principles of Judicial Conduct. The Bangalore Principles outline universal criteria that provide both legitimacy to a country’s domestic code of judicial conduct and a common basis for cross border discussions among judges. The Bangalore Principles were developed by an expert committee on strengthening judicial integrity, convened under the auspices of the United Nations Centre for International Crime Prevention. Using codes of conduct adopted in a variety of jurisdictions, the committee identified the core values inherent in each and formulated related principles.

International standards can be used as both a tool for evaluating judicial reform and as a guide for judges to drive domestic judicial reform forward. This article examines several ways in which international standards have been used to determine trends in judicial reform in south-eastern Europe. It also examines how these results have been incorporated into local reform movements.
These values and principles are meant to serve as an international code of judicial conduct against which judicial officers worldwide may be measured. What distinguishes the Bangalore Principles from other international standards is that it not only sets out general principles but also describes a number of specific applications of the principle at issue.

Tools for evaluation

In 1999 the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI) began developing its judicial reform index (JRI). This index draws on a number of international standards including the UN Basic Principles on the Independence of the Judiciary, the Council of Europe Recommendation on the Independence of Judges, the European Charter on the Statute for Judges and the International Bar Association Minimum Standards for Judicial Independence.

This attention to implementation makes it particularly useful in practice, because one can quite easily identify whether the principle at hand is being realised through the practices of the court.

What emerges from a comparison of these standards is a common basis for evaluation of the independence and effectiveness of judiciaries. While these documents do not dictate the precise manner in which a country would comply with the standards, for example they specifically seek to avoid a bias toward a common or civil law system, they are quite clear in establishing a baseline for performance. Each comprises common themes of:

- objective criteria for appointment and advancement
- transparent processes and standards of judicial conduct
- clear lines of jurisdiction and power of enforcement
- access to and control over resources.

With these guidelines in hand, objective assessment of judiciaries becomes possible.

Of course, ABA/CEELI is not the only organisation using international standards to evaluate judicial reform in SEE. Most notably, the European Union reports on pre-accession countries based on the acquis communautaire and on countries in the Western Balkans based on the Stabilisation and Association Process (SAP). These reports have contributed enormously to the assessments of key areas of judicial reform.

According to the European Commission, “the Stabilisation and Association Process combines contractual relationships (Stabilisation and Association Agreements) and an assistance programme (CARDS), which help each country to progress, at its own pace, towards the requirements of EU membership.”¹ These Stabilisation and Association Agreements (SAA) include European standards on a variety of issues including legal and judicial standards. The European Commission then issues yearly reports based on each of the countries’ progress and compliance with these standards.

The standards are drawn from European treaties and declarations, including the Council of Europe commitments. For example, the 2004 Stabilisation and Association Report for Serbia and Montenegro notes that the country has not lived up to its post-accession commitments of enacting “major amendments in the set of judiciary laws...”.²

The judicial reform index (JRI) draws on a number of international standards including the UN Basic Principles on the Independence of the Judiciary, the Council of Europe Recommendation on the Independence of Judges, the European Charter on the Statute for Judges and the International Bar Association Minimum Standards for Judicial Independence.
These reports highlight the progress and challenges of the judiciary in the countries evaluated and provide governments, international donors and technical assistance providers with a view of where future efforts should be directed. They also can potentially be used by judges, particularly through judges’ associations, who may seek some of the recommended legislative changes.

The World Bank also has a division dedicated to assessing judicial and legal reforms. They have developed a standardised legal and judicial sector assessment to evaluate progress and needs within the legal and judicial sector. The assessment consists of a detailed survey based on international standards. Much like ABA/CEELI’s judicial reform index, the assessment includes interviews with legal professionals and experts from each country and compiles the data received into an evaluation.

To date in SEE, the World Bank has evaluated Bulgaria and has run a diagnostic for Serbia and Montenegro.

Trends identified

The JRI has been implemented in Albania, Bosnia and Herzegovina, Bulgaria, Croatia, FYR Macedonia, Romania and Serbia and Montenegro (including Kosovo), as well as seven non-SEE countries. Through the index, ABA/CEELI has provided international donors and implementers with a concrete assessment of the strengths and weaknesses of the judicial systems in these places. In addition, it provides governments with independently-derived information that can contribute to decisions about their own reform strategies. Consistent use of the criteria

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**Chart 1**

Average judicial reform index scores for south-eastern Europe

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**Notes**

The judicial reform index (JRI) evaluates judicial reform and judicial independence through a prism of 30 indicators in the areas of quality, education and diversity of judges; judicial powers; financial resources; structural safeguards; accountability and transparency; and judicial efficiency. The index ranges from -1 (negative) to 1 (positive).

The rating given for each indicator is the average for south-eastern Europe: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, FYR Macedonia, Romania and Serbia and Montenegro (including Kosovo). Data are taken from each country’s first round JRI assessment.

Source: American Bar Association Central European and Eurasian Law Initiative, Judicial Reform Index (JRI).
derived from international standards has also provided ABA/CEELI with a sense of regional trends. Charts 1 and 2 provide a comparative view of the region and each of the countries assessed.

In comparing the JRI results from across the region, two overarching themes emerge. The first and most compelling theme is that while the countries have made significant changes to the structure and management of their court systems, they have consistently failed to allocate sufficient resources to enable the courts to operate more transparently and efficiently. While the shell of an independent and effective judiciary has been created, this shell remains largely empty.

The second theme that emerges is that court presidents continue to have power. These presidents have tremendous influence in appointing new judges, promoting and disciplining judges, assigning cases, releasing decisions to the public and managing the courthouse over all. The court presidents, moreover, remain politically connected and, in some countries, still seek to control the outcome of specific cases. Even when they do not exercise such overt control, judges still instinctively decide cases in a way that they think will meet with the approval of the court president or the ministry of justice.

This situation is inappropriate in several regards. First, UN Basic Principle No. 2 provides, “The judiciary shall decide matters before them [sic] impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”. As regards the appointment and promotion of judges, the Council of Europe R(94)12, Principle I(2)(c) states “all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability, and efficiency”.

These findings demonstrate that while progress is slowly being made, some changes have been superficial. To continue to fill the framework of the independent judiciary that has been created, judges will need to rely on international standards to compel continued reform.

Need for training

To address the problems identified by the assessments conducted, it is clear that judges need to be well-versed in the international standards that apply to the judiciary. Such awareness helps judges to be more effective in their own jobs and to better understand the role of the judiciary overall. Beyond raising awareness, judges need to understand how they themselves can use those standards in their day-to-day responsibilities as judges. By helping judges understand the practical application of international standards and by helping them develop public advocacy skills, international organisations can make more of an impact on reform by empowering judges to act on their own behalves. With such knowledge and skills, judges can better work with the executive to ensure judicial independence and effectiveness.

ABA/CEELI has undertaken training of this nature through the CEELI Institute in Prague, Czech Republic. The Institute’s course “Judging in a democratic society” introduces participants to the role of a judge in a democracy, international standards placed on the judiciary, and the essential elements of and threats to
independence. By giving judges practical examples of each of these elements, the course helps them to understand what judicial independence demands on a day-to-day basis. In addition, the course helps them to understand how they themselves can act to contain threats to independence.

As Judge Patricia Wald writes, “Although history shows us that authoritarian regimes to succeed must take over the judiciary…it also tells us that in too many cases judges have let themselves be co-opted by political tyrants and have cooperated in their own demise”. 3

Judges need to understand the significance that their actions can have on the independence of the entire judicial branch. Giving them this practical knowledge empowers them to make choices for themselves.

Application of standards
Applying international standards in a domestic context can be difficult and politically risky for many judges. However, they do provide a solid basis on which judges can begin to navigate a movement for reform. ABA/CEELI has witnessed several successful examples of such application, which are detailed below.

■ Applying the JRI
The utility and value of the JRI extends beyond its role as an evaluative tool for internationals. It can also be an empowering tool for judges themselves in the domestic reform process. For example, when ABA/CEELI conducted a JRI assessment in Romania in 2002, it was considered highly controversial by the Romanian Ministry of Justice (MOJ). The MOJ, threatened by the findings of the assessment, sought to undermine its methodology and subsequent conclusions. In response, ABA/CEELI organised a roundtable which was attended by representatives of the MOJ, the judges’ association, the magistrates’ school, judges from courts at many levels, and prosecutors and defence attorneys. The open dialogue of the roundtable, continuing on from the objective evaluation provided in the JRI, gave judges the opportunity to challenge the MOJ on some of its policies.

Most of the judges who attended the roundtable expressed that they welcomed the JRI and its findings and appreciated the resulting debate. One of the lawyers who attended summed up the experience saying, “Objective discussions about these issues are very useful, even if sometimes they are not at all pleasant.” 4

While the debate over its findings may have been contentious at times, the JRI did provide an objective basis on which the judges could advocate for their needs. Several judges submitted written comments on the JRI findings, highlighting legislation that needed to be modified to come into compliance with the international standards on which the JRI is founded. Therefore, the JRI became not only an assessment to sit on the shelf and inform outsiders about the state of the judiciary in Romania, but it also served as a transformative tool. It empowered and encouraged judges and the ministry to engage in an active discussion about the future of the judicial reform process.

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Chart 2
Average judicial reform index scores for south-eastern Europe, by country

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<tr>
<th>Country</th>
<th>Positive</th>
<th>Neutral</th>
<th>Negative</th>
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Notes
The judicial reform index (JRI) evaluates judicial reform and judicial independence through a prism of 30 indicators in the areas of quality, education and diversity of judges; judicial powers; financial resources; structural safeguards; accountability and transparency; and judicial efficiency. The index ranges from -1 (negative) to 1 (positive).

The chart shows the overall JRI rating for each country in SEE. To determine this rating, each country’s average score for the index’s 30 indicators (see Chart 1) has been combined and an overall average determined. Where possible, first and second round JRI assessment data have been provided. These assessments have taken place between 2001-04.

Data for Serbia and Montenegro has been divided into individual scores for Serbia, Montenegro and Kosovo. Where possible, all 30 indicators have been assessed. However, only 14 indicators were assessed in Kosovo’s first round assessment and Serbia’s second round assessment.

Source: American Bar Association Central European and Eurasian Law Initiative, Judicial Reform Index (JRI).
Applying training

Training in the practical application of international standards also gives judges confidence and support in making the right decisions. A judge from Bosnia-Herzegovina who participated in the “Judging in a democratic society” course reported that shortly after the course he was contacted by a cantonal court judge, two courts above him, asking him to take “special consideration” in ruling on a case. As a result of the training he had received on international standards and ethics, he “had the courage to explain to the judge why his call was inappropriate.” The use of the word “courage” is telling. International standards provide a basis upon which judges can act appropriately and provide justification for their refusal to engage in unethical behaviour in an environment in which such behaviour may be the norm.

Participants discuss various potential roles for the judges’ association, including:

- defending judges’ statutory rights before non-judicial authorities and other decision-making bodies
- participating in decisions affecting (a) the administration of courts (b) court budgets (c) the implementation of decisions at national and local levels
- consulting on legislation related to court structure, judicial remuneration, social welfare or pension benefits
- commenting on proposed legislative changes involving statutes routinely enforced by the courts, such as criminal law or procedure, commercial law and property law.
- Judges are also asked to identify areas in which they are required to interact with the executive and legislative offices or agencies and develop recommendations on the best practices to follow. Finally, the judges discuss the issues inherent in judicial involvement in political parties and seek to identify solutions to these problems. The objective of this day of coursework is to help judges understand what they can do as a group to improve the judiciary and the legal system in their countries.

Applying international standards in a domestic context can be difficult and politically risky for many judges. However, they do provide a solid basis on which judges can begin to navigate a movement for reform.

One judge from Serbia and Montenegro, in relating his experience taking part in the training, wrote that before attending the course he had “lost hope that individuals could make a difference, but the Institute gave [him] concrete examples of how one person can have a great effect”. The training emphasises the decisions of individual judges through the use of hypothetical examples. Judges are given a hypothetical case and asked to make a decision, using international sources of law. This demonstrates to judges how they can incorporate international law into their decisions and also encourages them to think about the impact of the decisions they make.

More often, the impact of international standards will be manifested through collective rather than individual action. For example, a group of judges from Serbia and Montenegro, who recently participated in training at the CEELI Institute, are working together to create a code of ethics for judges. This code will be based on international standards. In addition, this group is reproducing copies of the course materials to further educate a broader cross-section of judges in the country. In this way, the judges are taking responsibility for their own needs and using international standards to advance their work.
Conclusion

International standards are critical evaluative tools for measuring judicial reform. However, the goal of reform should always be to empower domestic reformers and advocate reform from within. Reform based solely on pressure from the international community is not sustainable. ABA/CEELI has seen judges, aware of international standards and trained in their application in domestic legal systems, become strong voices for judicial reform in their countries. International standards can play an important role in this process, providing benchmarks by which judges can measure the success of their own reform efforts. By training judges and giving them the tools to assess and to advocate for themselves, international donors and technical assistance providers can make a lasting contribution to the judicial reform effort.

Notes


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Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>ABA/CEELI</td>
<td>American Bar Association Central European and Eurasian Law Initiative</td>
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<tr>
<td>CARDS</td>
<td>Community Assistance for Reconstruction Development and Stabilisation</td>
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<tr>
<td>CIS</td>
<td>Commonwealth of Independent States</td>
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<tr>
<td>EBRD, the Bank</td>
<td>European Bank for Reconstruction and Development</td>
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</tbody>
</table>
| ETC          | Early transition countries  
(Armenia, Azerbaijan, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Uzbekistan) |
| EU           | European Union |
| EU25         | 25 member states of the European Union |
| FYR Macedonia | Former Yugoslav Republic of Macedonia |
| ICT          | information and communication technologies |
| IDLO         | International Development Law Organization |
| JRI          | judicial reform index |
| JTC          | judicial training centre |
| LIS          | Legal Indicator Survey |
| SAP          | Stabilisation and Association Process |
| SEE          | south-eastern Europe |
| SME          | small and medium-sized enterprise |
| TI           | Transparency International |
| UNDP         | United Nations Development Programme |
| WTO          | World Trade Organization |