



USAID | **BOSNIA-HERZEGOVINA**
FROM THE AMERICAN PEOPLE

SMALL COMMERCIAL CLAIMS REPORT

USAID FOSTERING AN INVESTMENT AND LENDER-FRIENDLY
ENVIRONMENT (FILE)

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Project Task:

(D) 3. Develop the legal and regulatory framework to remove current and future “Small Commercial Claims” from the commercial division dockets by employing a system of special masters and implement appropriate procedures and practices, including training of “special masters.”

Project Task within 60 days:

Prepare a detailed report on developing the legal and regulatory framework to remove current and future “Small Commercial Claims” from the Commercial Division dockets by employing special masters, including without limitation, laws, regulations and procedures which have to be amended or enacted; where and how such claims shall be adjudicated; the requirements for, educational and professional background of, and certification of and licensing of, “special masters” to handle such small claims.

FRAMEWORK
for Project Task (D) 3.

1. Build a library of pertinent materials that offers information regarding the management of small commercial claims in BiH and elsewhere in the Balkans. Review alternative approaches to small claims caseload and caseload management used by America's state courts as well as courts in Western Europe.
2. Review and analyze pending and/or existing BiH legislation governing the prosecution of small commercial claims. Define terms, e.g., what, in fact, is a "small" commercial claim? How is it differentiated from a "large" commercial claim? Evaluate the impact of newly passed laws on the present system, review drafts of new laws, identify areas that have been overlooked or appear to give "short shrift" to procedural or other aspects of managing small commercial claims and make recommendations to improve the management of the small commercial claims caseload that might result in the introduction of new legislation, amendments or modifications to statutes already enacted into law.
3. Analyze, draw conclusions and make recommendations with regard to the introduction of "special masters" or other "resolution advocates" that would handle all small commercial claims and be trained to do so. Involve local bar groups in the process and solicit their participation as "special masters" in their professional role as "officers of the court."
4. Identify and collect data, tabulate and analyze small commercial claims workload and analyze workflow in a representative sample of BiH courts. Prepare flowcharts and make recommendations to improve the processing of small commercial claims.
5. Interview judges, court staffs and other stakeholders who are familiar with the current system and can shed light on the areas where "bottlenecks" most commonly occur. Solicit their input on ways to improve the system, identify major issues and begin development of an action plan and timetable for addressing those issues.

6. Work with judges, court staffs and members of the bar to develop a plan which will ensure a smooth transfer of small commercial claims from the first instance courts to the newly established commercial divisions throughout BiH.
7. Identify and explore potential alternative means of small commercial claim dispute resolution using extra-judicial means and mechanisms.
8. Think “outside the box” and keep an open mind to new ideas. Remain flexible and be prepared to adapt our planned goals and objectives to any significant changes that may occur over the course of the project period.
9. Develop an action plan that, when implemented, results in at least a 50 percent reduction in the number of pending small commercial claims by the end of the project period.
10. Design, develop and publicize training initiatives and conduct training for members of the bar who agree to serve as “special masters” or “resolution advocates.”
11. Closely monitor and evaluate implementation of the action plan, and make changes or adjustments, as necessary.
12. Prepare and submit a final report, including recommendations for change where appropriate.

1. Build a comprehensive, permanent library of reference materials that provides relevant information regarding the management of small commercial claims.

Include a current, comprehensive array of proposed, pending or enacted laws, reports, analyses, studies and other materials that deal with similar problems in other countries or offer new thoughts or ideas regarding the management of small commercial claims.

The Court Administration Unit (CAU) of the FILE Project (the “Project”) will be responsible for the compilation, review and analysis of the following documents:

Laws:

- **Civil Procedure Code RS** (“Official Gazette of the Republika Srpska” No.58/03, published on 17 July 2003)
- **Civil Procedure Code FBiH** (passed, but not yet published)
- **Law on Enforcement RS** (“Official Gazette of the Republika Srpska” No.59/03, published on 18 July 2003)
- **Law on Enforcement FBiH** (“Official Gazette of the Federation of Bosnia and Herzegovina” No. 32/03, published on 18 July 2003)
- **IJC – DRAFT Law on Courts**
- **IJC – DRAFT Book of Rules**

Reports:

- IJC “**Restructuring the Court System – Report and Proposal,**” dated 15 August 2002
- IJC “**Justice in Due Time,**” dated April 2002
- IBTCI – Privatization of Strategic Enterprises Project “**Court Component: Helping create more efficient judiciary in handling commercial litigation, bankruptcy and liquidation,**” dated April 2003
- IBTCI - Privatization of Strategic Enterprises Project “**Enforcement of secured transactions and bankruptcy norms in Bosnia and Herzegovina,**” dated 5 May 2003

Other Documents

- Reports, studies, assessments and other materials which may be available from USAID, the National Center for State Courts, the Administrative Office of the United States Courts and other governmental entities involved with court administration in the Balkans or the EU.

2. **Review present legislation governing the management and disposition of small commercial claims; evaluate the impact of newly passed laws on the present system; review drafts of proposed legislation, identify areas that may have been overlooked; and, finally, make recommendations to improve the management and disposition of small commercial claims that could be incorporated in proposed legislation or used to amend existing law.**

Proceedings on Small Claims are regulated by the Civil Procedure Code in both the Federation and the RS. Because both laws are already largely consistent with one another, reference only will be made to those provisions which differ.

Small Claims are regulated as special proceedings within the Civil Procedure Code.¹ The new procedural code has largely abandoned special proceedings for business litigation. The former code of civil procedure had one entire chapter (15 articles) dedicated to business litigation.

It appears obvious that those drafting the code concluded that there is nothing which differentiates “civil litigation” from “business litigation” in the procedural sense. Businesses need access to justice in a timely, consistent and predictable manner. It is hoped that the establishment of commercial divisions in 10 (ten) courts in the Federation, 5 (five) in Republika Srpska and 1 (one, that already exists) in Brcko will meet that need.

3. **Identify issues, analyze alternatives, draw conclusions and make recommendations regarding the creation of “special masters” or “resolution advocates” to deal with small commercial claims.**

There are two approaches to the issue of “special masters” or “resolution advocates.”

The First Approach – Identify potential “special masters” within an existing category of professionals, e.g., members of the bar, judicial associates, reserve judges, lay judges, community or business leaders, economists, professors, bankers, etc., provide them with

¹ Small Claims are located in chapter: XXIX - SMALL CLAIM DISPUTES PROCEEDINGS, articles 428 through 433. Article 428 of the Civil Procedure Code provides that, “Other provisions of this Law shall be applied in the small claim disputes proceedings, unless this Chapter contains special provisions.”

“Special provisions” include:

- Small claim disputes are defined as those where the amount in controversy does not exceed 3,000 KM;
- Disputes concerning real estate, labor relations and trespassing do not fall under the category of small claim disputes;
- An interlocutory appeal is allowed only against the decision concluding the proceedings;
- The judgment or the decision concluding the small claim disputes proceedings may be contested only due to procedural errors or to the misapplication of substantive law;
- The decision may be appealed within fifteen (15) days.

comprehensive training to do the job at hand and propose legislative changes which govern their selection, qualifications, training, compensation and jurisdiction.

The Second Approach – Create a completely new category of professionals with specific educational or experiential requirements who could be trained and certified to hear and decide small commercial claims. The IJC’s draft Book of Rules provides the framework for such a professional, the judicial associate.² This provision allows greater reliance on judicial associates than is the currently the case. The Project will keep a close eye on developments of this issue as they occur and assess their impact on the management and disposition of small commercial claims.

The Project also will continue to interview “pre-war” judges who have had experience working with law associates in the adjudication of small commercial claims. For example, in our first court visit, Judge Amra Muhibic (Chief of the Civil Division of Sarajevo MC II) said that before the war, judicial associates were entitled to rule on small commercial claims as well as other types of cases. At that time, the ratio of judges to judicial associates was almost two to one in Sarajevo’s MC II.

Another option might be to use reserve judges to adjudicate small commercial claims. When the vetting and reappointment process is completed, some courts with sizable backlogs will be staffed temporarily with “reserve judges” to help deal with the backlog.³

² Article 47 of the *Draft* Book of Rules provides that:

- (1) A judicial associate shall be a law school graduate who has successfully passed the bar examination.
- (2) A judicial associate shall adjudicate in the first instance certain uncontested small claims and enforcement matters as assigned by the Court President.

³ Article 32 of the Law on the High Judicial and Prosecutorial Council provides that, Reserve Judges shall meet the professional requirements of judges of the court to which they would be assigned.”

Article 35 of the Rules of Procedure of the High Judicial and Prosecutorial Councils for the Transitional Period provides that:

1. A court president may apply to the Council for the appointment of reserve judges. The application should include:
 - a) a justification as to why the reserve judge is needed;
 - b) the types of case or duty that the reserve judge would handle or perform;
 - c) the period for which the reserve judge is needed;
 - d) proposed terms and conditions for his/her service; and
 - e) confirmation that sufficient funding and resources are available.
2. If the Council decides to appoint a reserve judge, the decision shall specify:
 - a) the duration of the mandate of the reserve judge;
 - b) the date when the reserve judge will commence his/her official functions;
 - c) the terms and conditions of service; and
 - d) any other matters the Council considers relevant.
3. If there is no suitable person to act as a reserve judge in the list established by the Council under the regulation of the Law, the Council shall announce the vacant position of reserve judge in accordance with the provisions of the Law and these Rules on the announcement of judicial vacancies generally.
4. The Council may decide to extend or modify the mandate of any reserve judge on request or if necessary.

The Project will explore the possibility that a number of those reserve judges would be interested in serving as “special masters” or “resolution advocates.”

Creation of a completely new group of professionals is perhaps the most labor intensive and costly option, but the Project does not have any preconceived notions about the efficacy of this approach. Depending upon the willingness of the bar to serve in a pro bono capacity, it might be the most workable option.

4. Identify, collect, tabulate and analyze statistical data which accurately describes the flow of small commercial claims, make recommendations for change where appropriate and assist with implementation, as necessary.

Project staff will develop data collection and analysis tools or obtain same from similarly focused USAID projects in other Balkan locations, e.g., Macedonia, Montenegro, Croatia or Serbia. We also may be able to obtain instruments from the National Center for State Courts or similar organizations in the EU.

Project staff will also review an array of statistical reports produced by the IJC. For example, one report entitled **Restructuring the Court System – Report and Proposal**, dated August 15, 2002, provides data on the number of cases filed by category for every court in the BiH from 1998 through June 2002.

Our analysis of the data revealed the following information:

Banja Luka MC

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Mals	18	182	51	24
Ps	293	611	841	1783
Ip	550	512	1416	846

Sarajevo I MC

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Mals	200	999	1652	1850
Ps	1104	753	782	787
Ip	4171	6016	5218	4896

Mostar I MC

	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
Mals	43	26	77	48
Ps	54	121	271	134
Ip	312	297	383	901

“*Mals*”- Small Commercial Cases

“*Ps*” – Regular Commercial Cases

“*Ip*” - Enforcement of Commercial Cases

Based upon this data, it appears that small commercial claims caseloads are greater in some courts than in others. We will explore and identify the reasons for this and whether the information provided is, in fact, accurate.

Because the survey only extends through 2001, the data will need to be updated. Because other components of the Project have to collect similar data, a single data collection strategy will be formulated and implemented to ensure that accurate data is collected from the courts in the most consistent manner possible.

Upon completion of the data collection phase for the remainder of 2002 and the first six months of 2003, the Project staff will create a list of courts that appear to have a significant number of small commercial claims. Staff will also explore alternative strategies to reduce the caseload backlog, beginning with those courts which have established commercial divisions.

It is important to note that in order for a case to be considered “small,” the amount in controversy may not exceed 3,000 KM, an increase of 2,000 KM over the former law.

This should channel our research in two directions:

1. Determine how many pending cases where the amount in controversy is between 1,000 and 3,000 KM are categorized as “Ps”; and
2. Accurately project the number of newly filed small commercial claims resulting from the increase of the amount in controversy limits.

In order to obtain an accurate picture of the number of pending small commercial claims, the following steps will be taken:

- Determine the actual number of pending “Ps” and “Mals” in every first instance court;
- Calculate mean, median and mode of how many pending “Ps” cases will become “Mals” cases upon review of the respective amount in controversy;
- Determine the number of cases that will be transferred from municipal courts to the newly created commercial divisions and the methodology for doing so.

5. Interview judges, court secretaries, court staffs, members of the bar and other stakeholders (persons, legal entities and international organizations) who may be able to identify systemic “bottlenecks” and offer potential solutions based upon their experience and professional perspective. By interacting with various stakeholders, a list of major issues to be addressed can be compiled

Discussions of issues involving small commercial claims with judges of Sarajevo Municipal Courts seemed to indicate that there were “no problems” in the adjudication of Small Commercial Cases. Past procedural delays were sanctioned by provisions of the former Code of Civil Procedure.

The judges pointed out other issues that may contribute to the creation of “bottlenecks.”

Issue No.1:

It appears that many cases that should not have been classified as small commercial claims are processed as such.

Example:

Case No.: Mals-1603/01
Parties: Kulovac vs. SZZ “Bosna”
Case value: 1.68 KM

Plaintiff requests restitution of funds paid to SZZ “Bosna” before the war for construction of an apartment building. Progress was halted because of the war.

All the money was paid in Yugoslav Dinars. When these funds are converted to KM, a de minimus amount (1.68 KM) results. But since the Plaintiff seeks interest payments for the intervening ten years, the resulting amount significantly exceeds 3,000 KM. This case requires expert testimony in areas of finance and construction from a variety of different witnesses.

The case should not be adjudicated as a small commercial claim, but should instead be processed as a regular commercial case, for several reasons. First, the parties have a dispute in excess of the statutory limit on small claims.⁴ Second, the subject matter of the claim is real estate; the law further provides that disputes concerning real estate, labor relations and trespassing do not fall under the category of small claim disputes

Issue No.2: (Judge Jahjaefendic, President of Sarajevo MC I)

There are also problems in the enforcement stage rather than the adjudication phase of small commercial claims.

Due to the “wrong instruction” given in the former (ex-SFRJ) Book of Rules, enforcement cases were reported as resolved once judgment was entered. In reality, months or years may elapse before the judgment is enforced and the debt is actually collected. Should the case be reported as resolved only after the judgment is enforced and the debt is collected or counted in a totally different manner? While reports reflect that there are very few unresolved cases of this type, the reality is that in Sarajevo MC I, there are between 50,000 and 60,000 cases considered closed despite the fact that the judgment has not been enforced and the debt has not been collected.

⁴ Article 316 of the New Civil Procedure Code provides that:

... (2) only the value of the main claim shall be taken as the value of the dispute.

(3) Interest, contract penalties and other secondary claims shall not be taken into account in assessing the value of the dispute unless they are a part of the main claim.”

A significant number of small commercial claims involving utility bills seek only enforcement because of the existence of an “authentic document,” as defined by the Law on Enforcement.⁵ It can be concluded that, even with the existence of the new law, the filing of such cases is not precluded. This requires an assessment of the impact of this legislation on the potential for future filings.

This may require that FILE Project staff recommend to the IJC’s Book of Rules team that provisions which currently provide that cases are reported as resolved before the debt is actually collected should be amended or modified.

Finally, FILE Project staff will address the issue of the assignment of multiple case numbers to a single case. At present, case numbers change whenever the jurisdiction of the court changes. This contributes to inaccurate statistical reporting because the same case may be counted and reported many times in different reports, instead of just once as it should be.

6. Facilitate a smooth and orderly transfer of small commercial claims from all first instance courts to the newly created commercial divisions

The newly created commercial divisions will soon be responsible for the management and disposition of commercial cases, including small commercial claims.

Bringing the commercial divisions up to speed will require the application of sound records, caseload and workflow management techniques and strategies to ensure a smooth and orderly transition. Each case must have its own unique number which will be used to identify the case from filing to disposition.

7. Explore alternative dispute resolution mechanisms, analyze applicability to BiH courts and determine whether it is possible to resolve small commercial claims through such extra-judicial means

Such mechanisms might include:

- All public utility companies should develop their own mechanisms for the collection of user fees and appropriate sanctions for nonpayment without the involvement of the judiciary.

⁵ Article 29 (of the New Law on Enforcement) provides that:

“(1) Enforcement for the purpose of satisfying a monetary claim shall also be ordered on the basis of an authentic document.”

“(2) Pursuant to this Law, an authentic document shall be a bill of exchange or check with protest and reverse account, if necessary, for the establishment of claim, as well as utility bills or records from the accounts of such utilities, with respect to the furnishing of water, heat and garbage removal.”

- Create a single utility bill for all public utilities. Nonpayment of such monies owed would result in the termination of service which would be restored only when payment is received in full.
- Employ or assign a significant number of public “bailiffs” to collect unpaid fees or consider the creation of a cadre of “private bailiffs” funded by the utility companies who work on a commission basis and receive a percentage of fees collected. Once customers realize that they lose the benefit of services provided when they fail to pay, more who can pay, will and the number of scofflaws will decrease dramatically.