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Practical Solutions for Intractable Problems:

FILE's Comprehensive Court Report and Recommendations for Bosnia and Herzegovina

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Introduction

Judicial quality directly affects the costs and risks of doing business in a country, and thus the levels and rates of economic growth. Streamlining the ability of the courts to adjudicate commercial claims is critical to establishing an environment that promotes and protects creditors' and investors' rights, and that provides business interests with assurance that their disputes will be adjudicated in a timely, efficient and predictable manner. Inefficient, unpredictable courts discourage both foreign and domestic investment and reduce growth and economic development.

Modernizing court practice in the post-Yugoslav era has been difficult for all of the former Yugoslav republics. Bosnia and Herzegovina (BiH) is no exception. Laden with an outdated judicial system that had become highly dysfunctional, BiH has watched as commercial, utility, and other claims exploded, inundating the courts with more cases than they could reasonably handle.

BiH is exceptional, however, in the level of changes already implemented. Unlike its neighbors, BiH (with substantial donor support) has heavily redesigned its court system, replacing its inquisitorial process with a hybrid civil-common law system that shifts burdens of evidence, proof and compliance back onto the parties. This radical new approach will be much more effective than the prior one at resolving disputes in a timely manner, but only after it has been fully implemented.

The BiH courts are still overwhelmed. Backlogs are substantial, with hundreds of thousands of cases awaiting attention in Sarajevo alone. (See Annex 6, *Backlog Statistics*.) Adding additional resources, however, is not a long-term or even short-term solution. Instead, the recent legislative reforms must be turned into behavioral reforms combined with re-engineering and streamlining of processes.

USAID's Fostering an Investment and Lender-Friendly Environment (FILE) Project has been working with a wide range of BiH counterparts since August 2003 to address these challenges. The purpose of this report is to capture lessons learned to date and propose practical solutions to the intractable problems facing the courts. First and foremost, changes are needed to reduce the number of claims – especially small claims and utility bills – that are overwhelming the system. In addition, the recommendations below emphasize effective means of reducing the burden of the remaining, legitimate claims through improved processes and procedures, both with and without new technology.

Many of the recommendations are budget neutral but with high impact. For example, the single most important reform requires no additional funding or equipment, but rather a change in judicial practice to implement existing law: simply by enforcing claims without delay, judges could have a dramatic and immediate impact in reducing the number of appeals and groundless objections and increasing payment of outstanding debts prior to being sued. This requires a change in policy and procedures to conform to existing law at no cost.

Other solutions require ongoing support and funding. For example, the successful implementation of FILE's Case Management Software in pilot courts (as further described below) will lead logically to the roll out of this technology to other courts. This will take

time, training, and equipment, but it certainly can be achieved in the near term, with immediate improvements in judicial efficiency and capacity.

The work is far from over for BiH. The recommendations below present a roadmap for that work – a roadmap of practical, implementable solutions that will have a measurable impact in the near term. If followed, the roadmap will lead to improved socio-economic development.

I. Small Commercial Claims

Small claims and enforcement actions significantly increase the logjam in the courts and reduce overall judicial efficiency. Studies in Europe demonstrate that most small claims do not involve adjudication or interpretation of law, but simply arise from delinquent payment of clearly established debt obligations.¹ Removing and reducing these claims would greatly improve the efficiency of the BiH courts.

Removal is more than shifting the burden to another body, which has been tried unsuccessfully. Instead, it is necessary to improve the legal and regulatory framework to both remove inappropriate cases and reduce delays and uncertainties of processing the cases. As the European Commission has noted:

A legal framework that does not guarantee a creditor access to the rapid settlement of uncontested claims may afford bad debtors a certain degree of impunity and thus provide an incentive to withhold payments intentionally to their own advantage. Late payments are a major reason for insolvency threatening the survival of businesses, particularly small and medium-sized ones, and resulting in numerous job losses. The necessity to engage in lengthy, cumbersome and costly court proceedings even for the collection of uncontested debts inevitably exacerbates those detrimental economic effects.²

Small claims, unless properly defined, managed and structured, can place inordinate burdens on the judicial system, burdens that are not necessarily justified economically. Currently, the law in BiH defines small claims “are those where the monetary claim does not exceed 3,000 KM.”³ The law does not permit courts to refuse substantially smaller claims, no matter how inconsequential the amount – claims of less than 10 KM have been brought by some utility companies. Much can be done through existing law and practice, however, to reduce and remove these low value cases.

Although many believe that the excessive small claims can be handled sufficiently by applying more resources, such resources are not the solution, even if they were available. Previous attempts to move the work from one part of the courts to another without undertaking fundamental reforms have offered no relief.

¹ Commission of the European Communities, *Green Paper on a European Order for Payment Procedure and on Measures to Simplify and Speed Up Small Claims Litigation*, COM(2002) 746 Final, 20 Dec 2002 (http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0746en01.pdf) (the “Green Paper”).

² *Green Paper*, page 8.

³ Code of Civil Procedure (CCP), Art. 429.

Reform of the small claim regime will require the coordinated implementation of independent but related solutions. These include revision of the legal and regulatory framework, using automation to expedite case processing, reorganizing the way small claims are handled, revamping the fee structure, increasing use of alternative dispute resolution and improving the use of litigation information for risk prevention through credit information agencies.

To better analyze problems and solutions, this report distinguishes between (1) small claims arising from utility services for water, heat and garbage and (2) all other small commercial claims.⁴ Utility claims for water, heat and garbage are addressed in Section III *Unpaid Utility Bills*.

A. Laws and Regulations

Small commercial claims are currently handled under a partially simplified civil procedure regime. That is, they are treated on a first-in/first-out basis with the normal schedule of hearings and other events. The only special consideration for these lower value actions is that parties may not appeal or object on interlocutory matters until final decision, which is read in court rather than served on the parties (CCP Art. 431). The elimination of interlocutory appeals eliminates delaying tactics commonly used in larger cases, which is an improvement, but much more could be done.

Legal reforms could permit a reduction of the overall burden of small claims, both through improved processing and reduced access to courts of inconsequential claims. Inconsequential claims can be reduced through revision of existing tax regulations (requiring suit prior to write-off), extension of the statute of limitations, and through rationalization of court fees and fee payment requirements. Such changes may meet resistance over access to justice concerns, but these can be adequately addressed without requiring burdensome and expensive judicial processes. (A comprehensive list of laws and regulations implicated by the changes recommended in this report can be found in Annex 5.)

1. Simplified Procedures

European standards, though varied across countries, generally **reduce the process** considerably. Instead of the more complex system of hearings, EU countries tend to treat small value claims (which range from €600 to €8,000 in value) in the same way BiH treats trustworthy documents. That is, the plaintiff may bring an action for judgment which, if not disproved or properly objected to promptly, can be immediately enforced. Defendants are protected through their right to object, but are otherwise unable to introduce unjustified delays.

In response to the crisis in the enforcement division, BiH amended the CCP to eliminate a number of claims being filed by reducing the types of commercial invoices that could be enforced as trustworthy (or “authentic”) documents.⁵ The drafters were particularly concerned with the high number of utility claims being brought by utilities that could cut off

⁴ Under Article 29 of the Law on Enforcement Procedure (the “LEP”), utility claims for water, heating and garbage can be brought on the basis of trustworthy (or “authentic”) documents directly as an enforcement action, without prior adjudication. Other utilities must first file a claim (small or otherwise), but tend not to because they can disconnect services and thus enforce the debts.

⁵ LEP, Art. 29 (for both RS and FBiH) limits “authentic documents” to checks, bills of exchange, and utility statements for water, heating and garbage. Prior law permitted a wider range of instruments.

services to enforce their claims, but were using the courts instead. This approach is understandable in light of the urgent situation in which it was adopted. The reduction of qualifying trustworthy documents has eliminated a number of utility enforcement actions. Unfortunately, this remedy did not address the underlying problems effectively. It diverted many of these small claims from the enforcement division to the slower trial division, thus moving the bottleneck without eliminating it.

Europe is moving in the opposite direction, seeking to establish common approaches in the EU to uncontested claims. The European Commission recently issued a proposal for simplified small claims procedures⁶ that is quite similar in approach to the trustworthy document procedures under the LEP. It provides for courts to issue enforcement decrees based on commercial invoices and, if uncontested, enforce the decrees immediately.

Long-term judicial efficiency would be better served by restoring the wider range of trustworthy documents (other than the eliminated utility bills, which can be handled through a Framework Utility Law and through requirements for ripeness⁷). We therefore recommend that BiH consider once again **extending the trustworthy (or “authentic”) document privileges** to a wider range of commercial invoices for claims less than 3,000 KM. At the same time, it would be beneficial to **simplify small claims procedures** even more along European guidelines. This would entail a single hearing with simplified rules of evidence and procedure, immediate decision (if appropriate) and limited recourse to appeal after the decision. Expedited processing of this sort would remove the incentives currently arising from the inherent delays in proceedings.

2. Tax-Related Filings

Article 4 of the Corporate Tax Regulations prohibits companies from writing off debt unless they have sought to enforce their claims in court. If they cannot write off the debts, the companies are unable to claim tax refunds related to their unpaid receivables, thus increasing their losses. Unfortunately, the tax regulations do not recognize that some claims are uncollectible, with or without a lawsuit, and that others are too small to justify the time and expense involved in bringing suit.

According to representatives of larger high-volume plaintiffs, thousands of claims are filed every year because of Article 4 write-off requirements. BiH would be better served by more reasonable standards for write off, allowing claims – at least below certain amounts – to be written off without suit. It is time to **revise Article 4**.

These mandatory suits also discourage the use of alternative dispute resolution (ADR) that might result in reductions of the total amount owed (at least for higher value claims). If the parties reduce the amount, that amount forgiven cannot be written off without a lawsuit, which defeats the purpose of the alternative approach. Moreover, costs related to ADR may not be deductible, whereas litigation costs are.

⁶ See Commission of the European Communities, *Proposal for a Regulation of the European Parliament and the Council to Establishing a European Small Claims Procedure*, COM(2005) 87 final, 2005/20 COM, 15 March 2005 (<http://www.dca.gov.uk/consult/smallclaims/pdf/procedure.pdf>).

⁷ See Annex 4, *Utilities Pilot Project*, which sets forth requirements that utilities must meet prior to filing a claim.

During the preparation of this report, USAID’s TAMP project proposed substantial changes to BiH’s tax regime. Among other reforms, the proposed new law removes the lawsuit requirement for tax write offs, instead permitting companies to write off any unpaid debt after 12 months of unsuccessful collection efforts. If this reform passes, it could have a substantial positive impact on reducing the number of claims in court, but the impact will be realized best if the reform is covered by a **public education campaign** on this issue. The campaign should target high-volume plaintiffs (such as the utility companies), accounting firms that can get the news out to their clients, and the courts, where information could be made available to plaintiffs informing them that they no longer need to file cases for tax write-off purposes.

3. Statute of Limitations

The statute of limitations for many of the smaller value claims currently being brought is only one year. Many companies preserve their claims for debts by making sure that they file within the one-year period of limitations, even if they know that actual decision and enforcement may be substantially delayed. By **extending the statute of limitations** to two or three years, plaintiffs could reduce such filings in the future by one-half to one-third while aggregating claims over the extended period to better justify the use of judicial intervention.

4. Court Fees

For commercial cases, most countries now attempt to set fees at a level that will pay for the services rendered by the judiciary, so that the courts are essentially self-supporting through fee collection. They also require payment off fees and costs prior to providing services. BiH currently suffers from inadequate fees and inadequate collection, both of which encourage irresponsible use of the courts by companies which pass of collection to the courts rather than use their own resources for better collection. This means numerous small value cases are filed which should not be, and that courts are not collecting enough fees to pay for their services.

a. Fee Structure. The existing fee structure has two problems. First, the costs of lawsuits and enforcement actions are **unreasonably low** and do not adequately or accurately reflect the cost of the services provided. Fees for higher value cases may approximate court costs, but for smaller claims they can be as low as 5 to 10 KM. As a result, the courts are subsidizing business collections while encouraging poor receivables management and multiplying the number of small, petty and frivolous claims filed.

Table 1: Court Fees

Value of Claim	100 KM	100,000 KM
Fee (KM) for Enforcement Motion or First Court Decision		
Sarajevo	25	1,500
Mostar	25	1,500
Tuzla	10	500
Brcko	10	250
Republika Srpska	5	500

Research by FILE indicates that approximately 20% of commercial claims filed in Mostar from 1999-2004 were valued at less than 100 KM. A substantial portion of claims in Sarajevo are also under 100 KM. Many of these would not be brought at all if the fees were properly set (and enforced). Thus, fee reform would reduce the number of low value claims being filed while also discouraging trivial, frivolous and nuisance suits.

Second, as shown in Table 1, the current **fee schedules vary widely** across the country, encouraging forum shopping. For example, in Republika Srpska, a 100 KM Motion for Enforcement costs 5 KM to file; the same motion costs 25 KM in Mostar and Sarajevo. If the goal is equal treatment among all citizens, the charges for public services should be similar, if not the same, across jurisdictions.

b. Fee Collection. Court fees are not consistently collected in a timely manner. Instead, plaintiffs are frequently allowed to wait and pay only upon successful recovery. Sarajevo Municipal Court, for example, has an estimated 100,000 cases with unpaid fees on its docket, an aggregate amount that may well exceed one million KM in value. In other words, BiH is running a contingency fee system for commercial plaintiffs, creating an incentive system that encourages managerial irresponsibility at considerable cost to the court system. Low fees, combined with the contingency system, remove the normal economic incentives for attempting other forms of collection or alternative dispute resolution. This is inappropriate.

Existing laws need to be changed to **require payment in full** prior to the courts rendering services. Under the current court rules of Sarajevo, Mostar, Brcko and the RS, moving parties are legally required to pay fees upfront (except Brcko, which allows an 8-day delay), but there are no immediate consequences to the failure to pay. Instead, court rules require that the court continue the process and then begin an action against the party for default on fees. This is far out of line with international best practices, and is tantamount to running a cinema where patrons only have to pay after watching the movie, and only if they enjoyed it.

Changing the law may meet resistance on human rights grounds (addressed below), but the objections are surmountable. Once reformed, the new law should provide that:

- No action or motion may be brought by a commercial enterprise without prior payment of fees
- In any motion or event generating a fee or cost obligation, the case will be stayed until fees are paid and, if unpaid for a certain period (such as 30 days), the case will be dismissed with prejudice
- The same rules will apply for individuals unless the court, upon application by the individuals, relieves them of the fees or costs for lack of financial capacity, essentially placing them in indigent status

Prior to a change in the law, however, court presidents can encourage greater payment discipline, especially with the use of the Case Management System (CMS) currently being installed. First, court presidents have the authority to **prioritize case disposition** during the current backlog crisis, and should simply state that commercial cases brought by companies will be prioritized according to payment. Those without full payment will not be heard until all paid cases are heard. Second, once a case is entered in the CMS, the files can be flagged to show whether fees have been paid; if not, the software can prohibit scheduling or other actions until the flag is removed through fee payment. That is, CMS can be used to do the prioritizing under the instructions of the court presidents.⁸

⁸ Some legal scholars and professionals have argued that all citizens – corporate or individual – have a right to use the courts, and therefore cannot and should not be denied service if they cannot pay the fee. However, corporations and legal entities have a privilege, not the same right as individuals, and even individuals do not

c. Human Rights Issues Related to Fees. There is a widely held belief that it is a violation of human rights for the courts to deny judicial process to a party for failure to pay fees. This is based on accepted principles regarding access to justice for individuals,⁹ but not necessarily for companies or other legal entities. Such corporate persons act under privilege, as there is no fundamental right to incorporate and receive limited liability protection, but rather a privilege granted in exchange for certain standards of behavior enshrined in law. It is noteworthy that individuals wishing to incorporate must pay certain fees for that privilege and cannot incorporate without doing so. It follows that such corporations fall under a different regime than individuals. Inability to pay court fees suggests that the corporation is insolvent and should be liquidated.

Whether BiH decides to extend to corporations the same rights as individuals is not necessarily important in rectifying the current non-payment system. BiH already recognizes that certain individuals, by virtue of their reduced financial circumstances, should be exempted from some mandatory costs. Article 400 of the Code of Civil Procedure expressly provides for relief from costs of the proceedings. European Union practice calls for the party seeking relief to apply for it;¹⁰ it does not provide relief to all parties (through delayed payment or otherwise) in case a few of them may have trouble.

BiH should revise the existing Code of Civil Procedure, Law on Enforcement Procedure and appropriate court rules, as necessary, to clearly **provide the standards and processes required for receiving legal aid**. This initiative should also include development of appropriate application forms and judicial guidelines for awarding or denying indigent status.

B. Automated Case Processing

Delay undermines the very purpose of the courts, as justice is lost with the passage of time. Effective caseload management makes justice possible, both in individual cases and across judicial systems and courts. Streamlining the ability of courts to adjudicate commercial claims will encourage positive developments, such as increased lending and investment.

In preparation for automation, FILE has conducted an analysis of the commercial, civil, enforcement, bankruptcy, and criminal case workflow in four courts to identify processing inefficiencies and develop recommendations for improvements. This analysis involved

have the right to *free* services if they can afford to pay. The law needs to shift the presumption so that all are obligated to pay unless they can prove indigent status that qualifies them for special treatment.

⁹ For example, in the Dayton Peace Accords of 1995 (which form the basis of the constitutions of both the Federation and Republika Srpska), Article I, section 6, addresses “the right to a fair hearing in civil and criminal matters, and other rights relating to criminal procedures.” This wording is parallel to that in the United Nations Universal Declaration of Human Rights, Article 7, which was enacted in 1948 and states that “All are equal before the law and are entitled without discrimination to equal protection under the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Similarly, the Federation constitution states in Article 2, section (1) (c) that “All persons within the territories of the Federation shall enjoy the rights: to equality before the law,” while the constitution of Republika Srpska states in Article 16, paragraph 1, that “Everyone has equal rights for protection of his or her rights before the court and/or other state authority or organization.”

¹⁰ See, European Commission, *Proposal for a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid and other financial aspects of civil proceedings*, COM(2002) 13 Final (http://europa.eu.int/eur-lex/en/com/pdf/2002/en_502PC0013.pdf).

interviews with judges and court staff, discussion and validation of data collected, and flowchart documentation of existing workflow practices. As a result, it is now possible to identify improvements that can be achieved through automation versus changes in process that are needed with or without automation.

1. Automation Efficiencies

FILE is developing automated case management software (CMS), which will soon be installed in three pilot courts and will be implemented in an additional twenty courts in 2006. CMS will provide the courts with a set of tools significantly **enhancing the efficiency of case processing operations**. In particular, the new automated system can accept and register cases, assign judges, docket events, and maintain a log of upcoming events. For the first time, the court has a systematic way to monitor the progress of each case, event by event, and to ensure that cases will move forward on schedule and not get unnecessarily delayed or “lost” in the system. In addition, CMS allows the court to clearly assign responsibility for each function and to focus attention on the timing of the next scheduled step in a case. Judges now know what is before them and must be done, and they can review and act on cases without having the physical docket before them.

CMS helps to eliminate duplicate cases through its ability to search records and collate information. With current backlogs in some courts, there may be multiple filings by a plaintiff against the same defendant over several years, a problem that can be eliminated through CMS data processing. Moreover, CMS enables courts to schedule hearings and enforcement actions more effectively. For example, court employees now search case records by hand before they deliver notices to court officers for enforcement. CMS will automatically sort cases by address, which will free up court staff; the geographical sorting will also help the court officers schedule the delivery of notices more efficiently.

In the near future, the CMS database will include the BiH national identification number of each party in its record. This will make it easier to identify duplicate cases and to find parties when the court has old or bad addresses. It will also allow enforcement officers to use their resources more efficiently because it will help them streamline the delivery of notices to individuals who have multiple enforcement orders outstanding.

As further addressed below, CMS can be used **to identify small claims and schedule them** for “bundled” hearings, allowing a judge to dispose of large quantities of these claims – which are usually uncontested – in a single hearing. Service, hearing dates, and even appeal dates can be better organized to reduce the amount of resources currently needed to address these claims.

Another significant accomplishment of CMS is the possible introduction of **electronic filing** to eliminate burdensome paperwork and filing requirements. Currently, the courts and the creditors are tied to a labor- and paper-intensive process that clogs up the judicial system. The utility companies and other high-volume plaintiffs expend extensive resources to prepare and submit paper claims and enforcement orders to the courts, which encounter excessive processing delays before even reaching a judge.

FILE has laid the foundation for the electronic transfer of information between creditors and the courts. Recently, FILE initiated a pilot project in Mostar to automate the transmission of information between the electric company and the court. The model reduces processing

steps, improves the accuracy of information exchanges, and allows plaintiffs and defendants to remotely access case information without involving the court staff. Once the pilot phase is completed, FILE will incorporate any needed changes and can roll out the system to other courts.

The President of the Mostar Court has been extremely pleased with progress made through implementation of CMS. Her commitment to change provides an opportunity for testing and verifying improvements in Mostar, which can then be rolled out to other courts for greater national impact.

2. Process Efficiencies

FILE has created model workflow flowcharts – significantly **streamlining current court practice** – that incorporate numerous recommendations for process improvements. Concepts and goals forming the basis for the recommendations included: (1) focusing the judge’s time on the adjudication of cases rather than administrative tasks; (2) delegating clerical and administrative tasks to non-judicial personnel (e.g., law associates, chiefs of registry offices, law volunteers, etc.); (3) ensuring accurate statistical data upon which sound managerial decisions can be based, and simplifying the workflow process; (4) minimizing the movement of case files between offices; (5) recognizing that process improvement should be continuous; and (6) pursuing changes that are “budget neutral” or, in other words, cost nothing to implement. Specific recommendations for streamlining administrative practice, thereby reducing case processing time and backlogs, are attached. (See Annex 7, *Recommendations for Improving Case Processing*.)

These recommendations were subsequently vetted with the “CMS User Group.” The User Group, which includes judges, court staff and other system users, was created to oversee and define the functional change in court practice that will result from implementing CMS. The group assessed the procedural/process recommendations and categorized them into three sets: those critical to CMS development; those that are valid recommendations but not critical to CMS implementation; and those that would not provide significant benefit to the operation of the courts.

The CMS application is being designed to provide the desired functionalities represented in the recommendations. The recommendations that do not require CMS or other computerization have been shared with other implementers working with the courts.

C. Reorganized Procedures

The one change that could have the greatest impact on clearing the crowded civil docket and reducing the backlog of cases would be to create a **specialized function** within the Civil Division of the BiH courts to process small claims. These claims (not including utility cases discussed elsewhere) make up a substantial portion of the civil division’s caseload. Most small claims are for non-payment of bills and present no legal issues. Even so, they put extraordinary demands on the courts’ resources and crowd out other types of cases that may require judicial intervention to interpret facts or points of law. Moreover, the current system does not give the plaintiffs in these cases the prompt resolution they are seeking.

Discussions with legal professionals and high-volume plaintiffs indicated strong support for establishing a **separate system for handling small claims**. FILE’s CMS provides the tools

for reorganizing treatment of small claims for expedited treatment and resolution. This does not require the creation of special courts, although establishment of a Small Claims Division might prove useful in the larger courts.

Creating a separate system for small claims has much to recommend it. Generally, the legal issues in these cases are straightforward, the monetary amounts involved are relatively small, and protracted litigation diminishes any potential award. Consequently, it is possible for a judge to handle a large number of these cases in one sitting. Under existing law, the system could work as follows:

1. Small claims are filed (electronically or manually), and are recognized as small claims by CMS.
2. CMS selects a date for all small claims filed during a certain period – for example, during one half of the month – with sufficient time for objections or answers to be filed, plus any permitted response.
3. The Court serves notice of the claim and the hearing date on the defendant.
4. At the hearing, all claims for which there has been no answer by the defendant are found in favor of the plaintiff and sent immediately for enforcement.
5. For cases with unfounded or unproven defenses (most cases), the Court dismisses the defenses and orders enforcement.
6. For any remaining legitimate dispute, the Court decides the case and issues the decision. If for the plaintiff, the Court orders enforcement; if for the defendant, the court dismisses the claim.
7. The Court sets the hearing date for all appeals using CMS.

This approach reduces a number of steps. Normally, the winning plaintiff must bring a separate action for enforcement. In the proposed approach, the plaintiff is deemed to immediately request enforcement and so that the enforcement request is sent immediately by the judge to the enforcement division, saving time and processing.

Resources permitting, the reorganized approach to small claims should be held in a separate facility or, at the least, a separate part of the existing courthouse. Preferably, the courthouse could be set up with “one-stop” service or “**all-in-one service center**” for small claims:

- a separate intake window for small claims only (for manual filings)
- a public-access computer terminal for checking case information
- a payment desk so that defendants can pay claims rather than proceed to hearing
- public information displays by credit bureaus
- for utilities (other than gas, heat and garbage) and other high-volume plaintiffs, a customer service representative to take payments and provide information
- an ATM kiosk to facilitate cash retrieval for payments

If the adjudication of these small cases were handled more effectively, made more certain, and accompanied with strengthened enforcement, we suspect that fewer accounts would become delinquent. Additionally, **segregating these cases** from the rest of the civil docket would improve resource allocation by allowing judges to focus more attention on the remaining, more complex cases.

FILE is currently discussing this “all in one center” concept with the Sarajevo City Trash Company, which brings 50,000 cases a year to court and could afford to assist in funding the creation of a center. That company has a highly automated system of recordkeeping and has the capability to submit claims to the court electronically.¹¹ Its director is the head of an association of 76 Bosnian utility companies and thus could be influential in rolling out similar initiatives in other cities.

CMS can also be used to **structure enforcement of small claims** more effectively. Using the sort functions of the software, claims can be separated geographically by address, a process currently handled by hand. This permits efficient scheduling of the enforcement officers’ time and resources so that enforcement actions are more productive.

Finally, CMS offers an opportunity to organize high-volume plaintiffs for greater effectiveness by **requiring them to file electronically**. The courts can assist plaintiffs in developing necessary software interfaces to file, track and dispose of claims. (For example, if a customer pays the plaintiff directly after commencement of suit, plaintiff’s accounting software should immediately notify the court computer system that the claim has been settled.)

D. Alternative Approaches

Courts are supposed to be the last resort for resolving disputes. In BiH, they are often seen as the only resort. However, better management of claims and conflicts by the private sector would reduce the overall numbers of cases coming to the court. The private sector is not doing its job effectively and the economy is paying the penalty.

Improved private sector management is not the responsibility of the courts, but courts can help encourage this. **Judges can be proactive** in questioning frequent plaintiffs on their internal collection procedures; they can also insist on payment of fees before they will hear a case. Judges can also examine underlying contracts for clarity and adequacy to **encourage better contracting skills** among the private sector. In addition, the courts can issue reports on where the private sector is failing, using their unique position to provide input on weaknesses they see.

BiH should consider redefining the concept of ripeness for commercial claims by amending the law to set forth various mandatory **steps necessary before a claim** can be filed. These steps should include simple collection procedures and credit reporting. The change would require plaintiffs to establish collection systems in order to have access to the courts.

Courts can have significant impact on the use of ADR devices such as mediation and arbitration. BiH should consider the use of **mandatory mediation** for certain types of cases, then use CMS to monitor use of ADR prior to judicial relief. ADR is covered more fully below in Section VI, Commercial Dispute Resolution. These mechanisms can be extremely effective in keeping parties out of litigation when cases are ripe for this form of intervention and when the involved parties want to maintain or preserve an ongoing business relationship.

¹¹ Of course, the ability of a business to transmit claims to the court electronically will depend on the automation stage of both the business and the court. In any event, electronic transmission of claims will be facilitated if the businesses and courts can agree on a standardized set of procedures and forms. We hope that the utility association will take an active role in encouraging such efforts.

These tools can also be useful in instances where specialized knowledge is required to reach sensible results and none of the judges have that knowledge.

We recognize that these alternative resolution devices will only work if all parties are willing to abide by and respect the outcomes; otherwise, the cases will find their way back into the courts. In BiH, these settlement outcomes are considered “enforceable documents,” but not “trustworthy documents.” Therefore, they cannot be taken to the enforcement division for action if a party shows bad faith. In instances where a party fails to comply with the agreement, the case reverts back to the Court of First Instance. It is crucial to **educate the trade associations**, the Chamber of Commerce, credit bureaus, banks, and other institutions about the appropriate uses and benefits of alternative approaches.

As noted in Section II, *Collateral Law*, **bills of exchange** provide another opportunity for reform with significant potential for removing claims from the courts. Bills of exchange permit creditors to secure debts effectively through access to their cash accounts. Unfortunately, accepted international practice for negotiating bills of exchange has been compromised in BiH by permitting the debtor to halt payments. This practice must be reformed: bills of exchange should not be characterized as trustworthy documents that can be easily challenged in enforcement (which usually results in protracted civil litigation). Instead, bills of exchange should be characterized as enforceable documents against which a debtor’s delay tactics are a few and the probability of successful collection higher.

E. Stale Claims

Much of the backlog problem exists more on paper than in reality. Because of the delays, many of the cases pending resolution for several years have actually been resolved by the parties long ago, but never taken off the books. Others have been abandoned because they were brought only to comply with tax write-off requirements, despite no reasonable prospect for success. No studies have yet been done to determine accurately the extent of this “phantom” backlog, but there are indications that many cases could simply be eliminated instead of processed. Unprocessed small utilities cases from 2003, for example, probably contain a high percentage of claims that have since been paid or are uncollectible.

The law of BiH does not have a clearly recognized concept of *laches* or staleness found in other systems. That is, many countries permit courts to dismiss older cases if no action has been taken on them in a certain time period. Normally, the lack of activity is a sign that the case was settled or mooted by other events and there is no real interest in pursuing resolution.

While the law should certainly be amended to include **dismissals for** staleness, court presidents could use their prioritization powers now to fill the gap. Presidents with substantial backlogs in their courts should develop a one-time elimination program for stale claims that shifts the burden for moving forward from the courts to the parties. To do this, they can set a policy that all registered cases that have not been the subject of any activity for at least six months will be **deemed to have been settled**, and unless otherwise advised by the parties, the courts will dismiss, archive and remove the cases.

The court should provide for a grace period of six months for parties to reactivate cases through a request for action on their cases. Only those cases in which there has been a request will be pursued, and all others will be dismissed, but with the possibility that a case

can be reopened within one year upon showing of extraordinary cause (such as the parties being out of the country during the period of reactivation).

In addition, as noted in Section III, *Unpaid Utilities Bills*, backlogged unregistered claims prior to 2005 should be **deemed abandoned** unless the plaintiff expressly certifies that a specific case is still open and requests registration and processing. To the extent that processing is needed only for purposes of write-off, those cases should be separated, registered, and then archived unless reactivated within six months of registration. This will permit companies to comply with tax laws, but as a practical matter no action will be taken on the cases.

To increase the incentive for parties to abandon stale claims, courts should award fees against the plaintiff whenever the defendant shows that the account has been settled, but was not withdrawn by the plaintiff.

It is likely that there will be an outcry by plaintiffs that most of the inactivity is due to the failure of the courts to process claims in a timely manner. This is certainly true, but part of that failure arises from the poor billing and commercial practices of high-volume plaintiffs who inundate the courts with small claims. The important issue, however, is that this initiative is not concerned with issues of fault. It is simply a realistic approach that recognizes that only the plaintiff can know whether there is still a claim. Consequently, the plaintiff should withdraw any claims that have become invalid during the delays. For valid claims, the plaintiff should amend them, if necessary, and request judicial action. Cases not withdrawn or reactivated should simply be dismissed.

F. Credit Information

Credit information can prevent lawsuits by attaching negative consequences to poor payment performance. Credit bureaus achieve this by providing information to credit risk managers that enables them to assess their exposure more effectively and either refuse to offer credit or secure credit more effectively. Those who fail to make payments find it harder to obtain credit in the future.

To be useful, a credit information bureau must gather relevant and timely information from relevant institutions. BiH currently has one credit bureau – LRC – which has actively sought to improve its database on noteworthy credit behavior. It would be extremely useful for LRC – and any other credit agency that may be started in the future – to receive regular automatic reports of commercial lawsuits. This can be achieved through modifications to CMS to permit **regular downloads of lawsuit and bankruptcy cases** by credit agencies. In addition, computer solutions can provide ready access to information on registrations, pledges and other filings.

Credit information at this point is still underdeveloped. In particular, developing a credit-scoring system is needed to “process” the raw data and convert it into a meaningful summary measure. Under the current system, the credit bureau simply provides information to the client without putting it into a weighted context; a scoring system that assigned appropriate weights to the various aspects of a person’s or firm’s financial situation would make those reports much more useful. If parties are able to make more informed business decisions at the outset, fewer issues will require adjudication.

Educating the public about the use of credit and the value of reliable credit information is proceeding, but at a slow pace. The credit bureau has initiated a public information campaign and given presentations at the economics department of the university, but it has very limited resources to perform these important tasks. Efforts to give the business community, media, university economics faculties, and the general public a better understanding of the power of accurate, accessible credit information should remain a high priority. Such **public education** is needed to encourage BiH businesses to change their traditional practices of making credit decisions without accurate credit information. This will reduce the number of claims made as debtors learn that their payment history affects their credit future.

II. Collateral Law

Collateral law lowers the cost and risk of lending by permitting borrowers to secure their obligations with property. For a country in need of rapid economic growth, a well developed system of secured lending is essential for investment and business development. BiH has made important advances in this area, but much work is still needed.¹²

Ongoing needs can best be understood by examining the component parts of the collateral law system. Simply stated, a healthy secured transaction system allows lenders to take and register an *enforceable interest* in a debtor's *property*. The strength and weaknesses of the system are therefore a function of property rights, registration, and enforcement.

A. Property Rights

Collateral law is founded on definitions of property that can be subject to a security interest. An effective system must be able to address business and investment needs with regards to three types of property:

1. Immovable Property (real estate) – land, buildings, fixtures permanently attached to land or buildings, and (frequently) interests in land and buildings.
2. Movable property – tangible items that can be moved, such as machines, equipment, vehicles, crops, livestock, inventory, furnishings and any other identifiable, movable item.
3. Intangible – rights or interests arising from law or contract that do not have physical qualities, such as patents, accounts receivables, rents or shares in a company interests.

BiH has made impressive progress in developing the collateral law regime for movable and intangible property. As a matter of law, most forms of movable and intangible property can be used as security, although practice has not yet caught up with the changes and possibilities. This should change naturally over time, and requires no particular donor interventions with respect to the collateral system.

With respect to unregistered collateral, there is a problem with **bills of exchange** that should be addressed. Bills of exchange are similar to a check, which are provided by a debtor to guarantee payment and thus reduce lending risks and costs. If the debtor fails to meet payment obligations, the creditor may present the bill to a bank for immediate payment,

¹² For additional analysis and recommendations, especially regarding private-sector responsibilities in improving the enforcement system, see Annex 8, *Enforcement Report*.

subject to no objections by the debtor. If the creditor misuses the bill of exchange, the debtor can bring an action for damages, but cannot stop the use of the bill in advance. This provides certainty and is the most important characteristic of this important trade-financing tool.

BiH currently treats bills of exchange as trustworthy documents (LEP Art. 50) subject to objections that can result in conversion of the claim to a civil suit, instead of a straightforward enforcement action. This completely undermines the certainty and effectiveness of such a document as an internationally proven and effective collateral device. Correcting this law will have a significant positive impact on financing in BiH, while also removing inappropriate cases from the courts.

Unfortunately, **real property rights** present several significant problems arising from pre-modern conceptual misunderstandings that are currently embodied in the law. Modern commerce and financing allow for a lender to take a security interest in a building that has not yet been constructed. In construction financing, banks in countries with modern collateral systems have the option of lending substantial amounts to builders to enable them to construct a building, and they manage their risks by taking an interest in the building to be built, as well as in future rents or sales proceeds from the building. In BiH, the law does not recognize this possibility. Before property can serve as collateral, it must exist physically. As a result, construction and investment financing are severely constrained, despite its paramount importance for the economy. Factories, homes, condominiums and all other new building are constrained by this outdated approach to property rights.

The conceptual problem can be addressed through substantial change in the laws defining and affecting real property rights. Unfortunately, it is not being addressed for three reasons. First, the lending and construction communities have not developed sufficient capacity to lobby for these reforms from the government. Second, legal scholars (professors) whose approval is needed do not understand the issues and are resistant to changing traditions. Third, the donors responsible for reforms in the area of real property are applying a model to the BiH system that encourages legal scholars to maintain the status quo.¹³

Each year of delay is hindering BiH's economic development. This is ironic, because such issues for movable property have been adequately addressed through a very modern and effective Pledge Law. Until the real property regime is reformed to permit modern lending practices, BiH will be condemned to lower-than-necessary economic growth.

B. Registration

As with property rights, issues of registration in BiH differ dramatically depending on the type of property being registered. For movable and intangible property, BiH has adopted a highly proficient Pledge Law and an extremely effective pledge registry. Because of these, the commercial sector has the necessary tools for development of vibrant collateral lending for tangible and intangible property.

¹³ The problem is not simply a failure to understand the concept of future rights. It hinges as much or more on concepts of the role of government in the market. Those favoring the status quo are not prepared to permit lenders to accept the risk that the building may not be built, and therefore the security interest may never become enforceable. Unfortunately, they are not protecting the economy from default, they are protecting it from development.

There is one significant exception, however. **Leasing** is a form of secured financing that is not adequately addressed by the existing system. In other forms of secured lending, the owner of property grants an interest to a lender, so that the lender can take possession of the property if the owner defaults on the contract. This interest is registered in order to reduce and avoid problems with third parties and other lenders by publicly establishing priority of interests in the property.

Leasing, however, is different. In this case, the owner is the leasing company, which grants the “borrower” possession of the leased property (such as a car). Instead of owning the car, the “borrower” has a possessory interest only, and cannot grant a security interest to the leasing company. Leases must be registered in accordance with the Pledge Law to preserve priority claims on the property. Normally, this should also permit enforcement in accordance with the same law.

In BiH, there is a gap in the law for enforcement of leases, which are not covered by the enforcement provisions of the Pledge Law. Instead, they must be enforced in accordance with the more complicated procedures of the Code of Civil Procedure. This can be changed through a separate law regulating leasing which states that registered leases are enforceable under the terms of the Pledge Law. This gap was being addressed through development of a separate leasing law. Due to the debatable quality of the draft law, as well as controversy surrounding the approach, the draft leasing law has failed and been withdrawn. It is now necessary to pass other legislation to bring enforcement of leases into the pledge regime, where they belong.¹⁴

For **real estate**, the current situation in BiH is highly problematic. A substantial percentage of plots and buildings are unregistered. Although the law permits enforcement against unregistered real property unless (CCP Art. 113ff.), it has proven to be both difficult and risky. The registries are in disarray, in large part due to the war. As a result, very little real estate can be used effectively for mortgages and other financing.

A project is underway to develop a real estate registry, including mortgage registry. Progress has been slow, and there is a great deal of disagreement between over the appropriateness of the model and approach being used.

It is possible to bypass some of the problems of registering interests in real estate that are caused by the current chaos in the real estate regime by adopting a **Canadian model** that has proven extremely successful. Under this progressive new approach, the law treats interests in real estate in much the same way it does interests in movable property, and permits all interests to be registered in a single registry. Interests in land are not dependent on the land registry under this model, although land registration is still important for establishing ownership interests definitively. Through the Canadian model, registration of mortgages and real estate liens in BiH would not be so highly dependent on the repair of the land registry system. The existing pledge registry in BiH could be adapted to handle such filings, or the

¹⁴ Under the Pledge Law, the plaintiff can bring an enforcement action for seizure without judicial notice to the debtor. The debtor is therefore unable to stop the enforcement in advance, but can seek protection – if justified – only after the collateral has been seized. Pledge enforcement is very effective in avoiding the need for seizure: debtors simply pay rather than risk losing the collateral. See Pledge Law, Arts. 25-27.

software could be used to establish separate but linked registries should the entities insist on separate registries.

Technically, this is a straightforward solution. Legally, it requires substantial work to reform the various laws that currently govern these issues. Politically, it could be very difficult, primarily because of the political issues related to donor “jurisdiction” over various reforms. If there is to be change, it needs to be directed by the banking and construction industries in partnership with those government agencies responsible for economic growth and development.

C. Enforcement

The Collateral Law system of BiH has been beset by problems of enforcement. Substantial progress has been made in the area of movable property, but, overall enforcement of commercial contracts continues to hamper economic development by increasing costs and risks of doing business in BiH. Without effective enforcement, economic rights are merely theories.

Many of the enforcement problems are not unique to claims against collateral, but instead arise from weaknesses in the existing judicial system common to all claims. These weaknesses can be divided into two basic categories: inappropriate delays and ineffective procedures for execution and liquidation. Together, they are crippling judicial effectiveness and reducing economic growth.

1. Inappropriate Delays

Recent changes to the Law on Enforcement Procedure eliminated the benefits of delay by providing that **enforcement actions will not be stayed** by complaint or appeal.¹⁵ Previously, a debtor subject to an enforcement action – whether because of a judgment, pledge or trustworthy document – could successfully delay the enforcement indefinitely simply by appealing the enforcement action. The new law provides for enforcement to continue during the appeal.

Unfortunately, practices have not kept up with law. Many creditors complain that judges continue to stay enforcement actions if a debtor objects. This suggests that re-training and monitoring are needed to conform practice to law.

In addition, judges are authorized to **reject frivolous or unfounded objections** on their own (such as claim of payment without any proof of payment), but many simply send the issue on for appeal without determination. Moreover, in some instances the judge can award costs against an unfounded objection, but this is seldom done.

Changing judicial behavior to conform to the new standards would have an immediate impact on efficiency of enforcement. Indeed, there are reports that some lawyers have begun advising clients not to object or appeal if the case is before judges who apply the new law. If the High Judicial and Prosecutorial Council would work with BiH’s Judicial and Prosecutorial Training Centers to establish training and monitoring for increased compliance with the new laws, it would likely result in measurable improvements in a very short time period.

¹⁵ LEP Art. 12(5) states: “An objection or appeal shall not stay the enforcement procedure . . .”

2. Ineffective Procedures

Despite substantial positive changes in the laws affecting judicial efficiency, courts continue to struggle with ineffective procedures that increase costs and risks associated with secured transactions. The process of enforcement should be very straightforward, but instead is hampered by practices in delivery of documents, seizure and storage of collateral, appraisal of seized assets, auctions, and payment of funds collected.

It should be noted that the Pledge Law has a separate, more efficient enforcement section that applies to enforcement against pledged property. This law bypasses the protest provisions mentioned above, and should bypass many of the problems below. Only a few cases have been tested under the new law, and they have worked well. However, continuing problems in enforcement represent a continuing risk even for enforcements against movable property, especially as backlogs continue to threaten the overall efficacy of the enforcement division.

a. Delivery of Documents

The new Code of Civil Procedure regulates service of documents on parties to a judicial action. The provisions appear to offer substantial opportunities for improving service of process over prior law and practice, but current practice has not adjusted to take advantage of these opportunities, resulting in numerous delays.

The Code of Civil Procedure permits service by post, by “an authorized legal person registered to conduct service” or by an authorized court employee (Art. 337). Moreover, “service can be performed at any place by personal delivery to the person to whom the service is directed” (Art 343, emphasis added). In practice, it is generally believed that the law requires service (1) for individuals, at the individual’s address as registered with the local police (unless an agent has been appointed to receive service, such as a lawyer), (2) for entities, at the registered office, unless an agent has been appointed to receive service, or (3) at the address of a properly appointed agent. In fact, the law does not require this, but it has become practice.

There are several serious problems with current practice. The first problem is in the perceived **address requirement**. Parties may establish the address for service of process by contract and thus eliminate numerous questions regarding receipt. This shifts responsibility for recordkeeping from the state to the parties themselves. At present, the habit of relying on the state (either the police or the company registry) to provide correct addresses promotes irresponsible behavior by debtors and creditors. Enforcement officers report that 30-50% of all service by mail is returned because the address is invalid. Practice should be changed to encourage parties to provide addresses for service of process by contract.

The second problem arises from conflicting legal regimes and holdover practices that remove **responsibility for service** from those with an incentive to ensure success. The court alone has taken responsibility for successful service even though creditors would gladly assume responsibility and cost of service in order to keep their claims on track. Currently, the enforcement division of the Sarajevo courts spends approximately 1.2 million KM annually on postal service, of which at least one third is wasted on incorrect addresses. Numerous modern judicial systems make the parties responsible for proper service, subject to serious

criminal liability for fraud.¹⁶ BiH courts do not have the staff, resources or incentives to ensure effective enforcement, but creditors have all three.

The new law provides for the use of “authorized legal persons registered to conduct service.” To date, this provision has not been defined or regulated. Some practitioners believe it was intended to permit the use of DHL or similar private couriers; others do not know what was intended. The current system of service frequently fails because the options utilized are too narrow. Postal service can be useful, but has been shown to have a high failure rate. Notice can be posted upon failure of delivery, but this is truly appropriate only when a reasonable attempt at service has been made. Creditors would be willing to pay for courier delivery or service by authorized agents, but these possibilities do not exist. BiH needs other, effective forms of delivery and the Code of Civil Procedure (Art. 337) seems to permit an opening to develop more effective approaches.

b. Misallocation of Resources

Enforcement officers should focus their efforts on seizing property and, where required, helping to liquidate the property through auction or other actions. Unfortunately, responsibilities of BiH enforcement officers have expanded inappropriately, so much so that it is difficult for them to perform their primary function of enforcement.

First, enforcement officers should handle only those documents that relate to their work: they should not act as a mobile filing service system for all court documents related to the case. Currently, all **responsibility for filing** shifts to enforcement officers once the case goes to enforcement. Central filing should maintain the principle file, sending only relevant documents to enforcement officers rather than smothering them with inappropriate administrative duties.

Second, enforcement officers are subsidizing the courts and the creditors because they are required to utilize their own vehicles to carry out their functions and are not reimbursed for either fuel or depreciation. **Personal payment** of these costs results in a net reduction of salary, and is one reason for a high turnover rate among enforcement officials. To complicate matters, enforcement officers often cannot find parking while trying to perform their duties; some have even had their cars towed while repossessing property.

Third, enforcement officers are often used to **serve court papers** when postal service fails. While they are certainly qualified to do so, the department is not sufficiently staffed to provide this service. Either they should be relieved of this duty, or more officers should be hired to do this work.

c. Seizure and Storage of Assets

Seizure, transportation and storage of seized assets are problematic. The enforcement division does not have enough room to **warehouse** seized property. As a result, they identify

¹⁶ Some stakeholders express concern that if private parties are permitted to serve papers, they will perpetrate fraud and be able to obtain default judgments. For them, this justifies keeping all service in state hands. It is worth noting, however, that state service is not immune from fraud – serious problems already exist with defendants paying postal servers not to deliver court documents. The more important issue is that various jurisdictions have effectively addressed these problems through imposition of severe sanctions for such fraud as well as through various certification and licensing requirements. The rare case of plaintiff fraud is not a significant threat to BiH; maintaining the status quo will do much greater damage.

property to be sold, but leave it on the premises (whether residential or business) of the debtor. It is very difficult to sell assets on the premises of the debtor, so the lack of storage space lowers the recovery, while also raising costs and complications by having auctions at numerous locations.

Likewise, court officers do not have adequate **transport capacity** for large seizures. The private sector can provide the trucks and warehouses needed by the courts, however. Delegating storage and transportation functions to the private sector will solve the problem more cost effectively, with no additional cost to the courts if the costs are included in the recovery from enforcement.

When they must seize property, enforcement officers often encounter serious resistance in attempting to carry out seizures, including **threats of violence**. This is true around the world, not only in BiH. Elsewhere, the problem is often addressed either by utilizing court police with the power to arrest individuals, or using the regular police force by having them accompany enforcement officers on seizure cases. Current practice in BiH is inconsistent, leaving enforcement officers unnecessarily at risk.

Finally, **computerization of enforcement cases** will allow more efficient allocation of time by enabling enforcement officers to group cases more effectively. That is, technology solutions can enable a court clerk to sort and arrange cases by geographical location so that assignments can be performed more efficiently, reducing transport time and cost. This, coupled with greater use of police escorts, could have an immediate positive impact on enforcement effectiveness.

Several of these issues are currently being addressed by FILE. Working with the Bank Association and the courts, FILE is helping to establish a private sector “auction center”. The Bank Association will assist the courts in setting up a privately funded center that can store seized goods, provide information about the goods (through internet and media publications), and hold regularly scheduled judicial auctions. By creating a single point of activity for sale of seized property in Sarajevo, the auction center will help the courts to establish a regular, predictable system of judicial auctions. At the same time, it will help to develop the market for repossessed goods by taking the sale out of homes and offices, where social pressures depress demand for the goods. Finally, it is expected that the auction center will enable the banking community and debtors to obtain higher value from the sale of seized goods.

d. Appraisal

Appraisal of seized property has no impact on the price offered at auction. In fact, appraisal is not even an appropriate role for the state: in countries with more effective procedures for liquidating collateral, the creditor will appraise the property at the outset to see if the value justifies the expense of seizing it. There is a mistaken belief that appraisals will somehow encourage bidders to offer more for the goods, but bidders pay no attention to official appraisals, they make their own assessments. During FILE roundtable discussions held in April 2005, participants could not identify an example in which appraisals had any impact on sales price. Furthermore, BiH execution officers report that appraisals have no effect on the bids. **Appraisals should therefore be eliminated**, in keeping with best practices in more effective legal systems. They increase costs and slow the enforcement process with no offsetting benefits.

The auction procedure also needs to be transformed. Minimum price auctions serve only to delay the final sale because they seldom result in a sale at the minimum price. Although justified as a means of protecting debtors and creditors by ensuring a higher price, they have no such impact. Instead, justice would be better served through a **single auction with no appraisal**. Price protection will come through improved auction procedures, including vastly improved publication of auctions in order to establish a market for judicial sales. To do this, it may be best to establish private sector auctioneers with incentives for obtaining higher prices. Such delegation appears to be permissible under the Law on Enforcement Procedure (Art. 130(2)), which provides for delegation of auction authority; in fact, judges delegate authority to execution officers for auctions of movable property. The same article permits private sale by a broker. There is no restriction in the current law against use of private auctioneers.

Roundtable participants noted that one of the problems with the existing auction system is that **auctions are irregular** and the public does not know when and where they will be held. Indeed, most movable property sales are held at the home or business premises of the judgment debtors. Participants recommended that auctions be held at a regular time and place, such as the first and third Monday of each month, at a specified warehouse or office, not in a court office. Such a change requires no legal or regulatory changes, merely instructions by the president of the court. Each court president should therefore establish a set time and place for auctions, post the schedule prominently at the courthouse, and send press releases to the local media to disseminate information generally.

Several of these issues are currently being addressed by FILE. Working with the Bank Association and the courts, FILE is helping to establish a private sector “auction center”. The center will serve as a warehouse and auction site, with regularly scheduled auctions. This is expected to develop the market for repossessed goods, improve recovery and lower the costs of judicial sales.

e. Payment of Funds

A separate problem in procedures arises once money is collected by the courts. Anecdotal reports indicate that it can take as long as two years for the collected money to be paid to the judgment creditor. The system should be reformed to establish **more effective clearing of accounts**. Many jurisdictions require the court to hold funds for thirty days to permit any claimants with higher priority claims to appear. After thirty days, all amounts are paid to the appropriate parties.

3. Special Problems of Enforcement against Real Property

The effectiveness of a collateral law system is dependent on all of the factors cited above, but they are not the only ones. The market for repossessed real property can be a constraint to the use and development of real estate as collateral. Even if the problems noted are fixed, they will not solve the problems presented by the market.

In general, only a few cities in BiH have a vibrant real estate market, or the potential for one. Repossessed land in small villages generally cannot be sold because of cultural constraints. In other words, enforcement is not a particularly important problem outside of urban real estate markets; instead, there simply is **no market**. This has implications for banking supervision and collateralization rules, not for the courts.

Enforcement agents in Sarajevo have reported great success in enforcing court decisions that required eviction of house and apartment residents. Although some are less effective than others, the problems seem to relate to just that – the capacity of the enforcement agent in pursuing the eviction. No significant project resources are therefore needed to improve eviction work.

For real estate, the greatest problems come after enforcement, where **delays in registering** the new owners make it difficult to obtain and register mortgage financing. Also, there has been a tremendous **tax burden for foreclosure sales** in which the lender redeems the property. Upon redemption, the lender must pay high taxes on the appraised value of the property and, upon resale, the next buyer must pay them yet again. Lenders do not purchase property for themselves and should be exempted from this redundant taxation, which merely serves to lower the purchase price and thus the recovery for the lender. Instead, tax should be paid only if a plaintiff purchases property at foreclosure auction and then fails to resell it within a certain time period. It may be difficult to address this issue outside of a more comprehensive tax reform program.

In a very positive move, the Sarajevo Canton recently amended its real estate taxation. Rather than seek payment based on the appraised value of the property (which is frequently much higher than the auction sale price), the transfer taxes are now 5% of the auction sale value received. This permits a lender to redeem the land for a nominal price without significant tax impact. The Sarajevo approach needs to be applied by other jurisdictions.

III. Unpaid Utility Bills

Today, there are several hundred thousand unpaid utility bills clogging the Municipal Court in Sarajevo alone. Only half of these have even been registered. The claims are overwhelming the enforcement division of the municipal courts. Various suggestions have been made to speed up the processing of these claims, but that is the wrong approach: the claims should not even be in the courts, because the courts were not designed to handle high-volume, low-value claims such as these.

The problem arises for only those utilities that are unable to cut off services for non-payment. For the most part, telephone and electric companies do not use the courts frequently - they simply turn off the services of delinquent customers. This is not possible for a certain group of heating, water, and garbage collection customers who live in communal buildings. The buildings were constructed without separate meters for individual units (or separate garbage receptacles), so that services cannot be disconnected for non-payment without disconnecting the entire building. In Sarajevo, there are 5,100 such buildings. The great majority of utilities claims come from delinquent customers in these communal buildings.

Unfortunately, the utilities have not developed effective collection procedures and turn immediately to the courts for collection, with few if any intermediate steps. To make matters worse, the utilities are required by law to attempt judicial enforcement in order to write off uncollectible accounts, which in turn is necessary in order to obtain subsidies from the government for losses. One result is that most of the claims are very low value (frequently less than 100 KM, with many less than 10 KM).

The most important strategic goal in handling utility bills is to get them out of the courts. Better processing is not the answer: Doing the wrong thing faster is not the same as doing the right thing.

Instead, something must be done to increase the Utilities' use of other enforcement mechanisms to improve their collection rate and reduce filings in the courts. Whether they do so or not, however, changes are needed to keep these claims out of the courts.

A. Improving Payment of Bills

Better payment behavior will result only if negative consequences attach to delinquency. Courts can be an effective part of the enforcement system, but not the only part of the system. Collection of overdue bills should entail a series of **escalating responses** by the Utilities, starting with a warning and ending – if all else fails – with a lawsuit.

Today, turning off service is the only enforcement option utilized by Utilities, but that option is not available with regard to many accounts. Other enforcement mechanisms based on existing contracts and existing law are available and can be employed immediately, but the Utilities are not using them. The solution, therefore, is for the Utilities to take responsibility for collecting on unpaid bills by utilizing mechanisms for enforcement that already exist and by creating additional tools for enforcement of existing claims and prevention of future claims.

The creation of additional enforcement options will require legislative changes. Other possibilities for improved enforcement can be created through better management of existing claims. Over the next year or two, it will also be possible to expand the number and quality of options by reforming the underlying customer contracts for Utilities' services and by reforming laws to permit faster, more effective enforcement.

An effective Utilities enforcement system should include the following options:

- Disconnecting service for non-payment
- Customer contracts that provide for extra-judicial enforcement remedies such as
 - attachment of bank accounts
 - garnishment of wages
- Reporting non-payment to a credit agency
- Creating liens on customer property
- Rapid execution with minimal court involvement
- Reporting write-offs to the tax authorities as income for the customer

1. Existing Remedies

The Utilities can and should immediately **report delinquencies** to any existing credit information agencies. Credit reports create incentives for customers to pay, because the reports make it difficult for them to obtain credit (loans, credit cards, leases, and other credit transactions) if the potential creditor discovers outstanding bills that may have priority over repayment. Unless reported, these delinquencies are unknown and unknowable.

To increase the impact of reporting, **Utilities' invoices should be revised** to state that delinquent accounts will be reported. In addition, the contract should provide that

delinquency creates a lien against the customer's movable property that can be filed in the Pledge Registry, thus creating a more readily enforceable claim. Moreover, contracts should expressly provide for attachment of bank accounts upon presentation of delinquency notices to the customer's bank. Contractual issues are further discussed below.

For claims that have been served on customers, if the customer does not respond, the judge may (and should) issue a default judgment, turning the claim into an enforceable document under the Law on Enforcement Procedure. At this point, prior to enforcement, the Utilities can **file liens** against the debtor's personal property in the pledge registry. This increases pressure to pay because it directly affects any future credit given to the debtor because the lien has priority. In addition, it creates another public filing of default.

2. Improved Collection Procedures

Court enforcement should be a last resort after a **series of collection efforts** have been made. Elsewhere, Utilities normally send a notice of delinquency, followed by a phone call or visit to the customer, followed by assigning the debt to a collection agency or turning it over to lawyers, with various penalties claimed along the way. The Utilities appear to be bypassing intermediate steps and going directly to the courts. Because the courts cannot handle these claims effectively, customers have no idea that any enforcement is taking place and do not take the Utilities seriously.

If the Utilities do not use better collection techniques, they cannot expect to improve collections. Several European organizations specialize in utility collection issues and could serve as resources for analyzing and upgrading existing practices in BiH. (See, for example, Eye for Energy (www.eyeforeenergy.com), which holds annual conferences on improving collections for utilities.)

3. Improved Filing of Claims

Current claims exceed the total number of customers, meaning that on average there is more than one claim for each customer being sued. By **consolidating the claims** against any given customer, the overall impact on the courts will be dramatically reduced. It will also provide a better understanding of customer behavior for determining priority of enforcement, and will eliminate many of the very small claims (less than 50 KM) by combining them with other small claims.

Once consolidated, the Utilities should **file the consolidated claims** and voluntarily withdraw all prior claims from the enforcement process. At the same time, the Utilities should organize their claims into two categories:

- low value claims that must be preserved for statute of limitation purposes, but which are not high priority for enforcement, and
- higher value claims that should be enforced immediately.

These claims should also be **grouped** by location and submitted in a way that permits execution officers to operate more effectively by pursuing claims that are physically close to each other. For example, if Utilities would group all claims by buildings and file those claims together, execution officers could enforce against an entire building in a few days.

Raising the court filing fee and setting a flat rate for every individual utility bill filed would encourage the Utilities to update their records and consolidate their claims.

Utilities should also provide a current printout from the Register of Transaction Accounts for each defendant to permit immediate **execution against bank accounts** as well. Enforcement against movable assets can then be limited to those without sufficient bank assets.

A more serious collection effort should be accompanied by **media campaigns** to alert the general public that the Utilities will begin to enforce bills aggressively. The campaign should educate the public on the damage to the system (particularly the high prices) caused by failure of some to pay their bills in order to create a climate of disrespect for those who do not pay while honoring those who do. It might also include coverage of successful enforcement operations against a building, for example, in which execution officers with police support seize property from numerous apartments in the same building.

For the worst offenders, the campaign could also include **public exposure** such as publishing a list of the 500 worst debtors, showing their combined outstanding debts to all Utilities.

Some customers are unable to pay because they are too poor. Those who *cannot* pay can be treated differently from those who *will not* pay. The Utilities should therefore offer the option of applying for **special indigent status** for the poor. Anyone who does not apply for the status will be subject to enforcement actions.

It is estimated that as many as 20% of the current invoices are being sent in the names of people no longer living at the address where services are provided. This means that the Utilities are billing the wrong people 20% of the time, and there is no incentive for the customers to change the records. While it is possible for the Utilities simply to initiate a **program of updating records**, this should be combined with incentives for voluntary change for new contracts. For convenience, this topic is addressed in the next section on *Reforms of Contracts and Laws*.

B. Reforms of Contracts and Laws

Reform of existing contracts involves only the customer and the Utilities. Reform of laws involves various ministries and state organizations, plus advocacy for the reforms from various counterparts. Both will take time and both should begin immediately

1. Reforming Contracts

As noted above, customer contracts need to be revised to include a greater variety of options for enforcement. For new customers, this is easy, but as of today, 100% of the existing contracts lack the necessary provisions. Delinquent customers, however, are in breach of contract and should be given new contracts with these expanded enforcement measures as a condition of continuing service. Customers who pay on time will probably not care to change, unless there is some benefit offered for renewing the contracts.

Existing contracts do not adequately provide for enforcement against non-payment. The Utilities should **revise standard contracts** immediately so that all new customers come into a different regime. The new contracts, at the minimum, should provide for the following consequences when customers become delinquent:

- Disconnecting services, if possible
- An increasing range of penalties and fees at each stage of default, including a disconnection and reconnection fee where applicable
- Reporting of delinquency to credit information agencies after 30 days
- Filing of a lien against the customer's property after 60 days
- Attachment of the customer's bank accounts or salary at 90 days, upon presentation of the invoice and contract to the bank *without court intervention*
- Lawsuit
- Agreement that any enforcement action can be commenced by delivering any relevant documents to the billing address of the customer
- Agreement that the Utility can unilaterally cancel the contract for non-payment and require substantial prepaid deposits and other remedies to initiate a new contract

In addition, new contracts should offer the possibility of payment by credit card, automatic payment from bank accounts, and internet-based payments to make it easier for customers to pay and manage their accounts.

All of these remedies are legal and available under existing law in BiH, but some must be incorporated by contract before they can be used. Changing contracts today will reduce problems tomorrow.

It is useful to note several important aspects of the existing situation. First, Utilities are carrying tens of millions of KM in uncollected receivables, a significant percentage of which are more than two years old. Second, it is estimated that approximately 20% of the debtors have moved away, but bills are still issued in their name. Third, the courts cannot possibly pursue all of the existing claims, much less any new claims, such as the 50,000 that the Water Company has informed the Sarajevo Municipal Court that they are holding. In other words, it is realistic to assume that at least 50% of the claims are uncollectible and will have to be written off.

With this loss in mind, it makes good business sense to convert this business loss into an asset. Rather than simply write off the losses, the Utilities could **offer incentives** in the form of amnesty, debt forgiveness or discount to all customers who re-register their accounts and renew their contracts. This can be limited to accounts in communal buildings where it is not possible to discontinue service, because the vast bulk of the problem is in those buildings. Those who regularly pay might be offered preferential rates or a bonus (perhaps even some sort of discount coupon for merchandise). Pre-payment should be encourage through bonuses, discounts or special pricing.

Any incentive program should be combined with an aggressive, high profile collection program. It should be clear that the Utilities will enforce the contracts and seize assets of those who continue in arrears. In other words, customers will have a choice between forgiveness and punishment, where forgiveness comes with benefits while punishment comes with consequences. This should help to shift a significant number of communal residents onto an enforceable contract and substantially reduce future problems.

At a higher level, contracts can be used between the Utilities to address some of the problems through disconnection. At present, the Electric Company has the least problem with non-

payment because they are able to disconnect service for most customers. A **combined utilities bill**, in which all Utilities were listed on the same bill, could provide for immediate disconnection of anything disconnectable if any portion were unpaid. In other words, customers would receive a single invoice each month listing the amount owed for each utility, plus the total amount owed. If they did not pay the entire bill, electric (or other) services could be disconnected.

This approach might require the creation of a joint utility billing and collection service, funded by contributions from each of the Utilities. In addition to improved collection, such an approach would lead to reduced administrative costs in the preparation and delivery of utilities bills.

2. Reforming Laws

Many of the impediments to enforcement could be removed and new options created by legislative reforms. The most efficient approach would be through laws regulating Utilities. However, new laws can be drafted or existing laws amended to create a broad-based, harmonized system for more effective improvements.

A **Framework Utility Law** should provide the legal remedies described elsewhere in this paper – that is, a right to place liens, report credit history, attach bank accounts and other options. This would be more effective than revising individual contracts because it would apply to all customers, even those who choose not to renew their contracts under the proposed amnesty program. (As a practical matter, this could take several years, so contract changes should be pursued and implemented simultaneously.) The law should further provide that utility claims be enforceable under the accelerated terms of the Framework Pledge Law. The law should also make it illegal to build multi-unit buildings without separate metering capacity for each unit. In addition, it should clearly spell out consequences for tampering with meters, including criminal sanctions. Preparation of a new law should include input from consumer advocates as well to ensure wider acceptance of the law.

The **Code of Civil Procedure** has recently created the possibility of expanding the methods by which judgments and court documents may be served. One of the serious bottlenecks in enforcing utility claims is that the post is inefficient and court officers cannot handle the quantity of service requests produced by Utilities. Consequently, it would be advisable to permit Utilities either to serve their own enforcement documents, or to create a company licensed by the courts for that purpose. The law does not define who may or may not serve documents, so it would appear to be a matter of regulation to be determined by the Federal Ministry of Justice.

The **Law on Enforcement Procedure** treats utility claims (but only for water, heating and garbage collection – not electricity) as trustworthy documents, which are presumed enforceable unless objected to. Some debtors use their right to object to turn a simple collection into a full civil trial, costing the Utilities and the courts while payment is delayed. The courts must work to establish clearer regulations and practice in order to combat this problem, by clearly delineating what objections are valid (such as the bill was already paid) and requiring proof. **Unsubstantiated claims** should be immediately dismissed and enforced and costs of additional litigation should be awarded against the debtor in accordance with existing law.

The **Obligations Law** provides for a three-year statute of limitations for contract claims generally; however, the limit is only one year for utility claims. The Utilities have stated that many of their smaller claims are brought solely for the purpose of preserving their rights. Changing the statute of limitation to three years would thereby eliminate a high percentage of the cases currently being filed for purposes of preserving claims.

Framework Regulations for Private Collections would permit development of collection agencies that could help collect on unpaid utility bills. Although the current law permits private collection (in that it does not prohibit such actions), there is a general discomfort with both the concept and the way private collection has worked elsewhere (frequently involving criminals). With a framework regulation in place, the Utilities could create their own agencies or use other private agencies, improving their collections while also reducing the load on courts.

There is also a great need to re-examine the regime for providing utility services to unmetered, **communal buildings**. The state is providing unfair subsidies to high use occupants of communal buildings at the expense of metered, bill-paying residents of stand-alone housing. This not only causes waste, but provides impetus for social instability. It would be advisable over time to establish a legal and contractual regime in which each building – perhaps through building associations – is responsible for payment to the Utilities and collection from the occupants, so that entire buildings could be cut off if delinquency reaches a certain level. This is not currently possible, but could be addressed through legal reform (perhaps through a framework utilities law), and through contract. In fact, utilities could negotiate lower rates with buildings in exchange for such joint responsibility.

3. Reforming Subsidy Policy

Finally, there is a need to examine the current practice in which the Cantonal Governments give Utilities a certain percentage of the amount of year-end write-offs of unpaid utility bills. This practice takes away the incentive for Utilities to pursue alternative means for collecting on unpaid bills other than filing a claim in the court.

To the extent that a subsidy is continued, consideration might be given to modifying its basis. Rather than make the provision of a subsidy contingent on showing amounts filed for in court actions (which may have the deleterious effect of encouraging Utilities to file redundant and otherwise poorly vetted claims), the subsidies could be based on “reasonable collection efforts”, which may include a number of the activities identified above, including the sale of such debts to a collection agency. Another approach would be for policy makers to evaluate the current non-payments statistically and to appropriate subsidies on a schedule that will taper off over a period of years. The current and future payments could take into account actions that the Utilities could be taking now but currently are not, and future payments could take into consideration the impact of the reforms noted here. In effect, such a program of “weaning” the Utilities from these subsidies would encourage the Utilities to promote and implement the reforms discussed above.

Another benefit of such an approach is that it encourages an understanding of the cost-saving value of these reforms and would also compel the same policy makers that reduce the subsidies to positively adopt those reforms requiring statutory and regulatory enactments.

IV. Insurance Claims

Many legal professionals in BiH have complained about the elevated number of insurance claims being litigated instead of settled. In countries with a mature insurance industry, litigated claims often involve valid disagreements over the extent of damage, or consist of the insurance company suing a wrongdoer on behalf of their clients. The number of such claims is often reduced through mediation. In BiH, however, the dynamics are reversed and an increase in lawsuits will probably be needed before they can be decreased.

The problem arises from failure of numerous insurance companies to honor their insurance contracts: there are credible reports that many insurance companies routinely deny or ignore all claims, especially with regard to traffic accidents. As a result, insurance customers must sue the company to get their claims paid. The ultimate solution to this problem is through **better insurance regulation**, with regulators providing sanctions and discipline to ensure proper claim practices. In addition, good advertising, press coverage or public relations campaigns regarding the few reputable companies in the country can help inform customers that there are reputable insurers, **allowing the market to respond** through better competition.

With such changes in place, there will likely still be numerous insurance claims in the courts, but many will be ripe for mediation or other ADR approaches that will help to manage the load. Until then, more lawsuits are needed to pressure the companies into better practices. The state may also wish to establish an **insurance ombudsman** or other consumer champion to police performance so that standards improve.

V. Privatization of Court Functions

Court efficiency can be increased significantly by turning to the private sector to provide services – under court auspices – that are currently overwhelming the judiciary. In addition, the courts can shift much of the burden they currently carry onto the parties to improve efficiency, especially with respect to information on addresses and bank accounts. [Note: the discussion below captures issues covered elsewhere in this report.]

A. Private Sector Services

Recent legal reforms have opened the possibility for delegating a number of services to the private sector that have traditionally been under the sole control of the courts, in keeping with their history of inquisitorial judicial models. With the introduction of adversarial aspects to the system, it is now possible to require parties to carry out duties previously under court control, or to permit the private sector to provide the services under court supervision and at the expense of the parties.

Service of process can legally be broadened to create private sector services. Plaintiffs would gladly pay extra for this in most cases, so there is already a high demand for such a solution. The service would have to be established pursuant to judicial regulation. Once established, plaintiffs could choose between post, court or private servers, thus increasing the success and decreasing the time needed to serve court papers for enforcement.

The courts already permit private sector assistance in **transportation and warehousing of seized property**. That is, enforcement officers sometimes obtain the help of a plaintiff in transporting seized goods to a storage facility. However, this ad hoc approach is not a solution. The courts need to work with the Bank Association to establish an **auction center** that can provide various services, such as transporting goods at seizure, warehousing the seized assets, and conducting judicial auctions. This is already underway with great support and enthusiasm from the Bank Association. The project needs ongoing support until established.

B. Shifting Burdens from the Courts to the Parties

As previously noted, plaintiffs frequently rely on the courts to find proper addresses and bank account information for defendants. The law no longer requires such dependency, so that the burden should shift back to the parties and off the shoulders of the courts.

First, plaintiffs should be required to provide **verified addresses for service**. There are two approaches, both of which are needed. First, the courts need to require such information from the plaintiffs at filing. If no address is provided, then the file should be rejected. Later, if it turns out that the address is wrong, the plaintiff should be charged for the cost of re-serving the documents – not just the postage or delivery charges, but administrative charges. This can be established through court regulation and practice, and should not need a change in laws.

Second, the law permits the parties to establish **contractual addresses for service of process**, but this is not yet a part of the contracting culture. The courts, bar association, and associations of those industries that frequently use the courts (such as the utilities) should develop standard contract clauses that provide for service of process to a stated address, and place the burden upon the parties to change the address as necessary or risk the possibility of a default judgment. Once in practice, service to the contractual address will be sufficient, even if the recipient has moved. Training will be required before most judges are willing to enter default judgments. (Indeed, there are reports of one judge who issued six or seven “15-day notices” in a case, refusing to enter a default judgment because the defendant had not yet responded to the notice.)

Finally, there has been some interest expressed by various high-volume plaintiffs in the development of **private collection agencies**. Arguably, the existing law permits private collection services, but numerous professionals have expressed hesitancy that such an enterprise would be culturally acceptable without first having a framework law to regulate it. At least one bank has expressed interest in funding the creation of a collection agency, but would prefer such a law first. Bulgaria and Croatia have successfully introduced private collection agencies and could provide models for use in BiH.

VI. Commercial Dispute Resolution

Alternative forms for resolving disputes are being used increasingly around the world to supplement the formal court system. Alternative Dispute Resolution (ADR) is the term used generically to encompass any alternative to the formal court system of litigation for resolving disputes. Commercial Dispute Resolution (CDR), as its name implies, is an ADR technique used for resolution of business disputes. Well known types of CDR forms include

commercial arbitration,¹⁷ commercial mediation (often called “conciliation” in Europe),¹⁸ and “Med-Arb.”¹⁹

ADR and CDR are especially useful in developing countries, as they increase access to justice, provide ways to resolve disputes effectively and efficiently, and complement the work of the formal court system by helping to alleviate case backlogs and reduce the number of incoming cases. In the commercial context, investors, lenders, and businesses need to resolve disputes expeditiously, in accordance with underlying laws and contractual obligations. The inability of the court system to do so hinders economic development and inhibits future investment.

Donors and implementing programs have laid the groundwork for CDR in BiH by creating the legislative framework, providing mediation training for judges, attorneys and other interested parties, and promoting mediation through pilot programs and similar undertakings. Although the results produced by the donors have been encouraging, there remain significant uncertainties surrounding mediation’s implementing regulations and the long-term sustainability of the current court-referred mediation model employed in Banja Luka and Sarajevo, given the resources required to support the model and the burden imposed on the court in administering court-referred mediations. Nevertheless, developments to date provide support for the continued development of CDR in BiH.

There is an old maxim that “trade follows the flag.” The corollary is that CDR follows closely on the heels of trade: as commerce inevitably generates disputes, and disputants are inevitably reluctant to place their investments at risk by litigating their disputes in unfamiliar forums having weak legal systems. Businesses have historically turned to CDR as a way of partially eliminating the problems of incompatible legal systems, forum bias and forum ineptitude that act as deterrents to doing business in other jurisdictions. In addition, as the volume of litigation has exploded in many countries over the last three decades, litigants have experienced long waits for case resolution and increasingly expensive legal fees.

As a result, litigants, particularly businesses, have turned to CDR as a way of avoiding problematic legal systems, expediting resolution of their disputes and reducing high legal fees and court costs.

¹⁷ In arbitration, the parties retain and pay a private third party to resolve their dispute. In its basic format, arbitration resembles litigation in the sense that the parties have a hearing in which they present evidence to the neutral third party, file briefs, make arguments and usually have rights of cross-examination and rebuttal. Arbitration is favored by commercial parties because it is quick, has limited discovery and streamlined procedures, provides finality with only limited rights of appeal, provides greater control over the choice of the decision-maker and is usually much less costly than litigation.

¹⁸ In mediation, the neutral third party has no power to decide the case for the parties. Instead, the mediator uses communication and facilitation skills to assist the parties to come to a mutually agreeable resolution of their dispute. Commercial parties in the United States and other western countries are increasingly opting for mediation because it is relatively inexpensive, expeditious, produces high settlement rates and usually preserves the business relationship.

¹⁹ “Med-Arb” is a hybrid mediation-arbitration technique where a neutral third party first attempts to resolve the dispute through mediation. If the neutral is unsuccessful and the parties agree, the same neutral or another neutral will be selected by the parties as the arbitrator to render a final and binding decision terminating the dispute.

A. Law and Regulation

BiH has the basic legal framework in place to support both arbitration and mediation. The Code of Civil Procedure sets forth the conditions under which parties may use arbitration for dispute resolution.²⁰ It regulates the types of cases that can be arbitrated; provides “legal flexibility” in case resolution (decisions can be based on “principles of justice” without strict adherence to the law); gives arbitration decisions equal weight as court judgments, with identical legal consequences for the parties; and sets forth rules for selecting arbiters and other procedural matters. Arbitration can be used “ad hoc” for one or more disputes between the same parties (with proceedings funded by the parties), or “institutionally” by groups such as chambers of commerce and business associations, which provide arbitration services for group members that have agreed to jurisdiction (with proceedings funded by the state, business entities and/or associations).²¹

Arbitration can be used now without legislative impediments; both the legal framework and operating infrastructure are in place. As such, arbitration can provide a cheaper, faster, more flexible, less formal resolution mechanism than the traditional courts.

BiH paved the way for mediation in 2003 by amending the Code of Civil Procedure to give judges the authority to propose mediation, “as prescribed by separate law,” to parties appearing before the court. In June 2004, a state-level Law on Mediation Procedure (the “Mediation Law”) was passed, which became effective in August, 2004. The Mediation Law sets forth, among other things, the principles of and procedures for conducting mediation.²²

Mediation remains in limbo, however, due to the failure to **pass implementing legislation** required by the Mediation Law. The law envisioned that mediation regulatory “tasks” would be transferred to an “association” or “associations” by “a separate law”²³ and provided further for party selection of mediators from a list maintained by the “Association.”²⁴ However, disagreements between competing factions as to what constitutes the “Association,” “association” and “associations,” as these various terms are used in the law, have delayed implementation of the law with the deleterious consequence that no mediation is being conducted pursuant to the strictures of the Mediation Law.

For the benefits of mediation to be realized, implementing legislation must be adopted that reflects internationally accepted standards, and operating structures and practices must be put in place that reflect internationally accepted best practices.

²⁰ CCP, Arts. 434-453.

²¹ Arbitration bodies currently include: (1) the Foreign Trade Chamber of Commerce of BiH, which hears commercial disputes involving between domestic companies and between foreign and domestic companies; (2) the Chamber of Economy of Federation of Bosnia and Herzegovina, which has jurisdiction over commercial disputes between its members; (3) the Chamber of Economy of Republika Srpska, which hears disputes similar to those heard by the Foreign Trade Chamber of Commerce of BiH.

²² Comparatively, the Brcko District amended its civil procedure law in 2002 to require mediation of all subsequently filed civil cases by a roster of five judges. The system has not functioned as anticipated, however, because in most cases, one or more of the parties (often the defendant) has failed to appear for mediation, and the law lacks sufficient sanctions against such parties.

²³ Mediation Law, Art. 1.

²⁴ Mediation Law, Art. 5.

The IFC's SEED project sponsored court-referred ADR pilot programs in Banja Luka in 2004 and Sarajevo in 2005. A large percentage of the cases mediated in Banja Luka were labor cases. Although labor cases seem to have produced a disproportionately high number of agreements, few of the agreements have been fulfilled due, in large part, to the employers' inability to pay. Effective **enforcement mechanisms** are needed to support CDR agreements and outcomes.

B. Operating Structures

The infrastructure for arbitration is already in place. Each of the aforementioned chambers or associations has the structure and capacity to conduct arbitration proceedings. Others can develop similar capacity.

Comparatively, the operating structures for mediation remain largely undeveloped. Given the uncertainty surrounding the adoption of implementing legislation and the enforceability of mediated settlement agreements, the results of SEED's pilot ADR programs are encouraging. The program may not be replicable, however, given issues of resource availability (for renting, furnishing and administering the "mediation centers" and paying mediators) and judicial capacity to administer court-referred mediation programs. Operating structures and practices that reflect internationally accepted best practices must be developed and maintained.

Meetings and interviews conducted in support of this report evidenced strong support among relevant stakeholder communities for helping the courts develop procedures for referring appropriate cases to private mediators. However, there would be little point in creating court-referred mediation capacity in the absence of "mediation centers" and qualified mediators to resolve cases referred by the courts. The achievement of this goal can be facilitated by encouraging the simultaneous development of both court and non-court related CDR programs, along with mediator training, using a three-track approach.

The first track is creating "**CDR centers**" closely linked with the private sector. The successful adoption of CDR in BiH is dependent on "buy-in" and close cooperation from the business community. Creating "private provider" programs within the chambers of commerce and/or other business associations to resolve existing and future commercial disputes would establish private-public linkage for a demand-driven CDR solution. Assistance to such private providers would embrace technical (not financial) support for creating the necessary infrastructure, and developing capacity to conduct, promote and administer CDR solutions.

The second track is establishing **court-referred CDR programs**. Court-referred programs require less administrative capacity and are thereby less costly to establish and maintain than court-annexed programs. Court-referred programs enable courts to refer cases to mediation specialists while maintaining their unique role as adjudicators.

The third and final track is providing continuing **training for CDR specialists**. This need is further addressed below.

C. Training and Public Awareness

Targeted **training programs** should be developed and delivered with the goal of increasing knowledge and understanding of CDR mechanisms and related implementation and application issues. Such training, including substantive CDR training, practicum, administrative training and “train the trainer” modules, would refine the practices and practical skills of participants and existing CDR institutions, thus increasing the likelihood of CDR gaining acceptance in BiH.

Implementation and public acceptance of CDR will be realized best if the benefits of CDR are covered by a **public education campaign**. In addition to traditional marketing methods, public awareness of CDR can be raised by facilitating roundtables and “settlement weeks” in major cities and, with the assistance of a public information consultant, generating support for the initiative among key champions such as judges, attorneys, business people and the press.

VII. Short-Term Initiatives, Pilot Projects and One-Time Interventions

The greatest need in BiH is for long-term, systemic solutions to the over-reliance on courts for resolving commercial disputes and to performance inefficiencies of the courts that are undermining effectiveness and credibility. Even so, short-term and “one-off” solutions can be useful in changing the momentum of reform while also cleaning up the backlog and freeing resources.

A number of short-term initiatives and pilot projects have already been mentioned in this report, but are set forth below as well. In addition, several one-time efforts could be implemented in the short-term to help move the overall reforms forward more rapidly.

A. Short-Term Initiatives

1. Revised Tax Write-Off Requirements

As already noted, FILE estimates that tens of thousands of cases are brought each year in order for the plaintiff to fulfill tax write-off requirements under Article 4 of the Corporate Tax Regulations. A separate USAID project (TAMP) has recently proposed a revised tax code that eliminates this requirement. The code is expected to be enacted within a few months. Should there be substantial delays in enactment, it may be necessary to seek an exception to Article 4 for utilities and other high-volume plaintiffs and relieve them of the lawsuit requirement for write-off. Developments need to be monitored.

2. Improved Fee Payment through Prioritization

Failure to insist on payment of court fees provides plaintiffs with an incentive to use the courts for small and even trivial claims that ought to be handled through internal collection procedures. Today, gaps in the law and concerns about human rights limit the ability of courts to insist on payment. However, court presidents have the authority to prioritize cases in extraordinary circumstances: current caseloads – loads that simply cannot be handled by the courts – present such circumstances. Consequently, court presidents have the authority to establish a system of priorities. Using this authority, they can and should immediately

establish a policy that for commercial claims by legal entities (not individuals), courts will give priority handling to those who have paid their fees in full. Unpaid cases will only be processed and heard after all paid cases are completed. As a practical matter, this means that unpaid cases will never be heard.

B. Pilot Projects

1. Judicial Practice Pilot

One of the reasons for the multiplication of claims is that the courts have had no “teeth” in their process to ensure certain, enforceable decisions. Despite legislative reforms to eliminate delays and unnecessary procedures, judicial practice has not adjusted sufficiently. Several areas of practice, if corrected, would have immediate impact on effectiveness, which in turn would reduce the time needed to process cases, increase certainty of enforcement, and thus reduce the number of cases being brought.

Establishing predictable judicial behavior in accordance with existing law falls within the responsibility of court presidents and the HJPC. Working together, they can establish a set of policies, materials (such as requisite forms and standardized language), and training to close unacceptable gaps in judicial practice. This effort can be structured as a pilot project, introducing changes one court at time, by retraining judges in the following:

- a. Enforcement of Judgments during Appeal. The new Laws on Enforcement Procedure for both the Federation and the RS mandate that enforcement actions are not to be stayed during the course of any appeal or objection.²⁵ Unfortunately, many judges order delays in enforcement anyway, a habit from former times. Anecdotal evidence suggests that when a judge in BiH mandates enforcement during appeal – as the law requires – lawyers for defendants recommend not wasting time and resources on appealing for the purpose of delay. It is imperative the judges be instructed and re-trained, if necessary, to proceed to enforcement.
- b. Rejection of Unfounded Defenses. The Laws on Enforcement Procedure also provide judges with the authority to reject unfounded or unproven defenses during enforcement proceedings. A substantial percentage of judges, however, do not decide the issues, but rather automatically remand the issue to a Court of First Instance. This dramatically increases the time and cost of the action to the plaintiff, while putting off the day of enforcement, not eliminating it. A program is needed to develop materials and provide training for handling baseless and unproven defenses. This will enable the courts to decide rather than delay, thus reducing processing times and reducing frivolous delaying tactics.
- c. Issuance of Default Judgments. Procedural laws permit judges to enter defaults when a party fails to comply with summons and other court orders. They need to do so. Giving numerous “second chances” makes a mockery of the judicial system, increases costs and risks, and increases the numbers of claims and objections filed. The HJPC and court presidents should provide clear guidelines and instructions for entering judgments against defaulting parties.

²⁵ There are some exceptions, such as death or bankruptcy of a party, but they rarely apply.

d. Application of Statutory Fees and Costs. Article 386 of the Code of Civil Procedure provides that the losing party can be made to pay various costs of the winning party. Article 387 provides for costs and fees to be awarded according to established tariffs, if they exist. Unfortunately such tariffs have not been established and judges complain that the extra work of setting costs is too time consuming to be cost effective. Consequently, judicial impact could be substantially increased by developing standardized tariffs for various items – such as unfounded or unproven defenses in an enforcement proceeding, or costs of appealing a judgment – and then requiring judges to apply such costs. Increasing costs of delays will reduce the number of unfounded delaying tactics used and limit appeals and protests to the less common valid defenses in a legitimate dispute.

2. Small Claims Pilot

Small claims make up a very high percentage of the courts' work and are in great part responsible for the sizeable backlogs in the busiest courts. Recent changes to the Code of Civil Procedure recognized that small claims should be subject to simpler procedural burdens, but failed to simplify sufficiently. The law should be amended, but in the interim it is possible to improve processing through improved handling of these claims.

The pilot should use scheduling, space allocation and prioritization authority of the courts to establish a separate track for small claims, and within that track should handle claims by individuals and claims by companies separately. As discussed further in Annex 2, *Small Claims Pilot Project*, the court can organize small claims more effectively by having special days in each month (or week, if necessary) to handle these matters through focused attention and targeted scheduling of events. In addition, the courts can increase discipline of the parties bringing claims by requiring various actions (such as prepayment of fees and better internal collection procedures) and granting priority service to those who comply with the pre-requisites for the small claims track.

As previously discussed, it is possible to create an “all-in-one” small claims center under existing law, and possibly with existing finances. Such centers can be part of the Small Claims Pilot. They can be used very effectively as a point for public education for both plaintiffs and defendants on small claims practice and enforcement.

3. Auction Center Pilot

FILE is currently working with the BiH Bank Association to establish an Auction Center for storage of movable property and sale of movable and real property seized in enforcement. As noted elsewhere, this will have a substantial impact on the value of auctions, development of a market for seized property, and the efficiency of the seizure and auction procedures. It should receive high priority support. The Memorandum of Understanding for the pilot is attached as Annex 3, *Auction Center Pilot Project*.

4. Utilities Pilot Project

Annex 4, *Utilities Pilot Project*, sets forth a proposed pilot project for reducing utility claims in the Sarajevo Municipal Court. The project combines better records management by utilities with focused enforcement efforts by the court to stimulate better payment behavior among utilities customers. It also includes removal of backlogged cases from the enforcement division (of which there are an estimated 500,000 to date). If successful, this model can be rolled out to other cities suffering from excessive utilities claims.

5. Commercial Arbitration/Mediation Pilot

A CDR program sponsored by a chamber of commerce or other existing arbitration body would provide dispute resolution services to its members and others in the business community. In addition to providing services to local businesses, such a program could focus on marketing CDR services to foreign businesses that would otherwise be reluctant to invest and do business in BiH.

Working with an existing chamber or association carries the promise of sustainability, as the entity would have: an established relationship with the business community and members that can afford to pay for CDR services; existing facilities and administrative staff, so would not require donor investment for launching and sustaining activities; and other revenue streams to offset the carrying costs of a CDR program. In a hypothetical partnership, the entity would provide facilities and administrative support for a CDR “court” of arbitration and mediation and outreach to its members and other companies in the business community. A donor, in turn, would provide technical support for creating operating structures and practices that reflect internationally accepted best practices; training for mediators, arbitrators and administrators; and marketing advice and promotional materials.

6. Labor Cases Mediation or Med-Arb Pilot

Many courts in commercial centers have a significant backlog of “labor cases.” Anecdotal evidence suggests that such labor cases typically involve back-pay claims arising out from the inability of BiH’s moribund state-owned enterprises to pay employees. Such labor cases comprised a significant percentage of the settlements produced by SEED’s pilot mediation program in Banja Luka. Although these mediated labor settlements have the force of enforceable court decisions, many of the settlements have not been honored due, chiefly, to the inability of the settlement debtors to pay.

Admittedly, there are problems relating to the enforceability and funding of these labor claims. However, lack of ability to enforce these agreements should not be viewed as reducing the mediations which produced them to useless and expensive acts. First, the mediation proceeding gives the aggrieved worker a chance to be heard and, in so doing, provides an outlet for diffusion of anger and a consequent reduction of social tensions. Second, these cases have, in addition, produced enforceable agreements having the force of judgments which may, at some time, become “enforceable in fact” should the settlement debtor acquire executable assets. Third, and perhaps most importantly for transferring state-owned assets to the private sector, the cases serve to reduce an inchoate mass of labor claims against a company to a cognizable and computable liability which will make the company more investment-worthy by the very fact of removing uncertainty and establishing the extent of liability. Finally, the very aggregation of the claims might encourage a donor or the government to make a substantial contribution towards the satisfaction of the awards.

However, since there is a substantial backlog of labor cases and little or no relationship between the employee claimants and the employer defendants, Med-Arb could be an appropriate CDR technique to quickly and finally resolve these pending labor cases. First, mediation should be able to resolve a substantial number of the cases in an informal environment with the facilitated assistance of a skilled mediator. Second, should mediation not end the case, the dispute could quickly be referred to an arbitrator for a final and binding arbitration award. A pilot Med-Arb program would enable a CDR center to provide much

needed training to its mediation and arbitration specialists while, at the same time, serving the public interest in providing a remedy to aggrieved employees and removing these cases from the judicial dockets.

C. One-Time Special Initiatives

1. Withdrawal of Stale Claims

Stale claims present a drain on judicial resources. The Code of Civil Procedure needs to be revised to recognize and eliminate stale claims, but such legislative changes are likely to take a substantial amount of time. In the interim, court presidents can use their prioritization authority to reduce the phantom backlog of abandoned and settled cases that have not been dismissed.

Presidents with substantial backlogs in their courts should develop a one-time elimination program for stale claims. To do so, they need to establish a policy that all registered cases in which there has been no activity for at least six months are deemed to have been settled or abandoned and will be archived and removed from the courts. The court should provide for a grace period, however, of six months for parties to reactivate cases through a request for action on their cases. Only those cases in which there has been a request will be pursued, and all others will be dismissed, but with the possibility that a case can be reopened within one year upon showing of extraordinary cause (such as the parties being out of the country during the period of re-activation).

2. Frequent Filer Electronic Interface

FILE is working successfully with the Electric Company of Mostar to establish standards for electronic filing in the Mostar Court. As this pilot project is completed, FILE and the Courts should create a standardized program for converting frequent filers (or “high-volume plaintiffs”) to an electronic filing format as CMS is rolled out into other courts. As an incentive to convert to electronic formats, filers should be offered reduced fees for electronic registration.

3. Prioritize High Value Claims

While Utilities and other frequent filers have numerous low value claims clogging the courts, they estimate a small percentage of their claims actually account for a very high percentage of the overall debts. That is, there are significant high value claims being delayed by the flood of low value claims.

As a one time event, court presidents could use the staleness program described above to permit frequent filers to move their high value claims to the front of the line through staggered re-activation requests. In other words, once the presidents announce that cases will be dismissed unless re-activated, the frequent filers could first re-activate high value claims, and then several months later re-activate any lower value claims. This would permit the judiciary to focus on resolving high impact, high value commercial disputes first.

Annex 1

Pilot Project for Improving Judicial Practice in Disposition and Enforcement of Commercial Claims

Over the past several years, the various governments of Bosnia and Herzegovina (BiH) have adopted numerous reforms to improve the disposition of commercial claims in the courts. Judicial practice has not kept pace with the rate of legislative reform.

If judges would simply apply the new laws consistently, they would increase court efficiency, reduce the backlog and the rate of backlog accumulation, and reduce the number of claims and appeals being brought to the courts. More importantly, improved judicial practice would improve the economic and investment climate of the country to support greater growth and development. Without this improvement, the socio-economic condition of BiH will suffer.

The purpose of this Pilot Project is to identify needed changes in practice under existing law and implement them. The Pilot should run under the High Judicial and Prosecutorial Council of BiH (HJPC), and include court presidents, the Judges Association, the Bar Association, and the Association of Lawyers in the Economy to ensure necessary stakeholder input, feedback and monitoring.

Most of the initiatives required by this proposed Pilot Project do not require additional funding or resources, although technical assistance may be required for some aspects. Technical assistance may be available through USAID's FILE Project.

The Structure of the Project

The problem addressed by this project is the lack of consistent application of existing law. Consequently, no legal reforms are needed, only behavioral changes. These can be accomplished as follows:

1. HJPC, with court presidents, institutes a **written policy** directing judges to apply the relevant law.
2. The HJPC develops **practice materials** for distribution to judges, such as forms, standardized language, or penalty schedules.
3. If necessary, the HJPC develops necessary **training** programs to teach judges how to apply the policies.
4. The HJPC conducts **public education** programs so that court users understand their rights with respect to the new practices.
5. Court Presidents **monitor** the success of their judges in implementing the policies and report problems, concerns and successes to the HJPC.
6. The Bar Association and Association of Lawyers in the Economy provide **stakeholder feedback** to Court Presidents on performance to ensure increased compliance with the new laws.

Targeted Practices

The following judicial practices need to be brought into compliance with recent legal reforms:

- a. **Enforcement during Objection and Appeal.** According to the LEP, an “objection or appeal shall not stay the enforcement procedure” (Art. 12(5)) and a “court shall not stop the enforcement procedure while waiting for a ruling of another competent court or other responsible body.” Enforcement judges need to consistently apply this law to put an end to unjustified objections and appeals that are used as delaying tactics.
 - i. **Policy:** Mandate that enforcement cannot be stopped during objection or appeal, except as prescribed by the CCP.
 - ii. **Materials:** Detailed list of exceptions under CCP; standardized notice to defendant stating that objection or appeal will not delay enforcement.
 - iii. **Public Education:** Provide information in courthouses (such as posters and brochures) stating that enforcement will not be delayed by objection or appeal.
- b. **Denial of Unfounded Defenses.** Practitioners complain that judges continue to automatically remand enforcement decisions for civil trial upon objection, even if the objection is unfounded or unproven. LEP Art. 49 gives the enforcement judge authority to decide rule on objections, and therefore to reject objections not consistent with Art. 47, which lists the allowable bases for objection. By failing to reject inappropriate objections, judges increase work for the civil division, increase costs for the plaintiff, and merely delay having to deal with the enforcement again.
 - i. **Policy:** Mandate that enforcement judges reject unfounded claims and not simply remand the case for civil trial.
 - ii. **Materials:** Instructions on acceptable and unacceptable objections; standard forms for issuing a decision on objections.
 - iii. **Training:** Practical courses for judges, using the above material, to improve ability to analyze and reject unfounded objections.
 - iv. **Monitoring:** Mechanism for plaintiffs to seek immediate review if an objection is accepted so that Court Presidents can monitor performance.
 - v. **Public Education:** Brochures regarding allowable objections to encourage defendants to object only when appropriate (not for delay) and in the proper manner.
- c. **Issuance of Default Judgments.** Both the CCP and LEP permit judges to issue decisions in the absence of a timely response by a party. Legal professionals report that judges often give one or more “second chances” to parties who fail to respond to a summons or who miss a deadline for providing information and evidence. This practice increases delays and costs and undermines the reputation and integrity of the courts. Default judgments should be ordered whenever a party defaults.
 - i. **Policy.** For enforcement judges, mandate the issuance of awards immediately if defendants fail to make objections within the 8-day time limit; for civil judges, mandate estoppel from presentation of evidence or, if appropriate, entry of default judgments for failure to meet deadlines; for both civil and enforcement judges, prohibit “second chances” or extensions unless a valid request is made prior to passage of the original deadline.
 - ii. **Materials:** Standardized forms for enforcement judges to declare a claim uncontested; standardized orders and decisions for issuing default judgments or estoppel orders.

- iii. **Training:** For civil division judges, courses on how to determine appropriate orders for defaults.
- iv. **Public Education:** Television and radio campaign covering default and other issues in this pilot.
- d. **Award of Costs.** Articles 16 and 17 of the LEP provide for various costs and fees that can be awarded against parties. Article 386 of the CCP provides that the losing party can be made to pay various costs of the winning party. Article 387 provides for costs and fees to be awarded according to established tariffs, if they exist. Unfortunately such tariffs have not been established and judges complain that the extra work of setting costs is too time consuming to be cost effective. Consequently, judicial impact could be substantially increased by developing standardized tariffs for various items – such as unfounded or unproven defenses in an enforcement proceeding, or costs of appealing a judgment – and then require judges to apply such costs. Increasing costs of delays will reduce the number of unfounded delaying tactics used and limit appeals and protests to the less common valid defenses in a legitimate dispute.
 - i. **Policy:** Encourage awards of costs and fees for delaying tactics and unfounded claims.
 - ii. **Materials:** Working with the legal and judicial profession, establish tariffs and guidelines for awarding fees.
 - iii. **Training.** Train judges in when to award costs and how to determine the appropriate level.

Annex 2

Pilot Project for Reducing the Number and Burden of Small Commercial Claims

Small claims have inundated the courts of BiH, creating an overwhelming backlog of unresolved cases in some jurisdictions. Many of these cases do not belong in the courts – they are simply too small and would be better handled through other means. Unfortunately, the cost of bringing a claim is lower than the cost of improving internal collection and management procedures for plaintiffs, so that many high-volume plaintiffs have effectively “outsourced” their collection activities to the courts.

To reduce small claims, it is necessary to adjust the economic balance that encourages this “outsourcing” and to organize their handling more effectively. Existing law is not ideal for improving the situation, but there are a number of practical steps available without additional legal reform.

The goal of this pilot project is to reduce both the number and burden of small commercial claims by using prioritization and scheduling authority of court presidents on a test basis in one or more courts. The pilot should run for one year. Successful changes should then be rolled out to other courts, while problems or failures should be analyzed and other solutions suggested.

I. Reducing the *Number* of Small Claims

A. Fee Payments

Problem: One reason for the excessive number of small claims is that courts do not enforce the pre-payment requirements for fees and costs (e.g., LEP Art. 16). Court rules in some jurisdictions simply create a claim against the plaintiff for court fees, but do not permit dismissal of the case for failure to pay. The law provides for relief from fees (CCP Art. 400) upon application by a party, yet courts treat all parties as if they were relieved from their cost and fee obligations. As a result, the economic incentives of judicial action are distorted, encouraging economically inappropriate use of the courts.

Solution: Establish court policy by which all mandatory costs and fees must be paid in advance, unless the party applies for and receives relief from payment obligations under CCP Art. 400. The policy should expressly provide for refusal to register claims until fees are paid and dismissal of claims thereafter if statutory costs are not paid in a timely manner. To the extent that existing law does not permit this for certain courts, parties, or types of cases, the court president should establish a policy by which priority attention is given to those cases in which fees and costs have been paid or relief from fees has been granted. This will result in fewer low value cases being brought, and, to the extent that they are brought, will generate appropriate revenue to the courts to fund the services being provided.

B. Ripeness

Problem: Law suits should be the last resort of a creditor, but in BiH creditors often turn to the courts without first attempting reasonable and standard business practices for collecting

bills. That is, the claim is not appropriately ripe for the courts, because a number of prerequisites have not been filled. Unfortunately, the law does not currently require claims to meet ripeness standards, thus encouraging claimants to forego internal procedures in hopes of using the courts to achieve collection for them.

Solution: Pending any change in the law, court presidents can prioritize handling of claims to encourage greater use of self-help and collection procedures. To do this, court presidents should adopt a prioritization schedule for cases so plaintiffs can qualify for higher priority treatment only if they first meet certain criteria. These criteria should include:

- **Timeliness**: Plaintiffs who first seek to collect their claims in a timely manner should have priority over those who waited 180 days before first contacting the debtor.
- **Collection Procedures**: Plaintiffs should certify that they have made timely demand for satisfaction on the debtor, and provide evidence of such demand in their complaint (e.g., a demand letter).
- **Self-Help**: Plaintiffs who report late payment to a credit information agency should be served before those who have not.
- **Banking Information**: Cases in which the plaintiff provides information on the debtor's bank account (by contacting the register of transaction accounts) reduce the burden on the courts.
- **Certified Address for Process**: The plaintiff should verify the address for process prior to initiating action to avoid failures in service of process.

In the Enforcement Division, the same priority schedule should be used for plaintiffs bringing actions based on trustworthy documents.

II. **Reducing the Burden of Small Claims**

A. **Scheduling**

Problem: Most small claims are for non-payment of debts and involve no contested legal or factual issues. They seldom require any substantial adjudication and can be handled quite rapidly. However, they tend to be randomly scheduled so that they must be handled between more complex cases.

Solution: Improve efficiency of handling by establishing special days for hearing small claims. Working within the existing case assignment system, court presidents can have each judge who hears small claims establish a set day each week (or less often, if applicable) to hear such claims. Judges could then handle these claims in bulk, separating contested from uncontested claims so that uncontested claims could be sent for enforcement while contested claims could be scheduled for hearings on the same date. This would permit the judge to hear multiple claims from the same plaintiff, claims which will generally present the same issues.

Such scheduling will be easier once CMS software is installed, but can be handled manually. In either case, the following sequence is needed.

8. Small claims are filed (electronically or manually), and are recognized as small claims by CMS or the filing clerk.

9. CMS or the clerk selects a date for all small claims filed during a certain period – for example, during one half of the month – with sufficient time for objections or answers to be filed, plus any permitted response.
10. The Court serves notice of the claim and the hearing date on the defendant.
11. At the hearing, all claims for which there has been no answer by the defendant are found in favor of the plaintiff and sent immediately for enforcement.
12. For cases with unfounded or unproven defenses (most cases), the Court dismisses the defenses and orders enforcement.
13. For any remaining legitimate dispute, the Court decides the case and issues the decision. If for the plaintiff, the Court orders enforcement; if for the defendant, the court dismisses the claim. If additional hearings are needed, the Court schedules them on the judge’s small claims day.

Proper scheduling will substantially reduce the burden of small claims on the courts.

B. Space Allocation: All-in-One Service Centers

Problem: Small claims often involve high-volume plaintiffs (“frequent filers”) and unsophisticated defendants. Navigating a large courthouse is inefficient for the plaintiffs and confusing for the defendants, who often need help finding the facilities and understanding the procedures, much less their rights and obligations.

Solution: Consolidating small claims physically into one section of a court or, resources permitting, a separate facility, allows for increased efficiency for the courts and the parties. Preferably, the courthouse could be set up with “one-stop” service or “**all-in-one service center**” for small claims:

- a separate intake window for small claims only (for manual filings)
- a public-access computer terminal for checking case information
- a payment desk so that defendants can pay claims rather than proceed to hearing
- public information displays by credit bureaus
- for utilities (other than gas, heat and garbage) and other high-volume plaintiffs, a customer service representative to take payments and provide information
- an ATM kiosk to facilitate cash retrieval for payments

If the adjudication of these small cases were handled more effectively, made more certain, and accompanied with strengthened enforcement, fewer accounts would come to trial. Additionally, segregating these cases from the rest of the civil docket would improve resource allocation by allowing judges to focus more attention on the remaining more complex cases.

C. Coordinated Enforcement

Problem: Enforcement officers cannot efficiently sort incoming enforcement orders by location so that they can more efficiently perform their duties by, for example, grouping 15 or 20 orders in one neighborhood to be done on the same day. Instead, they either waste time trying to organize the claims, or waste time traveling back and forth across the city.

Solution: There are two ways to organize enforcement orders. Once an enforcement division is computerized, the court can use CMS to sort cases by location. Until then, however, it is possible to request that high-volume plaintiffs group their claims by location, and then file them building-by-building, for example, instead of randomly. Requiring or encouraging such grouping would greatly reduce the burden on enforcement officers.

Annex 3 Auction Center Pilot Project

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (the “Memorandum”) is entered into by and among the Sarajevo Municipal Court, located at Augusta Senoe 1, Sarajevo (the “Court”); the Bank Association of BiH, with offices at Branilaca Grada 20, Sarajevo (the “Association”); and the Fostering an Investment and Lender-Friendly Environment (FILE) Project of the United States Agency for International Development (USAID), with offices at Fra Anđela Zvizdovica 1, Sarajevo.

I

The purpose of this Memorandum is to establish a formal, cooperative relationship between the Court and the Association regarding the creation of efficient mechanisms for the sale of enforcement collateral and liquidation of bankruptcy assets, and to set out the terms under which FILE will assist the Court and Association in creating such efficiencies.

II

The Court and the Association agree that the economic value realized through the sale of collateral - both real estate and movable property - in court enforcement procedures, direct sales, and bankruptcy liquidations is currently insufficient. Both, the Association and the Court, desire (i) to enhance debt recovery in enforcement procedure and in bankruptcy liquidation by increasing the efficiency of auctions and direct sales governed by the Court; and (ii) to explore

MEMORANDUM O RAZUMIJEVANJU

Ovaj Memorandum o razumijevanju (“Memorandum”), potpisuje se od strane i između Opštinskog suda Sarajevo, Augusta Senoe 1, Sarajevo («Sud»); Udruženja banaka BiH, sa kancelarijama u ulici Branilaca Grada 20, Sarajevo («Udruženje»); i Projekta za unapređenje okruženja pogodnog za investitore i kreditore (FILE) Američke Agencije za Međunarodni Razvoj (USAID), Fra Anđela Zvizdovića 1, Sarajevo.

I

Namjena ovog Memoranduma jeste da uspostavi zvaničnu saradnju između Suda i Udruženja u vezi stvaranja efikasnih mehanizama za prodaju zaloga u izvršnom postupku i unovčenje stečajne imovine, i da uspostavi uslove pod kojima će FILE Projekat pružati pomoć Sudu i Udruženju u vezi sa stvaranjem tih efikasnih mehanizama.

II

Sud i Udruženje se slažu da je ekonomska vrijednost realizovana putem prodaje zaloga - nepokretne i pokretne imovine – u postupku sudskog izvršenja, direktne prodaje i unovčenja stečajne mase, trenutno nedovoljna. Obje strane, i Sud i Udruženje žele (i) da povećaju povrat duga u postupku izvršenja i u stečajnom postupku, na način da se poboljša efikasnost aukcija i direktnih prodaja koje vodi Sud; i (ii) da se istraže mehanizmi za stvaranje željene efikasnosti.

mechanisms for creating the desired efficiencies. Similarly, FILE desires to provide technical assistance to the Court and the Association in creating such efficiencies. The Court, the Association and FILE are adamant that the activities contemplated hereunder could contribute to establishing an active and efficient secondary market for collateral throughout Bosnia and Herzegovina and the enhancement of its single economic, market space.

III

Given the foregoing understandings, the parties agree as follows:

1. **The Association** will take such steps as are reasonably necessary to meet the objectives described above, including but not limited to:
 - a. Creating a website where the Association's affiliate banks will post detailed information about:
 - (i) collateral available for sale through court enforcement proceedings;
 - (ii) collateral available for sale through direct sales and/or other sales organized by banks; and
 - (iii) sales scheduled to take place (i.e., notices of pending sales).
 - b. Establishing the "Auction Center" in Sarajevo – for use by the Court and the Association's affiliate banks in warehousing and storing collateral and in conducting auctions, direct sales and other sales of collateral and bankruptcy assets.
 - c. Developing, in close coordination with the Court and the Association's affiliate banks, the legal structure of the Auction Center, the services it will provide, and the terms and conditions for its use.
 - d. Working with FILE and the Court to institute the Auction Center no later than December 31, 2005.
 - e. Providing FILE with access to

Također, FILE Projekat želi da pruži tehničku pomoć Sudu i Udruženju u stvaranju tih efikasnih mjera. Sud, Udruženje i FILE čvrsto vjeruju da bi ove poduzete aktivnosti mogle doprinijeti uspostavljanju aktivnog i efikasnog sekundarnog tržišta zaloga širom Bosne i Hercegovine, kao i da bi dovele do poboljšanja njenog jedinstvenog privrednog, tržišnog prostora.

III

S obzirom na navedeno shvatanje, strane se slažu o slijedećem:

1. **Udruženje** će preduzeti korake koji su u razumnoj mjeri nepohodni da se postignu gore navedeni ciljevi, uključujući, ali ne ograničavajući se na:
 - a. Izradu web stanice gdje će banke, članice Udruženja postavljati detaljne informacije o:
 - (i) Zalozima dostupnim za prodaju putem sudskog izvršenja;
 - (ii) Zalozima dostupnim za prodaju putem direktne prodaje i/ili drugih prodaja koje organizuju banke; i
 - (iii) Zakazanim javnim prodajama (npr. obavještenja o prodajama u toku).
 - b. Uspostavljanje - «Aukcijskog centra» u Sarajevu - za korištenje od strane Suda i banaka članica Udruženja, za namjenu skladištenja i čuvanja zaloga, za održavanje aukcija, direktne prodaje i druge prodaje zaloga i stečajne imovine.
 - c. Izradu pravne strukture Aukcijskog Centra, usluga koje će nuditi, i uslova za njegovo korištenje, u uskoj saradnji sa Sudom i bankama članicama Udruženja.
 - d. Saradnja sa FILE Projektom i Sudom na uspostavljanju Aukcijskog centra najkasnije do 31. decembra 2005 godine.,

information (financial, legal, etc.) pertinent to the creation and use of the Auction Center, so that FILE may publicly refer and reflect on the establishment of the Auction Center in its training programs and other activities. FILE will not disclose confidential information in this process, provided that any information to be kept confidential has been clearly marked and not otherwise disclosed to the public.

2. **The Court** shall use the Auction Center for warehousing, storing and auctioning all collateral that is seized and subject to enforcement procedure, to the extent practicable. The Court shall also use best efforts to:

- a. Schedule auctions in the enforcement procedure on the same day(s) and time(s) each week, from week-to-week;
- b. Seize all movable property that is subject to enforcement procedure and store it at the Auction Center; and
- c. Work with FILE and the Association to institute the Auction Center no later than December 31, 2005.
- d. Provide FILE with access to information (financial, legal, etc.) relating to the creation and use of the Auction Center, so that FILE may publicly refer and reflect on the establishment of the Auction Center in its training programs and other activities. FILE will not disclose confidential information in this process, provided that any information to be kept confidential has been clearly marked and not otherwise disclosed to the public.

3. **FILE** will provide advice, recommendations, and technical assistance to the Association and the Court in achieving the objectives set forth in this Memorandum. While such advice, recommendations and technical assistance will be provided gratuitously, the ultimate decisions about

e. Omogućavanje FILE Projektu da pristupi informacijama (finansijskim, pravnim, itd.) koje se odnose na uspostavu i korištenje Aukcijskog centra, tako da FILE može izraditi izvještaj i izvršiti obuku u vezi Centra za aukciju i njegovih aktivnosti. FILE neće otkrivati nikakve povjerljive informacije u ovom procesu, s tim da bilo kakve informacije koje trebaju ostati povjerljive budu jasno naznačene i da na drugi način nisu javno predstavljene.

2. **Sud** će koristiti Centar za aukciju za spremanje, skladištenje i aukciju svih zaloga koji su izuzeti i koji su predmet izvršenja, do mjere do koje je to praktično izvedivo. Sud će se također potruditi da učini slijedeće:

- a. Zakaže aukcije u postupku izvršenja na isti dan (dane) i u isto vrijeme svake sedmice, na sedmičnoj osnovi;
- b. Zapljeni svu pokretnu imovinu koja je predmet izvršenja i da je uskladišti u Centru za aukciju; i
- c. Zajedno sa FILE Projektom i Udruženjem radi na uspostavi Aukcijskog centra najkasnije do 31. decembra 2005 godine.
- d. Da obezbijedi FILE-u pristup informacijama (finansijskim, pravnim, itd.) koje se odnose na uspostavu Aukcijskog centra, tako da FILE može izraditi izvještaj i izvršiti obuku u vezi Aukcijskog centra i njegovih aktivnosti. FILE neće otkrivati nikakve povjerljive informacije u ovom procesu, s tim da bilo kakve informacije koje trebaju ostati povjerljive budu jasno naznačene i da na drugi način nisu javno predstavljene.

3. **FILE** će obezbijediti savjet, preporuke i tehničku pomoć Udruženju i Sudu u vezi postizanja ciljeva predstavljenih u ovom Memorandumu, Iako će takve savjete, preporuke i tehničku pomoć pružati besplatno, krajnja odluka o tome kako ispuniti ciljeve ovog Memoranduma nalazi se

how to meet the objectives of this Memorandum rests with the Association and the Court. Under no circumstances will FILE or any of its employees, representatives, or agents be liable for any errors, omissions, misjudgments, or harm caused in pursuing the objectives hereunder, whether on the advice of FILE or otherwise. It is further understood that FILE will not provide financial assistance for any such activities, and that this Memorandum does not obligate FILE or the US Government to provide technical assistance.

IV

It is understood by all parties hereto that creation and use of the Auction Center by the parties should in no way and under no circumstance negatively impact or undermine the Court's impartiality or create any financial liability on the part of Court, either express or implied.

V

This Memorandum may be terminated for any reason by either party on written notice to the other party.

VI

By signing the Attachment 1 to this Memorandum of Understanding, the Affiliated banks express their full support to the Association in the realisation. of it. Affiliated banks also entitle the Association to take all necessary actions that are in connection with this Memorandum of Understanding.

Banks that are not affiliated with the Association may join to this Memorandum of understanding at any point of time and participate in the realisation of it.

VII

By signing below the parties acknowledge that:

na strani Udruženja i Suda. Ni pod kakvim okolnostima FILE, ili njegovi uposlenici, predstavnici ili posrednici, neće biti odgovorni za bilo kakve greške, propuste, pogrešne procjene ili štetu koja ja nastala prilikom postizanja ovih ciljeva, bez obzira da li je to po savjetu FILE-a ili na drugi način. Nadalje se naznačuje da FILE neće obezbijevati finansijsku pomoć za bilo kakve aktivnosti, te da ovaj Memorandum ne obavezuje FILE ili Vladu Sjedinjenih Država da obezbjeđuje tehničku pomoć.

IV

Sve strane potpisnice primaju na znanje da uspostava i njihovo korištenje Aukcijskog centra na nikakav način i ni pod nikakvim okolnostima može negativno uticati ili potkopati nepristrasnost Suda ili stvoriti bilo kakvu finansijsku obavezu Suda, izričitu ili prećutnu.

V

Ovaj Memorandum bilo koja strana može raskinuti iz bilo kojeg razloga, putem pismenog obaviještenja drugoj strani.

VI

Potpisivanjem Priloga 1 ovom Memorandumu o razumijevanju, banke članice izjavljuju svoju punu podršku Udruženju u njegovoj realizaciji. Banke članice takođe ovlašćuju Udruženje da preduzme sve potrebne radnje u vezi ovog Memoranduma o razumijevanju

Banke koje nisu članice Udruženja mogu pristupiti ovom Memorandumu o razumijevanju u bilo koje vrijeme i učestvovati u njegovoj realizaciji.

VII

Donjim potpisom, strane primaju na znanje slijedeće:

1. Each party has read, understood, and freely executed this document;
2. The activities of each party pursuant to this Memorandum are performed without any right or claim to compensation;
3. This Memorandum represents the entire agreement between the parties and there are no other understandings or agreements except as set forth herein;
4. This document has been translated and is also being executed in local language; and
5. That, in the event of any inconsistencies in translation, the English version of this document controls.

1. Svaka od strana je pročitala, shvatila i slobodno izvršila ovaj dokument;
2. Aktivnosti svake od strana prema ovom Memorandumu izvršavaju se bez bilo kakvog prava na ili potraživanja kompenzacije;
3. Ovaj Memorandum predstavlja ukupan sporazum između strana, te ne postoje drugi sporazumi ili dogovori osim kako je ovdje predstavljeno;
4. Ovaj dokument je preveden i također se izvršava na lokalnom jeziku; i
5. U slučaju nedosljednosti u prevodu, verzija ovog dokumenta na Engleskom jeziku ima prednost.

In witness whereof, the parties have entered in to this Memorandum of Understanding this ___ day of _____ 2005.

Donjim potpisom, strane su ozvaničile ovaj Memorandum o razumijevanju, na dan _____ 2005.

USAID FILE

Udruženje banaka BiH

Sarajevo Municipal Court

Potpis _____

Potpis _____

Potpis _____

Ovlašteni predstavnik

Ovlašteni predstavnik

Ovlašteni predstavnik

ATTACHMENT 1 - LIST OF AFFILIATED BANKS
PRILOG 1 - SPISAK BANAKA ČLANICA

	NAZIV BANKE	DATUM	
	POTPISIVANJA		
24.	TURKISH ZIRAAT BANK BOSNIA		
25.	TUZLANSKA BANKA		
26.	ABS BANKA UNION BANKA BALKAN INVESTMENT BANKA a.d.		
27.	UPI BANKA		
28.	BOBAR BANKA a.d. UniCredit Zagrebačka banka d.d.		
29.	BOR BANKA VAKUJSKA BANKA BOSNA BANK INTERNATIONAL		
30.	VOLKSBANK BH CBS BANK		
31.	ZEPTEK KOMERC BANKA a.d. EPB BANKA a.d.		
8.	LT GOSPODARSKA BANKA		
9.	HVB Central profit banka d.d.		
10.	HYPO-ALPE-ADRIA-BANK		
11.	HYPO-ALPE-ADRIA-BANK a.d.		
12.	INVESTICIJSKA BANKA		
13.	INVESTICIONO-KOMERCIJALNA BANKA		
14.	KOMERCIJALNO-INVESTICIONA BANKA		
15.	LJUBLJANSKA BANKA		
16.	NOVA BANKA a.d.		
17.	NOVA BANJALUČKA BANKA a.d.		
18.	ProCredit Bank d.d.		
19.	PAVLOVIĆ INTERNATIONAL BANKA a.d.		
20.	POŠTANSKA BANKA		
21.	PRIVREDNA BANKA		
22.	RAIFFEISEN BANK BH		
23.	RAZVOJNA BANKA JUGOISTOČNE EVROPE		

Annex 4 Pilot Project for Enforcement of Utility Claims in Sarajevo Canton

The Municipal Court of Sarajevo (the “Court”), with assistance from the High Judicial and Prosecutorial Council (“HJPC”) is revising its practices and procedures with respect to high-volume, lower value claims. Currently, the Court has a backlog of approximately 500,000 unresolved utility claims (including the estimated number of unregistered claims), many of which are no longer valid because of delays. The Court cannot reasonably process this backlog, even with additional resources.

As part of a broader reform effort to improve payment of utility bills, the Court, HJPC and the USAID FILE Project (“FILE”) have developed an experimental program for more effective handling of utility bills in order to clear the utility claims backlog, enforce claims, and reduce the number of claims presented by restoring payment discipline among utility customers.

To be effective, HJPC is offering to conduct this Pilot Project with the cooperation of any participating utility company (“Utility”), the Court and FILE as follows:

Responsibilities of the Utilities

1. **Existing Claims.** The Utility shall arrange approved off-site storage of existing claims in order to liberate space for work under this Pilot Project.
2. **Active Claims.** The Utility may analyze previously filed claims, certify that the claim is still unsatisfied, and request priority processing. The presentation, however, must follow the prerequisites and guidelines for New Claims, below, and must include an amendment of claim to include any payments received or further charges accrued since the original filing. If a request is made to process an existing claim, the Court will not accept a New Claim against the named defendant, only an amendment.
3. **New Claims.**
 - a. **Prerequisites.** For each claim filed, the Utility must *pay the filing fee* and certify the following:
 - i. **Confirmed address.** The Utility has confirmed the accuracy of the address for service of documents;
 - ii. **Banking Information.** The Utility has examined the register of transaction accounts to determine whether the defendant has a bank account;
 - iii. **a. Disconnection.** Utility services for the defendant have been disconnected; *or*, if not disconnected
b. Impossibility of Disconnection. Utility services cannot be disconnected because the defendant resides in a community building in which services cannot be disconnected on an individual unit basis.
 - b. **Required Sorting.** All claims must be sorted and presented in bundles as follows:
 - i. **Location.** To increase efficiency and effectiveness of enforcement actions, the Utility must group claims on a building-by-building basis. Claims should be delivered to the Court in bundles that include all

- outstanding claims for an entire communal building, further sorted by Value and Assets to be attached.
- ii. Value. Claims shall be sorted by value as follows:
 - Group 1: greater than 1,000 km
 - Group 2: 500 km to 1,000 km
 - Group 3: less than 500 km
 - c. Assets to be attached. The Utility shall sort claims as follows:
 - With bank account information
 - Without bank account information
4. **Transportation**. For any scheduled enforcement actions against movable property, the Utility will provide moving and transportation assistance for seized property. If the court has not yet established a planned auction center for such property, the Utility shall also provide appropriate warehouse space.
 5. **Coordination with other Utilities**. If more than one Utility participates in this Pilot Project, they shall coordinate their claims on a building-by-building basis, so that the courts can efficiently enforce all claims in a given building.
 6. **Judgment Lien**. For each unsuccessful enforcement action, the Utility agrees to file a judgment lien in the Pledge Registry against the defendant and report the amount of the uncollectible claim to the appropriate tax authorities as undeclared income.
 7. **Public Information**. The Utility shall engage appropriate public relations professionals to commence a media and public information campaign about the increased enforcement for publication before, during, and after this Pilate Project. In addition, the Utility will advertise each auction extensively, preferably including a website to describe the property for sale and the date of the auctions.

Responsibilities of the Court

1. **Register**. The Court shall receive and register up to a certain number of Pilot Project claims per week on an expedited basis.
2. **Commencement of Proceedings**. Once registered, enforcement officers will serve notice upon each building registered. They will track any objections to enforcement and notify the Utility.
3. **Enforcement**. After passage of the statutory period for objection, the enforcement officers will commence enforcement against all customers who have not objected, as follows:
 - a. Bank Accounts. The Court will seize all bank accounts for which they have been given information up to the amount of the respective claims.
 - b. Personal Property. The Court will contact the Utility to schedule enforcement actions against targeted buildings so that the Utility can schedule transportation. Enforcement actions will be carried out after normal work hours to ensure greater presence of customers and greater impact.
4. **Unsuccessful Actions**. Upon completion of an enforcement action at a building, the Court will notify the Utility for filing of liens and notification of tax authorities.
5. **Auction**. The Court will announce and conduct auctions of the seized property at the warehouse site in accordance with existing law. All appraisals will take into account reduced value for auctions to reduce the likelihood of multiple auctions.
6. **Objections**. In the event a customer objects to a claim, the Court will examine the claim in accordance with existing law and immediately dismiss or reject any

unfounded, unproven or frivolous objections, and award costs against the objecting party.

7. **Appeals and Reasonable Objections.** For cases in which a reasonable objection or an allowable appeal is offered, the Court will schedule all hearings together on the same day, and will provide notice immediately.
8. **Dedicated Staffing.** During the period of this Pilot Project, the Court will dedicate, at a minimum, the following personnel as a working group to handle and evaluate expedited enforcement of claims:
 - 2 registry clerks
 - 1 judge
 - 1 expert assistant
 - 2 enforcement officers
 - 2 court police officers (to accompany enforcement actions)

Responsibilities of the HJPC

1. **Working Group.** The HJPC shall establish and lead a working group of the participants.
2. **Authorization.** The HJPC will confirm and authorize any actions to be taken under this Pilot Project through appropriate instructions, decrees and regulations.
3. **Monitoring.** The HJPC will monitor and evaluate the effectiveness of the Pilot Project in order to identify and direct any permanent reforms that may be needed.
4. **Roll Out.** Depending on the level of success, the HJPC will roll this pilot project out to other courts and jurisdictions as appropriate.

Responsibilities of FILE

1. **Monitoring.** FILE will maintain contact with all parties to monitor the processes and effectiveness of the Pilot Project.
2. **Technical Assistance.** Subject to availability of funds, FILE will provide technical assistance in solving legal and procedural problems identified, and organize conferences or other events to evaluate and disseminate information about the Pilot Project.

Annex 5

Laws and Regulations affecting Effectiveness of Commercial Litigation Resolution in Bosnia and Herzegovina

The existing legal regime, while it provides numerous opportunities for practical improvements, limits the ability of BiH to reduce the number and burden of commercial claims currently clogging the courts. In order to achieve greater impact, it is necessary to revise a number of laws and legal provisions, as well as develop regulations for new areas of private sector activity. Below is a list of legal and regulatory reforms needed for long-term success.

A. Code of Civil Procedure.

1. Delivery of Documents. The code foresees private service through delegation. Article 337 states that service can be conducted by “an authorized legal person registered to conduct service.” Develop regulations for private sector process servers.
2. Small Claims: Reduce the number of hearings, permit decisions based on written responses, and otherwise simplify the small claims procedures (Art. 339) in accordance with European Union standards.
3. Ripeness: Establish pre-requisites for filing commercial claims in terms of collection procedures and demand for satisfaction.
4. Staleness: Establish dismissal guidelines for inactive cases.

B. Law on Enforcement Procedure.

1. Stay Pending Appeal. Clarify perceived conflicts between LEP Art. 12(5) (prohibiting stay of enforcement during objection or appeal) and LEP Art 35(2) (granting exceptions to the stay under the Code of Civil Procedure). Judges continue to remand claims for full civil trial whenever there are objections and appeals.
2. Multiple Auctions. Eliminate minimum-price auctions in favor of market-price auctions.
3. Trustworthy Documents. Expand trustworthy document definition and treatment (Art. 29) to include a broader range of commercial invoices, but maintain prohibition against utilities other than water, heat and garbage.
4. Enforceable Documents. Amend the treatment of bills of exchange from trustworthy documents (Art. 29) to enforceable documents (Art. 23).
5. Appraisals. Eliminate requirement for judicial appraisals.
6. Auctions: Eliminate requirement for minimum price and multiple auctions.

C. Court Rules

1. Fee Structure: Rationalize fees to cover costs of services provided rather than setting fees based on the value of claims.

2. **Fee Collection:** Amend court rules to permit dismissal and refusal of claims for failure to pay fees, subject only to CCP Art. 400 relief upon application by the moving party.
- D. **Obligations Law.** Extend the statute of limitations from one to three years for utilities claims, thus eliminating numerous future claims by allowing plaintiffs to consolidate claims rather than file annually in order to preserve their rights. Other types of claims should probably also be included.
- E. **Framework Regulations for Private Collections.** Promulgate regulations for the establishment, oversight and operations of private collection agencies. There is no prohibition against private collections, but a number of legal professionals have expressed concern over cultural resistance if there is no body of law or regulation permitting this. We are aware of private sector interest in this area, and we could possibly work with one or more banks to draft a proposal.
- F. **Corporate Tax Regulations.** Reform the tax law and regulations to eliminate litigation as a prerequisite to taking tax write-offs as currently required by Article 4 of the Corporate Tax Regulations.
- G. **Leasing Law.** Develop and enact an appropriate leasing law to regulate equipment and movable property leases, among other matters, by bringing them under the Pledge Law for enforcement purposes.
- H. **Real Property Law.**
 1. **Future Interests:** Recognize property rights in buildings and units of buildings not yet constructed to permit construction financing secured by future collateral.
 2. **Separate Registry:** Establish legal regime for registration of rights in property through an accessible registry, connected to or combined with the Pledge Registry.
- I. **Communal Dwelling Regime.** Shift responsibility for individual payment to communal dwelling for utilities that cannot be separately metered.
- J. **Framework Utilities Law.** Many of the procedure issues recommended could be handled through the introduction of a framework utilities law. Currently, the utilities are governed by a panoply of separate laws and regulations at various levels of the Dayton system. A single law could establish:
 1. Right to enforce against bank accounts upon notice without prior court approval
 2. Right to file liens in the Pledge Registry
 3. Right to enforcement procedure under the Pledge Law
 4. Right to report bad debts
 5. Service of process at the billing address without court intervention
- K. **Notaries Law.** Revoke Notaries Law as inappropriate for BiH and highly inconsistent with European Union trends and recommendations. Develop appropriate legal basis for competitive specialized service providers for authentication of documents, establishment of enforceability, and conveyancing of real property, along with other concerns identified in the Notaries Law.

Annex 6

Backlog Statistics for Commercial and Enforcement Cases In BiH's First Instance Courts

The following table sets forth the number of commercial and enforcement cases currently **registered and pending** in BiH's first instance courts. The term "registered and pending" is emphasized because, in certain courts, a significant number of enforcement cases have not been registered. For example, anecdotal evidence suggests that several hundred thousand enforcement cases remain unregistered in Sarajevo Municipal Court alone.

Data relating to bankruptcy cases was collected directly from the courts. It includes cases processed under both the old and new bankruptcy laws. Data relating to enforcement cases is based on information provided to FILE by the RS and Federation Ministries of Justice and the HJPC. The data was provided to the Ministries and HJPC, in turn, by the courts, which are required to report on pending cases on a semi-annual basis.

Earlier this year, FILE informally collected enforcement case data directly from the courts. Even after allowing for a reasonable number of incoming cases in the intervening months, there are still significant discrepancies between the data previously and currently collected. The discrepancies could be attributed to poor record keeping, the courts' inability to effectively track cases through various stages of proceedings, inconsistent registration practices, and other human error. Streamlined and uniform court procedures, the introduction of CMS to the courts, and the standardization of practice introduced thereby, will provide greater accuracy of data and a clearer picture of existing backlogs.

The data is sorted by case type. Case type designators are identified in the following table:

BC/MC: Basic/Municipal Court (first instance)

Mals: Small commercial cases

Ps: Civil commercial cases

Pl: Payment orders

RL-L: Liquidation

St: Bankruptcy

Ip: Enforcement

COURT (BC/BM)		FILED 1970-2004	FILED in 2005	Total
VLASENICA	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	514	410	924
CAZIN	Mals			
	Ps			
	Pl	26	0	26
	RL - L			
	St			
	Ip	4,028	553	4,581
ZEPCE	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	1,993	45	2,038
GRACANICA	Mals			
	Ps			

	Pl			
	RL - L			
	St			
	Ip	1,392	127	1,519
GRADACAC	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	5,932	250	6,182
TREBINJE	Mals	138	85	223
	Ps	305	85	390
	Pl			
	RL - L	420	0	420
	St	23	3	26
	Ip	976	576	1,552
TEŠANJ	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	4,110	139	4,249

SANSKI MOST	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	36	141	177
VELIKA KLADUSA	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	181	225	2,406
ORASJE	Mals			
	Ps			
	Pl			
	RL - L	20	29	49
	St	4	0	4
	Ip	2,880	41	2,921
SOKOLAC	Mals			
	Ps	398	104	502
	Pl			
	RL - L	25	0	25

	St	43	8	51
	Ip	299	212	511
ZAVIDOVICI	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	6,163	368	6,531
	ZENICA	Mals	2,060	380
Ps		1,054	319	1,373
Pl		1	0	1
RL - L		111	42	153
St		35	0	35
Ip		26,161	4,473	30,634
KAKANJ		Mals		
	Ps			
	Pl			
	RL - L			
	St			
	Ip	2,478	72	2,550
	BOSANSKA KRUPA	Mals		
Ps				

	Pl			
	RL - L			
	St			
	Ip	101	724	825
FOCA	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	56	152	208
BIHAC	Mals	661	578	1,239
	Ps	855	296	1,151
	Pl			
	RL - L	64	98	162
	St	8	4	12
	Ip	105	450	555
ZIVINICE	Mals			
	Ps			
	Pl	1	0	1
	RL - L			
	St			
	Ip	6,484	930	7,414

VISOKO	Mals			
	Ps			
	Pl	8	0	8
	RL - L			
	St			
	Ip	9,814	739	10,553
TUZLA	Mals	2,282	736	3,018
	Ps	2,238	535	2,773
	Pl			
	RL - L	167	108	275
	St	67	7	74
	Ip	32,659	1,883	34,542
BUGOJNO	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	4,047	324	4,371
VIŠEGRAD	Mals			
	Ps			
	Pl			
	RL - L			

	St			
	Ip	149	209	358
KALESIJA	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	1,423	77	1,500
	PRIJEDOR	Mals		
Ps				
Pl				
RL - L				
St				
Ip		688	202	890
BANJA LUKA		Mals	2,199	470
	Ps	4,026	628	4,654
	Pl			
	RL - L	26	35	61
	St	53	20	73
	Ip	5,947	774	6,721
	PRNJAVOR	Mals		
Ps				

	Pl			
	RL - L			
	St			
	Ip	253	161	414
KOTOR VAROS	Mals	0	3	3
	Ps	0	2	2
	Pl			
	RL - L			
	St			
	Ip	435	211	646
LJUBUSKI	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	4,057	60	4,117
SREBRENICA	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	184	237	421

SARAJEVO	Mals	0	9,195	9,195
	Ps	0	6,375	6,375
	Pl			
	RL - L	0	179	179
	St	20	9	29
	Ip	151,621	121,376	272,997
GRADISKA	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	240	768	1,008
DERVENTA	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	56	178	234
CAPLJINA	Mals			
	Ps			
	Pl			
	RL - L			

	St			
	Ip	2,947	79	3,026
MRKONJIC GRAD	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	587	55	642
	DOBOJ	Mals	375	152
Ps		726	210	936
Pl				
RL - L		9	9	18
St		26	1	27
Ip		166	189	355
SIROKI BRIJEG		Mals	108	92
	Ps	187	81	268
	Pl			
	RL - L	33	1	34
	St	17	0	17
	Ip	118	54	172
	ZVORNIK	Mals		
Ps				

	Pl			
	RL - L			
	St			
	Ip	543	424	967
KONJIC	Mals			
	Ps			
	Pl			
	RL - L			
	St			
	Ip	2,887	338	3,225
GORAZDE	Mals	2	28	30
	Ps	6	13	19
	Pl			
	RL - L	0	64	64
	St	4	0	4
	Ip	2,770	405	3,175
MOSTAR	Mals	688	269	957
	Ps	696	381	1,077
	Pl	12	0	12
	RL - L	26	18	44
	St	11	3	14
	Ip	11,435	910	12,345

TESLIC	Mals	2	0	2
	Ps	1	0	1
	Pl			
	RL - L			
	St			
	Ip	171	106	277
NOVI GRAD	Mals			
	Ps	2	2	4
	Pl			
	RL - L			
	St			
	Ip	161	98	259
TRAVNIK	Mals	1,692	476	2,168
	Ps	1,274	265	1,539
	Pl			
	RL - L			
	St	7	1	8
	Ip			16,196
BIJELJINA	Mals	96	132	228
	Ps	340	239	579
	Pl			
	RL - L	67	26	93

	St	19	7	26
	Ip	1,086	1,225	2,311
KISELJAK	Mals	20	0	20
	Ps	38	0	38
	Pl			
	RL - L			
	St			
	Ip	7,093	166	7,259
	MODRICA	Mals		
Ps				
Pl				
RL - L				
St				
Ip		25	6	31
LIVNO	Mals	83	137	220
	Ps	201	87	288
	Pl	15	0	15
	RL - L	9	2	11
	St	5	0	5
	Ip	9,135		9,563
BRCKO	Ip			2,281
SUD BIH	Ip	0	21	21

Total commercial and enforcement cases pending:	523,818
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ANNEX 7

RECOMMENDATIONS FOR IMPROVING CASE PROCESSING EFFICIENCY AT BIH COURTS		
Finding	Conclusion	Recommendations
<p>A.1 - Change of Present Filing System and Its Replacement with Color Coded Terminal Digit Filing Systems</p>		
<p><u>Finding 1:</u></p> <p>Upon receipt of a pleading or motion, the court's intake office affixes a file stamp to the document, notes whether court fees or taxes have been paid and confirms the number of attachments. The document is then placed in a new case file folder and routed to the respective registry office.</p> <p>Upon receipt, a registry clerk reviews the document, selects the appropriate registry book, assigns a case number, enters the date of filing, the names of the parties, the purpose of the pleading or motion, the amount of the claim and enters the case number on the pleading or motion. The registry clerk also enters pertinent information in the registry book for statistical purposes.</p> <p>In most courts, the registry clerk then annotates the overleaf, "index" or "table of contents" of the case file with the date of the filing, a description of the pleading or motion and the ordinal number of the document. The ordinal number is also written on the pleading or motion, itself. Next, the registry clerk enters the names of the parties and the case number on the file folder and in the party index, using the name of the defendant or debtor as a "locator."</p> <p>Finally, the court secretary, chief of the registry or responsible registry clerk assigns a judge and enters pertinent information in the delivery book. The file is then promptly taken to the judge for his/her review and to establish jurisdiction.</p> <p><u>Finding 2:</u></p> <p>Following the judge's review, the judicial typist prepares an order</p>	<p><u>Conclusion 1:</u></p> <p>The case intake/registry recordkeeping process appears to be unnecessarily redundant in nature and, as a result, very inefficient.</p> <p><u>Conclusion 2:</u></p> <p>The present filing system makes files difficult to locate, preventing the staff of the registry office from being able to easily file incoming documents, returns of service, et cetera in the respective case file.</p> <p><u>Conclusion 3:</u></p> <p>The current shelving design is not only wasteful of courts' limited resources but does not maximize the use of available space for housing court records.</p>	<p><u>Recommendation 1:</u></p> <p>The HJPC, in coordination with the respective court presidents, court secretaries and chiefs of registry divisions, should review the benefits which could be derived from the purchase and use of heavy, card stock, color-coded, terminal digit case files designed to withstand repeated handling. A number of courts were introduced to this concept by FILE at a June 2004 workshop. Implementation has been transferred to JSDP.</p> <p>The use of color-coded, terminal digit case file folders will facilitate the location and control of case records and greatly reduce the frequency with which the case files are handled. Cases could be filed either by terminal digit (the last digit of a case number, e.g., 1201, 1211, 1221, 1231, 1241, 1251, 1261, 1271, 1281, 1291, 1301, et cetera) or by consecutive case number and pulled using a simply designed, computer-generated calendar, e.g. Microsoft Excel or Outlook. While the cost of the new files may exceed that of the ones currently in use, they will provide many additional benefits that, in the long run, will offset the additional cost.</p> <p><u>Recommendation 2:</u></p> <p>Remove and discard the doors, hinges and locks from the existing file cabinets.</p> <p><u>Recommendation 3:</u></p> <p>Rearrange the file shelving to accommodate filing cases horizontally (not vertically) by the terminal or last digit of the case number, <i>not</i> by the date of the next scheduled event.</p>

<p>scheduling the matter for hearing and also types the required number of envelopes for delivery of the order to the parties. The file is returned to the registry or dispatch office together with the signed delivery book and the order is processed and mailed. The date of the next scheduled event is written on the return receipt to facilitate locating the file when the return receipt is returned to the registry office by the postal service.</p> <p>The case file is transmitted to the registry clerk who reviews and acts upon the judge's order, e.g., obtains and inserts the base case file, obtains missing documents, returns receipts, schedules further review or hearing, et cetera. The review or hearing date is written on the case file and entered in the registry book and the case file is filed vertically on the file shelf according to the date of the next scheduled event.</p> <p>On the day prior to the date scheduled for the next event, the case file is pulled and taken to the judge. If the judge has ordered the production of additional pleadings or other documentation, he/she may want to see the file when the filings are received in the registry office. In that event, the registry clerk selects an arbitrary date, usually 30 days hence, to wait for the pleading or other documentation to arrive.</p> <p><u>Finding 3:</u></p> <p>Case file shelving is poorly designed for easy access and does not maximize the use of available space. FILE observed that most file cabinets have doors, hinges and locks, all of which are expensive items to purchase and install. Moreover, most cabinet doors are not locked during the evening hours, when the courts are closed. We observed keys hanging from their locks in many courts.</p>		
<p>A.2 - Register of Actions</p>		
<p><u>Finding 1:</u></p> <p>It appears that the <i>same</i> information is recorded in various locations at least four times For example:</p> <ul style="list-style-type: none"> · A new complaint is presented to an intake or registry clerk who reviews the document for completeness and ensures stamps which represent payment of the proper 	<p><u>Conclusion 1:</u></p> <p>The present system of registering information on the cases is scarce. It provides just partial information on cases. To obtain "a decent" picture on a case, it is necessary to physically check the case file folder and documents in it.</p>	<p><u>Recommendation 1:</u></p> <p>The case number, the names of the parties, the name of the judge assigned, significant dates, events and other information currently written in myriad log or auxiliary record books should be entered solely in the register of actions. Subsequently, this process should be automated using "drop down" menus and common event codes to represent each unique party type, event or activity.</p>

	<p>court fees or taxes have been affixed to the complaint. Information about the complaint is then logged into a delivery or auxiliary record book and a case file is created.</p> <p>In some courts, the complaints are taken to the court president, court secretary or his/her designee for assignment to a judge approximately once a week. In other courts, this process is performed by the respective registry office.</p> <p>After a case has been assigned to a judge, relevant case information is recorded in a delivery book and the assigned judge acknowledges receipt of the assignment by signing the book.</p> <p>The same information is entered in a party index, a rather unwieldy register book or register of actions, on the case file jacket and on the case file overleaf, which is also referred to as an "index."</p> <p><u>Finding 2:</u></p> <p>Both registry office and judges' staffs use and appear to rely on "delivery" or other auxiliary recordkeeping books to track the delivery of case files to judges' offices and to record relevant dates and times of future events.</p>	<p><u>Conclusion 2:</u></p> <p>The use of delivery, assignment, hearing or other auxiliary recordkeeping books appears to be unnecessary, and wasteful of time and precious court resources. Where observed, the emphasis seems to be on form rather than function. In other words, the books are dutifully used to record the assignment or delivery of case files to a judge or to the registry office but we observed that entries are not reviewed or validated to ensure that what is written in the delivery book corresponds with the actual case files being transferred.</p>	<p><u>Recommendation 2:</u></p> <p>On an experimental basis, the use of delivery, assignment, hearing or other auxiliary recordkeeping books should be eliminated. All information having to do with the movement of the case file should be recorded in the respective registry book or in a database designed for that purpose.</p>
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A.3 – Delegation, Strong engagement of law associates

	<p><u>Finding 1:</u></p> <p>The formal correctness, e.g., sufficient number of copies, format, et cetera, of a complaint is determined by a judge.</p> <p><u>Finding 2:</u></p> <p>The substantive correctness, e.g., whether there is a legal question, of a complaint is determined by a judge.</p> <p><u>Finding 3:</u></p> <p>The intake or registry clerks are</p>	<p><u>Conclusion 1:</u></p> <p>Many tasks currently performed by judges could be delegated to law associates, the chief of the registry or well-trained, senior registry clerks.</p> <p><u>Conclusion 2:</u></p> <p>This practice encourages lawyers or litigants to file pleadings or other case-related documents with little or no regard for their respective correctness or completeness. This wastes precious human resources and takes the onus off the parties to prepare properly for a lawsuit.</p>	<p><u>Recommendation 1:</u></p> <p>To maximize judicial resources and minimize movement of the case file between the registry office and the judge's office, the formal correctness of the complaint should be determined by a law associate, the chief of the registry office or his/her designee, <u>not</u> a judge. This may require the development of written guidelines and minimal training but should nevertheless prove beneficial in reducing delay and freeing the judge to concentrate on cases previously assigned to him/her. Both the Mostar and Sarajevo Municipal Courts are experimenting with this concept.</p> <p><u>Recommendation 2:</u></p> <p>The substantive correctness of a complaint</p>
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	<p>required to accept all pleadings, even those that are incomplete or incorrect. Failure to pay court fees or “taxes” does not prevent receipt and processing of pleadings or other documents nor does it stay the court proceedings. If a party demands it, even if he or she is <i>not</i> indigent, the court must receive and process the filer’s pleadings regardless of whether fees have been paid in full or in part.</p>		<p>should be determined by an experienced law associate assigned to the registry office, not a judge. Both the Mostar and Sarajevo Municipal Courts are experimenting with this concept.</p> <p><u>Recommendation 3:</u></p> <p>All court fees or “taxes” or a notice of indigency issued by the Minister of Finance in lieu of fees or taxes, should be required to be paid in full before the court accepts a complaint for filing. Depending upon how one interprets and applies the current statute, this recommendation may require a change in the law in order to implement it.</p>
<p>A.4 - Movement of case files</p>			
	<p><u>Finding 1:</u></p> <p>FILE’s workflow analyses documented repeated, routine movement of the case file back and forth between judges’ offices and the respective registry office (workflow diagrams are available).</p> <p><u>Finding 2:</u></p> <p>Presently, the case file is routed to the judge assigned so that the judge can select and schedule the date of the preparatory hearing.</p>	<p><u>Conclusion:</u></p> <p>Such movements further delay and complicate an already complex process, especially when the reasons for transference of the case file have to do with procedural, administrative or clerical functions which can and should be performed by a law associate or the staff of the respective registry office.</p>	<p><u>Recommendation:</u></p> <p>The courts should make <i>every</i> effort to significantly reduce the movement of the case file between a registry office and a judge’s office; such movement should occur only when absolutely necessary. The <i>only</i> time a judge should receive a case file is when it is needed to conduct a hearing or trial, or make a decision dispositive of the case. At <i>all</i> other times, the file should remain in the registry office and all procedural, administrative or clerical functions should be performed by a law associate or the staff of the respective registry office.</p> <p><u>Recommendation 2:</u></p> <p>The date of the preparatory hearing should be assigned by the staff of the registry office in accordance with a predetermined schedule, e.g., “x” number of days after the deadline for filing the answer. Litigants should be notified of the date of preparatory hearing at the time of filing of complaint and when complaint is served on the defendant(s).</p>
<p>A.5 - Taxes</p>			
	<p><u>Finding 1:</u></p> <p>Failure to pay court fees or “taxes” does not prevent receipt and processing of pleadings or other documents nor does it stay the court proceedings. If a party demands it, even if he or she is <i>not</i> indigent, the court must receive and process the filer’s pleadings regardless of whether fees have been paid in full or in part.</p>	<p><u>Conclusion 1:</u></p> <p>Unless litigants are truly indigent and lack the necessary funds to pay required court fees or “taxes,” the court is forced to become a “tax collector” instead of performing its official function of dispensing justice. This takes judges and staffs’ time away from their primary function, delays case processing and impedes the administration of justice.</p> <p>Failure to require the payment of court fees or “taxes” by those litigants who can afford to pay eliminates a “filter” which has the potential effect of allowing only those who are serious about their respective cases to seek redress in the courts. As a result, the court may become clogged with numerous cases filed by litigants who may not be serious about pursuing a legal remedy. While every member of a</p>	<p><u>Recommendation 1:</u></p> <p>All court fees or “taxes” or a notice of indigency issued by the Minister of Finance in lieu of fees or taxes, should be required to be paid in full before the court accepts a complaint for filing. Depending upon how one interprets and applies the current statute, this recommendation may require a change in the law in order to implement it.</p>

	<p><u>Finding 2:</u> The court fee structure for filing fees or “taxes” is, in most cases, comprised of a sliding scale, based upon the amount in controversy of a specific case. The exact amount is determined by a judge.</p> <p><u>Finding 3:</u> Filing fees for enforcement of “utility bills” are “symbolic”</p>	<p>society should have equal, unfettered access to justice, only those who are truly indigent should be permitted to “play” for free.</p> <p><u>Conclusion 2:</u> This fee determination process unnecessarily elongates and complicates what should be a simple clerical step and adds needless complexity to the court’s accounting processes.</p> <p><u>Conclusion 3:</u> It is quite likely that the courts lose substantial sums of money when the cost of enforcement is compared with the “benefit” of the filing fee or tax received.</p>	<p><u>Recommendation 2:</u> The HJPC should propose or mandate a <i>flat</i> filing fee, in lieu of a sliding scale, for <i>each</i> category of case, e.g., civil, commercial, bankruptcy, family, et cetera, regardless of a respective case’s size or complexity, which adequately covers the courts’ cost of adjudicating a case in that category. Once established, a flat fee schedule should be published in local legal periodicals and posted at strategic locations adjacent to the courts’ respective registry offices.</p> <p><u>Recommendation 3:</u> The filing fee or tax charged for the enforcement of an unpaid utility bill by the courts should be increased to an amount sufficient to either ensure the courts’ effectiveness or to discourage the utility companies from filing only the most grievous complaints.</p>
<p>A.6 - Appellate procedure</p>			
	<p><u>Finding 1:</u> Following entry of judgment by the first instance court, the judge presiding remains involved in the appellate process.</p>	<p><u>Conclusion 1:</u> Involvement in the appellate or second instance process by a first instance judge diverts that judge’s time and attention from the workload of the first instance court. Two judges (the judge who adjudicated the case in the first instance court and the reporting judge at the second instance court) check to determine if the appeal is timely filed, allowed and complete. This task should not be performed two times, by two judges</p>	<p><u>Recommendation 1:</u> The appellate process should be managed, in its entirety, by the second instance court upon filing of a notice of appeal. The first instance court should receive the notice of appeal. Law associate should determine whether it is timely filed, allowed and complete and, if so, forward the appeal and the entire case file to the second instance court, which will take over the control for the rest of the appellate process. The case should continue under the original case number and with the original case file.</p>
<p>A.7 – Case Numbering, Case Types</p>			
	<p><u>Finding 1:</u> New case numbers are assigned to a pending case at several points throughout its processing, including the appellate process.</p>	<p><u>Conclusion 1:</u> The assignment of a new case number at different stages of processing adds undue complexity and makes it difficult to identify, track and count cases in process.</p>	<p><u>Recommendation 1:</u> Representatives of the HJPC, the courts and the prosecutors’ offices should confer and agree upon the assignment of a <i>single</i> case number that remains with the case throughout its vary stages of processing.</p>
<p>A.8 – Find alternatives for Utility cases</p>			
			<p><u>Recommendation 1:</u></p>

	<p><u>Finding 1:</u></p> <p>Enforcement cases based on utility bills comprise a significant portion of the backlog in certain courts.</p>	<p><u>Conclusion 1:</u></p> <p>Courts are ill-equipped to function as the prime collector of utility debts.</p>	<p>Alternative legislative and administrative remedies should be considered for utility claims, such as self-help or private collection mechanisms.</p>
<p>A.9 – Introduce Random Assignment of Cases</p>			
	<p><u>Finding 1:</u></p> <p>In the Banja Luka Basic Court, once a “Kps” case becomes a “K” case and a new case number is assigned, the case file is routed to the Chief of the Registry who assigns a judge to the case in consecutive, not random, order.</p>	<p><u>Conclusion 1:</u></p> <p>Routing the case file to the Chief of the Registry or the Court President wastes time and resources, and unnecessarily delays the processing of the case, especially considering the fact that because the case assignment process is consecutive and not random, there is no reason why a registry clerk could not perform the same function without the case file moving between at least two offices.</p>	<p><u>Recommendation 1:</u></p> <p>The practice of routing the case file to the Chief of the Registry for purposes of assigning a judge should be discontinued. Until such time as an automated, random case assignment methodology is operational, the judge should be assigned by a registry clerk in the criminal registry office.</p>
<p>A.10 – Develop a Weighted Methodology for Assignment of Cases that will replace the “Quota” system</p>			
	<p><u>Finding 1:</u></p> <p>Judges report the number of cases disposed of within specified timeframes, but the complexity of each case, and the time and effort required for disposition, vary significantly and are not adequately reported.</p>	<p><u>Conclusion 1:</u></p> <p>The present quota system does not adequately indicate or measure judicial efficiency, quality and productivity.</p>	<p><u>Recommendation 1:</u></p> <p>A weighted case methodology that takes into account all procedural/processing steps of a case should be developed. A working group should be established to determine weighting formulas for each procedural step.</p>
<p>A.11 – Delegation of post-judgment tasks</p>			
	<p><u>Finding 1:</u></p> <p>In all types of cases, the decision whether to archive a case file is made by a judge. This requires pulling and routing the case file to the judge presiding for his/her review, making a series of entries in various record books and processing the judge’s order when the file is returned to the registry office.</p>	<p><u>Conclusion 1:</u></p> <p>The decision to archive a case file is an administrative or procedural decision which should be delegated to someone other than a judge, e.g., the chief of the registry. This would free the judge to focus on substantive matters.</p>	<p><u>Recommendation 1:</u></p> <p>The responsibility for deciding whether to archive a case file should be delegated to the chief of the respective registry office or his designee. This task should <u>not</u> be performed by a judge.</p>
<p>B.1 – Service of Process</p>			
	<p><u>Finding 1:</u></p> <p>Based upon conversations with various court secretaries, it appears that courts spend considerable</p>	<p><u>Conclusion:</u></p> <p>Given the scarcity of court resources, the expenditure of funds for services that are inefficient, ineffective or</p>	<p><u>Recommendation:</u></p> <p>With the full knowledge and support of the HJPC, each court should be encouraged to use alternate means of service (e.g., posting on the</p>

	amounts of scarce resources paying for substandard, inefficient postal service.	provide minimal return on the courts' investment should be greatly reduced or eliminated.	court bulletin board) and should explore alternative mechanisms (e.g., using funds previously allocated for the postal service to establish a court courier system for service of process, summonses, indictments and other court documents).
B.2 – Storage of Disposed Cases			
	<p><u>Finding 1:</u> Archived records in the vast majority of cases are deemed permanent records of the court. Storage of archived records appears fraught with problems, either because of a lack of adequate space, substandard storage techniques or poor environmental conditions.</p>	<p><u>Conclusion:</u> Records management could be vastly improved. The application of modern records management techniques, practices, processes and principles would greatly benefit BiH's courts, the judges, the lawyers and the public.</p>	<p><u>Recommendation 1:</u> The respective court presidents, court secretaries and chiefs of the registry offices should, together, review and agree upon the bases for a records retention/destruction policy and recommend common records retention and destruction schedule for all courts to the HJPC.</p> <p><u>Recommendation 2:</u> A thorough records management study should be conducted in a sufficient number of courts so as to result in the development of a comprehensive records management policy and procedures manual for uniform use throughout BiH's courts. A records management study involves a review of the records maintained by a court, as well as how the records are assembled, processed, filed, maintained, stored and, in some cases, destroyed.</p>
B.3 – Impose on parties/lawyers performance of simple tasks			
	<p><u>Finding 1:</u> A considerable amount of time is consumed by judges' typists and registry staff in preparing and stuffing envelopes for "dispatch" of documents and pleadings to opposing parties.</p> <p><u>Finding 2:</u> It appears that judges personally prepare a large number of routine court orders, each on an original basis.</p>	<p><u>Conclusion 1:</u> This is a time-consuming, expensive procedure.</p> <p><u>Conclusion 2:</u> There seems to be no reason why a judge should be solely responsible for the preparation of routine court orders or why such orders should not be reduced to a standard form order.</p>	<p><u>Recommendation 1:</u> Non-indigent plaintiffs should be required to provide the registry office with addressed, stamped envelopes for serving defendants with copies of the initial complaint, pay for the service of process or serve defendants themselves.</p> <p><u>Recommendation 2:</u> As is commonly the practice in United States courts at both state and federal levels, the courts should consider the possibility and benefit of delegating the preparation of routine court orders to litigants' counsel, subject to court review and approval. Alternatively, the courts, with the help of the HJPC, should prepare an array of standard, pre-printed omnibus orders for the judges to use in lieu of creating their own orders from "scratch."</p>
C.1 – Merger of Intake and Registry offices			

	<p><u>Finding 1:</u></p> <p>In several of the courts, FILE noticed that pleadings and other case related documents delivered by the postal service or by hand were received by a common intake office. Staffs assigned to this office receive pleadings and other documents for all types of cases, process them, sort them by division and deliver them to the respective registry offices, e.g., commercial, civil, enforcement, and criminal. In each office, some form of a “delivery book” is used to corroborate the delivery process.</p>	<p><u>Conclusion 1:</u></p> <p>In FILE’s opinion, a separate intake office is delay-inducing, inefficient and does not contribute materially to the effective processing of cases.</p>	<p><u>Recommendation 1:</u></p> <p>Those courts with separate intake offices may wish to experiment with temporarily closing their intake offices in favor of litigants filing their documents or pleadings <u>directly</u> with the appropriate registry office. Staff presently assigned to the intake office could be reassigned to the respective registry office that has the greatest workload.</p> <p>The respective court secretary or chief of the registry division should monitor closely this change for a period not to exceed 90 days, make “midcourse” corrections where appropriate and determine whether elimination of a separate intake office would contribute to more efficient, effective court operations. If successful, the concept could be expanded to include the consolidation of registry offices.</p>
<p>C.2 – Distant registry offices</p>			
	<p><u>Finding 1:</u></p> <p>In the Sarajevo Municipal Court and the Banja Luka Basic Court, some of the registry offices are located a significant distance from the judges whom they support.</p>	<p><u>Conclusion 1:</u></p> <p>Locating the registry offices away from the respective judges served by such offices only adds to the inefficiencies already present and delays further the administration of justice.</p>	<p><u>Recommendation 1:</u></p> <p>To the extent practicable, the courts should make a concerted effort to establish registry offices in reasonably close proximity to the judges served by them.</p>

CIVIL CASES

<p>CA.1 – Preparatory Hearing and Discovery Concept</p>			
	<p><u>Finding 1:</u></p> <p>The courts do not appear to take <i>full</i> advantage of the preparatory hearing to ensure that the case is actually ready for hearing and that avenues of settlement have been fully explored by all parties to the litigation. As a result, a great majority of cases that might have been previously settled reach the hearing stage, unnecessarily consuming judicial and other court resources. In addition, unprepared lawyers or witnesses who fail to appear may needlessly delay the effective administration of justice.</p>	<p><u>Conclusion 1:</u></p> <p>Early and total control of the progress of the case from filing to disposition is essential to ensuring the effective utilization of judicial and staff resources and resolution of the case on its merits, as quickly as possible.</p>	<p><u>Recommendation 1:</u></p> <p>Each court may wish to identify one or more judges who are highly respected or particularly skilled in the art of negotiation and settlement, and assign those judges to hear all preparatory hearings exclusively. Preparation prior to, and attendance at, the preparatory hearing by <i>all</i> parties should be <i>mandatory</i>.</p> <p><u>Recommendation 2:</u></p> <p>The court should actively control the discovery process through an early discovery or “readiness” conference or</p>

			<p>establishment of a comprehensive discovery plan, through consistent application of the rules, and through the imposition of costs and sanctions for abuse.</p> <p><u>Recommendation 3:</u></p> <p>Litigants and attorneys must be fully prepared and must have <i>full</i> authority to settle the case at the preparatory hearing. Meaningful settlement discussions must occur even if they consume multiple hours or days. Litigants and attorneys should be sanctioned for lack of preparation, unnecessary delay or failure to appear as ordered by the court. Of course, early referral to an alternative dispute resolution program, e.g., mediation, should continue in selected cases.</p>
<p>CA.2 – Unequal disposition of judges per divisions</p>			
	<p><u>Finding 1:</u></p> <p>In the Sarajevo Municipal Court, it appears that the number of judges assigned to the newly established commercial divisions do not equate with the commercial workload.</p>	<p><u>Conclusion:</u></p> <p>Insufficient judicial resources will not be adequate to manage the current commercial caseload, reduce the existing backlog or prevent its recurrence.</p>	<p><u>Recommendation:</u></p> <p>Court presidents should reevaluate the numbers of judges assigned to the commercial and civil departments respectively and determine whether the allocations of judicial resources equate with the workloads of the respective departments.</p>

ENFORCEMENT CASES

<p>EA.1 – Discontinuance of civil/enforcement procedure</p>			
	<p><u>Finding 1:</u></p> <p>Enforcement is a wholly separate, independent phase of the adjudicatory process. Following adjudication and entry of judgment in the base case, the judge presiding enters an order archiving the case.</p>	<p><u>Conclusion 1:</u></p> <p>The bifurcation of the adjudicatory and enforcement phases, the assignment of a new case number, the creation of a new case file and the assignment of the case to a judge responsible solely for enforcement creates a great deal of additional work for the courts, and wastes valuable resources.</p> <p><u>Conclusion 2:</u></p> <p>The workflow process is unnecessarily complicated and there are insufficient staff resources</p>	<p><u>Recommendation 1:</u></p> <p>In accordance with the Law on Enforcement, to initiate the enforcement phase, the judgment creditor must file a motion for enforcement of the judgment and attach a copy of the judgment. In actuality, the base case cannot be considered closed until the judgment has been satisfied.</p> <p>Upon completion of the adjudicatory phase and entry of judgment, the case should move unabated into the enforcement phase of the proceedings <i>without</i> the need for a new case number or case file or the need for the judgment creditor to file a motion for enforcement of the judgment. The case should remain the</p>

		<p>to carry out actual enforcement actions in the field. As a result, the number of pending enforcement cases increases daily, greatly overshadowing the courts' ability to enforce them. Unless the specific case type is given priority or the parties voluntarily settle their respective dispute, the likelihood of timely enforcement is remote.</p>	<p>responsibility of the originally assigned hearing judge until the judgment has been satisfied by the judgment debtor; then, and only then, should the case be closed and archived. Existing enforcement judges should be reassigned as hearing judges.</p> <p><u>Recommendation 2:</u></p> <p>To further encourage prompt payment of the judgment, the courts should consider the imposition of "late" fees or penalty assessments, e.g., monetary judgments not satisfied within 30/60/90 days will be subject to an additional, escalating late fee, calculated as a percentage of the original judgment.</p> <p><u>Recommendation 3:</u></p> <p>The courts may wish to explore the possibility of establishing a separate, "fast track" procedure for the enforcement of monetary judgments below a certain threshold, e.g., 5,000 KM.</p>
<p>EA.2 –Improving current Utility Bill case procedures</p>			
	<p><u>Finding 1:</u></p> <p>The courts are charged with the responsibility to enforce unpaid utility bills for water, heat, satellite television and trash removal as well as judgments resulting from the adjudicatory process. Utility companies file reams of <i>computer-generated</i> "authenticating documents" for negligible sums and often in ever increasing, consecutive amounts for the <i>same</i> customers.</p>	<p><u>Conclusion 1:</u></p> <p>The courts are ill-equipped to enforce unpaid utility bills. Moreover, it is quite likely that the courts lose substantial sums of money when the cost of enforcement is compared with the "benefit" of the filing fee or tax received. Moreover, the utility companies could and should do much more to facilitate the work of the courts.</p>	<p><u>Recommendation 1:</u></p> <p>Until the Law on Enforcement is amended to remove the collection of unpaid utility bills from the jurisdiction of the courts, the utility companies should be called upon to assist with processing the courts' utilities-related workloads. The utility companies should be prohibited from filing motions for enforcement for amounts less than a specified amount (e.g., 500 KM). The utility companies should also make a concerted effort to avoid filing multiple motions for enforcement for the <i>same</i> customer, instead consolidating overdue bills for that customer in <i>one</i> motion for enforcement.</p> <p><u>Recommendation 2:</u></p> <p>Perhaps a methodology could be developed that eliminates the role of enforcement officers in the execution of judgment process or, in other words, "privatizes" the actual enforcement of the judgment. There is no reason why the taxpayer should bear the burden of enforcing private debts.</p> <p>Private individuals could be trained, certified and licensed to conduct lawful enforcements and be directly compensated by creditors for their work. Alternatively, court staffs could be reallocated or reassigned to focus more on the enforcement process.</p>
<p>EA.3 – Material Resources, Gaining Efficiency</p>			

<p><u>Finding 1:</u> Court police appear to be abundant in number and a potential source of assistance for enforcing judgments.</p> <p><u>Finding 2:</u> The courts lack an effective means and the budget to provide adequate, efficient transportation for the service of process as well as for transportation of seizure movables</p>	<p><u>Conclusion 1:</u> Court police may be a potential source of much needed manpower for the courts' enforcement of judgments and service of process, including criminal indictments.</p> <p><u>Conclusion 2:</u> Failure to provide adequate transportation apart from public transportation for bailiffs, couriers or enforcement officers may negatively impact court processes and the smooth running of the courts. As a result, service of process is impaired and the administration of justice is impeded.</p>	<p><u>Recommendation 1:</u> To the extent practicable, beyond simply providing court security, the court police should be used to enforce judgments and serve indictments.</p> <p><u>Recommendation 2:</u> The Ministries of Finance and Justice should be invited to meet with the respective court president, court secretaries and representatives of both banks and utility companies, as well as the FILE Project, to review the enforcement process and "brainstorm" possible solutions to the obstacles and "bottlenecks" which delay or prevent timely enforcement of judgments.</p>
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CRIMINAL CASES

<p>CCA.1 – “Kps” inappropriate data recordings</p>		
<p><u>Finding 1:</u> Miscellaneous law enforcement or prosecutorial requests to preserve evidence or single investigative actions, e.g., search warrants, wire taps, et cetera, appear to follow a procedure established when such investigational activity was the responsibility of the courts. Requests or motions for such hearings follow a standard filing routine via the intake and registry offices, and entry of case-related data in a public register.</p>	<p><u>Conclusion 1:</u> Law enforcement or prosecutorial requests to preserve evidence or single investigative actions may be of a highly confidential nature. By treating such requests as a “public” event, confidentiality may be compromised, investigations may be jeopardized, or witnesses or evidence may be endangered. In addition, investigatory activities should be the responsibility of and controlled by to prosecutor, not the court.</p>	<p><u>Recommendation 1:</u> Law enforcement or prosecutorial requests to preserve evidence should be made <i>directly</i> to a judge so assigned by the court president. The judge should review each request to ensure legality, sign or endorse an appropriate order prepared, supported and submitted by the requesting law enforcement or prosecutorial agency, and return it to the requestor for subsequent action. Moreover, the requesting agency should maintain relevant records and registers, <i>not</i> the court.</p>
<p>CCA.2 – Saving court resources in the investigative phase</p>		
<p><u>Finding 1:</u> During the investigatory stage, the prosecutor may summon the accused, as well as victims or witnesses to interview. In the event such persons fail to appear as summoned, the prosecutor uses the court police to compel attendance.</p> <p><u>Finding 2:</u></p>	<p><u>Conclusion 1:</u> Given the fact that an indictment has not yet been filed, the involvement of the court police in compelling attendance of interviewees summoned by the prosecutor “crosses the line” between the investigatory and accusatory stages of a criminal proceeding.</p>	<p><u>Recommendation 1:</u> The prosecutor should rely upon local law enforcement agencies, e.g., local police, to compel the attendance of interviewees prior to the filing of an indictment. The court police should perform duties specifically in support of the judiciary, e.g., personal service of an indictment, and only <i>after</i> an indictment has been confirmed.</p> <p><u>Recommendation 2:</u> The court has a clear role of adjudication. All other</p>

	<p>In the investigative phase, the prosecutor will hand over to the court things that were seized from the suspect. In case that the court does not have proper premises for keeping of the seized object, it will be handed over to police or other institution that can handle it.</p>	<p><u>Conclusion 2:</u> As an investigation does not have to end up with official indictment, court gets involved in keeping of things that will never become a part of 'court business.'</p>	<p>actions, except of those of 'monitoring' legality of prosecutor's work, should be performed by the prosecutor and the police.</p>
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ANNEX 8 – COMPREHENSIVE COURT REPORT



USAID
FROM THE AMERICAN PEOPLE

Fostering an Investment and Lender-Friendly Environment (FILE)

Bosnia and Herzegovina

Establishing Healthy Collateral and Enforcement Systems in Bosnia and Herzegovina:

Issues and Solutions

Contract Number
PCE-I-00-98-00015-00 TO 821

Submitted to:
USAID/Bosnia and Herzegovina
Economic Restructuring Office
Emir Mehmedbasic, Project Management Specialist

Submitted by:
Chemonics International Inc.
Deloitte Touche Tohmatsu Emerging Markets Ltd.
National Center for State Courts

May 13, 2005

Establishing a Healthy System of Enforcement in Bosnia and Herzegovina: Problems and Solutions

Executive Summary

Enforcement is not an event, but a system involving a number of distinct and complementary elements. The enforcement system begins with private sector risk management and ends, if all else fails, in the judicial system. When the various elements function effectively, they result in a culture of accountability that encourages investment and broad-based economic development. When the system fails, costs and risks of commerce cause low investment, high prices, and poor access to affordable capital.

The process of enforcement can be broken into parts for analysis and intervention, but each of these falls into one of two categories: enforcing claims without resort to courts, and enforcing claims through the courts. Keeping claims out of court is the responsibility of the private sector. Once a claim must go to court, the integrity of the judicial enforcement system is the last resort. Together, the two segments ensure that there are consequences for debtors who unjustly default on their commercial obligations (and benefits for those who do not). Each element in a healthy system reinforces this goal to ensure lower costs and risks in the overall business environment.

Today, the enforcement system of Bosnia and Herzegovina (BiH) is not healthy. The private sector makes insufficient use of the tools that could help them reduce delinquencies, default, litigation, and the costs inherent in each. Once in court, however, claims often become mired in a system that rewards unjustified delays and frivolous appeals. Enforcement judges are overwhelmed by an ever-mounting backlog, and enforcement officers are hampered in executing their duties by a number of systemic constraints.

Although there are numerous problems, each can be solved over time. Some reforms will require changes in law or regulation, but most are related to management practices by the parties responsible. Unfortunately, few parties – in the private or public sector – have actively and publicly taken responsibility for changes. This too is a management problem, but also suggests a lack of widespread awareness that recent changes in the system of government and economy require more active involvement in finding solutions.

This report begins with a framework for understanding and analyzing enforcement systems. Thereafter, each element of the system is then studied to identify specific weaknesses in BiH. The analysis includes explanation of the constraints and recommended responses. The report closes with a consideration of cultural influences on the enforcement system and questions of how – and whether – they should be addressed through programmatic efforts.

From a project standpoint, enforcement is a multi-faceted, multi-disciplinary field encompassing a broad range of civil society agents. Current efforts to address some of the problems are underway through sector-specific programs, such as court reform. Addressing the overall system will require coordination of efforts among local organizations and donors, if not a dedicated task or program charged with responsibility for a systemic approach.

Introduction

Why do people honor their commercial obligations? Why do they pay their just debts? The simple economic answer is that people pay their debts and meet their obligations when the benefits of compliance outweigh the costs of non-compliance. This calculation is not purely mathematical, but includes a range of factors. It also depends on the presence of a reasonably healthy system of enforcement.

Today in BiH, the enforcement system is not working effectively. Courts are clogged with an overwhelming inflow of cases and are unable to handle them in a timely manner. As a result, default creates few negative consequences and can even represent a rational business choice.

Yet the problem is not only in the courts. Numerous defaults would never happen, or at least would never get to court, if the private sector were better able to manage and monitor credit risks and commercial behavior. Although court enforcement is essential for a healthy commercial environment, it is not sufficient. Many of the solutions to commercial problems lie purely within the hands of the private sector. Together, public and private sectors can establish a system of enforcement that will lower the costs and risks of business as well as lower the cost of government, thus improving the likelihood of economic prosperity for BiH.

The purpose of this analysis is to identify problems in the existing enforcement system and recommend solutions. The analysis begins with a description of the characteristics of a healthy enforcement system and is followed by a detailed examination of the current situation in BiH. General recommendations are set forth in the text, but these are further supplemented by a recommendation chart in Appendix A. The primary focus of the analysis is on non-payment, rather than more complex commercial disputes, because unpaid debts are the primary point of crisis today. The analysis is relevant, however, to the entire enforcement system.

Benefits of Compliance vs. Costs of Default: A Variety of Incentives

Benefits include:

- *Economic:* Timely compliance and positive credit history can lead to additional credit at better terms and conditions.
- *Social:* Some people feel that defaulting on obligations is sign of poor character and wish to establish themselves as honorable members of society. They may also recognize that their own actions have an impact on the overall commercial environment, and wish to ensure a healthier economy through their own behavior.
- *Religious:* The world's major religions encourage integrity in business dealings, including meeting obligations. For example, Psalm 15 praises those who keep their commitments, "even when it hurts."

Costs include:

- *Economic:* Well designed enforcement systems apply various penalties and sanctions for delinquency and default, thus raising the costs of non-compliance through fees, penalties, and loss of current and future credit.
- *Social:* Some cultures regard commercial failure as personal failure and will hold bad debtors in disdain. This can include shunning in business dealings, making it difficult to maintain a profitable business.
- *Psychological:* Unpaid debts increase personal stress and interpersonal antagonism. Some people find that they cannot live productively with unresolved obligations and thus seek to resolve them through timely compliance.

I. Enforcement as a System

Enforcement is not just an event, it is a process embodied in a self-reinforcing system. It begins before a merchant or banker extends credit for goods or services, and ends only after the credit relationship has ended. Each credit transaction in the system reinforces the entire system by providing direct and indirect incentives for appropriate compliance with commercial obligations. When functioning effectively, the enforcement system lowers the costs and risks of doing business. It also provides ongoing feedback to all parties so that they can adjust their behavior to meet any changed conditions.

Establishing Risks. The system begins when a creditor assesses the risks of extending credit for goods or services to a potential client or customer. Throughout Northern Europe and North America, risk assessment starts with a review of credit information provided by a public or private credit information bureau, as well as public registries that may contain additional information about debts, pledges, liens and judgments. This information allows the creditor to determine past performance of the potential client and determine whether there is any significant risk of poor future performance. In addition, or if there is no prior history for the particular client, a careful creditor will check references provided by the client, and will check the credit history of any guarantors or other parties involved in the transaction. For larger transactions, such as bank loans, creditors will often perform a review of the financial statements, business plans and records of a company to determine whether projected cash flow and revenues are sufficient to meet payment requirements.

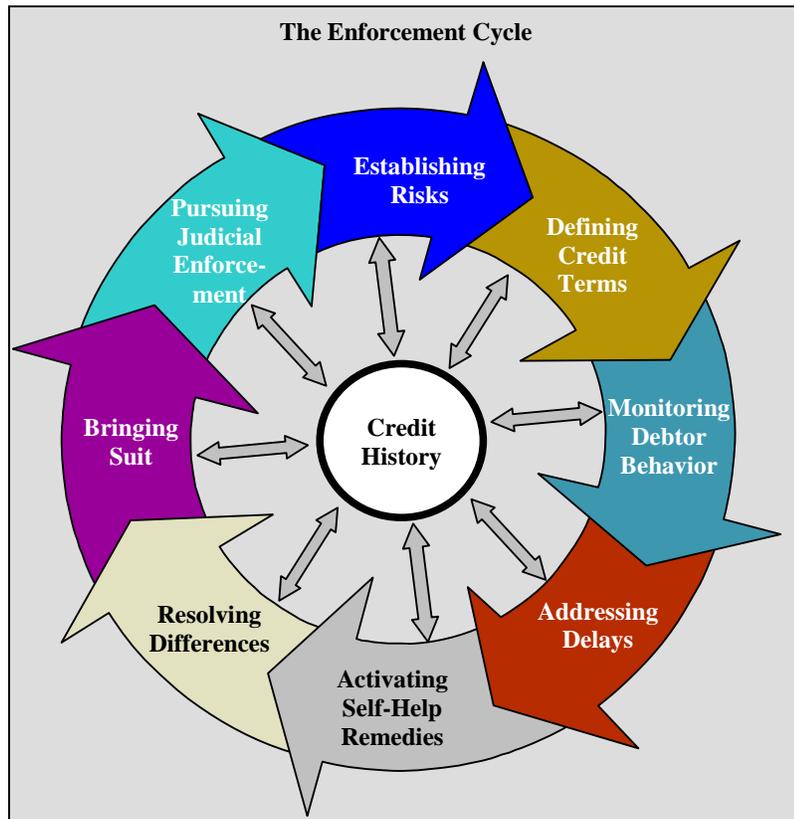
Defining Credit Terms. Having analyzed these various risks, the responsible creditor will then define the terms of the credit relationship primarily through a contract that clearly sets forth the terms of performance for all parties, including payments, deadlines, penalties and enforcement rights of the creditor. In addition, the contract should clearly specify any guarantors or the pledge of any movable, immovable or intangible property, together with the conditions under which the pledge or guaranty can be activated. If the contract includes bills of exchange as a means of enforcement, then conditions for presentation of the bills should be spelled out. Moreover, any rights to self-help (such as private sale or repossession) should be defined in the agreement. A clear, precise contract helps to avoid future problems by making all parties aware of the consequences of breach or default, and, in the event of default, helps the court to enforce the contract more accurately and effectively.

Monitoring Debtor Behavior. Many creditors undermine their own stability by failing to monitor receivables adequately. All creditors should have a reasonable, cost-effective system for tracking accounts receivable and determining when payments are late. The longer a delinquency goes unnoticed (or unmentioned), the more difficult it is to collect and the more likely it is to go into full default. Many banks also monitor the financial condition of their larger debtors to be aware of any changes in circumstances that might affect future performance. Their procedures often include semi-annual credit reports (to see if the debtor has picked up any additional debt or paid off other obligations) and visits to the premises of the debtor to examine financial accounts. For merchants who extend smaller amounts of credit, visits may not be financially viable, but a good monitoring system will pay off rapidly by catching delays whenever they happen. Monitoring systems affect debtor behavior by instilling discipline – debtors know that delays will be noticed and will trigger consequences, so that they are less tempted to skip or delay payments without first seeking permission from the creditor.

Addressing Delays. Credit terms and monitoring systems are only valuable if the creditor also takes action once a debtor fails to meet commercial obligations. Proper risk management includes a system for engaging delinquent clients *quickly* regarding any delays or defaults. This may be done directly through letters, phone calls, or site visits by the creditor, or indirectly through commercial collection agencies that specialize in addressing delinquency and non-payment. Either way, speed and certainty are essential to hold the debtor accountable for any failures.

Activating Self-Help Remedies. When simple delays turn into actual defaults, creditors must be prepared to utilize any self-help mechanisms available to them, whether established by the credit contract or by law. Self-help includes negotiation of bills of exchange, calling in guarantees, repossessing property, garnishing wages, attaching accounts, or otherwise taking action designed to liquidate security and ensure payment. Such actions should also be reported, along with prior delays, to a credit information bureau to maintain accountability. It is not always possible to recover the full amount of a claim through self-help (or through court, for that matter). However, such actions should not be measured in terms of the cost related to an individual transaction: repossessions and other remedies serve as a general deterrent, encouraging all debtors to stay current on their accounts instead of facing similar enforcement actions.

Resolving Differences. Monitoring behavior, addressing delays, and activating self-help remedies may bring to light legitimate disputes relating to the obligations of the debtor. At times, non-payment is due to disagreement over the quality of goods or services provided, or conflicting expectations between the parties. In these cases, alternative dispute resolution (ADR) mechanisms may be useful and appropriate. Mediation and arbitration can be highly effective whenever the parties wish or need to preserve their ongoing relationship, but serve little purpose other than delay when the dispute involves only a question of payment for goods or services. ADR can be effective in commercial dealings and insurance claims, but is seldom useful for bank loans, where negotiation may be appropriate in order to deal with changed



circumstances. Nonetheless, ADR is an important tool for keeping cases out of extended litigation, especially when such litigation is costly for both parties.

Bringing Suit. When all else fails, creditors must sometimes bring suit to enforce their claims. If the court system functions effectively, it will resolve conflicts efficiently and establish certainty over various types of disputes so that the outcome of litigation is predictable. With such certainty, parties are less likely to choose litigation because they can reasonably predict the outcome and prefer to avoid the additional costs involved in losing the suit. Indeed, many commercial lawyers advise creditors to bring suit – where the results are certain – as the opening move in negotiating with recalcitrant debtors. On the other hand, where courts are inefficient, creating unnecessary delays and providing uncertain outcomes, then many debtors will be encouraged to use the system as a means of avoiding accountability. If the system “protects” debtors, it will undermine the entire enforcement system and damage the overall commercial and economic environment.

Pursuing Judicial Enforcement. Unfortunately, judgment against a debtor or possession of other enforceable documents by the creditor may not result in voluntary payment. Some debtors simply refuse to pay unless forced by a government authority. The willingness and ability of the enforcement division of courts to liquidate valid claims is fundamental to the integrity of the entire enforcement system. An effective system should process enforcement requests rapidly, with few if any delays permitted, and should obtain the highest value for the debtor’s seized assets at the lowest reasonable cost. The various required activities – seizure, storage, and auction, for example – may be handled directly by the courts or delegated to court-approved private sector service providers. The enforcement functions must be efficiently designed and adequately staffed to minimize delays from avoidable backlogs. This will ensure the certainty and effectiveness that are essential to a healthy commercial environment.

Credit History. Information on debtors is important at every stage of the enforcement cycle. Reliable information on both positive and negative behavior of a potential debtor is essential when assessing risks and should include loan and credit history, payment behavior, pledges, liens, defaults, and judgments. Information should be actively provided to one or more publicly accessible databases by banks and other creditors. Public information, such as registrations, pledges, bankruptcies and lawsuits, should be readily retrievable through public records, preferably on the internet. Such information keeps debtors accountable for their behavior, but also provides benefits for those who consistently demonstrate integrity in their commercial dealings. Normally, this results in improved credit terms, higher credit lines, and increased flexibility when problems do arise. Either way, credit information is an indispensable part of the enforcement system as it holds people accountable for their actions.

II. The Enforcement System in Bosnia and Herzegovina Today

The economy of BiH is suffering badly from a breakdown in the enforcement system. Non-payment has become epidemic. The symptoms can be seen most clearly in the courts, which are clogged with hundreds of thousands of enforcement cases, ranging from unpaid utility bills to unenforced and potentially unenforceable mortgages. Most of these cases should never reach the courts; for those that should, the system is not working effectively.

Enforcement judges and officers are overloaded with backlogged cases and beset by unnecessary delays and improperly designed processes.

The problems can be addressed, but first they must be identified, analyzed, and targeted. The purpose of this section is to begin that process by providing preliminary observations, analysis and proposed solutions.

A. Problems in Risk Assessment and Credit History

Credit information provides important information to creditors and, in doing so, makes debtors responsible for the consequences of their behavior. In order to be useful, the information available must be current, accurate, comprehensive, and reasonably cost efficient to obtain. In Northern Europe, creditors rely primarily on information from private sector credit bureaus (which first appeared in Austria in 1860) as well as public bureaus. Banks often rely, at least in part, on negative information shared between banks either formally or informally.

BiH is making progress in capturing and sharing important credit and financial information. In 2000, a private credit bureau – LRC d.o.o. – opened and began collecting data and offering services. LRC now has an increasingly useful database of credit information on companies and individuals and is actively investing in expanded services. They report on credit lines, guarantor status, and performance history, but do not rate debtors, instead leaving that up to risk managers of the clients.

BiH has also recently established a consolidated register of transaction accounts accessible by internet. The register provides a list of all accounts opened by an entity or individual, making it more difficult for debtors to hide assets by changing bank accounts to avoid enforcement. Annual company financial statements are also available through the company registry. Creditors can also search the newly established pledge registry to see if debtors have any liens against their movable assets.

These developments are very positive, but they are not sufficient. There are three problems that inhibit greater expansion and use of credit information as a tool for risk management: gaps in the available information; poor public awareness of the existence of credit information; and insufficient use of risk management by the private sector.

Gaps in Available Information. Much of the current credit reporting is on a voluntary basis, especially among banks that provide information to each other and the credit bureau in exchange for access to consolidated information. Much information – including lawsuits, tax liability, unpaid utility or credit card bills, and bankruptcy filings – are either not adequately reported or not readily accessible.

There are several ways to address this problem. First, regulations can be enacted to require that all governmental, quasi-governmental and regulated agencies and businesses report defaults to a central database or to existing credit bureaus. In the banking sector, banking regulators can encourage more effective sharing of information either through mandatory requirements or through incentives that reward banks that share such information. Banking contracts should provide that borrowers permit sharing of credit information with credit information agencies. Bank regulators will need to be involved in addressing these issues.

Second, the government can provide incentives for voluntary reporting by private businesses, such as tax deductions for the cost of reporting, to ensure more comprehensive data on credit activity. Third, the government should accelerate programs for putting more public information on line, especially registries of lawsuits, bankruptcy, and tax compliance. Once online, credit bureaus and risk managers can access the information for better risk assessment. In the meantime, however, the government should begin filing liens in the pledge registry for tax arrears. Likewise, utility companies would improve the level of credit information and their own ability to collect by filing claims for unpaid utilities with the pledge register.

Real property presents a special problem. For some areas of BiH, real estate records are in complete disarray as a result of the war. Actualization of both property and mortgage records may take as much as ten years. Such delays will continue to have a very negative economic impact by constraining the availability of credit at affordable terms. Mortgage lenders can reduce risks and establish priorities (and therefore improve terms) somewhat by registering their mortgage interests in the independent and separate registry that could be similar to the existing pledge registry on movables. Technically, this is possible today; legally, it will require a change in law permitting mortgages to be registered in the new kind of registry.

The principle problem, however, is in private sector awareness, use and provision of credit information, a problem that the private sector needs to address. This is further discussed below.

Poor Public Awareness. Research for this analysis revealed that very few private sector businesses, including banks, were aware of the existence of a credit information bureau or that the government had recently established the register of transaction accounts, which is now available by internet subscription. Some had heard of the credit information bureau, but were unaware of its products and services. Unless the commercial sector knows that such resources exist, they have little value.

Public awareness must be addressed through public information campaigns and advertising. For government services, such as the new register of transaction accounts, it would be useful for the appropriate office to send information on the register to all banks, as well as to lawyers, judges, and enforcement officers. Projects involved in the creation or development of these registries should also be tasked with increasing public awareness in the appropriate target audiences. The private sector is responsible for its own advertising, but the use of credit information creates a societal benefit that would justify public-private collaboration in providing regular publicity on credit information through various media outlets. LRC (currently the only credit agency in BiH) would do well to increase its own outreach through business, banking, consumer and professional associations.

Insufficient Use of Risk Management. Private enterprise has only recently reappeared in BiH, so that the use of modern management techniques is still new. As a result, many businesses are not familiar with risk management concepts or practices and simply do not protect themselves adequately.

Risk management should become a basic component of the business culture. For new entrants to the market place, this can be accomplished in part by adding practical risk

management courses to the curriculum of management and business education. Other new entrants can be reached by providing basic information to all new businesses when they register their companies. For existing businesses, business associations, creditors (such as banks), and other organizations should be encouraged to promote and teach risk management to their members and clients. Unfortunately, business associations are still quite weak in BiH, so that much of the social infrastructure for transferring and expanding knowledge is still quite weak. Services such as risk management seminars, however, can be a very useful part of the benefits offered by recently developed business organizations, such as the American Chamber of Commerce (AmCham).

In many countries, the banking sector often leads the introduction of improved procedures. By insisting that their borrowers implement proper risk management practices (and thus protect themselves from unhealthy borrowers), banks can disseminate improved practices through a broad section of commercial enterprises. They can work alone and together through a banking association. For BiH, the Banking Association is growing in its capacity and should be encouraged to begin work in this area. Banks vary widely in their ability and desire to insist upon better risk management. A number of banks continue to assess lending risk based on assets and collateral instead of cash flow, and thus are perpetuating the problems. Bank regulators could have an impact in correcting this by creating and enforcing both penalties and incentives for improved lending practices, including practices of insisting that borrowers have proper risk management and collection procedures in place.

B. Weaknesses in Defining Credit Terms

Judges frequently complain that many contracts are difficult to enforce because they are so poorly drafted that it is not clear who has what rights or obligations. Legal professionals often note that businesses do not wish to spend money hiring lawyers to draft contracts, so that they instead edit existing contracts for various purposes, often inappropriately. Whatever the reason, when a business fails to define terms properly, enforcement problems often ensue.

Contracts should clearly spell out all payment obligations, deadlines and penalties. In addition, they should provide for any necessary security – such as guarantees or pledges of movable or immovable property. In this respect, BiH has made tremendous progress recently through the establishment of a modern, effective and efficient pledge registry system that allows creditors to register their claims against moveable property. The registry has provided substantial training in its use to banks and other secured lenders, who are increasingly utilizing this important tool.

There are still weaknesses, however, in defining terms of credit to improve compliance and lower risk. These can be generally categorized as inadequate contracting skills, inadequate use of security devices, and legal inadequacies of existing security devices.

Inadequate Contracting Skills. Contract problems arise in two places. First, many businesspeople attempt to save money by drafting their own contracts instead of paying a lawyer. Results can be disastrous. Second, many lawyers have not adjusted the contracts they produce to the changed laws and circumstances present in BiH today. Both cause difficulties in enforcement.

Problems begin in legal and business education. Law faculties and business schools do not adequately enable graduates to apply up-to-date contracting skills. Moreover, there is little if any continuing education that teaches former graduates how to upgrade their skill levels.

A lawyer may not be needed for every transaction involving a standard approach, but legal professionals should be involved in designing standardized forms for that approach. In countries that have older, established commercial laws, many contracts have been standardized and are readily available through various outlets, including office supply stores. These include standard powers of attorney, residential lease contracts, bills of exchange and other commercial instruments, and bills of sale. BiH has a few of these, but would do well to expand them within various industries.

Normally, standardized forms are developed either by specialized sections of a bar association or by specialized business associations. For example, banking associations often agree on standard forms that all banks accept for certain types of loan agreements or powers of attorney. As noted elsewhere, business associations are not yet well developed in BiH, and so are not performing this function. Likewise, the bar is essentially a licensing organization, not a professional development society, and thus does not serve this function. It is not clear when such associations will develop sufficiently to provide such services. However, much can be done through improved education – especially through mandatory continuing legal education – on practical improvements in contract drafting for lawyers. It will then be up to the lawyers to convince the business community that their services are worthwhile.

From a project standpoint, it would be useful to work with a business or banking association to analyze existing contracts in banking, utilities, leasing, property rental and other commercial credit contracts to determine quality and recommend changes to reduce confusion and increase enforceability. The results could also be shared with law schools for inclusion in courses on commercial transactions.

Inadequate Use of Security Devices. Commercial creditors in BiH – other than banks – often fail to reduce their risks because they do not adequately understand or use available mechanisms for securing their interests. Security devices include third-party guarantees, bills of exchange, pledges of moveable and intangible property, and mortgages on real property, among others. Such devices provide the creditor with leverage to encourage payment of obligations, and to demonstrate seriousness in collections that has a positive impact on the behavior of debtors.

Perhaps the best starting point is to increase public awareness of the use of the new pledge registry, which provides extensive possibilities for securing loans, an efficient enforcement mechanism, and public notice of encumbrances on debtors' assets. Creditors can take security interests in a wide variety of moveable and intangible assets, but only if they know how. They can also take a general lien against a debtor for unpaid bills. Utility companies and others with high default rates can increase the chances of recovery by registering liens against defaulting debtors. Mediation agreements can serve as the basis for registered pledges. As with other practices, banks and other lenders should play an important role in making their clients and the general business community aware of security devices.

Mortgages on real property also provide an excellent form of security in stable land markets, but the situation in BiH is far from stable: ownership records are in disarray, mortgage

registration is badly backlogged, seizure of property is very difficult, and the market for seized property is highly unstable. These issues need to be addressed, but are beyond the scope of this analysis, aside from recommendations regarding registration of mortgages noted above.

Legal Inadequacy of Existing Security Devices. Many lenders in BiH do employ some form of security device, but the effectiveness of some important devices is compromised by legal deficiencies. The principle problem is with bills of exchange, which are in important type of enforceable document.²⁶ Bills of exchange, by their nature, should be immediately enforceable on their terms without any delays as an executive title. Unfortunately, Article 29 of the Law on Enforcement Procedure (LEP) inappropriately defines bills of exchange as “trustworthy documents” subject to objections by the debtor. As a result, a debtor can convert the enforcement procedure into a full civil trial merely by objecting to the enforcement in accordance with LEP Article 50, invalidating the use of this security device. Bills of exchange should have the status of the “executive title” and be enforced immediately upon the initiation of the enforcement procedure in the same manner as a final judgment.

In addition to the problems with legal definitions, there are problems in enforcement practice affecting trustworthy documents. The LEP expressly provides that “the court shall reject an objection [to enforcement] without grounds and argument in support thereof.” (Art. 50 (3)) Enforcement judges estimate that approximately 90% of the objections to enforcement are groundless, yet few objections are rejected. As a result, trustworthy documents have little practical value as security devices.

These problems must be addressed through training, accountability, and legal reform. Where improperly drafted laws or inappropriate exceptions undermine the purpose of security devices, laws will need to be amended. In the meantime, significant impact is possible by changing existing practice to conform to existing law. Judges and lawyers need to better understand how and why the devices work. As discussed further below, BiH also needs to establish a system of accountability to ensure that the courts properly apply the laws.

A separate issue arises in the context of vehicle leases, which represent a growing commercial activity. Leasing companies are currently experiencing difficulties in using leases as a security device due to gaps in the law. Technically, a lease constitutes special ownership rights, not a security interest. That is, the leasing company is the legal owner of the leased vehicle or equipment, not a lender providing secured credit to a borrower and taking an interest in the borrower’s vehicle or equipment. In reality, most leases in BiH are financial leases – a form of secured lending where the intent is transfer of ownership with payment over time. As the laws now stand, leases cannot escape registration requirements of municipal courts or utilize the accelerated enforcement procedures of registered pledges. Resolution of these problems will require legal definition under the proposed Lease Law. Passing appropriate legal solutions should be a high priority.

²⁶ “Enforceable documents” consist include two types of commercial documents. One is an “executive title”, having the same force and effect as a final judgment. The other is a “trustworthy document” which has a presumption of enforceability and will be enforced according to its terms *unless the debtor objects*. Upon objection, the claim arising from the trustworthy document becomes a civil action, subject to the rules of civil procedure. For an executive title, objections have no such effect. (Note: Some English translations of BiH laws use the term “authentic document” instead of “trustworthy document,” thus causing confusion. “Trustworthy” is the generally accepted term among English-speaking practitioners.)

C. Poor Internal Systems for Identifying Problems and Addressing Delays

Delays in payment appear to be the norm rather than the exception throughout the former Yugoslavia, including BiH. Many credit contracts provide net 30 to 45 day payment terms, yet actual practice can include delays of up to six months. Part of the problem is economic, but part of the reason for the economic problems is poor payment performance. Delays increase when creditors fail to monitor and respond to missed deadlines, leading to greater levels of irredeemable default. Timely response to problem accounts improves performance and permits intervention while there is still a possibility of collection, but timeliness is not common today in BiH.

Insufficient Account Management Tools. Historically, business was a function of government, and payment problems were more political than economic. The business community of BiH is still learning basic management skills and concepts. It is vital that they learn to manage and monitor accounts, and to practice active account collection when delays occur. While it is clearly the obligation of the private sector to set their own affairs in order, many are not aware that proven approaches to receivables and payables management do exist and can provide improved profitability and economic security. Consequently, public education is needed – preferably through private sector business associations, but also through public-private collaboration. In short, a new ethic must be instilled in an old system, and this will take concerted, collaborative effort.

Part of that effort can come through incentives. Banks generally believe that they are using state-of-the-art skills and procedures, but outside observers note that many banks in BiH do not adequately monitor, manage or collect their accounts. Competition from more effective banks will provide some incentive for change, but it is likely that banking regulators will need to mandate and monitor the use of appropriate procedures.

Banks can also serve to transform the practices of the business community. If banks were either to require the use of certain management and collections techniques by borrowers, or to provide preferential terms for those using such techniques, they would force borrowers to upgrade their internal management systems. Within a few years, banks could revolutionize business practices among those seeking commercial loans. At present, however, they offer no such leadership.

Absence of Collection Skills. In addition to basic tracking of accounts, BiH businesses frequently lack experience or knowledge of collection techniques. For those businesspeople who are not well suited to collection, private collection agencies can be an excellent tool for improving payment by debtors, but to date there are no such agencies in BiH. The first shortfall can be addressed in part through training programs and curriculum development in business and economic faculties; the second requires a response by the private sector itself. Government (and donors) can help by providing incentives and assistance in developing collection agencies, which in turn will repay the investment by providing systematic market discipline, training creditors in how to avoid default through timely response. Likewise, banks can affect both demand and supply by insisting that clients utilize reasonable and effective business practices. Other business associations can also fill a valuable role by offering such training.

Viable collection agencies are unlikely under the current law. Though not legally prohibited, several areas of authority and rights are undefined, such as the right of collection agents to enter a debtor's premises and seize property. It is also important to define limitations on collection practices to avoid problems of harassment or other inappropriate collection techniques that have been outlawed in other countries. Consumer protection advocates should therefore be involved in defining the legal parameters of collection practices.

D. Insufficient Tools for Self-Help

Courts should be a last resort, preceded by various methods of self-help that can be used by creditors to solve problems without state intervention. BiH has a shortage of such methods. Two of the most important self-help rights elsewhere are repossession and private sale, allowing the creditor and debtor to reduce costs of collection by by-passing the court system. These are currently either underdeveloped or legally constrained in BiH.

Repossession. Repossession is a sensitive issue, because it can devolve into thuggery and intimidation if not carefully regulated. These possibilities for abuse have been effectively addressed in other countries and are not an excuse to simply prohibit such devices, especially because private enforcement is often more effective and cheaper than state intervention. BiH would do well to establish a law permitting and regulating the practice of repossession, with a wide variety of stakeholders (creditors, consumer rights advocates, police, and others) involved in setting the limits of the law. Various models already exist that can serve as the starting point, with careful attention given to the role of police or the courts in avoiding violence or use of force. Indeed, the Code of Civil Procedure is a useful starting point: the rules for enforcement officers can be amended and expanded to serve as a basis for private services.

Any change in the law, or any systematic development of repossession rights under existing law, will need to be disseminated to the public. Creditors will need to know how they can better utilize this self-help remedy, while debtors need to understand they are subject to a series of sanctions – both private and public – for default.

Private Sale. Recent changes to the LEP have expressly recognized the rights of parties to enter into contracts that permit the creditor to sell property privately, without resort to the courts, or permit the debtor to sell assets with the creditor's permission in order to raise funds to liquidate debts. That is, the parties can include private sale terms in their contract and bypass the use of the courts. Although such practices are permitted, they have not yet been effectively established. This needs to change.

Most auctions and sales for debt collection purposes are still handled by the courts in BiH. Unfortunately, court procedures do not effectively capitalize on natural incentives of the parties to ensure higher prices and lower costs. These court procedures need to be reformed (as further discussed below in section II G, *Design Flaws and Staffing Needs*), but private sector alternatives also need to be developed. Such development can be addressed simultaneously with court auction reforms both by joint training services for both court and private auctioneers, and also by one or more courts piloting delegation of auction functions to private auctioneers.

E. Absence of Alternative Dispute Resolution Mechanisms for Settling Conflicts

Various approaches have been developed for settling disputes where it is important for the parties to preserve an ongoing relationship, or where specialists are preferred to judges for adjudication on the merits of a disagreement. Mediation, negotiation, conciliation and arbitration can be effective tools for conflict resolution, but all ultimately depend on an effective court system that will guarantee enforcement if one party attempts to renege on the outcome of ADR tools. BiH lacks a strong tradition of commercial ADR; even worse, the courts cannot yet guarantee enforcement.

Limited donor projects are currently underway in BiH to introduce and develop commercial mediation to the business community including a new Mediation Law and some practical programs for independent mediation services. Experience elsewhere suggests that introduction of ADR – particularly mediation - can improve dispute resolution as long as certain conditions are met. First, mediators should be selected based on mediation skills, not on legal background. Lawyers and judges often make good mediators, but must be trained, because advocacy and adjudication orientations often conflict with the role of mediator. Second, mediators should not be trained until there is a critical mass of disputants who are willing to submit to mediation. Frequently, training (supply) precedes demand, and skills can be lost over excessive intervals between training and actual mediation. Croatia has successfully introduced mediation by partnering with business organizations so that they can offer this as a service.

Finally, it is advisable to attempt court-annexed mediation in a pilot project run by strong judges. Unless judges insist on good-faith efforts and encourage settlement through vigorous insistence on mediation, then mediation becomes simply one more delay device, with no real value.

F. Too Much Litigation

Better management of claims and conflicts by the private sector will reduce the overall number of cases coming to court. However, even allowing for this reduction, the courts of BiH are clogged with more lawsuits and enforcement actions than they can reasonably handle. Reforms that are currently underway are being undermined in practice by the sheer load of litigation. In the larger courts, a handful of enforcement judges are laden with hundreds of thousands of claims, thousands more than they can possibly address in a given year.

There is good news, however. Most of the cases do not belong in the courts and should be removed. Some plaintiffs should have no right to have their cases heard because they have not fulfilled the prerequisites to do so. Others should not be permitted to use the courts of general jurisdiction because the amounts in controversy do not justify the use of state resources at the current level. Of the cases that rightfully belong in court, many – probably a very large percentage – will cease to be brought once the courts begin to apply existing legal penalties to losing parties and to issue predictable, timely resolution of common claims. When enforcement is certain – especially at higher cost – then many delinquent debtors cease to attempt delay through the court system, but instead pay or renegotiate their debts. Certainty of enforcement provides discipline in the commercial sector.

Unpaid Fees. Enforcement judges report that plaintiffs regularly fail to pay court fees, resulting in tens of thousands of cases being prosecuted that should instead be rejected until paid for. The problem seems to arise from a hybrid of ideology and practice. Ideologically, there is a legitimate interest in ensuring that *poor* litigants have access to the courts despite lack of funds, but that does not need to be translated into a practice of allowing *all* litigants to bring their cases without paying appropriate costs and fees. Because of a mistaken belief that justice will not be done if litigants must first pay, great injustice is being done: the state is financing cases for those who can afford it, and thus removing important business costs from plaintiffs' calculations and strategic decisions. If plaintiffs had to pay their costs up front, they might be more serious about collecting and settling their claims.

Correcting this situation will take several steps. First, court presidents have the authority to set priorities when cases are backlogged. Consequently, the court presidents should instruct judges to hear commercial cases where the fees are paid before those in which they are unpaid. This would create incentives for businesses either to settle the claims themselves or pay their fees. As long as they are getting a "free ride", plaintiffs have reduced incentives for improved collection and prosecution defaults.

Second, regulations currently permit fee payments to be delayed. These rules need to be revised to clearly define which indigent plaintiffs qualify for free use of the courts. As a starting point, individuals – not legal entities – should be required to make application for indigency rights based on their ability to demonstrate financial need (a standard that will need careful definition). Legal entities should have no right to commence litigation without payment of fees.

Third, once the rules have been amended, court clerks should be clearly trained and strictly supervised to ensure that no actions will be registered or otherwise accepted unless the moving party first provides proof that all relevant fees have been paid. The only exception should be for individuals who have proven that they qualify for indigent status. The amended law should also provide a grace period during which plaintiffs can pay their fees or apply for indigent status. Upon expiration of that period, all cases with unpaid fees should be immediately stayed and the plaintiffs informed that no further action will be taken by the courts until all fees have been paid.

The result of these changes is two-fold. First, creditors will need to recalculate the costs of enforcement to include the cost of paying all fees. This will change their pricing structures for credit, as well as their strategic approach. If amounts are too low to justify the additional expense, creditors can make a rational choice whether to write off the losses or pursue their claims at a higher potential loss for general deterrence purposes. Write offs will lower the overall number of low value suits brought, as is further addressed below with respect to unnecessary suits.

Second, the courts will receive the fee income required to fulfill their duties. Currently, the system is structured to provide subsidized legal support to numerous undeserving plaintiffs to the detriment of the legal system. These unmerited subsidies create disrespect for the courts and for other court rules, undermining the ability of judges and enforcement officers to require compliance generally. There is simply no defensible reason for the courts to permit plaintiffs to ignore requirements for the payment of court fees.

Finally, it should be noted that the system of fee payments is one of the reasons for avoidance. Fees should not be based on the value of the case, but on the cost of litigation. Fee structures that include a percentage of the claim cause numerous distortions in the enforcement system. Eventually, court fees must be rationalized on the basis of services rendered.

Unnecessary Suits: BiH, like the rest of the former Yugoslavia, inherited an abnormality in the corporate tax regulations: companies cannot write-off bad debts for tax benefit purposes unless they sue the debtor. Accordingly, tens of thousands of lawsuits are brought annually that are completely unnecessary and counterproductive.

Article 4 of the Book of Rules for Implementation of the Corporate Tax Law limits tax deductions for write offs of uncollectible receivables to those cases in which “every legal option for collection has been utilized (final demand, law suit, motion for enforcement filed in the court with appropriate jurisdiction).” By doing this, the Rules override the reasonable business judgment of professional businesspeople and replaces it with an unnecessary and expensive requirement that increases costs for both the state and businesses. The Rules further undermine any attempt to develop systems of ADR, because no costs related to ADR can be deducted for tax purposes unless they lead to a law suit and enforcement action. This creates an unjustifiable imbalance in favor of unnecessary law suits.

In Northern Europe and North America, this same issue is handled by permitting businesses to exercise discretion to write off bad debts after reasonable attempts at collection have failed. The rule should be changed immediately to reduce the number of unnecessary lawsuits that are clogging the courts. Improvement of accounting practices and standards alone will not affect write-off practices unless Article 4 is changed.

Once Article 4 is amended, public education will be needed to inform litigants and potential litigants of this change. Accounting firms, business associations, media and the court intake office are best placed to relay the message to the target stakeholders. They should be principle counterparts in any public education efforts.

Inappropriate Actions. Court officials in BiH complain that tens of thousands of utility cases are being brought without regard to the value of the case. Spot investigations have uncovered an alarming number of claims for minimal amounts – as little as 25 KM, 7 KM or even 0 KM! Some utility companies do not appear to have collection departments. They simply send copies of their invoices to the enforcement courts for collection and, if possible, cut off service. While the claims (other than for zero) may be legitimate, they do not belong in the court system.

The role of government is to provide reasonable services, not to replace the collection departments of local businesses. The utility companies are essentially dumping their collection functions on the courts, expecting the courts to sort out their paperwork and accounts for them. (Moreover, more than 100,000 of the claims have not been accompanied by payment of required fees. Many of these cases would not be brought if fee requirements were enforced.)

BiH needs to establish a minimum amount for jurisdiction, as is practiced in the EU and North America. This limitation on the use of civil courts can be accompanied by introduction of small claims divisions or even specialized utility claims divisions, but even these should only hear claims above a certain threshold. By limiting actions to a minimum claim, for example, of 500 KM, hundreds of thousands of enforcement actions would be immediately eliminated.

This change would require utility companies to come up with effective management and collection techniques to reduce the tremendous losses currently being subsidized through government rescue payments. They could maintain access to the courts by aggregating small claims into larger ones, rather than bringing enforcement actions every month for minimal amounts. They can also begin to register claims on debtor assets, report bad debts to banks and credit information bureaus, and maintain their own “black list” of debtors who cannot receive services. Unfortunately, the current situation is sending a very clear message that the government will bail out the utilities if people do not pay their bills, which is directly encouraging people not to pay their bills.

As a practical matter, several initiatives are needed. In the immediate future, court presidents should issue instructions regarding prioritization of higher value cases, so that small utility cases are simply ignored until the higher value claims are resolved. Also, utilities should be required by the government to register liens against overdue customers and to report defaults to a credit information agency; this should be a pre-condition to any financial support for struggling utility companies. For longer-term solutions, BiH should establish a small claims system – one with lesser judicial involvement, simpler rules, and more user-friendly procedures to ensure that any citizen or company with a small claim can receive appropriate, timely attention.

An additional problem involving utility companies is that the one-year statute of limitations sometimes forces actions in order to preserve the claim. By extending the limitation period to two years, utility companies could reduce their number of suits. The additional time would either increase the amount of the claim or permit the companies to pursue other settlement options without court action. Claims arising from the same account should also be joined to existing cases and not be admitted as new claims; such joinder would avoid unnecessary duplication.

Another set of inappropriate actions arises from inappropriate practices by enforcement judges. Frequently, debtors will raise objections to enforcement actions brought on the basis of enforceable documents. Although a few challenges do require the claim to go to trial instead of execution, the majority of the objections are groundless, and are used solely as delay tactics. LEP Article 50 (3) requires judges to reject groundless claims. Too often, judges are in the habit of sending the case to trial rather than ruling on the objection first. As a result, numerous inappropriate cases are sent to trial, where they create unnecessary backlogs in the trial calendar, and eventually re-enter the execution division for a second attempt at enforcement. The judges association, High Judicial and Prosecutorial Council (HJPC) and bar association should carefully monitor this practice and correct it. No new laws or regulations are needed, only good court management and better judicial practice.

Finally, it is worth noting that the poor state of the insurance industry is producing a large number of cases that should not be in court. Unfortunately, an increase of lawsuits will

probably be needed before they can be decreased. The problem arises from failure of numerous insurance companies to honor their insurance contracts: there are credible reports that many insurance companies routinely deny or ignore all claims, especially with regard to traffic accidents. As a result, insurance customers must sue the company to get their claims paid. The ultimate solution to this problem is through better insurance regulation, with regulators providing sanctions and discipline to ensure proper claim practices. At that point, there will likely still be numerous insurance claims in the courts, but many will be ripe for mediation or other ADR approaches that will help to manage the load. Until then, more lawsuits are needed to pressure the companies into better practices. Also, better advertising and press coverage comparing the existence of credible companies against the questionable ethics of many other companies will help stimulate competition based on services provided. The state may also wish to establish an insurance ombudsman or other consumer champion to police performance so that standards improve.

G. Changes in Practice and Staffing

Once a claim reaches the enforcement stage in BiH, whether in the form of a judgment or trustworthy document, there are serious problems in the practice and staffing of the enforcement process that create unjustified delays and unnecessary costs for the parties and the court itself. The problems arise from failure to apply new laws properly, conflicts between laws, misallocated burdens for service of process, inappropriate burdens on enforcement officials, and unnecessary steps in the enforcement procedure. Each of these can and must be addressed to establish an effective enforcement system.

Inconsistent Application. The new LEP expressly provides that enforcement actions will not be delayed during any periods of complaint or appeal, with the exception of objections to actions based on trustworthy documents (LEP Art. 50). In other words, once enforcement begins, it does not matter whether the judgment debtor challenges the procedure, enforcement continues. If the judgment debtor wins the challenge, then the judgment creditor will have to make appropriate restitution.

In practice, many enforcement judges continue to stop execution upon complaint or appeal, thus encouraging debtors to use these as a delay tactic. Enforcement judges in Sarajevo have estimated that 95% or more of all enforcement decisions are challenged, and that approximately 90% of the challenges are completely groundless. By applying the current law according to its terms, the courts can substantially alter the behavior of debtors and lower their own case burdens: with 90% of the challenges issued solely for delay, there will be little reason for the debtor to incur the expense of the challenges if they do not result in delays. Indeed some lawyers are already advising against challenges in courts where judges comply with the new law. Until this practice is widespread, debtors will be unjustly enriched by bringing spurious defenses because it costs them nothing to do so.

This raises a second issue of application. The new Code of Civil Procedure (CCP) permits the court to award fees against the losing party and to impose fines for certain types of inappropriate behavior. If used, these tools could also reduce unnecessary delays and unfounded challenges. Sanctions and fees are not currently used effectively. Some judges have commented that they do not have time to determine the amount of the sanction, so they simply let it go. This suggests either that sanctions could be calculated by a specialist

working for the courts, a set fee schedule could be established for failed complaints and appeals, or winning parties could be given the task of submitting bills for the additional expenses, subject only to review by someone in the courts. Unless these sanctions are used, they are meaningless.

In addition, the CCP permits judges to order security to protect a judgment creditor's claim or rights during appeal, if requested by the judgment creditor. (CCP 269 and following) Theoretically, this could increase the likelihood of collection, but practitioners report that the use of the allowable devices has little impact and is normally not worth the trouble. Ineffectiveness seems to arise from the practice of using security devices to ensure compliance with court procedures and orders other than satisfaction of the judgment, so that the security cannot directly applied to the judgment debt. The purpose of security devices should be to ensure payment. Overtime, it may be worth considering revision of this section of the CCP in conjunction with the introduction of performance bonds (insurance) to ensure satisfaction of judgments. Better use of security devices would result in greater enforceability and fewer spurious appeals.

Conflicting Laws. Improvements brought by the new LEP have been badly undermined by apparent conflicts with the CCP. LEP Article 12(5) expressly states that an "objection or appeal shall not stay the enforcement procedure: while Article 34 (1) further adds that the "court shall not stop the enforcement procedure while waiting for a ruling of another competent court or other responsible body." However, Article 35(2) provides that enforcement proceedings may be interrupted "because of reasons set forth in the Code of Civil Procedure." (LEP Art. 35(2). Potential reasons are spread throughout the CCP, such as death of a party and bankruptcy. (CCP Art. 378)

In practice, practitioners report a common tendency of judges to stop enforcement proceedings against individuals generally and even against entities upon complaint or appeal, despite the clear provisions of the LEP to the contrary. Enforcement proceedings should only be stayed in rare and exceptional circumstances that are clearly defined. They must be based on law without regard to the nature of the parties. The current situation appears to arise from ongoing application of old law, either through habit or ignorance of the new law. This failure to apply the new provisions eliminates the improvements in enforcement envisaged by the reforms.

There is another significant problem on the horizon, but it can be avoided. Recent drafts of proposed changes to the Law on Obligations include provisions that will eviscerate an important segment of pledge law and practice. The draft law seeks to require creditors to obtain permission from pledgors before the creditors can assign their claim to a third party. If they do not obtain permission, they lose any priority on property used to secure the credit. This requirement is completely inappropriate.

The draft law represents a backwards move with serious negative ramifications for credit and enforcement. The prior law was deliberately amended through the Bulldozer Committee to get rid of this restriction. The new law must not reverse this progress.

Improper Incentives for Service of Process. CCP Articles 337-355 regulate service of documents on parties to a judicial action. The provisions appear to offer substantial

opportunities for improving service of process over prior law and practice, but current practice has not adjusted to take advantage of these opportunities.

The CCP permits service by post, by “an authorized legal person registered to conduct service” or by an authorized court employee. (Art. 337), Moreover, “service can be performed *at any place* by personal delivery to the person to whom the service is directed.” (Art 343, emphasis added) In practice, it is generally believed that the law *requires* service (1) for individuals, at the individual’s address as registered with the local police (unless an agent has been appointed to receive service, such as a lawyer), (2) for entities, at the registered office, unless an agent has been appointed to receive service, or (3) at the address of a properly appointed agent. In fact, the law does not require this, but it has become practice.

There are several serious problems with current practice. The first problem is in the perceived address requirement. Parties may establish the address for service of process by contract and thus eliminate numerous questions regarding receipt. This shifts responsibility for recordkeeping to the parties themselves from the state. At present, the habit of relying on the state (either the police or the company registry) to provide correct addresses promotes irresponsible behavior by debtors and creditors. Enforcement officers report that 30-50% of all service by mail is returned because the address is invalid. Practice should be changed to encourage parties to provide addresses for service of process by contract.

The second problem arises from conflicting legal regimes and holdover practices that remove responsibility for service from those with an incentive to ensure success. The court alone has taken responsibility for successful service even though creditors would gladly assume responsibility and cost of service in order to keep their claims on track. Currently, the enforcement division of the Sarajevo courts spends approximately 1.2 million KM annually on postal service, of which at least one third is returned for poor addresses. Numerous modern judicial systems make the parties responsible for proper service, subject to serious criminal liability for fraud. BiH courts do not have the staff, resources or incentives to ensure effective enforcement, but creditors have all three.

The new law provides for the use of “authorized legal persons registered to conduct service,” To date, this provision has not been defined or regulated. Some practitioners believe it was intended to permit the use of DHL or similar private couriers; others do not know what was intended. The current system of service frequently fails because the options utilized are too narrow. Postal service can be useful, but has been shown to have a high failure rate. Notice can be posted upon failure of delivery, but this is truly appropriate only when a reasonable attempt at service as been made. Creditors would be willing to pay for courier delivery or service by authorized agents, but these possibilities do not exist. BiH needs other, effective forms of delivery and the CCP Art. 337 seems to permit an opening to develop more effective approaches.

Inappropriate Burdens on Enforcement Officers. The job of enforcement officers should be to seize property, and, where required, help to liquidate the property through auction or other actions. Unfortunately, responsibilities of BiH enforcement officers are so much broader that it is difficult for them to perform their primary function of enforcement.

First, enforcement officers should handle only those documents that relate to their work: they should not act as a mobile filing service system for all court documents related to the case. Currently, all responsibility for filing shifts to enforcement officers once the case goes to enforcement. Central filing should maintain the principle file, sending only relevant documents to enforcement officers rather than smothering them with inappropriate administrative duties.

Second, enforcement officers are subsidizing the courts and the creditors because they are required to utilize their own vehicles to carry out their functions and are not reimbursed for either fuel or depreciation. Personal payment of these costs results in a net reduction of salary, and is one reason for a high turnover rate among enforcement officials. To complicate the matters, enforcement officers often cannot find parking while trying to perform their duties; some have even had their cars towed while repossessing property. They need official vehicles and official status for those vehicles.

Third, enforcement officers are often used to serve court papers when postal service fails. While they are certainly qualified to do so, the department is not sufficiently staffed to provide this service. Either they should be relieved of this duty, or more officers should be hired to do this work.

Fourth, the transportation and storage of seized assets is a problem. The enforcement division does not have enough room to warehouse repossessed and other seized property. Likewise, court officers do not have adequate transport capacity for large seizures. However, it is not necessary for the courts to own more warehouses or trucks when the private sector can provide these services. Delegating storage and transportation functions to the private sector will solve the problem more cost effectively.

Fifth, computerization of enforcement cases will allow more efficient allocation of time by enabling enforcement officers to group cases more effectively. That is, technology solutions can enable a court clerk to sort and arrange cases by geographical location so that assignments can be performed more efficiently, reducing transport time and cost. This, coupled with greater use of police escorts (see next paragraph), could have an immediate positive impact on enforcement effectiveness.

Finally, enforcement officers often encounter serious resistance in attempting to carry out seizures, including threats of violence. This is true around the world, not only BiH. Elsewhere, the problem is often addressed either by utilizing court police with the power to arrest individuals, or using the regular police force by having them accompany enforcement officers on seizure cases. Current practice in BiH is too restrictive to be either efficient or effective.

Staffing Shortages. Sarajevo Canton has seven enforcement officers; all other courts have even fewer. Each Sarajevo officer is currently responsible for approximately 70,000 cases, but cannot reasonably attend to more than 2,000 in a given year. Even if the overall burden of enforcement is reduced through the reforms mentioned above, the enforcement division is grossly understaffed. In the past, labor shortages have been addressed by paying court staff to assist with enforcement after normal work hours. Additional staff is needed immediately, whether temporary or permanent, by reallocating existing resources.

The same problem affects judges. At present, execution judges face far more cases than they can reasonably handle. As systemic reforms are introduced, this situation will change by reducing the overall number of incoming cases. Until that happens, however, caseload ratios should be analyzed so that some of the backlog can be reassigned on a temporary basis to judges with lower ratios, or judges can be temporarily reassigned to the enforcement division. This has been done in the past by court presidents to handle bottlenecks in the system. Similar action is needed now.

Some of the overall burden could be reduced through delegation of various functions to other appropriate parties. Many enforcement actions could be carried out effectively by lawyers or other licensed professionals, including notaries. For example, it should not be necessary for a court officer to deliver a judgment to a bank in order to freeze transaction accounts; this can easily be done by a lawyer. Enforcement practice should be amended to identify appropriate instances in which interested parties can take actions, subject to court sanction for any abuses, then delegate such actions to those interested parties.

Unnecessary Steps in the Enforcement Procedure. Recent changes to the CCP and LEP made improvements in the appraisal and auction stages of enforcement, yet it currently takes approximately over two years between seizure and final auction. The changes were not radical enough and need to be expanded.

Appraisal of seized property has no impact on the price offered at auction. In fact, appraisal is not even an appropriate role for the state: in countries with more effective procedures for liquidating collateral, the *creditor* will appraise the property at the outset to see if the value justifies the expense of seizing it. There is a mistaken belief that appraisals will somehow encourage bidders to offer more for the goods, but bidders pay no attention to official appraisals, they make their own assessments. During roundtable discussions held on 12 and 14 April 2005, participants could not identify an example in which appraisals had any impact on sales price. Furthermore, BiH execution officers report that appraisals have no effect on the bids. Appraisals should therefore be eliminated, in keeping with best practices in more effective legal systems.

The auction procedure also needs to be transformed. Minimum price auctions serve only to delay the final sale because they seldom result in a sale at the minimum price. Although justified as a means of protecting debtors and creditors by ensuring a higher price, they have no such impact. Instead, justice would be better served through a single auction with no appraisal. Price protection will come through improved auction procedures, including vastly improved publication of auctions in order to establish a market for judicial sales. To do this, it may be best to establish private sector auctioneers with incentives for obtaining higher prices. Such delegation appears to be permissible under LEP Art. 130(2), which provides for delegation of auction authority; in fact, judges delegate authority to execution officers for auctions of movable property. The same article permits private sale by a broker. There is no restriction in the current law against use of private auctioneers.

Roundtable participants noted that one of the problems with the existing auction system is that auctions are irregular and the public does not know when and where they will be held. Indeed, most movable property sales are held at the home or business premises of the judgment debtors. Participants recommended that auctions be held at a regular time and place, such as the first and third Monday of each month, at a specified warehouse or office,

not in a court office. Such a change requires no legal or regulatory changes, merely instructions by the president of the court. Each court president should therefore establish a set time and place for auctions, post the schedule prominently at the courthouse, and send press releases to the local media to disseminate information generally.

A separate problem in procedures arises once money is collected by the courts. Anecdotal reports indicate that it can take as long as two years for the collected money to be paid to the judgment creditor. The system should be reformed to establish more effective clearing of accounts. Many jurisdictions require the court to hold funds for thirty days to permit any claimants with higher priority claims to appear. After thirty days, all amounts are paid to the appropriate parties.

Underutilized Opportunities. As already noted, substantial changes in the laws surrounding enforcement open opportunities for changes in practice. Service of process, for example, is still constrained by practices developed under the old law, despite new provisions that could substantially improve service and reduce the burden on courts. This failure to adjust practices appears to arise from the sheer quantity of change taking place in the legal system, and natural human limitations on absorption of change. It will take time to adjust, but the adjustments need to focus and leadership.

One significant improvement has begun to take hold, and should be encouraged. The register of transaction accounts is now available through internet (by subscription) and to the courts. This permits creditors and courts to identify all transaction accounts held by a judgment debtor and enables them to refine motions for enforcement by giving up-to-date information, so that debtors cannot simply hide their assets by opening new accounts secretly. Unfortunately, relatively few lawyers and some judges are not yet aware of this improvement in the enforcement system. Targeted information campaigns are needed to correct this situation and ensure greater efficiency in execution against accounts.

H. General Issues Regarding Laws Affecting Enforcement

During the roundtables, a number of participants noted that reform of the enforcement system has been complicated by the way in which laws are being amended and passed. Participants noted that significant stakeholders are often left out of any meaningful input to the design of new laws or amendments to old laws, and therefore either do not know about the changes or actively resist the changes because they do not agree with or understand the new approach.

This could be corrected with a more democratic and inclusive legislative process. For example, despite numerous changes over the past few years to the law on enforcement procedure, enforcement officers reported that they have never been interviewed or invited to discuss the changes needed from their perspective, except during training sessions and interviews connected with the FILE Project. A number of suggestions in this report came directly from interviews with those enforcement officers, which, according to them, was the first time they had ever been approached.

The problem can also be seen in the recently enacted law on Notaries in the Republika Srpska. Several roundtable participants noted that the law had not resulted in the creation of a notary service, and many complained that the law was not appropriate for BiH. Indeed, a

Careful reading of the new law indicates that the mandated notary structure is completely inappropriate for the context of BiH. While the law identifies the need for important specialized services, including services that could improve enforceability and enforcement of contracts, the solutions provided will do more overall harm than good by creating non-competitive monopolies for fundamental services within a system currently struggling with serious problems of corruption. The existing law should be repealed, and a new program instituted to examine other models that might better achieve the intended results.

In light of the numerous legal changes recommended in this analysis, and in light of the numerous complaints from significant stakeholders regarding the process of legal reform, it would be wise to consider amending the system for addressing reform needs to ensure meaningful inclusion of the necessary stakeholders.

III. Intangible Obstacles: The Challenges of Culture

The enforcement system in BiH has been called a system designed to favor and protect debtors. While there is a great deal of truth in this diagnosis, it is simplistic and does not necessarily recognize that the structure is a result of deeply held beliefs and values. These cultural predispositions have not yet adapted to the extreme changes in the political and economic life that has appeared in the last few years. Efforts at structural reform are likely to be opposed, delayed and undermined unless they comport with underlying values. The reforms that BiH needs to produce a healthy socio-economic commercial environment will require new understanding and new applications of traditional beliefs and values.

A good starting point for analysis lies in the assessment of debtor protection. Just what, exactly, are debtors (or defendants more generally) being protected from?

It is useful to recognize that for at least the past 500-600 years, the territory known today as BiH has been subject to imposed government. Leaving aside earlier history, the Ottoman Empire established an unwelcome military rule that was generally maintained by force rather than desire of the governed. During the centuries of Ottoman rule, the role of government was to extract wealth from the local population on behalf of a distant government – with or without accompanying services – and the role of the population was to avoid wealth extraction and to evade a wide variety of enforcement measures.

More recent history has reinforced these patterns, but with some changes. During the Yugoslav era, government expanded its role to provision of a wide variety of services and guarantees of rights. Government took on the task of providing jobs, schooling, utilities and healthcare, structuring production and commercial transactions, and generally controlling the economy. The government continued to be widely perceived as imposed.

During the Yugoslav era, all of the former republics began to develop systems for delaying and avoiding court enforcement. Today, all have deeply inefficient court systems that were not designed to settle commercial obligations efficiently. Instead, they were designed to avoid enforcement by the government against its citizens. After independence, the delay incentives expanded because government began to develop additional delays to avoid judgment for its own, often extensive delinquent debts.

In short, the system that has evolved is primarily a system to protect defendants from the government. Because it does not effectively distinguish between commercial disputes between private sector parties and perceived oppression by unpopular rulers, the system has become very effective at hindering attempts at enforcement, whatever the source.

Another theme has also had a great impact on enforcement. Folk traditions contend that when property is taken away from a person, it becomes cursed. This appears to have evolved from strong religious and cultural traditions mandating that people should not be dispossessed from their land, which is a treasured family inheritance. In addition, the belief is supported by an almost universal religious proscription against participating in injustice and oppression by being party to the *unjust* taking of property, whether as the expropriator or subsequent owner. However, the issue of injustice has been lost in centuries of resisting state-sponsored taking. Today, a large percentage of BiH citizens believe that it is wrong – or at least unlucky – to purchase or assist in the seizure of someone’s property, even if it results from unjustifiably defaulting on just debts.

Further complications arise because most residents of BiH have always understood banks to be an arm of the government. Hence bank loans, like taxes, can be avoided and evaded without shame. To the contrary, many people are openly proud of their non-payment. Unfortunately for the economy, the banks are actually loaning the money of fellow citizens, and it is they who suffer from non-payment.

These cultural predispositions help to explain the ineffectiveness of some of the recent legal changes that should have improved the enforcement situation. According to one participant in the drafting process for the Law on Enforcement, the multiple auction system was deliberately designed to keep property from being sold, but justified in terms of protecting the parties. It has been effective in undermining enforcement.

Public understanding of the changing role of government in a democratic, market-oriented system has not kept pace with the changes themselves. Often there are attempts to protect rights of one group – such as debtors – at the expense of other groups – such as creditors – without regard to the equities involved or damage to economies. Persistent paternalistic tendencies help to explain the ineffective system for service of process or excessive control of court functions that could be more effectively handled by the private sector. Lack of self-protective initiatives – such a consumer rights advocates – is due in part to a belief that the government should protect the consumers, rather than consumers protecting themselves.

The clash of values embodied in the new economic order with those held over from the days of command economy and authoritarian rule is exacerbated by poor understanding of market economics, even among many of the well educated professionals involved in reform efforts. The question for reformers, therefore, is how and whether to engage culture and popular beliefs to accelerate beneficial changes.