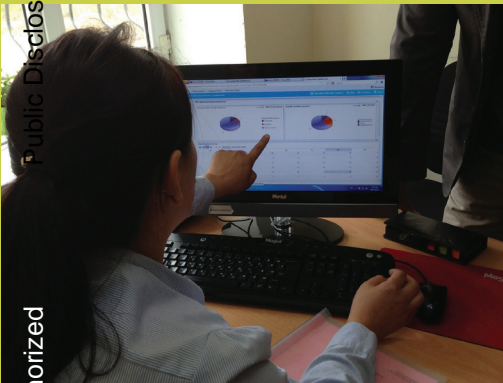


GOOD PRACTICES FOR COURTS:

Helpful Elements for Good Court Performance and the World Bank's Quality of Judicial Process Indicators



Key Elements, Lessons Learned, and Good Practice Examples

Heike Gramckow, Omniah Ebeid with Erica Bosio and Jorge Luis Silva Mendez

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Foreword and Acknowledgments

An effective and efficient justice system is essential for sustained economic growth. In a well-functioning, independent, and productive justice system, decisions are taken within a reasonable time and predictably, are effectively enforced, and individual rights, including property rights, are adequately protected. Among other objectives, the efficiency of the judicial system is important for creating a good business climate, attracting foreign direct investment, securing tax revenues, and supporting economic growth (Bénassy-Quéré, Coupet, and Mayer 2007). Research has shown that weak contract enforcement, for example, raises the cost of borrowing and shortens loan maturities (Bae and Goyal 2009), with a resulting negative effect on investment and GDP (Jappelli, Pagano, and Bianco 2002). Weak court enforcement systems have also been linked to late payments, which can lead to liquidity issues for companies and increase insolvency (Intrum Justitia 2013).

Since the publication of the World Bank's *World Development Report 2005*, the importance of well-functioning courts to strengthening the investment climate and ultimately to reducing poverty and boosting shared prosperity has been brought to the forefront and become internationally recognized (World Bank 2004). Indicators of commercial court performance, as well as business community perceptions of and trust in the courts, are a part of the World Bank Group's (WBG) country-level investment climate assessments and its influential Investment Climate Surveys and *Doing Business* reports (see World Bank 2016). Court performance has also become an element of European Union (EU) and Organisation for Economic Co-operation and Development (OECD) accession.¹ Helping countries to improve commercial court operations and ensure greater accessibility and more effective delivery of services is an important part of the development assistance provided by the WBG, the OECD, the EU, and other bilateral donors. This publication was developed to assist WBG teams, as well as those of other development partners and their client counterparts, especially commercial courts, in this effort.

This document was developed as a result of discussions that took place in 2014 and 2015 with OECD colleagues, Chloe Lelievre and Tatyana Teplova, who were interested in good practice examples, benchmarking options, and performance measures for courts in general, with a special view to assisting OECD accession countries. At the same time, the methodology for the "enforcing contracts" indicator included in the WBG's annual *Doing Business* report was adjusted, adding the new "quality of judicial processes index" to the assessment. The set of 15 good practice areas that are tracked not only provide a way for courts to assess how well they are performing on this indicator scale, but also indicate areas that could benefit from improvements.

1 For information on the OECD accession process, see <http://www.oecd.org/legal/accession-process.htm>.

While working with several client counterparts and some WBG assessment teams, it became clear that several of these good practice areas required some clarification. Equally important, client countries immediately requested more information about implementation requirements, lessons learned, and constructive good practice examples that would help courts assess their own performance and develop new practices that are a good fit for their particular jurisdiction. This publication was developed in an effort to respond to these client country requests. We hope that the information included here will be helpful to courts across the globe and useful to our colleagues at the Bank and OECD and other development partner organizations.

The authors would like to thank the World Bank's internal and external reviewers of an earlier concept note and draft of this document: Chloe Lelievre (OECD Policy Analyst, Justice Services, Public Governance) and Tatyana Teplova (OECD Senior Policy Analyst, Justice Services, Public Governance), Klaus Decker (World Bank Senior Public Sector Specialist, Governance), Pilar Salgado Otonel (World Bank Senior Private Sector Development Specialist, Trade and Competitiveness [T&C]), and Justin Yap (World Bank Senior Private Sector Development Specialist, T&C). Their feedback and comments have helped shape this paper into what we hope will be a useful contribution to the continuous reform efforts of many courts around the world. We also thank Patricia Carley for her excellent and skilled editing and Jihane El-Khoury Roederer for her creative design.

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Heike Gramckow is a Lead Counsel with the Governance Global Practice of the World Bank in Washington, DC, where she advises on justice reform issues and conducts related research. She has been working on justice sector reform issues for nearly 30 years. Before joining the Bank, she was Deputy Director of the International Division of the National Center for State Courts and served as Director for Research and Development for the American Prosecutors Research Institute. Dr. Gramckow has worked with courts, prosecutors, and police in the United States and throughout the world, especially on justice system management and reform. She has directed justice reform programs and assessments and provided advice to the governments of numerous countries, including Argentina, Bosnia, Bulgaria, Egypt, Germany, Haiti, Hungary, India, Indonesia, Kenya, Mali, Mexico, Mongolia, Morocco, Nepal, Nigeria, Papua New Guinea, Qatar, Romania, Saudi Arabia, Serbia, Slovenia, Syria, Thailand, the United Arab Emirates, and the United States. In her career, Dr. Gramckow has worked with common law, civil law, Shari'a-based, and customary justice systems. She has trained judges, prosecutors, and court personnel on management, budget and strategic planning, reengineering, and other substantive issues, such as victim assistance, drug case management, juvenile offenders, and domestic violence. She has also provided advice on establishing sustainable mechanisms for continuing education, introducing effective information and communications technology (ICT) solutions, and designing good governance structures that support democratic and accountable agencies. Dr. Gramckow holds a law degree and a doctorate in law from the University of Hamburg, Germany. She has taught undergraduate and graduate courses on international criminal justice systems and juvenile justice at American University and the George Washington University in Washington, DC, and is widely published in the United States and internationally.

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Erica Bosio joined the World Bank's *Doing Business* team in January 2013 and currently leads the "enforcing contracts" indicator. Prior to joining the World Bank Group, she practiced arbitration and litigation at the law firm Cleary Gottlieb Steen & Hamilton LLP in Milan. She holds a masters degree in international legal studies from the Georgetown University Law Center and a law degree from the University of Turin (Italy).

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Introduction


Most courts around the world continuously strive for good performance in the timely delivery of just and fair court decisions and other judicial services to all who need them. At the same time, many courts face challenges in reaching this goal and receive criticism from different government actors, the media, or various constituency groups for not performing well enough or not sharing performance information. Judiciaries in countries seeking accession to the European Union (EU) or to the Organisation for Economic Co-operation and Development (OECD) are especially under pressure to demonstrate satisfactory performance. Generally speaking, judiciaries that have focused on good performance tend to be better prepared to respond to challenges using data to effectively manage their operations; they also tend to focus on user experiences and are increasingly able to provide a range of information on their websites, including on court operations, services, and performance. With regard to the latter, more and more, courts include references to intentionally recognized performance indicators and reports that provide an independent view of their performance in relation to other courts in similar situations. Many courts are especially looking for information about how well performing courts implemented good practices to achieve good performance results. The latter is the focus of this publication.

Evaluating Judicial Performance

Today, a large number of international indicators and data collections include some measure of court performance. Some of the more prominent organizations that regularly collect information from different countries include the quite detailed data collection efforts undertaken by the European Commission for the Efficiency of Justice (CEPEJ), which are limited to EU and EU accession countries; the more general (and more sporadically collected) data obtained by the worldwide Rule of Law Index, which is implemented by the World Justice Project, a nongovernmental organization (NGO); the broader World Development Indicators collected by the World Bank; and other measures that have a narrower focus, such as the Corruption Perception Index compiled by the NGO, Transparency International.

Another international measure increasingly used by courts around the world is the “enforcing contracts” indicator included in the *Doing Business* report published annually by the World Bank (see, for example, World Bank 2016). The full *Doing Business* indicator set measures regulations and operations affecting 11 areas of the life of a business, ranging from starting a business to resolving insolvency. The enforcing contracts indicator is one of the 11, and it tracks the performance of courts and civil enforcement agencies in over 180 economies around the globe with regard to their ability to successfully resolve commercial cases.² Among the many indicators available, it is one of just a handful of internationally recognized annual publications

2 The “resolving insolvency” indicator of the *Doing Business* report also includes measures of court performance, but they are not as detailed and are limited to the smaller subset of commercial cases that involve insolvencies.



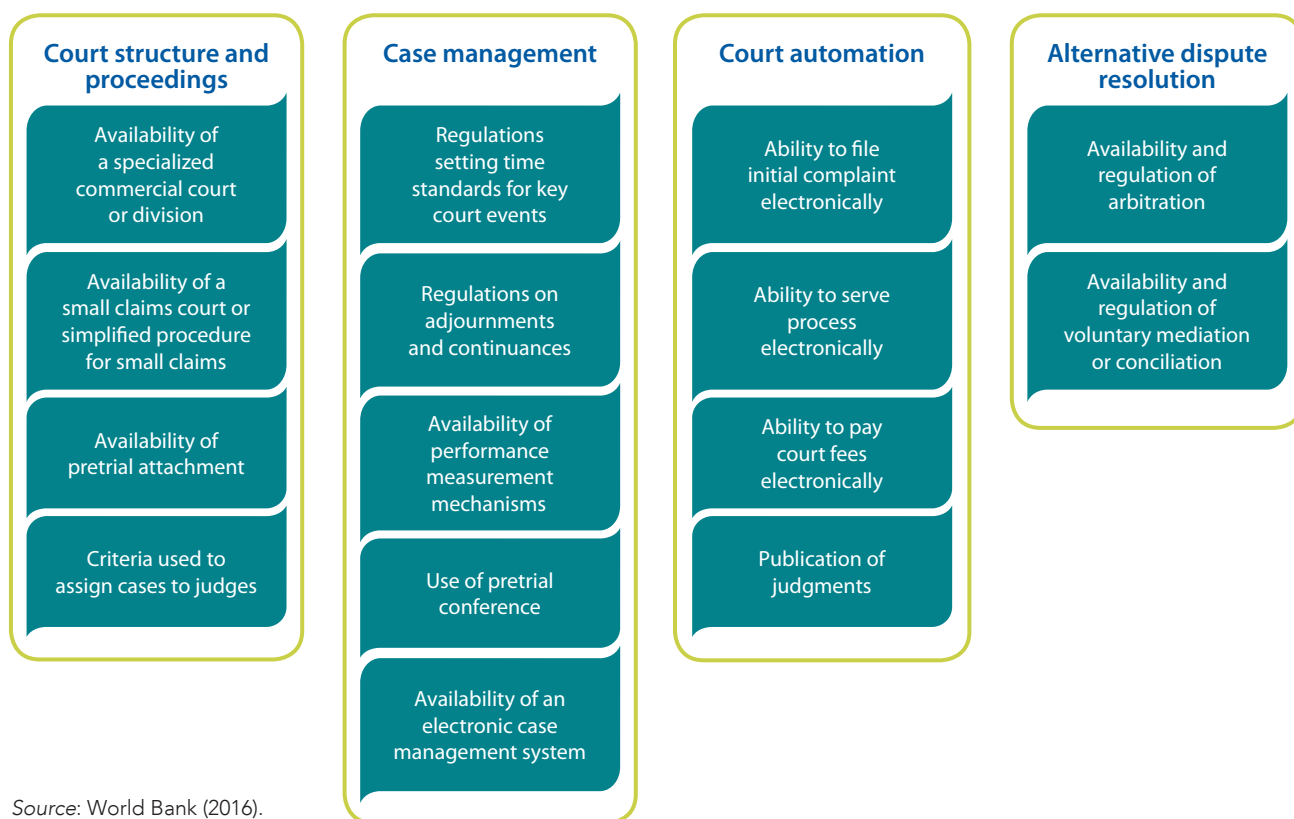
that continuously track information about court and civil enforcement agency performance trends related to the handling of commercial cases in a large number of countries across all regions of the world. It also is one of the few that track updates on reform efforts and good practice examples from various countries. The enforcing contracts indicator was included in the *Doing Business* report not only because contract disputes can be a critical part of business operations, but also because studies across the globe have shown that efficient contract enforcement influences how businesses operate and grow and is essential to economic development and sustained growth. Economies with an efficient judiciary, in which courts can effectively enforce contractual obligations, have more developed credit markets and a higher level of development overall. A stronger judiciary is also associated with the more rapid growth of small firms. In fact, enhancing the efficiency of the judicial system can improve the business climate, foster innovation, attract foreign direct investment, and secure tax revenues (World Bank 2016).

As important as all of these different international performance data and indicators are, it is also crucial to understand their limitations, what they actually address and mean, and how they can be used to inform improvement efforts. All data and indicator sets have some methodological issues, especially since many are based on respondent perception rather than concrete agency data. Furthermore, most measure only certain aspects of court performance, and since the systems, conditions, and circumstances across countries vary significantly, even the most well-defined indicators comparing elements across locations and time can be used only to understand trends and provide some performance reference points for benchmarking and identifying good performance examples. Another limitation is that few of these indicator sets provide courts with the information and examples needed to help them improve their performance in a particular indicator area.

The New Court Performance Indicator: Quality of Process

In an effort to widen the scope and usefulness of the enforcing contracts indicator, the *Doing Business* methodology was changed in 2015 to include what is called the *Quality of Judicial Processes Index* (QJPI). Although the methodology continues to measure two important performance elements, namely, the time and cost needed to resolve a standardized commercial dispute, it now also tests whether each economy has adopted a series of good practices that are captured in the QJPI. The aim of this change was to track select good practices that are internationally recognized as contributing to improved commercial court operations in support of fairer, timelier, and more transparent judicial proceedings. These 15 good practice areas address court structure and proceedings, case management, court automation, and alternative dispute resolution (ADR) (see figure 1).³ They aim to reflect the findings from numerous country studies that show that modern management approaches and advanced technologies provide new opportunities for courts and other justice sector agencies to modernize their operations to better reflect the changing needs of their communities as well as those of national and international markets.

FIGURE 1. Areas covered by the quality of judicial processes index



Source: World Bank (2016).

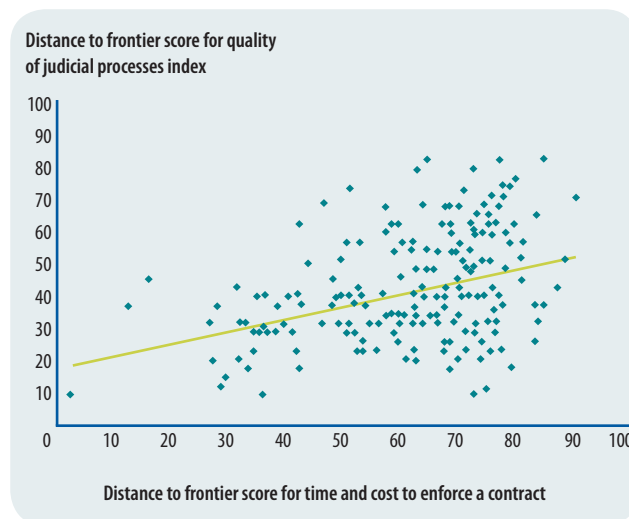
3 For details on how each of these elements are defined and collected see *Doing Business 2016*, p.153-155.

Courts in many countries are undergoing reforms or are interested in keeping informed about new trends in court operations elsewhere. Similarly, governments—and especially the business community—want to know how well their courts are working, how they compare to courts in similar countries, if there are areas that could be improved, and if so, how. And, as mentioned above, countries in the EU or OECD accession process are particularly seeking to learn about their own performance in comparison to others and about useful benchmarking points and good practice examples in other jurisdictions. Although the *Doing Business* assessments focus on commercial case processing only, most of these good practices apply also to other case types and can help improve court operations overall.

There are of course many other good practices that have been introduced in courts around the world beyond those that the QJPI tracks. These include the broader range of case management techniques that courts apply, a variety of assistance options for self-representing litigants, and particularly the use of other information and communications technology (ICT) solutions, especially short message service (SMS) communication methods, video hearings, and many others. The index also does not track other good practice options that are specific to the post-judgment civil enforcement process.

Clearly, courts have many other important functions and mandates and contribute to well-functioning societies and governments in numerous ways beyond commercial issues, and other measures of performance, such as judicial independence or transparency, are equally important. Nevertheless, the QJPI's good practices set provides some key examples of what some courts apply to enhance their structures, proceedings, case management, automation, and ADR options to better serve all court users. They all represent proven good practice elements used by well-performing courts. A special case study published in conjunction with the *Doing Business 2016* report discusses the implementation of these good practices throughout the world and concludes that countries that have introduced more of them have faster and less costly contract enforcement (World Bank 2016a; see figure 2).

FIGURE 2. QJPI and court performance



Source: *Doing Business* database.

Note: The correlation between the distance to frontier score for the quality of judicial processes index and the distance to frontier score for the time and cost to enforce a contract is 0.37. The relationship is significant at the 1% level after controlling for income per capita.

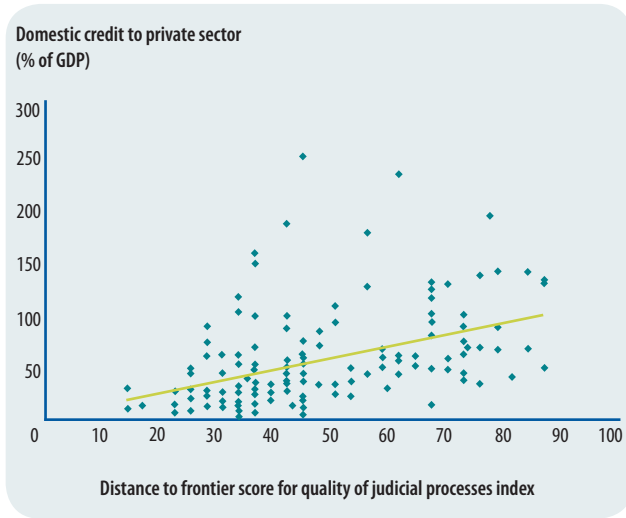
Other findings include:

- On average, OECD high-income economies have the largest number of judicial good practices in place as measured by the QJPI, while Sub-Saharan African economies have the fewest.
- Economies with more judicial good practices in place have higher levels of domestic credit provided to the private sector (figure 3).
- None of the 189 economies covered by *Doing Business* received the full measure of points on the QJPI, demonstrating that all economies still have room for improvement in judicial efficiency.

As shown in figure 4, although some good practices have been introduced in almost all economies tracked by the *Doing Business* report, others remain scarce.⁴ The reason that some good practices are almost ubiquitous and others are rare are manifold but are generally related to the preconditions and capacities that need to be in place before specific changes can be introduced.

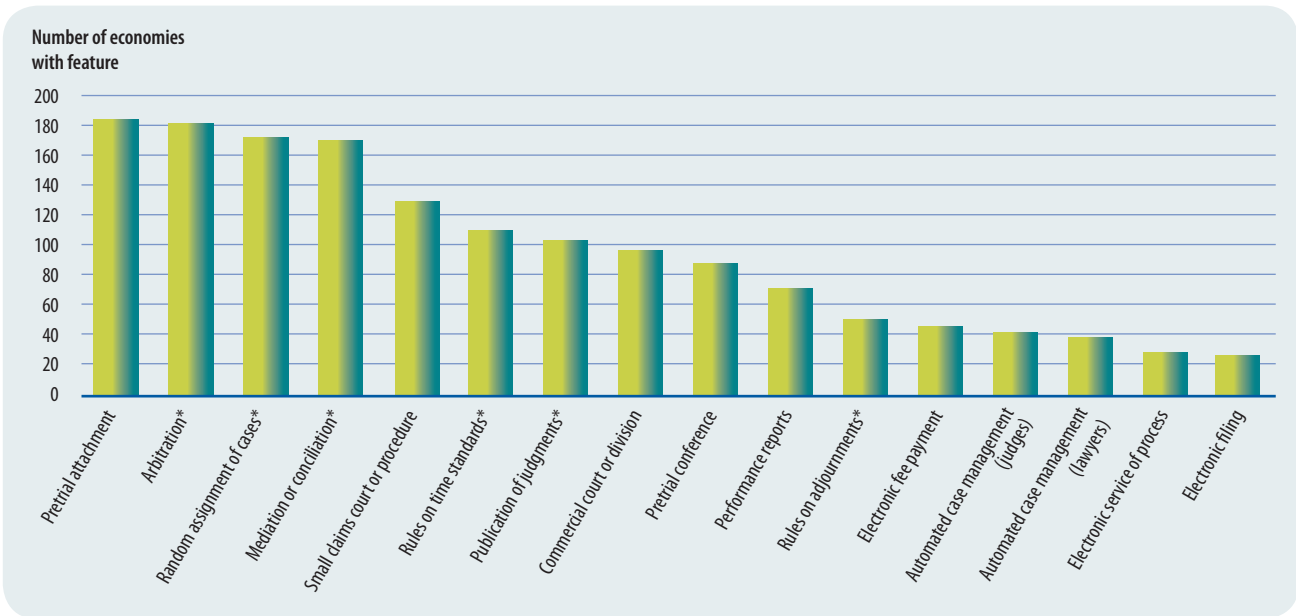
4 *Doing Business* generally includes only the court in the commercial center of a country that handles the specific commercial case type the study focuses on. This standardized sample case was created to ensure that the same information is collected from each economy evaluated across all jurisdictions. As a result, there might be other courts in a particular economy, often higher-level courts, that handle more complex commercial cases, that may feature a special bench or other elements included in the *Doing Business* methodology but are not part of the study and cannot be reflected accordingly.

FIGURE 3. QJPI and court performance



Source: *Doing Business* database; World Development Indicators database (<http://data.worldbank.org/indicator>), World Bank.
 Note: Domestic credit to private sector refers to financial resources provided to the private sector by financial corporations, such as through loans, purchases of nonequity securities, and trade credits and other accounts receivable, that establish a claim for repayment. The data for this indicator are for 2014. The correlation between the distance to frontier score for the quality of judicial processes index and domestic credit to private sector as a percentage of GDP is 0.40. The relationship is significant at the 1% level after controlling for income per capita.

FIGURE 4. Number of economies with good practice area



Source: *Doing Business* database, <http://www.doingbusiness.org/data>.

Note: This figure is based on a sample of 189 economies. For features marked with an asterisk, an economy must have received a score of at least 0.5 to be included in the count.

Expanding Knowledge About Good Court Practices and Reform Efforts

This publication resulted from earlier communications with colleagues at the OECD who were looking for information on court performance indicators, benchmarking options, and good practice examples. The QJPI was introduced at that very time, tracking a new set of good practice indicators for understanding commercial case performance. To assist courts interested in learning more about how other courts have addressed the 15 core good practice areas tracked by the *Doing Business* report, this document outlines the key elements needed for effective and user-friendly implementation. It also points to lessons learned and provides some good practice examples from around the globe for each area:

The **key elements needed for effective and user-friendly implementation**. These were selected from a wide range of reports and case studies and were chosen based on their applicability to courts of all sizes and jurisdictions.

The **lessons other courts have learned**. The lessons learned in the design and implementation of a particular good practice area were chosen based on a review of assessment reports from a variety of countries. Naturally, each court has learned many diverse lessons and some are unique to a particular location; chosen for inclusion here were those repeatedly mentioned in key review reports.

Good practice examples. The examples from around the world in this report make it easier for other courts interested in enhancing one or more practice area to better understand what is required in designing and implementing effective services that meet court and court-user needs. The examples were selected because assessments have shown that they have been effectively implemented and have received good court-user feedback. All of the good practice elements are used in a majority of countries in some form, but the meaning of each differs to some extent between countries, and related implementation requirements are not always well understood. And as with any good practice, its applicability in a different country and different court will need to be assessed, and adjustments may be required to ease its transferability.

Although the report has a special focus on OECD countries and those seeking accession to the OECD, these same lessons apply to other countries, and many interesting good practice examples can be found in non-OECD jurisdictions. Thus, when feasible, non-OECD country experiences were also included. Nevertheless, even the very best good practice examples may not be feasible in some jurisdictions, due to incompatible legal frameworks, high costs, and/or inadequate IT infrastructure and local court and user capacities. As such, the good practice examples presented here should be taken as just that—examples only, possibly seen as aspirational goals or benchmarks to work toward in the future rather than as a mandatory prescription.

1

Good Practice Area: Court Structures and Proceedings

Court structure and proceedings

Availability of a specialized commercial court or division

Availability of a small claims court or simplified procedure for small claims

Availability of pretrial attachment

Criteria used to assign cases to judges

The first component assessed by the *Doing Business* QJPI is related to the structure and select proceedings established at a court to handle commercial cases. Four particularly good practice areas have been included in the index: the availability of a specialized commercial court or division, the availability of a small claims court or simplified procedure for small claims, the availability of pretrial attachment, and the random assignment of cases to judges. These four good practice areas have proven to be essential for courts in effectively handling different case types in a fair and transparent manner that protects the rights of debtors and creditors alike. This is not to say that this is an exhaustive list of good structure and procedure options that courts can employ to better meet the needs of all court users. For example, limiting the requirements for notarization to only the most essential documents is another important good practice to support efficient case processing—and not just for courts and enforcement agencies. An effective notary system is also a factor in most other *Doing Business* indicator areas, such as starting a business, registering property, or resolving insolvency. Changing notarization requirements and improving the operations of notaries is, however, generally beyond the control of the courts. Other procedural good practices, such as pretrial conferences, differentiated case management, and clear adjournment rules, are included in one of the QJPI's other good practice areas.

1.1 AVAILABILITY OF A SPECIALIZED COMMERCIAL COURT OR COURT DIVISION

Background

Court specialization is commonly considered to be an important reform initiative to advance the development of a successful judicial system. Court specialization has been shown to also address broader business and development concerns, such as a better investment climate or more adequate protection of the environment. Studies from the United States, Australia, and other countries have shown that specialization can be helpful in improving the processing of court cases that are more complex or require special expertise, including expertise beyond the law, such as in bankruptcy, intellectual property, or environmental issues, or cases that must be handled differently to better reflect the needs of a particular court user group, such as business cases (for

a more detailed review of implementation requirements for specialized courts, see Gramckow and Walsh 2013). These studies have also shown that court specialization of any type should take different forms depending on the needs of a particular jurisdiction. This can mean the assignment of specialized judges to regular panels, the creation of specialized benches, or, if the case volume is large enough, the establishment of a specialized court in the commercial center of a country, or a combination of these different options across a country depending on the needs of different locations. Not surprisingly, the *Doing Business 2016* report showed that 97 of the 189 economies included had created some form of commercial court specialization (World Bank 2016).⁵

⁵ The *Doing Business* methodology assesses whether a specialized commercial court or a section dedicated solely to hearing commercial cases is in place at the court included in the study.

BOX 1.

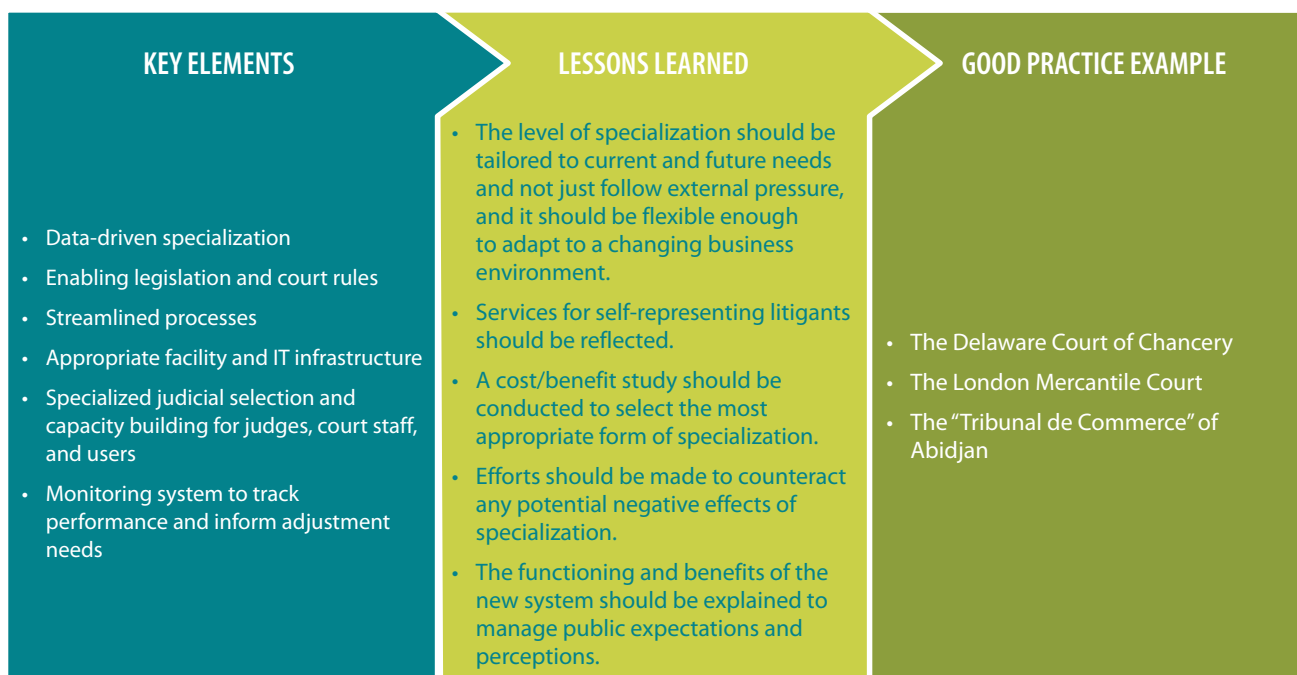
**Beyond Costly International Arbitration:
Addressing International Commercial Disputes Locally**

A new trend in commercial litigation involving parties from more than one country is the “local-international” commercial court that is being created not just in international free trade zones, such as the Dubai International Finance Center Court, but also in regular (non-English speaking) jurisdictions with high levels of international business. These special courts offer litigation in English and are created based on demand as an alternative to the increasingly costly international arbitration processes that many mid-size and smaller companies trading across borders can no longer afford. An example is the limited-jurisdiction international commerce chamber at the District Court in Rotterdam. In addition, commercial court hearings are already offered in German courts in several commercial centers. The planned creation of a special international commerce division at the District Court of Amsterdam, and similar efforts at the district courts in Hamburg, Cologne, Bonn, and Düsseldorf, Germany, are currently pending legislation.

Source: Gramckow 2016.

The international court studies have also pointed to some drawbacks that are important to note when considering any specialization effort. For example, special attention to, and the allocation of additional resources for, handling business cases can lead to the perception that the court provides preferential services to the business community, which can undermine the

general public’s trust in the courts, if not adequately addressed (Gramckow and Walsh 2013). The following sections outline the key components of this good practice area and lessons learned across the world to help courts assess their own specialization needs and address potential problem areas early on. The good practice example section offers further information from three well-performing commercial courts.



Key elements

Key elements for implementing and maintaining effective court specialization are those that allow the court to adjust its specialization offers over time to meet the ever-changing needs of the business environment it is serving. This involves especially the needs of small and mid-sized businesses as well as consumers, whether or not they are involved in international commercial transactions. Larger, and especially multinational, companies tend to favor and include international arbitration options in contractual agreements, as they can afford them and thus rarely rely on local courts. Below are some key elements needed for effective specialization identified by courts in countries as diverse as Tanzania, South Africa, the United States, the United Kingdom, South Korea, Germany, the Netherlands, Abu Dhabi, and Egypt.

Data to identify sufficient “special” case handling needs and volume to target specialization requirements and justify their expense. Commercial cases range from simple contract disputes to complex litigation issues in specialized legal fields. They can involve straightforward disputes about nonpayment of a contract or the delivery of faulty goods between two business partners, complex disputes concerning the insolvency of a large firm, or intellectual property right infringements involving many parties. The special expertise needed varies, depending on the type and volume of commercial disputes. Today, courts operating in large commercial centers across the globe tend to be presented with commercial cases ranging from the simplest to the most complex, not counting those that are utilizing international arbitration. Courts in smaller cities and rural areas tend to have fewer or different needs for specialization, depending on their business environments.

In order to assess the type and level of specialization that would be feasible for a particular court jurisdiction, it is important to have data and stakeholder (such as judges, the business/legal community, and so forth) opinions to inform the choice of specialization options. At a minimum this means:

- Assessing the number of cases by type that were filed and processed in the court and the filing and type of settlement trends, and also the collective views of judges, private lawyers, and the business community on the processing needs of those

cases to understand what type and form of special attention they may require.

- Reviewing the data and views of the court’s leadership, the government, judges, and others to understand what areas of specialization are considered important and a matter of public interest.
- Using the data and views of the various court actors to determine what specialization option will most likely meet the needs identified.
- Assessing the need to adjust the rules or laws to support the different options.
- Conducting on-the-job training needs analyses of judges to identify areas of judicial specialization that require additional training and other educational development programs or activities. Such analysis should also consider how long it would take to develop the requisite educational courses to develop the needed number of specialized judges.
- Based on the data collected, evaluating the other resources that need to be made available for the different options and their likely costs.
- Organizing discussions and outreach to other courts that have gone through similar changes to determine a good approach to planning, pilot testing, implementing, and monitoring the chosen options and to provide information for future rollout and continuous fine-tuning.

Key elements in establishing specialization also have to focus on its impact on the rest of the court and legal system, especially on any real or perceived significant inequalities in the handling of other case types.

Enabling court rules or legislation. Naturally, any new form of specialization has to be supported by enabling court rules and legislation. Effective specialization frequently means not just that a particular court with specially trained judges will focus on a special set of cases but also that different, streamlined processes to more effectively handle such cases are in place. This means, that court rules and procedural codes may need to be adjusted enable the court to use different processes. Parallel enhancement of new rules and draft legislation while pilot projects are being developed is essential. In some jurisdictions courts may be authorized to adjust court rules to test pilot a new specialization approach but for long-term permanent procedural changes and a country-wide rollout the law itself may

need to be changed. This is a process that can take a while and is generally beyond the control of the court and therefore requires early legislative engagement to ensure enabling legislation is in place to the change does not end after a successful pilot period.

Use of the specialization effort as an opportunity to develop more streamlined procedures for commercial cases as a test for process enhancements in other areas of the courts. It is generally understood that well-functioning commercial benches and courts are successful because they are staffed by qualified judges and are applying streamlined processes and meaningful case management techniques. The leading commercial courts in the world, such as those in Singapore, South Korea, Delaware (the United States), or the highly specialized Admiralty Court in London, all distinguish themselves by using comprehensive and clear processing timelines, a range of early settlement options, fast-track processing, and comprehensive case management approaches; they are also all supported by advanced IT solutions and automated case management systems (CMSs). Using the commercial court as a testbed for process optimization and other efficiency enhancement options will also be helpful in advancing changes throughout the entire court system, an important factor in countering public perception of preferential treatment for the business sector.

Availability of appropriate facilities, equipment, and adjusted IT structures, including adjusted case management software. The choice and scope of specialization will determine the need for supporting court facilities and infrastructure. A special court building tends to be the most costly option and has to be justified by sufficient special case volume and demand and the capacities to respond. Considering that specialization generally means not only that judges with special qualifications and expertise are assigned but that more streamlined proceedings are being applied, any CMS will also need to be adjusted to reflect the new processes. The time needed to make the necessary system changes will need to be reflected in the planning process.

Development of qualified judges, court staff, and other core participants. Adequate training for judges to adjudicate commercial cases effectively and, together with court staff, to implement special processing requirements is a necessity for the success-

ful implementation of any specialization. At the same time, relevant education and training will also need to be made available to other professions that are part of the process, such as experts, mediators, prosecutors, private attorneys, and enforcement agents, to enable them to respond effectively to the new court option. Equally important is that the business community understands and has an appreciation of the changes that are being introduced, and if small businesses and individual consumers are the likely litigants, developing resources for self-representing plaintiffs will be especially crucial.

A system to monitor the implementation of specialization. Building on the preliminary data obtained during the initial planning phase and the case management and user feedback information collected during implementation, the court should track (or develop) the information available to understand if the new option is meeting its objectives and goals and is worth the change investment. This will include case filing data; information on timelines, cost and resource needs, and court outcomes; and feedback from internal and external stakeholders and users. Without such progress monitoring, any needed adjustments may be missed and further rollout plans will be insufficiently supported.

Lessons learned

Understanding court business-based specialization needs and future trends. As outlined above, specialization decisions should be based on the current business needs of the courts, their ability to adapt over the short and long term, and especially future trends. In some instances, unusual economic developments, such as the 2008 worldwide economic crisis or local economic up- or downward trends in certain sectors or in general, can significantly change the number and type of commercial cases filed in the courts. Depending on economic pressures, especially if the business community is in a crisis situation, demands for commercial court services in special areas, such as real property, bankruptcies, and so forth, can spike temporarily. Assessing multi-year court filing and processing trends and ongoing user feedback and needs assessments are therefore essential. There may be a temporary need for the court to react to particular commercial cases, for example, but such spike may not be a long-term trend that would require the creation

of a permanent response. This does not mean that a court that is diligently tracking filing and processing trends and prospects should ignore such spikes and exceptional situations; rather, it means that different, temporary solutions should be considered.

Determining whether external pressure for specialization reflects actual current and future needs. The business community can be a strong ally for pushing court specialization. However, this also means that particularly strong business groups may promote options that prioritize investments in changes that benefit their constituency only. Again, it is essential that the courts have—and quickly develop—data to inform stakeholders and decision makers, especially government counterparts, about actual filing and processing trends to avoid creating specialization options that may respond to temporary trends only or create a significant imbalance in the court’s ability to serve all court users equally.

Determining whether the availability of assistance to self-representing litigants is important. The need to provide services to self-representing litigants is not always seen as a priority at commercial courts, since companies tend to be able to afford to hire a lawyer as part of their cost of doing business. However, depending on the country context, the small and even mid-sized companies that the court serves may not be able to afford a lawyer; equally important, there is the consumer, often one of the parties in these disputes, to consider. Many well-performing courts are providing and continuously enhancing information and assistance to self-representing litigants in general. These systems are also helpful in business cases, but further special information may be needed. An interesting example of assistance to self-representing litigants can be found in the U.S. state of Colorado. In addition to helpful information and forms that can be accessed via the courts’ website, each judicial district has a self-help center that is staffed by Self-Represented Litigant Coordinators commonly referred to as “Sherlocks” (see box 2).

Weighing the costs and benefits of specialization. The choice for a particular form of specialization will also need to be weighed in relation to the costs associated with its implementation. Even if the creation of a special bench alone is chosen, it is important to understand that designating specialized, trained judges to handle select

BOX 2.

The Self-Represented Litigant Coordinator in Colorado, United States

The Coordinators, commonly known as “Sherlocks,” work for the court. They do not provide legal advice but help self-represented litigants with general questions, paperwork, and resources, including how to find a pro bono lawyer and fill out forms related to their case, while also educating litigants on state statutes, rules, policies, and procedures that may be applicable (within legal limitations).

The Coordinator can help anyone who is not represented by an attorney with non-criminal matters that are filed in county court. Appointments are recommended and given priority; however walk-ins are welcome and will be assisted on a first-come, first-serve basis. Appointments can be made online, via e-mail, or in person at the court, and the court clerk provides assistance in making the appointment.

This is a free service provided by the court and has proven to very popular and helpful for litigants as well as the court. In 2014, the Sherlocks’ first full year in operation, the program had more than 100,000 contacts with self-represented individuals.

Source: Colorado Judicial Branch website, <https://www.courts.state.co.us>.

commercial cases may not enhance case processing timeliness unless procedures are streamlined, and that focusing select judges on these cases also tends to mean that they are no longer available to handle other cases. The need to balance resource allocation to specialized commercial courts is not specific to any particular country, but it tends to be a more prevalent issue in developing countries, where pressures from influential parts of the business community can be strong, while small entrepreneurs, consumers, and other court users, especially those looking for court assistance to settle family matters or neighbor disputes, have relatively little influence. Any specialization effort has to consider its potential impact on other court areas in terms of resource allocation and service delivery. Such

specialization should generally be considered as an effort to improve court operations overall, and lessons learned should inform future plans for enhancing all court operations across a country.

Counteracting the potential negative effects of specialization. Studies in the United States and other countries have shown that the creation of some forms of court specialization, especially a separate specialized court, can trigger negative consequences related to the quality of judicial decisions and the resource allocation to the rest of the courts. The potential negative public perception of preferential treatment for (select) business communities is an important issue to address, as will be further outlined in the next section. In addition, judges who have been exclusively handling a narrow scope of business cases, such as bankruptcies or intellectual property rights, tend not only to become too familiar with the equally specialized private lawyers appearing before them but also to develop “tunnel vision,” that is, they lose track of other legal trends and innovations, leading to stagnant decision making that can eventually result in judgments that are less relevant to legal, economic, and societal trends. Experiences from various countries, including the United States, the United Kingdom, Australia, France, and Germany, which have decades of experience in providing specialized court services, have shown that this is a problem that can be managed well by appropriate selection, rotation, and performance-management systems.

Managing public perceptions and expectations. Any changes in court—or any other government agency—operations and services require that the target beneficiaries and the general public understand a) the benefits of the specialized system, and b) how to use the new system to reap those envisioned benefits. Courts and relevant ministries that involve all stakeholders in the design and initial pilot processes tend to develop a stronger communication strategy to ensure that all potential users and other participants understand the advantages of the special court and to allow feedback for further improvements. Recent examples of such extensive consultations include efforts in the United Kingdom, when changes to the proceedings and cost structures of the Admiralty and Commercial Court were considered, and Singapore, when the creation of the Singapore International Commercial Court was proposed. Wide-ranging consultations contribute to

better planning and implementation of changes and are also an important vehicle for balancing potential negative public reaction to commercial court specialization. A very well-informed public education campaign should accompany the planning and implementation of any specialization. Ideally, this kind of campaign would also include information about future plans to extend beneficial lessons to other courts.

Good practice examples

Although a relatively large number of countries have implemented specialized commercial courts, it is surprising that few case studies are readily available to identify and report on particularly good implementation examples. Available reports from numerous specialized commercial courts from less well-documented jurisdictions, such as Uganda, Ghana, Tanzania, India, or Saudi Arabia, as well as internationally recognized centers of judicial excellence, such as Singapore, Hong Kong, and South Korea, provide evidence for the effectiveness of such specialized courts but offer little detail to fully elucidate what exactly was implemented and what did or did not work. In other cases, experiences from commercial courts well known for their good performance, such as the Copenhagen Maritime and Commercial Court, are simply not well documented. As a result, there are clearly more existing good practice examples that could be promoted if the appropriate information were available. Notwithstanding this limitation, the commercial courts below present effective examples of specialized court implementation that have performed well over time.

The Delaware Court of Chancery. Established in 1792, this court is one of only three pure equity courts in the United States and focuses mainly on business and corporate law. Its jurisdiction includes cases involving fiduciary duties, alternative entity litigation (limited liability companies, limited liability partnerships), partnerships and business trusts, estates, trustees, zoning matters, guardianships, and contested wills. This court has several distinctive features that contribute to its success and popularity. First, its jurisdiction is limited and purely equitable. As a court of equity, the Court of Chancery does not hear criminal cases and rarely hears routine civil cases seeking only money damages (such as products liability or automobile negligence cases).

Instead the judges hear major corporate law disputes and business-to-business contract disputes, such as disputes between joint venture partners, in a timely manner. The assigned judge oversees the litigation and manages the schedule until the case is concluded. The Court of Chancery adopted electronic filing early and provides litigants electronic access to case document and a host of other information, inducing court decisions. The court's procedural rules allow the judge and the parties to tailor litigation as necessary, including the use of equitable remedies (such as temporary injunctions and declaratory judgements, depending on the circumstances of a particular case.⁶ Furthermore, the scholarly culture of the court emphasizes the expression of varying opinions by the judges, resulting in an extensive body of case law. Third, the geographic proximity of the court's five judges fosters a tradition of collaboration and collegiality, allowing them to consult with each other on new and complex issues that arise in their cases. (see Hannaford, Rottman, and Gonzalez 2000). Today, the court applies a variety of approaches to processing different case types efficiently, including voluntary mediation and confidential binding arbitration. It offers a range of e-services and uses ICT solutions extensively to manage its significant caseload.

The London (and Greater England and Wales) mercantile court(s). Set up in the 1990s, the 10 specialist mercantile courts created in England and Wales handle business disputes that require specialized judges but fall outside the scope of the Commercial Court in London, which handles commercial cases that involve very high value and international cases, or the jurisdiction of the Chancery Division. These 10 courts provide regional commercial court services, particularly to small and medium-sized enterprises but also to large national and international businesses. Although other commercial courts, such as the one in Singapore, may have more advanced technology and shorter processing deadlines, these mercantile courts stand out for their willingness to innovate and work with other stakeholders to develop good processes even when budgets are tight and the economy puts additional pressures on the courts and businesses alike. All of these courts are well administrated, and the ease and speed of procedures are recognized by litigants. One of the advantages is that the same judge handles a case from filing all the

way through to the final decision. The judges tend to be interested in engaging with local practitioners and are always seeking feedback and encouraging innovation. Few cases go through a complete trial, due to the court's proactive case management, a general encouragement to consider sensible ADR, and commercial realities, that is, the fact that clients tend to understand when early settlement and other options are beneficial to them.

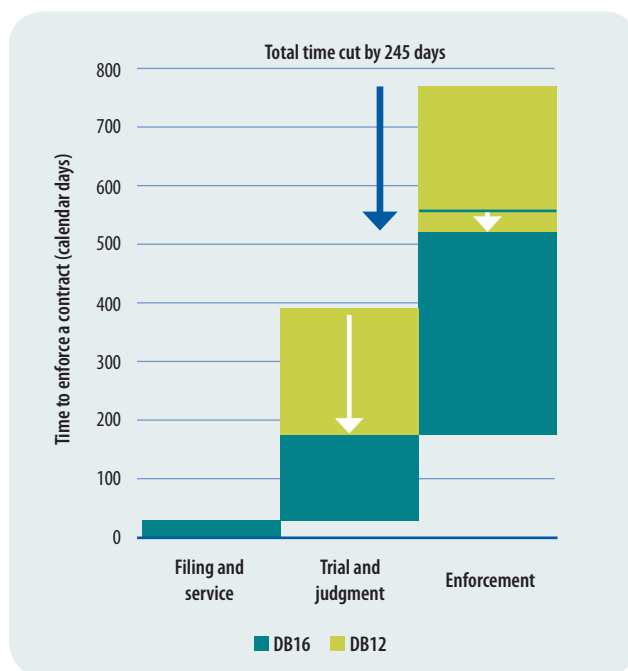
The mercantile courts are working because they are staffed by very able judges, have very good staff, and apply good case management practices. Until recently, however, they lacked more advanced technology to support their operations. In 2016, this limitation began to be addressed by the government, which is committing up to £700 million in investments in technology and other IT upgrades. In addition, these courts, especially the court in London, are testing new, shorter processing and trial options for cases that can be fairly tried on the basis of limited disclosure, summary assessment of cost, and oral evidence if the parties agree to it. There are also consultations under way to introduce some form of fixed fees or cost-capping—and not just of court fees—in order to enable the court to recover its cost to the extent possible and also to encourage parties to settle early. Another procedural option that is so far underutilized is the so-called “early neutral evaluation,” in which a judge who is not otherwise part of the case gives a nonbinding indication of its merits at an early process stage before motions are placed and before it is assigned to a trial judge, is being reviewed to increase its use when feasible (see below under section 4). An additional increasingly employed option puts experts together in the witness box to reduce the back-and-forth procedure during contested issues. There is also significant focus on the cost of litigation and its impact on access to justice and how this can best be addressed (Langdon-Down 2015).

The Commercial Court of Abidjan, Côte d'Ivoire. After the post-electoral crisis of 2011, resolving a commercial dispute in Abidjan took 770 days, according to *Doing Business* data. Civil courts were backlogged, and commercial cases were stuck among the flood of civil cases. In 2012, to provide more suitable responses to business disputes, a stand-alone commercial court was created in Abidjan, and professional judges were

⁶ For further information about the court, its rules and services see <http://courts.delaware.gov/chancery/>

appointed to work with newly recruited lay judges. Today, it takes 525 days to resolve the same dispute in Abidjan (figure 5). Similar results can be observed in virtually all of the Sub-Saharan African economies that have introduced a commercial court. In the 16 economies in the region that have launched such courts over the past 10 years—Benin, Burkina Faso, Cameroon, Côte d’Ivoire, Ghana, Guinea-Bissau, Lesotho, Liberia, Malawi, Mauritius, Mozambique, Rwanda, Senegal, the Seychelles, Sierra Leone, and Togo—the average time to resolve the standardized case measured by *Doing Business* was reduced by about 2.5 months.

FIGURE 5. Côte d’Ivoire introduced a commercial court and cut the time to enforce contracts



Source: *Doing Business* database; <http://www.doingbusiness.org/data>.
 Note: The white arrows indicate the decrease in time for the trial and judgment and enforcement phases. The blue arrow indicates the decrease in the total time.

1.2 AVAILABILITY OF A SMALL CLAIMS COURT OR SIMPLIFIED PROCEDURES FOR SMALL CLAIMS

Background

In many countries, the complexity and formality of the legal system, along with the often high cost associated with litigating even simple disputes, can be prohibitive to many court users and can collectively operate to impede access to court services. To respond to these factors as well as address the increasing resources expended by courts in addressing simple disputes and the need to more efficiently resolve them, judiciaries began developing special courts and proceedings as early as the 1600s in England. This movement ultimately made its way across to North America by the early 1900s

and has since been spreading worldwide, both changing the way that justice services are delivered and increasing access to justice. To date, according to *Doing Business 2016* data, 128 out of the 189 economies included in the study have small claims courts or proceedings.⁷ Across regions, OECD high-income countries as well as countries in Latin America and the Caribbean have the highest number of courts and simplified procedures for small claims—91 percent of these economies display this feature (figure 6).

⁷ The *Doing business* methodology assess whether a small claims court or a fast-track procedure for small claims is in place. A score of 1 is assigned if such a court or procedure is in place, it is applicable to all civil cases and the law sets a cap on the value of cases that can be handled through this court or procedure. If small claims are handled by a stand-alone court, the point is assigned only if this court applies a simplified procedure. An additional score of 0.5 is assigned if parties can represent themselves before this court or during this procedure. If no small claims court or simplified procedure is in place, a score of 0 is assigned (World Bank 2016, 153).

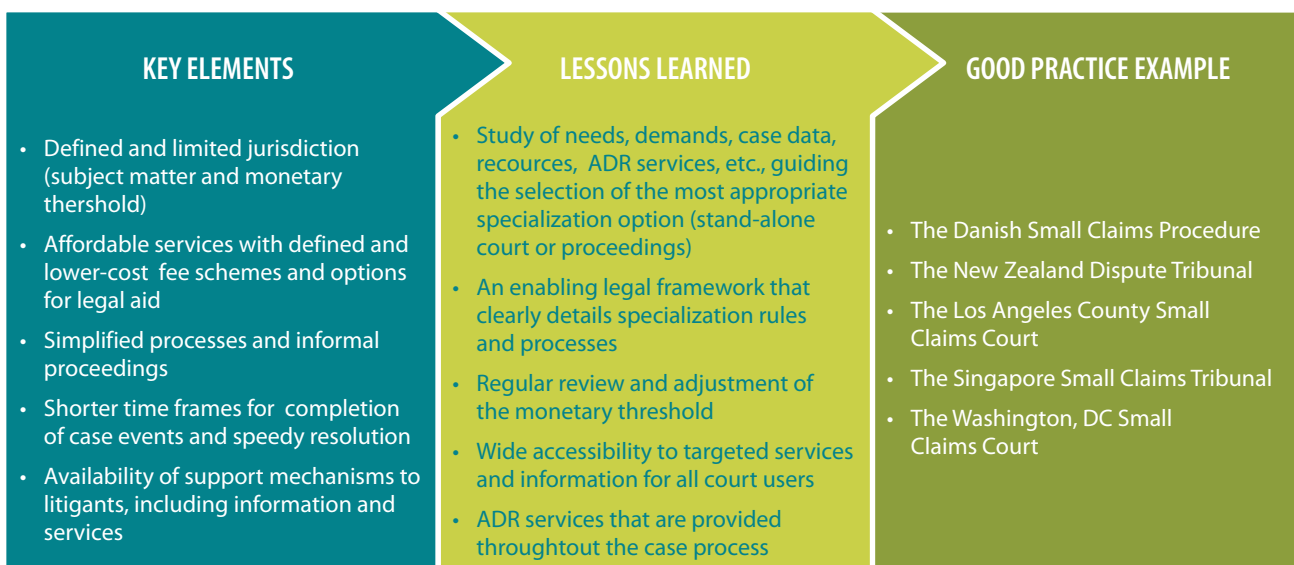
FIGURE 6. Share of economies with a court or procedure for small claims



Source: *Doing Business* database, <http://www.doingbusiness.org/data>.
 Note: This figure is based on a sample of 189 economies.

Small claims courts are generally specialized courts created by law with specific duties and powers to adjudicate and resolve small-value disputes. Special proceedings or tracks established in some countries, especially in Europe, represent another option, where small claims are processed by the first instance courts applying a different set of or simplified procedural rules. When developed well and based on user needs, caseload, court capacity, resources, and court efficiency in handling simple disputes, small claims courts and simplified proceedings/tracks can enhance court-user experience, provide greater access to services, reduce caseload, enhance efficiency, free up court resources,

and increase public trust in the judicial system. These courts/proceedings specifically provide a segment of court users with a cost-effective and efficient alternative that does not require them to undergo the customary adjudication process and incur the high cost often associated with resolving disputes. However, despite the existence of special proceedings for handling small claims in many economies worldwide, establishing actual small claims courts with dedicated judges and staff who apply simplified and less formal procedures in processing small disputes has proven to be a more effective option for courts users.



Key elements

Simplicity, informality, affordability, and speed are the cornerstones of small claims courts and simplified proceedings/tracks. Regardless of the mechanism, which should vary from one jurisdiction to another based on needs and resources, establishing small claims courts and proceedings can serve to reduce the burden of litigation and free up the courts to more efficiently and effectively resolve larger and more complex cases. Based on a review of well-performing small claims courts/proceedings in Singapore, New Zealand, Canada, the United States, Denmark, and the United Kingdom, among many other countries, a number of common elements are key to their success.

Limited jurisdiction: subject matter and monetary threshold. Small claims courts are generally limited to resolving simpler civil disputes involving some type of debt recovery rather than large, complex commercial disputes. In some jurisdictions, simple traffic fines, landlord-tenant cases, or other simple matters may be handled in a small claims court. For example, Denmark has instituted a debt-recovery proceeding for parties who are not contesting an issue but simply wish to recover a claim. Family disputes, including divorce and custody cases, bankruptcy, defamation/libel or slander, tax disputes, and so on, are generally not within the jurisdiction of small claims courts or proceedings. In addition, the monetary threshold is typically limited and low. The *Doing Business 2010* report indicated that in most economies, the threshold for small claims is generally fixed by courts at 20 percent or less of income per capita (*Doing Business 2010*). In the Washington, DC Small Claims Court in the United States, the limit is currently set at US\$5,000. The small claims court in Ontario, Canada has a threshold of Can\$25,000, while the Singapore Small Claims Tribunal has a cap of S\$10,000. The latter, however, provides that the tribunal may still adjudicate cases in which the amount in dispute is up to S\$20,000 if both parties consent in writing. This flexibility and leeway in handling smaller claims is also provided by other courts such as the New Zealand Dispute Tribunal, where small claims are handled.

Affordability. Affordability is another key element of all small claims courts/proceedings. Driven by the need to provide greater accessibility and a suitable dispute-resolution forum especially to those with limited financial means, the cost of filing and processing a case in these alternative venues is generally significantly lower than in regular first instance-level courts. Detailed fee schedules are generally outlined by law with fee amounts directly related to the cost of the claim. For instance, the Washington, DC Small Claims Court rules stipulate that for claims of US\$500 or less, the cost for filing a new claim is US\$5; for a claim of US\$500 or more and up to US\$2,500, the fee is US\$10; and for claims over US\$2,500 and up to US\$5,000, the fee is US\$45. A similarly graduated approach is also used in the United Kingdom when filing a small claim (see box 3). Other countries such as Denmark go so far as to provide for a fee schedule for lawyers' fees that directly correlates to the number of hours spent on the case.

Various forms of legal aid also work to provide greater accessibility and affordability. These include free legal help, representation, and advice; fee waivers and exemption schemes; and the acceptance of self-representation. In the United Kingdom, for example, parties can receive legal aid if they meet a means test that considers income and capital, and help is even provided in determining whether the necessary criteria have been met. If a party does not qualify, he or she may still be entitled to receive free legal advice from the Citizens Advice Bureau or legal drop-in clinic.⁸ The Washington, DC Small Claims Court applies a comparable means-tested fee waiver scheme; a party who cannot afford to prepay the filing fees can request a waiver by filing a motion with the court. In the Los Angeles County Small Claims Court, a similar waiver request can be granted, provided the party is receiving public benefits and does not earn enough income to pay for the household's basic needs. Denmark provides an even greater level of access to assistance. A claimant in Denmark can apply for means-tested legal aid; apply for public subsidies, which if granted, will pay for a portion of lawyer fees; and access the "Advokatvagten," an entity that provides free advisory legal services to anyone across the country.⁹

⁸ Citizen Advice Bureaus are independent entities that exist across the country and provide free, confidential, and impartial advice and information to individuals in need. Legal Drop-in Clinics are operated by LawWorks, a charity that connects volunteer lawyers with people in need of legal advice who are not otherwise eligible for legal aid and cannot afford to pay for a lawyer.

⁹ For more information on the Advokatvagten, see <http://www.advokatvagterne.dk/other-languages>.

BOX 3.**Small Claims Mediation Services, Manchester County Court, United Kingdom**

In 2005, a pilot program was established offering free and voluntary in-house mediation services in small claims. In 2006, an evaluation of the pilot scheme indicated that the services provided achieved a high settlement rate (86 percent) and that the parties expressed a strong level of satisfaction with the mediation services and mediators (93 percent). The pilot was rolled out across the United Kingdom, including Wales. Some of its main features included the use of telephone mediation (70 percent of all mediations were conducted by phone at the time of the evaluation) and judicial support. Based on a survey of 3,000 users who were contacted in 2009, 98 percent were satisfied or very satisfied with the services of the mediators and 94 percent stated that they would use the services again.

The Manchester Small Claims Mediation Pilot program was awarded the European Commission for the Efficiency of Justice (CEPEJ) European Scales of Justice award in 2006.

Source: United Kingdom, "Her Majesty's Court Services Civil Court Mediation Service Manual" (London: Civil Justice Council and Judicial Studies Board, 2009).

Simplified rules and informality. Small claims courts/proceedings are premised on the use of straightforward procedures that are easier for litigants to understand and follow and do not require the parties to rely on the assistance of lawyers. As evidenced in many jurisdictions (for example, in New Zealand, Washington, DC, and Singapore), small claims courts are often governed by specific rules that are easier to apply and are separate and apart from the rules of civil procedures. Even in countries that have not developed separate rules for small claims, such as Austria, Germany, and Portugal, the law requires the use of simplified proceedings in small claims matters. Generally, the regular rules of civil procedures do not apply to the processing of small claims. Notification can often be carried out via telephone (by calling the opposing party), personally by notice delivery, through a call from the court clerk to the opposing party, or via a notice by mail. In Norway, the rules allow unrepresented parties to file

a case and submit their defense (and so on) verbally. Other jurisdictions allow judges to question witnesses and provide assistance to parties if need be. The simplicity of processing a case is buttressed by the informality with which litigants interact with the courts. In Sweden, the entire process, from filing to issuance of a judgment, is informal. The parties are not required to use any particular forms to file a claim; no special rules of evidence apply; written witness statements can be submitted only in limited circumstances; and the form and content of judgments need not comply with any particular rules or guidelines. In other jurisdictions, such as New Zealand, Singapore, and Los Angeles, California, self-representation is mandatory. In fact, according to the *Doing Business 2016* report, only 12 of the 128 economies in which a small claims court or fast-track procedure is in place mandate that parties be represented by a lawyer during such disputes. Most of the economies that do so are in the Latin America and Caribbean region.

Speedy resolution. In addition to using a simpler legal framework, small claims courts/proceedings generally apply short time limitations for the completion of action by the court and litigants. Some courts, such as the Singapore Small Claims Tribunal, have developed even shorter time limitations for certain actions. For claims filed by or involving a tourist, for example, the court will set the case for mediation within 24 hours of filing. To ensure speedy resolution of non-tourist small claims, the tribunal schedules consultation (mediation) between 10 and 14 days from the date of filing for company claims and within seven days from filing for consumer claims. If a party is not present at consultation and a default judgment is entered, the party has 30 days from the date the order was issued to file a motion to set the judgment aside. If the consultation fails, a hearing with the referee (the judge in the Small Claims Tribunal) will generally be scheduled within seven days of the consultation. Tribunal decisions may be appealed to the high court on points of law after applying to the district judge for leave to appeal within 14 days of the referee's order. Notice of Appeal must be filed within one month of the district judge's order granting leave to file it. Other countries such as Denmark set small claims cases for one hearing, after which the judges have 14 days to issue their judgment, making the processing of such cases highly efficient. Similarly, in Norway, once the case is filed and not resolved through mediation, the judgment must be issued no later than three months

from filing. Other countries with small claims tracks such as the United Kingdom require that 70 percent of small claims be heard by the court within 30 weeks (from receipt to final hearing).

Access to services and information. More so than in other types of civil disputes, accessibility to information and services is key. As such, providing as much information as possible to self-represented litigants in various formats and languages and assisting them in processing and resolving small claims are necessities. Access to online information, including forms that must be filed, procedural guidelines, checklists, and other information, can greatly enhance a court user's experience, as can instructional videos on processing cases from filing to enforcement of judgments; the availability of court hotlines and centers that users can personally access for assistance; implementation of IT tools such as e-filing and e-payment; and the provision of online remote access to court calendar case information.

Lessons learned

Assessing the need, demand, and options for small claims courts and simplified proceedings. Even though establishing and operating small claims courts can save judicial resources, creating and running them requires financial and human investments. The decision to establish these courts or special proceedings should be based on a careful study of the type of cases that could be assigned to small claims processes to benefit court users and free up court resources for more complex commercial disputes. Also needed are a series of detailed reviews of: (i) the legal framework for processing commercial cases to identify whether the establishment of a small claims court is permissible; (ii) commercial caseload data for at least three–five years (including, for example, filing trends by case types and causes of delays); (iii) existing ADR mechanisms and their effectiveness in resolving smaller cases and those where the parties are not represented by counsel; and (iv) user needs. A determination of the required human and financial resources will also have to be made to identify the initial cost of establishing a small claims court as well as the projected future resources needed to maintain its operations. Based on the results of this extensive review, a decision can be made to establish a stand-alone small claims court, or in the event that the caseload is too small to warrant a court, special proceedings for small

cases can be established instead. Once one of these options is instituted, regular reviews of small claims caseload and an assessment of the effectiveness of the court or special proceedings should be undertaken to ensure that it is meeting the needs of court users as well as to identify areas for improvements.

Having a proper governing legal framework. Like other specialized courts, the key to the success of small claims courts rests on having a clear and detailed legal framework that leaves no room for varying interpretations, confusion, or delays. A solid legal foundation for processing small claims cases should clearly outline the following: 1) the subject matter jurisdiction, which, may be simple, small value contractual matters or other simple case types frequently filed; 2) the monetary jurisdiction, specifying a maximum threshold above which the disputes would have to be filed in regular first instance courts; 3) the court's cost scheme, including filing and other fees required of litigants; 4) the availability of legal aid and the provision of fee waivers or exemptions, as well as the procedures for applying for these mechanisms; 5) the processes and procedures to be used by the parties for completing major case events such as filing and notification as well as the time frames for their completion; 6) the availability of e-filing (in Singapore, for example, despite its availability, parties in small claims cases cannot e-file); 7) if and when parties can be represented by counsel (considering that simple matters tend to pose few legal issues, in many economies, this is not permissible); 8) the use of ADR, the discretionary power of the court to refer cases to ADR, and any requirement that the parties attempt ADR (most often mediation) before proceeding to trial; 9) the effects of reaching a settlement prior to trial and the enforceability of such agreements; 10) evidentiary matters, including how evidence can be presented to the court and at trial; 11) the right to appeal, as in some economies, the judgments of a small claims court/proceedings are final and cannot be appealed, while others allow appeals to higher courts; 12) the issuance of judgments—how and when; and 13) any other matters affecting the processing of a case.

Regularly updating the monetary threshold across all court levels. The monetary threshold for small claims should be regularly reviewed and adjusted to account for trends in case filing by case types, inflation, economic growth, and other local factors. Failing to regularly review the monetary threshold can have a

negative impact on the courts' caseload, efficiency, and allocation of resources. This was evident in Uruguay in 2004, where the threshold was not updated and raised to account for the growth in per capita income. The failure consequently resulted in an increase in workload at the district courts and processing delays, since small commercial cases that would have been resolved quickly by the justice of the peace court as originally intended were being handled by the district court. According to the *Doing Business 2012* report, more than 19 economies have updated the monetary threshold for their courts and proceedings since 2003 (*Doing Business 2012*). In 1996, the United Kingdom tripled the threshold for small claims following a study initiated by Lord Harry Woolf that argued that doing so would enhance access to civil courts (Woolf 1995). The threshold has since been regularly increased to accommodate the needs of the courts and other justice stakeholders.¹⁰

Providing access to information. It is essential to provide access to information in paper and online formats and in various languages, depending on the ethnic diversity of court users. The information provided in well-performing courts is always clear, detailed, and targeted specifically to the small claims court's users and includes: guidelines, procedural rules, copies of the law governing small claims, handbooks on the processing of cases, checklists that help court users to identify if the court has jurisdiction and the type of claim they may file, forms that must be filed with the courts to process a case, brochures explaining court services, legal glossaries, and useful links to helpful organizations. In Singapore, information on small claims courts is provided in Malay, Mandarin Chinese, and Tamil, the most commonly used languages in the courts. The Washington, DC Small Claims Court has an online live chat function that allows any member of the public to submit inquiries and obtain answers in real time. For users who may not be technologically savvy, the court operates a resource center that is open to the public.

Providing ADR services. Providing access to a variety of ADR services throughout the case process and even before a claim is filed (as is the case in Washington, DC) is effective in increasing the settlement rate and reducing a court's caseload. Although mandatory mediation is not a best practice in all cases, it has been effective in

resolving small claims in some jurisdictions. For example, the Washington, DC court's settlement rates in cases going through mediation have ranged from 58 to 73 percent over the past five years. To ensure that parties are provided with various options, the DC court also allows cases to go through arbitration if mediation has failed, provided all parties consent. Although the model may vary from one jurisdiction to another, the success of ADR in resolving small claims cannot be overlooked (See good practice example 4 further below).

Good practice examples

Many countries provide good examples of how small claims can be handled and resolved either by establishing courts or developing simplified proceedings or tracks. A jurisdiction's approach to small claims varies and is generally based on the local context. The examples included below were selected based on the level and ease of services provided and their effectiveness in handling small claims cases and providing access to justice services.

The Danish Small Claims Procedures were established in 2008. Small claims are filed in the district courts, which have jurisdiction over claims in which the disputed amount does not exceed DKK 50,000 (approximately US\$7,500) without interest and cost. The parties may request damages or other types of relief, for example, vacating a lease. Defendants must contest the claim, and if the only issue is to compel the opposing party to fulfill it, the parties are provided with simplified debt recovery procedures that they can use instead. The Danish model for handling small claims represents a unique approach that provides judges with greater authority over how cases are processed while significantly reducing the burden on litigants and generally eliminating their apprehension about going to court or representing themselves.

Unlike in other judiciaries, cases before a district court are decided by one professional judge and two lay judges. These judges are proactive in helping the parties prepare for the case and guiding them while remaining impartial; in fact, the court has a duty to advise the parties on legal issues and assist them with presenting evidence.

¹⁰ For the current monetary threshold, see <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27#27.2>.

This level of judicial involvement helps parties avoid the need for legal representation. Following a review of the pleadings and evidence submitted, the court prepares a record of the case that is then sent to the parties for review. Assuming the parties have nothing to add, the court sets the case for a hearing. Only one hearing is set and the claim is generally resolved, and the issuance of a verdict within 14 days of the hearing makes the process highly efficient. Applying the small claims procedures is also within judges' discretion, and if they deem a case to be too complex, the procedures will not be applied. To further reduce the potential financial burden created by hiring a lawyer, if a party chooses to do so, attorney's fees in small claims are fixed based on the amount of time the lawyer spends on the case.

The Los Angeles County Small Claims Court and the New Zealand Dispute Tribunals are good examples of how a court can provide litigants with services and information that essentially reduce (or eliminate) the need to physically go to court. Unlike many other well-performing courts that have yet to provide online services such as e-filing and e-payments to self-represented parties, both of these courts provide this capacity. In addition, the Los Angeles County Small Claims Court provides litigants with online access to a case calendar that can be searched by case number or location and date; a case summary function allowing parties to obtain case information by searching by case number and court location; and a party locator allowing one to search a case by party name. Similarly, the New Zealand Dispute Tribunal provides for the e-filing of claims, counter-claims, and requests for a hearing as well as online access to information and guidance on how to process a case. The tribunal can also allow defendants who cannot attend a court hearing to request appearance via telephone conference. The websites of both courts also provide good examples of how information and online services should be presented to court users.¹¹

The Singapore Small Claims Tribunals (SSCT). The success of these tribunals is the product of many factors. First, they are governed by a detailed legal framework, the Small Claims Act of 1985 that has been regularly reviewed and amended (more than 10 times since its

enactment).¹² The monetary threshold has been regularly increased to reflect inflation rates, growth in per capita income, and other economic and local economic factors, as well as the rising caseload. Second, the tribunals are focused on promoting early settlement by mandating a consultation (that is, mediation) that is presided over by the tribunal's registrar shortly after the claim is filed. Failure to attend can result in dismissal or the issuance of a default judgment. If no settlement is reached, a hearing before the referee (the tribunal is presided over by referees rather than judges) is scheduled, providing a second opportunity for the parties to settle. Only after these attempts are exhausted will the claim be adjudicated. Third, the tribunals aim to meet the needs of users. Online access is provided to brochures, guidelines, and detailed information on how to proceed with each case process (for example, court fees, aspects to consider before filing a claim, mediation services, how to prepare the case before a hearing, what to do and expect during the hearing, how to enforce the court's order, how to file an appeal and debt recovery plans, and so on) as well as to every form that may be used by litigants.

Unlike other courts, the tribunals go a step further in assisting users by ensuring that all forms are accessible in editable (MS Word) and PDF formats, with a detailed brochure as well as an "Arrow Guide" for each form outlining how each item must be completed. A seven-part video series in Windows Media Video (WMV) format is available online and provides viewers with an overview of the required procedures, from filing to enforcement and appeal. These videos are available in Mandarin, Malay, and Tamil. Also, links to service providers, such as the Legal Aid Bureau, the Law Society of Singapore, the Community Mediation Center, and other potentially useful resources, are included on the website. Certified interpreters in Chinese, Tamil, and Malay are provided, and access to free interpretation services is also available to parties who speak other languages. The tribunals also continuously capture user feedback on all services and assistance tools provided online. This is achieved through a short online user survey that seeks to assess the utility and ease of using the materials and tools provided on the website. Although e-filing has yet to be

11 For more information on the Los Angeles County Small Claims Court, see <http://www.lacourt.org/division/smallclaims/smallclaims.aspx>; on the New Zealand Dispute Tribunal, see <http://www.justice.govt.nz/tribunals/disputes-tribunal>.

12 The Small Claims Act was reviewed and amended in 1992, 1995–98, 2001, 2005, 2008, and 2014–15. The tribunals' case volume has steadily been growing since their establishment in 1985, when 3,788 cases were filed; by 2001, 33,768 cases had been filed.

provided to all users in small claims, the tribunal has worked to enhance remote access to reduce the burden that litigation places on court users in an increasing number of cases. Moreover, since 1998, parties in small claims cases have been able to attend consultations/mediations and hearings via video link and telephone conferencing, while defendants have been allowed to admit claims filed against them via telephone.

The Washington, DC Small Claims Court was created by law in the early 1930s and is governed by a clear and detailed set of rules: the Rule of Procedure for the Small Claims and Conciliation Branch. Much like the Singapore Tribunal, the DC Small Claims Court provides an impressive level of access to detailed information and services to its users. The court is aware of its diverse user population and provides information in multiple languages. Also available are court-wide interpreter services—in person and by telephone—and a list of bilingual employees and their languages (court employees speak more than 20 languages). Access to electronic services is provided, with the exception of the e-filing of claims by self-represented parties, which can only be carried out by lawyers. The “Court Cases Online” system provides remote online access to general case information and all docket entries. The system is searchable by case number or name of parties and includes a summary of cases (type, status, and date filed); names of parties and their attorneys; case schedules (next hearing date scheduled); docket information, including all chronological listings of officially recorded entries in a case; and financial information involving court fees and payment history. In addition, through the court’s website, online access is provided to the court calendar and the Active Warrant

List, a legal glossary, and to information on e-filing and e-service, which is mandatory for those parties represented by counsel. A comprehensive list of all court forms and legal aid providers is also available online.

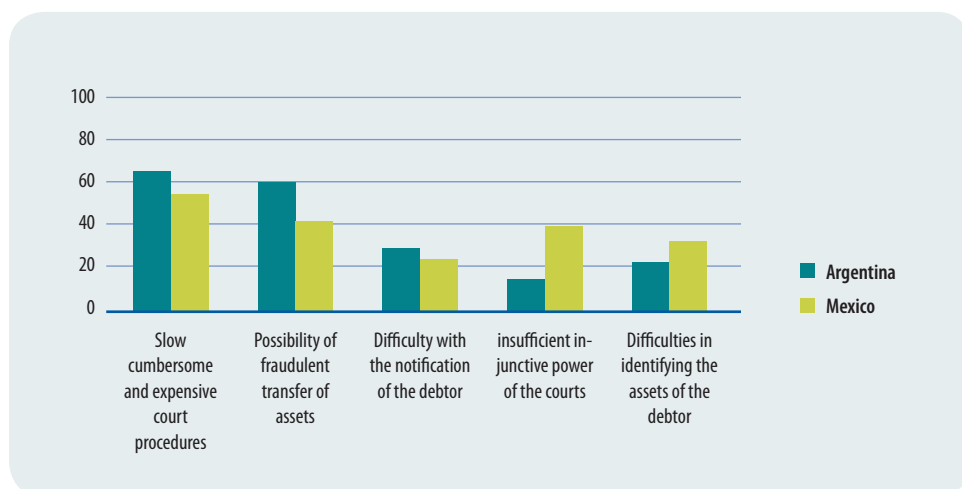
The court also operates the Small Claims Resource Center, which is staffed by attorneys from the Neighborhood Legal Services Program and law students who are supervised by attorneys from surrounding law schools. In terms of access to ADR services, the court uses a multi-door approach that is based on providing and facilitating various ADR options at every stage. This approach has demonstrated a significant level of success; as noted above, since 2011, the settlement rate for mediated cases in small claims has ranged from 58 to 73 percent. Mediation is offered before and after a party files a claim. Also, access to mediation services is provided through the Community Information and Referral Program (CIRP), which has been operational since 1985 and provides mediation free of charge. To ensure easier access to its services, mediation may be provided in person or via telephone. Parties can also access other entities providing dispute-resolution services through a database of over 300 organizations that is maintained by CIRP. In the event that the case is not resolved after filing the claim, all cases are scheduled for mediation, although this is a legally discretionary action for judges. Cases can also be referred to arbitration during the initial scheduling conference with the judge. To do so, both parties must consent, and once the arbitration begins, neither party can withdraw. The arbitrators, who may be selected from a list available at the court, will manage the resolution of the case, which may last up to 120 days. The arbitration decision is final and cannot be appealed.

1.3 AVAILABILITY OF PRETRIAL ATTACHMENT

Prejudgment or pretrial attachment is a statutory provisional remedy available in many countries. This remedy can be requested by a plaintiff/creditor prior to filing a case (for example, in South Korea, France, China, and Chile), at the time of filing (in Abu Dhabi), or thereafter (in Singapore and South Korea) in order to secure a claim or protect a particular property—real, immovable (real estate), or movable (motor vehicles, vessels, aircrafts, and so on)—from being damaged, destroyed, transferred, encumbered, or sold by the

defendant pending a final judgment. By ensuring that property is protected by the court and immobilizing a defendant’s assets pending the final judgment, pretrial attachments protect creditors against fraudulent transfers, which, according to studies in South America, are one of the major obstacles to the fair and effective enforcement of judgments (Henderson et al. 2004, see figure 7). Freezing debtors’ assets can also encourage debtors to settle early, which can significantly reduce litigation costs and reduce the court’s caseload.

FIGURE 7. Most important obstacle to fair and effective enforcement of judgments



Source: Henderson et al. (2004).

According to the *Doing Business 2016* report, the vast majority of economies included in the study provide litigants with the right to request pretrial attachment.¹³ As a statutory remedy, pretrial attachment is governed by the laws in each country, with some variations in how it is implemented and enforced. Despite minor differences across economies, however, pretrial attachments are generally granted upon proof that a lawsuit for damages has been filed or is imminent; an identification of the property that must be protected; and evidence that there is a risk and a need that would warrant the court to protect the property and bring it into custody and away from the control of debtors.

A well-functioning attachment process protects the rights of all parties, can contribute to more effective settlements and court procedures, and greatly improves enforcement effectiveness. Its intent and application by courts and litigants are essentially the same worldwide. There are, however, a number of issues that may significantly affect courts' ability to provide this provisional remedy and thereby effectively enforce judgments, including difficulties associated with locating and protecting assets. In addition, attachment requests have to be well supported to avoid frivolous requests for freezing assets, since doing so can affect firms' ability to continue their business, endanger jobs, and impact a range of business opportunities.

¹³ The *Doing Business* methodology assesses whether plaintiffs can obtain pretrial attachment of the defendant's movable assets if they fear the assets may be moved out of the jurisdiction or otherwise dissipated (World Bank 2016, 153).



Key elements

A review of attachment practices and laws across Europe, South America, the United States, Canada, the United Arab Emirates, Singapore, Hong Kong, South Korea, India, Brunei, and Mongolia indicates that despite some statutory differences (such as the kind of property that can be attached; procedures for obtaining attachments; timing of the request to attach; debtor's right to notice and opportunity to be heard; how assets are attached and by whom; duration of the attachment, if any; and liability for damages to attached property), a number of common and core elements exist in all economies.

Showing a risk to assets. Pretrial attachments are generally premised on the existence of some type of risk to the debtor's assets and a potential impediment to the enforcement of the claim. The extent and type of risk that has to be shown varies between countries.

Mongolian courts, for example, will grant a pretrial attachment request if they believe that not doing so will risk the future enforcement of the court's judgment. Failure to comply with the order results in a legal fine. In Canada (Alberta, British Columbia, Manitoba, Labrador, Newfoundland, Northwest Territories, and a number of other provinces), courts will grant pretrial attachments if they are convinced that there are reasonable grounds to believe that the debtor/defendant may be dealing with the property in a way that will likely and seriously hinder the enforcement of the court's judgment. The court's order will only attach assets to the extent necessary to satisfy the amount of the plaintiff's claim. In the U.S. state of Florida, pretrial attachment is granted upon a show of proof that the defendant is actually removing property out of state or is fraudulently disposing of or hiding the property in order to avoid payment of the debt.¹⁴

¹⁴ Fla. Stat. Section 76.05 (2016), http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0076/Sections/0076.05.html.

In Brunei Darussalam, plaintiffs are required to show under oath that the defendant has the intent to obstruct enforcement (has removed or is about to remove, has concealed or is concealing, or is transferring property to other persons).¹⁵ And Dutch courts require that when attaching immovable assets, securities, or registered shares, the plaintiff must show a well-founded fear of embezzlement and the threat that the debtor will remove or dissipate the assets from the jurisdiction (Mierlo and Hoebeke 2011).

Providing for a notice to defendant/debtor and a right to contest the attachment. As a provisional remedy meant to protect against the disposal of assets, there is usually a sense of urgency when requesting pretrial attachments, and courts will generally grant them quickly and without notice to the defendant or a hearing, with some exceptions in a few of countries. In Hong Kong, pretrial attachments are granted *ex parte*, without notice and immediately in cases of an emergency. Similarly, Irish courts grant it without notice and on the same day in urgent matters, while Indian courts provide notice to the defendant unless they believe that such notice would defeat the purpose of attaching the property. In the Netherlands, a hearing is held only when a judge intends to reject the request; otherwise, an attachment is granted solely on the written information submitted to the court (Mierlo and Hoebeke 2011).

In addition, debtors generally have the right to contest an attachment. The European Commission suggested that “the permissible grounds of objection should differ depending on whether the attachment is granted on the basis of an existing enforceable right or independently of any such.” The Commission also suggested that “where an attachment is granted prior to the commencement of judicial proceedings in the principal action, it will not be upheld if the creditor does not raise the principal action within a specified time period (e.g., one month)” (Commission of the European Communities 2006, 9).

Acknowledging limitations, effect on debtors’ assets, and liability for damages. Although pretrial attachments aim to protect plaintiffs’ right to enforce judgments, debtors are also protected to a certain degree. In most countries, pretrial attachments cannot reach debtors’ basic assets, those that are necessary

for the subsistence of themselves and their family. In Europe, this limitation has also been outlined in the *Good Practice Guide on Enforcement of Judicial Decisions* (CEPEJ 2015). In some countries, such as Chile, the law clearly defines the type of assets that cannot be reached, which include family allowances, social security, welfare contributions, life insurance, work equipment, and set percentages of the salary needed to cover basic living expenses. Dutch law goes further by exempting a debtor’s household items such as beds, linens, and clothes for himself and his family, while in Hong Kong, attachment may be partially lifted based on a request by the debtor and valid grounds that there is a need to pay for business, living, or legal expenses (Mierlo and Hoebeke 2011). In countries where attachments can be granted prior to filing the case, the courts have the authority to entirely lift them for failure to file a lawsuit. In the Netherlands, attachments cease automatically if the case is not initiated or at the expiration of a period of time indicated by the court order. Likewise, attachments in China are lifted if the plaintiff does not file the lawsuit within 30 days.

Debtors are also protected against any damages caused by this process. In many countries, the risk of damage is addressed by requiring claimants to provide security and by holding them liable for damages to debtors’ assets that are unjustifiably suffered as a consequence of the attachment. In Germany and Hong Kong, for example, courts can make the enforcement of an attachment order conditional on the claimant providing security for any potential damages incurred. Requiring security to compensate for wrongfully attaching property is also required in the United States. To further protect against damages to debtors’ assets, some courts impose liability on creditors for damages regardless of fault or upon a showing of bad faith. In Germany, for example, if the attachment order is set aside after being enforced, the claimant is liable for all damages suffered by the debtor as a result of the attachment regardless of fault. In India, however, the claimant is not liable for damages provided the order was sought in good faith; if the court determines the order was sought in bad faith, it can order the payment of damages.

The effect of attachment on the right of creditors over debtors’ assets also varies between jurisdictions. For

¹⁵ See “Brunei Darussalam Country Report,” International Conference on Enforcement of Civil Case Judgment in the Context of Dynamic Regional Economic Integration, July 26–29, 2015, Bangkok, http://www.led.go.th/inter/pdf/2_Brunei.pdf.

instance, in Germany, the seizure of the assets (tangible personal property, real property, or claims) creates an attachment lien in favor of the claimant over the seized property only, and in Mexico, an attachment order creates a preferential right to salaries, alimony payments, tax claims, and previously recorded liens or encumbrances, regardless of these variations. In many other countries, attachment orders do not create a preferential right or lien on the property attached (Australia, Netherlands, Denmark, Canada, India, Ireland, and Hong Kong, for example).

Effecting attachments. The growing use of new communication technologies in the justice field is supporting the securing of attachments via more simplified mechanisms. The computerization of enforcement procedures and the implementation of protective measures can significantly save time, money, and efforts for the parties. Information exchanges by electronic means between the various bodies involved in the attachment process are used primarily in attaching bank accounts, immovable property, and vehicles (this is done, for example, in Armenia, Denmark, Georgia, Portugal, and the Czech Republic) (CEPEJ 2015). The CEPEJ, among others, has encouraged the Council of Europe member states to use electronic methods and other options that do not require physical interim possession to secure an asset, provided that these methods also safeguard the debtor. The latter includes, among other concerns, protecting the confidentiality and integrity of any information passed on.

The process of actually effecting the attachment generally depends on the asset involved. Frequently, there are different procedures in place for bank accounts, movable and immovable property, and perishable goods. In the majority of economies, and with regard to tangible assets, debtors are generally provided with the ability to continue to use the assets during court proceedings unless there is a risk of destruction upon use (CEPEJ 2015). In the Netherlands, once an attachment order is issued, movable assets are effectively attached as soon as the order is served upon the debtor, who is then prohibited from removing the assets from the jurisdiction pending judgment. Where registers for movable property exist (such as for cars, boats, vessels, aircrafts, and so on), attachment is effected once the writ is served on the debtor and entered into the public

registers. In other jurisdictions such as South Korea, creditors must provide a security deposit to the court in the form of a cash deposit, surety bond, or negotiable instrument. To ensure that creditors can enforce a final judgment, courts in several countries (for example, Singapore) may order the sale of the property attached if it is perishable. The proceeds of the sale are then retained by the sheriff or paid into the court pending the outcome of the trial.

As to immovable property, specifically real estate, the overriding method of attaching the property is to enter a notation into real property registers. For example, in Chile and Estonia, attachment of real estate is completed once the order is noted in the respective land registers. In Singapore, immovable property is seized or attached by the sheriff of the Supreme Court or the bailiff of the state courts by registering the court order under the Registration of Deeds Act, the Land Titles Act, or the Land Titles (Strata) Act.¹⁶

Violating attachment orders. Failure to comply with the restrictions outlined in a pretrial attachment order can amount to both a criminal offense and an unlawful tortuous act under civil and criminal law. This principle of punishing debtors is also addressed in Europe by the CEPEJ's *Good Practice Guide on Enforcement of Judicial Decisions*, which provides that appropriate penalties should be imposed to stop or punish debtors for wrongful obstruction and for concealing or damaging assets they continue to use during enforcement proceedings (CEPEJ 2015).

Lessons learned

Identifying debtors' assets. As previously stated, when requesting a pretrial attachment, plaintiffs are generally required to detail the assets/property in question (for example, the laws in the Netherlands require that assets be defined by nature, location, and distinctive marks). Unless the claimant is requesting the attachment of known assets or those that are the subject of the dispute (such as movable property that was involved in a breach of contract), identifying the debtor's assets poses a unique problem to creditors. This issue can also be problematic during the enforcement of a final judgment but to a lesser degree, since enforcement agencies

¹⁶ Singapore State Court Act, Chapter 321 and Supreme Court Debtors Act, Section 17.

and officials are generally entitled to greater access to information than individual creditors. A good practice promoted in the EU and other regions is that at least in the case of bank accounts, the creditor does not have to provide a specific account number (Commission of the European Communities 2006). Nonetheless, locating assets remains a problem. Research from Mexico, Argentina, Peru, and the EU indicated that the inability to locate assets was at the core of enforcement problems (Henderson et al. 2004; Alekand 2008). An assessment conducted by the European Bank for Reconstruction and Development (EBRD) of the Commonwealth of Independent States (CIS) countries, Mongolia, and Georgia also indicated that the greatest problems during enforcement are generally related to identifying debtors' assets (Colman and Bradautanu 2014, see box 4).

In the majority of economies, information on debtors' assets can generally be obtained through two mechanisms: 1) requiring debtors to disclose their assets through an asset declaration process; or 2) accessing records, mainly contained in registers. With regard to the former, compelling debtors to provide testimony as to the whereabouts of the assets is beneficial primarily for the enforcement of the final judgment rather than the pretrial attachment phase. In Estonia, where enforcement is carried out by bailiffs, the Enforcement Code provides them with the authority to demand that debtors submit the oral and written information

BOX 4.
Most Problematic Dimensions of Enforcement in Descending Order

- Searching for assets
- Sale of assets
- Speed of enforcement
- Supervision
- Seizure of assets
- Cost of enforcement

Source: Colman and Bradautanu (2014).
 Note: Information based on the Enforcement Agents Assessment conducted in 2013 by EBRD.

necessary for enforcement proceedings.¹⁷ In Germany, debtors are required to attend a hearing or provide information regarding their assets if enforcement has been unsuccessful; failure to do so is punishable by detention (Henderson et al. 2004). To support creditors, the German courts also maintain registers of entities and individuals who have pending actions against them, have failed to comply with court orders, or are in bankruptcy. These registers are accessible to potential creditors and assist them in determining the creditworthiness of potential debtors. They also serve to urge debtors to comply with court orders and have their names removed

FIGURE 8. Registers and databases most commonly accessed by enforcement agents in searching for assets

Cadastre of immovable property	Visa and passport office
Register of legal entities/enterprises	Register of pledges of movable property
Tax service	Central depository/registers of shareholders
Register of citizen	Commercial banks databases
Road police	Notaries' databases
Customs authority	Mining register (common only in Mongolia)
National/social insurance service	

Source: Colman and Bradautanu (2014).

Note: Information based on the Enforcement Agents Assessment conducted in 2013 by EBRD.

¹⁷ Estonia Enforcement Code, Section 26, <https://www.riigiteataja.ee/en/eli/516092014002/consolide>, and Bailiffs Act, <https://www.riigiteataja.ee/en/tolge/pdf/530102013002>.

from the register. Other countries, such as the United Kingdom, Greece, Spain, and Portugal, also require debtors to disclose assets, though the laws in Spain and Portugal do so only to the extent necessary to satisfy the claim (Hess 2004).

The second and most commonly used mechanism to identify debtors' assets is to access publicly available information contained in registers. Because creditors at the pretrial attachment stage do not yet have an enforceable order and as such cannot rely on the assistance of enforcement agencies or officials, they must rely on publicly available information, most often in registers. According to the EBRD assessment conducted in 2013, registers are an invaluable source of information for creditors and enforcement agencies (Colman and Bradautanu 2014, see figure 8). This right to access information on debtors' assets is also recommended in the *Guidelines for a Better Implementation of the Existing Council of Europe's Recommendations on Enforcement* (CEPEJ 2009).

The most commonly used registers include the following:

- ▶ **Commercial or business registers** generally include information on firms, including legal status, name or company, date of establishment, company capital, sector activity, corporate bodies, and number of employees, to name a few examples. In many countries, these registers are accessible online. In some countries such as the United Kingdom, this information is centralized in a number of large national registers (three), while in others such as Germany, there are numerous district-level registers (approximately 400) that are managed by local courts. Despite their utility, the reliability of the information contained in registers may be an issue, since in some countries, the information is not verified before being entered (for example, in Finland, Ireland, Netherlands, and the United Kingdom) or is not accessible to creditors (such as in Portugal) (Hess 2004).
- ▶ **Public property registers** generally include land and other real property registers that provide information on real property ownership and title.

However, their utility to creditors is undermined if registration of title is not required. According to studies conducted in Latin America, in countries such as Peru, where land registries are incomplete and not determinative of legal ownership, creditors encounter difficulties when attempting to identify ownership for purposes of attaching property. In Mexico and Argentina, however, where land registers are well developed and have the full faith and credit of the courts, creditors are in a better position to identify and seize property and satisfy judgments (Henderson et al. 2004). In Europe, computerizing registers and making them available online have provided greater access to creditors. In countries such as Croatia, where there are cadastral and land registries, providing online access and linking both registries have increased access and reduced creditor time identifying ownership and real property structures (Madir 2011).¹⁸ Additional registers for movable property that may be accessible to creditors include those for motor vehicles, aircrafts and vessels. Automation of these various registers has been shown to improve accessibility, which is the case in Armenia, where requests for information to all state property registers can be made online (Colman and Bradautanu 2014).

- ▶ **Insolvency registers** in some countries (such as Denmark, Sweden, Portugal, Spain, France, Greece, and the United Kingdom) are maintained and provide invaluable information on debtors' financial status. These registers are useful in preventing creditors from seeking pretrial attachment of encumbered property and incurring unnecessary costs.

To ensure that creditors and enforcement agencies have access to information on debtors' assets, registration of immovable and movable property should be legally required. The information should be verified before being entered into the registers and online access provided. This, together with linking all registers electronically, can significantly reduce the time for debtors and enforcement agencies to request and obtain information and can help ensure that it is up to date and reliable.

18 Land registers contain the records of titles and deeds on land, while cadastres contain information about land properties and their boundaries within a certain area.

Accounting for the informal economy. In many low-income and even some middle-income countries, the informal sector represents a significant portion of the overall economy. According to a study conducted by the International Labour Organization (ILO) in 14 Latin American and Caribbean countries, approximately 46.8 percent of jobs in those regions are in the informal economy (ILO 2014). In the Europe and Central Asia region, the informal economy represents approximately 36 percent of the national GDP on average, with a marked difference between EU (18.5 percent) and non-EU (from 15 to 30 percent) countries (ILO 2015). The informal economy presents many challenges for creditors and enforcement agencies alike. Informality in business ownership, registration, and employment practices (such as payment of wages) makes debtors invisible, rendering it nearly impossible for creditors to locate and seize property.

Identifying early on what assets, if any, exist and how debtors operate may reduce the risk associated with transacting with informal business partners. For countries with a sizable informal economy, a number of measures may work to reduce the associated risks, such as requiring that debtors disclose assets, limiting the ability of businesses and individuals to make deals without a formal contract, providing simple contract templates that include effective enforcement clauses and repossession options, and requiring state registration and notarization of these contracts, at least for higher-value assets.

Connecting agencies. Developing electronic data exchange tools with banks and other institutions to access holdings and place court-ordered liens can significantly increase the efficiency of the attachment process. In some jurisdictions, asset searches are conducted by an exchange of letters or e-mail messages with relevant agencies: banks, the commercial register, the real property register, traffic department (vehicles), stock accounts, or other business interests. Clearly, an exchange of e-mail messages is more efficient than the traditional letter, but direct electronic data exchanges (such as the ability to remotely access asset registers and execute a certain search of property) are even more efficient and effective. To have this capacity, enforcement agencies should develop bilateral data exchange agreements with other relevant agencies and institutions to access motor vehicle title systems, commercial or land registers, tax and insolvency registers, and so forth. Linking these registries and entities and providing for

online data exchange can reduce the time it takes to locate assets and increase transparency (for example, the Croatia Organized Land Project linked the country's real estate registries with its cadaster system and provided the information online) (Madir 2011; Kontrec 2012). Data exchange agreements can also serve to prevent fraudulent or unauthorized access, such as access to sensitive data by employees for nonbusiness purposes. With regard to electronic access to data held by private agencies such as bank accounts, developing data exchange agreements is likely more problematic, due to the large number of companies/banks and the complexity of negotiating individual agreements with each private institution.

Protecting property that is impounded in place. In most countries, the property attached remains in the custody of the debtor (possessor as custodian) and some form of protection is in place to ensure the property is neither tampered with nor sold or hidden. In the Emirate of Abu Dhabi, following older traditions, the property usually remains in the custody of the debtor and, at the request of the debtor, a guard can be assigned to protect it (Gramckow, Ebeid, Melis and Sherman 2014). In other cases, the property may be seized and impounded in a secure warehouse (see below). Both options are risky and costly for preserving assets. A relatively safe and more cost-effective option is to introduce modern techniques of attachment, such as the above mentioned securing of titles in property registries, temporary custody of the title or applying devices that make certain types of property or equipment inoperable (for example, ignition or steering wheel locks that effectively make motor vehicles unusable). In most countries the courts can impose criminal penalties for moving and/or damaging the property. In Germany, enforcement agents will assess and document the property and affix an official seal to property impounded in place, indicating court attachment. Simply tampering with the seal alone triggers a criminal charge. When introducing any such practices, however, enforcement agencies and/or courts should initially evaluate asset loss history and identify the associated costs with implementing any of the various options available within the context of the jurisdiction.

Protecting seized property. Internationally, only a few jurisdictions authorize enforcement agencies or officials (private or public) to remove, physically take possession, and impound property involved in commercial disputes

to a secure location (such as a warehouse or storage facility) in order to reduce the risk of loss, maintain control, and preserve property value. One example is the judiciary in the Emirate of Abu Dhabi, where the courts carry out enforcement and where, in 2016, the court built a warehouse to securely store seized property pending a final judgment. Such warehouses or storage facilities must also provide for the security and preservation of the seized property until it may be sold pursuant to a judgment, and enforcement entities must have clear guidelines and procedures as well as the necessary expertise to deal with access to the property and its maintenance and/or use. Although many well-developed and comprehensive guidelines have been produced by law enforcement agencies for property seized under criminal proceedings, the same principles in protecting property apply also to *all* civil and commercial enforcement processes. Such guidelines should ideally be part of a process and procedure manual for the court enforcement agency and should address property tracking, inventory management, maintenance, and proper staffing (Otto 2011). Tagging the seized property items and conducting a regular inventory should also be addressed in procedural manuals.¹⁹ Once developed, the guidelines should be regularly reviewed and amended to reflect changing needs or legal requirements and also be made widely available to all those responsible for seized property.

Good practice examples

The Netherlands. As in most other jurisdictions, prejudgment attachment is governed by the Code of Civil Procedures, which allows a creditor to attach a debtor's assets, including: assets in the possession of a debtor; assets held by third parties (such as funds held by a Dutch bank or under another party owing money to the debtor); shares in a Dutch company; and any vessels, airplanes, or real estate located in the Netherlands. Parties are provided with this right even if they are not domiciled in the country, but they must initially obtain permission by applying with the court president of the competent district court. Obtaining a prejudgment attachment can also be useful for a creditor who does not otherwise have jurisdiction in that, once granted, the order will establish jurisdiction within the district court

where the assets are located. Once filed, the applications are generally granted on the same day, unless there is a *prima facie* case that prejudgment attachment is invalid or disproportionate. Because the goal is to secure assets pending the outcome of a dispute, Dutch law allows it in both judicial cases as well as those in arbitration. If the claim in the main proceedings is granted, the prejudgment attachment is automatically converted into an executory attachment and the assets attached will be used to recover on the claim. If the party does not prevail, then he or she will be liable for any damages that may have been caused to the assets as a result of the attachment. In addition, prejudgment attachments can be partially lifted if the debtor offers alternative security for the payment of the claim (such as by providing a bank guarantee issued by a recognized bank) or can apply for a summary proceeding and request that it be removed. At that point, the president of the district court will lift it unless the creditor's claim is evidently invalid, the attachment is disproportionate, or the debtor offers alternative security.

Singapore state courts. Creditors in Singapore are entitled to apply for a prejudgment attachment (also called Mareva Injunction or freezing order) to prevent debtors and third parties (such as banks) from destroying, transferring, or handling the debtors' assets pending the outcome of the dispute. To obtain the order, creditors have to provide evidence that they have an arguable case, including that the defendant has assets in Singapore and there is a real risk to these assets if the injunction is not granted. The creditor is not required to provide security. When the order is granted it does not change proprietary rights in the assets seized or provide an enforcement advantage over other creditors. A creditor may be required to pay for damages caused by the order. In addition, search orders can be granted to 1) prevent defendants from destroying assets in their own possession, including orders that require debtors to allow the plaintiff to enter his premises; 2) search for goods or documents that belong to the plaintiff or are relevant to the claim and remove, inspect, or make copies thereof; and 3) compel the disclosure of names and addresses of suppliers or customers. These orders are customarily used in actions involving infringement of intellectual property rights and abuse of confidential information. In order to be granted a search order or

¹⁹ For an example of this kind of procedures manual, see the website of the Burbank (California) Police Department, http://home.iape.org/resourcesPages/IAPE_Downloads/Property_Manuals/BURBANK-CA_Property_Manual_3-3-06.pdf.

Mareva Injunction, creditors are specifically required to submit an affidavit in support of the application that includes the following information as stated in the Singapore State Court Practice Directions:

- a) Reason(s) the application is taken out on an *ex parte* basis, including whether the applicant believes that there is a risk of dissipation of assets, destruction of evidence or any other prejudicial conduct;
- b) Urgency of the application (if applicable), including whether there is any particular event that may trigger the dissipation of assets, destruction of evidence or any other prejudicial conduct;
- c) Factual basis for the application, including the basis of any belief that there will be dissipation of assets, destruction of evidence or any other prejudicial conduct, whether there have been any past incidents of the opponent dissipating assets, destroying evidence or engaging in any other prejudicial conduct, and whether there is any evidence of dishonesty or bad faith of the opponent;
- d) Factual basis for any reasonable defenses that may be relied on by the opponent;
- e) Whether the applicant is aware of any issues relating to jurisdiction, *forum non conveniens* or service out of jurisdiction, and, if so, whether any application relating to these issues has been or will be made;
- f) An undertaking to pay for losses that may be caused to the opponent or other persons by the granting of the orders sought, stating what assets are available to meet that undertaking and to whom the assets belong; and
- g) Any other material facts that the Court should be aware of. (Singapore State Courts n.d., part IV).

In addition, litigants have other remedies, including filing for: 1) an application for interlocutory injunction, which can be done at any stage after filing a request that the court require the opposing party to either take or refrain from taking a certain action until the trial date; or 2) an application for a so-called “Anton Piller order” to request that the court specifically prohibit the opposing party from destroying incriminating evidence.

1.4 CRITERIA USED TO ASSIGN JUDGES

Background

For judicial systems to be trusted and seen as impartial, it is important to minimize the impact of individual judges’ personalities, ideology, opinions, and preferences on their decisions. Although the law itself, as well as high court precedents and appeals structures, outline, guide, and limit judicial discretion to some extent, individual judges have the authority to make decisions within this scope of discretion to express their individual, rule-based, and independent opinion of a case. This naturally leads to some variation in judicial decisions, and such variations within margins that reflect different shades of societal trends are desired and important. As a result, the selection of a judge or composition of a multi-panel court influences the outcome of a case, and it is vital for litigants to have confidence that they have or have not lost because of the decision to assign their case to a particular judge or panel. It is equally important for the

protection of judges’ independence that assignments are made by random systems that apply clear, objective, and random assignment criteria that do not allow for manipulations.

The random assignment of cases, based on clearly defined and published objective criteria, to ensure, to the extent possible, the neutral assignment of judges to cases is therefore internationally recognized as a best practice for courts (Eisenberg, Fisher, and Rosenzvi 2012). At the same time, neutral case assignment requires additional objective reassignment criteria: since options need to be available to ensure that cases are not allocated to judges who have, or appear to have, an interest in a case or who may appear otherwise prejudiced, or to reassign a case if a judge becomes sick, leaves the court, or is already overburdened. In those

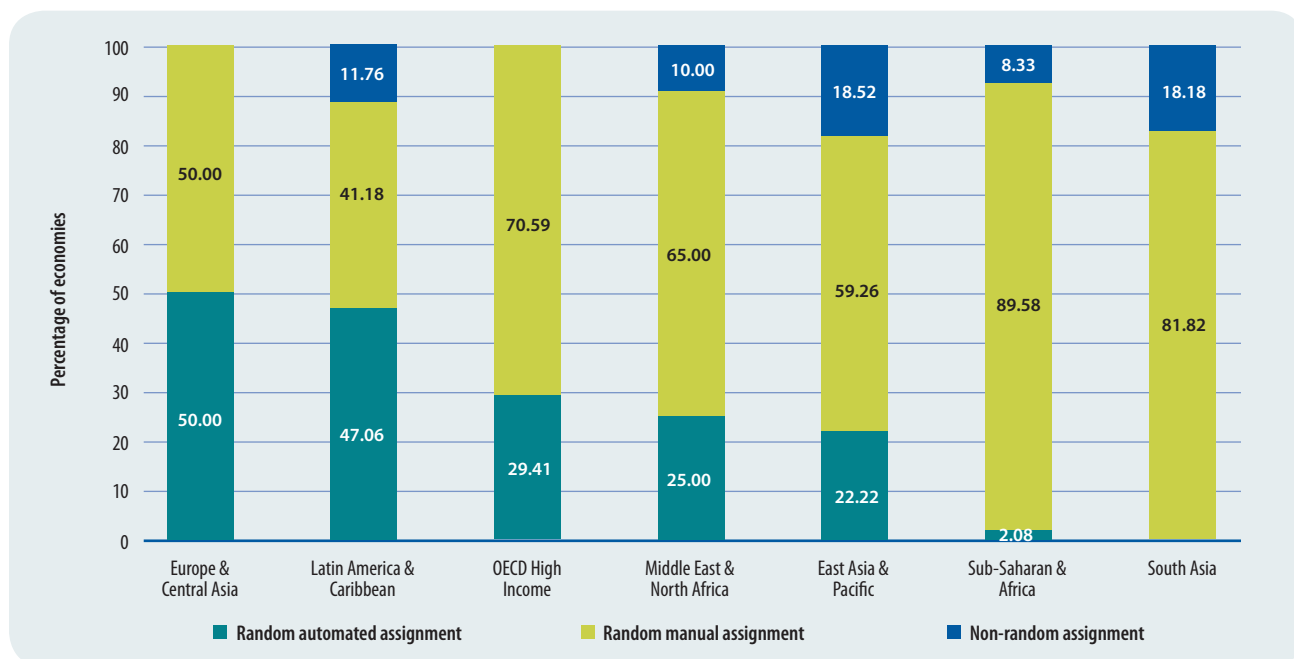
instances, objective and transparent rules have to be available to reallocate a case to another judge (Fabri and Langbroek 2007). Such reassignment, combined with the requirement that it is tracked, requires a justification with a note on who made the reassignment, since even the best automated random assignment system will still require occasional manual adjustments in exceptional situations.

Random case assignment has been employed for several decades using manual processes, including by blind drawing cases on a weekly or monthly basis. The more complex a court's organization and structure become and the more specialization that is introduced, the more difficult it is to rely on random manual assignments and the more rules for variation in randomization have to be created. Including a rule-based randomized assignment process in a CMS addresses this problem. Although almost all economies (172) included in the *Doing Business 2016* report provide for the random assignment of cases, only 48 have a fully automated

process (World Bank 2016).²⁰ There are no economies in which assignment of cases is not random in the OECD high-income and Europe and Central Asia regions. Nearly half of the economies in the Latin America and the Caribbean and Europe and Central Asia regions provide for the automated random assignment of cases. Latin America and the Caribbean is also the only region in which automated random assignment is more frequent than the manual process. All regions, except South Asia, have at least one economy in which assignment is done randomly through an automated process (see figure 9).

Random assignment is not just an important way to ensure objectivity in case allocation and reassure the public, it is also critical for limiting opportunities for parties and sources inside the court to manipulate the process. The practice of what is called "judge shopping," that is, a party's efforts to get his or her case assigned to a judge who may be perceived to make a more favorable decision, not only provides unfair advantage to those who know the judges well, it also makes

FIGURE 9. Judicial assignment method by region



Source: *Doing Business* database, <http://www.doingbusiness.org/data>.

Note: The percentages shown in the figure are based on data for 189 economies, though for economies in which *Doing Business* collects data for two cities, the data for the two cities are considered separately.

20 The *Doing Business* methodology assesses whether cases are assigned randomly and automatically to judges throughout the competent court (World Bank 2016, 153).

managing workloads across the court difficult. Where judge shopping is still possible it greatly contributes to the perception that judges and the court in general are corrupt or at least do not deal fairly with all parties. Older, generally objective assignment systems that allocated cases to judges depending on the weekday a case is filed on, the first initial of the plaintiff, for example were easy to manipulate and did not provide for even workload distribution. Particularly when a court clerk, registrar, or chief judge is responsible for making case assignments, and when assignment rules are vague, as was the case in most courts a few decades ago (and still is the case in some countries), these individuals are often seen as susceptible to favoritism and corruption. Even if this is not the case, the significant administrative burden

of this duty limits their time to address more important court matters and exposes them to significant pressures from parties to make certain assignments—often on a daily basis. Random case assignment rules prevent parties in most cases from judge shopping, although it does not always eliminate it. This might occur, for example, when multiple actions are filed in a case arising out of the same facts and can then be consolidated in a courtroom of a judge viewed as the most favorable (see *United States v. Pearson*, 203 F.3d 1243, 1264 (10th Cir. 2000) in Brown 2010). Interestingly, although most federal district courts in the United States (but not the federal courts of appeals) have a system for ensuring the random assignment of cases, this principle is not yet written into U.S. federal law.



Key elements

Clear and transparent random assignment rules with objective criteria for reassignments and exceptions.

Randomness as the underlining rule for assigning cases in itself already requires that specific criteria for assignment by case type within a particular court are established. In addition, courts have to define clear criteria for the reassignment of cases in justified situations, such as conflict of interest, illness, or other reasons, including workload issues. These reassignments should be registered manually or in an automated case assignment system to create a record and develop a database to track reassignment reasons. When manual processes are applied, courts can include a document

issued by the judge, clerk, or registrar who is reassigning the case that explains the reasons for the change and the legal arguments that are being considered. To increase the transparency and legality of the process, some courts have established that decisions regarding the reassignment of a case can be challenged by the parties.

Studies and experiences in the US and other countries have shown that well designed random assignment systems that can differentiate between less and more demanding case types, be they manual or automated, over time will typically result in an even workload among

judges in a particular court. Occasionally, however, as David Steelman notes, “it can cause problems that may require management attention. A court will typically need to have some adjustment mechanism to deal with such problems as (a) having a number of difficult cases assigned at the same time to one judge, who may thereby be faced with lengthy trials and need assistance with a short-term work overload; (b) dealing with extended judge illness or absence from the bench; (c) seeing that related cases are assigned to the same judge if they are suitable for such consolidation” (Steelman 2003, 2). To deal with such workload issues, effective case assignment systems include workload indicators (such as the number of defendants, the number of plaintiffs, the type of case, the amount of money in dispute) to predict the complexity and related workload requirements of a case. These indicators should be determined based on court data and the experiences at a particular court and should also differentiate by the type of cases they handle (see box 5).

Publication of assignment criteria and objection rules. One of the underlying reasons for random case assignment is party and public concern over lack of integrity in the assignment process. It is therefore essential to publish the established criteria for random assignment, the rules governing the authorization and rationale of assignment changes, the persons authorized to request and approve them, and the procedures for adjustment requests and complaints. Moreover, all of these rules, as well as the process by which they were derived, their justification, who was involved in their development, the reasons for any needed changes, and how and when to issue a complaint against case assignments, should also be published, ideally on a court’s website. As mentioned above, including the private bar association and key court user groups in a case assignment rules committee will also be helpful, not only in creating an understanding but also in helping the court respond to future information needs via public education or other events in collaboration with them.

Automated assignments as part of a case management system. As already indicated, random case assignments can in general be easily managed manually, but the more case types that are involved, the more complex a court’s own structure is (for example, multiple specialized benches, courts, locations, and so on), and the more complex the random assignment rules and exceptions have to be, the more helpful automation

BOX 5.

Civil Case Assignment Rules, U.S. District Court of Vermont

(a) Case assignment. Civil cases are assigned blindly and at random by the clerk using an automated system. The system supports the following:

- (1) Proportionate, random, and blind assignment of cases;
- (2) An approximate equal distribution of newly filed cases among the active judges of the court and a fixed percentage to the senior judges and magistrate judge as directed by the chief judge and as approved by a majority vote of the district judges. Actions may also be referred to the magistrate judge.
- (3) A high level of security to reasonably avoid prediction of the results of any case assignment;
- (4) A system of credits and debits to adjust for reassignments of cases among and between judges; and
- (5) A record of all assignments and reassignments made.

(b) Judge assignment. Civil cases are assigned and distributed among the judges based on percentages reflecting each judge’s approximate civil workload:

- Chief Judge 26%
- District Judge 26%
- Senior District Judge 22%
- Senior District Judge 19%
- Magistrate 7%

Source: Adjusted from U.S. District Court (2014a).

of random assignment becomes. Furthermore, and of critical importance, automation of the random assignment process means that it is the system that makes the assignment and not a court clerk, registrar, or chief judge, and if the system is well designed, any changes are documented within it. This not only means that opportunities to unduly change the assignment are significantly reduced it means that those previously responsible for these decisions, can now point to the system and assignment rules when parties want to approach them with a request to assign a case to a particular judge. Considering that those previously responsible for case assignment, be they presiding judges, registrars or court clerks often spent many hour

tending to litigants and their lawyers seeking a particular assignment decision, introducing firm rules and a system for random assignment frees up their time to handle other pressing court matters or deciding cases. Furthermore, and not to be underestimate, it relieves them of the pressures parties place on them often on a daily basis. Considering that an increasing number of courts today are supported by some type of automated CMS, including or adding random case assignment based on pre-established rules with change-tracking options is an option that should not be overlooked (see box 6).

Lessons learned

Inclusive evidence-based development and revision of assignment rules. Random assignment rules have to ensure that the assignment of a particular case to a judge, while based on clear and transparent criteria, is not predictable and cannot be unjustifiably influenced, and also provide for a relatively even workload distribution between judges and panels. At the same time, exception and reassignment rules to accommodate conflict of interest situations, changes in the availability of judges, and emergency circumstances have to be in place.

In order to develop a meaningful random assignment scheme, courts should have sufficient case volume and workload data available. There should also be a determination if process reengineering plans are under way (or are planned for) and how they might influence workloads and related case assignment percentages. The input and active participation of the impacted judges and other court staff are as essential for meaningful rule setting as are the related case data. Several courts have created case assignment working groups that not only inform the rule development process but regularly monitor implementation, respond to internal and external concerns, and suggest revisions as lessons are learned or circumstances change. Such reviews also help the court identify unusual patterns that can indicate if plaintiffs are “judge shopping” or if there is unlawful manipulation by internal or external parties. Suggestions for revisions made by these groups are helpful in identifying security risks and also opportunities to improve the way cases are being distributed in the court. The most effective working groups also consult with representatives of the private bar association and other court user groups and counterparts to reflect their needs and concerns, particularly for developing public information material and events and effective feedback

BOX 6.

Automated Random Assignment of Cases in Malaysia

The case management system implemented in incremental phases in the courts in Malaysia today provides for an integrated system for the management of cases. Linked to an e-filing system, it creates a detailed record of the case, allows the courts to manage schedules, centralizes case assignments, and provides for access to case minutes, case lists, and court statistics. This combination supports not only the random assignment of cases but any adjustments that have to be made and also creates the information needed to inform further adjustment processes.

Source: Zakaria (2013).

and complaint processes to ensure that the assignment rules are transparent, understood, and appreciated by court users.

Rule-based assignment exceptions. No matter how well informed and evidence based the development of random assignment rules in a particular court environment has been, case assignment systems have generally not been able to reflect changes in the workloads of a court or individual judge over time. The nature of litigation in any country means that though some assumptions can be made as to the likelihood that certain case types will settle or progress to further stages, assumptions that can be reflected in workload estimates, the actual current workload of a judge can be significantly lower or greater than the assumed average in a particular week, month, quarter, or, in some cases, even year. Random case assignment rules thus have to provide for meaningful options to adjust to workload fluctuations. In response, some courts in the United States, for example, have established a scheme of so-called “debits and credits,” that is, rule-based options to raise a flag when cases assigned to them have been withdrawn or additional cases have been added to their schedule. Although well-advanced CMSs help with substantiating such determinations and provide evidence for reassignment schemes, these kinds of debit and credit schemes also consider the complexity of cases added, settled, or withdrawn, a feature that, to date, is difficult to reflect in automated systems.

Management and tracking of party requests for changes in case assignments.

One of the most common ways for plaintiffs to engage in “judge shopping” in courts that apply random assignment systems is to argue that a new case they are filing is related to other cases handled by a particular judge, and that the new case needs to be assigned to the same judge. To avoid this scenario, courts have created different rules and mechanisms to decide whether a case must be assigned to a particular judge outside the general random assignment system. In some countries the civil procedures code or court rules provide clear guidance and when and how cases can be and should be joined. Some courts in US jurisdictions where such rules are not in place, not detailed enough or not may not be fully understood by the parties also request, as a general rule, formal and detailed explanations from the plaintiffs of why they believe that the case must be handled by a particular judge. Independent of the availability of clear reassignment rules, a general court rule to require such written request is helpful for the court to understand party concerns and to swart unjustified future challenges and appeals. Based on these used and party explanations, courts—ideally using a panel of judges—make a decision on reassignment, track this decision and include it in its annual count of reassignment decisions—and ideally also published in an annual report.

To enhance the transparency of these procedures, some courts have decided that the decision taken by a judge or panel of judges regarding the plaintiff’s request can be challenged. In this sense, courts are creating more steps to ensure that the assignment of cases observes the established rules and that the public decisions made by judges can be contested. In addition, some courts have created sanctions to deter “judge shopping.” If courts determine that lawyers are manipulating the way cases are assigned (for example, by claiming that a new lawsuit is related to ongoing cases or by presenting similar lawsuits and withdrawing them once they have the desired judge), they can sanction the lawyer for misconduct. Some courts have decided to report these faults to the bar associations to enable them to impose the corresponding disciplinary measures. However, there is no empirical evidence of whether these sanctions reduce or deter “judge shopping.”

Good practice examples

FYR Macedonia courts. The courts in the FYR Macedonia’s implemented an Automated Court Case Management Information System (ACCMIS) that provides for random assignment. For this process, the ACCMIS includes criteria such as the type of judge, the urgency or priority of the case (especially for criminal litigation), the case type, the number of cases assigned to each judge (to ensure a balanced distribution of the workload), and the judges who are on duty. With these criteria, clerks enter the information in the ACCMIS and the system automatically and randomly assigns the judge who will be in charge of handling the case.²¹

Toledo Municipal Courts (Ohio, United States). The Toledo municipal courts system implemented its Case Assignment Tracking System (CATS) with a feature to assign cases randomly (criminal, traffic, and civil cases). This system also includes the option of managing the court calendar according to the availability of the parties in the scheduling of pretrial hearings. The system is managed by the court’s Assignment Office, which is in charge of registering the information and assigning the cases to the judges. According to the website of the Northwest Ohio Regional Information System,

A calendar is maintained for each judge to manage and organize court events. The availability of the judge, police officer, and attorneys are [sic] confirmed prior to scheduling a court date. A case consolidation feature combines an offender’s multiple cases for assignment to a single judge, reducing the number of required court appearances. As scheduling becomes more efficient, the number of criminal and civil cases pending beyond time guidelines is reduced.

CATS has maximized the efficiency of the Toledo Municipal Court’s Assignment Office. The primary responsibility of the Assignment Office is random judge assignment for criminal, traffic and civil cases as well as scheduling pretrial, trials and other hearings. In order to improve the efficiency of the court, single judge assignment was introduced for criminal and traffic cases. When a defendant is put on probation, a link is created between the judge and the defendant

21 For more information on the ACCMIS, see Edusoft, “ACCMIS: Technical Documentation, Business Processes And Process Model Of Automated Court Case Management Information System” (Washington, DC: USAID, 2008), http://pdf.usaid.gov/pdf_docs/pnaeb574.pdf.

for the length of probation. For any new cases where the defendant has entered a plea of not guilty, the defendant will be assigned to the 'Link Judge'. If a 'Link Judge' does not exist for the defendant, but the defendant has other pending cases assigned to a judge, the new case will be assigned to the judge with the oldest pending case. Otherwise, a random judge draw occurs to determine the judge assignment. All housing cases are assigned to the housing judge. The 'Link Judge' or single judge assignment has provided a more effective and efficient case management for the offenders, court staff, attorneys and judges.²²

Moreover, the *Guidelines for Assignment of Judges* of the Ohio Supreme Court stipulate that, "The Ohio Constitution and the Revised Code vest the Chief Justice of the Supreme Court with the authority to make temporary assignments of judges to serve in any court in the state as established by law in whatever circumstances the Chief Justice deems appropriate."²³

22 See Northwest Ohio Regional Information Center, 2016, <http://www.noris.org/courts/case-assignment>.

23 The guidelines can be found at <http://www.supremecourt.ohio.gov/JCS/judicialAssignment/judgeAssignGuide.pdf>.

2

Good Practice Area: Case Management

Case management

Regulations setting time standards for key court events

Regulations on adjournments and continuances

Availability of performance measurement mechanisms

Use of pretrial conference

Availability of an electronic case management system

The second component assessed by the *Doing Business* QJPI is related to the case management practices used in processing commercial cases. The five good practice areas that are included in the index are: regulations setting time standards for key court events; regulations on adjournments and continuances; availability of performance measurement mechanisms; use of pretrial conferences; and availability of an electronic CMS. These practices are proven to contribute to effectively and efficiently managing cases and ultimately to improving investor confidence in the courts. Case management generally refers to a set of principles and techniques intended to ensure the timely and organized flow of cases through the court from initial filing through disposition (Gramckow and Nussenblatt 2013). It enhances processing efficiency, promotes early court control of cases, and provides judges with the tools that may be used to dispose of a case efficiently. When well implemented, case management techniques can enhance recordkeeping, reduce delays and case backlogs, and provide information to support the strategic allocation of time and resources—all of which encourage generally better services from courts. They can also improve the predictability of court events, which can in turn increase public trust, reduce opportunities for corruption, and enhance the transparency of court administration. The five areas included in the index represent some but not all of the many case management techniques that have been developed and implemented in courts over time. The core elements of case management include ensuring early court intervention, establishing meaningful time frames for carrying out case event and disposition, instituting early out options for settlements, implementing clear adjournments rules, and establishing differentiated CMSs..

2.1 REGULATIONS SETTING TIME STANDARDS FOR KEY COURT EVENTS

Background

As one of the core elements of case management, time standards help courts to closely manage and monitor the processing of cases from filing to conclusion and measure and assess court performance. Specifically, time standards set defined targets for the completion of key process steps and events, establish overall goals that judges and lawyers must meet, create the expectation of what constitutes timeliness, and are essential to eliminating and avoiding backlogs. They also enable judges to exercise early and continuous control over

the case process, which allows them to better identify bottlenecks and devise swift remedial actions. Studies in the United States and other countries have shown that early court control and the use of time standards can reduce case processing times. Depending on whether the standards apply to the entire case process or individual steps or both, they help in measuring the performance of courts as a whole as well at the individual court and judge level.

BOX 7.**U.S. Model Time Standards for State Trial Courts**

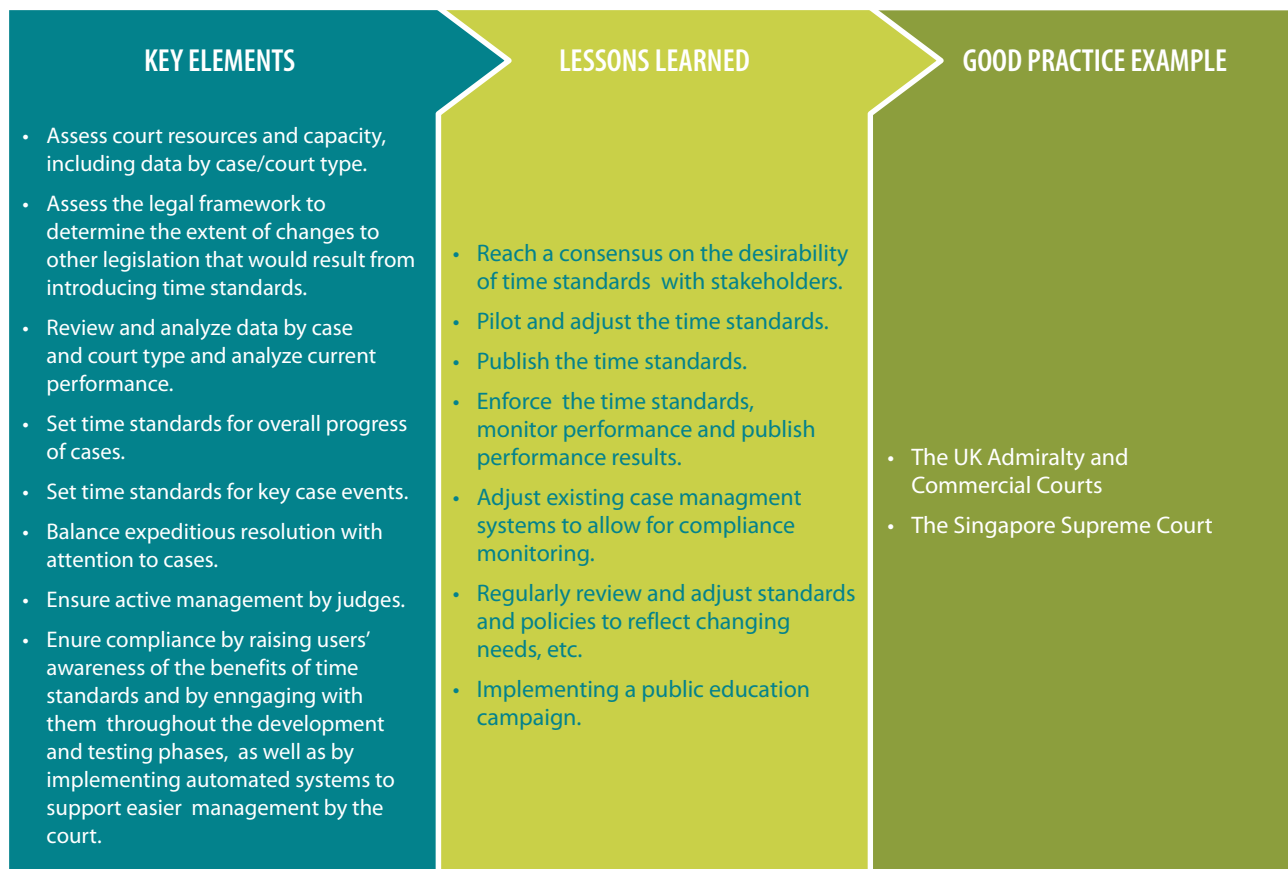
- Civil Cases** ▶ **General Civil:**
- 90% resolved within 180 days
 - 97% within 365 days
 - 98% within 540 days
- ▶ **Summary Matters:**
- 75% within 60 day
 - 90% within 90 days
 - 98% within 180 days

Source: Van Duizend, Steelman, and Suskin (2011).

Such standards also reflect a commitment by the courts to complete cases promptly, and they should therefore also reflect what court users' regard as a reasonable time for the resolution of case. Their development may at times be driven and guided by national and government-wide policies to increase court efficiency, as was the case in Estonia, where the government established goals for courts for resolving cases (CEPEJ 2015). National standards for case processing have also been developed in Norway and Sweden. In the latter country, the government sets yearly court targets after extensive discussions with all courts and the National Court Administration. In very large countries with separate Federal and state level court systems, like the US, where standards are appropriate only at the state level, and only if they allow for sufficient flexibility to reflect differences in jurisdiction sizes, court and case types, so called model standards have been developed to provide general guidance across all jurisdictions (see box 7).

According to the *Doing Business 2016* report, laws or regulations that set time standards for key court events exist in 111 economies, though these standards are respected in practice in only 76 of them.²⁴ Time standards can be an effective case management tool that can significantly increase overall court efficiency as well as empower court leadership and provide the necessary detailed data to make well-informed policy and management decisions. When developed well, with broad participation, input, and consensus from the court-user community, judges, and court staff, implementation problems can be reduced or avoided. This participatory approach, along with some other key elements that will be discussed below, ensures that the court's goals are realistic, developed by consensus, and enforced. High-performing courts worldwide, including, for example, the Singapore state courts, the Singapore Supreme Court, and the UK Admiralty and Commercial Courts, to name a few examples, have developed and implemented time standards to help guide and monitor the progress of cases and increase overall court efficiency.

24 The *Doing Business* methodology assesses whether any of the applicable laws or regulations on civil procedure contain time standards for at least three of the following key court events: (i) service of process; (ii) first hearing; (iii) filing of the statement of defense; (iv) completion of the evidence period; and (v) submission of the final judgment. A score of 1 is assigned if such time standards are available and respected in more than 50% of cases; 0.5 if they are available but not respected in more than 50% of cases; 0 if there are time standards for less than three of these key court events (World Bank 2016, 154).



Key elements

To ensure their successful implementation and use, courts must dedicate time and effort to developing realistic standards for different case types and ideally also key processing steps, obtaining buy-in from judges, staff, and court users, and creating a broad consensus about the many benefits such standards offer. There are two main approaches to defining time standards in courts: one is to set general standards for how long it should take to process cases, broken down by major case types (i.e. civil, criminal, commercial, etc.) from filing through final judgment (or enforcement);²⁵ and the other is to focus on setting more detailed time standards for each major processing step from filing through final

enforcement. Effective courts use one or the other or both in combination for different management and reporting purposes. Regardless of the approach, a number of key elements should be considered for successful implementation. A review of efforts in a number of U.S. state courts, the Singapore state courts, the UK Admiralty and Commercial Courts, and the Dublin Commercial Court, as well as a number of other well-performing European courts, including the Swedish courts, the Norwegian and Finnish district courts, and the latter's Rovaniemi Court of Appeals, identified the below key elements of the successful development and implementation of time standards (CEPEJ 2015).

²⁵ Responsibility for the court judgement enforcement process does not always rest with the courts and is therefore frequently out of the control of the courts and not part of their performance measurement system. Even in courts that have this responsibility the data the court collects often does not appropriately track the progress and duration of cases filed through the enforcement process. Frequently the enforcement case is tracked separately, if at all. This is not helpful in either case since it does not provide the court with feedback on enforcement outcome, i.e. success in enforcing its own decisions, and users tend to not make a distinction between the courts and court enforcement agencies when it comes to judging court effectiveness in getting a case to closure. Since the *Doing Business* report measure the entire process of case handling from filing through enforcement, it encourages courts and enforcement agencies to work together to improve the entire process effectively.

Assessing court resources and capacity. Developing and implementing time standards requires financial and human resources, sufficient data and capacities to assess it, and experience to develop meaningful timelines. It is also a process that requires time and the will to experiment. For developing meaningful time standards, the court should review not only how a more streamlined, and possibly more automated, process would impact the overall workload and decision-making processes of judges, court staff, and others who are interacting with the court, but also what counter arguments are being voiced and by whom. Concerns over and potential resistance to standards should not only be closely considered but also reflected in change plans.

Assessing the legal framework for adjustment needs. To reduce development and implementation problems that may arise, an assessment of the legal framework (including laws, decrees or orders, and internally created practices and procedures) governing the processing of cases should be undertaken to identify the extent to which the laws already provide for time frames for completion of cases and case events and where they may need to be adjusted; clarify the extent of the court's legal authority in developing additional and/or more specific

time standards; and determine the extent to which legal requirements for court practices and procedures may be contributing to delays and need to be adjusted.

Reviewing and analyzing data by case and court type and analyzing current performance. Collecting and analyzing detailed case data by case types for different courts and court levels, broken down by major case process steps (that is, from filing to first hearing, trial, judgment, and enforcement), are essential when developing time standards. Different cases require different time standards, and specialized courts and the various court levels have disparate case processing time requirements. Reviewing how different cases currently move through the system enables the court to identify meaningful timelines by case type(s), which case events are taking too long to complete, and which courts have more delays. The analysis will be assisted by good case data, and a well-functioning automated system will naturally help too. When good data are not readily available to understand where cases tend to linger for too long in the process, additional data will need to be collected. A combination of a review of a representative sample of case files, possibly combined with a Delphi study involving judges and court staff,

BOX 8.

Implementing Standards at the Oregon State Courts, US

Developed based on detailed court data with input from courts across the state, the Oregon State courts are using the following overall time standards for civil cases:

- ▶ **General jurisdiction: Filing to conclusion**
 - 90% of all cases resolved within 12 months
 - 98% of all cases resolved within 18 months
 - 100% of all cases resolved within 24 months
- ▶ **Summary proceedings: Filing to conclusion**
 - 100% resolved within 75 days

The courts monitor performance according to these standards and produce reports with relevant information that is compiled at both the local and statewide levels. The reports are accessible to all judges, the division managers, local Trial Court Administrators, the State Court Administrator, the Chief Justice, and the legislature and are updated monthly and available on demand. Quarterly reports are published related to all key performance measures. The Oregon Judicial Department is working on a dashboard reporting system to make the right information available to the right people at the right time. The dashboard reporting system is real-time reporting and available via the department's Intranet site. The tool offers administrators and judges the ability to drill down to varying levels of detail to problem solve specific areas.

Source: Adjusted from Oregon Judicial Conference Standards for Timely Disposition at [https://www.ojd.state.or.us/web/OJDPublications.nsf/Files/E7j99025.pdf/\\$File/E7j99025.pdf](https://www.ojd.state.or.us/web/OJDPublications.nsf/Files/E7j99025.pdf/$File/E7j99025.pdf) and NCSC online at <http://www.ncsc.org/Information-and-Resources/High-Performance-Courts/Case-Processing-Time-Standards/CPTS-States/Oregon.aspx>

is a good substitute (for a short description of these approaches, see Gramckow 2012).²⁶ The result of such review will provide the information needed to establish initial timelines for testing, facilitate the development of pilot standards, and select the court where the standards can be piloted (see box 8).

Focusing on the overall progress of cases. Developing and implementing overall standards/goals for processing cases from filing to disposition by case types and monitoring performance against these goals allow courts to effectively assess overall case performance across an entire court, or, where applicable, across a multi-jurisdiction court system. Used today by many states in the US (and adapted courts and many other countries), they provide model time to disposition standards by case types developed to provide guidance to state courts for developing their own standards. The United States in particular has been the leading force for many years in developing such time standards. The above mentioned latest version of the *Model Time Standards for State Trial Courts*, for example, was the result of a comprehensive 40-year review of state and local court efforts in developing and implementing standards. (Van Duizend, Steelman, and Suskin 2011).

Focusing on the progress of key case events. Time standards that cover overall progress are a good first step and are particularly helpful in educating the public about the court's efforts to ensure the timely disposition of cases. In courts that rarely face delay issues and in small claims courts with only a few, simple procedures, such overall timelines may be all that is needed to keep cases on track. However, in order to be able to help a particular court and individual judges achieve such set standards, more specific timeline standards for the completion of key case events become necessary. For example, having time standards for the completion of specific key court processes and events, such as completion of service/notification, pleadings, submission of expert reports, trial and non-trial disposition, issuance of judgments, and so forth, allows all involved (i.e. litigants, lawyers, experts, judges, court staff, etc.) to better understand document submission and action completion timelines required by the court to ensure the case is moving forward in a timely manner. Related case process data, ideally available throughout the case progress are essential to help judges and court staff keep cases on

BOX 9.

Commercial Court, Dublin, Ireland

A key feature of the Commercial List has been the introduction of a system of rigorous case management that relies on developing and enforcing strict deadlines, which are imposed for the exchange of pleadings, correspondence, presentation of evidence, and legal submissions, and penalties or other costs incurred by the court or other party may be imposed for non-compliance. The following standards have been published:

- ▶ From issue of Notice of Motion for entry until the return date: 5 days
- ▶ From entry to List to allocation of date for trial (whether for full hearing or preliminary issue): 5 weeks
- ▶ From entry to List to conclusion of case: 6 weeks, of which:
 - case settled: 3 weeks
 - cases heard by the court: 8 weeks

Source: Courts Service (Ireland), "The Commercial Court," [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/20CE12A5BD13310B80256FC50059178F/\\$FILE/Commercial%20Court%20brochure.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/20CE12A5BD13310B80256FC50059178F/$FILE/Commercial%20Court%20brochure.pdf).

track and allows managers better understand and drill down to what is happening in each case and generally in similar cases, to more easily identify specific reasons for delay, and to take remedial action in a particular case and especially for managing similar cases overall (see box 9).

Studies in the United States show that the courts' ability to control case progress is correlated to their ability to reduce the time to disposition. These studies have also shown that "case processing times and delay can be reduced where there is a commitment to more expeditious disposition times and an organized program for achieving this goal." (Goerd, Lomvardias and Gallas 1991). They further showed that efficient courts move quickly at every stage of the case, and that lowering the time to disposition did not rest on addressing one or two pretrial practices but was rather the result of improving the time between events at every stage of the case process. Courts such as the Estonian Tallin

26 A Delphi Study is a research technique that is used for arriving at a true estimate by sampling expert opinions.

Administrative Court have developed time standards for all major case events, requiring judges to begin proceedings within 30 days from registration. The UK Admiralty and Commercial Courts have also developed specific time frames for case events. Similarly, the Wayne County Circuit Court in the U.S. state of Michigan has been successful in providing effective management by ensuring that for every case, each event is prescheduled and the time between events is as short as reasonably possible (Batty et al. 1991). In the district courts in Massachusetts, civil cases are separated under three different categories based on the type and complexity of the case, and time standards are developed for each. For example, one category dealing with contract and tort cases has the following standards: “from Answer to Case Management Conference date: not more than 4 months; from Case Management Conference to Pretrial Conference date: not more than 7 months; and from Pretrial Conference to trial: not more than 3 months.”²⁷

Balancing expeditious resolution with attention to court and user needs and fairness. As expressed by the distinguished US legal scholar Maurice Rosenberg, writing in 1965, and repeated by many since “Slow justice is bad, but speedy injustice is not an admissible substitute.” This means that delay reduction efforts and efficiency should not overshadow a court’s attention to each case and to the need to deliver fair and substantive justice to litigants (Rosenberg 1965). As such, seeking and factoring in court and user preparation needs and expectations into the establishment of court event timelines and balancing them with the court’s needs for efficiency and other local dynamics will ensure that the standards are realistic, fair and do not infringe on due process. As mentioned before, this also means that it is important to embed some flexibility in the time standards to account for the individual facts of each case.

Ensuring active case management. Effective use of time standards requires judges in particular to be more active in managing cases. Studies in the United States have shown that case processing delays can be reduced when time standards are in place and their application is well understood and taken seriously by judges and court staff. Targeted activities, such as training and roundtable discussions, to promote the use of time standards and encourage active and continuous management of cases

by judges are essential for effective implementation. It is also important to dedicate time and resources to changing the court’s internal culture to one in which judges, court administrators, and staff are playing a more integral role in managing cases. The Wayne County Circuit Court in Michigan, which has been widely recognized in the United States for its effective case management practices and success, has relied heavily on providing judges with the various tools (such as time standards, early court intervention, pretrial conferences, and so on) that allow them to take responsibility and actively manage cases within set standards but in a manner that allows for reasonable and justified flexibility to reflect the needs of individual cases and litigants.

Ensuring compliance. In line with building a culture of active management within the courts, similar efforts should be dedicated to raising the legal and court-user community’s awareness of the benefits of time standards. Seeking input and discussing their importance early on in the development process, as well as engaging with users during the testing and rollout phase, will help create buy-in and ensure compliance. Publication of time standards is essential and publishing court performance reports that show adherence to these standards do not only demonstrate the court’s efforts to be accountable for timely dispersions but helps educating the public about time requirements. A study of almost 8,000 cases in the U.S. federal courts that focused on court delay and efficiency also indicated that the most efficient case processing occurred in jurisdictions where the local legal community embraced case management practices as guided by the expectations set by the judiciary. It should also be clear that adhering to these timelines means that judges and court staff have to complete their responsibilities in a timely manner. Automated systems can be particularly helpful in assisting them to manage their work within set deadlines, not just by streamlining and automating certain activities but by sending reminders of upcoming deadlines, thus providing individual court staff and judges with daily, weekly, or monthly prioritized tasks lists and individual-level dashboards to monitor their own activities within timelines. A range of customizable software applications that provide such features is available to courts as well as to law offices to help lawyers manage their cases within set timelines.

27 Massachusetts Court System, “District Court Joint Standing Order 2-04: Time Standards for Civil Cases,” [mass.gov, http://www.mass.gov/courts/case-legal-res/rules-of-court/district-muni/standing-orders/dist2-04.html](http://www.mass.gov/courts/case-legal-res/rules-of-court/district-muni/standing-orders/dist2-04.html).

Lessons learned

Developing and implementing time standards are straightforward but take time and effort. The following sections present some of the lessons learned in this endeavor.

Developing consensus and collaborating with justice stakeholders. Obtaining an initial consensus that control over the case process is possible and desirable and then creating a culture of support for using time standards are both necessary steps for effective implementation. Capturing external feedback about expectations, needs, and perceptions through various mechanisms, such as meetings, targeted surveys, and committees, for example, ensure that the standards are not developed in a vacuum. In Ireland, the Commercial Court in Dublin established a user group that includes judges, court registrars, and barristers and solicitors that meets to discuss performance issues. In the Turku District Court in Finland, judges hold regular meetings with lawyers to discuss and develop a common understanding of time standards and how they can be used to improve efficiency. In another district court in Finland, the head of each court discusses and reaches agreement with the judges on the targets for resolving cases. And in Germany at the Stuttgart Regional Court of Appeals, the court holds regular meetings with lawyers to discuss user satisfaction and service delivery issues (CEPEJ 2015). The Danish courts, on the other hand, implement regular user surveys, while the Finish Rovaneimi Court of Appeals collaborates with external research institutes to capture user views (CEPEJ 2015). In the United Kingdom, the Manchester County Court conducts three public surveys a year to obtain feedback from users (CEPEJ 2015). Regardless of the mechanism used to capture user feedback and input, involving stakeholders ensures that the time standards are realistic and can be maintained and enforced; it also helps to build commitment in the legal community and fosters accountability among all those involved in developing and implementing the targets.

Piloting and adjusting the standards over time. An effective approach to developing time standards is to introduce them incrementally by piloting them in one or more court(s) within a particular jurisdiction for a limited time. In California, for example, time standards were piloted and tested in several courts across the state as a part of a court delay pilot program. In Finland, the Quality Project was also tested at a district court and a court of

appeals before being rolled out across the country. This approach allows courts to evaluate, adjust, and improve the standards before introducing them into other courts; it also serves to familiarize judges, court administrators, the legal community, and litigants with the standards and helps build a culture of support that is essential once they are fully implemented.

Publishing the time standards and performance data. Court data in general should be made available to the public for review and scrutiny on a regular basis. Time standards in particular establish the expectation that courts will perform effectively, and a mechanism for measuring performance against such expectations should be instituted. Access to the standards and performance data should be available internally to judges and staff as well as externally to court users. Providing wide access to this data promotes accountability, improves transparency, and increases public trust and confidence in the courts. It can also serve to educate the court-user community of the benefits of using time standards. Many courts publish this type of data, together with the time standards, in their annual reports. The majority of well-performing courts that have developed time standards also publish them online. For example, the Commercial Court in Dublin, the Singapore state courts and the Supreme Court, and the UK Admiralty and Commercial Courts all publish their time standards online, as do many states and the federal courts in the United States.

Enforcing time standards. As indicated in the *Doing Business 2016* report, only 76 out of the 111 economies that have developed time standards are effectively using them. To ensure that the standards are enforced, interventions from senior judges and/or courts managers are needed. This means that judges and managers have a) the information available that allows them to identify when deadlines are running out and when court or party actions are required and b) that these interventions provide the opportunity for courts to address issues and discuss potential remedies (such as reallocating caseload, training judges and staff, implementing targeted awareness activities, promoting active engagement with parties to ensure that timelines are adhered to, and setting additional fees for violations, see also section 2.4). Such hands-on approach has proven to be effective in many courts. In Sweden, for example, the head of the

district court analyzes pending cases on a regular basis and inquires as to the cause of any delays; in the Linz District Court in Austria, judges are regularly informed of their caseload, and regular discussions are held between them and the head of the court to identify delay causes and potential solutions.

Monitoring results. Once developed, court managers and/or senior judges must continuously monitor performance results in order to assess system as well as individual court and judge performance and to adjust the time standards, workload, or resource allocation scheme as needed. An effective and functional CMS should facilitate this task by providing reliable and detailed statistical reports. It is also critical to regularly monitor and analyze key data, such as time to disposition, the rate of cases disposed as against cases filed, the size and age of the pending caseload, and the rates at which case events are being adjourned, continued, and/or rescheduled.

Adjusting the case management system (CMS). In courts where an automated CMS is implemented, and depending on the functionality of the system, adjustments may be required to ensure it is capturing the required information to support compliance monitoring without the need to manually collect data.

Training judges, staff, and lawyers. Targeted training on the use of the standards and tracking tools available should be provided to judges, court staff, and lawyers prior to their rollout. Similar training should also be implemented when updating them, which will ensure compliance and promote their use.

Adjusting time standards and policies. Time standards are not static but are a working tool that should reflect the changing needs of the court and the court-user community as well as any national or government-wide policies. As such, the standards should regularly be reviewed and adjusted, if need be. In Singapore, for example, the Supreme Court regularly reviews and amends its time standards and policies and provides online access to the new or changed versions.

Implementing a public education campaign. Informing the public by providing detailed information on court operations and case processing is essential for building the public's trust and confidence in the court. Awareness activities should be carried out prior and subsequent to implementing time standards in all courts. As stated

earlier, raising awareness helps create a culture of support, which is essential for successful and effective implementation.

Good practice examples

The UK Admiralty and Commercial Courts have some of the best and most detailed examples of successful time standards and court case processing rules. These courts have achieved control over the pace of its quite complex litigation through the development of very thorough time standards for key events that occur between case registration and issuance of judgment. The courts have issued the *Admiralty and Commercial Courts Guide* with comprehensive information about standards and case processing rules. This supplements the more formal *Civil Procedure Rules* (CPR) and *Practice Directions* (PD) for the courts and introduces additional time guidance developed for the purpose of improving court efficiency. The guide is a working document produced by the court with collaboration and input from its users through the use of users committees. More importantly, it is a living document that is revised, as needed, in order to quickly implement changes aimed at improving efficiency, a process that does not require any formal modification of the CPR or PD. For example, certain practices made possible by emerging technologies, such as the use of e-mail and electronic filing, have been added to reflect technological advancements, with detailed guidance specifically provided to users. With regard to time standards, the document identifies many time limits for intermediate case events and the consequences of failing to meet these limits (HM Courts and Tribunals Service 2014). For example:

- ▶ **D3.1** states that “a mandatory case management conference will normally take place on the first available date 6 weeks after all defendants who intend to serve a defence have done so.”
- ▶ **D3.2** (a) states that “if proceedings have been started by service of a Part 7 claim form, the claimant must take steps to fix the date for the case management conference with the Listing Office in co-operation with the other parties *within 14 days of the date when all defendants who intend to file and serve a defence have done so: PD58 § 10.2(a)*. The parties should bear in mind the need to allow time for the preparation and service of any reply” [italics added].

- ▶ **D3.3** (a) states that in accordance with section C3, the Registry will expect a defense to be served and filed by the latest of:
 - (i) 28 days after service of particulars of claim (as certified by the certificate of service); or
 - (ii) any extended date for serving and filing a defense as notified to the court in writing following agreement between the parties; or
 - (iii) any extended date for serving and filing a defense as ordered by the court on an application.

(b) If within 28 days after the latest of these dates has passed for each defendant, and the parties have not taken steps to fix the date for the case management conference, the Listing Office will inform the Judge in Charge of the List, and at his direction will take steps to fix a date for the case management conference without further reference to the parties.

- ▶ **D3.4** states that “if the proceedings have been transferred to the Commercial List, the claimant must apply for a case management conference within 14 days of the date of the order transferring them (HM Courts and Tribunal Service 2014, 22–23).

In addition, Appendix 8 of the guide includes a standard pretrial timetable with due dates to be entered into the CMS for significant events in each particular case. The guide also outlines specific practices the court has established to reduce the length of trials while at the same time ensuring that the rights of all parties are protected and that the final decision is of good quality. A key element of court practice described in the guide is the Case Management Conference (CMC), an event held early in litigation that is intended to summarize issues, assess elements of case complexity, help estimate the required court resources, establish a pretrial timetable, and estimate the duration of trials. Overall, the CMC helps to predict the time to disposition of each individual case and provides tools (such as an agreed timetable) to help judges manage each case and stay within the estimated timeline. In addition, the guide provides useful practice information for litigants and attorneys to help them to process cases in a timely manner, reducing errors and ensuring good quality decisions, such as:

- the content and format of submissions to the court
- the practice regarding notifications (service)
- the practice regarding experts and evidence

- trial practices, including video testimony and information technology during trial
- pretrial checklists
- a progress monitoring information sheet with a corresponding deadline for submission (at least three days before the progress monitoring date)

The Singapore Supreme Court is similarly managing and controlling the progress of each individual case as guided by the 2016 *Supreme Court Practice Directions*. These practice directions are regularly reviewed and amended and are made available electronically. The online version is easily accessible, searchable, and also authoritative. The directions specifically identify limits on the timing of intermediate case events to ensure efficient processing. For example:

- ▶ **Entering Appearance:** If a defendant is served with the writ within the jurisdiction, he has eight days after service of the writ to enter an appearance by filing a Memorandum of Appearance with the court. If the writ is served out of jurisdiction, the defendant has 21 days to enter an appearance.

- ▶ **Default of Appearance:** If the defendant fails to enter an appearance within the time specified in the writ, the plaintiff may enter a judgment against him. This may be a final judgment or an interlocutory judgment, depending on the nature of the claim. The court may, however, set aside or vary such a judgment as it thinks just.

- ▶ **Defense and Counterclaim:** When the defendant has entered an appearance and intends to defend an action, he is required to file his defense with the court and serve it on the plaintiff 14 days after the time limited for his appearance, or after service on him of the statement of claim, whichever is later.

- ▶ **Reply and Defense to Counterclaim:** A plaintiff may serve on the defendant his reply and defense to a counterclaim within 14 days after the defense (and counterclaim) has been served on him.

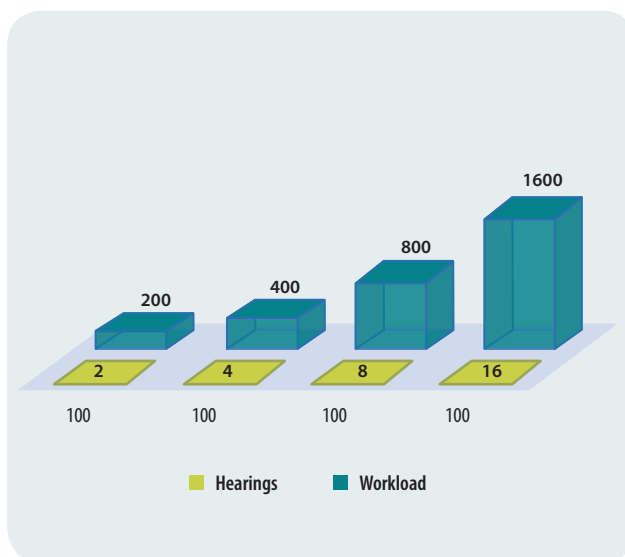
- ▶ **Close of Pleadings:** Pleadings are deemed closed 14 days after service of the reply or service of the defense to the counterclaim. If neither a reply nor a defense to the counterclaim is served, pleadings are deemed to be closed at the end of 14 days after the defense is served (Singapore Supreme Court 2016).

Background

Another caseflow management technique employed by well-performing courts is the availability of clear rules that establish meaningful hearing schedules and limit adjournment options.²⁸ Without such rules and regulations to enforce them, time standards for processing cases become meaningless. The need for and value of caseflow management in general and of adjournment rules in particular was first established by a 1977 study based on data from U.S. federal district courts (Flanders 1977). The study showed that fast courts strictly monitored pleadings, began and completed discovery within reasonable early timelines, and promptly initiated a trial if it was needed. Other studies have demonstrated the direct relation between the number of hearings held and resulting workload for the court (Graecen at all 2005, see figure 10). Today, it is generally recognized that judges have the right to ensure the timely processing of all cases by employing timelines and other well-tested case management techniques and allowing adjournments only in exceptional cases. To preserve process fairness, clear adjournment rules and the mechanisms to enforce them must be established and publicly available. The courts must also ensure that established schedules for all court events are realistic and allow all parties reasonable time frames for preparation (Steelman, Goerd, and McMillan 2000).

The European Court of Human Rights (ECHR) has stated that it is the duty of the judge to ensure that cases are progressing in a timely manner.²⁹ The ECHR implied that a special duty rests upon the domestic court to ensure that all those who play a role in the proceedings do their utmost to avoid any unnecessary delay, and in that sense, it expects a proactive attitude from the judge. The ECHR has rejected governmental arguments that national courts cannot cope with their workload because of inadequate staffing or an insufficient number of courts; rather, the ECHR indicated that the state is obligated to organize its legal system in a way to ensure compliance with ECHR requirements. In the same vein, in 2006, the European Commission for Democracy through Law,

FIGURE 10. Workload increase by hearings



Source: Adjusted from Graecen Associates

Note: Based on a steady caseload of 100.

better known as the Venice Commission, which acts as the Council of Europe's advisory body on constitutional matters, stated in its report on the excessive length of court proceedings that member states should first and foremost provide adequate means of ensuring that cases are processed by courts in a reasonable time (Kuijer 2013).

Well-performing courts also recognize that with the right to set timelines and limit adjournments comes the responsibility that the court itself will proactively ensure that parties and lawyers are prepared for court events. In any jurisdiction, it is lawyers and not judges who settle cases, and lawyers do this when they are prepared—and they prepare for significant and meaningful court events. Establishing the expectation that court events are meaningful (that is, they will contribute substantially to moving the case toward disposition) and will occur as

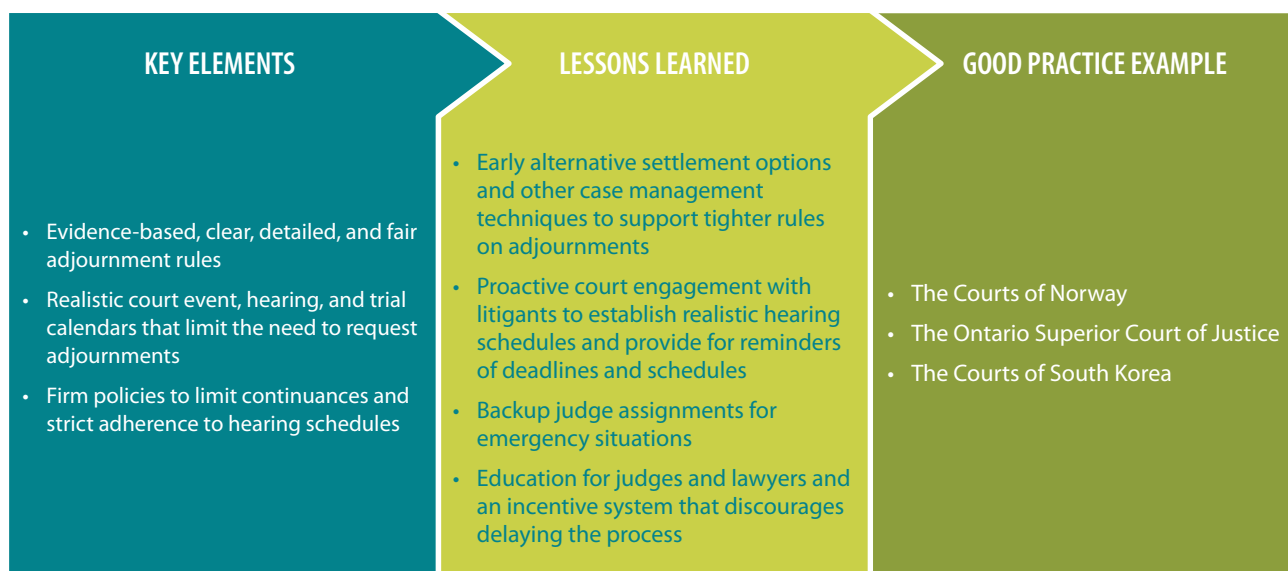
28 The terms "adjournment," "postponement," and "continuance" are used differently in various jurisdictions. Postponement often refers to the period before a hearing starts, and adjournment or continuance is frequently used when a hearing is already under way. All three terms are, however, used interchangeably, and this publication will only use the term adjournment to refer to any such request.

29 See ECHR September 24, 2002, *Cuscani v. the United Kingdom* (appl. no. 32771/96).

scheduled is therefore an important way to encourage the lawyers and parties to be prepared.

If events are continued without good cause, the emotional and financial costs of litigation tend to increase because of the need to prepare and appear for additional court proceedings. Uncertain court events and options for multiple adjournments without good reason can also create perverse incentives for lawyers and parties to delay the completion of the case beyond reasonable timelines (Friesen, Gallas, and Gallas 1971). Multiple adjournments also increase the effort and cost to the court; clerks have to prepare files for each potential hearing, and especially in civil law countries, judges may

repeatedly need to prepare for hearings that will not be held. Even the short time it may take to call a case and establish the need to postpone can add up. The effort to call the case, hear the reason for postponement, and order a new hearing date may take just 10 minutes of the judge’s and clerk’s time, but multiplied by 10 cases per day, it translates into one hour and 40 minutes of time wasted by each of them every day, time that could be better spent on actually moving the case along toward settlement or a judicial decision. Not surprisingly, the *Doing Business 2016* report indicated that only 50 of the 189 economies measured had detailed rules regarding adjournments, and in some of these countries, the rules are not strictly enforced (World Bank 2016).³⁰



Key elements

Development of evidence-based, clear, and fair adjournment rules. The Council of Europe Committee of Ministers already advised in 1984 on the establishment of a typical court procedure based on “not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the

second for taking evidence, hearing arguments and, if possible, giving judgment” (Council of Europe 1984). Any adjournment rules should be outlined with detailed explanations of what has to be submitted to the court and at what time. Such rules are essential not just for trial dates but especially for pretrial events that focus on

30 The *Doing Business* methodology assesses whether there are any laws regulating the maximum number of adjournments or continuances that can be granted, whether adjournments are limited by law to unforeseen and exceptional circumstances and whether these rules are respected in more than 50% of cases. A score of 1 is assigned if all three conditions are met; 0.5 if only two of the three conditions are met; 0 if only one of the conditions is met or if none are met (World Bank 2016, 154).

submission of documents and other evidence. Ideally, the development of adjournment rules is part of the process of setting timelines for court events, since much of the information needed to inform the development of fair and effective adjournment rules is the same that is required to develop meaningful process timelines. Proposed adjournment rules should be developed based on case data and judges' experiences to identify when and how often such requests are generally made in which types of cases and the potential complicating factors that may generally justify an adjournment.

Adjournment rules should be developed in collaboration with representatives of affected party groups, that is, lawyers, experts, and so on, to ensure that reasonable justifications for adjournments beyond standard events, such as death of a party, health circumstances, *force majeure*, and other complicating issues, are reflected for different case types and process steps. The rules need to spell out exactly when and how adjournments can be requested, the information and supporting documentation that has to be provided (and the court may have to ensure that the requester's privacy concerns are protected), and if the consent of the other party is needed. They will also need to indicate how the court will consider the information submitted and what the likely response or response option may be (for example, an adjournment request from a large law firm with many lawyers may need to explain why another lawyer cannot reasonably be expected to take the case within the established schedule). The rules should outline if a complaint can be filed against the decision and if so, on what grounds. Publication of the rules, ideally on the court's website, is key, as is the related training of judges and lawyers and public information events for other parties. These rules also need to be clear on the likely consequences if the court denies the adjournment request, such as the cost, impact on the judgment, and so forth. To assist courts in the United States with the creation of effective adjournment rules, staff at the National Center for State Courts, in collaboration with judges and court managers, developed Model Rules for Continuation that are also helpful to courts in other countries (Steelman 2009).

Introduction and maintenance of realistic event, hearing, and trial calendars. Rules limiting adjournments can work well only if the court schedules all court events, hearings, and especially trials effectively and is itself prepared to handle the issues at hand.

Effective scheduling of hearings can be straightforward in most simple cases but becomes a science in cases that involve multiple hearings, more complex issues, and/or multiple parties and witnesses. This is a topic in and of itself and should be appropriately reflected when setting standards and deciding on the appropriateness of other case management techniques (see, for example, Steelman, Goerdt, and McMillan 2000). Today, good software exists to implement an effective scheduling approach that reflects the needs of different case types. It is important in the management of hearings not only that the scheduling approach of the court is effective but that parties are consulted on the dates and are offered and can provide alternative dates that accommodate other commitments or restrictions if reasonable (see Mackenzie 2013, see box 10). That is why electronic assignment of hearing dates tends to initially be "firm" only in small claims or for the first pretrial event, which may focus on setting a reasonable hearing and trial schedule within the court's time standards, if the case does not settle before.

Future events should be scheduled to balance the need for the realistically prompt completion of necessary case-related activities with reasonable accommodation of the conflicting demands placed on the participants' time. Moreover, these future events should be scheduled sufficiently far in advance to allow for the accomplishment of the necessary task, but as soon as possible to support timelines and established adjournment rules and to ensure that litigants are aware that all the necessary preparations have to be completed by the next hearing. The court can still anticipate that some cases scheduled for trial may settle or have to be continued, and it must set its trial calendars accordingly, in the same way that airlines or hotels "overbook" and set cancellation fees so they do not lose revenue when people do not appear. But this approach requires good data to project the likelihood that certain events will or will not take place. To simplify scheduling when good data are not available, a court might choose not to overbook, but this often means that the court and individual judges may experience excessive "down time."

The most effective way to avoid either excessive overscheduling or down time is to develop a "reasonable setting factor" and to utilize practical but firm adjournment rules. The determination of a reasonable setting factor depends on the dynamics of each court. It is the lowest number of cases per judge or court

BOX 10.

Techniques to Manage Adjournments

- Publishing clear adjournment rules, policies, and practices
- Providing (online) availability of detailed adjournment request forms that include requirements for submitting supporting evidence
- Consulting parties and reflecting justified scheduling needs in court hearing scheduling
- Notifying and reminding parties of pending events and the requirements for each
- Reminding and confirming witnesses
- Ensuring the consistent application of rules and publishing actual practice data

Source: Adapted from Mackenzie (2013).

calendar that allows them to keep the pending inventory manageable in terms of the number and age of cases. The number of cases to set for trial can be effectively determined in a manual or automated environment, and courts should utilize both historical data and the knowledge of judges and other court staff of both cases and case participant behaviors. Using information from case records in the clerk's office or from the court's automated case management information system, the court can compare the number of cases scheduled to the number actually heard and establish a ratio of cases heard to those continued, settled, or dismissed.

It is also necessary to determine the likelihood that cases will go to trial or be disposed by plea or settlement. Factors involved here include the type and complexity of the case, the amount at stake (in a civil case) or of the possible penalty (in a criminal case), and the practice styles of the attorneys concerned. This kind of "optimal setting level" must often be achieved through experimentation. A useful way to start is to increase the number of cases set and see what happens to the ratio of cases tried, continued, and settled or otherwise disposed. If the ratio improves, the court can continue adding cases until it becomes overstretched and unable to handle hearings in a timely manner. The "setting" should result in the smallest number of scheduled cases possible to ensure that matters are heard at or near the arranged time and date, cases that "fall out" are accommodated, and case progress is sufficient to support compliance with time standards without leaving the court idle. Because of the changing dynamics of the litigation environment over time, the court should regularly reassess trial and fallout rates and other factors affecting its scheduling activities, and such empirical experimentation (using case data in support, if available) should be repeated periodically

to determine whether a different setting level is better (again, supported by good data, if available) (Steelman, Goerdt, and McMillan 2000).

Implementation of a firm policy to limit trial continuances and strict adherence to hearing and trial schedules. Rules that limit adjournments need to be enforceable to be effective, and the court has to be committed to applying enforcement policies. The Slovak Republic's Bratislava District Court, for example, is obligated to try to decide a case on the first hearing; adjournments are allowed only for serious reasons, and they are announced by the judge to the parties and put on the record (CEPEJ 2006). In Latvia (Riga Central District Court), hearings cannot be postponed until new dates are fixed (CEPEJ 2006). At the same time, the court too has to be prepared to ensure that hearings and trials are held as scheduled, since if case participants are in any doubt about the arranged timetable, they will not be prepared. At the Tingrett Nedre Romerike District Court in Norway, the court's case administrator's work actively on scheduling cases within the set deadlines and targets and lawyers are expected to conduct the case within the official time limits. If the lawyer is unavailable, the administrators push for a transfer of the case to another lawyer at the same firm. This court's practice on adjournments is restrictive and mainly limited to illness documented by a doctor's certificate (CEPEJ 2011).

In the United Kingdom, in the Queen's Bench Division of the High Court of Justice, the judge can determine if one of the parties is causing a delay and impose sanctions or order that party to cover the other party's costs. In addition, the judge may order the lawyers to cover the parties' court costs because of delays and if

necessary, strike out the claim or defense and award the case to the other party. If the court is responsible for the delay, compensation may be paid to the parties to cover the additional costs incurred, which will be identified by the court's performance reports and reflected in the appraisal of the staff, possibly affecting their pay and promotion prospects (CEPEJ 2011).

In Switzerland, in the Judicial District Dorneck-Thierstein (first instance civil and criminal court), extension requests of the parties are generally not granted more than twice (according to Art. 81, Civil Proceeding Law of Canton of Solothurn from 11.9.1966). In New South Wales, Australia, Section 66 of the Civil Procedures Act (CPA) permits the adjournment of proceedings to a "specified day" only in exceptional cases. When an adjournment is granted, the party responsible is usually ordered to pay the additional costs incurred by the other party (Judicial Commission New South Wales 2014). The Turin First Instance Court in Italy takes advantage of Article 117 of the Code of Civil Procedure (CCP), which allows the judge to take into account parties' behavior when adjudicating the case. If a party (or his/her lawyer) does not cooperate with the expert appointed by the judge (for example, by not providing the information the expert requires or not agreeing to or attending on the dates set for a building inspection or a machine assessment), the judge can decide the case against the non-cooperative party. A new version of Article 96 of the CCP stipulates that even without a particular request, the judge can order a party who has submitted frivolous motions to provide compensation to the other party (Fabri and Carboni 2015).

Lessons learned

Early and alternative disposition and pretrial management options. As mentioned above, rules and practices to limit adjournments are part of good caseflow management practices. They can be effective only if other case management techniques are applied, so cases that can be settled early can move out of the system and those that come to trial are limited to contested issues. This means that a range of settlement options (such as ADR, small claims courts), pretrial management

hearings, and early evidence disclosure rules needs to be in place. It also means that rules exist that limit adjournments for all court events, including these early events, and that such rules reflect the needs of each process step. In slow jurisdictions like Italy, for example, the procedural rules allow lawyers to add new evidence throughout the process, enabling them to prolong a case with new submissions that require adjournments. This is mainly because evidence rules are not focused on early disclosure and settlement of less-contested issues, do not effectively forbid the withholding of evidence, and do not set timelines for evidence disclosure before trial.³¹ Pretrial management hearings or conferences could also address any problems that might need to be dealt with in advance to ensure that the trial will begin at the scheduled time. For example, there may be problems concerning the presence of particular witnesses, the necessity of bringing defendants to the court from jail, last-minute issues for the judge to settle with counsel, or other demands on the judge's time. Any problems that can be reasonably anticipated should be resolved in the pretrial hearings to ensure that participants will not be frustrated by delays; the court can then reflect these needs in its scheduling so key hearings and the trial can be held on the earliest possible day.

Ongoing clear communication with litigators. In order to ensure that lawyers—and self-representing litigants—can be appropriately prepared for different hearings, the court should commit to engaging in continuing open communication with the litigators. The ECHR has provided some helpful guidance by clarifying that a litigant cannot be blamed for using all the procedural avenues that are available and is not required to cooperate actively in expediting the proceedings; rather, the litigant's duty is only "to show diligence in carrying out the procedural steps relevant to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings" (as quoted in Mole and Harby 2006). This means that it is not enough that the court possess and publish clear and detailed rules for submission for any motions, including adjournment rules; it must also remind litigants ahead of time of deadlines and procedural requirements and of the information needed to request adjournments or other schedule changes, which will not be granted

31 "Europe's Civil Courts. The Wheels of Justice Grind Slow." *The Economist*, February 20, 2016, <http://www.economist.com/news/europe/21693252-especially-southern-europe-not-exceedingly-fine-wheels-justice-grind-slow>.

if these necessary requirements are not fulfilled. The court should also advise them of the consequences—and notify them of related court actions—in case of noncompliance with deadlines or other requirements and ensure that requests for extensions or schedule revisions are handled consistently.

Well-performing courts tend to be proactive in ensuring that lawyers and all parties are prepared and appear. If there are requirements or steps that need to be taken prior to the hearing (such as the disclosure or filing of documents), deadlines should be set and clearly identified in the hearing notice. Lawyers have a professional duty to keep track of deadlines and hearing dates, but a reminder notice from the court a few weeks before a hearing may result in fewer last-minute requests for postponement. Although this places an administrative burden on the courts, the effort and cost of providing a reminder is offset by averting unnecessary adjournment requests and the related costs. Technology can be especially helpful in sending electronic reminders and allowing parties to automatically add the hearing date and location to their electronic calendars. Some courts require parties to identify the witnesses they intend to call, and if a summons is sought, the court may request proof that it was delivered a certain number of days prior to the hearing.

In Ireland, judges in high courts often use what are called “positive call overs.” These occur after the pleadings have been closed and a notice for trial is served by either party. Although the case will have been certified as ready for trial by one or both sides and thus placed in a list to fix dates for trials, frequently there are outstanding unresolved procedural issues, usually the discovery of documents. In a “positive call over,” the legal representatives of the parties are required to attend court to confirm that their case remains “live” and inform the court if they are ready to proceed. Problems causing delay in progressing a case are frequently brought to light in these call overs, and the judge can make appropriate orders directed to any party perceived to be in delay in any requisite procedure. A case in which the parties fail to appear can be struck and reentered only by order of the court (CEPEJ 2006).

Provision of “backup” judges. The court itself has a responsibility to adhere to set hearing schedules, but even the best prepared and organized court experiences an occasion on which a judge may not be available to

hold a hearing as planned. Today’s ICT options may provide some alternatives to in-court events that allow the judge to attend via phone or video, if s/he has to be at a different location but has the time to attend to the matter. If the judge is not available due to the unexpected duration of other cases, illness, or the like, the only option to avoid postponement is reassignment to another judge, if that is allowed and feasible. Few courts have the luxury of keeping one judge unassigned each day to deal with disruptions in the daily trial schedule. If the chief judge of a multi-judge court carries a lighter caseload in order to deal with administrative responsibilities, he or she may be able to serve in this backup capacity.

More often, the most practical way to provide backup judge capacity is for all the judges of a multi-judge court help one another. This approach requires a system to quickly determine which judge can help an overburdened colleague and to arrange for case files and case participants to be brought to the courtroom of the alternate judge. Judges may simply communicate directly to each other to ask for assistance or develop “judge teams”; alternatively, the chief judge and court manager may have the means to monitor the court calendar to determine which judge might be available to step in when needed.

The provision of backup judges is easiest in a multi-judge court with all judges in the same building, but it can be managed with judges who sit in different locations. In rural courts in which judges sit alone in adjacent towns or counties, a reciprocal assistance agreement may be necessary. In rural areas where judges ride circuit, the provision of backup judges may have to be coordinated through state or regional court administrative centers. In the Barry County Trial Courts in the U.S. state of Michigan, a court long recognized for its innovative procedures, the judges have developed an approach to caseload management that includes an agreement to schedule all the trials to start on the same day of the week. If any of the judges finds that s/he has two cases on the calendar that have not settled and are ready to go to trial concurrently, it is agreed that one of the other judges would, if not in trial already, take the second trial of the overbooked judge. As a result, the Barry County Trial Court has firm trial dates. Attorneys in any particular case know that it will be tried on the date scheduled—if not by the originally scheduled judge, then by one of the others. The circuit court backlog that existed in

1995 has been eliminated, and the pending inventory for all three judges has dropped. Knowing that the court is willing and able to reach trials on the first scheduled date, attorneys are much more likely to resolve cases by negotiation (Steelman, Goerd, and McMillan 2000).

Judicial attitudes and judicial training. Judicial attitudes toward keeping timelines and limiting adjournments will be equally important. Since judges have to ensure that judicial proceedings before them comply with the reasonable time requirement, engaging them early on to develop timelines and adjournment rules is valuable in creating buy-in for these stricter approaches. Judges also have to be provided with appropriate training to better understand the impact and benefits of such changes, and judicial performance systems should be adjusted to reflect related case management skills and attitudes. Experiences in Italy indicate that judicial performance systems, including promotion schemes, can influence a judge's incentive to manage adjournments and keep cases within set timelines. If a judge's managerial effectiveness is not considered in performance reviews and promotions, some judges, especially ambitious younger ones who may not be as vested in the "traditional" approaches, have few incentives to clear their dockets. Conversely, in many countries, it tends to be more difficult to get longer-serving judges to disavow the more "lenient" practices of the past, a situation that may require specific guidelines and attention from the head of the court and call for the need to be reflected in performance systems (Fabri and Carboni 2015).

Attitudes, ethics, and rules for payment of lawyers. Another important factor is lawyer attitudes and payment structures. Some countries limit the hourly fee that lawyers can charge for a given service or stipulate that they be paid by individual case events rather than for the full process, which can make stretching out a case the only way to earn more.³² Ensuring that lawyers understand the need for—and benefit of—case processing time standards and limits to adjournments is one of the reasons why the local bar association should be consulted and seen as a partner in establishing effective court process rules. Bar associations that support these measures will be essential not only in educating lawyers of the benefits of these approaches

but also in ensuring that the new methods are reflected in training and ethics or performance requirements. The timely preparation and handling of cases should be viewed as a lawyer's duty in serving his/her client and violations as a performance and possibly ethics concern that may trigger professional sanctions. For example, in the United States in 2015, in response to allegations that he lied about his mother's death and his own health to try to justify discovery delays and support a continuance of a hearing in two separate cases, an Illinois lawyer had to resign from the Illinois Bar (see Corsmeier 2015).

Good practice examples

Courts of Norway. There are a number of key reasons why Norwegian courts have a reputation for efficiency. These include: a) only one main hearing/trial is held in each case, whether criminal or civil; b) the main hearing is scheduled within days after the case has been registered by the court; c) in civil cases, a preparatory meeting is held between the judge and the parties' counsel soon after the case is registered; d) the meetings are generally held as telephone conferences; and e) the parties' counsel is expected to set up a timetable for the main hearing and to limit the hearing to contested issues only (Fabri and Carboni 2015). The Nedre Romerike Tingrett District Court, for example, schedules planning meetings in all civil cases shortly after the case has arrived at the court. The lawyers and the judge—but not the parties—participate, and the meetings are supposed to plan all necessary steps until the disposal of the case. The meeting also clarifies the claims of the parties, their main supportive arguments, and the evidence they offer. During the meeting, the progress of the case is planned, deadlines are established, and the dates and number of days needed for the main hearing set.

All evidence must be ready before an established date, and the parties must plan their collection and presentation of evidence accordingly. The hearing date is set according to the general time standards used by the courts, which is six months for ordinary civil trials and three months for small claims (i.e., claims with a value of less than the equivalent of €15,000). Scheduling for a later date requires special justification and is expected to be rarely done (CEPEJ 2011). Similarly, the Frostating

32 Ibid.

Lagmannsrett Court of Appeal sends letters to both counsel to indicate deadlines for new submissions, evidential lists, and input for the appeal proceedings. Letters are followed by telephone calls to decide on the date and duration of the hearing. A week or two before the appeal hearing, the judge contacts the lawyer directly (by e-mail) to define a detailed joint timetable for the appeal hearing (presentation of witnesses and so on). This is a time-saver because it obligates the lawyers to talk to each other and agree on practical arrangements (CEPEJ 2011).

Ontario Superior Court of Justice. In an effort to limit adjournments while ensuring fair and reasonable court processes, the courts of the Ontario region in Canada follow new guidelines established by the Ontario Superior Court of Justice after several studies and extensive consultations with all courts and external court users were conducted. This is one of the busiest trial courts in the world, operating in 52 locations across Ontario, in addition to numerous satellite locations. Its practices follow case law established by the Ontario Appeals Court in 2009, which provided a non-exhaustive list of procedural and substantive factors to consider when assessing adjournment requests (see box 11). When a matter has been adjourned, parties are responsible for ensuring that all the materials for adjournment are available at least one week before the new hearing date, including any documents that have to be submitted. If there are prior endorsements, orders, or judgments that are relevant to a continuing matter, parties are encouraged to file an “Orders Brief” containing the relevant material. Between 12 and 2:30 p.m. two days before the hearing date of a long or complex motion or application, the court recommends that a representative of the moving party come to the Civil Motions Office and organize the court file to ensure that all relevant documents are provided in the form required (Ontario Superior Court of Justice 2014). Many courts across Canada discourage postponement or adjournment requests. For example, the Human Rights Tribunal of Ontario (HRTO) has issued a practice direction outlining that requests for adjournments, particularly at the last minute, are a significant impediment to fair and timely access to justice; as such, the tribunal will grant them only in extraordinary circumstances, such as illness of a party, witness, or representative. Absent exceptional circumstances, the HRTO will not grant adjournments, even when all parties consent (Mackenzie 2013).

BOX 11.

Ontario Courts: Factors Considered in Adjournment Requests

Factors supporting the denial of an adjournment:

- a lack of compliance with prior orders;
- previous adjournments that have been granted to the requester;
- previous peremptory hearing dates;
- the desirability of having the matter decided; and
- a finding that the requester is seeking to “manipulate the system by orchestrating delay.”

Factors supporting the granting of an adjournment:

- the consequences of the hearing are serious;
- the requester would be prejudiced if the request were not granted; and
- the requester was making honest efforts to avoid an adjournment (for example, honestly seeking to exercise a right to counsel).

Other factors to consider:

- the timeliness of the request;
- the reasons for being unable to proceed on the scheduled date; and
- the length of the requested adjournment.

Source: Law Society of Upper Canada v. Igbinosun, 2009 ONCA 484, at paragraph 37, <http://www.canlii.org/en/on/onca/doc/2009/2009onca484/2009onca484.html>.

South Korean courts. The South Korean courts have a strong reputation for good case management. The court has exclusive authority to manage its cases, the ICT infrastructure and legal framework to support it, and a CMS that provides for up-to-date case status information. Courts can and do hold one or more preliminary sessions to clarify issues that are in dispute and to review the evidence before formal hearing dates are set. Subsequently, the court holds several short hearings (usually at four to six week intervals) until it can determine that it has received and reviewed sufficient information to pass judgment, which is immediately announced at the end of the last hearing. Different from other jurisdictions, there is no concentrated trial period where the case is heard continuously over days or weeks.

At the closing of the hearing or hearings, the court announces its judgment. The court consults with the parties and/or their legal representatives to determine the schedule for the proceedings, including deadlines for submission of briefs, dates for preparatory meetings, examination of evidence and witnesses, court hearings, and announcement of the judgment. At the same time, the court does not have to follow the parties' requests for setting the procedures schedule. Although the court

cannot hold a party in contempt for disobeying an order or direction in civil proceedings, it has several options to manage such situations, including to refuse to accept submissions or motions if a party fails to abide by the due dates set by the court (see Article 147, Korean Civil Procedures Act [KCPA]). If a party causes delay intentionally or through gross negligence, the court can refuse to consider the party's arguments (see Article 149, KCPA) (Chung and Seo 2016).

2.3 AVAILABILITY OF PERFORMANCE MEASUREMENT SYSTEMS

Background

In order for a court to verify that it is meeting legal and organizational performance standards and delivering the needed quality of court services in a timely and cost-effective manner, practical and meaningful measurement systems need to be in place. Solid performance measurement systems, be they manual or automated, are important not only to help the court track and meet its performance goals but also to support resource management, provide the evidence needed to support budget requests, and communicate the court's efforts to the public. Modern performance measurement approaches underline the need to distinguish the quality of court outcomes from measures to assess the functioning of internal procedures, programs, and activities. Good practice examples from around the globe therefore measure the outcomes as well as the results of a court's operation to inform improvement needs. The need to measure a range of elements poses challenges for courts, not only in terms of creating the required systems and capacities but initially in selecting meaningful measures to better understand the many different aspects of court performance in a particular court environment (Clarke et al. 2008).

Using lessons from the private sector and other government agencies, the development of meaningful and practical performance measures that can be integrated into a court's daily operations began in earnest with the introduction of the Trial Court Performance Standards (TCPS), first in the United States and Canada (see BJA 1997). Building on these efforts and other well-established quality performance measurement approaches from the private sector, courts in Singapore, Ireland, the United Kingdom, Hong

BOX 12.

Five Core Court Quality Performance Areas for Improved Court Service Outcomes

- Access to justice
- Expedition and timeliness
- Equality, fairness, and integrity
- Independence and accountability
- Public trust and confidence

Source: TCPS, CourTools, and International Framework for Court Excellence.

Kong, and Australia followed, as did courts in several continental European countries, Latin America, and other regions soon after. The TCPS provided measures and standards against which courts could conduct self-assessments for the purposes of internal evaluation and self-improvement in five key performance areas: access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence (see box 12). They focused the court's attention on good performance not simply as an internal court matter but also as a dynamic that affects those who appear before the court and the ways operations could be improved for court users.

Although this was an important development, it proved to be difficult, if not impossible, for most courts to implement all 68 measures that the TCPS established across 22 standards for assessing court operations within the five core performance areas. Even though several individual courts in the United States, Canada,

and elsewhere used the TCPS or experimented with them, only the state of Washington managed to implement the standards statewide in all its trial courts. An important lesson to learn from this well-researched, comprehensive, and collaborative effort, which brought together court managers, judges, external experts, and stakeholders from the federal and state levels and from different court types, is that the desire for comprehensive data collection should not neglect what different courts across a jurisdiction are actually able to implement and use—not just once but over time.

Taking this lesson to heart, court management professionals and experts in the United States came together again to develop the CourTools. Released in 2005, the CourTools emerged as a more manageable way to measure court performance. They integrated the five above-mentioned core performance areas with relevant and more practical measurement concepts from other successful private and public sector performance measurement systems that could apply to the majority of courts in the United States (see NCSC 2005). The CourTools provided a focused set of 10 core indicators linked to overall court performance goals and offered concrete measurement tools that are widely applicable. This more targeted and practical approach has proven to be more effective, and its use has soared in the United States and Canada and inspired similar approaches in other countries. One somewhat unusual but very telling indicator of the success of CourTools is that today, several commercial vendors of case management software offer options to integrate select CourTool measures into their applications. These systems collect the required data and provide the resulting management reports automatically, as the CourTools are currently used in enough courts to sustain a market for this commercial software addition.

At the same time, the CourTools did not address some very particular data requirements for performance measurement in the increasing number of specialized trial and appellate courts that have emerged in the United States and in many other countries. As a result, further performance measures for specialized dockets and courts have evolved. In the United States, there are now CourTool-based performance measures for child dependency cases, drug court and appellate court performance, domestic violence cases, mental health issues, and adult criminal courts. Although the different case types and court responsibilities have to be reflected

in the performance measures, this diffusion has again led to some confusion, less clarity about what should be measured, and more operational complexity and demands on resources that smaller courts in particular have difficulties meeting.

Courts in other countries have also gone through various cycles of performance measurement approaches, and tools more applicable to courts outside the United States have been developed (see, for example, ICCE 2014). The Singapore trial courts were among the first to apply and electronically publish a scorecard approach early in the new millennium. The court continues to develop its internal performance measurement and reporting systems and has become significantly more focused on what it is publicly reporting (see Singapore State Courts 2015).

This raises the important question of what a court needs to measure to be able to inform internal management about improvement needs. In addition, it is important to determine what is required for other court objectives, such as developing and supporting budget requests and encouraging a healthy public trust level in the courts. Another important consideration is how performance information is actually used in the daily management of court operations, who has access to what type of information, and how this information is applied by judges, court staff, court managers, and the court's judicial leadership. Performance measurement is helpful only if it is applied to inform all court activities and operations: case management, judicial decisions, resource and budget management, and ultimately service delivery to the "clients" of the courts.

Reflecting these essential implications of performance measurement, the *Doing Business* QJPI measures whether the court (and other relevant enforcement agency) is able to generate and publish any performance measurement reports that monitor the progress of cases through the court and also provide related information about compliance with established time standards. A score of 1 is assigned if at least two of the following four reports are made publicly available: (i) time to disposition; (ii) clearance rate; (iii) age of pending cases; and (iv) single case progress. A score of 0 is assigned if none or only one of these reports is available (World Bank 2016a). In 2016, at least two of these reports were published in 71 of the 189 economies the report tracks (World Bank 2016).



Key elements

Establishing meaningful and measurable court performance goals and practical measurement schemes that fit the court. The TCPS, the CourtTools, the International Framework for Court Excellence (IFCE) (see below under “Good practice examples”), and similar data clusters are helpful instruments in determining what a court or court system might want to measure to best inform its own performance management and accountability measurement processes. All of these tools focus on the five above-mentioned core performance areas that are essential for any court and its users. Depending on the context of the jurisdiction, other measures may be also important. As outlined, specialized courts will need to collect additional or subsets of data to assess performance in their focus areas. The needs of a particular location may also call for other performance data needs. For example, if corruption is a significant concern, related data, especially experiences and perceptions of court users, will be important to collect; if judicial independence is in question, related inquiries in surveys of judges and court users may be helpful.

Here again, it is important to consider the difference between input, output, and results when performance is to be measured. Corruption or lack of resources may explain unusual delays or unreasonably high appeal rates and can be important to track, but neither is necessarily the core performance indicator that shows how much delay there is and which cases and courts are most impacted or how many and what types of justified appeals are filed and for what reasons. The

court must decide what its most essential performance goals should be and then choose related measures that can realistically be collected over time. For analyzing performance measures, the court may also need to look for other influences, such as resource misalignment, outdated legislation, and so on, and may also choose to include measures collected by others. These can include one or several of the international indices that contain court-related measures, such as the World Bank’s *Doing Business* report and World Development Indicators, Transparency International’s Corruption Perception Index, or local public perception surveys to provide further context to the analysis. The Singapore state courts, for example, include their performance results on several of these international indices in their annual reports (see Singapore State Courts 2015). As long as the methodological limitations of these indices are understood, they can provide helpful additional information, though they cannot replace the court’s own performance measurement system.

Creating a collaborative process for setting court goals and performance indicators and designing data collection strategies. Some overall court performance goals, such as fairness and timeliness, tend to already be expressed in constitutional and other legal frameworks that guide the courts. Others, such as user satisfaction goals, are specific to the particular court. The overall performance goals and exactly how they should be measured will still need to be defined by each court. As part of the process, it is critical that all groups impacted

by the choice of performance measures, the data collection requirements, and the results are consulted in the design of a good measurement system to ensure that they understand its importance, are committed to achieving its goals, and willingly contribute to the data collection and analysis. Through the collective work of all members of the judicial process, from judges to administrators to clerks, courts can better assess and recognize the areas within their system that require attention and improvement.

A good practice employed by well-performing courts is to engage in a court-wide strategic planning process that not only sets goals, objectives, and core performance measures but also creates committees to oversee data collection design, implementation, regular review of the results, and the formulation of response steps. The Florida state courts, for example, in 2002 created a Commission on Trial Court Performance and Accountability. Consisting of judges from several circuit courts and a Supreme Court liaison, the commission reviews performance data and reports and proposes policies and procedures to improve the efficient and effective functioning of Florida's trial courts. It also develops and reviews comprehensive performance measurement, resource management, and accountability programs.³³

Developing regular performance reports and data-based management capacities. To ensure that the performance data are regularly reviewed and used to inform performance gaps and develop response mechanisms, performance report prototypes should be developed for use by individual judges, administrative staff, and the court's leadership. Such reports can be manually created from case files, registration ledgers, and similar court documents. The production of the needed performance reports can be effortless if this function is appropriately reflected in the CMS design. Court leaders and managers as well as individual judges may need some training to interpret the reports and develop and capture the operational adjustments indicated. Ideally, individual judges receive regular reports about the progress and age of the cases pending

before them, processing trends, and comparison information that shows how their own caseload is proceeding in the context of the entire court. This allows them to take action if delays increase and to flag issues that they cannot resolve on their own for the chief judge or a court manager to provide additional resources or reallocate cases. If court leadership alone has access to such performance reports, individual judges are left with only a limited understanding of potential case performance issues and have fewer incentives to actively monitor and manage their own cases.

Disseminating performance reports and results.

Beyond active use of performance information to monitor case progress and address potential issues early on, it is also good practice to publish regular performance reports and the court's responses to the problem areas. It is not just a matter of making the court more transparent but an important element for informing the public about the court's commitment to ensuring good performance. This is one way to create trust and provide a solid basis—and potentially broader support—for any requests for additional resources if the court can no longer manage the caseload within the timelines and/or provide other much-needed court services.³⁴

Lessons learned

Selecting a few focused measures that can be collected over time.

The experience of creating the extensive set of measures included in the TCPS for the U.S. trial courts is telling. When too many data points have to be collected to provide regular performance measurement information, few courts will have the resources to maintain the process. There have been similar experiences in other sectors. For regular performance measurement, determining key performance areas and collecting just one or two measures in each are part of the most effective approach. More data may be needed when special cases or problems have to be tracked, but these are the exception. The CourTools are a good example of how to limit measurement to core information.

³³ For information on the Commission on Trial Court Performance and Accountability at the Florida state courts, see <http://flcourts.org/administration-funding/performance-accountability/trial-court-pa.html>.

³⁴ For examples of helpful public information about court performance, see the website of the Dubai courts at http://www.dubaicourts.gov.ae/portal/page?_pageid=292,663857&_dad=portal&_schema=PORTAL; or South Africa (2015).

Creating judicial understanding and support for court performance measures to promote responsibility for good court management. Effective court performance measures are used by judges, court staff, managers, and chief judges throughout the court system. In many countries, judges’ traditional opposition to performance measures in general, as well as their own active engagement in managing and tracking their own caseload for good performance, often rests on their understanding of judicial independence and their concern that such measures would interfere with it. The fact that courts are also part of the state organization, however, means that courts and judges are accountable to political decision makers—and ultimately, the public—for their performance. In many countries, it is still the ministry of justice that has the responsibility to inform parliament about the state of affairs of the courts and to request and justify judicial budgets. Although quality-control policies tend to stress the accountability of any state organization, active quality management is the courts’ mechanism for reinforcing their autonomy in their relation to other state powers, ministries of justice included. Getting to this understanding sometimes takes considerable time and effort, good training, and the ongoing involvement of judges in the entire management cycle, including budget processes.

Ensuring that appropriate resources are available to collect, review, and report performance data. The implementation of quality enhancement policies may put courts and judges under considerable pressure to increase timeliness and improve their performance. Accurate registries of relevant data and proper information management are required for a judiciary council or a ministry of justice to understand how well a court is operating. These are not easy undertakings, particularly in a large country or jurisdiction with many courts. In addition, registries that reflect set performance data require time and effort to create, maintain, and update. Without investments in data collection and in systems enabling court management to use the data to benefit local courts, it would be very difficult for central court administrators to initiate improvements. When this data collection also focuses on the quality of court hearings and judicial decisions, there is a risk that it will affect judicial independence and thereby lose judicial

support (Langbroek 2010). This is another reason why performance measures should be developed collectively and why systems should be created that allow judges to review the performance data and manage their workloads. Moreover, these measures should be part of any training programs, individual performance review systems, and ongoing consultations about the results and needed adjustments.

Good practice examples

The Supreme Court of Victoria, Australia. The Supreme Court of Victoria monitors its performance in terms of the efficiency, effectiveness, and quality of its administrative operations. The court also closely monitors its performance in relation to the initiation of new cases, conclusion of cases, clearance rates, and the backlog of cases pending, and evaluates the needs of court users and jurors to continually improve operations. It publishes annual aggregate data for the entire court, as well as breakdowns for the court of appeal and the trial division. The Supreme Court of Victoria was the first in Australia to become a member of the International Consortium for Court Excellence (ICCE), the group that developed the IFCE, which includes a framework of core values that are aligned with seven areas of excellence.³⁵ In addition to monitoring the above data, the Supreme Court regularly assesses its own performance against the IFCE to ensure it is tracking well in its application of the model.³⁶

Florida state courts. In 2002, similar to the efforts that had evolved on the national level earlier, the Florida state courts created a Commission on Trial Court Performance and Accountability to set up a state-wide consultative process and formed a group of local judges and court managers to develop, review, maintain, and adjust quality performance measures and related systems for all court levels throughout the state. The Supreme Court established commissions for trial court and district court of appeal performance and accountability. The commissions propose “policies and procedures on matters related to the efficient and effective functioning of Florida’s courts” and support the “development of comprehensive performance measurement, resource

35 The seven areas are court management and leadership; court policies; human, material, and financial resources; court proceedings; client needs and satisfaction; affordable and accessible court services; and public trust and confidence.

36 For information on the Supreme Court of Victoria, see <http://www.supremecourt.vic.gov.au/home/about+the+court/court+performance>.

management, and accountability programs.”³⁷ In addition, a Court Statistics and Workload Committee is responsible for developing related information and engaging with all courts to gather feedback and response mechanisms if case performance becomes problematic. These groups also develop and update a Compendium of Trial Court Standards and Best Practices, create Circuit Profiles, and actively support the implementation of and adjustments to the Trial Court Integrated Management Solution. Judges from the relevant courts are members of these commissions and committees, which are staffed by the Court Services Unit of the Office of the State Courts Administrator.

The Dutch courts. The courts in the Netherlands apply a national set of quality standards for the functioning of the courts. Building on lessons from the United States and other countries, the standards were developed by judges and court staff in collaboration with researchers

as part of a concerted effort to strengthen the operations and performance of the judiciary. The quality standards selected are: impartiality and integrity; expertise; treatment of litigants and defendants; legal unity (sentencing consistency); and speed and promptness (Langbroek 2010, 17). These standards are measured by a set of data elements and collected for each court via an automated system. The Netherlands Council for the Judiciary is responsible for analyzing the data and developing the needed data reports for each court and the judiciary overall to help with tracking case progress as well as overall performance information. A significant impetus for establishing this system, called RechtspraakQ, was the increasing pressure on the courts to become more cost effective. As a result, quality management for the Dutch courts is not just a tool for effective management but also for better performance, including financial performance, for which it is accountable to the Council and the Ministry of Justice (Langbroek 2010).

2.4 USE OF PRETRIAL CONFERENCES

Background

Initially developed in the United States in the 1930s with the introduction of the Federal Rules of Civil Procedures, the practice of using pretrial conferences as a case management tool has spread worldwide and is currently implemented in varying ways in many countries.³⁸ According to the *Doing Business 2016* report, 87 economies included in the study have instituted a form of pretrial conference that satisfies the indicator’s methodology.³⁹

The use of pretrial conferences is widely recognized as an effective tool for assisting courts in managing and promptly resolving cases and promoting preparation and early settlement. Generally, a pretrial conference is an informal meeting of the judge (or in some countries such

as Australia, a court registrar) and the parties following the filing of a claim that aims to define and narrow down the issues in dispute, thus clarifying evidentiary matters to be tendered by the parties and working toward a settlement. Studies in the United States and Europe have shown that pretrial conferences are successful in reducing backlog, increasing efficiency, and cutting the length of trials. In many instances, cases brought before a court could be disposed of before trial, provided the court has the necessary information to make such a determination. It is at the pretrial conference stage that a judge is able to obtain detailed information about a case to determine how best to dispose of it and create a realistic and firm roadmap for how it will be processed.

37 Florida Courts, “Performance & Accountability,” <http://www.flcourts.org/administration-funding/performance-accountability>.
<http://flcourts.org/administration-funding/performance-accountability/trial-court-pa.stml>.

38 See “Federal Rules of Civil Procedure,” <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure>.

39 The *Doing Business* methodology assesses whether a pretrial conference is among the case management techniques used before the competent court and if at least three of the following issues are discussed during the pretrial conference: (i) scheduling (including the time frame for filing motions and other documents with the court); (ii) case complexity and projected length of trial; (iii) possibility of settlement or alternative dispute resolution; (iv) exchange of witness lists; (v) evidence; (vi) jurisdiction and other procedural issues; and (vii) the narrowing down of contentious issues. A score of 1 is assigned if a pretrial conference is held in the competent court in which at least three of these events are discussed and a score of 0 if not discussed.

There is also consensus in Europe about the significance of using pretrial conferences along with other case management techniques in reducing caseload, delays, and costs. This movement was due in part due to Lord Woolf's report on access to justice in England, which recommended that procedural changes emphasizing early settlement and providing greater control to judges were needed in order to improve access to justice and court efficiency (Woolf 1985). This resulted in the codification of the use of early control mechanisms. The Civil Procedures Rules currently provide judges with authority over case management, including issuing orders on their own initiatives and providing additional directions for the lawyers aimed at effectively disposing of cases. In 2001, the changes and the introduction of judicial control were evaluated, which indicated that the culture of litigation had shifted from overly adversarial to more cooperative and that there had been a drop in the overall number of claims issued and an increase in pretrial settlements. This trend can also be seen in other countries such as Norway, where the introduction of pretrial conferences resulted in settlements in 80 percent of the civil cases in the district courts. Denmark, Finland, and Ireland have also implemented similar approaches.

Conversely, the less information the judge has about a case early on, the more likely that parties will be able to manipulate the process to their advantage,

causing unnecessary delays, reducing the likelihood of settlement, prolonging trials, and even leading to frivolous cases and appeals. Pretrial conferences eliminate many of these risks by empowering courts to have early control over the process. Generally, pretrial conferences aim to do the following:

- ▶ Simplify disputed issues and eliminate frivolous claims
- ▶ Gather information, identify the merits of the dispute, and formulate issues
- ▶ Encourage and discuss the possibility of settlement
- ▶ Develop schedules and set deadlines for case events and the submission of pretrial documents and evidence
- ▶ Obtain admissions of facts
- ▶ Resolve evidentiary matters and disputes
- ▶ Set dates for future conferences and set trial dates

Regardless of how they are implemented across the globe, pretrial conferences have a number of common elements that will be presented in the following sections, along with lessons learned in implementing them. In addition, several good practice examples from a variety of countries will shed some light on the different ways in which countries with civil and common law legal systems have approached the use of this case management tool.



Key elements

Ensuring effective early and continuous control of case progress by judges. For pretrial conferences to be effective, early and continuous control is required to ensure that the case is progressing without delay and that frivolous claims are being disposed of effectively. In the United States, for example, federal rules require that pretrial and trial conferences be held, the former after filing and as needed thereafter and the latter within weeks of the trial date. Trial conferences in particular provide an added measure of control over trials by ensuring that they are streamlined and short. They also provide another opportunity for the court to facilitate and promote settlements. In the district courts in Denmark, pretrial meetings must be held at the early stages of the claim so that the judge and the parties can agree on the development of the case. A similar practice takes place in Ireland in the High Court, where the parties are required to attend a conference immediately after the filing of the defenses to clarify the issues and focus on timely processing and reducing costs. Continuous and active judicial control over case management, however, places a greater burden on the courts and requires resources as well as judicial capacity.

Developing realistic, meaningful, and binding case events: In countries where pretrial conferences have been effective, the scheduling orders issued by the court at the conclusion of the conference are realistic and binding on all parties. These orders reflect: 1) participation and agreement by all parties, lawyers, and, at times, the experts; and 2) the balance between the court's desire to expeditiously resolve the case and to avoid imposing undue and unreasonable demands on the parties. The result is a document with meaningful and binding dates for case events, which is essential for creating the expectation that these events will take place as scheduled. This is beneficial for both the courts and the litigants, as firm dates operate to increase settlements, improve the likelihood that the lawyers will be prepared for trial if the case cannot be settled, and eliminate the possibility that lawyers or experts will manipulate the case process. The court is also personally authorized to issue sanctions on its own, including by imposing fees and costs for failure to participate, failure to appear, failure to be substantially prepared or to participate in good faith at the pretrial hearing, or failure to obey a scheduling or other pretrial order.

Promoting early pretrial disposition/settlements and limiting the scope of trials. One of the cornerstones of pretrial conferences is the focus on encouraging and driving pretrial settlements. The conference provides a forum for presenting information, identifying and disposing of unsubstantiated claims, agreeing on uncontested issues, and ascertaining the merits of a claim in an informal setting guided by the judge.

Lessons learned

Active and continuous engagement with the attorneys. The participation of lawyers and parties, when permitted, contributes to developing realistic time frames for case events. Many countries (such as Australia) require that the parties be present, which can facilitate and increase the likelihood of settlements, especially in commercial cases. In Norway, where the parties are not required to attend pretrial conferences, the lawyers are obligated, according to their code of conduct, to consult with the client and relay their concerns to the court. In the United Kingdom, feedback on timing and case management orders is sought from the parties. The broad engagement of all those involved in a case ensures that all interests are factored into the court's order and that no undue burden is placed on the parties. The end result is an understanding of and agreement on how the case will progress.

Active involvement of experts. Expert-related issues are a major cause of delay in many jurisdictions. These issues may range from untimely submission of expert reports to the submission of unfocused and badly written documents that require clarifications, as well as the failure to provide expert testimony during hearings. The lawyers, to manipulate the progress of a case, can also use dilatory tactics that rely on expert issues. By mandating the participation of the experts in the pretrial conference and in the presence of the lawyers (and parties if allowed), a court is able to address all evidentiary matters and identify realistic deadlines for expert actions. The existence of a scheduling order with such deadlines creates a sort of contract between the court and the experts, which can significantly eliminate delay.

Training of judges. Pretrial conferences confer a great deal of authority on the judges to exercise control over the management of cases, including by mediating them. This power, in order to be exercised effectively and fairly, must be based on a good understanding and knowledge of case management techniques and case preparation requirements for the parties. In many countries, judges do not have this knowledge or the opportunity to acquire it through training prior to serving on the court. Instead, preparatory and ongoing judicial training is often limited to legal issues. This, in addition to the view of many judges that their work should be limited to applying the law, can be detrimental to the court's ability to effectively implement pretrial conferences and other case management tools. Countries such as the United States, where case management is effectively used, provide judges with preparatory training in case management as well as access to resources (for example, the *Federal Civil Litigation Management Manual* and the *Elements of Case Management: A Pocket Guide to Judges*) that offer successful approaches and suggested practices. Mediation skills must also be acquired in order to effectively promote and facilitate settlements. Well-performing courts (such as the District Court of Western Australia), in recognition of the importance of training judges in mediation skills, provide ongoing training and require accreditation.

Good practice examples

The U.S. federal courts. The Federal Rules of Civil Procedures were the first to establish and introduce the concept of pretrial conferences as a case management tool.⁴⁰ Since their enactment, federal judges have been empowered with the authority to actively control and manage the progress of cases at the pretrial and trial stages. Pretrial conferences may be held after the filing of the case, and trial conferences can be held shortly before trial. Each serves a purpose, but both collectively enhance the court's efficiency in streamlining the case process. Pretrial conferences initiate the case management process, involving the litigants in establishing an appropriate plan for a just and speedy resolution of the case. They are an effective tool for planning, coordinating, and carrying

out discovery; eliminating unfair procedural tactics by lawyers; enhancing the preparation of the case and presentation of evidence at trial; and improving the overall transparency of the proceedings. They have also been integral in encouraging settlements by providing lawyers with a "reality check" on the merits of their cases that may lead to early settlement. As outlined in Rule 16 C (2) of the U.S. Code, the issues determined at the conference may include:

- ▶ "Formulating and simplifying the issues, and eliminating frivolous claims or defenses
- ▶ Amending the pleadings if necessary or desirable
- ▶ Obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence
- ▶ Avoiding unnecessary proof and cumulative evidence
- ▶ Determining the appropriateness and timing of summary adjudication
- ▶ Controlling and scheduling discovery
- ▶ Identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial
- ▶ Referring matters to a magistrate judge
- ▶ Settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule
- ▶ Determining the form and content of the pretrial order
- ▶ Disposing of pending motions
- ▶ Adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems
- ▶ Ordering a separate trial of a claim, counterclaim, cross claim, third-party claim, or particular issue
- ▶ Ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law or a judgment on partial findings
- ▶ Establishing a reasonable limit on the time allowed to present evidence; and
- ▶ Facilitating in other ways the just, speedy, and inexpensive disposition of the action."⁴¹

Pretrial conferences can also be utilized to address attorney fees early on, which reduces the possibility of

40 Ibid.

41 Ibid, 16(c)(2).

a dispute arising between the parties at the conclusion of the case.

Much like the earlier pretrial conference, trial conferences (convened prior to the start of a trial) provide an additional control mechanism through which judges are empowered to streamline trials by establishing the ground rules. They can also consider limits on the length of the trial, clarify procedural issues, preview the evidence, and narrow down the issues to be presented at trial. This tool has been effective in reducing the length of trials as well as increasing pretrial settlement rates.

Unlike in other many other countries, pretrial and trial conferences in the United States are governed by a clear legal framework that fosters active case management and control by judges. To ensure effectiveness, various types of sanctions are provided to foster active participation and avoid obstruction by lawyers and parties. For instance, sanctions can be issued for failure to appear at the pretrial conference or for being unprepared to participate. In extreme violations, the rules require a judge to order the party and attorneys to pay reasonable expenses, including the other party's attorney fees, because of noncompliance. In addition, the focus on training and providing access to resources ensures that judges have the requisite capacity for and understanding of case management.

Norway district courts. In the district courts, planning meetings in all civil cases are scheduled within days after the case is filed. Lawyers are required to participate and may also do so via telephone. The meetings aim to: plan all steps necessary to process the case until its disposition; clarify the claims and supportive arguments and evidence; set deadlines for case events; and set the date of the final hearing (trial).⁴² The overall effectiveness of the Norwegian model for managing cases rests on a holistic approach to efficiency that not only requires early pretrial conferences but also places limitations on the number of hearings held in civil cases (judges are limited to holding one hearing, which is usually at the end of the process when all information and documents have been reviewed, settlement options eliminated and the judge is prepared to conclude the case) and implements time standards for resolving disputes. Major civil cases must

be resolved within six months, while small cases must be concluded within three months. Additional success factors include the inclusion and consideration of the parties' feedback in setting deadlines and estimating the timing of future procedural steps and the participation of experts in the meetings.

District courts, Western Australia. The court is guided by an ambitious goal of resolving civil cases within 12 months from filing and allowing only two to three cases out of every 100 go to trial. To achieve this goal, the court has developed and implemented an approach based on a detailed legal framework that calls for active case management with a commitment to pretrial settlement and a focus on capacity building.

The rules stipulate that when the parties make their first appearance, the court registrar can summon them to attend a case management hearing that must be set within 14 days of the issuance of the summons.⁴³ During the hearing, the registrar reviews all the documents filed with the courts; establishes the complexity of the case; determines the need for interlocutory proceedings; and assesses the parties' readiness for trial. In addition, the judge may issue procedural directions to facilitate the efficient and expeditious resolution of cases and dispense with all or some of the pleadings. The directions may also require the parties to file an additional pleading; dispense with interlocutory applications; direct that experts confer with each other to identify differences and resolve as many issues as possible; and direct some or all the parties to confer to settle the case, and failing settlement, to resolve as many issues as possible and identify those to be tried. Once the case is assigned a trial date, it is set for a pretrial conference presided over by a court registrar who also acts as mediator. Attendance is mandatory, and rarely will the parties in a commercial dispute ask to be excused. The parties are required to attempt to settle in good faith. If the registrar is not satisfied that a party is ready for trial, he or she may adjourn the conference or amend any case management direction previously made. To promote settlement, all discussions and admissions made during the pretrial conference are confidential and inadmissible in trial.

42 See Act of June 17, 2005, no. 90 relating to mediation and procedure in civil disputes (The Dispute Act), <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050617-090-eng.pdf>.

43 See "District Court Rules 2005" of the Western Australian Current Regulations, http://www.austlii.edu.au/au/legis/wa/consol_reg/dcr2005236.

This active and elaborate case management approach has proven to be effective. According to the court's annual statistics for 2014, only 71 out of the 4,800 civil cases filed, or 1.7 percent, proceeded to trial, with a total of 2,390 pretrial conferences held at which mediation was carried out by the registrars. In 2015, court data showed that only 51 out of the 4,663 cases filed, or 1.1 percent, proceeding to trial. The high settlement rate was also due in part to the court's focus on the professional

development and capacity building of its registrars.⁴⁴ Conducting the bulk of the mediations, registrars must undergo an accreditation process and are continuously and regularly offered mediation training. For cases that could not be settled prior to trial, the court's active management approach succeeded in narrowing down the disputed issues and evidentiary matters, which resulted in a reduction of the length of trials.

2.5 AVAILABILITY OF AN ELECTRONIC CASE MANAGEMENT SYSTEM

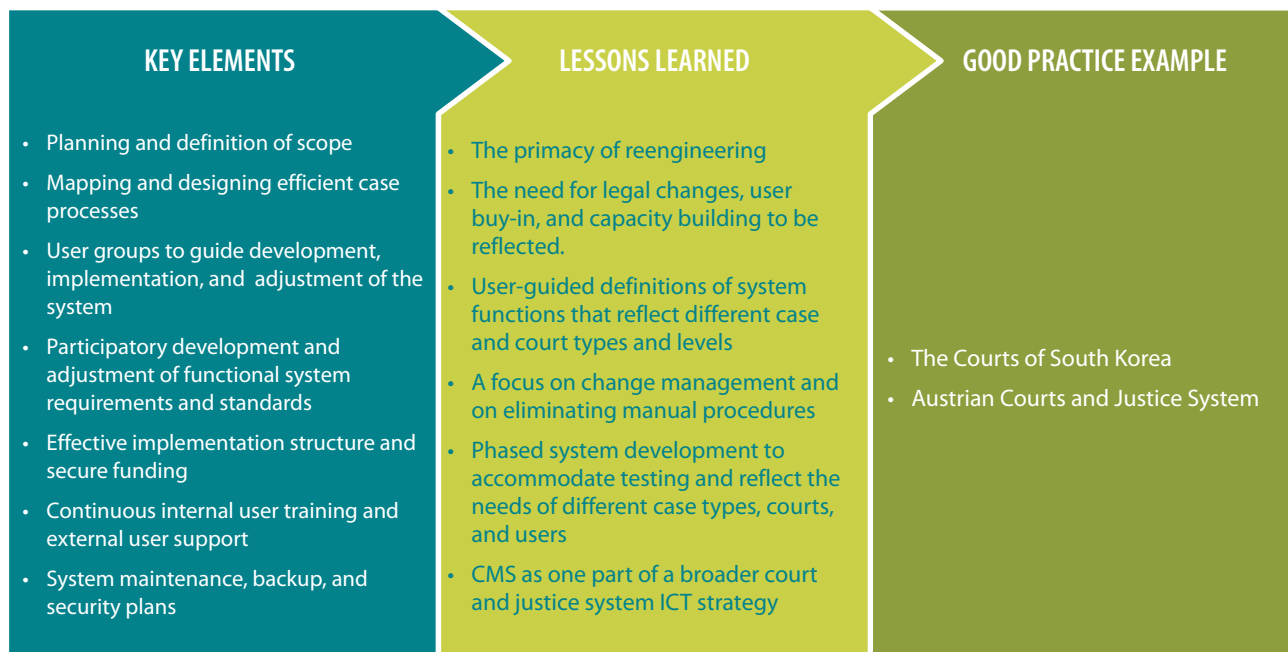
Traditionally, a case management system (CMS) is the combination of the practices and techniques that support manual caseload management, such as timelines, pretrial conferences, adjournment rules, and so on, using paper forms and files. The automation of case management processes and broader introduction of ICT into the judicial system greatly facilitate effective case management. With the advancement of technology, the automation of such systems has become increasingly common. A good electronic CMS reflects and supports the various caseload management techniques and principles applied to different case types at a particular court. If appropriate case management techniques are developed and translated into a CMS, the system can effectively track the status of cases and their position in the court process, support the development of caseload and possibly workload statistics and management reports, and monitor case processes, all of which contribute to performance monitoring. Regularly gathered statistics on the flow of cases through the court process can identify process bottlenecks and case delays, which together can inform needed resource and process adjustments. A CMS can provide judges with the information needed to control timely processing and produce a complete and reliable case record. Since such a system helps establish and preserve case records (see USAID 2009), it can also facilitate and likely reduce appellate reviews (Gramckow and Nussenblatt 2013).

Considering the advancements of technology and the continually decreasing cost of computer systems, automation of at least the basic case management processes to track caseload is within reach of almost any court that has access to steady electricity, a relatively sound infrastructure, and a workforce that can manage simple computer entries. These basic systems are not very complex, and they can already greatly increase court efficiency and accountability. Moreover, they are no longer very costly; indeed, when well designed, they can reduce operational costs. At the same time, they require a solid assessment of current operations, the desire to develop optimal processes, and a commitment to deliver good court services. They also require time and commitment to design a good system from the court itself—no software developer, whether a local expert or an international software company, can design a well-functioning system unless the court's leadership and relevant court users are extensively involved in the design, testing, and rollout. And no CMS, even the most sophisticated automated one, can deliver results if the data it collects are not translated into management reports that those in charge are actively using and responding to. This is the essence of good case management: establishing effective procedures, verifying that they are adhered to, and responding when things do not develop as they should (for more detailed information, see Gramckow and Nussenblatt 2013).

44 For more detailed court data, see a list of the court's recent publications at http://www.districtcourt.wa.gov.au/P/ps_publications.aspx?uid=8413-9020-9299-8705.

The *Doing Business 2016* report established that a form of electronic CMS with the elements used in the indicator's methodology was available to judges in 41 economies of the 189 evaluated.⁴⁵ Access to such

a system was, however, available to lawyers in only 37 economies (World Bank 2016a). There is clearly room for advancing these systems in many countries.



Key elements

Planning and defining the scope of the envisioned system. Developing an automated CMS that fits the needs of a particular court or even entire court system requires careful planning, effort, and time. The more complex the envisioned system and the more courts involved, the greater the effort that will be needed. Before automation begins, it is fundamentally important that the court(s) have a clear vision of their automation

goals, fully understand what is involved in designing and implementing such a system, and are aware of the impact the desired changes will have on all involved. This means that the court (that is, court leadership, judges, and key court staff) must be able to clearly articulate its needs, goals, and objectives; it also means that the court should fully comprehend that processes have to be optimized first before any automated system

⁴⁵ Since electronic CMS vary significantly in scope and complexity, the *Doing Business* methodology defines – and scores the existence of such a system in the following way: first, reflecting the fact that individual judges need to be actively managing their cases, one point will be given if judges within the competent court can use an electronic case management system for at least four of the following purposes: (i) to access laws, regulations and case law; (ii) to automatically generate a hearing schedule for all cases on their docket; (iii) to send notifications (for example, e-mails) to lawyers; (iv) to track the status of a case on their docket; (v) to view and manage case documents (briefs, motions); (vi) to assist in writing judgments; (vii) to semiautomatically generate court orders; and (viii) to view court orders and judgments in a particular case. Second, reflecting the court user needs and service delivery focus of the court, another point of 1 is assigned if lawyers can use an electronic case management system for at least four of the following purposes: (i) to access laws, regulations and case law; (ii) to access forms to be submitted to the court; (iii) to receive notifications (for example, e-mails); (iv) to track the status of a case; (v) to view and manage case documents (briefs, motions); (vi) to file briefs and documents with the court; and (vii) to view court orders and decisions in a particular case (World Bank 2016, p.154).

can be developed that actually makes a difference in court operations. Moreover, the court must be able to identify the processing and automation changes that can be made within the existing legal framework and resource capacities and the amendments that will be needed. Ideally, the court reviews its business procedures, maps the flow of key case types through the entire court process from filing through final judgment, assesses and evaluates operations and management systems in place, and determines whether there is a need to redesign processes before embarking on major automation.⁴⁶

In addition, the court will need to have reliable case data to determine where automation can have a significant impact and what functions and/or case types should have priority. Automating all court processes for all case types is such a complex undertaking that a phased approach is needed. Some courts have chosen to automate their civil caseload first, which for many courts represents the largest court function (see box 13). Automating larger caseloads means the system can have a greater impact on the court's operations. In other instances, courts have started with a smaller subsection of cases, such as commercial cases, for example, to keep the initial design effort manageable. Automating other case types subsequently becomes easier, since procedures and data requirements are similar and the design can build on and learn from the first automation effort. The decision to identify where to start and how complex a system to develop has to especially consider staff abilities, training requirements, and other end-user needs and capacities, as well as whether current court facilities and other infrastructure can support the envisioned automation. IT development costs as well as likely future use and maintenance must be considered equally. The results of the planning process will have to clearly state the circumstances under which automation would add value to court operations and the options for streamlining and automation that are available (Gramckow and Nussenblatt 2013).

Mapping and designing efficient case processes.

A key requirement for designing a good CMS—and a step that can be taken by any court aiming to improve its performance—is a review of how cases are currently moving through the court. This will help identify if and

BOX 13.

Automation: Where to Start?

The civil caseload tends to be the largest in many courts across the globe. Starting automation there is thus likely to have a significant impact on court operations. Automating civil case procedures also tends to be less difficult, since there are fewer important information elements that need to be tracked than in criminal cases, and the need to link information to other agencies is lower. Courts in jurisdictions as diverse as Abu Dhabi and Mongolia are among those who have opted for automating civil cases first.

When fewer resources are available, targeting a smaller but still high-impact caseload, such as commercial cases, can be very effective to demonstrate the benefit of automation. Morocco and Serbia are countries that have successfully taken this approach.

When resistance to changing processes is high and staff and other resource capacities to support automation are initially low, focusing on the automation of only a few court processes where impact can be seen quickly is a good option. For example, Egypt piloted the creation of a one-stop filing counter in the North Cairo First Instance Court, which has the highest caseload in the country. The impact was significant, since the new filing process required only three steps in one location, instead of over 40 actions that had to be conducted in various offices across the court.

Source: Gramckow and Nussenblatt (2013, 10).

how operations can be simplified, streamlined, and adjusted to increase both internal efficiency and user friendliness (for a detailed account of how this can best be undertaken, see Gramckow and Ebeid 2016a). The initial process and organizational review conducted during the planning phase will have determined which procedures will be automated and when, as well as the information the system should capture for operations and management, information exchange, and interconnectivity requirements.

⁴⁶ For an overview and helpful tools to conduct such case mapping process, see Gramckow and Ebeid 2016a.

The initial review will also help define the capabilities the software needs to provide and the data it must maintain. Based on this preliminary identification of the scope of the system, a detailed review of the operations and processes to be automated has to be conducted, with several objectives. First, it should point out process inefficiencies, design better operations and procedures, and identify any need to adjust rules and legislation as well as any resource requirements. Second, to be successful, this process will also result in the development of procedural and information standards. Finally, and equally important, full functional standards and technical specifications have to be developed for each implementation phase.

Creating (internal and external) user groups to inform and guide the development, implementation, and future adjustment of the system. The creation of a user group to guide the system development process and work hand in hand with the software developers is essential for:

- defining and communicating the scope and nature of the proposed system
- communicating its own processing and information needs and system-related functional requirements to vendors or system designers
- informing process, resource, legislative, and other change needs and change process options
- providing a benchmark for evaluating and selecting software, if a new software system is to be procured (Webster 1996).

These groups should be comprised of experienced and committed representatives of all key internal and external users the system will be designed to serve. This will involve judges, court staff, court managers, and leaders. Depending on the focus of the system, judges and staff from different court types at different court levels should be involved. External users should also be engaged if the system will be available to them in some form. Considering that the design of the system is just the first step and that testing and implementation will require adjustments, such user groups should be available as long as the system evolves.

Ensuring participatory development and ongoing adjustment of functional requirements and standards for the system. Based on a solid caseload mapping process that ideally would have also resulted in streamlined procedures, court rule and legislative

changes for the system, as well as resource adjustments, active user groups should focus on developing the needed functional standards and specification details for the development and future adjustments of the electronic system. Clearly, these functional specifications should be based on and reflect any process modifications that resulted from the earlier analysis of the business flow models. If inefficient procedures are automated, the result will be a correspondingly inefficient system that may benefit to a certain extent from automation but will not be a more effective process.

The development of functional standards for what the system is supposed to support and deliver is crucial but not always well understood or appreciated by those who need to define them, court staff and judges. Many are new to the design of a good CMS—this is not a skill tough in law school. Younger generations more familiar with various ITC applications, social apps and coding may find the thought processes required for this process easier. But if they, the judges, court staff—and external users who are supposed to use the system—are not defining in detail what the system needs to do for them, the software developers will. Overall, the process starts with identifying data requirements for each of the different functions the system is expected to perform, such as case initiation, case maintenance, and calendaring. For each function, the needed range of data has to be defined, which tends to cluster around four core data types: (1) person-related data (defendants, parties, and attorneys), (2) time-related data (processing, decision making, and hearings), (3) case data (history, event, statistics, and records), and (4) financial data (fees, fines, resources, maintenance, and services, including incarceration). Each of these data sets relates to the other, creating a relational database. These relationships have to be defined when building a CMS that will successfully retrieve and store information (Steelman, Goerdts, and McMillan 2000). Even when the functional specifications have been developed, additional areas for process improvement may be identified in the process and may be considered for possible inclusion (see Kujanen and Sarvilinna 2001, 41) but there needs to be time when the desire for continuous adjustment has to stop, when the functional standards developed so far are declared “good fit”, coded, tested and the system goes live. It is easy to understand why court users continuously have further ideas for enhancing the system or why court leaders demand further changes; as the system is used, it should evolve, but functional specifications and related system changes cannot be constantly made

even if system adjustment cost were not an issue. Functional specifications are not unlike court rules, they respond to the legal environment, processing requirements and (internal and external) user needs over time. Just like court rules, they need to be set, and there needs to be a system in place that provides for capturing adjustment suggestions, reviewing them and adjusting them at regular intervals. A thoughtfully assembled, inclusive user group to not just design the system but continuously manage this adjustment process is what well-performing court have created.

A CMS links the data types as they are needed throughout the court process to individual functions and decisions and compiles them into reports. To assist courts in the United States with this complex and time-consuming design process, a group of court professionals, including judges and court managers, from different courts on the federal and state levels came together to develop functional standards for different case type management systems.⁴⁷ These standards outline a set of functional requirements that a system should at minimum be able to provide; they also offer a base in relation to which courts can review the requirements of their jurisdiction, ensure that core elements are not missed, and eliminate the need to focus on the general functions each court has to fulfill for each court step. This allows courts then to identify if the “standard” system is sufficient or if adjustments are desired or required, thereby saving them time and helping them design systems that meet their own needs. The specifically crafted functional system requirements and related information captured to develop the system’s enterprise architecture will not just be the basis for building the system but will also support ongoing adjustments as laws change, user needs shift, and demands grow.

Creating an effective implementation structure and securing funding. Developing a system that meets the needs of the organization and its internal and external users requires more than the involvement of a user group, however. It also requires that all who will eventually use the system are able to participate in its development, understand its benefits, and ultimately, actually utilize the system as envisioned. More than appropriate training, this requires that users are committed to using the

system, are involved in providing feedback for further improvements, and have sufficient IT support (such as help desks and hardware and software support), and that there are structures in place to ensure that the system is used. Managers will need to motivate staff to use the system and have mechanisms in place to enforce this goal. Initially, a transition phase that allows for learning, system reliability, and effective backup to create trust in the system will be important, but the concurrent use of the old manual and the new automated systems is not advised and should not be tolerated. Employing both systems increases the workload and does not make the processes more efficient, thereby essentially wasting all the investments made.

It is equally important to ensure that funding is available not only for the design, testing, and early implementation of the system but for ongoing maintenance and user capacity building. A CMS requires at minimum some adjustments each time the relevant procedural and related substantive laws are amended. If funding for such changes is not available, the system can become outdated quickly. Similarly, as users become more familiar and comfortable with the system and as internal procedures continue to be identified for streamlining or increased user friendliness, system changes will be needed. Without appropriate funding, the system will be stagnant and less effective in a short period of time.

Providing continuous internal user training and external user support. One-time training of internal users, court staff, and judges in the use of the system is often part of the contract with the system developer. This, however, is not enough. Training for internal users has to be provided on an ongoing basis; it also needs to cover more than how to use the system and focus on how to utilize the information and reports the system provides. Judges, and especially court managers, chief judges, and judicial councils (and ministries of justice, where applicable), need to understand how to employ the system to generate information and reports for planning and managing their work, tracking performance, and informing managerial decisions and resource allocation requests. Courts that are enabling external users, lawyers, other agency counterparts, and other litigants to use the system, whether for tracking case status or filing cases and other information electronically, should also aim to

⁴⁷ For more information about the history and current status of functional standards for court technology in the United States, see the website of the National Center for State Courts at <http://www.ncsc.org/Services-and-Experts/Technology-tools/Court-specific-standards/History.aspx>.

provide related information support and training. High-performing courts, such as the Singapore state courts, the South Korean courts, and others, regularly provide step-by-step online help as well as training for external users and help desk assistance.

Arranging system maintenance, backup, and security plans. From the beginning, courts should consider and recognize the effort and resource requirements needed to maintain the system, provide effective backup to avoid data loss, create an effective disaster response plan, and ensure the security of the system and the data. The South Korean courts, for example, have a completely dual (in some parts, even triple) system to ensure that users do not experience system outages (Gramckow and Ebeid 2016). Data backup to avoid data loss has to be frequent, and the ever-evolving cyberattacks on many organizations, including courts, require increased response capacities. In the United States, for example, courts continuously exchange information on the latest cyber threats and how best to respond (see McMillan 2016). Publishing general information about the court's efforts to ensure a secure and reliable system is an important element in creating user trust in the system's reliability.

Lessons learned

The priority of reengineering. As mentioned above, automating the case process without reengineering will not be very successful. Not only are inefficient processes that tend to be more complex more difficult to automate, but if processes are not streamlined, the inefficient duplication of efforts, repeated hearings, and unnecessary process steps are likely to persist. If timelines for case processing are not established and enforced, if adjournments continue to be widely granted, and if options to fast-track small cases are not available, courts will continue to be clogged. The successful automation experience in Malaysia, among others, is credited with building on an earlier backlog clearance program that began with tracking all cases, monitoring court and judge performance, concentrating all administrative matters in administrative units, and thereby relieving judges from administrative burdens. This was followed by the creation of strict processing timelines in the New Commercial Court in Kuala Lumpur, clear scheduling hearings, and limited options for adjournments. Building on improved processes and better workload distribution, the e-court

system, which automated document development and other routine procedures, provides alerts and reminders of the timelines (Zakaria 2013).

The need to anticipate legal framework changes, user buy-in, capacity building, and other transitioning requirements. If legislative changes are required to allow for certain automation options, for example, new timelines for more efficient procedures or the submission of e-documents and e-signatures, automation plans will need to reflect the time needed to pass new legislation. This is one reason why phased approaches are not only helpful but often a necessity. If enabling legislation is lagging, the system may not be possible as envisioned, at least in the short run, but a phased design can provide more time to ensure that all internal and external users are on board, can participate in the design, and can use the system effectively. Understanding user resistance, developing constructive measures to overcome it, and building training, help-desk, and other support functions also require time, resources, and planning.

As courts develop or update their technology, selecting and implementing a highly configurable CMS also requires that courts and a core group of internal and external users have the capacity to inform the system design and the selection of a vendor. Choosing an appropriate system depends on accurately judging its configurability capabilities, and developing good user requirements depends on capturing process-oriented needs to take advantage of those capacities. If courts do not have their own IT staff with a solid understanding of the various needs and the ability to work with the different user groups in this process, another agency, such as a ministry of justice, may be able to assist to some extent. In the end, however, the court has to make an effort to develop the capacities of at least some judges and court staff to actively engage in the process, not just once but over time. This is one of the reasons why the South Korean courts were so successful in creating a globally recognized system—they focused on creating the needed capacities among judges and court staff.

User-driven development of clear and detailed definitions of system functions that reflect different case and court types and levels. The functional standards specify exactly what a court CMS must be able to do. Although many court functions cut across most case types (such as monitoring speedy trial rule dates for

BOX 14.**The Next Generation Case Management System for U.S. Federal Courts**

When the U.S. federal court system embarked on an effort to develop its next generation case management and e-filing system, it was able to draw upon a broad number of internal and external users who already had experience with the existing system and understood well what they needed and wanted from a new one. By that time, 700,000 attorneys and others had filed court documents over the Internet.

According to the courts' website, "the requirements-gathering phase of the NextGen project ended in March 2012, as groups of judges, chambers staff, clerks, court staff, and AO [Administrative Office of the Court] staff identified and prioritized more than 400 functional requirements. Those requirements elicited more than 6,000 comments from the courts. The project also received input from the bar, academia, government agencies, and others."

AO developers then began the "design, coding, testing, and implementation of NextGen. The goal [was] to further improve efficiency and integration among the appellate, district, and bankruptcy systems; achieve greater consistency, especially for external users; collect more case-related statistics; and share data with other Judiciary systems."

Source: "Improving Court Case Management, Financial Systems, and Statistical Reporting," website of the United States Courts, <http://www.uscourts.gov/statistics-reports/improving-court-case-management-financial-systems-and-statistical-reporting>.

criminal cases) and even most court types and levels, including specialized or appeals courts, each major case type has some unique requirements that need to be reflected in the system. In order to ensure that the system comprehensively meets a court's needs, each function must be examined separately for each case type (see box 14).

For instance, the calendaring of traffic cases in many countries requires an interface with traffic police officer duty schedules who may need to appear as witness, a feature not needed for civil trial calendaring in general jurisdiction trial courts; complex commercial cases may regularly require the involvement of experts, a feature not needed in most small claims cases. This is another reason why a phased implementation is helpful, as automating all the different case types simultaneously is highly resource intensive and can be a significant burden on the internal and external users who will need to provide input. If multiple user groups are working in parallel to provide input for the development of a system, they are likely not only duplicating efforts but possibly developing conflicting recommendations. Starting instead with a concentrated effort for one case

type, testing and adjusting it, and then building on this effort for the next case type is a more meaningful process and often takes less time overall, since the second group can focus on the few procedures that are different.⁴⁸

At the same time, gathering not just caseflow but also management requirements is never an easy task. Moreover, the result is often incomplete information because 1) management requirements are difficult to discover from judges and support staff, and 2) shortcuts are often taken due to time and budget constraints, which then reduce data and implementation quality. Conventional approaches to software development rarely capture the kinds of interaction needed between judges, support staff, and IT professionals to achieve the goal of designing a highly user-friendly system that responds to the many organizational layers and needs of a court. This requires another level of information, especially if the system also needs to track tasks in work queues to help measure and manage user performance. Most CMSs in place in courts today capture only limited staff and judge performance measurements or are restricted to counting activities at a rudimentary level (such as the overall percentage of cases disposed within

48 For a helpful source in developing functional standards, see the National Center for State Courts online at <http://www.ncsc.org/About-us/Committees/Joint-Technology-Committee.aspx>.

set timelines). A system that tracks the duration of finer tasks (for example, the percentage of pretrial hearings by case type held within set timelines and so on) and how long it takes before a user performs them, would improve management's ability to analyze overall work flow and inform ongoing improvement needs, including the need for training or system adjustments.

Focus on change management and on eliminating manual procedures. As mentioned above, the planning process should have identified the requisites of all internal and external users, including what they will need to understand and use the system effectively. The development, testing, and rollout require ongoing engagement, feedback, and special effort to overcome resistance to the new system. This necessitates not only early user engagement in the process but ongoing communication about design, testing, and implementation steps. It also requires clear policies regarding the use of the system. Although the initial continued use of manual (paper-based) processes as a backup may be prudent, clear policies should be in place to ensure that they are phased out as soon as possible. Performance systems should be adjusted to incentivize the use of automation, and sufficient training has to be provided to enable users to make the most of the new system and to understand its benefits. Help desks and service bureaus have to be created to assist users and address system issues, and also to capture user experiences so that they are reflected in further support functions as well as system adjustments. System performance has to be monitored and adjustments have to be made as needed. The courts in Malaysia—and all courts that have developed effective systems that are widely used—engaged all end users in the design, carried out extensive training of internal and external users of the system, and provided help options after the system was online (Zakaria 2013).

System development in phases to accommodate testing and reflect the needs of different case types, courts, and users. The need for an iterative as well as interactive CMS development approach has been experienced by many courts. Judges, support staff, and other key users must be involved in defining system requirements and in reviewing whether the design and end-system meet them. This stage of system development is time consuming, because each individual element of just one case type for a particular court usually requires multiple user-developer sessions

to ensure it meets the needs of the end users. In other words, for each data entry or search screen, in order to create a user-friendly workflow process, multiple sessions are needed with all internal and external court user groups. Managing this dynamic process requires that users also understand that the first version of the system will just have to be “good enough for now,” and that, within practical limits, any element can be revisited later. If users were to expect a perfect system that meets everybody's needs from the very start, the design process would never end (Mathias 2010, 5).

Many courts that have a good automated CMS have also opted to use a few pilot courts to experiment with a new application. This helps to identify whether further system adjustments need to be made, to better understand training and user support needs, and to plan and budget for a realistic rollout to other courts (Gramckow and Nussenblatt 2013). All of the most advanced systems that have been successfully implemented, such as those developed by the courts in South Korea, Malaysia, Singapore, Norway, and Austria, were developed in phases. In Malaysia, for example, the CMS and the queue management system were first deployed at the Kuala Lumpur Court complex and then gradually extended to four other court centers. The e-filing system was the last part that was implemented in those courts that had both systems. This ensured that e-filing was effectively linked to the CMS and allowed for sufficient time to engage with external users to certify that their system needs were reflected appropriately (Zakaria 2013).

CMS as one part of a broader court and justice system ICT strategy. A CMS that is developed in close cooperation with all internal and external users, is based on solid assessments, has followed a reengineering process, and has strong leadership support will likely be successful in improving court processes and services. At the same time, it can only be as successful as its surroundings allow it to be. Legislation, processes, and all users need to be geared toward appropriate system use, and the overall ICT environment also has an impact on its effectiveness. Ideally, the system is supported by a broader court ICT strategy and also by a similar government-wide strategy. A court that does not have a forward-looking ICT strategy, that is, one that places CMS development into a context of reengineering and other ICT developments, will likely end up with a system that is not as efficient and well connected as it could

be. A government-wide focus on e-government can make budget requests for developing, expanding, and maintaining the system easier, and as other government agencies increase automation and e-solutions, knowledge and resources can be shared and information linked across agencies. Courts with limited resources will rarely be able to advance their own ICT solutions unless they can build on government-wide ICT infrastructures. Mongolia, for example, was only able to effectively link all its courts after the government had connected all administrative centers across this vast country via fiber-optic cabling (Gramckow and Allen 2011).

Good practice examples

South Korean courts. South Korea's successful automation of its courts was part of a long-term agenda to reform the judiciary that reflected similar efforts in other government sectors. Started in 1979 by a group of judges aiming to better manage their cases and based on a feasibility study that outlined how technology might be used in the courts, the new system evolved from the availability of a simple case database into several comprehensive and integrated IT solutions for judges and court users. The engagement and strong sense of system ownership, as well as the ongoing reform processes of the South Korean judges, continue to be major drivers of the many achievements made. Since 2011, South Korea has ranked 2nd out of 189 economies in the enforcing contracts indicator. Recognizing early on that technology can be an effective tool for providing services, improving efficiency, and helping judges, the court adopted a three-pronged approach to systematically develop the use of technology in the judiciary. With users' needs at the forefront, carefully studied incremental steps were taken to introduce technology based on rigorously testing, evaluating, and improving upon each solution over time. In 1986, nearly a decade after the results of the study on the use of technology in the courts were made available, the first-generation CMS software for civil cases was launched. Since then, the CMS has been rolled out in all courts, expanded to other case types, continuously improved upon, and later transitioned into a web-based system (Gramckow and Ebeid 2016, 1–2).

Today, the continuously updated and expanded system covers all case types and provides for e-filing and easy information exchange with the Ministry of Public Administration and Safety and the Prosecutor's Office, and also links with several registries, the National Statistics Office, banks, and others. Web-based applications provide easy online access to information, cases, and court services to court users. To give those with little or no online access the same level of services, "over 1,000 automated self-service machines were installed throughout the country in local government offices. Other tools include the E-Trial homepage where users can file cases and request service for all types of cases online and a 'Court Auction Information System' that is linked to the Case Management System, the Bailiffs Consolidated System and the Registration System allowing users to participate in real property auctions held by the court online" (Gramckow and Ebeid 2016, 5). Although offering significant online services, the court is also very conscious of privacy and information security concerns and provides systems that reflect the security needs of Korean society. With its ever-evolving, judge-driven, and user-focused approach, the Korean court system continues to be among the best in the world when it comes to automation.

Austrian courts and justice system more generally. Another very well-developed court CMS that was carefully improved over time and is part of the wider judicial system is the Automation of Court Procedures (ACP) scheme in Austria that supports all courts and Public Prosecution Services. The system was developed and managed by the Austrian Ministry of Justice in close collaboration with judges, prosecutors, and other internal and external users. Many case types and processes (such as summary proceedings) are now fully automated, while others are just coming online. Court notices and judgments are created automatically and dispatched via a central mailing facility. Submissions, applications, and dispositions are transmitted electronically and court fees are also collected electronically. The system also provides the needed statistics for tracking performance and managing the courts and prosecutors' offices. It is built with internal operations in mind but also offers many functions for court users, including a range of online help tasks (E-Justice Austria 2014).

3

Good Practice Area: Court Automation

Court automation

Ability to file initial complaint electronically

Ability to serve process electronically

Ability to pay court fees electronically

Publication of judgments

As just discussed in the prior section, court automation opens new avenues for courts to deliver their services more effectively and goes well beyond implementing an internal CSM system. When done well, automation is based on proper needs and capacity assessments of all internal and external users and builds on streamlined and user-friendly processes as well as other government (and even NGO and commercial counterpart) systems and efforts. As ITC solutions and hardware have become more affordable and as new technologies become more prevalent and offer more options for citizens to use e-services, courts too continue to develop and implement new ways to manage their work and deliver justice. In addition to the previously outlined automation of CMSs, the *Doing Business 2016* report assessed the availability of four important e-solutions available to court users that can contribute greatly to the enhanced efficiency, access, transparency, and accountability of courts, namely, the ability to file a complaint electronically, the ability to serve process electronically, the ability to pay court fees electronically, and the electronic publication of judgments.

These are, of course, not the only good ITC practice areas related to court automation. Other options, such as video and audio recording of hearings, video arraignments and testimony, online auctions, and many other ITC solutions, are increasingly used in courts today. As mentioned in section 2 above, automated CMSs enable courts to streamline and better manage their cases. In addition, the four good practice

areas covered here are among those that appear to make the greatest difference in helping courts provide their users with less-complicated and timelier processes and create greater predictability in court event schedules and outcomes. Each of these options requires resources and implementation capacities, but if well developed and effectively implemented, they save the court and its users time and resources, improve court record reliability, and increase access to information and accountability. Yet, to date, automation of court processes is not as widespread as one might think. *Doing Business* research shows that the four measured features of court automation are the least available good practice across all regions. Worldwide, only four economies—Estonia, the Republic of Korea, Lithuania, and Singapore—display all the court automation features measured by *Doing Business*. In these four countries, sophisticated CMSs for use by both lawyers and judges are also in place. In 74 of the 189 economies measured, none of these features are automated (see figure 11).

FIGURE 11. Percentage of economies using select e-court services by region

	Economies with e-filing	Economies with e-service	Economies with e-payment
South Asia	0%	0%	18.2%
Latin America & Caribbean	5.9%	20.6%	8.8%
East Asia & Pacific	11.1%	18.5%	14.8%
Europe & Central Asia	19.2%	19.2%	53.8%
Middle East & North Africa	5.0%	5.0%	10.0%
Sub-Saharan Africa	4.2%	2.1%	4.2%
OECD high income	35.3%	26.5%	58.8%

Source: *Doing Business* database, <http://www.doingbusiness.org/data>.

Note: Percentages shown in the figure are based on data for 189 economies. For economies in which *Doing Business* collects data for two cities, the data for the two cities are considered separately.

Background

Generally, electronic filing is understood to be the process of transmitting documents and other court information to the court through an electronic medium rather than on paper. Being able to file cases online means that lawyers and litigants do not have to come to court to submit all the needed documentation and that courts have all the necessary documents, authentications, and confirmed signatures in a legally acceptable format to make the case file record readily available for further processing, thereby saving time and effort for the court, its staff, and users. As simple as this sounds, for electronic filing to be possible, effective, and user friendly, a number of elements have to come together that go beyond court IT capacities.

The offer to parties and litigants to simply send the documents required for case filing by e-mail is not enough and does little to help the court become more efficient. Legal requirements alone mean that all documents that are submitted have to be authenticated and in a format that cannot be changed by others; in addition, signatures must be confirmed and the authority of those submitting the documents verified. This requires authorizing legislation, authentication systems, and IT capacities on the part of both the courts and the user to accept and verify submissions. Furthermore, unless the documents submitted can be electronically transferred into the court's automated system and used to establish the record of filing and further court actions, the initial information received will have to be reentered, reconfirmed, and reauthorized at the court. This would essentially increase court staff effort (and increase data entry error potential), since they would have to enter the filing information into the court's system and also manage the electronically submitted documents. Unfortunately, such duplicative quasi-electronic filing systems have been and continue to be the reality in quite a number of courts around the

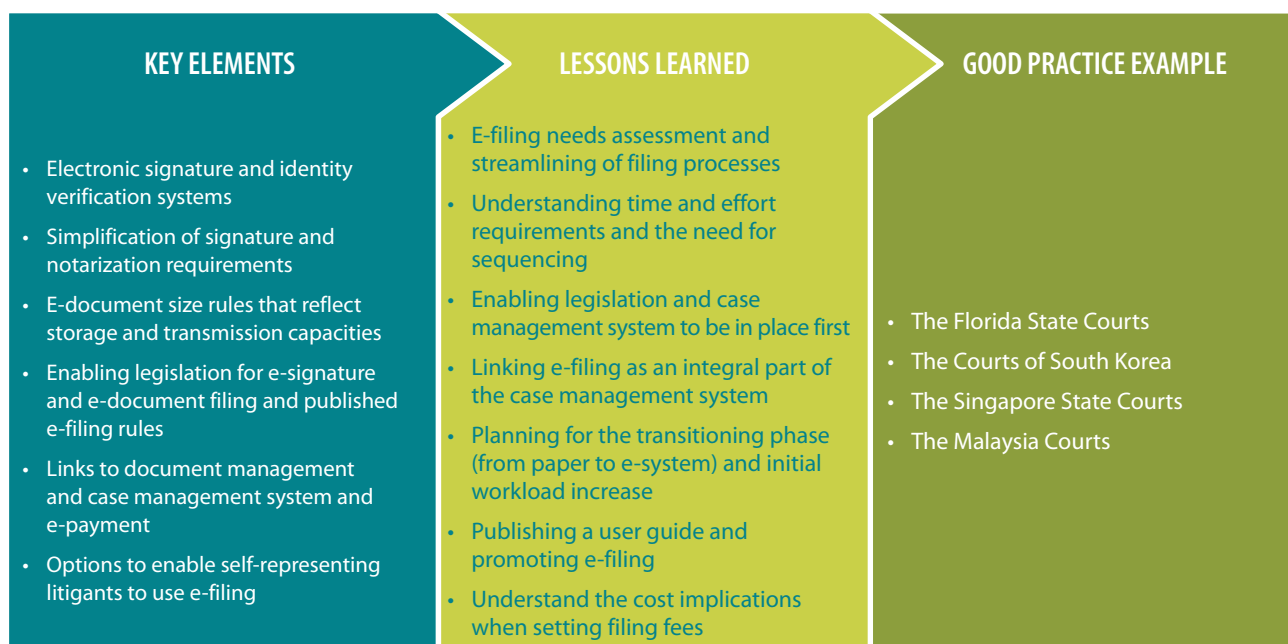
globe and not just for short periods of time; countries as diverse as Serbia, Morocco, Germany, and many others have struggled with this, sometimes for years.

As shown in the introduction, e-filing is the least frequently implemented good practice tracked by the *Doing Business 2016* report. Today, electronic filing of the initial complaint is allowed in only 24 of the 189 economies included in the report (World Bank 2016a).⁴⁹ Perhaps because of this, e-filing is becoming an increasingly common reform effort; in the past five years, *Doing Business* recorded 13 reforms focused on introducing an electronic filing system for commercial cases. In fact, the introduction of electronic filing was the most common court reform effort recorded in the 2015 report and among the most common in 2016.

Part of the reason why it has taken many countries longer than expected to establish an effective and user-friendly e-filing system is that many elements need to be considered and come together in a well-sequenced manner. The legislative framework has to allow and facilitate electronic filing, filing procedures need to be streamlined, and software, hardware, and human resource capacities need to be in place at the courts and among their users.

Fortunately, today, there are many good examples around the globe from which to learn, and the introduction of e-filing as a natural part of enhancing court services is not as challenging as it once was. Courts considering the introduction of e-filing or interested in optimizing their current system have many places to turn to. One important lesson shared by all courts that embarked on this venture is that the introduction of e-filing takes time and has to be part of a broader process to improve court service delivery that embraces new technologies and focuses on the end user.

49 The *Doing Business* methodology assesses whether the initial complaint can be filed electronically through a dedicated platform (not e-mail or fax) within the relevant court (World Bank 2016, 155).



Key elements

A number of key elements have to be in place to ensure that e-filing is effective, that is, that it saves time and resources and eases access to the courts for all. Courts with more advanced e-filing applications, in countries such as Estonia, the United States, the United Kingdom, Malaysia, Singapore, Korea, and others, have identified the following factors as the most critical.

Electronic signature and identity verification. In all countries, court rules and statutes require that the original pleading be filed with the actual signature of the party and/or attorney. When e-filing is introduced, the law must allow electronically submitted documents to be accepted by the court and a mechanism must be in place to substitute the original signature. In addition, the filer must be able to provide verifiable proof of identity electronically (Zorza 2013). A range of verification approaches is used by courts, including the preregistration of e-mail accounts combined with individual passcodes, the use of smart ID cards, or, when e-verification is not yet feasible, the somewhat inefficient process of in-person verification within a few days of e-submission. One interesting approach to notarization was introduced in the U.S. state of Virginia in 2012 with new legislation that allowed for video-supported notarization (USAID and UNDP 2015). The need for verification and electronic signature should

be reviewed for each of the different documents the court requires for the various filing steps. Older laws and court rules in many countries require signatures—indeed, often multiple signatures—unnecessarily. Revising when signatures and verifications, including notarization requirements, are needed should be part of the process review and reengineering and reflected in changes to the legal framework if needed.

E-file size limitations and appropriate e-storage capacities. An important element for e-filing that has to be delineated in the rules is the maximum file size of the electronic documents that can be accepted by the court. The size of the electronic files and the volume of e-filings a court can handle will need to be reflected in its electronic storage capacities. Even when courts are using cloud storage and could potentially allow the submission of larger e-files, reasonable limits will need to be set to ensure that most regular users can send files and that submissions include only what is needed instead of superfluous volumes of scanned paper that are not. The courts in New Delhi, for example, limit e-file size for submission of the initial claim to 100 megabytes (MB), and the courts in Florida stipulate that documents filed through the e-portal cannot exceed 25 MB. Depending on the e-filing rules, courts can allow the submission of multiple documents of the

allowed size, including in PDF format and zip files. That combination provides for sufficient flexibility for the initial claims filing process, especially when subsequent submissions are also part of the more advanced system. Later process submissions will then allow for the further e-filing of required documentation throughout the case process, and many courts provide for submission of e-documents on CD-ROM or USB flash drives.

Enabling legislation and court rules for e-signature and the filing of e-documents. Legislation allowing the court to accept electronic documents and signatures to create electronic records, preferably also allowing for electronic payment of court fees, has to be in place. As further detailed below, the court rules and related practice guidelines should be published online to ensure that court users understand and can follow the instructions to avoid submission errors and failures. Like most courts with e-filing, the Delhi High Court, for example, makes its e-filing rules and practice guidelines available on its website.⁵⁰

Document management system and link to case management systems. An important component of electronic filing is an electronic document management system linked to the CMS system that not just stores electronic pleadings but creates the official filing record and links relevant filing information to the CMS case file. It does not make sense for a court to accept documents electronically if it is not prepared to use them in their electronic form. If the court were to establish electronic filing without a document management system, it would just transfer the expense of printing the filing documents from law firms to the judiciary. The importance of having at least an electronic case tracking system—if not a full-fledged CMS—in place so that the filing process can be traced, as well as a mechanism that creates a case number and filing record and enables further process steps (such as process service, case assignment to a judge or panel, and the establishment of hearing dates), is further addressed below in the “lessons learned” section.

Link to e-payment. Given that fees tend to be immediately triggered when a case is filed, the inability to pay

these fees online significantly limits the usefulness of any e-filing application. This issue is addressed further in section 3.3.

Access for self-representing litigants. In many countries, e-filing has focused on non-small claims civil litigation and is frequently offered to law firms only. This well-educated user base is generally motivated to reduce its operational costs and tends to have the needed capacities for e-filing. At the same time, most state-level courts in the United States and other countries are experiencing a significant increase in self-represented litigants. The state of Connecticut, for example, reported a 101 percent increase in the number of civil cases involving self-represented litigants from 2005 to 2010 (NCSC 2011). In the United States, in response to this growing need, a group of state and national stakeholders, including state court administrators, legal aid advocates, and the National Center for State Courts, developed a guide entitled, *Best Practices for Access-Friendly Court Electronic Filing* (Zorza 2013), to help courts deploy e-filing in a way that removes barriers to access to justice. Increasingly, courts are providing online capabilities that are designed for the self-represented litigants, including guided forms for data capture.⁵¹ Unfortunately, many courts currently allow self-represented litigants to generate only paper forms with these systems, although a few “save” the information so that it can be automatically transferred and entered into their CMS when the litigant appears at the court and submits his/her signed paper copies and/or fee payment. An excellent example of a fully electronic online filer/response system for all court users has been built by the UK courts in their Money (Small) Claim Online system (NCSC 2011).

Lessons learned

Undertaking an e-filing needs assessment. This is one important lesson learned in Canada and elsewhere. The assessment has to cover the needs of the potential users as well as the courts. It also has to review the barriers that the laws and court rules may pose, the capacities and needs of different court user groups, the volume of case

50 See the website of the New Delhi High Court at http://delhihighcourt.nic.in/writereaddata/upload/Announcements/AnnouncementFile_UKNURLIT.PDF.

51 See, for example, “Access to Justice Author,” which, according to its website, “is a cloud based software tool that delivers greater access to justice for self-represented litigants” (www.a2jauthor.org); and Minnesota’s I-CAN! court forms at <http://www.mncourts.gov/ican>.

filings by case type, and cost implications for both the court and its users. Understanding the computer literacy rate and determining the access of court users to good broadband provision are key factors in the success of e-justice. If computer literacy and broadband availability are not high, the use of an electronic filing system and other e-court systems will be impeded (USAID and UNDP 2015). For example, the Australian federal courts learned that the legal profession was slow to take up e-filing, litigants' and lawyers' awareness of e-filing and their willingness to use it were low, and concerns about the privacy and security of e-filing limited uptake. On the side of the courts, the cost of credit card fees presented an impediment to achieving cost benefits, and the federal framework and court rules required amendments to fully realize the benefits of e-filing.⁵² All of these issues have to be understood to ensure that those impacted by (and who might possibly resist) automation are engaged early on, that their needs are met, and that they have the capacity to use the system.

Allowing sufficient time for proper planning and implementation. Another lesson learned by all jurisdictions that embarked on the introduction of e-filing is that it takes time to design a full-fledged e-filing system that works for all users and increases court efficiency. Although a simple system that allows users to file the initial pleading documents electronically without an adequate electronic system in place at the court can be a preliminary testbed for user readiness and is not that difficult to implement if the legal framework permits it, this approach does not help the court become more efficient and actually increases costs in the long run. A high-quality e-filing system, on the other hand, is part of an integrated system that allows for e-filing, e-payment, e-service, and electronic access to the case file throughout the entire case process, and this takes time to develop. The courts in Singapore, for example, have long been regarded as leaders in the use of e-solutions. Their initial plans for e-filing and other automation processes began in 1997, and after three years of intensive testing, the first version of the e-filing system was launched, along with mandatory e-filing for writs of summons in all courts. The system continued to evolve and expand in the following years, and as recently

as 2013, a new generation of the country's e-justice system was launched. The new Integrated Electronic Litigation System expands system functionalities and introduces intelligent electronic court forms that reduce submission errors and eliminate the use of a smart card to authenticate a user, making the system simpler to access and extending accessibility to tablets and mobile phones (USAID and UNDP 2015). Case studies from Canada (Kennedy and Jaar 2012), the Federal Court of Australia,⁵³ and the courts in the U.S. states of Maryland and New York all show that efficient e-filing requires solid planning and time (NYC Global Partners 2013).⁵⁴

Conducting a review of current processes and operations. Like other courts, the Saskatchewan Court of Appeals in Canada recognized the importance of conducting a review of court operations before its e-filing solution was developed. This review not only indicated where administrative processes were unnecessarily complicated or even duplicative but also made the staff involved in the review think about why things were done the way they were. This enabled them to support or adjust change recommendations and to communicate each actor's processing needs to the system developer, leading to a more effective and user friendly system (Kennedy and Jaar 2012). The importance of reengineering was stressed again when the Singapore courts improved on their already quite advanced e-solutions in 2014. This kind of review should also include an assessment of the documents that are actually needed at each process step. Eliminating unnecessary documents that are not compatible with an electronic system is essential and also serves to reduce the number of e-forms that need to be developed (USAID and UNDP 2015).

Ensuring adequate and appropriate sequencing of implementation. Considering that many elements have to be adjusted and in place and that the courts and many other players need to be ready, proper sequencing of the development and implementation of the various e-filing elements is essential. The Australian federal courts, for example, began allowing litigants to file initial claims documents and pay their fees electronically in late 2000. The second stage of the wider e-court strategy was to

52 See Federal Court of Australia, "Case Study. E-filing" (2012), <http://unpan1.un.org/intradoc/groups/public/documents/other/unpan022288.pdf>.

53 Ibid.

54 For information on electronic courts in Maryland, see <http://www.mdcourts.gov/mdec/updates/20141114mdeclaunchqa.pdf>.

allow for electronic returns of “stamped,” or accepted, documents in 2001, followed by an amendment of court rules to allow for the electronic service of documents and further expansions of the system.⁵⁵ Similarly, the Italian courts experienced several stages in the expansion of the use of e-filing and case processes in civil proceedings. From 2005 until 2009, the system was used only for money claims and only in five of the 165 tribunals and courts of appeals. It took more progressive legislation to significantly extend the system and its uptake. In 2011, certified e-mail was introduced, and in 2013, the law mandating electronic communications came into effect. In early 2014, e-filing became mandatory for injunctions and pleadings in new civil cases, for all pleadings at all tribunals soon after, and in all courts of appeals in 2015 (USAID and UNDP 2015).

Depending on the country context, sequencing also tends to mean that not all case types at all courts in a country are available for e-filing by all court user types at the same time—and possibly not for a long time. As mentioned above, in most countries, e-filing options are first offered to law firms, not individual litigants, since the high frequency of filings by law firms, combined with their generally greater IT capacities, means that their business interests in using the system tend to offset if not reduce any related costs. Starting with the “frequent” case filers and with limited types of cases also allows the court to fine-tune its system, gather user experiences, and improve on the first version, the 1.0 e-filing version, so to speak. The Canadian federal courts, for example, started their e-filing project in 2001 and began by allowing e-filing in intellectual property matters only, followed by three more phases until all federal cases were covered in 2006 (Kennedy and Jaar 2012).

Making parallel adjustments to the legal framework.

Italy began the development of its electronic system for civil cases in 2001. Some enabling legislation, such as electronic signature, was already in place. When the uptake remained very low, it was recognized that the effective introduction of e-filing and other e-service solutions required additional enabling legislation that could promote a more progressive approach. As a result, in 2011, the government of Italy introduced new legislation that provided for the digitalization of paper files for open cases before the system went into effect in any new court; it also required that all communications

related to these cases be conducted electronically (USAID and UNDP 2015). Similarly, the Money Claims Online system in the United Kingdom was based on parallel changes in legislation and IT solutions. The system designers understood that the procedural law would need to be written to support evolving IT solutions and ongoing process improvements over time and should not aim to be too specific (USAID and UNDP 2015).

Linking e-filing to the court’s case management system.

As already mentioned, ensuring that e-filed documents can transfer into a document management system and are linked to a good court CMS is essential for effective e-filing, especially if e-submission of documents is to be available for more than just the initial claims filing phase. Without this link, neither the court nor its users can reap the efficiency or cost benefits of e-filing. Here too, capacities for electronic document and case management, along with e-filing by case type, are essential. The federal courts of Canada, for example, realized that though e-filing for various case types had been available since 2006, none of the documents electronically filed with the Canadian Revenue Agency, that is, tax cases in administrative proceedings, which represented a good 90 percent of documents filed, were accessible or linked to the Court and Registry Management System. This link was created in 2011 with the aim of integrating all other e-filed documents in the coming years (Kennedy and Jaar 2012). Similarly, when the e-Greffe (bailiff) system was introduced in France and interfaced with the courts’ CMS, it allowed lawyers, among others, to file emergency cases electronically, saving the courts the time needed for entering data. At the same time, however, the civil procedures code still requires paper documents for most process stages, and as a result, the system uptake remains at only 25 percent of the estimated potential users (USAID and UNDP 2015).

Managing dual processes and transitioning from paper-based to e-filing systems.

The Canadian Saskatchewan Court of Appeals was among many courts to realize that the required incremental introduction of e-filing also meant that the workload in the Registrar’s Office would initially increase as a result of the need to manage a dual processes as manual entries and paper documents were transitioned to electronic processes.

55 Federal Court of Australia, “Case Study. E-filing” (2012), <http://unpan1.un.org/intradoc/groups/public/documents/other/unpan022288.pdf>.

The court estimated that the workload rose by 30 percent at the beginning, an increase that had not been planned for and could not be sustained over time. Similarly, the British Columbia Supreme and Provincial Courts in Canada are among many courts that had to continue a dual system of handling e-filed and paper documents. Until such time when e-filing becomes more prevalent and the norm, it is not just court staff who will have to handle dual processes but users also, as they tend to be more likely to continue using and submitting paper files. In order to keep the continued use of paper in check, the court in British Columbia initially established a “print on demand” rule that required a special request from the judge and other court users to receive e-filed documents on paper (Kennedy and Jaar 2012). In Malaysia and other countries, the courts opted to mandate e-filing soon after an initial test period and provided those who were not yet ready to file online with an e-filing service (Zakaria 2013).

Promoting e-filing. Ensuring that all potential e-filing users understand the benefits of the system and consulting them throughout the development process are essential for good uptake. The e-filing team of the Australian federal courts, for example, not only consulted with all key stakeholders during the development of the e-filing project to gain their input and buy-in, but also actively promoted the benefits of the new system to each stakeholder group, addressing all concerns and reflecting their comments in the design and later introductory phases. Lessons from the Singapore courts showed that mandating electronic filing will ensure that the system becomes the *de facto* tool, but this should be done only once the system is established, sufficiently mature, and accepted by court users (USAID and UNDP 2015). The Korean courts offer a 10 percent discount when e-filing is used instead of filing at the court.

Providing for publication of and user training on filing rules and requirements. For users to not just know about e-filing but understand the requirements, the rules have to be easily accessible. For e-filing, publication on the court’s website is a must. Users should have all the information available to complete the e-filing process correctly so the system—or the court—does not reject the documents electronically submitted. If that happens

more than occasionally, users and the court lose time and effort, court users get frustrated with and lose confidence in the court’s ability to handle e-filing, and uptake of the system will be low or even drop. In addition to well explained online step-by-step guidance to e-filing, some courts, such as the Singapore courts and others, offer online e-filing training sessions. The Florida courts e-filing portal website, for example, provides many resources for users, including WebEx video tutorials that cover all common e-filing tasks.⁵⁶ The Malaysian courts are among those that have paid attention to the needs of their users by continuing to track user satisfaction with e-filing and the overall e-court system at different court locations via a court-user survey and by making training, help desks, and information readily available (Zakaria 2013).

Setting e-filing fees and implications for cost savings. When e-filing fees are higher than traditional paper filing in court, the likelihood that it will be used by a sufficient number of law firms and litigants is low. The Australian federal courts, for example, ensured that court users did not incur additional costs and in fact made e-filing available at no cost to litigants.⁵⁷ In contrast, when the e-Grefe system was introduced in France, use of the system initially required a digital certificate that carried a subscription fee of €750 for three years. This fee was not only too high even for most law firms, it also did not exactly encourage the use of the system (USAID and UNDP 2015). Avoiding additional fees is especially essential to allow self-representing litigants and pro bono attorneys to use the e-filing system.

Appropriate cost calculations and assessment of the feasibility of the envisioned fee structures during the planning stage are as important as consultations, potential user needs, and capacity assessments to ensuring sufficient uptake of the e-filing option and cost benefits. Suitably designed e-filing systems that eliminate paper and avoid data entry by filing clerks can save operational costs at the court in the long run, but only if the incentives for lawyers and litigants to use the system are effective (see New York State Courts 2011). The Ontario Supreme Court, for example, experienced serious cost overruns in its e-file project, while the actual cost savings were about 27 percent lower than expected.

56 See <https://www.myflcourtagency.com/authority/trainingvideos.html>.

57 See Federal Court of Australia, “Case Study. E-filing” (2012), <http://unpan1.un.org/intradoc/groups/public/documents/other/unpan022288.pdf>.

In this context, it is also important to mention that many courts have experienced difficulties in linking e-filing processes to fee waiver requirements, which is essential for many low-income court users. Fee waiver procedures in many countries still require judicial review, something that will need to be reflected in the e-filing process. In addition, e-filing systems in quite a number of courts are outsourced to external vendors whose revenues are based on fee collection and who therefore tend to have few incentives to enable fee waivers through the system. If external vendors are providing the e-filing services, waiver options have to be included in the initial contract (Zorza 2013).

Good practice examples

The Florida state courts. These courts, which are comprised of the Supreme Court, five district courts of appeal, 20 circuit courts, and 67 county courts, all have e-filing in place. Several jurisdictions, especially the Miami-Dade County courts, have even managed to become largely paperless courts. The Statewide E-Filing Court Records Portal (“e-Portal”) has been established to manage and handle all of the court filing in the state of Florida, and it can be accessed online by attorneys and self-representing litigants.⁵⁸ Many resources are available to provide assistance to attorneys using the e-Portal on the website, and once on the site, the user can access the clerk of any court in Florida. The portal also provides very good step-by-step guidance on using the system and filing cases correctly.⁵⁹

Courts of South Korea. In 2010, the South Korean judiciary launched the Electronic Case Filing System (ECFS).⁶⁰ It serves the Supreme Court, five high courts, 18 district and 40 branch and/or municipal court(s), six specialized family courts (with two more to open in the next two years), 16 specialized branch-level family courts, and the Patent Court. By 2016, the system provided for e-filing of civil, commercial, administrative, and family affairs cases and will soon integrate insolvency cases. It is a comprehensive system that allows litigants and their attorneys to file, register, and manage cases and enable service notification, as well as to access court

documents and court information and procedures, electronically. Users can file all court documents, documentary evidence, and digital evidence over the Internet. After filing a case via ECFS, the plaintiffs/petitioners receive e-mail and text message notifications when the other parties submit documents to the court. If the defendants/respondents consent to e-filing, they may also receive electronic notices of the other parties’ filings. Such notice, in conjunction with access to case records and procedures electronically, allows all parties using ECFS to promptly check the current status of the proceedings. They can also check procedural information and search for legal information such as judgments, law-related articles, or news related to their cases. The ECFS also provides services linked to financial institutions, the Patent Office, Korea Post, Registration Office, and other related institutions’ computer systems. Anyone willing to use the system must sign in to be a member of the ECFS homepage. Before signing in, the user must obtain a public key authentication from the government-approved Certificate Authority (CA). The user may register as an individual, corporate, agent, or solicitor member, and the scope of functions available is restricted by the type of service (see World Bank 2013a).⁶¹

The Singapore state courts. Singapore’s courts continue to be internationally recognized as a leader in the implementation of e-justice (see United Nations 2014). Building on its earlier Electronic Filing Service (EFS) that already enabled subscribers to use smartcards for authentication of identity for mandatory e-filing of court documents for both civil and family court jurisdictions, a new system was developed in 2014. The new generation e-justice system, the Integrated Electronic Litigation System (iELS) or eLitigation system, was developed in collaboration with the judiciary and the legal profession, which ensured high stakeholder involvement. eLitigation improved upon the EFS by introducing intelligent electronic court forms instead of the submission of standard PDF forms (additional PDF documents can still be submitted). The forms have built-in automatic checks and validations, thereby reducing submission errors and failures. Another major change was the elimination of the need for a smartcard

58 The website is www.myflcourtagency.com.

59 See <https://www.flmic.com/files/6214/0327/4617/1stq20131.pdf>.

60 For information on ECFS, see <http://ecfs.scourt.go.kr>.

61 See also the website of the Supreme Court of Korea at http://eng.scourt.go.kr/eng/jis/jis_ecourt_intro.jsp.

to authenticate the user. The need for special software components was also eliminated, making the system simpler to access and more widely available, including for use with tablets, mobile phones, and similar tools. The eLitigation users must register and use a registered SingPass ID, available from government agencies, to login and access the eLitigation module. Citizens can apply for the SingPass eID online or at a SingPass office.

As of this writing, the system is available only to law firms and selected government agencies in Singapore. Others can use the assistance of a vendor service bureau. The eLitigation system provides for e-filing and access to a Case Information Repository that allows individual law firms to have virtual storage of all the relevant files and documents so that they can update and retrieve them for future reference. It also includes eService, which provides for e-service of court documents to other law firms. Other features include notifications of any updates about current cases handled by the firm and the ability to view and select calendaring and hearing dates. A report generation function provides information about financial transactions on a particular case, including case-level information on charges incurred.⁶²

Malaysia courts. The e-Filing System (EFS) was developed in 2010 and first implemented at the Kuala Lumpur courts in March 2011 for civil cases. By 2016, the system

had been implemented in the six courts with the heaviest caseload in the country. The EFS enables lawyers to file the claim, register, and pay fees electronically. The EFS is linked to the court's CMS, which automatically schedules cases and generates case lists; it is also part of a broader e-court project that can build on other wide-ranging e-governance solutions offered. This includes the Government Public Key Infrastructure (GPKI) provided by the Malaysian Administrative Modernisation and Management Planning Unit (MAMPU), which also covers the cost for e-certification offered by the Certification Authority. The courts also utilize the dedicated computer network for government agencies known as 1GovNet, also provided by MAMPU, and use the Financial Process Exchange online payment gateway offered by the Malaysian Electronic Clearing Corporation Sdn Bhd (a wholly owned subsidiary of the Central Bank of Malaysia) to facilitate payment of court filing fees by law firms via Internet banking. Since the Kuala Lumpur courts are the busiest, e-filing there was made mandatory for all law firms. To ease the transition from manual to e-filing for users, court staff at service bureau counters assist lawyers in becoming familiar with and using e-filing. User buy-in for the EFS has gradually improved, and by July 2013, the ratio of online filing increased to 70 percent compared to 30 percent filing via the service bureau (Zakaria 2013).

3.2 ABILITY TO SERVE PROCESS ELECTRONICALLY

Background

Closely related and frequently linked to e-filing is the provision of electronic service (e-service) of court orders and notices to parties. E-service generally means the electronic transmission of documents from a court to a party, attorney, or representative. In many countries, however, e-service is not allowed for service of process or summons to gain jurisdiction over persons or property (Olson, Edwards, and Ahalt 2003), which is the focus of the particular practice area included in the QJPI.⁶³ In 2016, service of the initial summons through e-mail, fax, or text message was allowed in 27 of the 189 economies

included in the *Doing Business* survey (World Bank 2016a). This does not mean that these courts allow e-service exclusively, nor does it mean that courts in other economies do not use select electronic means for some information changes, such as SMS messages, for hearing schedule updates or acceptance of electronic documents. But it is particularly the initial summons that informs a party for the first time that a claim has been filed against them, for which the laws in most countries continue to require service in hard copy to the respective party or representative.

⁶² For more information on the full eLitigation system at the Singapore state courts, see <https://www.elitigation.sg/home.aspx>.

⁶³ The *Doing Business* methodology reviews whether the initial complaint can be served on the defendant electronically, through a dedicated system or by e-mail, fax or SMS (short message service). It does not distinguish if e-service is used parallel to existing paper-based service of process or can be used exclusively (World Bank 2016, 155).

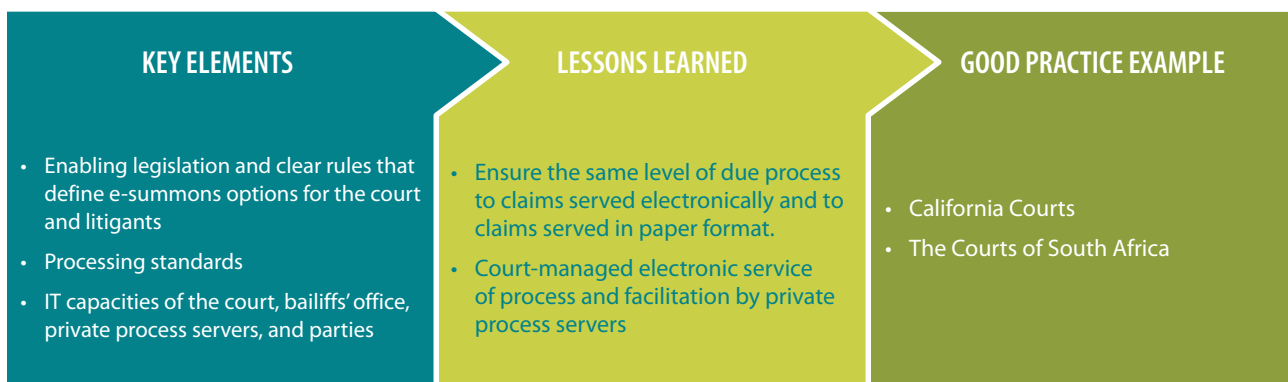
This is not only because laws may not have been updated to allow e-transmissions but for a range of other important reasons, such as little public acceptance and trust in e-notifications as well as concerns for the system’s unreliability and lack of capacity to deliver fully authenticated documents and return receipts, all of which serve to discourage policy makers from adjusting related laws and regulations. Pro se (self-representing) litigants and other parties might not have access to computers. Most importantly, there is still a fundamental difference between receiving a physical summons and receiving an e-mail or Facebook message. The ultimate hurdle remains the due process requirement to establish that the notice will “reasonably” get to the defendant. As a result, to date, it has not been possible to confirm that electronic service of the initial summons is allowed in any jurisdiction as the primary or exclusive option of service but only as an alternative option with limited application. At the same time, as electronic means of communication and new technologies, including social media applications, become increasingly ubiquitous across the globe, this is an area where new options are being explored by all courts with advanced automated systems.

The benefits of well-designed e-service options overall are not only faster delivery of court summons and almost instantaneous notification to parties of filings, deadlines, hearings, and changes in schedules. Benefits also include the creation of an instant electronic record of receipt of notices and other information exchanges if the system is created accordingly. E-service allows courts and parties

to track deadlines and the timeliness of responses and saves costs on delivery services, paper documents, and storage. Particularly in countries where street addresses are difficult to locate or where geographic or security hurdles often delay delivery of notifications, electronic options allow for more timely and reliable service and exchange of information.

Especially for serving the initial summons, the use of electronic means offers an important alternative. When other required notices and document or information exchanges are incomplete or not submitted in a timely manner, delays occur, but if the initial summons cannot be served, the case cannot begin until all service options are exhausted. Ideally, e-service rules and capacities provide for electronic options for these summons as well and also extend to parties to respond to the court and to serve the other party electronically. The latter is especially important in the large number of countries (mainly common law countries) where it is the responsibility of the claimant to serve process.

These and other issues all need to be carefully assessed and explored, and options need to be tested before full e-service for delivering the initial summons is introduced. Most of the key elements, lessons learned, and select good practice examples for exchange of documents and court notifications in general apply also to electronic service of process. Other factors that have proven to be essential for courts and policy makers in jurisdictions that already allow e-service for the initial summons, at least as an alternative, are described below.



Key Elements

An enabling legal and regulatory environment and clear definitions and rules. Like most other e-solutions that courts want to use effectively, e-service options have to be supported by an enabling legal environment. This begins with clarifying what is meant by “e-service”: Can the initial summons to notify a party that a claim is being filed against him/her be sent via e-mail, fax, or text message? Can this initial summons be exclusively sent electronically or only as a faster secondary option? Can the initial court notices of hearings and timelines for submission of documents or motions also be sent electronically? Can the initial summons be sent electronically as a last resort when other options have failed? Can e-summons be used in select types of cases (such as commercial or cross-border cases) or for select types of defendants only (companies, law firms)? Is it only follow-up e-notices of changes to hearing and timeline dates or clarifying information that are allowed?

Service of process is one of the first steps in a legal proceeding. Documents asserting a claim are “served” on a defendant, thereby delivering legal notice and imposing a requirement to respond. This process is a cornerstone of most judicial systems because it gives a court jurisdiction over the defendant, and the method used for this process has to satisfy the due process requirements contained in a country’s constitution and relevant substantive laws (see Messick 2012). In the United States, the Supreme Court clarified that the due process requirement for service is met by any method that is “reasonably calculated to provide notice and an opportunity to respond.”⁶⁴ It also outlined that alternative service of process was permissible when “due diligence” to serve a defendant had been exhausted. Today in the United States, federal- and state-level courts have allowed electronic service of process as an alternative, including, in exceptional cases, via television announcements and Facebook, but primarily in the international context and as a last resort. The same approach is used in Australia, New Zealand, Canada, and the United Kingdom. In Singapore, the e-service function permits only registered law firms to electronically serve court documents to other registered law firms and only after the court allows this option (for details, see Singapore Supreme Court 2016).

In 2006, the American Bar Association’s Science and Technology Committee developed Best Practices for Electronic Service of Process (eSOP). These measures proposed requiring voluntary waivers of service, document encryption for privacy and confidentiality, and the retention of principles and protections consistent with due process. The draft rules also reiterated the importance of receipted transactions as reliable proof of electronic service of process (ABA 2006). Although now somewhat outdated, these suggestions reflect the rules developed in other countries as well and remain helpful to any court exploring e-service options for the initial summons.

Processing standards. Standard hard copy delivery of summons in any country is ruled by clear legislative requirements and court practice rules that outline how the summons is to be requested and delivered and by and to whom. There are general rules indicating when such summons can be delivered, and these rules differ if the defendant is a private party, business, or government agency. There are also rules that outline when delivery comes into effect and when a response is to be issued with clear timelines. All of these rules also have to be applied to an e-summons, and since electronic delivery tends to mean relatively instant delivery, practice rules issued by courts that allow this option in certain cases, such as the courts in California, Australia, Singapore, New Zealand, and South Africa, also define when e-service delivery is effective and what proof has to be submitted.⁶⁵ Existing rules, such as the service waiver available in the United States and other countries that informs the defendant that a claim has been filed by another party but does not provide all the necessary details included in a summons, can be particularly helpful in limiting traditional summons processes (see under “Lessons”).

IT capacities at the court and bailiffs’ office, private process servers and parties. E-service of the initial summons requires that the needed hardware and software solutions be available—and not just at the court. Since these summons have to be effectively received by the defendant and proof of receipt has to be provided, the solution chosen should be one that is

64 US. Supreme Court. 1950. Mullane v. Central Hanover Trust. 339 U.S. 306 (1950).

65 For rule examples, see Judicial Council of California, California Rules of Court, “Rule 2.253. Permissive Electronic Filing, Mandatory Electronic Filing, and Electronic Filing by Court Order” (2016), http://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_253.

commonly used by potential recipients and provides for the required level of proof of service. When summonses are to be delivered by the plaintiff, or rather, a bailiff, sheriff, or private process server, as is the case in many countries, they as well as recipients too have to have the needed hardware and software solutions.

Lessons learned

Reflecting due process rules for effective e-service in an e-court environment. As outlined above, more so than most other electronic exchanges of documents and court notices, the initial service of process has significant due process implications that to date limit the use of electronic means for this essential court process. Naturally, e-service of an initial summons has to provide the same due process protections as the traditional service of summons, including by providing for some privacy, ensuring that the e-summons can reasonably be expected to be received, and adhering to timelines for delivery and sufficient response time. Since many electronic means, including e-mail but more so social media applications, are neither universally owned nor a completely reliable delivery mechanism, and since they provide only certain levels of proof of delivery, legislators and courts have rightfully been careful in allowing e-delivery of the initial summons.

That said, the benefits of e-service, not just to the court but to both parties, including the defendant, should be available if the parties agree to its use and when the type of case and its circumstances are particularly conducive to an electronic option, even if just offered in addition to the traditional service or as a last resort when all other options have been exhausted. This is especially the case when companies are involved that do have a web presence. If a company does a good part of its business over the Internet, there are few reasons why it could not reasonably be expected to accept an e-summons. This is exactly how courts today are using e-service for the initial summons. Several courts in the United States, Australia, and elsewhere, for example, require parties who sign up for e-filing (and therefore reap the benefits of this electronic process) to also agree to e-service of process. For example, U.S. federal court

rules state that by participating in the electronic filing process, the parties consent to the electronic service of all documents and will make available e-mail addresses for service. When a user files a document, an e-mail message containing the notice of electronic filing, with a hyperlink to the electronically filed document, will be automatically generated by the Electronic Case Filing system and sent via electronic mail to the e-mail addresses of all parties who have registered in the case.⁶⁶

In some jurisdictions that have made e-filing mandatory for commercial cases, parties have to file an exception if they do not want to accept an e-summons. Since publication in a newspaper tends to be the option of last resort for delivering the summons in most jurisdictions, there are few reasons why utilizing e-newspapers, e-mail delivery, or even social media cannot be considered also as a last resort. Moreover, in jurisdictions that already provide for a pre-summons option to inform the defendant that a claim has been filed and by whom, the offer to waive the summons could be sent electronically, together with the request to accept e-service for all further communications, thereby reducing effort, time, and cost to the court and both parties without any due process concerns.

Court-managed electronic service of process and facilitation by private process servers. Even when the legislative framework does not provide for meaningful options to allow full e-service of process, there are other ways the electronic means can at least support the regular service of the summons process. In California, for example, recognizing that such electronic transactions can be a necessary part of ensuring the due process rights of the parties, the California Association of Legal Support Professionals developed guidelines for an electronic service process facilitated by the many private process servers it also represents. These guidelines state that such a process has to be developed in a way that is trusted and reliable and implemented to embrace the following:

- Electronic Service of Process (eSOP) should be knowing and voluntary. Parties should be required to consent to eSOP and/or waive physical service of process. Proof

⁶⁶ See "Electronic Filing and Service of Documents," http://www.vaed.uscourts.gov/ecf/documents/17i-ElectronicFilingandServiceofDocuments-ConsenttoElecSvc_000.pdf.

that a party has consented or waived physical service must be documented and proven.

- Electronic Service of Process must require a receipted transaction—Electronic service of process must include reliable proof that notice was actually received by a person who was authorized to accept service. The receipted transaction must reflect what was sent, when it was sent, what was sent was unaltered, what was sent was received and acknowledged by the intended recipient or its authorized agent.
- The manner and method of electronic service should mimic the standards for physical service of process. The proof of service must be in a format that the courts or government accept as being reliable and secure. Electronic Service of Process is complete on the date that it is acknowledged by the recipient.
- The trusted/disinterested third party process server must provide the parties and the courts with reliable proof that the documents were received and acknowledged by the intended recipient or its authorized agent.
- Electronic Service of Process must be performed by a disinterested third party that is a Registered Process Server that can attest to the facts of the transaction. (Cals Pro 2015)

Good practice examples

California courts. The California state courts have been ahead of many states in the United States in terms of their acceptance of alternative means of service. California was one of the first states to implement e-filing as well as limited e-service of process. Currently in California, e-service is allowed if consent is given by both parties, thus not just when a judge signs off on

such a request as is the case in other states. Effective in early 2016, the Judicial Council of California approved a new court rule related to e-service (Rule 2.251) that not only clarifies that e-service is authorized for any civil processes that allow for serving a document by mail, express mail, overnight delivery, or fax transmission, but also specifies the conditions for e-service by consent of the parties. The rule stipulates that such an agreement is established by a) serving a notice on all parties that they accept electronic service and filing with the court, a notice that must include the e-mail address at which the party agrees to accept service; or (b) electronically filing any document with the court. The rule assumes that the act of electronic filing is evidence that the party agrees to accept service at the electronic address the party has furnished to the court. This rule also clarifies that it does not apply to self-represented parties, who must affirmatively consent to electronic service under subparagraph Rule 2.253(b)(2).⁶⁷

South African courts. In 2012, an amendment to the Uniform Rules of Courts opened the door to the service of court documents using electronic means, including social media platforms. This amendment was applied for the first time when the KwaZulu-Natal High Court in Durban “granted an application for substituted service of a notice of set down and pre-trial directions on the respondent (the defendant in the main action) via a message on social media website Facebook, in addition to the notice being published in a local newspaper” (Hawkey 2012, 1). Although this was not related to the initial service of process, it was an important step toward broader uses of electronic means of service in South African courts and probably the first time the use of a social media application was allowed for process service in Sub-Saharan Africa (Hawkey 2012).

3.3 E-PAYMENT OF COURT FEES

Background

As mentioned above, an e-filing system that does not offer the option of also paying the required court fees electronically largely eliminates the benefits of e-filing. When litigants and other court users have the option of

paying court fees (and fines) electronically, they save the time and resources needed to come to the court. E-payment, if well designed, also provides an instant record of payment and eliminates the need for cash

⁶⁷ Judicial Council of California, California Rules of Court, “Rule 2.253(b)(2). Permissive Electronic Filing, Mandatory Electronic Filing, and Electronic Filing by Court Order” (2016), http://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_253.

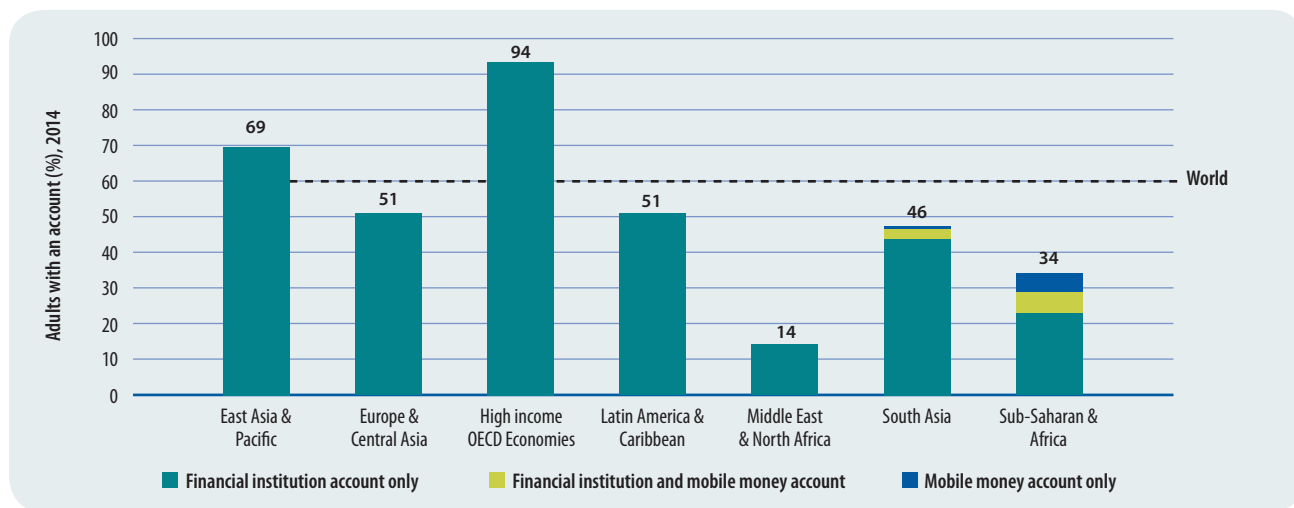
transactions directly with court staff, thereby greatly increasing the transparency and reliability of the payment process. In many countries, however, especially in the developing world, cash is still the predominate form of payment at courts, not least because other options, such as mailing paper checks, credit and debit cards, and even most wire transfers, require a bank account. For many of the self-represented litigants in particular, including in those in middle- and high-income countries, this represents a problem since most do not have bank accounts or credit cards. The question therefore is how to offer options that make fee payment easy, speedy, efficient, and financially feasible (Zorza 2013).

Electronic payments or “e-payments” are not new to the court system, though they have not always functioned adequately. In the early years of e-payments, many courts experienced technological limitations and the public demand for remote services was minimal. The e-payment processes in place were generally for traffic citations and limited to “clean” cases, which meant that e-payments were offered for uncontested payments on first-time fines and traffic court payments only. Furthermore, among the courts that had an electronic

CMS, there was no way to automate an interface for the e-payments to be processed directly into the system. From the customer’s perspective, the convenience of online payments appeared to be easy and to save time; however, the back-end processing inside the court was usually completely manual. The vendor typically sent a daily report to the court that listed the fines paid from the previous day. Court staff would then enter the individual payments manually in the CMS.

New technologies and the remarkable growth of communications networks are increasingly enabling organizations to transition from cash to e-payments in a growing number of countries. The spread of mobile phone access and a corresponding increase in “mobile money” products create new opportunities to use inclusive e-payment platforms. In the developing world, mobile phone access today far outstrips access to banks. Figure 12 compares access to formal financial institution accounts with mobile phone accounts.⁶⁸ In 2016, electronic payment of court fees was the most commonly available feature of court automation measured by *Doing Business* (World Bank 2016). Forty-five economies provide for e-payment, more than all the other court automation practices measured.⁶⁹

FIGURE 12. Bank account penetration



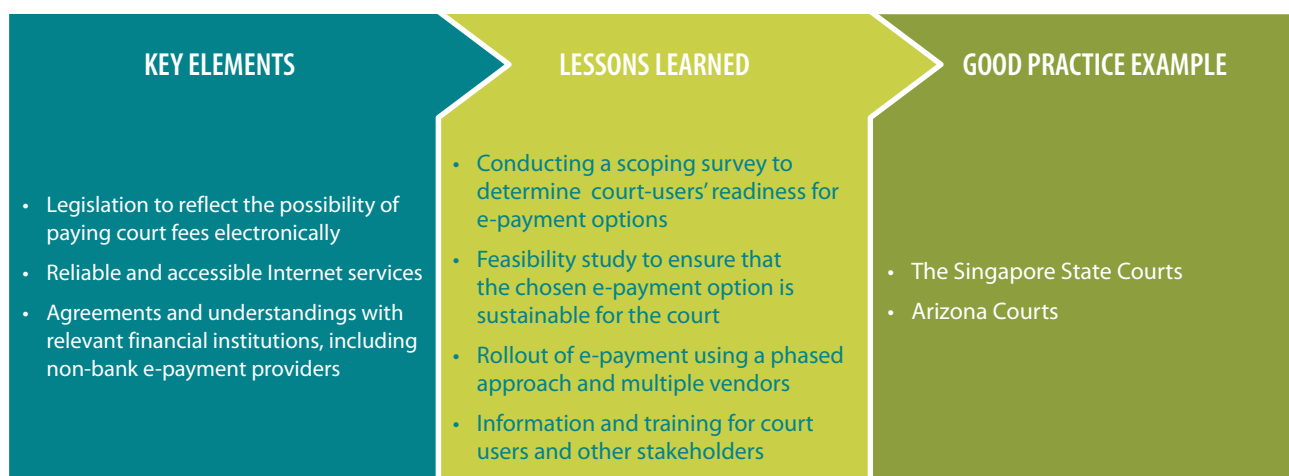
Source: World Bank (2015).

68 See World Bank, “The Global Findex Database” (2015), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/10/19/090224b08315413c/2_0/Rendered/PDF/The0Global0Fin0ion0around0the0world.pdf#page=3.

69 *Doing Business* only measures whether court fees can be paid electronically, either through a dedicated platform or through online banking (World Bank 2016, 155).

Nevertheless, this number is still only a minority among the 189 economies included, and the use of new alternative payment forms in courts remains limited. For example, M-Pesa, the award winning e-payment option that takes advantage of the increasing use of cell phones, was initially developed in Kenya and is now available in at least seven other Sub-Saharan countries as well as India. The Kenyan courts currently allow its use for payment of traffic fines but not for court fees. Even in the United States, courts offer few alternatives. A survey conducted in 2012 showed that 29 courts across several

U.S. states reported acceptance or planned acceptance of credit cards, and only two the digital wallet service provider PayPal, suggesting the need for continued expansion of forms of acceptable payment in the US (Hernandez 2013). According to an online report from the Pew Charitable Trusts, “Research predicts that mobile payments in the U.S. will grow at an overall 22 percent compound annual rate through 2019” (Pew Charitable Trusts 2016). So far, however, courts worldwide have not really taken advantage of this trend.



Key elements

Some of the basic prerequisites for implementing successful e-payment systems, most of which have been addressed before, include reliable and accessible Internet service, cooperative financial institutions, an IT-oriented public, and adequate financing to set up the appropriate infrastructure in the court. Equally important is that the regulatory framework supports the court's use of any e-payment option chosen.

Lessons learned

Conducting a payment scoping survey. This kind of survey would help identify the court's needs and capacities to offer and manage different e-payment options and also inform the system design to integrate the court's operations with its other IT solutions. It maps cash payment streams, volumes, and values; cash management points and controls;

processing impediments; costs; capacities; and risk management options. Depending on current payment collection and reconciliation responsibilities, other government agencies will need to be involved. Generally, it is a good idea to reach out to other agencies that have already introduced e-payment options or are planning to do so to share experiences and build on already existing systems.

Reengineering payment processes. The scoping survey will also provide information to reconcile payment transaction and reconciliation processes in order to inform the software design and optimize operations and system implementation. Back-end reconciliation, especially if multiple payment options are offered, can be complex and should be centralized (Hernandez 2013). Reengineering of payment also means focusing

on online e-payment options. Often, the first step for courts is to accept credit card payment or other online options, but either only on the premises of the court (sometimes via a bank terminal at the court) or if the litigant later files the payment receipts in person, thus negating the benefits of e-payment. Ensuring that fully online options can be used is the next step.

Determining court-user readiness for various e-payment options. The court needs to analyze what e-payment options are available, what methods users are currently using, and how the market is developing. Helpful tools for an e-payment market assessment have been developed for other sectors and can be easily applied to the court's environment (see, for example, U.S. Global Development Lab 2013).

Ensuring that the e-payment option is financially feasible for the court. Any payment method has direct financial costs, such as transactions fees, security or insurance costs, or outlays for travel to the bank to deposit cash. There are also other capacity and operational costs (staff, operating systems) as well implications for the court users and their trust in the institutions (access, transparency, speed, reliability, and security). Understanding the costs and potential savings in other areas that are triggered by the different payment options is essential. In Europe, for example, current credit and debit card fees and how they are applied vary significantly across card providers and among EU member states. For some, the accounting and reporting requirements are significantly more involved than for others. Some courts have found that the financial costs related to particular e-payment options may be higher than cash transactions, but that these costs would easily be offset by producing savings in staff time for payment processing, reducing payment leakages through improved transparency and tracking, and facilitating user access (U.S. Global Development Lab 2013).

Applying a phased introduction of multiple payment options. Like other automation projects, taking a phased approach that tests a few options with targeted, high-frequency user groups first and expanding the scope of payment options and coverage to different case and user types is advisable. Only after sufficient testing and marketed adjustments are made should mandatory e-payment be considered. Furthermore, the court should aim to offer a range of electronic payment options in addition to payment at the court to meet the

needs of all its users. Depending on market conditions and user preferences, this could include:

- Credit and debit cards
- Electronic transfer from checking account
- PayPal and other online payment systems
- Prepaid cards, depending on use and availability
- Where widely available, electronic mobile money systems, such as M-Pesa or Zaad in East Africa

Using multiple vendors. The offer to use multiple payment systems, including multiple credit card options, also means that courts need to be prepared to manage multiple credit card and other payment option vendors. For example, a 2012 study in Orange County, California, showed that the Superior Court contracted with seven external vendors who provide e-payment services, with another eight vendors in the process of contracting with the court to provide additional e-payment options. The court's local finance department processes the daily payment reconciliations for each of the vendors, as well as all payment reconciliation efforts currently in place outside of e-payments. The findings showed that contracting with multiple vendors for e-payment/e-service solutions can create a challenge for a finance department's back-end reconciliation process. The findings additionally showed that there are often inconsistencies in the convenience fees charged by vendors for the services provided. There also appear to be inconsistencies within the web pages of the e-file vendors, as several do not show an affiliation with the Orange County Superior Court, which could potentially create confusion among court customers.

Embracing stakeholder outreach and education. Any e-payment option can work only if the potential users can access it and find it useful. The above-mentioned market research should include user behavior and attitudes toward various payment options, which would help provide user feedback for optimizing the solution. In addition, outreach, public information, and training activities should be conducted.

Good practice examples

Most of the courts that offer advanced e-filing solutions also offer a range of electronic payment options, but few address the needs of the less affluent who do not have a credit card and are representing themselves. Notable exceptions are the Singapore state courts, which began

providing the option of fee payment by credit card many years ago and offer special “pay as you go” cards to those who cannot afford (or qualify for) a credit card. The Arizona courts’ AZTurboCourt portal allows for payment via select credit and debit cards as well as PayPal, and similarly, since 2015, the U.S. federal courts provide the option of payment via PayPal and Dwolla.

Overall, this appears to be an area where courts have plenty of room to extend payment offers to a wider range of court users, especially the less affluent. Particularly in the developing world, mobile money solutions have significant potential, since, as shown above, large sections of the population have a mobile phone but not a bank account. This remains an area where courts are lagging far behind the private sector and other government agencies. For example, in Kenya, the biggest African user of mobile money, there are currently 15 million subscribers to M-Pesa. Though originally a method to send money home from cities to families in rural areas, M-Pesa is now widely used for many things, from receiving salaries to paying bills

and school fees, slowly making cash obsolete. This payment option is gradually being taken up by select government agencies in Kenya. Even the courts already allow for M-Pesa payment of traffic fines, though not of court fees. M-Pesa, hosted by Vodafone’s subsidiary Safaricom, will now also be available in Tanzania, the Democratic Republic of Congo, Mozambique, Uganda, Rwanda, and Zambia.⁷⁰ Similarly, the use of mobile money via Zaad, hosted by Telesom, has made Somaliland the second-highest user of electronic money options after Sweden. Though offered in one of Africa’s poorest regions this mobile solution has created an informal electronic banking system with more efficiency and convenience than the systems used in many middle and high income countries. Cash is disappearing, and there is no need even for credit cards because even street vendors accept payments by mobile phones. A survey in 2012 found that the average customer made 34 transactions per month on his/her mobile phone, higher than almost anywhere in the world. It could not be confirmed, however, whether fee payment options via Zaad are available in the still-evolving court system.

3.4 PUBLICATION OF JUDGMENTS

Background

Accessibility to court decisions and other court and legal information is central to a well-functioning judiciary and key to a strong investment climate. Publishing and providing wide and easy access to court decisions in particular enhances transparency and improves the public’s trust and confidence in the courts. The availability of information on the outcome of cases (commercial disputes in particular) and on the courts’ interpretation and application of laws provides litigants, including businesses, with invaluable insight into their rights and duties and how they are protected. Having this information provides predictability; can play a key role in improving investors’ confidence in the courts, especially in transitioning and evolving countries; and has been recognized even in historically more restrictive economies such as China. Indeed, in 2013, China’s Supreme People’s Court issued *Provisions on the Online Issuance of Judgment Documents by People’s Courts*,

which mandated that all court judgments from all court levels in China be published online in a searchable public database especially set up for that purpose.

The benefits of publishing court judgments from all courts and all court levels are indisputable. Widely accessible publication affects not only how courts function and provide services but how the public, including ordinary citizens, businesses, and investors as well as the legal community, views the judiciary and conducts commercial transactions. In addition to creating predictability, publication of court decisions can also serve to promote accountability, improve efficiency, and support efforts to curb corruption. Studies in the CIS, for example, have shown that publishing court decisions contributes to the creation of legal certainty (Byfield 2011). In particular, knowing that decisions will be published can improve the quality of court verdicts

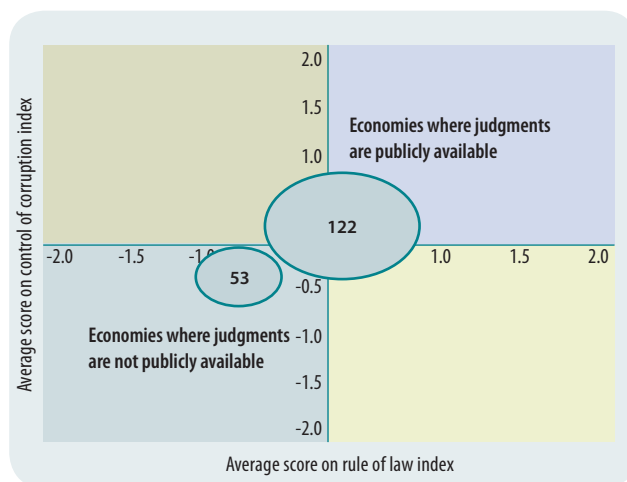
⁷⁰ For more information, see <http://afkinsider.com/97718/vodafone-mtn-partnership-spreads-m-pesa-to-seven-african-countries/#sthash.Ug8l6KK8.dpuf>.

and support the issuance of more uniform and well-reasoned judgments that also safeguard the rights of parties, especially the right to appeal. It can also support impartiality in how cases are decided and ensure that they are issued without interference from improper pressure, influence, or threats.

Providing access to judicial decisions can also serve to indirectly promote the professional development and capacity building of judges, which may in turn contribute to improving court efficiency and the quality of decisions. Anecdotally, judges in several countries indicated that they draft their decisions more carefully since they are published. In terms of supporting the development of legal jurisprudence and improving services, publishing court decisions allows legal scholars to study and advance legal theory; enables legal experts and the legal community to study and improve legal services; and helps build legal precedents. The latter is especially important for common law legal systems that rely heavily on the use of legal precedents. Publishing court decisions has also been shown to reinforce efforts to increase integrity and can serve as a tool for curbing and reducing the perception of corruption. Data from the *Doing Business* studies also suggest that countries with stronger rule of law and greater control over corruption were more likely to publish court judgments (*Doing Business 2012*, Enforcing Contracts, p.4) (see figure 13). Moreover, making court decisions widely available can further support the development of law school curriculum and improve legal education (which has occurred in Mongolia, for example). In 42 economies of the 189 included in the 2016 *Doing Business* report, courts publish virtually all recent judgments in commercial cases either online or through publicly available gazettes. Only two economies in Sub-Saharan Africa, the Middle East and North Africa and South Asia could be recorded to regularly publish judgements (World Bank 2016, p.95).

The significance and potential impact of easy accessibility to court information on the justice sector, the legal community, and businesses are also recognized by many international instruments, including the UN Convention against Corruption, the African Union Convention on Preventing and Combating Corruption, and the European Convention on Human Rights. With regard to court judgments in particular, a

FIGURE 13. Judgments are more likely to be publicly available in economies perceived as having lower corruption and stronger rule of law



Source: *Doing Business* database, World Bank, Worldwide Governance Indicators (2009 data) <http://www.doingbusiness.org/data>. Note: Higher scores on the indices indicate perceptions of lower corruption and stronger rule of law. Relationships are significant at the 5% level after controlling for income per capita.

number of recognized international standards provide specific guidance on accessibility, including those in the Convention on Preventing and Combating Corruption, the International Covenant on Civil and Political Rights, the Council of Europe Recommendation, Rec (2001) 3E (on the delivery of court and other legal services to the citizens through the use of new technology), and the Organization for Security and Cooperation in Europe (OSCE) Kiev recommendations on accessibility. The Council of Europe recommendation provides that communication with the court should be as easy as possible; that access to information regarding the effective administration of justice, including statutes, laws, case law, and court proceedings, should be provided; and that this information should be widely accessible using the available technologies (see box 15). The OSCE document equally places emphasis on online accessibility and on the ready availability of court decisions, preferably on courts' websites. Despite focusing on European states, these standards are relevant to any region and provide valuable guidance to economies worldwide. In fact, in an assessment of court decisions in the Middle East, EBRD applied both

BOX 15.**Select International Recommendations on Access to Court information*****Council of Europe Rec (2001) 3E:***

Considering that access of the citizens of Europe to laws, regulations and case law of their own and other European states and to administrative and judicial information should be facilitated through the use of modern information technology in the interest of democratic participation.

OSCE Kiev Recommendation on Judicial Independence in Europe, Central Asia and the South Caucasus, Part III, Section 32:

Transparency shall be the rule for trials. To provide evidence of the conduct of judges in the courtroom, as well as accurate trial records, hearings shall be recorded by electronic devices providing full reproduction ... To enhance the professional and public accountability of judges, decisions shall be published in databases and on websites in ways that makes them truly accessible and free of charge. Decisions must be indexed according to subject matter, legal issues raised, and names of the judges who wrote them.

Source: Council of Europe Rec (2001)3E 28.2001; and OSCE (2010).

standards in evaluating the extent to which courts in a number of countries, including Morocco, Egypt, Jordan, and Tunisia, were providing access to court decisions (Byfield 2014).

In addition to international standards, country-specific factors, such as the existence of constitutional guarantees and laws (such as in Chile), as well as the development of precise access policies, have also guided the efforts in many economies to provide access to court information. Although an enabling legal framework governing access can be a helpful guide, the presence or absence of specific laws should not prevent the provision of access to court decisions. Courts in Australia, Ireland, the United States, and Singapore, for example, provide online access to decisions despite the lack of specific legal mandates. It should be noted, however, that access to court information in these economies is guided by clear and detailed government policies that address wider access issues and also apply to court judgments. These specific court policies developed there are based on this general framework and input from judges, court staff and stakeholders to ensure that their needs are

met; the policies also aim to enhance transparency and confidence in the courts without infringing on the independence of judges or the privacy rights of litigants.

Despite the many benefits, accessibility to all court judgments is still not generally available in many economies worldwide. As mentioned above, the *Doing Business 2016* report identified that courts in only 42 out of 189 countries publish virtually all recent judgments in commercial cases either online or through publicly available gazettes.⁷¹ Other studies have shown that many economies still publish decisions of higher courts only, while others publish only case summaries of key decisions (Byfield 2014). A recent study conducted by EBRD of 27 transitioning countries in the Middle East, Eastern Europe, and CIS regions also indicated that approximately 22 countries publish decisions of the constitutional and appellate courts in journals and periodicals, while a limited number of countries (Cyprus, Morocco, Tunisia, and Tajikistan) do not require the publication of even higher court decisions (Byfield and Kroytor 2015) (see figure 14 next page).

71 The *Doing Business* methodology assesses whether judgments rendered by local courts are made available to the general public through publication in official gazettes, in newspapers or on the internet. A score of 1 is assigned if judgments rendered in commercial cases at all levels are made available to the general public; 0.5 if only judgments rendered at the appeal and supreme court level are made available to the general public; 0 in all other instances (World Bank 2016, 155).

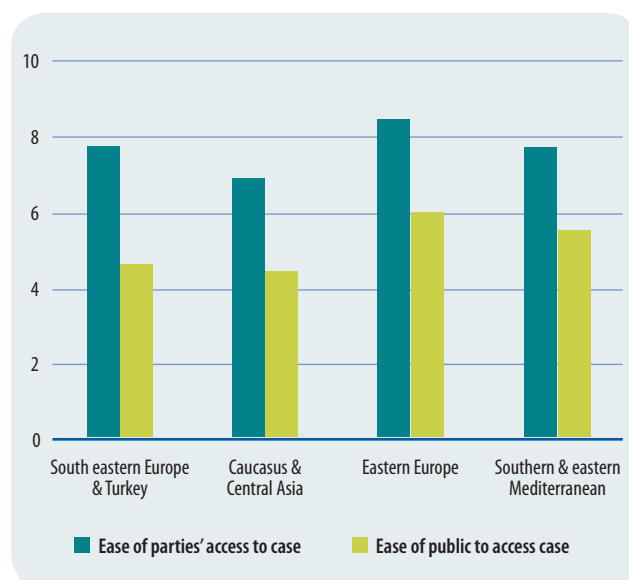
FIGURE 14. Access to court decisions in the South Eastern Middle Easter Region (SEMED)

Country	Is there a legal requirement for court decisions to be published?	Does the country have a dedicated periodical/website publishing court decisions?	Are commercial court decisions published regularly?	Does the country have a strategy to improve the use of technology in the court system?
Egypt	No	No – but decisions of the Constitutional Court are published in the official Gazette.	No – some higher court decisions are published, both in paper and on a website.	Yes – a joint project between the Court of Cassation and Ministry of Communications and IT was recently initiated.
Jordan	No	No – but court decisions of the highest courts are supposed to be published in the journal of the Jordanian Bar Association.	No – but the commercial courts were only established in 2010.	Yes – USAID is partnering with the Jordanian Bar Association to upgrade the ICT systems.
Morocco	No	No	No – but information booths are available in Casablanca Commercial Court to check the status of cases.	Yes – in 2013 the government announced a ICT project for the courts.
Tunisia	No	Yes – the E-Justice portal contains 12,000+ cases.	Yes – the E-justice portal contains the text of some commercial cases.	No – the court system currently relies on a paper-based system.

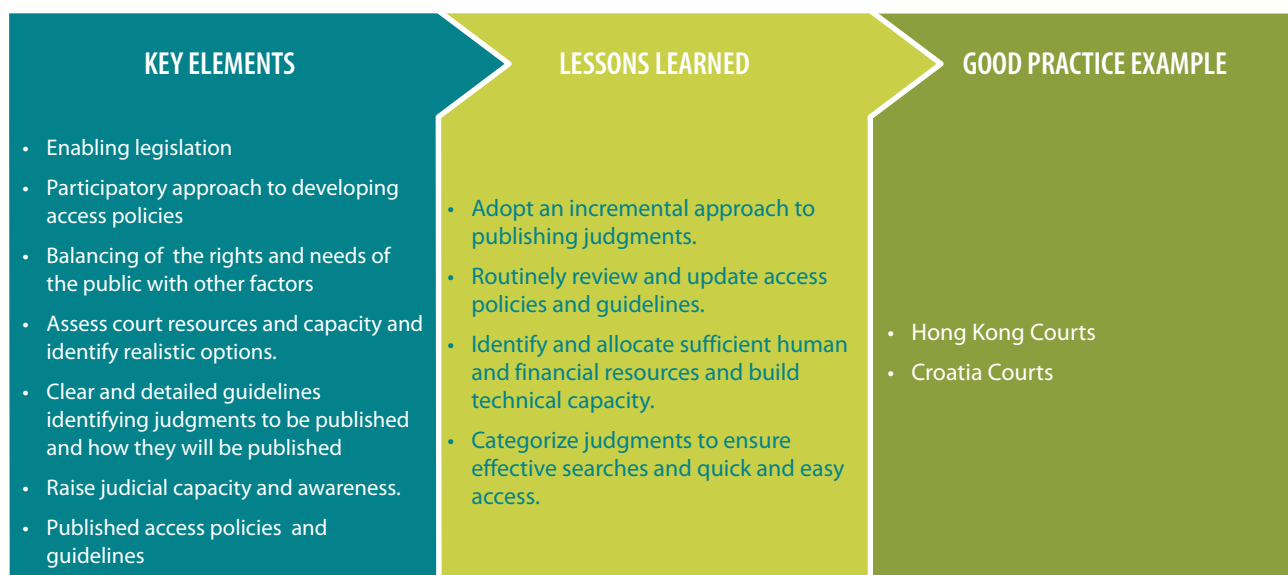
Source: EBRD.

Limitations also exist in other economies. These include restricted dissemination, irregular publication of official gazettes where judgments are published, delays in publishing decisions, incomplete registries, databases that are not regularly updated, and limited accessibility to all members of the public (for example, in Tunisia, only parties can obtain copies of judgments) (Byfield and Kroytor 2015). These issues, along with limited IT capacity and access to Internet services, are more pronounced low income economies (see figure 15).

FIGURE 15. Ease of access by parties and general public to court decisions: regional comparisons



Source: EBRD Assessment of Availability of Court Decisions, 2015. Key: Rating 10= esasy; 1= difficult..



Key elements

Providing access to court judgments, whether online or in paper format, is an issue that well-performing courts address as part of a broader strategy and policy to make court records available. Developing these policies is essential to establishing a governing framework for accessibility and ensures uniformity in how and what information is provided and to whom. In the absence of enabling laws, these policies are especially important and should be developed with careful consideration of many factors and wide input from judges, the public, and the legal community. They should generally address access to: judgments (ideally by court levels); information related to the internal operations and administration of the courts (such as budgeting, expenditures and procurements, judicial appointments, and so on); court performance data; information on the functions of the judiciary; annual reports; court rules and procedures as well as any practice guidelines or notes; laws and regulations; and calendaring and case information. The policies should also reflect and ensure that various options based on available resources (for example, online databases, paper publications and official gazettes, and court registries) are provided; address how privacy rights will be protected; and set forth the scope of dissemination and access, among many other issues (see box 16).

BOX 16.

Access to Court Decisions in Mongolia

In Mongolia, the World Bank supported a justice sector reform project that focused on, among many other issues, making court judgments more widely accessible via a public website. In particular, the online publication of Supreme Court decisions increased transparency and also provided law faculties with the opportunity to utilize these decisions as part of their new teaching approaches. There was also evidence that the publication of court decisions helped judges pay closer attention to how they draft their opinions. To provide greater access to justice, the project also provided important legal outreach in rural regions, poor urban communities for minority populations and to Mongolia's blind population through a legal information campaign and legal aid schemes. Laws had not previously been published in braille due to the relatively high cost. For the first time, blind Mongolians were able to directly access these laws more easily.

Source: World Bank (2013).

The following sections outline the core elements in developing and upgrading court policies on access with a focus on judgments, based on a study of courts in Australia, Hong Kong, South Korea, Mongolia, China, the United States, the United Kingdom, Croatia, Ireland, Singapore, CIS countries, and a number of countries in the Middle East and North Africa region.

Ensuring an enabling legal environment. As indicated above, legal provisions on access to court records may or may not exist. When developing a policy, a review of existing laws is necessary to identify the legal parameters. Publication policies need to clearly outline when and what can be publicly available, which records may be accessible to parties only, when records need to be closed to the public (i.e. in cases involving juveniles, for example) and if part of a judgement or other court record may need to be protected (i.e. identities of victims and information that could infringe on intellectual property rights). In addition, current practices or directives that courts have developed over time should also be reviewed to identify if they are prohibitive and if there is a need to develop new ones that will support enhanced access to court judgements and records. In the United Kingdom, for instance, the President of the Court of Protection issued new guidance in 2014 on publishing the court's judgments that allowed for increased access (Munby 2014). In Ireland, there are no constitutional provisions that govern access to court records though the Supreme Court, Court of Criminal Appeals, and High Court all provide access and publish their judgments.

Adopting a participatory approach to developing access policies. A participatory approach based on broad input and feedback from the court's stakeholders, including lawyers, members of the business community, litigants, self-represented litigants, and other members of the public, should be undertaken to ensure that their needs and concerns are specifically addressed by the access policy. In some countries such as the United States, for example, committees are established to seek input and identify changes that may be required to improve access to court information, including judgments. Seeking user input can also save the court resources by preventing the establishment of ineffective mechanisms, such as requiring online publication in an area where Internet access is generally unreliable and/or not available to the public. In that event, more viable and effective options would include developing a court registry of judgments that users can access at the court,

providing free copies of printed official gazettes, and/or providing access to user friendly computer terminals that contain documents online.

Examining court resources and capacity. Judiciaries in many economies lack resources and tend to be underfunded compared to other public sectors. Providing access to judgments, whether online or in paper format, requires financial and human resources. When identifying the means and scope for providing access to decisions, courts must carefully assess their resources and capacities and identify realistic and viable options for accomplishing this goal. Resources need to be available to regularly publish judgements, to check for consistency and for developing mechanisms that allow for searching for and researching judgments. Simply posting PDF versions of decisions online in chronological order is a start but a searchable database that allows judges and others to search by case or court type is what is ultimately needed to provide for comparison and lead to some consistency in judicial decision making.

Developing guidelines that balance public access with other factors. When upgrading their access policies, courts should balance the public's interest in and right to information with security concerns and the need to safeguard privacy rights and prevent abuses. Doing so will ensure that any access policy does not infringe upon the rights of individuals (such as victims of crimes, minors, or the mentally ill) or other entities (such as proprietary company information), or prejudice one group over another, and that it promotes consistency and transparency. Guidance on redacting litigants' names may also be considered, but the overall editing of court decisions should be prohibited. To ensure that access is provided in a consistent and transparent manner, guidelines should be developed to supplement the policy. Guidelines should address the following:

- ▶ Define the types of cases by court types and levels that will be published and whether unqualified access to certain cases will be provided. Some courts, primarily supreme or high courts, provide unqualified access to court judgments, while others may limit access and provide court registrars and judges with the authority to exercise discretion in providing access to some information.
- ▶ Define access to judgments by parties and third parties.

- ▶ Define the format in which judgments and other information will be provided (paper and online).
- ▶ If online access is provided, define the frequency with which judgments and other information will be updated.
- ▶ Articulate exceptions where judgments and court records will not be accessible (such as cases involving minors, family matters, and certain crimes related to national security concerns and so forth). For example, the New South Wales courts in Australia have identified a number of items that were deemed classified and restricted, including pre-sentence reports, victim impact reports, medical health records, and documents subject to a nonpublication or restricted access order.
- ▶ Establish the process for applying for an exception, including the criteria and procedures for doing so.
- ▶ Identify who will have the power (court administrator, registrar, committee, and so on) to review and grant requests for exceptions.
- ▶ Identify the information that may be redacted from judgments and considered private (such as social security numbers, birth dates, and so forth).
- ▶ Identify how far back in time the court will go when publishing old judgments.

In some countries such as the United States, model strategies for state courts have been developed to assist them in their effort to develop access policies. Since publication, the model policy developed by the Conference of Chief Justices and the Conference of State Court Administration has provided uniformity in the way in which courts have approached access to records and guided the development and upgrading of court policies (Steketee and Carlson 2002).

Raising judicial capacity and awareness. Making judgments public can place a burden on those judges who may not yet be well versed to issue well-reasoned judgments. In jurisdictions judicial where capacity is an issue, the courts should focus on providing ongoing training opportunities to raise the technical capacity of judges. Developing and providing access to resources, such as guidelines on writing judgments and judicial Bench Books with practice examples of well-written judgments by case type, can also support these efforts.

Publishing policies and guidelines. Once developed, the policy and related guidelines should also be accessible on the court's website as well as in paper

format for those courts with less online capacity and fewer resources.

Lessons learned

Undertaking an incremental approach to publication.

In the absence of a culture of openness, which is still evident in many courts worldwide, developing and implementing a transitional plan that provides for the initial publication of possibly limited types of judgments (by court type and court level) to a particular set of users (such as judges and parties) allows the court to test the effectiveness of its policy and change it accordingly. Especially in courts with limited IT capacity and functional websites, this transitional approach may be required to iron out any technical issues that could affect publication. Developing pilot schemes to test the new policy in one court can also be beneficial in identifying specific issues that a court may face.

Conducting regular reviews and updating the policies and guidelines accordingly.

Access policies are not static but should evolve over time to reflect the changing needs of court users, the legal environment, and technological developments. As such, courts should regularly review their policies and guidelines. With the increasing use of online services, for example, many state courts in the United States conducted reviews of their access policies to assess if and how online access to court records would be provided. A similar review was also conducted in New South Wales, Australia.

Finding the dedicated staff and resources.

Publishing judgments, whether through official gazettes, court registries, and/or online searchable databases, requires human and financial resources. To ensure that judgments and other information is regularly provided and updated, courts must dedicate sufficient staff and resources. In addition, medium- to long-term plans should be developed to build the courts' internal capacity to provide enhanced access to judgments (such as setting up websites and online databases).

Categorizing judgments. Developing appropriate categorizations of judgments to allow for effective database searches is essential for providing easy and quick access.

Good practice examples

Hong Kong Special Administrative Region (SAR) courts. These courts represent a good example of how online access to judgments can be provided even in a challenging environment where the judicial system is bilingual—both Chinese and English are official languages of the courts. Despite this challenge, the courts' website, through its Judgments and Legal Reference System (JLRC), currently provides online access to judgments of significant legal precedent from 1946 to 1948 and from 1966 onward from: 1) the Court of Final Appeals (since its establishment in 1997); 2) the Court of Appeal of the High Court; 3) the Court of First Instance of the High Court; 4) the Competition Tribunal (since its establishment in 2015); 5) the district courts; 6) the family courts; and 7) the Lands Tribunal.

Judgments are published online within three working days from issuance, and cases of importance or public interest are available online on the same day. If a judgment is not available online for some reason, an individual can submit an application to the court registry where the judgment was issued and obtain a copy, at times for a fee. In addition, since 2008, Chinese judgments of significant jurisprudence have been made available online, along with the respective English translation. Since 2009, online access to a database of *Reasons for Sentences* issued in both the high and district court has been provided. The high court's decisions are searchable by case number or party names and available for cases dating back to 1973, while cases from the district court are available from 1976 onward. A database of *Reasons for Verdicts* handed down in district court has also been operational since 2012, and it is similarly searchable by case number or party name and includes decisions dating back to 1987.

In addition, the judiciary's efforts are supported by a government-wide drive to increase online accessibility to all legal information. Established and maintained by the Department of Justice, the Bilingual Laws Information System (BLIS) is a database that provides consolidated versions of all Hong Kong laws. Further access to judgments from all courts dating as far back as 1946 is also available online on the Hong Kong Legal

Information Institute (HKLII) website, which provides access to information from the BLIS and Law Reference System (LRS) in an easy, user friendly, and searchable format.⁷²

Croatian courts. These courts represent another approach that was guided by a broader e-government and EU accession strategy to combat corruption and increase transparency. A Freedom of Information Law was enacted in 2013 requiring all public authorities to develop information databases and provide online access unless otherwise specifically exempted (for example, information related to state, military, professional, or business secrets). The law went further by establishing the position of information commissioner, who is elected by Parliament and provided with the broad authority to inspect and issue administrative sanctions for noncompliance with the law. The law also authorizes the imposition of penalties on entities that illegally withhold information. At the same time, courts can deny access to information if, among other reasons, it interferes with the prevention or prosecution of criminal offenses or the protection of the life, health, or safety of individuals or the environment.

Since enactment, the law has made the information held and created by government entities, including the courts, more accessible. Currently, access to judgments of the municipal and county courts, the first instance and high commercial courts, and the European Court of Justice is provided online on the Judges Web.⁷³ Although the website was initially launched by a private nonprofit entity, it is currently managed by the Ministry of Justice. It is publicly accessible and provides additional information that is helpful to court users, including: 1) a list of court experts by location and specialization; 2) information about the courts, including their territorial jurisdiction; 3) a list of court interpreters; 4) an index of court fees; and 5) bankruptcy-related information. In addition to this website, the Ministry of Justice also maintains an e-Portal that has served as a depository of some judgments since 2003, including Supreme Court decisions dating back to 1993.

72 For more information on the types of judgments available through the LRS, see <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp>. For information on the BLIS, see <http://www.legislation.gov.hk/eng/home.htm>, and on the HKLII, see <http://www.hklii.hk/eng>.

73 The Judges Web can be found at <http://www.sudacka-mreza.hr/pristojbe.aspx> (in Croatian).

4

Good Practice Area: Alternative Dispute Resolution

Alternative dispute resolution

Availability and regulation of arbitration

Availability and regulation of voluntary mediation or conciliation

The fourth component assessed by the *Doing Business* QJPI is alternative dispute resolution (ADR). ADR complements adjudication by providing litigants with different options for effectively resolving disputes. When implemented well and based on a clear legal and regulatory framework, studies in the United States and Latin America indicate that ADR can contribute to increasing court efficiency; reducing caseload and backlog by reducing the number of cases that would otherwise have to go through the courts; streamlining trials; and reducing costs (Jorquiera and Alvarez 2005; Amsler et al. 2009). Even partial settlements that work to narrow down the disputed issues help to streamline trials by reducing trial time and associated costs. Because of their non-adversarial nature (with the exception of arbitration), ADR services may also preserve personal and business relationships and can prevent future litigation, which is a valuable factor for small and medium-sized businesses. Placing control in the hands of the litigants also provides them with a level of predictability that is otherwise lacking

in the judicial process and can contribute to enhancing the enforceability of settlement agreements. Data have also shown that the willingness of the parties to participate and reach an agreement is another key factor that contributes to the effectiveness of ADR services.⁷⁴

Having access to effective ADR services matters to investors since they help mitigate the risks associated with adjudicating commercial disputes in the often less-than-efficient courts. ADR can also enhance a country's reputation internationally, is an essential factor in attracting foreign direct investment, and is often the more preferred option of multinational corporations (Pouget 2013). For countries where the courts are viewed as inaccessible or do not have the confidence of litigants and the business community, ADR services can contribute to improving user perception and enhancing their trust in the overall judicial system and business environment, which may in turn contribute to increasing investment and improving economic development. The same is also true for countries that are undergoing economic reforms and moving toward an open market economy. In China, for example, a host of ADR services, including mediation, "arbitration-mediation," and arbitration, have been implemented that have been effective in commercial disputes and are favorably viewed by domestic and international businesses (Yanming 2010).⁷⁵ Arbitration in particular has increasingly become one of the most important methods of resolving commercial cases.

74 In a survey of lawyers and litigants in New Zealand, the lawyers viewed the disputants' willingness as overwhelmingly the most important determinant in ADR efficacy.

75 Arbitration-mediation is a unique form of mediation held in arbitration cases where the parties mediate the case; and only when it fails will the case then be arbitrated.

KEY ELEMENTS	LESSONS LEARNED	GOOD PRACTICE EXAMPLE
<p>Arbitration</p> <ul style="list-style-type: none"> • Governed by law • Consensual and flexible • Confidential and private proceedings • Adversarial, lengthy, and costly • Binding and enforceable awards <p>Mediation</p> <ul style="list-style-type: none"> • Cost effective • Participatory, flexible, informal, and not requiring legal representation • Confidential • Settlements based on mutual agreement of parties and contractual in nature • Enforceability via courts 	<p>Arbitration</p> <ul style="list-style-type: none"> • Enabling and governing legal framework that also does not provide courts with opportunities to intervene or interfere with arbitral process • Law based on the UNCITRAL Model Law • Membership in the 1958 New York Convention <p>Other ADR Services</p> <ul style="list-style-type: none"> • Institute an enabling and governing legal framework and integrate ADR into court processes by developing court rules when the law is not sufficiently detailed. • Identify and provide the most appropriate ADR services, and ensure that services address cultural and local factors and are tailored to the specific needs of court users and the court. • Take a participatory approach and ensure that services are developed and evaluated with input from the user community. • Provide ADR on a voluntary basis. • Ensure that services are provided when they are most beneficial and conducive to settlement. • Provide litigants with ADR options. • Pilot, test, evaluate, and refine ADR services. • Implement good data collection practices and regularly evaluate performance. • Raise user awareness of ADR services through targeted activities. 	<ul style="list-style-type: none"> • Hong Kong • The United States • Singapore • Australia

Background

ADR has existed for centuries and is rooted in the traditions and cultural norms of many regions and countries (for example, Southeast Asia, Africa, China, and the Middle East). More recently however, ADR has emerged and become recognized by many well-performing courts worldwide as an effective case management tool. In the United States, one of the leading countries in utilizing ADR, the federal courts are

legally required to develop services and adopt ADR as one of the principle case management tools to reduce cost and delay (Stienstra 2011). In the Singapore state courts the presumption for all civil cases is that “(t)he Court encourages parties to consider ADR options as a first stop,” at the earliest possible stage (Singapore State Court n.d.).

ADR encompasses a variety of services that are implemented differently across the globe. These include mediation, conciliation, arbitration, negotiated settlements, judicial settlement conferences, summary jury trials, mini trials, neutral evaluation, online dispute resolution (ODR), and others (see box 17). Since its modern introduction in the courts in the 1970s, however, a limited number of these services have become

more widely used, including arbitration, mediation, conciliation, and, to a lesser extent, neutral evaluations. The vast majority of European economies utilize at least three forms of ADR—conciliation, mediation, and arbitration—with the latter two the most commonly used (CEPEJ 2014). This is also true in almost all other regions, including North America, the Middle East, and Asia.

BOX 17.

Core Elements of the Most Commonly Used ADR Services

Mediation: is a process in which an impartial third person, a “mediator,” facilitates the discussions and assists the parties in trying to reach a mutually acceptable agreement. The mediators do not decide the outcome. It is a process that leaves control in the hands of the parties and can be used in different types of disputes (e.g., family, probate, tax, landlord-tenant, civil, and commercial); may be used at any stage in a judicial proceeding, although it is often more effective after case filing; and operates to preserve the relationship between the parties (e.g., in the United States, Singapore, and Hong Kong).

Conciliation: is similar to mediation and is a process in which a conciliator (much like a mediator) meets with the parties to establish a mutual understanding of the underlying cause of the dispute and the settlement (e.g., as in Mali and Abu Dhabi and many countries in South America).

Neutral Evaluation: is a process in which each party is provided with the opportunity to present a summary of the case to a neutral person, an “evaluator,” who is most often an attorney or expert in the subject matter. The evaluator then presents the parties with a nonbinding assessment of the merits of the case, including the strengths and weaknesses of each party’s evidence and arguments and how the dispute could be resolved (e.g., in U.S. federal and state courts).

Arbitration: is a process in which the parties select one or more impartial third parties, or “arbitrators,” to resolve a dispute. It is used primarily in cross-border disputes and complex commercial and intellectual property disputes and can be used in resolving differences between investors and governments pursuant to bilateral investment treaties, national investment laws, or contracts. Much like a trial, parties present evidence and testimony before the arbitrators. The process is flexible in that the parties agree on the procedures to be used. Arbitration may be either binding or nonbinding. In binding arbitration, the parties waive their right to a trial and agree to accept the arbitrator’s decision as final. Generally, there is no right to appeal an arbitrator’s decision. Nonbinding arbitration means that the parties are free to request a trial if they do not accept the arbitrator’s decision and the arbitration award is binding. In some cases, it may be provided by the courts (i.e., court-annexed arbitration, which is used in the United States for small disputes). Unlike mediation, arbitration can be lengthy and costly. Since attorneys’ fees represent a large portion of the cost, lengthy arbitrations can drive up the expenditure for all parties.

Source: Adapted from USAID (1998), Decker (2013), Pouget (2013), and Stienstra (2011).

According to the *Doing Business 2016* report, arbitration is recognized in 183 economies.⁷⁶ It is, however, a unique service because it operates mainly outside of the courts, with the limited exception of court-annexed arbitration, which is not widely used. Arbitration services are not provided by courts but often by national, international, and regional centers.⁷⁷ The extent of the court's involvement in the process is generally limited to enforcing arbitral awards, which are also generally not appealable on the merits. The process itself is adversarial and guided by formal rules, making it akin to a trial and also making it significantly different from mediation, which is not constrained by rules and is an informal process driven by the desire to reach mutually beneficial agreements.

With regard to mediation and conciliation on the other hand, the *Doing Business* report 2016 indicated that 171 economies recognize voluntary mediation or conciliation (World Bank 2016). *Doing Business* research also shows that only slightly more than half the economies recognizing voluntary mediation or conciliation (102) have a stand-alone consolidated law regulating these practices, though reforms in this area are increasing. Across Europe, mediation is provided in approximately 42 economies in different types of disputes (for example, in family courts in Finland and in labor disputes in Hungary and Romania), while conciliation is available in 35 countries (CEPEJ 2014, analyzing 2012 data). The importance of mediation has also been regionally recognized, as evidenced by the EU European Mediation Directive adopted in 2008, which requires member states to introduce legislative frameworks to employ and promote mediation.⁷⁸ This effort has led to the enactment of legislation regulating mediation services across Europe. Moreover, a number of recommenda-

tions adopted by the Committee of Ministers of the Council of Europe (such as Recommendation (98)1 on family mediation, Recommendation (99)19 on mediation in criminal matters, and Recommendation (2002)10 on mediation in civil cases), as well as guidelines adopted by CEPEJ to facilitate their implementation, have contributed to the increased use of mediation in Europe (CEPEJ 2014). Additional legislative reforms and developments have also taken place supporting the use of mediation, including the creation of a register for mediators in the Netherlands and the establishment of mediation information and assessment meetings in the United Kingdom pursuant to the new family mediation scheme under the Civil Procedures Rules (Neuberger 2015).

Another ADR service widely used in the United States is the early neutral evaluation (ENE). Unlike both arbitration and mediation, neutral evaluation is a process in which each party is provided with the opportunity to present a summary of the case to a neutral person, an "evaluator" (See box 17). ENE can position the case for early resolution by settlement. Although it is not an area that is covered by the *Doing Business* reports, ENE is often provided along with other ADR services (Stienstra 2011) and can be effective in narrowing down disputed issues and reducing trial time.

The variations between ADR services are many. Each serves a particular local need and goal, but the overall benefits remain the same, which are to: provide effective and efficient alternatives to litigants, drive settlements, assist courts in reducing caseload, and increase access to justice. ADR continues to evolve, as evidenced by the use of arbitration-mediation in China as well as the development of new delivery

76 The *Doing Business* methodology measures the availability of ADR based on the following criteria. The alternative dispute resolution index has six components: Whether domestic commercial arbitration is governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all its aspects. A score of 0.5 is assigned if yes; 0 if no. Whether commercial disputes of all kinds—aside from those dealing with public order, public policy, bankruptcy, consumer rights, employment issues or intellectual property—can be submitted to arbitration. A score of 0.5 is assigned if yes; 0 if no. Whether valid arbitration clauses or agreements are enforced by local courts in more than 50% of cases. A score of 0.5 is assigned if yes; 0 if no. Whether voluntary mediation, conciliation or both are a recognized way of resolving commercial disputes. A score of 0.5 is assigned if yes; 0 if no. Whether voluntary mediation, conciliation or both are governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all their aspects. A score of 0.5 is assigned if yes; 0 if no. Whether there are any financial incentives for parties to attempt mediation or conciliation (for example, if mediation or conciliation is successful, a refund of court filing fees, an income tax credit or the like). A score of 0.5 is assigned if yes; 0 if no. (World Bank 2016, 155).

77 Arbitration can be provided by the International Chamber of Commerce's (ICC) International Court of Arbitration, the London Court of International Arbitration, the Hong Kong International Arbitration Center, the American Arbitration Association, the Cairo Regional Center for International Commercial Arbitration, or the Singapore International Center, to name a few, and in some countries, it can also be carried out by chambers of commerce.

78 EU European Mediation Directive 2008/52/EC, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>.

mechanisms such as ODR. With the increasing use of technology and access to Internet services worldwide, courts are developing new services to maximize the use of IT to deliver more affordable, accessible, and faster court services. Her Majesty's Courts in the United Kingdom, for example, have more recently studied the implementation and piloting of ODR for low-value civil claims. ODR will leverage technology to provide litigants with an alternative process to settle disputes largely online. Similar efforts have also been under way in the Netherlands and British Columbia, Canada (Civil Justice Council 2015).

The following sections will primarily focus on arbitration and mediation as the most commonly utilized ADR services. Because both services are interlinked, the core elements of arbitration and mediation will also be addressed together. Furthermore, for the purposes of this publication and because of the similarities between mediation and conciliation, the two services are combined into one category termed "mediation."

Key elements

Arbitration

Provided for by law. Arbitration is widely recognized and governed and regulated by specific national laws, as well as codes of civil procedures in some countries (such as Romania and the United Arab Emirates). These laws generally provide for the use of arbitration, recognition of arbitral awards as an enforceable instrument and typically limit the right to appeal and/or vacate awards. As a mechanism that is carried out outside of the court system, however, its proceedings and scope are a contractual matter that is determined by the parties.

Consensual and flexible. Arbitration is consensual and contractual in nature. Parties agree to use it to resolve disputes that may arise under a contract generally at the time of entering into it. Arbitration is flexible in the sense that it provides parties with the right to select arbitrators as well as the rules under which the arbitration will be conducted; moreover, it is carried out by a private neutral individual or a panel of individuals who are selected based on their expertise and knowledge in the subject matter of the dispute. This ability is a key factor in cross-border disputes in particular, since it enables the parties to select arbitrators of neutral nationality who are detached from any particular loyalties and who may

have knowledge of civil and common law legal systems, if need be.

Private and confidential. The proceedings/hearings are confidential and maintain the privacy of the parties. They are held in a private setting and attended only by the parties and their attorneys, unless agreed otherwise. This confidentiality is especially important in complex cases, that is, those involving trade secrets, intellectual property rights, or other international disputes where publicity could have a negative effect on the reputation or position of the parties, the marketplace, or the political arena.

Adversarial, often lengthy, and costly. Arbitration proceedings are adversarial in nature and akin to judicial proceedings. They are oftentimes lengthy, which can make them just as costly and time consuming as trials. Based on World Bank and International Finance Corporation (IFC) data from 2012, it takes an average of 326 days to conduct arbitration in most regions of the world, including Eastern Europe and Central Asia, East Asia and Pacific, Latin America and the Caribbean, OECD high-income countries, the Middle East and North Africa, South Asia, and Sub-Saharan Africa (Pouget 2013). This time can be even longer in some countries. For instance, arbitration proceedings take 560 days in Brazil, 569 days in India, 679 days in Croatia, and 910 days in Iraq (Pouget 2013). This, in addition to the time it may take to enforce arbitral awards if a dispute arises between the parties, can result in even more delays and higher costs. Because costs are driven in major part by attorneys' fees, arbitration is regarded in some economies, including New Zealand, as a costly mechanism. Results from a survey of lawyers there indicated that increased cost was by far regarded as the biggest limitation to arbitration (80 percent of lawyers named this as a limitation) (Saville-Smith and Fraser 2004).

Binding and enforceable. Arbitration provides finality. The outcome of arbitration is a binding and final determination of the rights and obligations of the parties. These awards are enforceable by the courts; moreover, there is generally very limited basis for appeals and an even more limited ability to vacate the awards (for example, the U.S. Federal Arbitration Act does not provide for the appeal of an arbitration award). In addition, foreign arbitral awards are enforceable in local courts provided the country is a party to the 1958 New York Convention on the Recognition and Enforcement of

Foreign Arbitral Awards (UNCITRAL 1958). To date, 156 states have become parties to the Convention.

Court-annexed arbitration, which is primarily used in U.S. federal and state courts, is another type of arbitration that is available in some economies. Unlike traditional arbitration, which deals mostly with large complex commercial disputes, its scope is limited to smaller disputes.⁷⁹ Some state courts in the US (such as in Washington, DC, see box 18) provide this type of arbitration to litigants along with other forms of ADR.

A third form of arbitration is nonbinding arbitration, which is by definition different from binding arbitration. Nonbinding arbitration is used by disputants to obtain an assessment of their positions, the result of which is a nonbinding award that can serve to help the parties with settling the case. It is similar to ENE in that it provides the parties with a “reality check” about the merits of their case and can be beneficial in narrowing down disputed issues and fully or partially settling disputes.

Mediation

Reduced cost. Mediation is generally a cost-effective mechanism for resolving disputes. Whether it is provided by the court, which is often free of charge, or carried out by private mediators, the cost of mediating cases is far less than processing a case through the court and going to trial. Studies in the United States, for example, have shown that mediation is an economical option compared to the cost of adjudicating disputes and is also cost efficient for the courts, though only if the cases are settled (Decker 2013). Mediation reduces costs by eliminating attorney, expert, and court fees, as well as enforcement costs. In addition, because mediation tends to result in mutually agreeable solutions, it can also serve to prevent future litigation and associated costs. Even when mediation fails to reach a settlement, it often succeeds in narrowing down the scope of the dispute, which can reduce the length of the trial and the cost of litigation. The informality and flexibility of the process does not require parties to hire legal counsel, which can also reduce costs. Studies in Latin America indicate that conciliation in Columbia, for example, reduces the parties’ litigation cost by about 50% (Jorquiera and Alvarez 2005). This is true also in New Zealand, where

BOX 18.

Court-Annexed Arbitration at the Washington, DC Courts

During the initial scheduling conference in civil cases, the judge, parties and attorneys may select arbitration as the best forum for reaching a settlement. Before arbitration takes place, all sides must agree to use either binding or nonbinding arbitration. The arbitrator, who may be selected from a list available in the court, has full authority to manage the case for approximately 120 days; oversee discovery; decide all motions after a case is assigned to him/her; conduct evidentiary hearings; and render decisions. In binding arbitration, the arbitrator’s decision is final and becomes a judgment of the court. This decision carries the same weight as a decision from a judge. In nonbinding arbitration, either side of the case can file a request for a “trial de novo” or new trial, which is a statement that a person does not want the arbitrator’s decision to become a court judgment, and that the case should go to a regular trial process with a judge. If this request (trial de novo) is not made, the arbitrator’s decision will be final and carry the same weight as a decision from a judge. Since 2011 and according to court data, the settlement has been 100 percent.

Source: Washington DC courts at <http://www.dccourts.gov>.

litigants and lawyers agree that ADR reduces costs (with the exception of arbitration), provided that a settlement is reached.

Participatory, flexible, and less formal than court proceedings and trials. Mediation is premised on the willingness of the parties to participate and openly discuss their disputes in an informal, flexible setting without legal and procedural constraints. The mediation process itself is therefore not as intimidating as judicial proceedings and does not require adherence to rules of evidence or any other rules, which contributes to its effectiveness in many countries. For example, it is a productive alternative in countries with sizable segments of disadvantaged and economically marginalized groups that may not have the resources or capacity to access

79 See 28 CFR 50.20, “Participation by the United States in Court-Annexed Arbitration,” <https://www.gpo.gov/fdsys/pkg/CFR-2010-title28-vol2/pdf/CFR-2010-title28-vol2-sec50-20.pdf>.

justice services. It is also useful in countries where greater traditional and cultural emphasis is placed on sustaining personal and commercial relationships. In addition, mediation can often result in atypical settlement terms, including an acknowledgment of a party's role or an apology, which can play a significant part in preserving both personal and business relationships.

Confidentiality. Testimony and evidence presented during mediations, as well as the discussions that take place, are confidential and not admissible into evidence in the event that mediation fails and a trial is necessary.

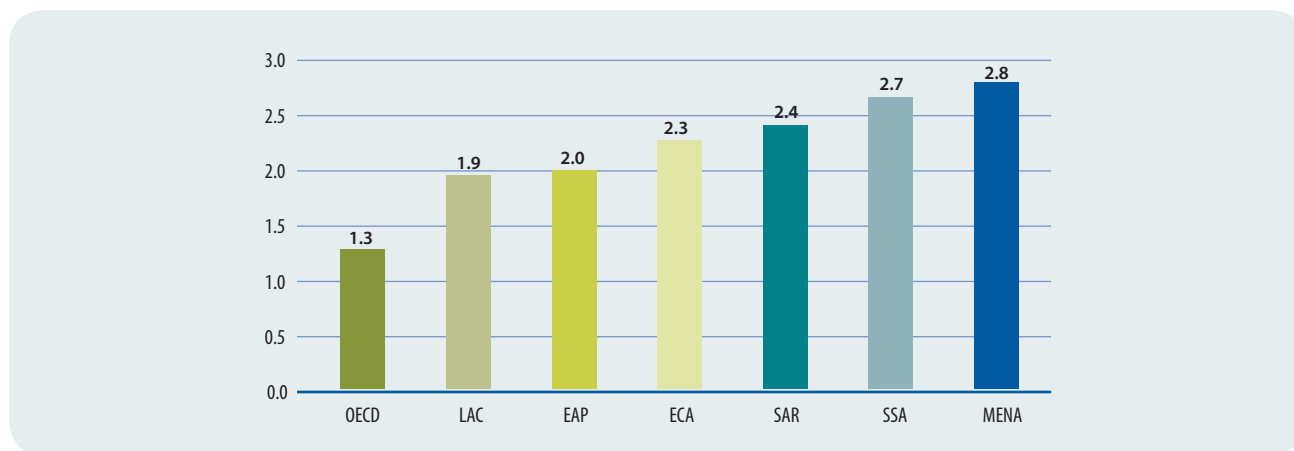
Enforceability. Mediation settlements are based on the mutual agreement of the parties, which means that they are more likely to abide by the terms of the agreement. Settlement agreements are contractual in nature and as such can be enforced as a contract in the event of noncompliance (which is the case in Australia, Germany, the Netherlands, and Hong Kong). In countries where the agreement has to be ratified by the court (such as Belgium), ratification gives it the weight of a court judgment that can then be enforced. In Italy, once a judge validates the written agreement, it has the force

of a writ of execution, and in Indonesia, parties have the option of either submitting the agreement to a judge, who will affirm it as a consent judgment, or having it enforced as a court award.

Lessons learned

Instituting a comprehensive legal framework. As evidenced by the experiences of the U.S. federal courts, the courts in Singapore and Hong Kong, and many others worldwide that are successfully implementing ADR mechanisms, a clear and detailed legal and regulatory framework is essential for supporting the effective introduction and implementation of different ADR services. According to World Bank and IFC data, between 2011 and 2012 alone, 59 percent of OECD economies and 43 percent of East Asia and Pacific and Eastern Europe and Central Asia economies had amended or adopted, or were in the process of adopting, new laws or provisions on international commercial arbitration, mediation, or conciliation.⁸⁰ Indeed, the expansion of the legal framework for ADR was the most common feature of reform in the *Doing Business 2016*.

FIGURE 16. Perception of the legal ADR framework as an obstacle to FDI, per region



Source: Pouget (2013).

Note: The Arbitrating and Mediating Disputes study (AMD) Perception score measures the average perception of contributors based on a scale from 1 to 5, of the extent to which their legal framework on ADR is an obstacle to FDI. The highest scores indicate the regions where the obstacle is perceived as bigger.

80 This information comes from the Foreign Direct Investment (FDI) Regulations Database, which is "a World Bank Group initiative comparing the regulation of foreign direct investment in 105 economies. The dataset presents quantitative indicators on economies' laws, regulations and practices that affect how foreign companies invest across sectors, start businesses, arbitrate commercial disputes, hire expatriate staff, and convert and transfer currency. The indicators are based on a survey of private-sector practitioners and government regulators. They evaluate the quality of laws and policies, as well as their implementation and enforcement in practice." For information about the FDI Regulations Database, see <http://iab.worldbank.org/data>.

The laws must in particular address what forms of ADR services are provided and when, how, and by whom. Legislation must also identify the court's discretion in referring cases to ADR; specify associated costs; outline any legal aid schemes (such as the availability of waivers and/or exemptions from ADR fees), qualification requirements, and application mechanisms; the effects of reaching settlement agreements prior to trial; the enforceability of settlement agreements; and the existence of any incentives for litigants, to name a few requisites (see figure 16).

Integrating ADR into court processes by developing court rules is essential, especially when the law is not sufficiently detailed. For courts that implement court-annexed programs (such as services provided by the courts), internal regulations are necessary, as they play a key role in supporting day-to-day implementation and help educate court users on their rights and obligations (Pouget 2013).

A recent study of arbitration in Africa indicated that the national arbitration laws in some countries such as Tanzania provide courts with many opportunities for procedural intervention, which interferes with the arbitral process and undermines its use and effectiveness (Namachanja 2015). Sound national arbitration laws should demonstrate a commitment to effective arbitration practices. These laws should follow the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on International Commercial Arbitrations*, which harmonizes discrepancies that may

exist in national law and provides guidance on the selection and appointment of arbitrators and on arbitral proceedings, among other matters. Unless a country has already developed enabling national laws that have similar guiding principles, (such as France), adopting the Model Law is key to the effectiveness of arbitration. To date, national legislation based on the Model Law has been adopted in 72 states in a total of 102 jurisdictions (UNCITRAL 2008). In addition, in order to ensure that foreign arbitral awards are recognized and enforced by local courts, economies should also become parties to the 1958 New York Convention, which requires national courts to recognize and enforce foreign arbitral awards. Failing to join the Convention can thwart local efforts to provide more effective arbitrations, which was the case in the United Arab Emirates, for example. There, the process of amending the arbitration law was significantly delayed due to the fact that the country had not become a party to the New York Convention.

Identifying and providing the most appropriate ADR mechanism. When considering the range of ADR mechanisms, courts must balance their needs with those of court users while ensuring that cultural norms and traditions are respected. Adopting a thoughtful and holistic approach to implementing ADR services ensures that the services are tailored to the needs of court users and to effective dispute resolution (see box 19).

Cultural norms in particular can impact the effectiveness of services. Some cultures may be more predisposed and open to using informal mechanisms to resolve disputes,

BOX 19.

Court-Annexed Mediation Pilot in Thailand

Mediation in Thailand is specifically governed by the Code of Civil Procedure and corresponding guidelines and is a part of the judiciary's strategic plan. To support and promote its use, the judiciary established the ADR Office, which has set up a center where the mediation of civil, commercial, land, probate and family, debt recovery, and loan disputes are mediated as part of court-annexed mediation efforts. The judiciary's approach was based on a pilot scheme that included four pilot courts. Based on a detailed evaluation, court-annexed mediation was rolled out into other courts. To support the use of mediation, the ADR Office also developed a guidebook that was made available to users and stakeholders. The Office is also responsible for recruiting and training mediators and cooperates with financial institutions to build its capacity to provide mediation in financial disputes.

Source: Sorawit Limparrangsri and Montri Sillapamahabundit, "Mediation Practice: Thailand's Experience" (Paper delivered at the 11th General Assembly of the ASEAN Law Association, Bali, February 15–18, 2012), <http://www.aseanlawassociation.org/11GAdocs/workshop5-thai.pdf>; and Thammanoon Phitayaporn, "Strengthening the Independence and Efficiency of the Judiciary in Thailand," *Thailand Law Forum*, <http://www.thailawforum.com/articles/strengthening3.html>.

while others may value and require the formality of a court judgment. In Southeast Asia, for instance, case studies have shown that there is a cultural preference for informal dispute resolution because of its ability to preserve personal and commercial relationships (USAID 1998).

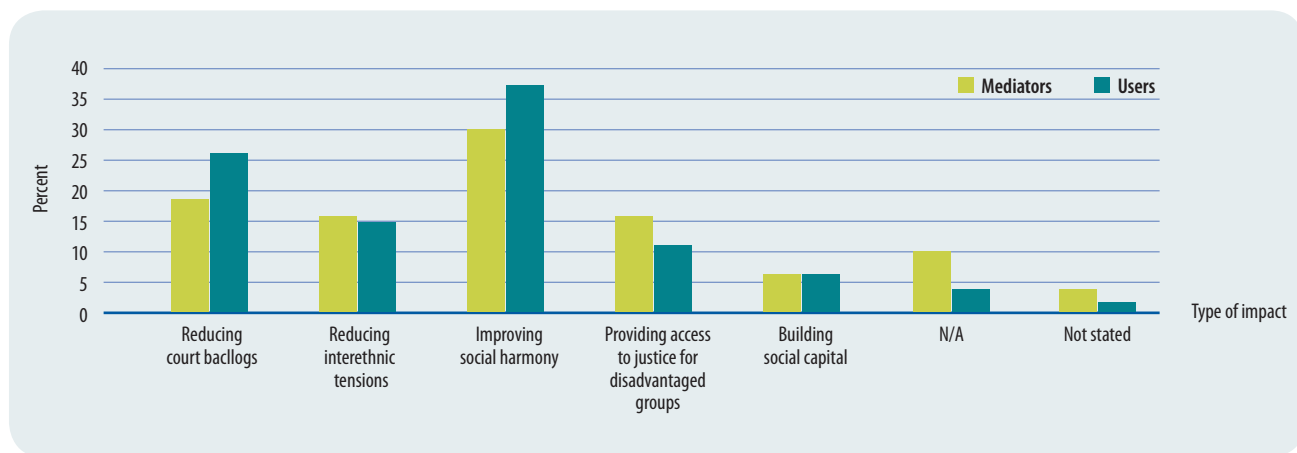
In Sri Lanka, commercial mediation centers established by law have been providing mediation services in commercial disputes since 2000.⁸¹ Community mediation boards established by the Ministry of Justice have also been highly successful and are viewed as having contributed to peace and encouraging coexistence (Gunawardana 2011). Traditional norms in Sri Lanka and its history of using informal dispute resolution have made mediation widely accepted. In countries (such as Sri Lanka) where the courts are viewed as historically inaccessible, ADR has been introduced and promoted to increase access to justice services.⁸²

There are additional factors that should guide the type of service offered and how it is provided. These include the level of literacy among a country’s population; the needs of both the urban and rural population; court resources and capacity; IT capacity and Internet access; and case filing trends and case data, including case

volume by case type and court. If a court’s caseload indicates that the majority of cases filed are complex commercial or labor disputes, mediation may not be the best option and more focus should be placed on providing an effective arbitration framework. In countries with IT capacity but dwindling funding for the justice sector (such as the United Kingdom), ODR may be implemented to free up some of the court’s resources while providing an easier and cheaper alternative to adjudication for court users. In line with this, adjusting and implementing new ADR services to better respond to economic developments is also key to meeting the needs of courts users. In Thailand following the economic crisis in 1997 and the rise in enforcement proceedings, there was a need to reduce enforcement costs. The country responded by implementing post-judicial mediation, which is provided at the enforcement of judgment stage—both before enforcement proceedings begin and thereafter. To date, mediation centers exist across the country to specifically resolve enforcement issues⁸³ (see figure 17).

Taking a participatory approach. Ensuring that ADR services are developed and evaluated with input and feedback from the legal community, court users, and other stakeholders is essential. In Hong Kong, for

FIGURE 17. Perceived larger impact of mediation



Source: Gunawardana 2011.

Note: Data from the Evaluation of the Mediation Boards programme in Sri Lanka conducted in 2010.

81 Sri Lanka, Commercial Mediation Centre of Sri Lanka, Act, No. 44 of 2000.

82 For additional information about the mediation boards, see http://www.justiceministry.gov.lk/index.php?option=com_content&view=article&id=49&Itemid=64&lang=en.

83 Presentation by Thailand’s Legal Execution Department, delivered at the World Bank, Washington, DC, February 17, 2016.

example, a working group on mediation was established representing the judiciary, the legal profession, and major mediation service providers to evaluate existing services and make recommendations. Consultations were also carried out in which members of the public were invited to comment on all aspects of mediation as well as the working group's recommendations. Following the consultation, a number of additional groups were established to implement the final recommendations.

Providing voluntary services. As previously stated, ADR services are premised on the willingness to participate and as such, are generally more effective when not forced upon the parties. Although making ADR mandatory may be useful when first introducing services and can increase its use, doing so may not necessarily result in an increased rate of settlements. Experiences from many economies with mandatory ADR schemes at the pre-filing and post-filing stages (for example, in Abu Dhabi and Mali, respectively) indicate that forcing parties into ADR can result in it becoming a mere formality and a hurdle that parties feel they have to get past in order to get to the next stage, which is trial. Mandating conciliation can also result in a lack of reasonable effort on the part of the parties to reach a settlement (Ebeid 2015). In addition, mandatory ADR can impose an added cost on parties who are not likely to settle as well as increased costs to the court. A distinction, however, should be made between mandating that parties go through mediation or conciliation before filing a case (as in Abu Dhabi) and requiring courts to refer a case to mediation at any stage in the proceedings. According to studies in the United States, requiring courts to refer amenable parties to mediation post-filing does not reduce the satisfaction with the mediation process or its outcome (USAID 1998).

Ensuring that services are provided at the right time. Being well informed about the merits of the case can be a major factor in whether a settlement is reached. Despite cost savings if conducted early on, mediation tends to be more successful when carried out after the case has reached a stage when the parties and lawyers have a better and more realistic understanding of the merits of their case and the potential for losing if it goes to trial – one of the reasons why providing for ENE can be helpful in increasing settlement willingness.

Providing options. Offering a range of ADR options is the best way to meet the varying demands of court users. The needs of the business community often differ from those of ordinary court users, and the needs within the business community may also vary; small business owners may effectively utilize mediation as a means of resolving disputes, saving costs, and preserving commercial relationships, while multinational corporations may not regard mediation as effective in resolving complex commercial issues. Appreciating the variation in needs allows courts to develop and implement targeted ADR services that are useful for everyone. Studies in the United States have shown that that over one-third of all federal courts effectively provide three or more different ADR services (Stienstra 2011), as do the vast majority of European countries. Some U.S. state courts have approached the issue by implementing a multi-door approach, which essentially offers court users various “doors” or avenues for resolving disputes (such as mediation, conciliation, arbitration, neutral evaluations, and so on). Assistance from the courts is initially provided to screen cases to determine which option would be most effective. This approach is effectively implemented by the Washington, DC Superior Courts, which provide a host of services through its Multi-Door Dispute Resolution Division, including arbitration and community information and referral, as well as child protection, family, medical malpractice, landlord-tenant, probate, tax assessment, small claims, and civil mediation. These programs have been effective in increasing access to justice services, and based on court data from 2011–15, have been highly effective in resolving disputes, especially landlord-tenant, small claims, probate, and tax cases. The settlement rate for landlord-tenant cases has ranged from 65 to 68 percent; for probate cases from 43 to 55 percent; for small claims from 58 to 73 percent; and for tax cases from 41 to 51 percent.⁸⁴

Piloting and testing. Piloting and testing allow for a robust analysis and evaluation of the services provided. These actions also allow for refinement and help courts to create buy-in and educate the public and the legal and business communities. Many courts worldwide have adopted this kind of phased implementation approach, including the Netherlands (court-annexed family mediation and bankruptcy mediation), Hong Kong,

84 For more information, see the annual reports of the District of Columbia Courts, <http://www.dccourts.gov/internet/about/orgperf/annualreports.jsf>.

the United Kingdom, Thailand, the United States, and numerous other economies.

Implementing good data collection practices and evaluating performance. Once implemented, courts must regularly collect and analyze detailed data by case and court type and type of ADR service provided, as well as data on cases settled and partially settled. This will allow courts to evaluate the effectiveness of the services, identify any trends and potential demands for additional or different programs, or pinpoint any need for altering the way in which the services are provided. This data, along with user surveys (lawyers and litigants), will enable a detailed evaluation of the effectiveness of the services provided and are collected by many well-performing courts worldwide.

Raising user awareness. When implementing mediation and related services, it is necessary to promote and educate the public and the legal community, particularly on the use and benefits of ADR. Awareness activities, whether through the provision of information and support mechanisms—such as court-operated mediation assistance offices (as in the Hong Kong judiciary and Washington, DC Small Claims Courts) or comprehensive websites that provide easy access to educational information—are necessary to educate, assist, and promote ADR use among all court users. In California, court rules mandate that litigants be provided with information about all ADR services at the time of filing. This information package is available online and must be included along with the original petition when serving defendants (Decker 2013). Educating and creating buy-in from the legal community, on the other hand, may require different efforts. Lawyers are in large part driven by financial gain from the time spent on cases, but they also play a key role in driving settlements. As such, careful and targeted efforts should be undertaken to change their mindset and highlight the benefits of expeditious settlements as a way to free up their time to take on more cases. Creating buy-in can also be achieved by involving them in pilot schemes, seeking

their opinions, and including them in other participatory activities when developing and evaluating ADR services.

Good practice examples

ADR in the Hong Kong judiciary. Hong Kong provides a good example of how courts can holistically approach and promote the use of ADR (in particular mediation) by providing a solid legal framework, implementing various services, and ensuring public awareness of their use and benefits. Hong Kong's legal framework for mediation was developed in 2009 as a part of the civil justice reform effort and is an integral part of the courts' active case management approach to facilitating settlements. In fact, the courts are required and have a duty to encourage the use of ADR. Mediation is specifically guided by two Practice Directions (PDs): PD 31 on Mediation and PD 3.3 on Voluntary Mediation in Petitions under Companies Ordinances.⁸⁵ To supplement PD 31, a Mediation Ordinance (Cap 620) was enacted in 2012 essentially establishing mediation as the preferred ADR and providing in more detail the statutory framework for conducting this service.⁸⁶ Recognizing that different subject matters may require different frameworks, mediation is further regulated by subject matter through a number of other PDs and ordinances. Separate PDs govern: 1) family disputes; 2) personal injury cases; 3) employee compensation cases; 4) probate and administration of estate proceedings; 5) compulsory land sale cases; 6) construction cases; and 7) building management cases.⁸⁷ In addition to the supporting and detailed legal framework, mediation was also developed with broad feedback and input from court stakeholders. This participatory approach, adopted to develop, implement, and evaluate services, was based on establishing the working group described above made up of a variety of stakeholders. After a three-month long consultation period in which members of the public were also invited to comment, a Mediation Task Force was established to determine how to implement the recommendations with the help

85 PD 3.3 applies to cases involving disputes between company shareholders (and not disputes involving the interest of creditors or the public interest), and PD 31 provides for voluntary and confidential mediation (by a third party agreed upon by the parties) in all other civil disputes. To promote the use of mediation, PD 31 provides the courts with the authority to impose adverse costs on parties for failure to reasonably engage and participate in the mediation; provides for detailed procedures for parties who are legally represented by counsel and another set of procedures when one or more of the parties is not legally represented; and provides for a procedure for applying to stay the proceeding pending the mediation.

86 Cap 620 addresses a number of issues, including confidentiality and the admissibility of communications during mediation into evidence.

87 For details on the various practice directions, see the website of the Hong Kong judiciary at http://mediation.judiciary.gov.hk/en/practice_directions.html.

of three groups working specifically on: the regulatory framework; accreditation and training; and public education and awareness raising.

Another factor that contributed to the effectiveness of mediation services is the judiciary's focus on raising public awareness and providing adequate support services for court users, including access to services and facilities, information on mediation, and other resources to help navigate the mediation process. Services are delivered by: 1) the Mediation Information Office, which provides information to litigants and assistance in how to seek mediation from professional bodies and/or to utilize computer terminals to access the court's website and obtain additional material if necessary; and 2) the Building Management Mediation Coordinator's Office, established as a pilot to streamline the processing of building management cases.⁸⁸ Additional detailed information is also available on the website and includes: laws, publications, and judgments related to mediation as well as videos explaining the process and comprehensive information and historic and detailed court statistics on mediation since the enactment of PD 31. This holistic approach has proven to be effective in steadily increasing the use of mediation in both first instance and district courts. Since being introduced in 2011, the mediation settlement rate in district courts ranged from 46 percent in 2011 to 62 percent in 2015 (these figures apply to civil cases that do not include family, construction, and other specialized cases listed above).⁸⁹

A similar approach was undertaken with regard to arbitration. Until 2011, the arbitration law was not consolidated, and there were two regulations governing the conduct of domestic and international arbitrations. The regime for domestic arbitration was based largely on the United Kingdom's arbitration law, while international arbitration was based on the UNCITRAL Model Law. Stemming from a committee recommendation with broad input from and participation by the Solicitor General, the legal community, arbitration experts, and relevant government officials, a proposal for unified legislation

was presented. This resulted in the current framework that unifies domestic and international legislation into one law based on the Model Law and eliminates any past restrictions on foreign law firms engaging in and advising on arbitration in Hong Kong. An Arbitration Ordinance was also enacted defining the Hong Kong International Arbitration Center (an independent entity) as the designating body of arbitrators in the event that parties are not in agreement. In addition, foreign awards can be enforced pursuant to the country's membership in the New York Convention of 1958. Providing this type of enabling environment for arbitration has benefited Hong Kong. In 2008, the International Court of Arbitration of the International Chamber of Commerce (ICC) opened a branch of its Secretariat in Hong Kong to serve ICC arbitration in the Asia-Pacific Region, and in 2012, the China International Economic and Trade Arbitration Commission (CIETAC), which handles a large number of international arbitration cases, established its first office outside of mainland China in Hong Kong.⁹⁰

ADR in the U.S. federal courts. For decades, courts in the United States have been a leading force in introducing and using ADR services. The federal courts in particular led the introduction and expansion of ADR in the US. They were guided by an enabling legal framework that included the enactment of the Civil Justice Reform Act of 1990 and the Administrative Dispute Resolution Act of 1990 (later amended, see box 20). This detailed framework drove the establishment of ADR services by requiring all federal courts to develop cost and delay reduction plans as well directing that all courts adopt six case management principles, one of which is the development of ADR services (Stienstra 2011). To support this mandate, courts were provided with support mechanisms such as training and expert on-site ADR consultations. These services were provided by the Federal Judicial Center (the education and research agency of the federal courts in the United States) and its Program for Consultations in Dispute Resolution. The program specifically provided advice to courts that were developing ADR services and also supported courts with established ADR options in examining and

88 The Building Management Mediation Coordinator's Office is set up in Land Tribunals to facilitate mediation, answer inquiries, and provide information on mediation. Mediation coordinators also hold information sessions and consultations with the parties to provide assistance free of charge. Legal advice, however, is not provided by either this office or the Mediation Information Office, and detailed information about both is easily accessible on the courts' website.

89 For more information, see the website of the Hong Kong judiciary at http://mediation.judiciary.gov.hk/en/figures_and_statistics.html.

90 For more information, see "CIETAC HK Arbitration Centre Enhances HK's Status as Legal Services Hub," website of the Hong Kong Department of Justice, http://www.doj.gov.hk/eng/public/pr/20120924_pr1.html; and the website of CIETAC at <http://www.cietachk.org>.

assessing their services using experts who were judges, court clerks, and ADR administrators. In addition, and to further guide courts when developing ADR services, a list of the attributes of a well-functioning court ADR program were developed. Some of these attributes include:

- ▶ defining program goals and characteristics and promulgating them in written rules
- ▶ requiring training
- ▶ adopting written ethical rules for mediators
- ▶ defining the scope of confidentiality
- ▶ evaluating and measuring the success of the services

As a result of this comprehensive approach and support, ADR has been institutionalized in the US federal courts as a primary part of judicial case management practices. A detailed assessment of ADR services in 2011 determined that all U.S. federal courts were providing ADR services in one form or another (Stienstra 2011). In many courts, multiple forms of ADR are provided, with mediation the most commonly used, followed by settlement conferences. None of the courts authorize arbitration alone since it is no longer considered a key ADR service. These conclusions were supported by recent data from a number of federal courts. According to the 2015 annual report of the Central District Court in California, 2,630 cases were referred to one of the three ADR options: 372 cases to a magistrate judge for a settlement conference; 1,290 to the Court Mediation Panel; and 968 to private mediation (U.S. District Court 2015a). Panel mediators conducted mediations in 671

cases and settled, or partially settled, 353 of them, which amounts to a settlement rate of 52.6 percent (U.S. District Court 2015a) (See figure 18).

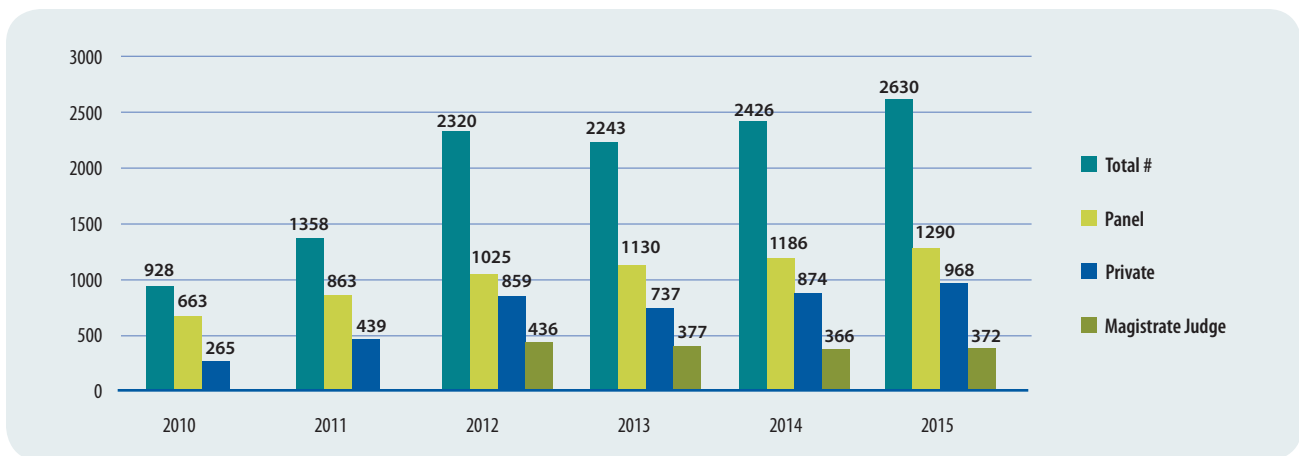
BOX 20.

Requirements of the Federal US ADR Act of 1998 for the U.S. Federal Courts

- Each district court must by local rule authorize use of ADR
- Each court must by local rule create its own program
- Each court must provide at least one type of ADR
- Each court must by local rule require litigants to consider using ADR
- Courts may require litigants to use mediation and ENE
- Arbitration referrals require party consent
- Districts may exempt cases or categories of cases
- Courts must adopt processes for making neutrals available
- Neutrals must be trained
- Courts must adopt a local rule on confidentiality
- Courts must adopt a local rule on conflicts of interest
- Courts with programs must examine their effectiveness
- A program administrator must be designated
- Funding must be authorized

Source: Stienstra (2011).

FIGURE 18. Cases referred to ADR options in US federal courts



Source: U.S. District Court 2015a.

With regard to user satisfaction, surveys conducted in 2015 in another federal court in California that uses a multi-door program indicated that more than 90 percent of participants using mediation and ENE were satisfied with the ADR process and that 84 percent reported that the benefits outweighed the costs (U.S. District Court 2015b). This court data correlate with generally consistent trends in other courts showing that mediation has consistently been the most commonly used ADR service.

ADR in the Singapore judiciary. The state courts in Singapore adopted a holistic approach to providing ADR services, supported by an enabling legal framework and an overarching government-wide effort to develop and utilize mediation services in particular. Today, mediation is entrenched in Singaporean society and institutionalized across the country in the public and private sector. For example, mediation is utilized in a structured manner by: 1) public entities (such as the Ministry of Manpower, which resolves employment disputes; the Government Procurement Adjudication Tribunal, which hears and mediates disputes related to procurement by government and other public agencies; and the Strata Titles Boards, where mediation is legally mandated before filing a court case as a way to resolve disputes related to real estate development issues); 2) the Singapore Mediation Center (SMC) for resolving private commercial disputes; and 3) the Community Mediation Centers for resolving disputes between neighbors, families, and friends. The latter also receive referrals from the courts to mediate cases pursuant to its enabling law, the Community Mediation Center Act (Menon 2015).

With regard to court-annexed ADR services, mediation and neutral evaluations are provided for cases that have been filed. Mediation is carried out by the State Courts Centre for Dispute Resolution (located at the court) and may be conducted by judges who work at the center or by trained mediators based on agreement of the parties or a referral from the courts. These services have been effective as a case management tool and have reduced the court's caseload and served to narrow down issues in cases that failed to settle, which has in turn reduced the duration of trials. According to court data, in 2013, 7,292 civil and criminal cases were mediated, resulting in a 92 percent settlement rate; and in 2014, 6,420 cases were mediated, producing an 89 percent settlement rate (Menon 2015). To support these efforts further, the court introduced the presumption of ADR in all civil cases, which means that all such cases are referred to the most

appropriate ADR service (that is, mediation, neutral evaluation, or arbitration) at the case management conference unless the parties opt out of the ADR process. In addition, the court has adopted an active role in promoting mediation and can consider a party's conduct in relation to mediation when determining cost.

ADR in the Western Australia district courts. The district courts have performed well in using ADR to resolve cases. All cases filed are subject to some form of ADR conference prior to securing a trial date. ADR conferences include an initial pretrial conference that the parties and lawyers are required to attend. If the case does not settle, a special appointment pretrial conference is set up, at which a court registrar mediates the case. The court also has the power to order the parties to mediate the case using a private mediator.

A part of the court's success in using ADR is the guidance provided by clear and detailed court rules. These rules govern the ADR/mediation process and clarify the role of the parties (for example, parties are required to attend mediation without delay; to participate in mediation in good faith; and to be responsible for the costs incurred in the process of referring the case to mediation). To encourage settlements, all evidence and testimony provided during mediation is confidential and inadmissible at trial. Failing a settlement, mediation serves to narrow down the issues that will go to trial. Mediations are conducted by the courts' registrars or private mediators. To verify that registrars are qualified, the courts focus on building their professional capacities by ensuring that they are provided regular and continuous mediation and negotiation training. The registrars are also accredited mediators for the purpose of the Australian National Mediation Standards. Pursuant to the data published in the court's annual reports, its success in resolving cases by using both mediation and pretrial conferences has been consistent in limiting the number of case that are resolved by trial:

- ▶ 2015: 1.2 percent of all civil cases filed were resolved by trial
- ▶ 2014: 1.7 percent of all civil cases filed were resolved by trial
- ▶ 2013: 1.4 percent of all civil cases filed were resolved by trial
- ▶ 2012: less than 1 percent of all civil cases filed were resolved by trial

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