

Fast-tracking Small Claims in Bosnia and Herzegovina

A Comparative Analysis and Reform Proposals

June 2019

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About This Report

This Report is an output under the BiH Commercial Justice Technical Assistance Project funded by the UK Good Governance and Investment Climate Reform Trust. The objective of the Project is to support justice institutions in implementing reforms that improve efficiency and access to commercial justice in Bosnia and Herzegovina (BiH) building on the recommendations of the UK-funded 2016 Feasibility Study on Improving Commercial Case Management in FBiH.

The Project comprises five components as follows: (1) Strengthening commercial departments and commercial courts in FBiH and RS, respectively, through analysis of caseloads and workloads, and providing recommendations to reengineer processes, reduce backlogs and strengthen court management; (2) Fasttracking small claims based on results of comparative legal analysis of civil procedure in BiH and in several countries of the European Union; (3) Increasing access to justice for micro, small and medium enterprises (MSMEs) through developing guides to increase legal literacy among firms; (4) Capacity building through developing and implementing peer counseling and supplementary training for commercial judges; (5) Implementing procedural reforms to close loopholes and reduce bottlenecks in processing through proposals for legislative changes and amendments.

This Report is delivered under Component 2 of the BiH Commercial Justice Technical Assistance Project. It examines the procedural laws and court practices for resolving small claims in Austria, Denmark, Estonia, Germany, Latvia and Slovenia and compares them to the procedures in Bosnia and Herzegovina (BiH) in order to assess the effectiveness of the latter and provide actionable recommendations to optimize them.

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The author acknowledges the valuable contribution of Ms. Georgia Harley whose ideas and enthusiasm inspired this research.

Abbreviations and Acronyms

ADR	Alternative Dispute Resolution
BD	Brčko District
BAM	Bosnian Convertible Mark
BiH	Bosnia and Herzegovina
CEPEJ	Council of Europe European Commission for the Efficiency of Justice
CoE	Council of Europe
CPL/CPLs	Civil Procedure Law/Civil Procedure Laws
EC	European Small Claims Procedure, hereinafter referred to as Regulation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FBiH	Federation of Bosnia and Herzegovina
HJPC	High Judicial and Prosecutorial Council
IT	Information Technology
RS	Republika Srpska
SFRY	Socialist Federal Republic of Yugoslavia
SOKOP	System for the Electronic Submission and Processing of Utility Claims in BiH
WB	World Bank

Executive Summary

- 1. Purpose of the Report.** The purpose of the Report is to conduct a comparative analysis of the procedure for resolving small claims in Bosnia and Herzegovina (BiH) and provide recommendations to improve it, based on lessons learned from comparator jurisdictions Austria, Denmark, Estonia, Germany, Latvia and Slovenia. The Report is an output of a technical assistance project designed to improve the business climate in BiH by expediting the processing of commercial cases and is informed by a broader World Bank initiative to reform justice policy dialogue and reform in the Western Balkans. The analysis is primarily intended for the legal community in BiH including policy makers, judges, lawyers and those in academia.
- 2. Definition of Small Claims and Scope of the Report.** Small claims procedures are designed to resolve civil and commercial disputes below a certain value in a way that is simpler, quicker and cheaper than the general procedure. The small claims procedure in BiH is applicable to civil and commercial claims below BAM 500 (approximately EUR 250). In terms of scope, the Report covers both commercial and civil small claims. This is because the same procedure is applicable to both types of cases. The Report focuses primarily on the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS), because the caseload in Brčko District (BD) is negligible. Still, the research reviews all three procedural laws and the 13 different laws on court fees applicable in BiH.
- 3. Small Claims and Enforcement Procedures for Uncontested Claims.** The research discusses the effect that the definition of authentic title has on the volume of small claims cases. It recommends broadening the definition of authentic title since its narrow scope in BiH results in an extraordinarily high volume of small claims. The current definition is not only quite narrow but also differs across entities. Currently, courts are overburdened with small claims for utility bills. To address this situation, BiH could broaden the definition of authentic title to encompass all types of utility claims. In the long term, BiH could consider reintroducing the order for payment procedure in order to relieve the courts of civil and commercial non-utility cases which are not contested by the debtor.
- 4. Caseload of Small Claims in BiH.** Small claims in BiH have a very high relative volume compared to general civil and commercial cases which highlights their importance within the country's legal system. Case duration data indicate that overall, small claims procedures are no shorter than the general ones and are sometimes significantly longer. This means that the simplified rules are not resulting in the quicker and cheaper resolution of small claims.
- 5. Thresholds for Small Claims.** There are two issues with the threshold on small claims procedures in BiH. First, the threshold is relatively high. Therefore, the procedures are applicable to a very wide range of cases. This in turn means that the legal community may be cautious when considering introduction of more simplifications of the procedure because a high volume of cases would be affected by such reforms. Given potential resistance, BiH could introduce an additional, lower threshold to which these new simplifications would be applicable. Second, BiH judges do not have the discretion to decide whether to apply the small claims procedure or not.

procedure is further simplified, it would also be helpful to grant judges the discretion to not apply small claims procedures to complex cases even if their value is below the threshold.

6. Fees. BiH comprises many different jurisdictions, each with its own rules on fees. Furthermore, there are several fees within an instance (for the claim, for the judgment and sometimes for the defendant's response). Conversely, in all the comparator countries, a single fee is payable at each instance. Requiring the payment of various fees per court instance is contrary to international practice and burdensome for courts. It would be beneficial if the rules are amended to require a single court fee to be paid prior to commencing litigation. This would discourage frivolous claims, spare judges and court clerks time, and relieve enforcement authorities of efforts invested in collecting unpaid fees.

7. Filing the Claim. Under international best practices, small claims are either filed electronically through a single judicial portal, if such portal is not available, by using structured forms that facilitate the process for judges and parties. In BiH, the SOKOP enables the electronic filing of utility claims. There are no forms and no options to file nonutility claims electronically. The introduction of mandatory forms both for the claimant's action and for the defendant's response in nonutility claims is recommended in the short term. In the long term, an option to file all claims via an electronic portal should be introduced.

8. Collection of Evidence. Most jurisdictions simplify the collection of evidence in small claims. Simplifications take two principal forms: they introduce a stricter relevance assessment and/or simplify the form in which evidence is presented. Procedures in BiH do not include either of these simplifications. As a result, even in cases with minimal value, first-instance court may hear numerous witnesses and admit an expert assessment where the costs of doing so may greatly exceed the value of the dispute. It is recommended that BiH consider the introduction of a stricter relevance assessment, simplify the form of evidence, and restrict the use of expert assessments in cases where the value of the claim is very low.

9. Hearings. BiH requires two hearings for both small and general claims: a preliminary hearing then a main one. In many comparator jurisdictions, however, it is admissible for small claims procedures to develop only in writing. BiH could consider reforming its procedure along these lines by stipulating that small claims should, as a general rule, be processed based on documentary evidence unless a party specifically requests a hearing. Alternatively, cases can be processed without a preliminary hearing unless the court decides, based on the complexity of the case, that a preliminary hearing is necessary. The rule that allows for the omission of the preliminary hearings is currently applicable only in RS and only to commercial cases.

10. Timelines. Unlike comparator jurisdictions, BiH has only shortened a few timelines in its small claims procedure and they do not have a significant effect on the duration of the case. Introducing shorter timelines similar to the ones used in the EU cross-border procedure would encourage the faster resolution of small claims.

¹ System for the electronic submission and processing of utility claims in BiH.

11. Content of the Judgment. In BiH, there is no difference between the content of judgment handed down in a small claims case and in a regular case. In contrast, in many of the comparator jurisdictions, certain elements of the judgment in small claims cases are omitted. This saves the judge time that would have otherwise been spent drafting lengthy judgments. BiH could simplify requirements on the contents of judgments for small claims cases. For example, instead of including all the facts and evidence presented in a case, when writing the judgment, a judge could have the option to only include the facts that he/she deems to have been established and the evidence upon which the judgments are based.

12. Judgment Based on Nonappearance. Under general and small claim procedural rules in BiH, if the duly served defendant does not respond, the court issues a judgment based on nonappearance upon the claimant's request. The request is a formality but if omitted, the court is prevented from closing the case. BiH could strengthen this rule in small claims cases by providing that if the duly served defendant fails to respond to the claim, the court should issue a judgment on the basis of nonappearance even in the absence of an explicit request from the claimant. The same consequences could be provided for in the event the duly served defendant submits a purely formal response to the claim and fails to appear at the court hearing.

13. Appellate Court Rules of Procedure. At the second instance, there are no simplified procedures for small claims in BiH. Second instance judges spend as much time and effort on small claims cases as they do on general ones. Generally, small claims judgments have limited grounds of appeal. Therefore, the expectation is that very few small claims cases should reach the appellate level; however, a significant number of small claims cases are appealed. Therefore, it would be useful to introduce simplified procedures at the second instance as well. For example, simplifications could include having a single judge hear the cases rather than a panel of three judges.

14. Alternative Dispute Resolution. Mediation is often seen as a cost-effective way to resolve small claims cases. However, most European states struggle with encouraging its use. The introduction of compulsory initial mediation sessions for certain types of cases holds promise with some caveats. Experience in Germany demonstrates that compulsory mediation is not appropriate for all types of small claims. It may, however, be appropriate for some narrowly defined categories of cases. It would be important to gather additional empirical evidence from countries that have incorporated compulsory initial mediation in their procedures, before emulating the same procedure for certain types of small value cases in BiH (for example, neighbor disputes, medical malpractice disputes, insurance claims).

15. Principal Finding. The principal finding of the Report is that the small claims procedure in BiH has minimal simplification. As a result, it is neither cheaper nor shorter than the general one. For the procedure to be effective and serve its purpose, it would need to be reformed. The introduction of more significant simplification. The Report offers a menu of options for the kinds of simplifications, which could ensure that the small claims procedure in BiH meets its purpose to provide quicker and less expensive resolution to small value dispute as compared to the general procedure.

1. Background

16. In recent years² small claims have been receiving increased attention. The World Bank addresses the issue in various documents. The WB's flagship publication, *Doing Business*, recognizes that "small claims courts or simplified procedures for small claims, as the form of justice most likely to be encountered by the general public, play a special part in building public trust and confidence in the judicial system. They help meet the modern objectives of efficiency and cost-effectiveness by providing a mechanism for quick and inexpensive resolution of legal disputes involving small sums of money. In addition, they tend to reduce backlogs and case loads in higher courts."³ As a consequence, the WB recognizes the existence of a small claims court or a simplified procedure for small claims as good practice when assessing the indicator on Enforcing Contracts.⁴

17. In 2017, through a project financed by the Dutch Rule of Law Initiative, the WB conducted a comparative analysis of small claims procedures in all European Union (EU) Member States.⁵ The report highlighted the principal features of small claims procedures and contained a series of recommendations and options for countries that want to introduce small claims procedures or reform and improve existing ones. The report was presented in the Western Balkans and was met with interest. However, the reform options it proposed needed further elaboration in order to be actionable and tailored to BiH's legal context; the current technical assistance follows on this task.

18. The Study *Improving Commercial Case Management in the Federation of Bosnia and Herzegovina* conducted in 2016 identified small claims as one of the most problematic case types in FBiH. Small claims cases were found to have excessively long disposition times; the average disposition time for small claims was 702 days, four times longer than the Council of Europe (CE) median of 177 days.⁶ The length of small claims cases in FBiH was not only excessive in comparison to European averages but also in comparison to general commercial cases in the country. In 2015, the average duration of resolved first instance commercial small claims in FBiH of 702 days compared to a duration of 391 days for general commercial cases at the first instance

² For a historical review of the development of small claims procedures, see Annex 4 to this Report.

³ See The World Bank, *Doing Business*, Enforcing contracts, Good Practices at <http://www.doingbusiness.org/data/exploretopics/enforcingcontracts/goodpractices#Introducing>

⁴ A third of the score for this indicator is made up of the 'court structure and proceedings index', which has five components, the availability of a small claims court and/or simplified procedure for small claims being one of these five components. The other four components contributing to the 'Court structure and proceedings index' are: Availability of specialized commercial court, division or section, availability of pretrial attachment, criteria used to assign cases to judges and evidentiary weight of woman's testimony. See The World Bank, *Doing Business*, Enforcing Contracts Methodology at <http://www.doingbusiness.org/Methodology/EnforcingContracts>

⁵ Harley, Georgia; Said, Agnes Cristiana. 2017. *Fast-tracking the resolution of minor disputes: experience from EU member states* (English). Washington, D.C. World Bank Group. <http://documents.worldbank.org/curated/en/670181487131729316/Fast-tracking-the-resolution-of-minor-disputes-experience-from-EU-Member-States>

⁶ Ibid., page 9.

In RS, the duration of resolved first instance commercial small claims was 580 days, compared to 789 days for the general commercial first instance cases.⁷ The situation in BiH was particularly paradoxical since in principle, small claims cases should be shorter in duration than those processed through the general procedure. If they are longer, this defies the purpose of having a special track for small claims. The Study recommended improving the small claims procedure in BiH and considering options for its improvement in RS. A follow-up to the recommendations of the Study, the WB and the UK Good Governance and Investment Climate Reform Trust Fund, in close coordination with the HJPC, launched the Commercial Justice Technical Assistance Program. This Report has been developed in the framework of the Small Claims Component of the program.

19. This analysis of the small claims procedure in BiH comes at an opportune time. The Civil Procedure Law (CPLs) in the BiH entities were enacted 16 years ago, in 2003. Since then, the procedure has remained unchanged apart from an increase in the threshold from BAM 3000 to BAM 5000 in 2013. Small claims have not received attention in BiH academic literature either. The time is ripe for a critical assessment of whether the small claims procedure rules meet the goal of ensuring quicker and cheaper justice in small claims and for identifying recommendations for improving them. As BiH and other countries in the region continue to reform their justice systems in order to facilitate a competitive business environment that supports private sector and economic growth, increasing efficiency in the processing of small claims has become a priority and a key entry point for reforms. Therefore, an analysis of the current procedures and how to improve them can help build reform scenarios that could be leveraged by counterparts in BiH.

2. Methodology

20. This comparative analysis examines how the procedure for resolving small civil and/or commercial claims is regulated in the law and implemented in the court practice of six EU jurisdictions (Austria, Denmark, Estonia, Germany, Latvia and Slovenia). It then compares procedures in the EU countries to the small claims procedure in BiH. Based on the comparison, the analysis provides recommendations to improve the small claims procedure in BiH.⁸

21. The choice of comparator EU jurisdictions is based on several criteria. To ensure relevance, the legal systems of the selected jurisdictions are based on continental law, have similar legal systems to BiH and do not have stand-alone small claims courts. To ensure variety of approaches, three of the chosen jurisdictions (Austria, Germany and Denmark) are from the so-called "old democracies" of Western Europe and the remaining three (Estonia, Latvia and Slovenia) represent East European nations which have been part of the Eastern bloc. Finally, to

⁷ Ibid., page 15.

⁸ The research was conducted in parallel with a comparative analysis of the small claims procedure in Serbia funded by the Multi-Donor Trust Fund for Justice Sector Support in Serbia (MDSF). The Serbian research juxtaposes Serbian procedure with the rest in the same six EU jurisdictions. Progressing with the two comparative analyses simultaneously allowed for cross-fertilization of ideas among team members. While the comparative information is the same for both reports, findings and analytical emphasis differ dramatically due to the significant differences between small claims procedures and governance structures in BiH and in Serbia.

enhance the qualitative aspect of the analysis, the team identified countries that justice systems performing at a relatively high level based on the standards of the Council of Europe European Commission for the Efficiency of Justice (CEPEJ). Where appropriate, the research juxtaposes national rules on small claims with the rules on cross-border small value disputes under Regulation (EC) No 861/2007 of the European Parliament and of the Council establishing a European Small Claims Procedure (hereinafter Regulation (EC) No 861/2007).

22. The premise of the analysis is that the small claims procedure differs from the general one in that certain requirements are eased, simplified, or waived in order to ensure a cheaper, faster, and more efficient procedure and to facilitate access to justice. Therefore, the research team focused only on those elements of the small claims procedure (referred to in various countries as a fast-track procedure, simplified procedure, written procedure, and so forth) that deviate from the general civil procedure in the respective country.

23. The Report was produced based on desk research, consultations, as well as focus group discussions and an electronic survey of the BiH legal community. The desk research covered legislation, academic papers, and caselaw, including that of the European Court of Human Rights (ECtHR). It used extensive input from country rapporteurs (one per comparator jurisdiction and one for BiH) focusing on various aspects of the small claims procedure compared to the general procedure in each jurisdiction. A total of four focus group discussions, two with judges and two with lawyers, were conducted in BiH and in RS to solicit their opinions on reforms that could be appropriate in the local context. The list of stakeholders consulted is provided in Annex 2. The team collected the opinions of judges, judicial associates, and lawyers on various aspects of the small claims procedure and the proposed recommendations through an electronic survey. The survey was distributed via the mailing lists of magistrates' Training Centers, Bar Associations, and Chambers of Commerce. It was open for three months and received 159 responses. The questionnaire used in the survey can be found in Annex 6. The survey results, which were in Bosnian/Serbian/Croatian, are only available online.

24. BiH's complex government structure means that within the country, small claims are examined in a number of different jurisdictions. BiH was established following the breakup of the former Socialist Federal Republic of Yugoslavia (SFRY). The country's highly fragmented government structure is enshrined in its constitution set up by the Dayton Peace Agreement. There are 14 relatively autonomous government units in BiH: the BiH Institutions at the State level; two Entities - FBiH and RS; autonomous Brčko District (BD) and 10 cantons in FBiH - each with its own executive, legislative and judicial branches that have extensive functions specified in the constitution. In FBiH, both commercial and civil small claims cases are examined at the first instance by municipal courts. In RS, all commercial cases, including commercial small claims, are resolved at the first instance by the district commercial courts whereas civil cases and small civil claims are under the basic courts. In BD, both civil and commercial cases are under the jurisdiction of the Basic Court of Brčko. Each of the three jurisdictions has their own CPs which are similar but not identical. Furthermore, RS, BD and each of the cantons have their own

laws on court fees. The Court of BiH also has its own rules on fees. This research focuses on BiH and RS, because the caseload in BD is relatively negligible. Still, the research examines all three procedural laws applicable in BiH and the 13 different laws on court fees applicable in the country.

25. This Report is organized in three principal parts. First, it outlines the scope of the analysis and the current situation regarding small claims in BiH in terms of caseload, disposition times and backlog. Second, the Report follows the development of a typical small claims procedure exploring key elements such as fees; filing of the claim; collection of evidence including the level of initiative admissible for judges in adversarial systems; preparation of the case; timelines; judgments; grounds for appeal; fees for appeal; rules for the appellate court; and the potential of alternative dispute resolution in small claims. Finally, the Report presents the conclusions and recommendations.

3. Small Claims and Enforcement Procedures for Uncontested Claims

Findings:

- The definition of authentic title in BiH is quite narrow and differs across entities. As a result, courts are overburdened with small claims for those types of utility bills that are excluded from the authentic title procedure.
- Even if the definition of authentic title is expanded to encompass all utility claims, many claims that are not contested by the debtor would still go to litigation because unlike most EU jurisdictions there is no order for payment procedure in BiH.

Recommendations:

- Broaden the definition of authentic title in BiH, BD and RS to encompass all types of utility claims.
- Consider reintroducing the order for payment, with improvements based on best practices

⁹ According to the Law on Civil Proceedings before the Court of BiH jurisdiction in the following types of civil proceedings: (i) property disputes between the state of BiH and the entities, between the state of BiH and the Brčko District, between the entities, between the entities and the Brčko District, and between the institutions of BiH exercising their public authority, (ii) property disputes arising from the damage which is a result of activities of the public authorities of BiH and their officials, and (iii) other property disputes where the Court jurisdiction has been established by the laws of BiH or an international treaty.

26. It is important to distinguish small claims from enforcement procedures for uncontested claims (hereinafter referred to for brevity as 'uncontested claims'). At first glance, the distinction seems straightforward. Small claims are litigious procedures designed to resolve disputes below a certain value.¹⁰ Because of the low value of the dispute, these procedures are simpler than the general civil ones. The simplifications could be minor or significant, depending on the jurisdiction. Uncontested claims¹¹ are procedures in which the creditor has the opportunity to obtain an enforceable title for an outstanding monetary claim assuming the debtor acknowledges the claim or remains silent. If the debtor objects, however, then the uncontested claim would proceed as a litigious case and, depending on its value, may end up in the small claims track. Uncontested claims usually encompass two types of enforcement procedures: order for payment (available in most European countries) and enforcement based on authentic title (typically available in Eastern Europe).

27. If a creditor has a monetary claim below a certain value towards a debtor, he usually chooses whether to demand payment via the uncontested claims procedure or via the small claims one. If both procedures could be applied to a certain claim, most creditors would file the claim as uncontested because it is faster and cheaper. However, if the uncontested claims procedure in a certain country is dysfunctional or its applicability is very narrow, then a high volume of cases would be directed to the small claims track. Hence, even though the definition scope and features of uncontested claims are not part of the small claims rules, they have a direct effect on the volume of cases that enter the small claims track.

28. The only uncontested claims procedure in BiH is enforcement based on authentic title. Unlike most EU jurisdictions, BiH does not have order for payment. The scope of the authentic title procedure is different across BiH. In BiH, the procedure is applicable to claims ensuing from bills of exchange, checks, bills, or business book excerpts for the price of utility services of water supply, heating supply, and garbage disposal. The scope of the procedure is broader in RS and BD. In BD it also includes radio and television fees and public parking services. In RS, the scope is even broader than in BD and also covers telecommunication services and membership fee for RS Bar Association while it excludes public parking services.

29. Overall, the scope of uncontested claims in BiH is rather narrow compared to most EU jurisdictions. For instance, in comparator countries the uncontested claims procedure (usually

¹⁰ Unlike BiH, most examined jurisdictions do not distinguish between civil and commercial small claims. Slovenia is the only other examined country to make such distinction.

¹¹ The term "uncontested claims" is formally introduced by Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims. Under its Article 3, a claim may be considered uncontested when: (a) the debtor has expressly agreed to it by admission or by means of a settlement which has been approved by a court or concluded before a court in the course of proceedings; (b) the debtor has never objected to it, in compliance with the relevant procedural requirements under the law of the Member State of origin, in the course of the court proceedings; (c) the debtor has not appeared or been represented at a court hearing regarding that claim after having initially objected to the claim in the course of the court proceedings provided that such conduct amounts to a tacit admission of the claim or of the facts alleged by the creditor under the law of the Member State of origin; or (d) the debtor has expressly agreed to it in an authentic instrument.

order for payment) can be initiated in respect of any monetary claim, without the requirement for official evidence that is, a utility bill or another formal document.¹² In BiH many of these claims would go through the small claims or the general procedure. In BiH, mass claims such as building maintenance and mobile phone bills, as well as all disputes between citizens and businesses go straight to litigation.¹³ In RS too, most of these claims, with the exception of mobile phone bills, are litigated as opposed to having the claim enforced directly. By contrast in most EU countries, such claims use the order for payment procedure and only result in litigation if the debtor objects. As a result cases that move through the enforcement track in other jurisdictions proceed as small claims or general civil claims in BiH, depending on their value.

30. The small claims track may become inundated with cases for one more reason debtors may file objections against a very large percentage of orders for payment (where this procedure exists) or authentic titles. In most jurisdictions, claims that have been objected to are directed to the litigious civil procedure. If they are of a small value, they may be processed through the small claims track. Therefore, the rate of objections to these enforceable titles has a direct effect on the volume of cases that are processed through the small claims track. Typically, in countries where uncontested claims procedures function well, the rate of objections is around 10 percent.¹⁴ If objections in a jurisdiction greatly exceed this percentage, it is worthwhile to reexamine the rules, consider comparative examples, conduct information campaigns and take measures to ensure that debtors do not make frivolous objections.¹⁵ In order to do that however, it is important to first have accurate statistics on the percentage of objections. Many countries do not collect such statistics.

31. The relationship between small claims and enforcement procedures for uncontested claims in a jurisdiction shapes the use of small claims procedures. If a jurisdiction has a relatively narrow definition of uncontested claims and this is coupled with a high percentage of objections to orders for payment or authentic titles, this may result in conditions where the small claims

¹² For example, in Estonia the order for payment procedure is applicable to claims against another person arising from a private law relationship directed at the payment of a certain sum of money. The procedure is not applied to noncontractual claims except those arising from Motor Third Party Liability Insurance Act or claims where the debtor has acknowledged the obligation or where another agreement requiring performance has been made. The procedure also does not apply to claims for compensation of nonproprietary damage.

¹³ The same applies to electricity bills although such litigation is less frequent due to the fact that the electricity provider can cut off electricity of a single customer. As a result, such cases are rare.

¹⁴ In Slovenia debtors object in approximately 10 percent of cases. See Stojin, Gregor. 2012, Building Interoperability for European Civil Proceedings Online, Case studies Slovenia, page 39 at http://www.irsig.cnr.it/BIEPCO/documents/case_studies/COVL%20Slovenia%20case%20study%2025042012.pdf

In Hungary, the percentage of objections is a little under 7 percent. See Statistical Information (in Hungarian) available here:

http://birosag.hu/sites/default/files/allomanyok/Mailathpalyazaterdmenyek/MGyTFP-B-3-Szabados_Janos_Kiserteku_perek_A_gyorsabb_jobb.pdf. In Estonia, debtors object in approximately 10 percent of cases. (Based on statistics from 2013 and 2014 and concerning cases where the debtor is a natural person.)

¹⁵ For further discussion of these issues see Petkova, Svetozara; Harley, Jason. 2017. Towards effective enforcement of uncontested monetary claims: lessons from Eastern and Central Europe. Washington, D.C.: World Bank Group. <http://documents.worldbank.org/curated/en/748601499954362710/Towards-effective-enforcement-of-uncontested-monetary-claims-lessons-from-Eastern-and-Central-Europe>

procedure is used to process a much higher volume of cases than the procedure designed to serve.

32. In order to reduce the volume of incoming small claims, BiH should consider expanding its definitions of authentic title. In BiH, where the procedure for enforcement based on authentic title has the narrowest applicability, courts are overburdened with small claims for utility bills that are not included in the definition of authentic title. Participants in both focus group discussions conducted in BiH strongly supported expanding the definition of authentic title to encompass all types of utility bills.

33. In addition to expanding the definition of authentic title, BiH could reintroduce the order for payment procedure.¹⁶ This way, civil and commercial justice would be relieved of cases which are not contested by the debtor thus focusing on real disputes. There are concerns that the order for payment procedure may be abused by creditors whose claims are not legitimate. However, there are EU countries that have sufficient experience with the procedure and lessons can be drawn from these countries to establish measures to minimize abuse.¹⁷

34. Lastly, BiH may wish to look for ways to optimize the uncontested claims procedure (regardless of whether it includes just enforcement based on authentic title or an order for payment) which is reportedly generating significant backlog, for example, by centralizing it and making it electronic.¹⁸ BiH may also start tracking the percentage of objections in the procedure for enforcement based on authentic title (and in the order for payment procedure, if it is reintroduced). If the percentage of objections is excessive, measures to discourage frivolous ones could be taken.

4. Caseflow of Small Claims in BiH

Findings:

- Small claims in BiH have a very high relative volume and it is not only due to utility claims
- The small claims procedure is no shorter than the general one and is sometimes even longer

Recommendations:

- Broaden the definition of authentic title in BiH, BD and RS to encompass all types of utility claims.
- Speed up small claims by adding more simplifications as discussed in the respective sections of this Report.

¹⁶ This procedure existed in BiH legislation but was abolished in 2000 in BD and in 2003 in FBiH and, presumably due to concerns for abuse of the procedure

¹⁷ Most abuse of such procedures occurs when debtors are not served with the enforceable title personally (for example, because they were not found at their address) and a presumption of seizure is made, for example, by announcing it on the court's notice board. To avoid such abuse, Estonia's law, for example, provides that the order for payment only becomes effective if the debtor was served personally and he did not object. If no personal service took place, the procedure would move through the litigious track, usually as a small claim.

¹⁸ For a discussion of comparative examples and ways to optimize contested claims procedures, see Petkova, Svetozara; Harley, Georgia. 2017. Towards effective enforcement of uncontested monetary claims: lessons from Eastern and Central Europe. Washington, D.C.: World Bank Group.

35. Small claims in BiH have very high volume due to two principal reasons. First, there is no order for payment procedure in the country. As a result, all monetary claims below a certain value that do not meet the definition of authentic title must be processed through the small claims track with no option for the creditor to test whether the debtor would object or not. Secondly, the only existing type of uncontested claims procedure in BiH, namely enforcement based on authentic title is so narrowly defined that many types of mass claims are excluded and must instead be processed through the small claims track. Together, these two factors lead to a situation where the creditor must litigate even if there is no real dispute.

4.1. Volume of Small Claims

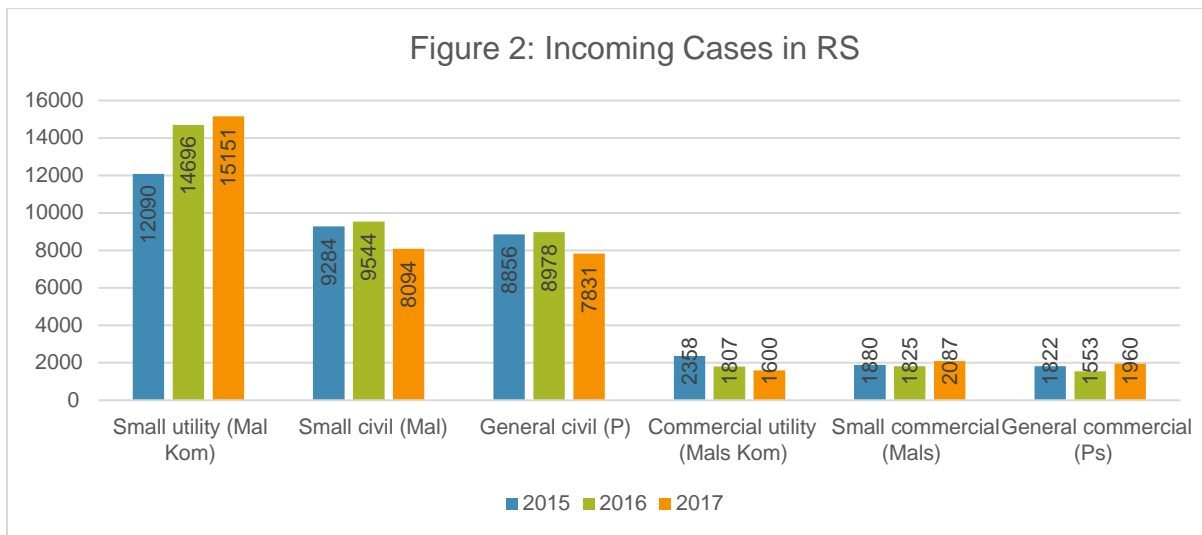
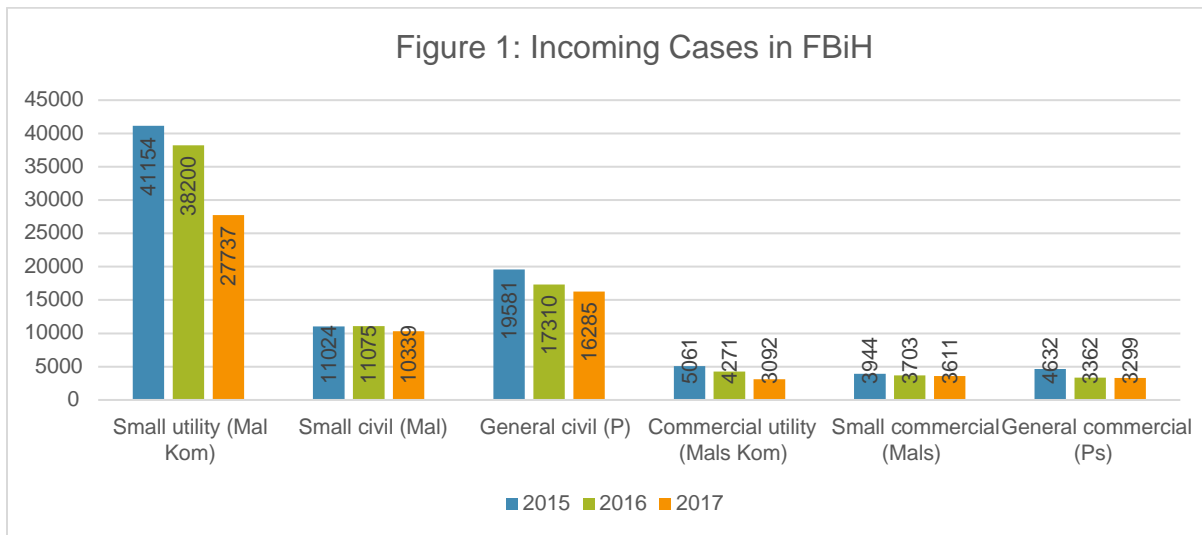
36. The fact that the small claims track is overwhelmed by utility cases leads to two major misconceptions among the legal community in BiH. Firstly, many practitioners believe that small claims in BiH have a significant volume only insofar as they include utility claims. Secondly, there is a belief that since utility disputes among companies are rare, commercial small claims are infrequent. A review of statistical information disproves these beliefs. The data demonstrates that even though a large percentage of small claims cases are indeed made up of utility claims, the non-utility ones also have very high numbers. Secondly, the volume of commercial small claims is actually significant and is roughly equal to the volume of commercial general claims.

37. The methodological premise of this analysis is that since small claims were designed to provide simplifications to the general procedure, they can best be understood when compared to cases examined under general procedure. The same logic is applied in evaluating statistical information. Small civil claims are juxtaposed with regular civil claims, small commercial claims are juxtaposed with regular commercial claims. Furthermore, in order to appreciate the height of utility cases within the small claims category, the latter is further disaggregated into utility civil claims and other small claims; respectively utility commercial claims and non-utility small commercial claims.²⁰

¹⁹ The overwhelming number of utility cases in BiH has long been identified as an issue. The reasons for it are manifold: the difficult socioeconomic situation of many BiH citizens, the poor quality of data about the users of utility services, many cases refer to people whose address is wrong, who are deceased, who pay in installments, or who have already paid their debt; the ineffective enforcement system which encourages reduced compliance with financial obligations; the massive inflow of cases sent by utility companies, due to the short statute of limitations and the rigid rules that publicly owned companies have to follow. Diagnostic Assessment of the Enforcement Regime of Final Civil Claims in Bosnia and Herzegovina, USAID's Justice Activity in Bosnia and Herzegovina, March 2016, p. 96 at <http://usaidjp.ba/assets/files/publication/1465828696/diagnostic-assessment-of-the-enforcement-regime-of-final-civil-claims-in-bih.pdf>.

²⁰ Small civil claims are signified by the Bosnian case registry as "Mal"; regular civil claims as "P"; small commercial claims as "Mals"; regular commercial claims as "Ps"; The small claims category is further disaggregated into utility civil claims ("Mal Kom") and other small claims - "Mal"; respectively utility commercial claims - "Mals Kom" and other small commercial claims "Mals". The data used has been provided by HJPC. The research team has been informed that due to the fact that not all small utility claims that are examined by the Sarajevo Municipal Court are duly reflected in the case management system, actual numbers of small utility claims may be higher than what is reflected in the statistics.

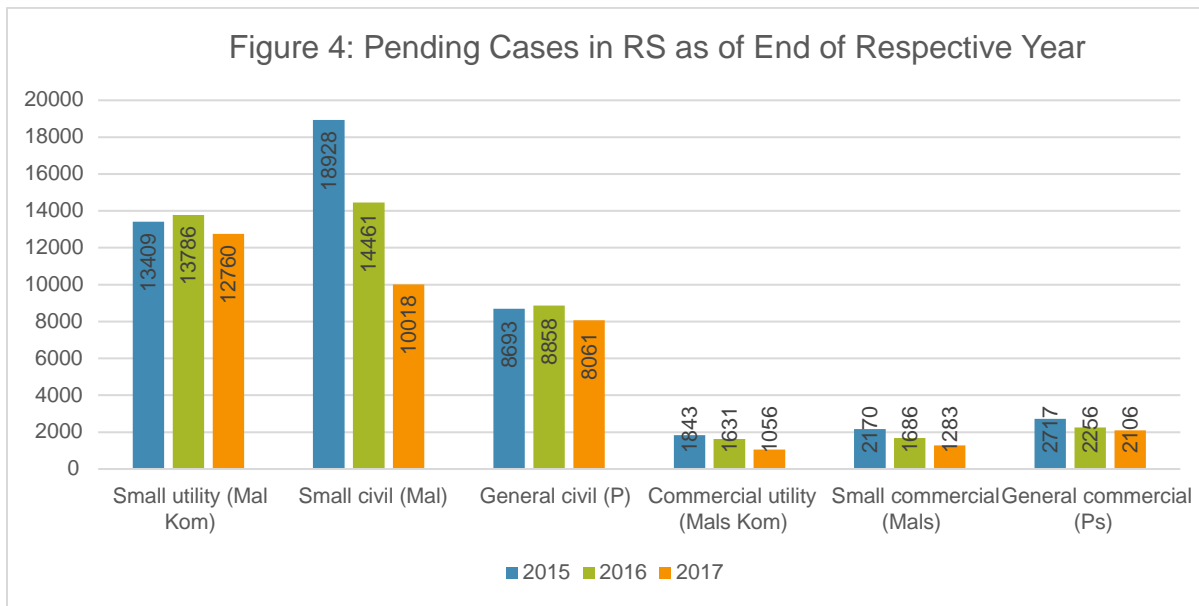
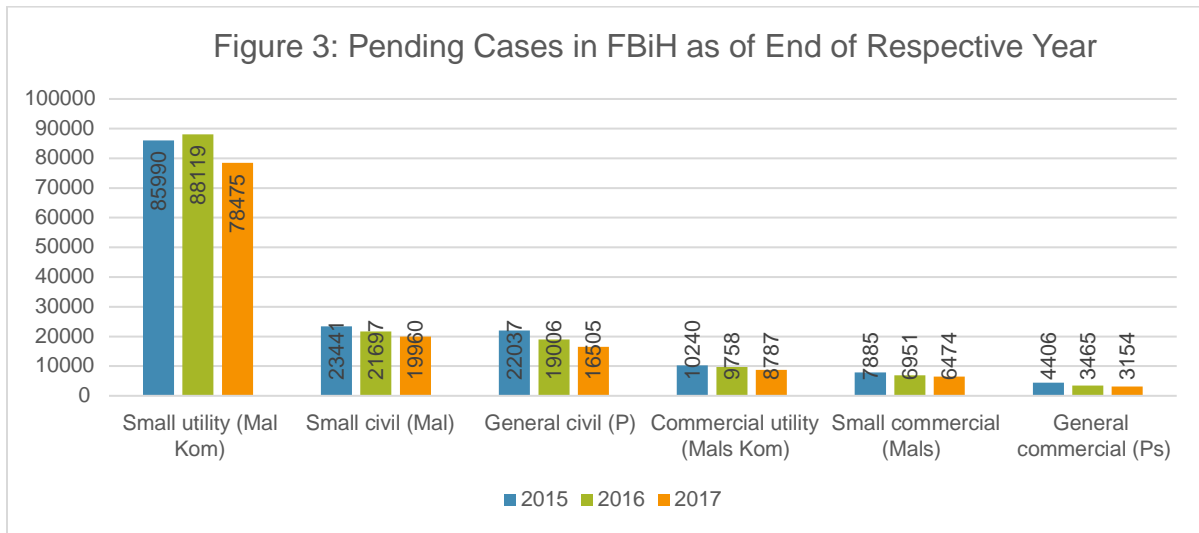
38. Statistical data demonstrates that small claims are by far the largest group of first instance civil and commercial cases in BiH. Figures 1 and 2 illustrate incoming cases in 2015, 2016 and 2017 for FBiH and RS. The two entities are examined separately because the difference in the definition of authentic title affects the ratio between small and regular claims. It is expected that the share of small utility claims in RS will fall in the following years due to the 2018 amendment of the scope of authentic title in this entity. BiH is not included in the graphs because the number of cases examined was very small.



39. Incoming utility civil claims exceed other small civil claims and regular civil claims however the share of other small claims is also substantial. The number of nonutility related small civil claims is in fact comparable to the number of regular civil claims. In RS, the share of utility civil claims is smaller than in FBiH while the share of small civil claims is bigger. A somewhat similar dynamic is observed in respect of commercial cases. Indeed, commercial cases are much fewer than civil cases, and this applies equally to small and to regular commercial

claims. Also, utility commercial claims are not so overwhelming in number as utility civil claims. Within the commercial cases breakdown, utility commercial claims, small commercial, and regular commercial cases have very similar shares, which disproves the widespread belief that small commercial cases are of insignificant numbers.

40. Statistics of cases pending in the end of each year demonstrate that small claims contribute disproportionately to the backlog of civil cases in BiH. Across the board, the backlog is decreasing, albeit slowly. The most significant decrease of pending cases during the three period examined can be noted among the small civil and small commercial cases (which are not utility-based) in RS.

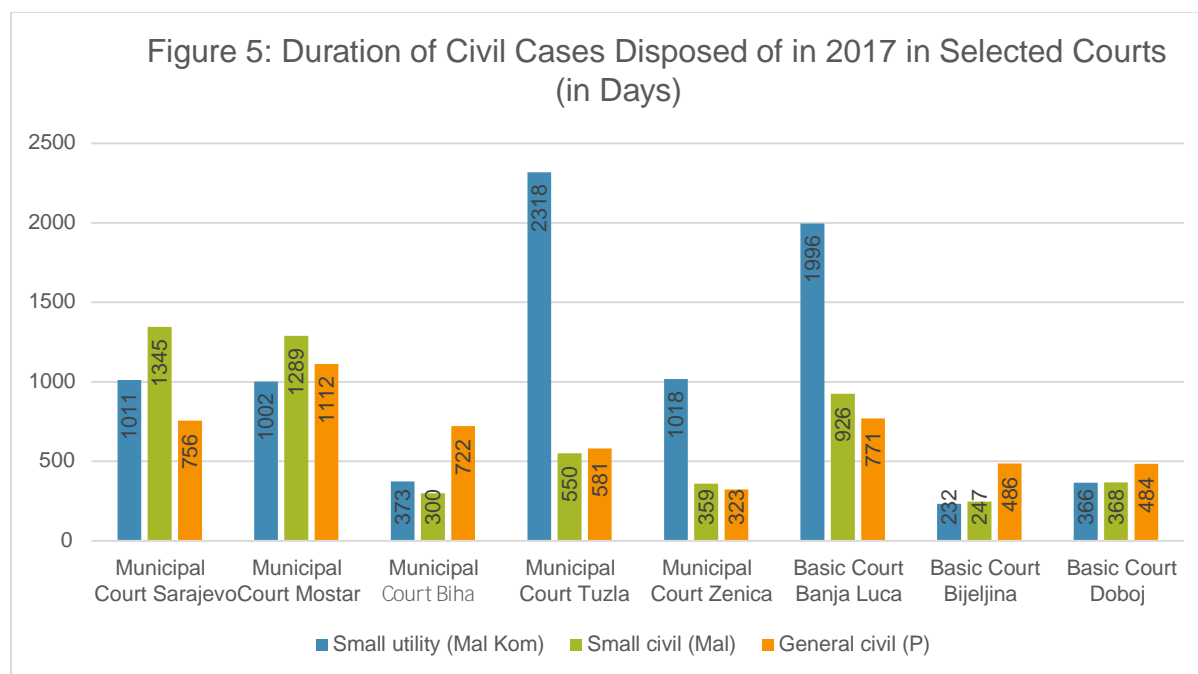


41. In FBiH, utility civil claims contribute excessively to backlog, while in RS the situation is more balanced. Still the combined numbers of the two types of small civil claims greatly exceed

regular civil claims. For commercial cases in BiH, pending small commercial claims (both utility and nonutility ones) greatly exceed the share of pending regular commercial claims. In RS there is a higher share of regular commercial claims among the pending cases. Overall, the small claims procedure in BiH by no means serves a minority of cases. The volume of the cases which use this procedure as well as their contribution to overall backlog is significant.

4.2. Duration of Small Claims

42. Since the small claims procedure is designed to be shorter and cheaper than the general one, one criterion for its success is whether small value cases are resolved more quickly than general ones. In BiH, case duration from filing to resolution within a single court instance varies largely among the courts. In some courts small claims are indeed examined more quickly than general ones while in others they are even longer than general cases. Figures 5 and 6 juxtapose the duration of small civil cases with general civil cases and the duration of small commercial cases with general commercial cases. The comparison covers selected courts in BiH and RS with large caseloads.²¹

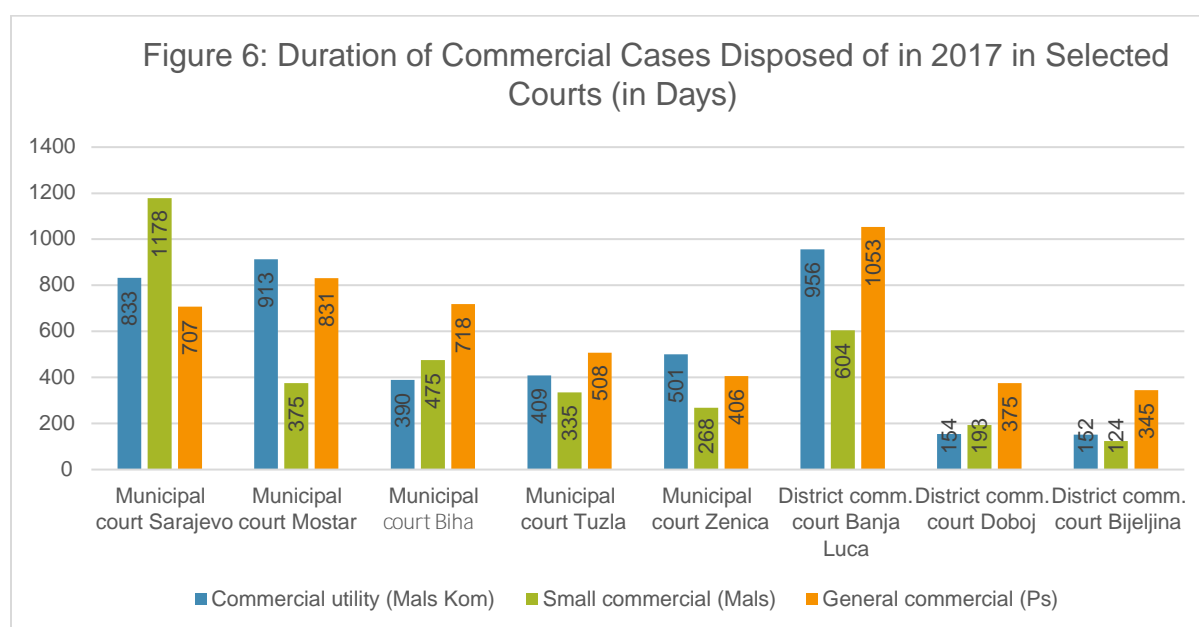


43. In some large courts, such as Municipal Courts in Sarajevo, Tuzla, Zenica and Basic Court of Banja Luka, small value civil cases (both utility and nonutility related) take longer than general civil cases, which in essence means that the small claims procedure is not meeting its

²¹ The considerable variation in case duration across different courts is in itself a cause for concern. The reasons are manifold, including varying caseloads, number of judges, internal organization of work at each court, and incentive mechanisms. These topics are discussed in detail in the report under project Component 1, which provides recommendations for addressing caseload imbalances and related organizational issues in the context of commercial justice in BiH.

goal. The duration of small utility civil claims in the courts of Tuzla (2018 days), Zenica (1018 days) and Banja Luka (1996 days) is particularly striking. Even though these cases are standard and can be expected to take the least time, they actually take the longest.

44. For commercial cases, small values tend to be shorter than general ones but still there are courts where this is not the case (for example, Municipal Courts in Sarajevo and Zenica). Furthermore, because RS has first instance commercial courts, the expectation would be that commercial cases in RS are resolved more quickly than in BiH. However, this is not always the case. While cases in the district commercial courts Doboj and Bijeljina (that also have relatively small caseloads) are indeed resolved more quickly than commercial cases in the compared courts in BiH,²² in the district commercial court of Banja Luka the resolution of cases takes longer than the resolution of commercial cases in some of the largest courts in BiH.



45. During the focus group discussion, legal practitioners noted that the establishment of the Small Claims Department of Sarajevo Municipal Courts resulted in the accelerated processing of regular cases rather than small claim cases. The reason appears to be that when small claims are processed separately, by a dedicated department, their high volume no longer weighs down regular cases and the latter can be processed more quickly. Some lawyers even reported advising clients to package and file claims that are below the threshold at a time and a way that would make them exceed the threshold, just to avoid the Small Claims Department and increase the prospects for a swift resolution of the case.

46. The research team was not able to find statistics on case duration in comparator jurisdictions in order to ascertain whether small value cases there are indeed quicker than general ones (except for Denmark). Statistical information on small claims is more readily available and accessible in BiH than in the comparator countries. Although the general perception

²² Municipal courts in Sarajevo, Mostar, Bihać, Tuzla and Zenica.

in the comparator jurisdictions is that small claims procedures are shorter than the statistical systems do not differentiate between small claims cases and general ones. Therefore, this perception cannot be confirmed for most of the comparator countries.

47. One exception to the overall lack of statistical information on small claims procedures is Denmark, where data confirms that the resolution of small claims is quicker than general ones. Danish fast track procedures have been measured both by national statistics and by a 2013 report.²³ According to official statistics, small claims represent almost 50 percent of all civil (including commercial) cases in the country. The Deloitte report estimates that the average duration of a fast track procedure is 117 days. When looking only at fast track cases where a main hearing was conducted (that is, where the case was not dropped before the main hearing), the average duration is 298 days. By way of comparison, a general civil case has an average duration of 347 days, that is, three times longer than the average duration of the small claims one. For general civil procedure cases where a main hearing was conducted (that is, where the case was not dropped before the main hearing), the average duration is 570 days. The Deloitte report also shows that court staff spends an average of 720 minutes on regular civil cases and an average of 353 minutes on fast track cases.²⁴

48. To conclude, statistics show that small claims in BiH have a very high relative volume and are slow. While a large part of the (and an even larger part of the backlog) is currently composed of utility claims, even if all utility claims were to be transferred to enforcement based on authentic title, still approximately half of all civil and commercial cases respectively would be below the small claims threshold. Therefore, the small claims procedure warrants continued attention that goes beyond expanding the definition of authentic title. Data on case duration indicate that overall the small claims procedure is no shorter than the general one and is in some cases significantly longer. This means that the simplified rules may not be meeting their goal.

49. To address the current issues of the procedure, BiH policy makers could first transfer all or most utility claims to the authentic title track by expanding its scope. BiH could also speed up small claims procedures by adding more simplifications than the currently existing ones. These simplifications are discussed in the respective sections of the Report.

²³ Deloitte, report developed on assignment by the Danish Ministries of Justice and Finance, *Analysens sammefatning*, 9 September 2013 Rapport, at <http://www.justitsministeriet.dk/sites/default/files/media/Pressemeddelelser/pdf/2013/Bilag%204%20del%201.pdf>.

²⁴ Ibid.

5. Thresholds for Small Claims

Findings:

- Systems with high thresholds for small claims are conducive to fewer procedural simplifications. In BiH, the threshold is relatively high but there are numerous cases with extremely low values, whereby, ultimately, the court costs greatly exceed the value of the claim. The current procedure does not allow further simplifications even in cases with minimal value.
- Unlike comparator jurisdictions, judges in BiH do not have the discretion to choose whether to apply the small claims rules or not. If these simplifications become more significant, the review of complex small value cases might be hindered.

Recommendations:

- In case very significant simplifications are considered (e.g., not allowing appeals or court assessments altogether for some claims), introduce a second, lower threshold below which these rules would be applicable, e.g. BAM 100/200.
- In case significant simplifications are introduced, give judges discretion not to apply them if they consider that the case is too complex.

50. Regardless of the differences among various small claims procedures, they share one common feature – the application of the procedure is triggered by a monetary threshold. The special rules apply when the value of the dispute, calculated in the manner prescribed by the respective procedural law, is below that threshold.

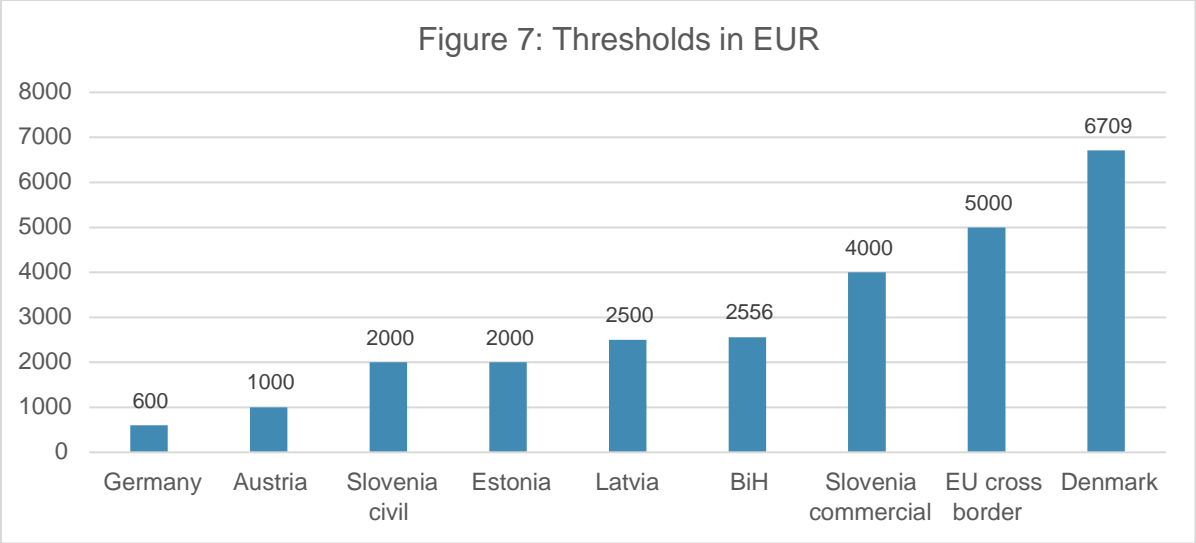
5.1. Threshold Levels

51. The level of the threshold in a country represents an important policy choice since it determines the range of claims to which the special rules could be applicable. If the threshold is low, the procedure would have a narrower scope of application. It might then be conducive to more simplifications because fewer cases with a relatively low pecuniary interest would be affected. By contrast, if the threshold is high, a large percentage of all cases would qualify for the special rules. This might be conducive to staying with fewer simplifications.

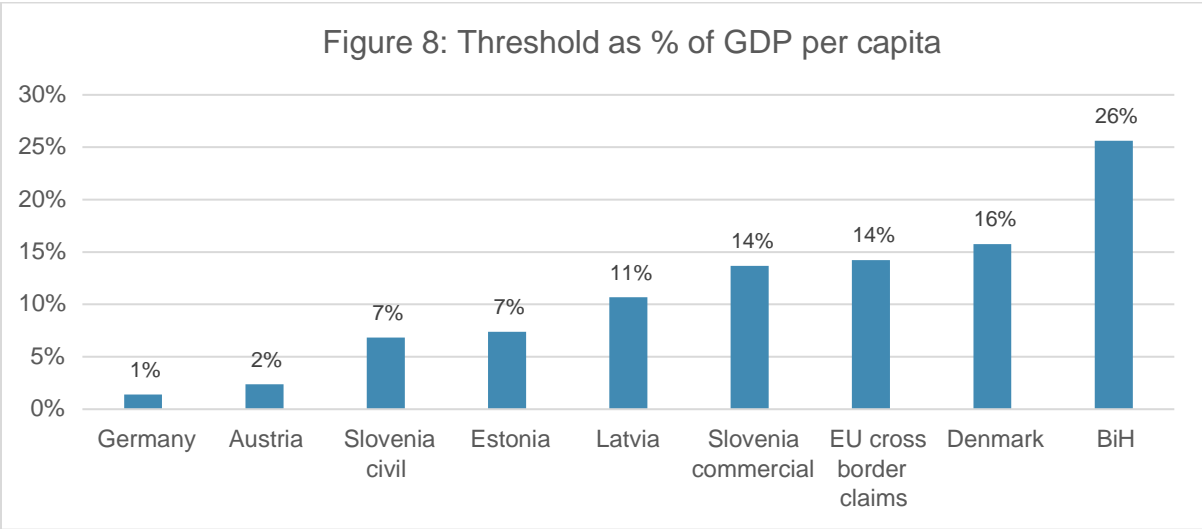
52. The small claims threshold in BiH is set at BAM 5000 (equivalent to EUR 2556)²⁵ As illustrated in Figure 7, the thresholds in the comparator countries vary greatly.²⁶

²⁵ At the Court of BiH, the small claims threshold is double that amount, BAM 10,000.

²⁶ All monetary amounts (thresholds, fees) for jurisdictions that are not part of the Eurozone were converted to Euro using applicable exchange rates as of the time of drafting this report. Since fluctuations of exchange rates occur on a daily basis, slight inaccuracies of these Euro equivalents are possible at any time.



53. Threshold amounts should be examined in light of the economic conditions of the threshold ranks the highest among comparator countries as a percentage of GDP per capita

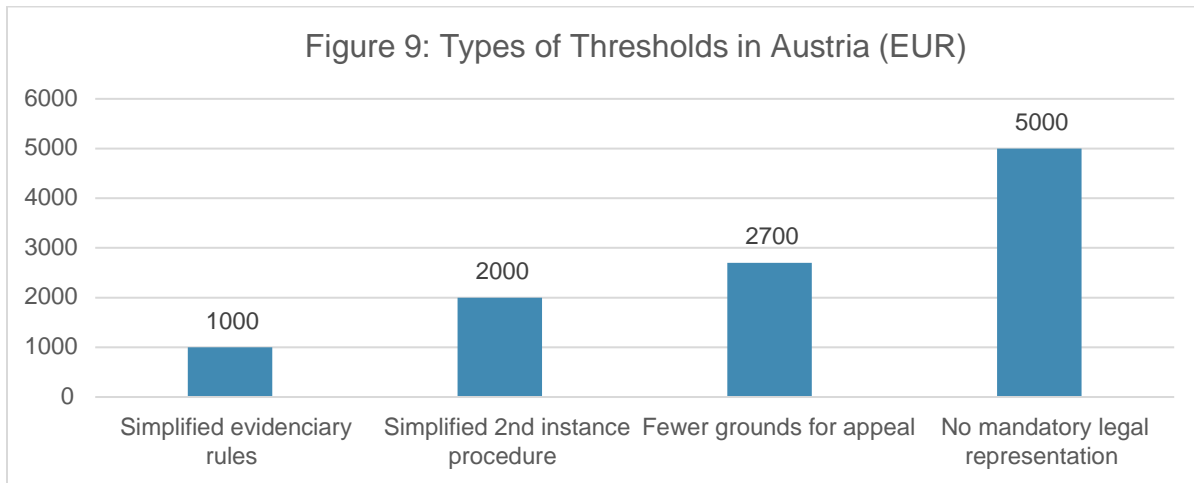


5.2. Multiple Thresholds

54. Although most of the examined systems introduce a single threshold, multiple thresholds can also be introduced within the same jurisdiction. In some jurisdictions, different thresholds trigger the easing of different procedural requirements. Austria is one such example. The threshold of EUR 1000 referenced in Figure 7 is applicable to the simplification of evidentiary rules. However, the threshold for simplifying the second instance procedure is set at EUR 100,

²⁷ Data on GDP per capita is obtained from Central Intelligence Agency, The World Factbook at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>. The latest available data on GDP per capita for each country was selected. The dollar values provided therein were converted to EUR at the time of drafting this Report.

the one for limiting the grounds for appealing the court judgment at EUR 2700, and the threshold for allowing self-representation at EUR 5000.



55. The status quo in Austria illustrates that a system can function well with multiple thresholds. If a country wished to assess the effects of increasing simplifications to the procedure, it could introduce these additional simplifications only in respect of claims with a very small value thus significantly reducing the risk of them negatively affecting cases with a high value. This would mean adding a second lower threshold to the currently existing one and a further level of simplifications that would be applicable only to claims with a value under that lower threshold.

5.3. Flexibility of the Threshold

56. In BiH, the threshold for small claims is inflexible; neither the court nor the parties can choose whether to apply the simplified rules. Whenever the value of the claim is below the threshold, courts are obliged to apply the simplified rules. As a result, claims that may be relatively high in value and complex in nature but fall under the threshold go through the simplified procedure. Similar rules are applicable in Slovenia and Latvia where the small claims procedure cannot be waived at the court's or parties' discretion.

57. In the other comparator jurisdictions, the court may choose not to apply the simplified rules even when the value of the claim is below the threshold. In Denmark, the court may decide ex officio not to apply the simplified procedure due to the complexity of the case. It is also possible not to apply the small claims procedure if the case, even though not very complex, is deemed to be of great importance to the party. Estonia, Germany, and Austria, the general procedure is applicable by default unless the court decides to use the available simplifications for example, to apply some of the rules more liberally²⁸

²⁸ Approaches to and examples of regulating small claims in the examined jurisdictions are presented in Annex 5 to this Report.

58. In Denmark the threshold is flexible in one additional dimension depending on the parties' choice. They may select whether the small claims procedure should apply or not without regard to the value of the claim. The parties may agree that the fast-track procedure shall apply although the value of the dispute exceeds the threshold. If the parties are consumers they may enter into such an agreement only after the dispute has arisen. If the parties are non-consumers they may make this choice both before and after the dispute has arisen. The parties may also agree that the fast-track procedure shall not apply even though the value of the dispute is below the threshold. This is only possible after the dispute has arisen.

59. When a country sets a low threshold, the legal community is likely to accept significant simplifications to the procedure more readily. Conversely, if the threshold is high, there could be a corresponding heightened concern that simplifications might negatively impact higher material interests. In BiH, the threshold is generally in line with international practice but is among the highest ones. This view is corroborated by the electronic survey results, in which 56 percent of the respondents are of the opinion that the threshold is appropriate and 28 percent believe that it is too high.

60. In BiH, there are many cases with extremely low values (for example, less than BAM 50) in which court fees and expenses vastly exceed the value of the claims. This may warrant the introduction of a second, lower threshold. Businesses and citizens in most jurisdictions would not even file such minimal claims because there is hardly a business case to be made for seeking to collect minor sums through expensive and slow litigation. However, in BiH, because of the automatic filing of many types of utility bills through the small claims track, cases with a minimal value abound and continue to multiply. The focus group discussions demonstrated that legal professionals were unlikely to accept a particular simplification for a claim of BAM 500 but they would welcome the same simplification for a claim of less than BAM 50. Therefore, BiH could take some of the more significant simplifications identified in this Report by introducing a second, lower value threshold.³⁰

61. Finally, another feature of the comparator jurisdictions that BiH should consider is the introduction of some judicial discretion in the application of simplified rules. The electronic survey shows that the legal community in BiH is divided on whether such discretion would be appropriate or not, with 54 percent of respondents considering it to be inappropriate and 21 percent considering it appropriate. The minor simplifications that small claims procedures in BiH currently offer do not justify introducing judicial discretion on whether to apply the rules or not

²⁹ A survey of EU citizens commissioned by Directorate General Justice of the European Commission asked respondents in EU member states what is the minimum amount for which they would be willing to go to court over a dispute with a retailer, provider or business partner. The survey shows that generally the respondents would not go to court for less than EUR 458 (Latvia). In other EU member states, the amount was even higher. See Special Eurobarometer 395, European Small Claims Procedure, April 2013, page 46 at http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_395_en.pdf

³⁰ Having multiple thresholds within a country is not unheard of. Austria was cited above as an example where different thresholds trigger different simplifications. In BiH, too, the Court of BiH has a different small claims threshold as compared to other courts.

However, if the procedure is enhanced with numerous simplifications, some of them might not be suitable for all small claims and judges should be able to opt out of these.

6. Fees

Findings:

- BiH comprises many different jurisdictions, each with its own rules on fees.
- The payment of many fees per court instance is contrary to international practice and burdensome for courts.
- Constitutional Court caselaw in BiH does not allow the court to discontinue the case if a fee is not paid. This is inconsistent with international practice. Some jurisdictions within BiH have penalties for nonpayment, others do not.

Recommendations:

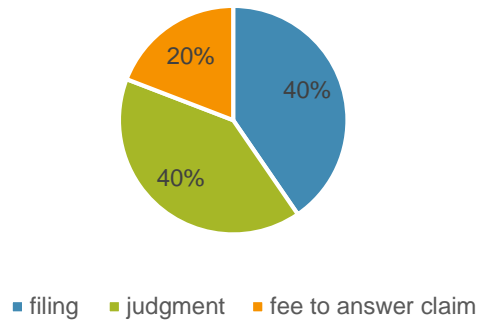
- Unify court fees across the country.
- Introduce a single fee per court instance, payable at the outset of the procedure.
- Introduce a penalty for nonpayment across the country.

6.1. Comparing Court Fees within BiH

62. Court fees³¹ in BiH stand out from comparator countries in a number of ways. First, due to its complex governance structure, BiH comprises a number of different jurisdictions, each with its own rules on fees. Second, in the various jurisdictions, the fee that is due for a first-instance case includes either two or three separate payments. In jurisdictions with three fees, the first fee is due when the claim is filed, the second when the defendant files his response, and the third for issuance of the judgment. In jurisdictions with two fees, no fee is due for the defendant's response. The claimant shall pay the fees for filing the claim and for obtaining the judgment. The defendant shall pay the fee for filing the response. If the claimant wins the case, he can recover his costs from the defendant at a later stage. The fees for filing the claim and for the judgment are normally equal while the fee for the defendant's response is half that amount. The ratio of each of these three court fees (in jurisdictions where all three are present) is illustrated in Figure 10.

³¹ Only the level of the main, indispensable fees is discussed. In most countries, there are small additional payments related to examining a case which may or may not be referred to as fees but are technically more in the category of expenses for example, fees for sending summons to the parties, publications in Official Gazette about obligation to appear before the court, fee for repeated issue of decision and fees for invitation of witness to the court).

Figure 10: Components of the Court Fee in BiH



63. Having several types of court fees within a single court instance is highly unusual. By way of comparison, in all comparator jurisdictions a single fee is due at the time of filing the claim, by the claimant. At some point the case is terminated because parties have reached a settlement or for another reason, part of the paid fee may be returned but there are no separate fees for the defendant's response and for the judgment.

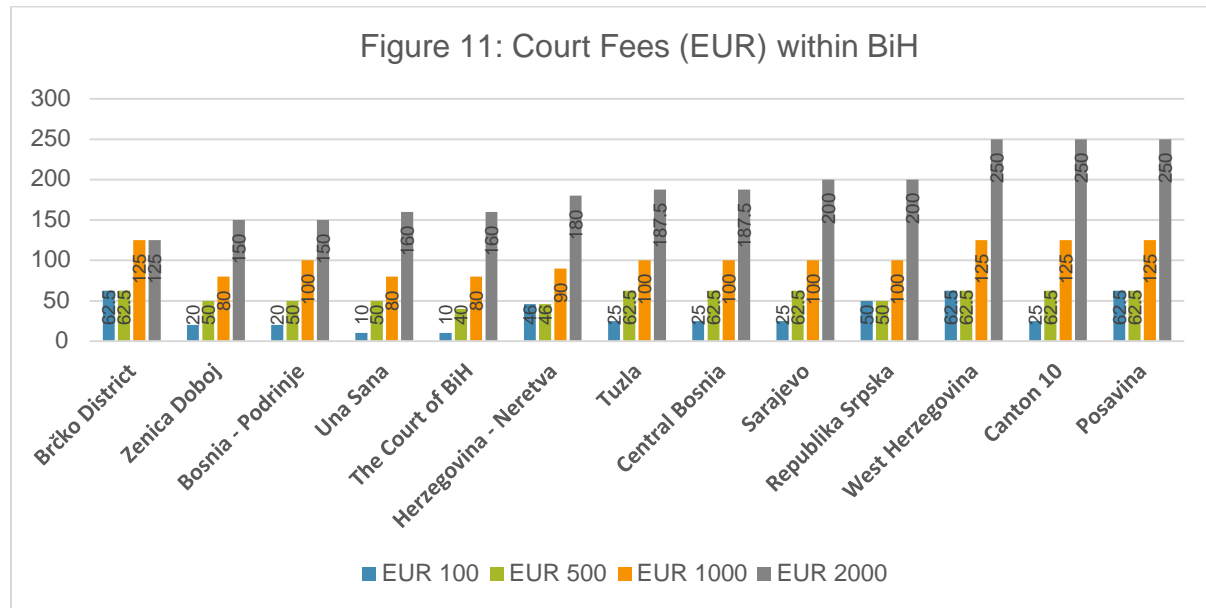
64. The fee for the defendant's response is particularly unusual. It is due in seven jurisdictions (Cantons Sarajevo, Tuzla, Central Bosnia, West Herzegovina, Posavina and Brčko District). No fees are due for the defendant's response in six jurisdictions (Republika Srpska, Cantons Zenica-Doboj, Una-Sana, Herzegovina-Neretva, Bosnia-Podrinje and the Court of BiH). The focus group participants were of the opinion that this fee is unjustified since responding to a claim is a defendant's procedural right and exercising a procedural right should not be tied to the payment of a fee. Furthermore, most participants were of the opinion that in practice parties do not pay this fee and courts do not seek its payment. Interestingly, some lawyers were not aware of the existence of this fee in the jurisdiction where they practice.

65. Since each jurisdiction in BiH has its own rules on court fees, litigation is more expensive in some parts of the country than in others. Figure 11 shows the value of the fee (in EUR equivalent)³³ for claims with a value of EUR 100, EUR 500, EUR 1,000, and EUR 2,000 in different jurisdictions of BiH. For claims with the lowest value (EUR 100) litigation is least expensive in Una-Sana Canton and the Court of BiH and most expensive in Brčko District, Posavina Canton and West Herzegovina Canton. For small claims with a value of EUR 100, litigation is least expensive

³² In Denmark, there is a single fee for the small claims procedure; however, for the ordinary civil procedure one fee is due at the time of filing the case and a second one after the preparation of the case has been finalized and the main hearing has been scheduled.

³³ When this Report compares the court fees of jurisdictions within BiH among each other or with the fees in comparator jurisdictions, it uses the total of all fees due. Thus, in jurisdictions with three fees, the total of the three is calculated. If there is no fee for the defendant's response, the graphs show the total of the two fees that are due in the case. All graphs use EUR equivalents in order to facilitate comparisons.

in Brčko District and most expensive in Posavina Canton, West Herzegovina Canton and Canton 10.



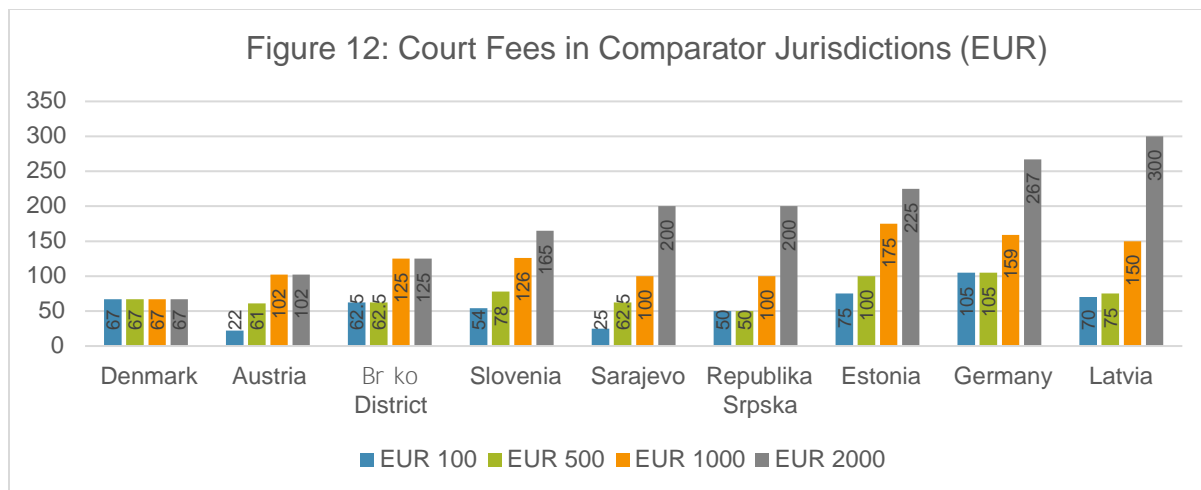
66. The variations of court fees among the jurisdictions lessen predictability, especially for inexperienced or self-represented litigants. These are the type of litigants who are more likely to participate in small value litigation.

6.2. Comparing BiH Court Fees with Those in Comparator Jurisdictions

67. The level of court fees in BiH is comparable to that in other countries. Of the comparator jurisdictions only Denmark has a fee of EUR 67 that is applicable to all cases with a value of maximum EUR 709 in both the general civil procedure and the fast track procedure. In the rest of the comparator countries, like in BiH, there is a progressive scale of fees, depending on the value of the claim. Figure 12 shows the amount of the fee (in EUR equivalent) for claims with a value of EUR 100, EUR 500, EUR 1000 and EUR 2000.³⁴

³⁴ As the amounts differ within BiH, the fees of comparator jurisdictions have been compared to those in Brčko District, RS, and Sarajevo. Again, when determining the court fee in BiH, the sum of all applicable fees (for filing, judgment and, where applicable, defendant's response) has been used. For consistency, Figure 13 includes information on claims above EUR 600 for Germany and claims above EUR 1000 for Austria although these are not small claims in these countries.

Figure 12: Court Fees in Comparator Jurisdictions (EUR)



68. A small claims procedure with a very low value would be cheapest in Austria and in Sarajevo Canton (approximately EUR 22- 25). It would be most expensive in Estonia and in Germany. This ranking changes as the value of the claim increases with a value of EUR 2,000 would be cheapest in Denmark and most expensive in Germany and Latvia. Court fees rank among the average. Still, the court fees in BiH are comparatively high for a case with a value of EUR 200, which may mean that litigation there is less affordable than elsewhere in Europe.

69. Overall, the level of court fees in BiH appears to be in line with EU levels but their weight is distributed differently over time. The complex composition of court fees in BiH and the fact that they are divided into two or three separate payments means that the financial burden at the start of the procedure is significantly lower than elsewhere. By the time the respondent has filed a response to the claim and the judgment is pronounced, the total amount of the fees reaches typical EU levels.³⁵ Nevertheless, when the initial investment of the claim is very low this may encourage frivolous litigation. Furthermore, when there is more than one fee per instance, this poses an additional administrative burden on judges in terms of making sure the fee is calculated properly, notifying parties of various fees, and so forth.

70. To simplify court fee structures in BiH, policy makers could consider introducing a single fee per court instance, payable at the outset of the procedure. This would save the judges and the parties time and effort and would ease collection. Some focus group participants expressed their concern that this mechanism might not be effective on the rare occasions when part of an already paid single court fee needed to be returned (for example, because the parties have reached a settlement). Comparator jurisdictions do not report any particular problems with the partial return of the court fee upon settlement. Nevertheless, if BiH chooses to introduce a single fee, it should pay special attention to ensuring that it has a system for returning overpaid fees, where necessary, in a manner that does not burden the court or the parties returning part

³⁵ The level of the fees in BiH may in fact be lower than the representation in the figures because of the reported mass noncompliance with the obligation to pay the fee for the defendant's response in the jurisdictions where it applies.

of the fee would be an exception, whereas currently the court and the parties need to manage numerous fees in each case.

71. Furthermore, BiH could consider unifying court fees and their calculation across the country. For example, even though Germany is a federal republic with 16 states with its own constitution, court fees are uniform throughout the country. Such unification does not only equalize access to justice across the country but also scales. BiH judges reported that currently, parties to a dispute usually do not calculate the amount due themselves but file the claim without paying the court fee and wait for the court to calculate it for them. A simplified fee system applicable throughout the country with an electronic fee calculator on an accessible Internet portal could streamline the calculation and payment of fees.

6.3. Payment of Fees

72. In most jurisdictions, the court discontinues the case if the fees are not paid within the prescribed deadline, whereas in BiH, the court reviews the case regardless. Due to access to justice considerations, courts in BiH examine the case even if the fee is not paid within the deadline set by the court.³⁶ The unpaid fee may be collected later through enforcement procedures, but the payment of the fee in advance is not a prerequisite for the court to examine the case. In five jurisdictions (RS, BD, Posavina Canton, Una-Sana Canton, and the Court of BiH) there is a 50 percent penalty if the party does not pay the court fee within the prescribed deadline. In the other jurisdictions, there is no such penalty.

73. In contrast, in most comparator jurisdictions, the court would not review the case in this situation, unless the claimant has been relieved of the obligation to pay the fee. This is the rule in Denmark, Germany, Latvia, Estonia, and Slovenia. In Austria, like in BiH, the court proceeds with the case even if the fee has not been paid. However, the nonpayment of fees in advance is extremely rare in Austria since most claims are filed by attorneys through an IT system and the law authorizes the system to automatically withdraw the amount due from the attorney's account.

74. When courts examine the claim regardless of whether the fee has been paid or not, this can create an environment that enables frivolous claims or litigation over extremely small amounts. Especially in cases of very small value which nevertheless have merit and the claimant can be sure to win (for example, utility claims) the court system may in essence be subsidizing them until the burden of the fee is transferred to the losing party. It is not clear how actively the state enforces claims for unpaid court fees. If it is excessively expensive or burdensome for the government to collect payment, it may give up enforcement and this may in turn lead to a perception that justice is free.

³⁶ The Law on Court Fees of Canton Sarajevo used to stipulate that in case of filing a motion without a paid fee, the court shall request payment within eight days. If the party failed to comply with the order within the time limit, the petition had to be returned and it would have been considered as not submitted. While these rules are quite typical for EU countries, the Constitutional Court of BiH in case No. U/12 decided that this provision was not in accordance with Article II/3.e of the Constitution of BiH and Article 6 paragraph 1 of the ECtHR Statute protecting the right of access to court.

75. In its practice, the ECtHR finds that discontinuing civil proceedings due to nonpayment of the court fee does not in principle, violate access to justice. Access to justice forms part of everyone's right to have any claim relating to their civil rights and obligations brought before a court or tribunal under Article 6, Section 1 of ECHR. The ECtHR consistently reiterates that the right of access is an important aspect of the right to a court since the *fair, public and expeditious characteristics of judicial proceedings are indeed of no value at all if such proceedings are not first initiated.*³⁷ However, the ECtHR has also repeatedly proclaimed that the right to a court is not absolute and states may introduce limitations to it, as long as these limitations have a legitimate aim, are proportionate and ensure that the very essence of the right is not impaired. One of the most common limitations is the obligation to pay a fee. The ECtHR has on numerous occasions examined whether the requirements to make prior payments such as court fees or security deposits violate Article 6, Section 1 and has found that the obligation to pay a fee in order to initiate court proceedings is not a violation of the Convention per se. The Court found that a violation is present only in cases where the amount of the fee was prohibitively high.

Box 1. Case of Kreuz v. Poland³⁸

In the Case of Kreuz v. Poland, the court had to specifically answer the question of *“whether the obligation to pay court fees in civil proceedings imposed by Polish law in itself amounted to a violation of Article 6 § 1 of the Convention”*. In answering this question, the Court stated:

“In the instant case the applicant first contested the general rule whereby access to Polish civil courts depended on the payment of a court fee amounting to a certain percentage or fraction of the claim being lodged [...] The Government maintained that collecting court fees for proceeding with civil claims could not be seen as in itself contrary to Article 6 § 1 [...]

[...] the interests of the fair administration of justice may justify imposing a financial restriction on the individual's access to a court [...] Furthermore, the Court considers that while under Article 6 § 1 fulfilment of the obligation to secure an effective right of access to a court does not mean merely the absence of an interference but may require taking various forms of positive action on the part of the State, neither an unqualified right to obtain free legal aid from the State in a civil dispute, nor a right to free proceedings in civil matters can be inferred from that provision [...]

The Court accordingly holds that the requirement to pay fees to civil courts in connection with claims they are asked to determine cannot be regarded as a restriction on the right of access to a court that is incompatible per se with Article 6 § 1 of the Convention.”

In this particular case, the Court proceeded to examine the amount of the fee, which was equal to the average annual salary in Poland at that time, together with the applicant's ability to pay, and concluded that in the particular case the amount of the fee was excessive and had impaired the very essence of the applicant's right of access.

76. To conclude, as long as there are mechanisms in place to ensure that the fee is proportionate to the financial position of the litigants, the fact that the court discontinues the case due to nonpayment does not constitute a denial of access to justice. Given that in most EU jurisdictions fees need to be paid in advance and the court does not examine the case if the fee is not paid, it is unfortunate that the Constitutional Court of BiH has declared such a rule unconstitutional. Paying a single court fee in advance, as a precondition for commencing

³⁷ ECtHR Case of Kreuz v. Poland, Application no. 28249/95, <http://hudoc.echr.coe.int/eng/?i=00-59519>, para 52.

³⁸ Ibid. paragraphs 58-60.

litigation, generally disciplines claimants, spares judges and court clerks time spent on repetitive notifications to the parties, and relieves enforcement authorities of efforts invested in collecting unpaid fees. Still, as the Constitutional Court's decision and the views of BiH legal community appear not to permit the discontinuation of a case due to nonpayment, the penalty for nonpayment of the fee which is currently applicable in five jurisdictions could be introduced uniformly across the entire country.

7. Filing the Claim

Findings:

- Under international best practices, small claims are filed using forms that structure the claim to make the process easier for judges and parties. In BiH, such simplification is available for the filing of utility claims through the SOKOP system. For nonutility claims, there are no simplifications.
- Under international best practices, claims are filed electronically through a single judicial portal. In BiH this is not possible for nonutility claims.

Recommendations:

- In the short term, introduce mandatory forms both for the claimant's action and for the defendant's response in nonutility based small claims. Such forms should be available in electronic format.
- In the long term, create an opportunity for full electronic filing of all claims via an online portal (for nonutility claims).

77. Small claims procedures should be as accessible as possible to litigants; therefore, simplifications to the procedure may be introduced from the outset when the claim is filed. These simplifications may range from advice to litigants provided by court staff through possibilities for electronic filing to the use of forms that structure the claim. In BiH, the SOKOP system is used for utility claims. This system is tailored to utility claims enforced as authentic titles and utility claims processed as small claims for judgment based on nonappearance rendered due to a failure of the defendant to respond to the claim. Therefore, the system has no functionality for scheduling and holding hearings. If the defendant responds to the claim, it will be transferred to the principal case management system. For nonutility claims, there are no simplifications in the filing of the claim. In the comparator countries however, simplifications are available regardless of whether the small claim is based on a utility bill or not. The following paragraphs document some of the simplification options that are available in comparator jurisdictions.

78. The first possible simplification entails allowing oral claims and having court personnel aid claimants, if necessary, if persons who wish to file a claim are not represented by a lawyer and are not qualified to draft the text themselves, they would need assistance. German and Austrian law permit the oral filing of claims in the lower courts. In Austria, oral claims are recorded by judges or by court trainees on behalf of judges. This option is applicable to all civil claims filed in the lower courts, that is, claims with a value of up to EUR 15,000. Germany also allows parties to file oral claims in the lower courts, which have the jurisdiction to hear claims that are below EUR 500 in value. In Germany, oral claims are recorded by court clerks.

79. The option of filing oral claims is not used frequently. In Austria, such oral claims are rare, not the least due to a perception that the case may end up being presided over by the judge who documented the oral claim when it was filed, which could affect the judge's impartiality. In Germany, interviews with judges indicate that recording oral claims is regarded as extra work for court clerks and this option is used more frequently. Article 11 of Regulation (EC) No 861/2007 contains an obligation for member states to provide parties to cross-border small claims with practical assistance in completing the forms. Research on the implementation of the cross-border small claims procedure in the then 27 EU Member States found that this requirement is being implemented in slightly more than half of the Member States.³⁹

80. User-friendly forms for claimants (and defendants). Such forms are used in Latvia⁴⁰ and Denmark⁴¹ and are also applicable to cross-border disputes under Regulation (EC) No 861/2007. User-friendly forms that have clear formats can help to encourage claimants to file claims without the assistance of a lawyer. Such forms are also beneficial for judges because they create structure and improve the clarity of claims that are filed. While it is possible to only have user-friendly forms for claimants, a more even-handed approach would entail making such forms available to defendants for their response. This is the case in Latvia. Regulation (EC) No 861/2007 also requires the use of such forms for the defendant.

³⁹ ECN Net European Small Claims Procedure Report, September 2012, page 20 at

https://ec.europa.eu/info/sites/info/files/small_claims_international_claims_2012_en.pdf

⁴⁰ See Justice portal, Latvia at

<https://likumi.lv/ta/id/299326-noteikumi-par-vienkarsotajaproceduraizmantojamamveidlapam>

⁴¹ See Justice portal, Denmark at

<http://www.domstol.dk/selvbetjening/blanketter/staevningogsvarskrift/Pages/default.aspx>

⁴² See Justice portal, EU at https://e-justice.europa.eu/content_small_claims_form137-en.do?clang=en

Box 2. Civil Procedure Law, Latvia

Section 250³ Explanations of a Defendant

(1) Explanations regarding a statement of claim in simplified procedure shall be drawn up in conformity with the sample approved by the Cabinet.

(2) A defendant shall indicate the following information in the explanation:

1) the name of the court to which explanations have been submitted;

1.1) the given name, surname, personal identity number, declared place of residence of the plaintiff, none, the place of residence; for a legal person the name, registration number and legal address thereof;

1.2) the given name, surname, personal identity number, declared place of residence and the address of the defendant indicated in the declaration, but, if none, the place of residence; for a legal person – the name, registration number and legal address thereof. In addition, the defendant may also indicate another address for correspondence with the court;

1.3) an electronic mail address for correspondence with the court, and if he or she has registered his or her participation in the online system, also include an indication of registration if the defendant (or his or her representative whose declared place of residence or indicated address for correspondence with the court in Latvia) agrees to electronic correspondence with the court or he or she is any of the subjects referred to in Section 56, Paragraph 2.3 of this Law. If the declared place of residence or indicated address of the representative of the defendant is outside Latvia, in addition he or she shall indicate an electronic mail address or notify regarding registration of his or her participation in the online system. If the representative of the defendant is a sworn advocate, an electronic mail address of the sworn advocate shall be indicated additionally;

1.4) the name of the credit institution and the number of the account to which court expenses are reimbursed;

2) [Repealed on 29 November 2012];

3) the number of the case and subject matter of the claim;

4) whether he or she recognizes the claim fully or in any part thereof;

5) his or her objections against the claim and substantiation thereof, as well as the regulatory enactments which they are based upon;

6) evidence that confirms his or her objections against the claim;

7) requests for requisition of evidence;

8) the fact whether it is requested to recover the court expenses;

9) the fact whether it is requested to recover expenses related to conducting of the trial, indicating the amount thereof and attaching the documents justifying the amount;

10) the fact whether the trial of the case in a court hearing is requested, by justifying his or her request;

11) other circumstances that he or she considers as important for examination of the case;

12) other requests;

13) the list of documents attached to explanations;

14) the time and place of drawing up of explanations.

81. In Denmark the document instituting the procedure must comprise only a short description of the case, compared to the general civil procedure, where the description must be detailed. This simplification gives the claimant the option not to engage a lawyer at the filing stage as the process is relatively simple.

82. Information technology (IT) platforms provide an effective way to file claims. None of the comparator jurisdictions have introduced an IT platform that only services small claims.⁴³ In the countries where such platforms are available, they are applicable to all civil commercial claims. This is the case in Denmark, Austria and Estonia. For example, in Estonia, claims can be submitted by email or through an information system accessed via a dedicated portal. If petitions and other documents can be submitted through the IT portal, then they should not be submitted by email, unless there are exceptional circumstances. The system enables citizens to initiate civil, administrative and misdemeanor proceedings online, monitor them, and submit documents to be processed. The system only allows parties to view and access the proceedings in which they are involved. The electronic filing of civil claims via a court portal is also available in Austria. The system⁴⁵ can be used by anyone, but its use by lawyers, notaries, banks and insurance companies is mandatory. As mentioned above, in BiH only utility claims can be filed electronically through the SOKOP system.

83. In Latvia, documents can be signed by signature and submitted by email. This option is used with growing frequency, as more natural persons and representatives of legal persons have e-signatures. Supporting documents to a claim can be signed by signature and submitted electronically or hard copies can be sent to the court by mail. Latvia has the e-signature system and issue confirming documents on payment of court fees signed by signature. In Slovenia and Germany, it is not possible to file civil claims electronically.

84. The focus group discussions and the survey show mixed attitudes towards the introduction of mandatory forms or electronic filing for non-utility small claims in BiH. 42 percent of the survey respondents believe that it is not necessary to make any changes to the existing procedure, 32 percent believe that mandatory forms could be introduced to facilitate the filing of the claim and 30 percent believe that there should be options to file claims electronically. Interestingly, during the focus group discussions, some lawyers expressed concern that the introduction of forms, especially if they are provided to the defendant as a hard copy, together with the invitation to answer the claim, could encourage people to complete the forms in handwriting thus leading to illegible documents that burden the court and the parties. Indeed, such a result would be undesirable and in the other countries where forms have been introduced the forms are not completed by hand. The forms are available on the websites of justice institutions, in downloadable and editable formats and are completed electronically regardless of whether they are subsequently filed on paper or electronically.

85. It seems that introducing user-friendly forms to file non-utility small claims would be the most effective simplification for BiH in the short term. The forms can be used both by the claimant and the defendant and provide a low-cost solution that can be implemented in the short run. These forms would help to structure the claim and may, in simple cases, allow self-representation. They could also be convenient for judges because they would result in actions

⁴³ For example, for uncontested claims procedures such as orders for payment, there are often dedicated IT systems for filing and processing them.

⁴⁴ See Justice portal, Estonia <http://www.rik.ee/en/international/public-e-file>.

⁴⁵ See Justice portal, Austria <https://webportal.justiz.gv.at/at.gv.justiz.formulare/Justiz/Geldleistung.aspx>

that are better structured and easier to follow. It would also be important to take measures to discourage people from completing the forms by hand. In the longer term, it would be beneficial to introduce electronic filing for all civil and commercial claims, not just small ones, through an IT portal.

8. Collection of Evidence

Findings:

- Unlike comparator jurisdictions, BiH has a stricter relevance assessment in small claims and no criteria on rejecting evidence.
- Unlike most comparator jurisdictions, judges in BiH are not able to reduce the cost or length of small value cases by applying simpler requirements to the form of evidence.
- Experts' assessments are expensive and time-consuming but judges in BiH are not able to forego such assessments in small value cases.

Recommendations:

- Stipulate that in small claims, judges shall apply a stricter relevance assessment than in general litigation and shall admit only evidence which is necessary and not excessively relative to the value of the claim.
- Stipulate that in small claims, judges may deviate from requirements on the form of evidence and recognize means of proof not currently available in the law, including written statements.
- Stipulate that expert assessments shall be approved in small claims only in exceptional circumstances and considering the value of the claim and the cost of the assessment.

86. The small claims procedures in all the jurisdictions examined except Latvia allow some type of simplification in the collection of evidence and the use of court experts. It is worth noting that great caution ought to be exercised in the introduction and implementation of procedural simplifications related to evidence because the evidence presented in a case directly impacts its outcome. Therefore, imposing significant limitations on evidence may violate the parties' right to a fair trial. However, if the value of the case is fairly small, it could also be unreasonable to invest significant resources in collecting inessential or expensive evidence. The main criteria for determining whether resources are excessive should be a comparison of their costs with the value of the case.

87. Unlike some of the comparator jurisdictions, BiH has not introduced any simplifications in the collection of evidence and the use of court experts. The rules on the collection of evidence and the use of court experts are the same as those under the general civil procedure. Under the general procedure in BiH, judges have the discretion to decide whether or not to admit evidence. Specifically, the procedural laws provide that based on the preparatory hearing, the court shall decide which evidence will be presented at the main hearing. Proposals for evidence which is not considered to be relevant shall be rejected by the court in a written ruling with a rationale. However, there is no criteria for this relevance assessment and there is no opportunity to reject evidence on the basis that it would be significantly costly to collect.

88. Interviews with legal practitioners suggest that the option available to judges to reject evidence is virtually unused. Judges fear that the second instance court may view the decision not to admit evidence as a procedural violation and based on this, overturn the judgment. Overturning the judgment directly affects the first-instance judge's performance evaluation. As a result, first-instance courts prefer to hear numerous witnesses for cases with values as low as 50 BAM and admit an expert assessment even if the cost greatly exceeds the value of the dispute. In other comparator jurisdictions, the small claims procedure tends to alleviate the evidentiary requirements.

89. Austria has introduced minimal deviations from general evidentiary requirements. For claims with a value below EUR 1000, the court can disregard evidence proposed by the party if the process of fully clarifying all the relevant circumstances would be disproportionately difficult. In such cases, the judge must make a nonarbitrary ruling in good faith. This decision may be reviewed on appeal. Even though there are no special rules on the use of court experts, the option to refuse to admit evidence extends to that aspect as well. Specifically, given that the court can disregard evidence due to disproportionate difficulty, the use of an expert could be considered difficult and/or expensive and may not be allowed.

90. In Slovenia, the court can limit the time and scope of evidence to balance the protection of parties' rights and the need to resolve proceedings swiftly and in a cost-effective manner. In order to do that, the judge is required to develop a precise and rational plan of procedural actions and give priority to evidence that can be taken quickly, simply and at a relatively low cost (for example, submitting written witness statements and concentrating the hearing of parties and witnesses). To this end, if there are several witnesses, the judge can request a party to select only those who will provide compelling evidence. Furthermore, the judge can make certain inquiries (for example, with state authorities) more informally, for example by telephone instead of in writing.

91. In Estonia, the court can also deviate from formal requirements when collecting evidence and can recognize means of proof not provided by law, including statements not given under oath. This provision is used when a party has requested the hearing of a witness. Instead of summoning the witness to court, the court can accept a written statement. It is also possible to question a witness over the phone. In Estonia, the rules on the use of expert witnesses are the same for the small claims procedure and the general one.

92. In Denmark, under the small claims procedure, only evidence that is important to the case may be presented. Under the general procedure, evidence may be presented unless it is deemed to be irrelevant to the case. Thus, the rule in small claims is only a slightly more stringent relevance assessment compared to the general civil procedure. Therefore, evidence that is presented under the fast-track procedure is subject to the court's approval. The court approves the presentation of such evidence if it determines that it is likely that the evidence will be important for the case. Furthermore, the court determines the form in which evidence may be presented. This determination is usually reached following discussion with the parties. Therefore, the judge has more leeway to decide a witness should be summoned and heard in person or if a written statement suffices.

93. The procedural rules on the use of court experts in small claims cases in Denmark are significantly different from the rules used under the general civil procedure. In a complex expert opinion is required, the cases referred to general civil procedure. In the fast-track procedure the court may upon request from a party request a simplified expert opinion in the form of a written statement from an organization or an individual expert. An expert is not usually summoned to give expert testimony in person unless there are weighty reasons for an appearance. If a written expert statement is given by an organization it is only followed by an oral explanation in exceptional circumstances. Another difference is that in small claims cases, questions for the expert are prepared by the court while in the general civil procedure questions are prepared by the parties. Under the small claims procedure the court presents its questions to the parties for comment before sending them to the expert.

94. In Germany the rules on taking evidence for claims below EUR 600 are rather relaxed. In the general civil procedure the principle of direct evidence gathering applies, that is, witnesses, experts or parties must be heard by the court in the presence of the parties. However, under the simplified procedure the court may question witnesses, experts or parties over the telephone or in writing.

95. Regulation (EC) No 861/2007 also introduces a stricter relevance assessment and simplifications in the form of the evidence. To avoid holding a hearing unless it is absolutely necessary oral testimony or expert evidence is only heard if it is necessary in helping the court to come to a decision. Like in Austria, the court takes costs into account when deciding whether to collect certain evidence.

96. To summarize simplifications regarding evidence taken two principal forms. They tend to relate to the court's flexibility to assess and determine which evidence to admit (that is, stricter relevance assessment) and/or to simplifying the form in which the evidence is presented. The two simplifications can be used in combination. BiH has not introduced any simplifications for the collection and presentation of evidence. It is certainly an area where reforms that can save time and money for both the parties and the court can be leveraged.

97. Regarding the introduction of a stricter relevance assessment, discussed above, the current option to reject evidence under the general procedure in BiH is rarely used. The explicit introduction of a stricter relevance assessment in the small claims procedure based on criteria such as necessity and cost could empower judges to exercise more discretion and pragmatism when admitting evidence.

98. Another option is to allow the submission of certain evidence in writing, based on the court's discretion. For example, currently the Civil Procedure Law in BiH states that the main hearings should be held even if the expert witness does not attend, unless the court deems their presence necessary for supplementation or clarification of the opinion, in which case it will adjourn the hearing.⁴⁶ This means that even under the general rules, the court may deem an expert witness written statement to be sufficient. Nevertheless, deliberations during the focus group discussions suggest that without clear authorization in the law, judges will continue to

⁴⁶ Art. 157 of the Civil Procedure Laws of FBiH and RS.

question expert witnesses in person even for cases where the expert opinion does not need to be supplemented or clarified

99. It is appropriate to introduce restrictions on the use of expert witnesses in cases with very small value since the use of expert opinions is costly and causes delays. Commercial Justice Study finds that “[e]xpert witnesses are also a source of delay. Expert witnesses are commonly appointed by judges to prevent their cases being overturned in appellate courts. However, there are instances where expert opinions add little or no value to the case. Expert witnesses are costly, so their excessive use drives up the cost of the case for the parties. Stakeholders also report that expert witnesses are a common source of adjournments and delays (i.e., their reports are not timely, they do not appear at hearings, their evidence is contested) and this extends the duration of the case. Furthermore, heavy reliance on expert witnesses creates opportunities for other procedural bottlenecks, including disputes over the choice of expert and over their testimony.”⁴⁷ Therefore, introducing simplifications both in the admissibility and form of evidence in small claims procedures in BiH appears to be warranted.

100. The introduction of stricter relevance assessment and lighter requirements to the form of evidence in small claims was viewed favorably in the working group discussion. The survey also contained questions on the collection and presentation of evidence in small claims cases. 65 percent of the respondents supported the introduction of a stricter relevance assessment in small claims; 20 percent the acceptance of written as opposed to oral witness testimony, and 26 percent the acceptance of a court expert’s written opinion as opposed to questioning the expert under oath.⁴⁸

9. Principle of Adversarial Proceedings

Finding:

- It is not considered to be contrary to the adversarial principle for a judge to guide the collection of evidence or instruct the parties on their rights and obligations

Recommendation:

- If BiH seeks to give judges a more active role in small claims, the appropriate place to start is to grant them more discretion and initiative in the collection of evidence.

101. A typical feature of small claims procedures is to assign a more active role to the judge in order to make the process faster and more efficient and to assist self-represented litigants. Some judges are overly cautious about taking a more active role, fearing that they may violate the principle of adversarial proceedings. The following paragraphs discuss the adversarial principle and its relationship to fair trial.

⁴⁷ Harley, Georgia; Svir ev, Sr an; Mati Boškovi , Marina; Krni , Ana; Esquivel Korsiak, Victoria. 2016. Improving commercial case management in the Federation of Bosnia and Herzegovina: feasibility study (English). Washington, D.C.: World Bank Group, page.

⁴⁸ The total of percentages exceeds 100 percent because respondents to this question were allowed to give more than one response.

102. The development of civil procedure in common and continental law has witnessed gradual convergence between the adversarial principle, which was initially typical to common law systems and the inquisitorial process associated with continental systems. Traditionally, a judge in the adversarial procedure was seen as a referee of the parties' competition and was not necessarily under a duty to ascertain the truth.⁴⁹ This was a passive judge who sought procedural rather than substantive justice.⁵⁰ However, the classical adversarial process in England proved costly and time-consuming. Therefore, the new Civil Procedure Rules 1999 implemented wide-reaching reforms that introduced the role of the informed judge who has more control and initiative in managing the case. This judge *can use his knowledge of the case and the powers given to him for the purpose of case management to ensure that he gets the information he needs to create a real prospect that the decision will be based on the nearest approximation possible to the truth*.⁵¹ The reforms of British civil procedure introduced features that were previously seen as inquisitorial in nature.

103. In contrast, traditional continental civil procedure was considered to embody inquisitorial elements. Thus, a 1965 reform of French civil procedure saw a great enhancement of the powers of the French court to control the progress and preparation of a case. A judge could engage in fact-finding, make orders that are binding on the parties and had a duty to seek the truth.⁵² This was an active judge who would strive not only for procedural but also for substantive justice. Still, these inquisitorial features of the procedure would be balanced against the principle of equity of arms, guaranteeing that the judge's involvement in instruction and fact-finding would not give an unfair advantage to either party.

104. Countries of the former Eastern bloc traditionally belonged to the continental legal family, but before the fall of the Iron Curtain, the inquisitorial element in their civil procedure was more pronounced than in Western Europe. After the end of the Cold War, the pendulum swung in the opposite direction. East European nations introduced wide-ranging reforms to make civil procedure adversarial. In some cases, these reforms were perceived to limit the power of judges to introduce a measure of efficiency in the courtroom and ascertain the truth. Therefore, in recent years, these countries have cautiously started to allow judges to take a more active role in directing procedure, thus redefining once again the meaning of the adversarial principle.

105. Nowadays, some inquisitorial elements in the adversarial process are so common that they are rarely questioned. In its practice, the ECtHR sees adversarial proceedings as one of the key elements of a fair trial. However, it does not interpret the term "adversarial" in the same sense as the classical common law doctrine and does not view the judge's active participation in

⁴⁹ In a landmark case of the English adversarial system, *Canada v Secretary of State for Trade*, [1983] 2 AC 394 the prominent English justice Lord Denning held that *when we speak of the due administration of justice this does not always mean ascertaining the truth of what happened. It often means that, as a matter of justice, a party must prove his case without any help from the other side.*"

⁵⁰ Jolowicz J. A. *Adversarial and Inquisitorial Models of Civil Procedure*, *The International and Comparative Law Quarterly*, Cambridge University Press, Vol. 52, No. 2 (Apr., 2003), pp. 281

⁵¹ *Ibid.*, p. 288.

⁵² *Ibid.* p. 291.

fact-finding or his instruction to parties as violations of the adversarial principle. According to the ECtHR, "the right to adversarial proceedings means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision".⁵³ The violations of the adversarial principle that the ECtHR finds are usually related to instances where evidence and documents have been obtained by the court and one party has not been provided with access to the documents or evidence and has not had an opportunity to comment on them.

106. In light of the above, a certain degree of initiative by judges in guiding the collection of evidence or instructing the parties on their rights and obligations is not considered to be contrary to the adversarial principle. Quite the opposite, striving for efficiency, many countries allow judges to be active and to provide limited guidance to the parties, especially under the small claims procedure where litigants may not have legal representation. Examples of the judge taking an active role were presented in Section 8 on the collection of evidence.

107. In BiH, the judge is not expected to guide parties to a small value case more actively than he or she would under the general civil procedure. Similarly, in Latvia, Austria and Slovenia, the role of the judge in small claims procedures is no different than their role under the general civil procedure. If there are any slight differences in the judge's behavior, these are a result of the structure of the procedure rather than the judge deliberately taking on a more active role. For example, in Slovenia, the judge is required to ensure that all decisive facts are stated, incomplete statements are supplemented, evidence is adduced, and all necessary explanations are given in order to establish the facts and legal relationship in dispute. In the general civil procedure this is usually done orally in the main hearing. Since the small claims procedure is often conducted in writing, the judge may do so earlier on and in writing. However, this difference in the judge's behavior does not stem from assigning to him an essentially different role but from the very structure of the procedure.

108. In Denmark, Estonia and Germany, judges take a more active role than usual under the small claims procedure. In Denmark, once the claim has been filed and the defendant has responded, the judge seeks to clarify the case as well as further evidentiary needs through a discussion with the parties. The court gives guidance to parties who have no legal skills and are not assisted by a lawyer. The aim is to reduce the need for legal representation substantially. In contrast with the general civil procedure, the court prepares the main hearing by making a list of claims, arguments and evidence. During the main hearing, the judge is responsible for guiding and helping the parties, but less so if a party is represented by a lawyer. Furthermore, in the fast track procedure in Denmark, questions for the expert witness are written by the court and not by the parties. In Estonia, the court is entitled to collect evidence on its own initiative. This rule saves a significant amount of time because the court is not dependent on a party's motion to collect evidence. In Germany, the judge is expected to provide some instruction and guidance to parties who do not have legal representation. Of course, these rules are applied very cautiously.

⁵³ Guide on Article 6 of the European Convention on Human Rights, Right to a fair trial (civil limb), Updated to 31 December 2017.

so as to not tilt the balance of powers between the parties, thereby violating the equity of arms principle.

109. Overall, judges in all the jurisdictions examined are cautious when showing initiative or assisting self-represented parties. Generally, judges are hesitant to assist and guide self-represented litigants. However, they are more open to taking initiative in the collection of evidence as this ultimately contributes to establishing and determining the facts of the case. Therefore, if BiH seeks to grant judges a more active role in small claims cases it may be useful to build on the existing receptivity to taking a more active role in the collection of evidence, rather than focusing on encouraging judges to advise and guide parties to the proceedings.

10. Preparation of the Case

Finding:

- Court hearings, both preliminary and main ones, tend to be among the most time-consuming parts of the judicial process.

Recommendation:

- BiH could introduce a written-only preliminary phase for small claims where parties are under an obligation to present all their evidence in writing with the claimant and the defendant's response.

110. In all the comparator jurisdictions, a standard civil case has a pretrial stage and a trial. The pretrial stage normally involves a written and an oral phase. The written phase comprises exchanges of documents between the parties, submission of evidence and other similar activities. The oral phase entails a preliminary hearing. Not all systems differentiate between a preliminary hearing and a main hearing. Some civil procedure acts may regulate hearings without classifying them as "preparatory" or "main". A typical feature of small claims procedures is that the preliminary stage of the process is either shortened or omitted altogether, in the interest of resolving the case quickly and reducing costs.

111. BiH has not introduced simplifications to the preliminary stage of small claims procedures. The process involves the exchange of documents and a preliminary hearing, like any other civil procedure. The timelines are also the same. In BiH, the preparatory hearing is mandatory, except in cases where the court finds that there are no controversial facts, or that, due to the simplicity of the dispute, a preparatory hearing is not necessary. Focus group discussions indicate that the court rarely takes advantage of this rule in the general civil procedure or the small claims one. A procedural rule empowering the court to schedule the main hearing immediately after the preliminary one is frequently applied. In RS, the rule on whether to hold a preparatory hearing is the same as in BiH for civil cases. However, a procedural simplification applies to commercial cases and by extension, to small commercial claims. The rule stipulates that a preparatory hearing in commercial cases is scheduled only if the court finds that this would facilitate the faster and more efficient resolution of the dispute. Overall, in BiH,

⁵⁴ Civil Procedure Law of RS, Art. 433v.

there is no procedural simplification in the preliminary stage that applies specifically to small claims. This is unusual.

112. Most comparator countries shorten the preparatory stage of the small claims case. In Estonia, the court can shorten the preparatory stage by either waiving the written phase or deciding not to hold a court session. The judge may also decide to shorten the timeline is up to the individual judge to decide whether to use these options or not, as well as which ones to apply, that is, whether to request a response to the claim, whether to hold a preliminary hearing and what timeline to apply. If a preliminary hearing is held, it may take the form of a phone call with each party. Phone calls, instead of in-person preliminary hearing, are also used in Denmark to save the parties' time and money. In Denmark, it is also possible to have the phone call outside of regular office hours. In Germany, the court can set a very short limit, of approximately 3-5 days for the defendant to file his or her response. It is also possible for the German judge to clarify additional matters on the phone rather than hold a preliminary hearing.

113. Not all judges feel comfortable talking to parties on the phone. In the framework of this research, some BiH judges expressed concern that verifying the parties' identities on a phone call is not always reliable. However, this appears not to be a cause of concern in Estonia, where judges are of the view that since the party itself provided the telephone number, he or she would personally respond to the phone call. For some judges in Estonia, the challenge with conducting pre-trial proceedings over the phone is rather the need to inform the other party about what was discussed during the call. Judges take notes of the conversation based on the provision allowing for simplified protocols in small claims, but it can be difficult to ensure that the information obtained from one party is disclosed to the other in its entirety.

114. The written phase of the preliminary proceedings regulated in a fair amount of detail in the laws of some of the comparator countries. In Latvia, the written phase for small claims proceedings is extensive and includes mandatory forms for the defendant's written response. In Slovenia, preliminary hearings are generally not scheduled; however, the law imposes restrictions on the written submissions, each party may only file one preparatory pleading within short timelines. Facts and evidence presented outside of these pleadings shall be ignored. The procedure for cross-border small claims under Regulation (EC) No 861/2007 also does not incorporate a preliminary hearing but provides clear rules and timelines for the exchange of documents. Overall, the main function of the preparatory phase is to clarify issues so that the main hearing is as effective as possible. In small claims, the preparatory phase of the case often helps the court to decide whether a main hearing is necessary at all.

115. In BiH, the written phase of the case is not fully utilized, both in the small claims procedure and in the general one. Although parties can and should present their evidence on the claim and the response are filed, many rely on the preliminary hearing to present or request evidence for the first time. Also, judges often use the preliminary hearing to get acquainted with the case instead of studying the written materials beforehand. This overreliance on the preliminary hearing reduces the effort that the parties and the court invest in the written part of the preliminary phase.

116. According to the focus group discussions and the results of the survey, the prevailing opinion of BiH's legal community is that the preliminary phase could be simplified. 35 percent of the survey respondents were of the opinion that no changes to the preliminary phase were needed. The rest of the respondents supported various simplifications, such as introducing shorter timelines in this phase (23 percent), eliminating the preliminary phase altogether and scheduling the main hearing at the same time that the claim is sent to the defendant (23 percent), and having a written-only preliminary phase without a preliminary hearing (22 percent).⁵⁵

117. BiH could consider introducing a written-only preliminary phase for small value cases, since court hearings, both preliminary and main ones, are among the most time-consuming part of the judicial process. To facilitate this, parties would be obliged to present/request all their evidence in writing when the claim is filed and with the defendant's response. The law would also need to preclude parties from presenting or requesting evidence at a later stage, for example, the main hearing, if there is no preliminary one if such evidence was available to them during the preliminary stage. Timelines could also be shorter. Alternatively, BiH could introduce a rule that small claims procedures be conducted without a preliminary hearing unless the court decides that such a hearing is necessary, depending on the complexity of the case.⁵⁶

11. Main Hearing

Finding:

- Unlike other comparator jurisdictions, BiH does not have rules that limit the number of court hearings in small value cases

Recommendation:

- Stipulate that small claims shall, as a rule, develop only in writing unless one of the parties has specifically requested a hearing.

118. The most typical way to simplify the main hearing of a small value case is to avoid it altogether. Other simplifications, albeit of lesser significance, relate to the manner in which the minutes of the hearing are taken.⁵⁷ In BiH, small claims procedures include a main hearing. The only time a hearing is not conducted is if the defendant fails to respond to the claim within the stipulated timeline – in this case, the court simply issues a judgment based on non-appearance and a hearing is not required. Otherwise, small claims procedures always include a hearing. Like BiH, Austria and Denmark also have hearings under their small claims procedures.

⁵⁵ The total of percentages exceeds 100 percent because respondents were allowed to give more than one response.

⁵⁶ A similar rule exists in RS but is only applicable to commercial cases.

⁵⁷ The simplification of the rule on taking minutes of the hearing is available in comparator jurisdictions Estonia and Slovenia. In Estonia, the court enters procedural acts in the minutes only to the extent it deems it necessary and the parties may not file any objections to the minutes. Similarly, in Slovenia, the court also summarizes record of the main hearing that includes the most important statements made by the parties, the essential data on the evidence produced and the decisions announced at the main hearing which are subject to appeal. This simplification enables the more formal nature of the procedure and may allow certain stages of the process to be conducted by phone, especially during the preliminary stage.

119. In contrast, the approach in Estonia, Latvia, Slovenia and Germany is to conduct the proceedings in writing and if possible avoid a hearing. For example, in Slovenia the court can decide on a small claims case without a hearing if, after the written exchange of documents, it finds that there is no dispute on the facts and no other obstacles to give judgment. Thus, the hearing is avoided unless a party specifically requests it during the written phase of the case. Similarly, in Latvia the default position is that small claims are reviewed in writing. A judge may decide to conduct a hearing if a party explicitly requests one. The request must be accompanied by reasons justifying why a hearing should be held. All judges may, at their own discretion, decide that an oral hearing is required, even if neither of the parties have requested it. In Germany, too, small claims cases can be processed exclusively in writing unless the parties specifically request a hearing. In Estonia, even if a party requests a hearing it is not necessary to conduct it in the court or in person; the party can be heard by phone. It is also possible to avoid a hearing under the EU cross-border small claims procedure.

120. As discussed above, countries that allow the hearing to be waived usually require it to be held if one of the parties explicitly requests it since a party's right to a fair trial may be violated if the court disregards its request for a hearing. That said, according to international standards, the right to a fair trial is not necessarily violated if a party requests an oral hearing and the court declines the request. However, a court may only decline a request for an oral hearing in exceptional circumstances and the decision to decline the request must be substantiated by reasons that are clearly explained. Furthermore, the hearing does not necessarily have to be conducted in person; modern forms of technology such as video conferencing equipment and software may be utilized. The ECHR decision in *Ponka v Estonia*, summarized below, comments on the principle of the right to a fair trial in simplified procedures, and focuses specifically on the importance of providing reasons for opting to conduct the process in writing.

Box 5. Case of Ponka v. Estonia⁵⁸

The applicant, Mr. Ponka, a Finnish national, was convicted of murder in Estonia and transferred to Finland to serve his sentence. The owner of the apartment where the murder took place brought a civil suit against Mr. Ponka in Estonia, claiming damages in an amount equivalent to approximately EUR 1806. The court ruled that the case was to be resolved using the simplified procedure and that if the parties wished to be heard they had to inform the court. In his response, Mr. Ponka requested a court hearing and asked that the two witnesses be questioned. The court dismissed the request and based its judgment on the findings of the criminal case.

Mr. Ponka brought a case before the ECtHR, contending that he did not receive a fair civil trial because he was not granted an oral hearing, which constituted a violation of Article 6 § 1 of the Convention. Indeed, the Court found a violation of the right to a fair trial in this case.

“The Court recognizes [...] that member States may find it useful to introduce a simplified civil procedure for the adjudication of small claims. Such a simplified procedure may be in the interest of the parties as it facilitates access to justice, reduces the costs related to the proceedings and accelerates the resolution of disputes. The Court also accepts that member States may decide that such a simplified civil procedure should normally be conducted via written proceedings – unless an oral hearing is considered necessary by a court or a party requests it – and that the court may refuse such a request. Such a simplified civil procedure for the adjudication of small claims must of course comply with the principles of a fair trial as guaranteed in Article 6 § 1. The domestic provisions and their application in the domestic courts must therefore ensure respect for the right to a fair trial, in particular when deciding on the necessity of an oral hearing, on the means of taking evidence, and the extent to which evidence is to be taken. [...] In this context the Court also reiterates the obligation under Article 6 § 1 for the domestic courts to give reasons not only for judgments but also for major procedural decisions issued in the course of the proceedings [...].

According to the Court’s established case-law, [...] the right to a “public hearing” within the meaning of Article 6 § 1 entails an entitlement to an “oral hearing” unless there are exceptional circumstances that justify dispensing with such a hearing [...] [A] hearing may not be required when the case raises no questions of fact or law which cannot be adequately resolved on the basis of the case-file and the parties’ written observations [...] The Court has also held that, other than in wholly exceptional circumstances, litigants must at least have the opportunity of requesting a public hearing, even though the court may refuse the request and hold the hearing in private [...]. With regard to the opportunity to request an oral hearing, the applicant had such an opportunity and he made use of it [...] The Court observes that the domestic court in substance gave no reasons for deciding the case in written proceedings [...]. It merely cited a provision of the law that set a threshold amount for cases which could be examined in written proceedings and explained that such proceedings could be used if a party had significant difficulty in appearing before the court due to the length of his or her journey or for another good reason. The court did not explain why this provision was applicable in the applicant’s case.

[...] The Court has also taken account of the practical problem of the applicant serving his prison sentence in Finland [...], whereas the civil proceedings against him took place in Estonia. It notes that “hearing” the applicant did not necessarily have to take the form of an oral hearing in a court room in Estonia. However, it does not appear that the domestic court considered other alternative procedural options (such as the use of modern communications technology) with a view to ensuring the applicant’s right to be heard orally. [...]

The above considerations are sufficient for the Court to conclude that there has been a violation of the applicant’s right to an oral hearing under Article 6 § 1 of the Convention.”

121. Hearings are a major source of delay in court cases. Reducing the number of hearings or avoiding them altogether could contribute to decreasing the time it takes to resolve small claims and the costs involved. According to the Commercial Justice Study “[d]elays in scheduling court

⁵⁸ ECtHR Case of Ponka v. Estonia, Application no. 64160/11, <http://hudoc.echr.coe.int/eng/?i=004142950>

hearings are a significant procedural obstacle influencing efficiency and timeliness in FBiH courts. Several years may pass (in certain cases over five years) between case filing and the first hearing. Hearings are cancelled or adjourned frequently and without strong justification.”⁵⁹ The survey explored the idea of introducing a written-only small claims procedure 39 percent of the respondents supported this simplification. There was also support for the introduction of a simplified protocol of the hearing and for limiting hearings in small value disputes to just one.

12. Timelines

Finding:

- Shorter timelines bring more discipline to small claims cases and make it possible to resolve them more quickly. Unlike the comparator jurisdictions, BiH has only shortened a few timelines under the small claims procedure.

Recommendation:

- Introduce shorter timelines for small claims similar to the ones in the EU cross-border procedure.

122. The swift resolution of small claims cases can be enhanced by shortening the timelines for certain procedural actions. Compared to the general civil procedure, only a few timelines have been shortened under BiH's small claims procedure. The time limit to lodge an appeal against a court decision under the general civil procedure is 30 days and in small claims proceedings it is 15 days. The deadline to implement a court order and to submit a motion to supplement a court decision in general civil proceedings is 30 days. The deadline for the same processes in small claims proceedings is 15 days.

123. Some of the comparator jurisdictions have also shortened statutory timelines under the small claims procedure. Slovenia has shorter timelines for filing the written statements of the parties in the preparatory phase (8 days after receipt of the plea from the other party as opposed to 30 days under the general procedure) for performance of the adjudged obligation (eight days as opposed to 15 days); and for appealing the judgment (eight days as opposed to 30 days). Denmark has shorter deadlines for the issuance of the judgment (14 days as opposed to four weeks in the general procedure) and for the duration of the main hearing (a maximum of half a day as opposed to no limits in the general procedure). Latvia also has shorter timelines for the issuance of the judgment (14 as opposed to 30 days) and its entry into force (10 as opposed to 20 days) in small value cases.

124. The rules on small claims in Estonia and Germany grant judges the discretion to shorten non-mandatory timelines as appropriate. In Estonia, indicative timelines such as the timeline for filing the defendant's response or the interval between the date the summons are served and the first court session can be shortened by the court. The period in which an appeal can be lodged can also be shortened if the parties agree and inform the court. In Germany, the law does

⁵⁹ Harley, Georgia; Svirčević, Srđan; Matić Bošković, Marina; Krnić, Ana; Esquivel Korsia, Victoria. 2016. Improving commercial case management in the Federation of Bosnia and Herzegovina: feasibility study (English). Washington, D.C.: World Bank Group, page 5.

not specifically prescribe shorter timelines for claims that are below EUR 600 in value. However, judges may use their discretion and reduce the timelines to speed up proceedings. For example, under the German Code of Civil Procedure, the period between serving the summons and the date of the hearing should be at least one week in cases in which legal representation is mandatory and at least three days in other proceedings. Since judges have wide discretion in this area, under the general civil procedure they normally give the defendant two weeks to indicate his or her intention to defend the claim and two additional weeks to prepare a response. In a small claims case the judge may give the defendant the minimum three-day notice to appear before the court or respond to the claim.

125. The EU procedure for cross border small claims has numerous timelines

- The claim and the supporting documents should be dispatched to the defendant within 14 days of receiving the properly filled in claimant's form;
- The defendant should submit his response within 30 days of service of the claim;
- The court should dispatch a copy of the defendant's response, together with any relevant supporting documents, to the claimant within 14 days of receiving the response;
- The claimant should have 30 days from service of the defendant's response to respond to any counterclaim;
- The court should give a judgment within 30 days of receiving a response from the defendant or the claimant if an oral hearing is not necessary and additional information is not required;
- If an oral hearing is deemed to be necessary, it should be scheduled within 30 days from the time that summons is sent; and
- The court should give a judgment within 30 days of the oral hearing if one is held.

126. BiH could introduce additional shorter timelines, similar to the ones used in the EU crossborder procedure to bring more discipline to small claims cases and make it possible to resolve them more quickly. It is important to note that most comparator jurisdictions only shorten a few timelines and not significantly so. The reduction in timelines is informed by the provisions of the law of judicial discretion.

13. Content of the Judgment

Finding:

- In BiH, there is no difference between the content of a judgment in small value and in regular cases whereas in many comparator jurisdictions, some elements of the judgment in small claims are omitted to save the judges' time.

Recommendation:

- Simplify the content of the judgment in small claims, for example, by allowing the court to describe only the facts it considers to have been established and the evidence upon which the judgment is based, as opposed to all the facts and evidence presented in the case.

127. In BiH there is no difference between the content of the judgment in small value cases and irregular ones. During the focus group discussions, judges from BiH explained that it is not unusual to write judgments that are longer than 10 pages for small claims cases with a value of less than BAM 50. Participants in the focus group discussions were of the opinion that the level of effort is grossly disproportionate to the value of the claim. Like BiH, Austria and Denmark do not have provisions that permit judges to simplify the contents of a judgment in small claims cases.

128. The other comparator jurisdictions allow judges to omit certain parts of the judgment in small claims procedures. In Latvia, Estonia and Slovenia, the court can choose whether to issue a full or a short judgment. In the descriptive part of a short judgment, courts in Latvia only state the claim and the legal basis for the parties' actions and may omit the parties' explanations. In the reasoning, the court is only required to cite the legal provisions which it has applied and may omit the facts of the case, the evidence on which it bases its conclusion, the arguments for rejecting evidence, as well as conclusions on the validity of the claim. Within 10 days of a short judgment being issued in Latvia, a party may request a full one. This is usually done when the party intends to appeal the decision handed down by the court. In Estonia, the court's judgment can be comprised of only an introduction and conclusion, omitting the descriptive part of the judgment and the reasoning. If a party notifies the court of its intention to appeal the decision, within 10 days of the judgment being issued, the court will supplement the judgment. Alternatively, the court may issue a simplified judgment. A simplified judgment contains limited reasons for the decision, setting out the legal grounds and the evidence on which the court based its conclusions. A simplified judgment cannot be supplemented. In Slovenia, if the court opts to issue a short judgment, it should contain the legal basis of the claim and the facts upon which it is based, a notice of the right to appeal, and a statement that full reasoning will only be added to the judgment if a party announces an appeal within eight days of receiving the short judgment and pays a court fee. In Germany, the legal provision that allows simplifications for claims under EUR 600 does not exempt the court from providing a reasoned judgment. However, the court may omit the grounds upon which a judgment is based in cases where the reasons have been included in the minutes of the court session.⁶⁰

129. While simplifying the contents of judgments in small value cases will not bring about measurable economies in the overall speed of the process, it could save the judges' time. Therefore, BiH could consider introducing a rule that simplifies requirements on the contents of the judgment in small claims cases. For instance, the court could only be required to describe the facts it considers to have been established and the evidence upon which the judgment is based, as opposed to all the facts and evidence presented in the case. This recommendation was viewed positively by judges who participated in the focus group discussions.

⁶⁰ For this interpretation of the rule § 495a ZPO, see Chamber Decree of 19.07.1995 (ref.: 1 BvR 1506/93), BVerfG.

14. Judgment Based on Nonappearance

Finding:

- Under general procedural rules in BiH, if a defendant is duly served and does not respond to the claim, the court can issue a judgment based on nonappearance but **only** on the claimant's request. The request is a formality, but if omitted, the court is prevented from closing the case.

Recommendation:

- Stipulate that in small claims if the duly served defendant fails to respond to the claim, the court issue a judgment based on nonappearance even in the absence of an explicit request.

130. The comparator jurisdictions except for Slovenia do not have special rules under the small claims procedure for when a party fails to appear before the court or respond to a claim. To the extent that they exist, these rules are the same as in the general procedure.

131. Under the general procedure rules in BiH⁶¹ if a defendant is duly served and fails to respond to the claim within the statutory deadline, the court can issue a judgment sustaining the claim, unless the claim is obviously groundless. This type of judgment is known as a judgment based on nonappearance. However, the court is only empowered to issue a judgment based on the claimant's specific request to do so. If the claimant does not specifically request the court to render a judgment based on nonappearance, the court is required to schedule a hearing regardless of the fact that the defendant has responded to the claim. This rule is applicable to both the general and the small claims procedure.

132. Under the small claims procedure in Slovenia a defendant's failure to respond to a claim or appear before the court is regarded as an acknowledgement of the claim. The general rule is that a default judgment should be rendered if the defendant fails to file a defense plea within the stipulated timeframe. In the default judgment the court must evaluate if the claim is founded upon the facts stated in the action and if the facts contradict evidence adduced by the plaintiff or judicial knowledge. In the small claims procedure, the sanction for a defendant who fails to respond is stricter. Here, the court equates a defendant's silence to an acknowledgement of the claim and issues judgment based on acknowledgement unless requested judgment contradicts peremptory norms or moral principles. The same process is followed if a duly summoned defendant fails to appear at the hearing. If the plaintiff fails to appear, the court issues a judgment on the basis of relinquishment of the claim.

133. The rule empowering the court to render judgment based on nonappearance in BiH, is applicable to both the general and the small claims procedure and partially compensates for the absence of order for payment in BiH. Judges report that claimants usually (but not always) include in their claims a request that the court hand down a judgment based on nonappearance, if the defendant fails to respond to the claim within the deadline. Unfortunately, there are no

⁶¹ Art. 75 and 182 of the Civil Procedure Law of FBiH; Art. Art. 75 and 182 of the Civil Procedure Law of RS; Art. 196, 307 and 308 of the Civil Procedure Law of BD; in BD, there is an additional condition that the non-appearance judgment shall not be issued if the claimant did not provide all evidence that could reasonably be provided with the claim.

statistics on how often defendants fail to respond. BiH could strengthen this rule in the small claims procedure by providing that if the duly served defendant fails to respond to the claim, the court shall issue a judgment on the basis of nonappearance even in the absence of an explicit request thereof in the claim. The same consequences could be provided for the event the duly served defendant submits a purely formal response to the claim and fails to appear at the court hearing. This suggestion was viewed positively during the focus group discussions.

15. Grounds for Appeal

Finding:

- BiH's rules on the grounds for appealing small claims judgments are reasonable and in line with the typical manner of regulating this aspect of the procedure in comparator countries

Recommendation:

- No changes are recommended

134. Another typical feature of small claims procedures is that appeals against the court's decision may be limited. This rule has two dimensions. First, the grounds for appeal may be fewer than those available in general civil cases. Second, appeals against specific rulings of the court made during the course of the trial rather than the final judgment (interlocutory appeal) can also be restricted. Both simplifications are available in BiH.

135. In BiH, a first-instance court's judgment on a small claims case can only be appealed on the grounds that civil procedure rules have been violated or substantive law has been misapplied. This type of limitation on the grounds for appeal is typical for small claims cases. Nevertheless, the limitation was recently challenged in the Constitutional Court of RS on the basis that the restriction on appealing a judgment based on the facts in small value cases violates the right to appeal under Article 113 (1) of the Constitution of RS and leads to inequality.⁶² The Court rejected the complaint stating that the relevant provision does not restrict or violate the right to appeal but only the scope of exercising this right in a very narrow group of cases.⁶³ Furthermore, in small claims proceedings, appeal is only allowed against court resolutions concluding the proceedings. Other court resolutions, which under the general rules may be subject to appeal, could in this case be challenged only by an appeal against the court resolution concluding the proceedings.

⁶² The claimant in the constitutional case maintained that the restriction to appeal on the facts in small value cases violates the right to appeal under Article 113 (1) of the Constitution of RS and leads to inequality.

⁶³ See the decision of the Constitutional Court of RS no. 651/17 as of 2 May 2018. The decision was controversial, especially since one of the judges (Ms. Irena Mojovic) issued a dissenting opinion on the financial threshold for small claims and the economic standard in RS, judge Mojovic of the view that the relevant provision restricts the right to appeal. She stated that the majority of parties in small claims proceedings are citizens with low income and for whom the threshold is very high. Her argument was that the constitutionality of the relevant provision cannot be assessed without considering the threshold. She made comparisons with surrounding countries that have higher GDP and lower thresholds. Summarizing these facts, the dissenting opinion concludes that a significant population in RS has been put in an unequal financial and procedural position before the second instance courts in the appellate procedure.

136. In Slovenia and Austria the grounds for appeal in small claims procedures are very similar to those in BiH. In Slovenia, the judgment may be appealed against only on grounds of the severe violation of civil procedure provisions and violation of substantive law. Like in BiH, the judgment may not be appealed against on grounds of erroneous or the incomplete determination of facts. The second type of restriction on appeal also exists in Slovenia; appeals are only allowed against resolutions of the court which conclude the proceedings. Other resolutions may be challenged only by the appeal against the court act concluding the proceedings. Austrian law only allows limited appeals in cases that are below EUR 2700 in value. The grounds for appeal in such cases are restricted to points of law or grounds for invalidity (that is, extremely serious procedural errors). Other procedural errors cannot be challenged either can the findings on the facts or the assessment of the evidence by the first-instance court.

137. In Estonia and in Latvia, the grounds for appeal in small claims procedures extend to facts and evidence. In Estonia, an appeal can be lodged in any of the following circumstances: (i) if permission to appeal is granted in the judgment of the first-instance court, (ii) if a provision of substantive law was clearly applied incorrectly, (iii) if a provision of procedural law was clearly violated, or evidence was clearly evaluated incorrectly and this could have materially affected the decision. If the appellate court refuses to accept an appeal, the party can challenge this ruling in the Supreme Court. In Latvia, the grounds for appeal are only slightly narrower than in the general civil procedure. Appeals are admissible if the first-instance court has incorrectly applied or interpreted substantive law, breached a provision of procedural law, established facts incorrectly, or assessed the evidence incorrectly. When lodging the appeal, it is also necessary to state the specific substantive law provision that was incorrectly applied or interpreted, the procedural law provision that was breached, the facts that were incorrectly established, and the evidence assessed erroneously and how it has affected the trial of the case. These grounds are rather broad, but they are still stricter than in general civil procedure.

138. Germany has the most restrictive rules on appeal. Essentially, appeals against the first-instance judgments are not permitted in cases that are below EUR 600. There is one exception to this rule. An appeal is possible if it is specifically permitted in the judgment of the first-instance court. This is rare, but the court may decide to allow an appeal if it deems the case to be of fundamental importance (regardless of its relatively low monetary value) or if the court believes that a decision from the appellate court is required to further develop the law or ensure consistent case law. Furthermore, if a party is of the view that its right to be heard has been violated, it can file an objection and the first-instance court is required to re-open the proceedings to rectify the situation. The latter possibility however does not constitute a right to appeal.

Box 4. Civil Procedure Code, Germany

Section 511

Appeal available as a remedy

(1) Appeals are an available remedy against the final judgments delivered by the court of first instance

(2) An appeal shall be admissible only if:

1. The value of the subject matter of the appeal is greater than 600 euros, or if

2. In its ruling, the court of first instance has granted leave to appeal.

(3) The plaintiff in the appeal is to demonstrate to the satisfaction of the court the value pursuant to subsection (2) number 1; the plaintiff in the appeal may not file a statutory declaration in lieu of an oath.

(4) The court of first instance shall admit an appeal in cases in which:

1. The legal matter is of fundamental significance or wherever the further development of the law or public interests in ensuring uniform adjudication require a decision to be handed down by the court of appeal, or wherever

2. The judgment does not adversely affect the party by an amount higher than 600 euros.

The court of appeal is bound to the admission.

139. BiH's restrictions on the grounds for appeal in small claims are consistent with international practice. Most countries limit the grounds for appeal in small claims. The only exception is Denmark, where the grounds of appeal are the same for both the small claims and the general civil procedure. The most typical restriction is to disallow appeals based on the facts of the case as established by the first instance court. This is the position in BiH, Slovenia and Austria. The existing rules in BiH are adequate and therefore no recommendations are proposed.

16. Fees for Appeal

Finding:

- BiH comprises many different jurisdictions, each with its own rules on appellate fees.

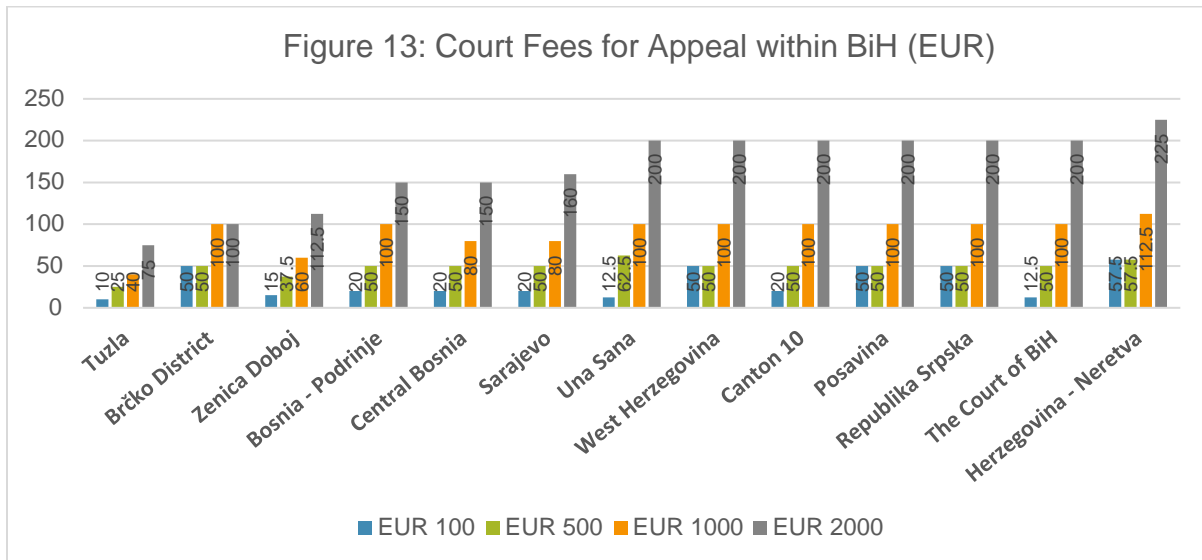
Recommendation:

- Unify appellate court fees across the country.

140. Like first-instance fees, fees for filing an appeal in BiH differ from jurisdiction to jurisdiction. Unlike first instance proceedings, a single fee is due for filing the appeal and for the second instance court's judgment. In most jurisdictions, the amount is twice the amount of the fee for filing the claim in the first instance. However, the appeal fee for Canton Zenica Doboje is equal to the claim fee plus 50 percent, and the appeal fee in Canton Tuzla equals the claim fee.

141. As an exception, the laws on court fees in three jurisdictions (Cantons Una Sana, Herzegovina Neretva Canton, and the Court of BiH) prescribe the payment of a fee for the defendant's response at the appellate level. The other jurisdictions in BiH do not require the payment of this fee. According to interviews, this fee is almost never collected. The fees for appeals of claims with a value of EUR 100, EUR 500, EUR 1000, EUR 2000 at the appellate level are illustrated in Figure 13 below. Appeals of claims with a value of EUR 100 or less are most expensive in Tuzla and Una Sana Cantons and the Court of BiH and most expensive in

Herzegovina Neretva Canton⁶⁴ Appeals of claims with a value of EUR 200 are the cheapest in Tuzla Canton and Brčko District and are again the most expensive in Herzegovina Neretva.

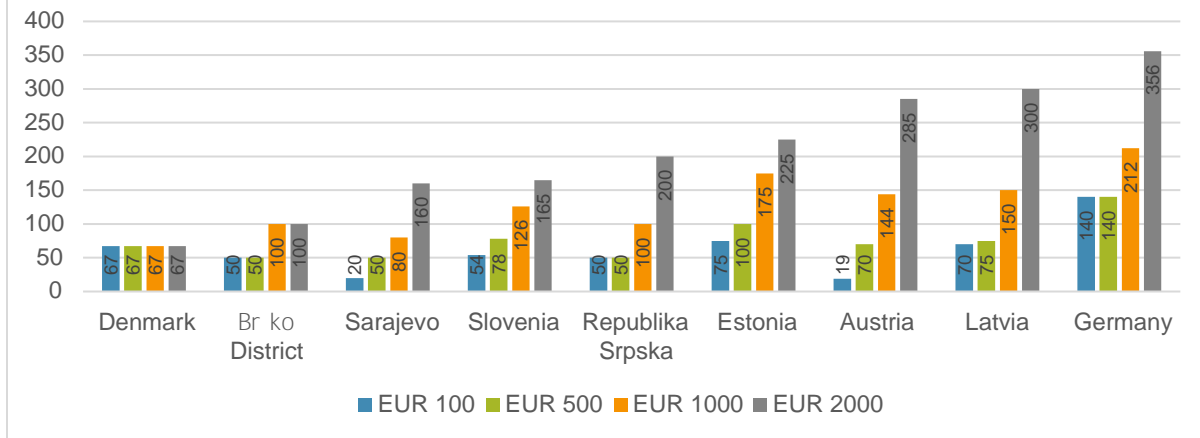


142. In most of the comparator jurisdictions, the court fee for appealing a decision for a certain monetary amount is the same as the fee for the first instance case. Only in Germany and Austria are the fees for appeal generally higher than in the first instance. In most BiH jurisdictions, the fees for appeal are equal to the total of the claim and the judgment fees for the first instance proceedings. This means that appeal fees in BiH are slightly lower than first instance fees because usually there is no fee for the defendant's response at the appeal stage. In Figure 14 below, fees for the second instance case are compared across comparator jurisdictions. Again, only the fees for Sarajevo Canton, BD and RS are included in this comparison.

⁶⁴ Fee amounts are calculated in EUR. In jurisdictions where laws require the payment of a fee for the defendant's response to the appeal, it is added to the total, even though it may not be actually collected.

⁶⁵ Only claims below EUR 600 are truly considered small claims in Germany. Also, in Germany, appeal cases are very rarely allowed. Nevertheless, for the purposes of comparison, Figure 14 presents court fees that would be payable to the second instance court in Germany for claims with a value of EUR 100, EUR 500, EUR 1000 and EUR 2000, assuming that the appeal was allowed.

Figure 14: Court Fees for Appeal in Comparator Jurisdictions (EUR)



143. The fees for appeal in BiH are in line with comparator jurisdictions but it would be beneficial to unify them across the country to avoid the current discrepancies. Efforts to align the fee structure could also extend to eliminating the fee for the defendant's response, which in any event is rarely paid in the three jurisdictions where it applies.

17. Rules of Procedure in the Appellate Court

Finding:

- There are no simplifications of the second instance small claims procedure. Second instance judges spend as much time and effort on small claims as they do on other civil and commercial cases.

Recommendation:

- Have second instance small claims examined by a single judge as opposed to a panel of three.

144. Usually, simplified procedural rules in small claims only apply to the first-instance hearing of the case. BiH is no exception and the procedural rules for small claims at the second instance are the same as the general rules. However, some of the comparator jurisdictions also have simplifications at the appellate level.

145. Denmark has the most numerous simplifications in the second instance procedure. For example, the requirements to document initiating the appeal are less formal than those under the general civil procedure. The same applies to the defendant's response which under the fast-track procedure should only include his remarks without any other formal requirements. Furthermore, under the general civil procedure the appellant is required to submit a complete set of hard copies of the documents presented in the case to the court. There is no such requirement under the fast-track procedure. Finally, in the general second instance procedure the main rule is that there should be an oral hearing, but the court may decide to omit it. In the fast-track procedure the rule is the opposite: there should be no oral hearing unless the court deems that it is necessary to have it. Thus, as a rule the appeal in small claims is decided on the basis of written documents.

146. In the other comparator countries the simplifications of the second instance small claims procedure are minimal, if any. In Austria, if the value of the claim is up to EUR 2000, then an oral hearing is scheduled only if the court considers it to be necessary. In Slovenia, such appeals are normally examined by one judge unless the case is considered complex, which would warrant examination by a panel of three judges. Estonia and Latvia do not introduce any simplifications in the appeal procedure for small claims. In Germany, there is a specific appeal of decisions for claims with a value below EUR 600.

147. BiH could simplify its second instance procedure for small claims, for example, based on the Slovenian example, by reducing the number of judges on appeal from a panel of three to a single judge. This suggestion received wide support during the focus group discussions. Because of the limited grounds for appeal, the expectation is that most small claims cases do not reach the second instance. However, in reality, in most countries first-instance judgments handed down in small claim cases are often appealed against. One of the purposes of small claims procedures is to relieve courts from spending too much time and effort on cases that have low monetary value. If this principle applies to first instance courts, it ought to apply in higher courts as well.

18. Alternative Dispute Resolution

Findings:

- BiH's legal tradition is familiar with the initial mediation session but currently there are no rules on mediation incorporated in the small claims procedure.

Recommendation:

- Once more comparative information becomes available, consider introducing a compulsory initial mediation session for some types of small claims (for example, neighbor disputes, medical malpractice disputes, and insurance claims).

148. Small claims are considered by many to be the ideal candidate for the use of an alternative dispute resolution (ADR). Achieving a settlement was one of the primary goals of traditional small claims courts. The ambition to resolve such cases quickly and cheaply, with the advantages that ADR has to offer.

149. Nevertheless, neither BiH nor any of the other comparator jurisdictions have incorporated ADR in the procedure for resolving small claims. A judge in BiH can invite the parties to settle the dispute through mediation or court settlement no later than the preliminary hearing if she considers that the nature of the dispute is appropriate. Also, in the comparator jurisdictions, the court fees would be reduced significantly if the parties do settle. While these rules are applicable to all civil cases and are not tailored to small claims, the ADR shows excellent results in many common law countries, struggles in continental Europe.

150. In 2013, Germany's Civil Procedure Code attempted to give an impetus to amicable resolution of small claims. It provided⁶⁶ that for certain types of disputes the provincial

⁶⁶ Section 15a (-2), Civil Procedure Code, Germany.

legislature may stipulate that prior to starting court action, a compulsory conciliation must be carried out by a conciliation authority established or authorized by the State Justice Administration. The types of disputes were property disputes with a value of up to EUR 750 before the District Court, disputes between neighbors, disputes about defamation, and disputes over breaches of the prohibition of discrimination. After 2013 many German states introduced compulsory conciliation for disputes with a value of up to EUR 750, but after several years of implementation, all these states repealed the rule for small value disputes because of disappointing results. It was found that just a fraction of these conciliations had been successful and that the requirement was applied only formally, without being a true attempt at reaching a settlement. While the compulsory conciliation requirement had been repealed everywhere in respect of disputes with a value of less than EUR 750, the states Bavaria, Brandenburg, Mecklenburg-Vorpommern, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony-Anhalt, and Schleswig-Holstein still require a conciliation attempt in conflicts between neighbors, defamation disputes, and partly for claims under the General Equal Treatment Act.

151. In addition to the compulsory conciliation still applicable to certain disputes in a few German states, optimistic reports come from Italy. In 2014, it introduced a mandatory initial mediation session for certain matters. These included joint real estate ownership, real estate division of assets, inheritances, family business agreements, real property leases, medical malpractice liability, damages from libel, and damages from insurance, banking, and financial contracts. Plaintiffs are required to file a mediation request with a provider and attend an initial mediation session before recourse to the courts may be granted. At this stage, an administrative filing fee is requested EUR 40 for claims with a value below EUR 250,000. If one party does not attend this initial session, the judge will sanction that party in subsequent judicial proceedings. After the initial session, each party may decide not to proceed with mediation and file a court case. The parties may also choose to mediate. In this case, mediation should last no more than 90 days and additional fees would be based on the value of the claim.⁶⁷ Four years after the introduction of this law, 180,000 mediations had been initiated. Although it is not clear how many of the parties in these cases decided to proceed with mediation after the initial session, for those that did proceed, the reported success rate was approximately 50 percent. Furthermore, since 2013, a substantial decrease has been recorded in filed cases of the same type, namely 30 percent decreases in disputes over joint ownership of real estate, 40 percent in disputes over rental apartments, and 60 percent in adverse possession disputes. While it is not clear if this reduction was due, wholly or partially, to the initial mediation session, the Italian model warrants further observation.

152. BiH's legal tradition is no stranger to the compulsory conciliation session. The CPL of the SFRY obliged the claimant in a small value dispute in which both parties resided in the same court area or were with the same organization or community in which there was a Peace Council,

⁶⁷ The description of the Italian mediation model is based on D'Urso, Leonardo. Italy's Required Initial Mediation Session: Bridging the Gap between Mandatory and Voluntary Mediation, Alternatives to the High Cost of Litigation, The Newsletter of the International Institute for Conflict Prevention & Resolution, Vol. 36, No. 4, April 2018 at <https://onlinelibrary.wiley.com/toc/15494381/2018/36/4>

to first approach that Peace Council and attempt to reach an amicable settlement. If one or both parties did not respond to the invitation of the Peace Council to attempt to settle or if this attempt failed, the Peace Council was obliged, within three months from the date of receipt of the case, to hand the matter over to the ordinary court. Moreover, if a claimant approached the court directly, the court had to refer the matter to the Peace Council and would only take it back if no settlement was reached within the stipulated three months. Obviously, this predecessor of the initial compulsory mediation session was applied in a very different social context. The research team has no data on the effectiveness of this provision. Nevertheless, the fact that the legal tradition in BiH is acquainted with this type of rule means that the experience of countries which have introduced compulsory initial mediation sessions could be relevant to BiH.

153. Furthermore, even now, BiH has some experience with the initial mediation session. Specifically, in the Family Laws of RS, FBiH and BD, spouses who have minor children together are obliged to go to a mediation or a reconciliation session before filing for a divorce.⁶⁸ Similarly, in labor disputes the Labor Laws of RS and FBiH provide for an initial mediation session before going to court.⁶⁹

154. Overall, while compulsory initial mediation sessions appear to be the most effective impetus for the use of ADR in continental Europe, the German experience warns against attempts to introduce this requirement for all types of small claims. A compulsory session may add time and costs to the resolution of disputes which for small value claims represent a bigger relative burden than for claims with a higher value. Such sessions seem to be more viable in some narrowly defined types of disputes. Italy has chosen the type of dispute, rather than its value, as a criterion for introducing the initial mediation session requirement. In Germany, too, the rule is still applicable in respect of some disputes. In BiH, the rule exists for divorce and labor cases. The future experience with this requirement (especially in Germany and Italy where it affects a broad category of cases) and the statistics on the types of cases in which the initial mediation session most frequently leads to settlement would be important in informing the choice of other jurisdictions that are considering a compulsory initial mediation session.

19. Conclusions

155. Unlike in the comparator countries, the small claims procedure in BiH is almost identical to the general one. Simplifications are minor. Although no jurisdiction has simplifications in every area of the procedure, no jurisdiction has as few simplifications as BiH. A comparative overview of available simplifications by area is provided below.

⁶⁸ Art. 45 of the Family Law of FBiH, Art. 47 of the Family Law of RS and Art. 42 of the Family Law of BD.

⁶⁹ Art. 116 of the Labor Law of FBiH and Art. 201 of the Labor Law of RS. It is not perfectly clear from the two provisions whether the requirement for mediation is a mandatory precondition for approaching the court. In the case of RS, the Constitutional Court of RS in its Decision 30/16 of 28 February 2017 has confirmed that it is a precondition and that the introduction of this requirement does not hinder access to court.

⁷⁰ Another assessment that needs to be made if the compulsory mediation session rule is introduced for some types of disputes is whether and to what extent and for how long the state could subsidize such initial mediation sessions.

Does the small claims procedure provide for special rules or simplifications as compared to general procedure?							
Element of procedure	BiH	Austria	Denmark	Estonia	Germany	Latvia	Slovenia
Filing the claim	No	Yes	Yes	Yes	Yes	Yes	No
Evidence	No	Yes	Yes	Yes	Yes	No	Yes
More active judge	No	No	Yes	Yes	Yes	No	No
Preparation of the case	No	No	Yes	Yes	Yes	Yes	Yes
Main hearing	No	No	No	Yes	Yes	Yes	Yes
Timelines	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Content of judgment	No	No	No	Yes	Yes	Yes	Yes
Non-appearance judgment	No	No	No	No	No	No	Yes
Grounds for appeal	Yes	Yes	No	Yes	Yes	Yes	Yes
Rules of appellate court	No	Yes	Yes	No	No	No	Yes

156. BiH needs to introduce additional simplifications to the small claims procedure to ensure the more efficient resolution of small value disputes. Any simplification must strike a careful balance between efficiency and fairness and must always stop short of breaking the fair trial standard. This is the principal challenge faced by any system wishing to introduce a simplified procedure for small claims. For the same reason, the ECtHR caselaw must always be taken into consideration when considering procedural reforms. Specific findings and recommendations, along with proposed actions, responsibilities, timeframes and anticipated levels of priority and resistance to implementation are summarized in Annex 1.

Annex 1 Findings and Recommendations

The table below represents the Report's findings and recommendations, along with proposed actions, responsibilities, timeframe and anticipated levels of priority and resistance to implementation. The level of priority is proportional to the anticipated impact on BiH's justice system. The level of resistance to implementation is assessed based on stakeholders' feedback. Timeframe (short-term - within a year), mid-term - from one to three years) and long-term (more than three years) is determined based on the assessed feasibility of implementation.

	Key Finding	Recommendation	Action	Responsibility	Priority / Resistance / Timeline
1	The definition of authentic title in BiH is quite narrow and differs across entities. As a result, courts are overburdened with small claims for those types of utility bills that are excluded from the authentic title procedure.	Broaden the definition of authentic title in FBiH, BD and RS to encompass all types of utility claims.	Amendment to the Enforcement Acts of FBiH, BD and RS	Ministries of Justice of FBiH, BD and RS	High priority Low resistance Short Term
2	Even if the definition of authentic title is expanded to encompass a utility claims, many claims that are not contested by the debtor would still go to litigation because unlike in most EU jurisdictions there is no order for payment procedure in BiH.	Consider reintroducing the order for payment procedure, with improvements based on EU best practices.	Amendment to the Enforcement Acts of FBiH, BD and RS	Ministries of Justice of FBiH, BD and RS	Moderate priority High resistance Long term
3	Systems with high thresholds for small claims are conducive to fewer procedural simplifications. In BiH, the threshold is relatively high but there are numerous cases with extremely low values, whereby, ultimately, the court costs greatly exceed the value of the claim. The current procedure does not allow further simplifications even in cases with minimal value.	In case very significant simplifications are considered (that is, not allowing appeals or court assessments altogether for some claims), introduce a second, lower threshold below which these rules would be applicable, for example, BAM 100/200.	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD and RS	Moderate priority Low resistance Mid term
4	Unlike comparator jurisdictions, judges in BiH do not have the discretion to choose whether to apply the small claims rules or not. If the simplifications become more significant, the review of complex small value cases might be hindered.	In case significant simplifications are introduced, give judges discretion not to apply them if they consider that the case is too complex	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD and RS	Moderate priority Low resistance Mid term

5	BiH comprises many different jurisdictions, each with its own rules on fees. This lessens predictability.	Unify court fees across the country.	Amendment of Court Fee Acts	Ministries of Justice of Cantons, RS and BD	High priority
					Moderate resistance
					Short term
6	The payment of many fees per court instance is contrary to international best practices and burdensome for courts.	Introduce a single fee per court instance, payable at the outset of the procedure.	Amendment of Court Fee Acts	Ministries of Justice of Cantons, RS and BD	High priority
					Moderate resistance
					Short term
7	Constitutional Court caselaw in BiH does not allow the court to discontinue the case if the fee is not paid. This is inconsistent with international practice. Some jurisdictions within BiH have penalties for nonpayment, others do not.	Introduce a penalty for nonpayment of the fee across the country.	Amendment of Court Fee Acts	Ministries of Justice of Cantons, RS and BD	Moderate priority
					Moderate resistance
					Short term
8	Under international best practices small claims are filed using forms that structure the claim and make the process easier for judges and parties. In BiH, such simplification is available for the filing of utility claims through the SOKOP system. For nonutility claims, there are no such simplifications.	Introduce mandatory forms both for the claimant's action and for the defendant's response. Such forms should be available in electronic format.	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD and RS	Moderate priority
					Low resistance
					Mid term
9	Under international best practice claims are filed electronically through a single judicial portal. In BiH this is not possible for nonutility claims.	Make it possible to file all claims electronically via an electronic portal for all civil claims	IT system upgrade and amendments to the Civil Procedure Laws of FBiH, RS and BD	HJPC, Ministries of Justice of FBiH, BD and RS	High priority
					Low resistance
					Long term
10	Unlike the comparator jurisdictions, BiH has no stricter relevance assessment in small claims and no criteria on rejecting evidence.	Stipulate that in small claims judges shall apply a stricter relevance assessment than in general litigation and shall admit only evidence which is necessary and not excessively costly relative to the value of the claim.	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD and RS	Moderate priority
					Moderate resistance
					Mid term

11	Unlike most of the comparator jurisdictions, judges in BiH are not able to reduce the cost or length of small value cases by applying simpler requirements to the form of evidence.	Stipulate that in small claims judges may deviate from requirements on the form of evidence and recognize means of proof not currently available in the law, including written statements.	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD, and RS	Moderate priority
					Low resistance
					Mid Term
12	Expert assessments are expensive and time-consuming but judges in BiH are not able to forego such assessments in small value cases.	Stipulate that expert assessments shall be approved in small claims only in exceptional circumstances and considering the value of the claim and the cost of the assessment.	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD, and RS	Moderate priority
					Moderate resistance
					Mid Term
13	Hearings tend to be the most time-consuming element of litigation but unlike the comparator jurisdictions, BiH does not provide for rules that would limit court hearings in small value cases.	Stipulate that small claims shall, as a rule, develop only in writing unless one of the parties has specifically requested a hearing. (Alternatively, if softer measures are sought, the preliminary phase could develop only in writing and a maximum of one hearing shall be held altogether).	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD and RS	High priority
					Moderate resistance
					Mid term
14	Shorter timelines bring more discipline to small claims cases and make it possible to resolve them more quickly. Unlike the comparator jurisdictions, BiH has only shortened a few timelines under the small claims procedure.	Introduce shorter timelines for small claims similar to the ones used in the EU cross-border procedure.	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD, and RS	Low priority
					Low resistance
					Mid term
15	In BiH, there is no difference between the contents of a judgment in small value and in regular cases, whereas in many comparator jurisdictions, some elements of the judgment in small claims are omitted to save the judges' time.	Simplify the content of the judgment in small claims, for example, by allowing the court to describe only the facts it considers to have been established and the evidence upon which the judgment is based, as opposed to all the facts and evidence presented in the case.	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD, and RS	Moderate
					Low
					Mid term
16	Under general procedural rules in BiH, if a defendant is duly served	Stipulate that in small claims if the duly served	Amendment to the Civil	Ministries of Justice	Low priority

	and does not respond to the claim, the court can issue a judgment based on nonappearance but only at the claimant's request. The request is a formality but if omitted, the court is prevented from closing the case.	defendant fails to respond to the claim, the court can issue a judgment based on nonappearance even in the absence of an explicit request.	Procedure Laws of FBiH, RS and BD	of FBiH, BD and RS	Low resistance
					Mid term
17	There are no simplifications of the second instance small claims procedure. Second instance judges spend as much time and effort on small claims as they do on other civil and commercial cases.	Have second instance small claims examined by single judge as opposed to a panel of three judges.	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD and RS	High priority
					Low resistance
					Mid term
18	BiH's legal tradition is familiar with the initial mediation session but currently there are no rules on mediation incorporated in the small claims procedure.	Once more comparative information becomes available, consider introducing a compulsory initial mediation session for some types of small claims (for example, neighbor disputes, medical malpractice disputes, insurance claims).	Amendment to the Civil Procedure Laws of FBiH, RS and BD	Ministries of Justice of FBiH, BD and RS	Low priority
					Moderate resistance
					Long term

Annex2. List of Stakeholders Consulted

Judges and judicial associates:

- Judge Dunja Rojević, Municipal Court Zenica
- Ms. Amela Balić, **Judicial Associate, Municipal Court Zenica**
- Judge Vibor Vučić, **Municipal Court Sarajevo**
- Mr. Bojan Knežević, **Judicial Associate, Municipal Court Sarajevo**
- **Judge Biljana Novak, Municipal Court Tuzla**
- **Judge Samra Akova, Cantonal Court Sarajevo**
- Judge Mirsada Čaušević-Dučić, Cantonal Court Sarajevo
- Judge Asmir Korić, **District Commercial Court Banja Luka**
- Judge Ljubica Komljenović, District Commercial Court Banja Luka
- Judge Bogdan Gajić, Higher Commercial Court, Banja Luka
- **Judge D. Kudka, Basic Court, Banja Luka**
- Judge Slavica Slavnić, Basic Court, Banja Luka
- **Judge Aleksandar Matković, Municipal Court Bjeljina**
- **Ms. Danijela Radonić, Judicial Associate, Higher Commercial Court, Banja Luka**

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- **Jelena Ljuboja, lawyer Banja Luka**
- **Natasa Sajic, lawyer Banja Luka**

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- Law on court fees of Canton Sarajevo
- Law on court fees of Canton Tuzla
- Law on court fees of Canton Central Bosnia
- Law on court fees of Canton 10
- Law on court fees of Canton Herzegovina Neretva
- Law on court fees of Republika Srpska
- Law on court fees of Canton West Herzegovina
- Law on court fees of Canton Posavina
- Law on court fees of Brčko District
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- Civil Procedure Code, Estonia
- Civil Procedure Code, Germany
- Civil Procedure Law, Latvia
- Civil Procedure Law, Slovenia
- Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure

Annex 4 Historical Review of the Development of Small Claims

The origins of small claims courts can be traced back to the common law tradition. Complex and legalistic litigation in common law countries was perceived to be out of reach to the ordinary man. Therefore, as early as the 18th century, Northern Ireland, England and Wales began establishing courts and tribunals that would dispense ~~informal~~ ^{quasi-formal} justice. Very often the decisionmakers were not judges but lawyers or even laymen who were expected to adjudicate based on their general notion of what was fair and equitable.

In the United States, the first small claims courts were established in the early 20th century. The US model featured five major components: (1) court costs were minimized; (2) pleadings were greatly simplified; (3) trial procedure was left to the discretion of the judge and formal rules of evidence were eliminated; (4) judges and court clerks were expected to assist litigants during trial preparation and at trial so that legal representation would be rendered unnecessary; and (5) judges were given the power to allow payment of the adjudicated amount in installments.⁷² Additionally, court fees were extremely low.

In the 1960s and 1970s, the consumer protection movement fueled renewed interest in small claims courts throughout the United States, Canada, Australia and New Zealand. A concern was raised, especially in the United States, that these courts had been colonized by debt-collection companies and large businesses, which overshadowed the courts' initial purpose to serve wage earners and small businessmen. Discussions abounded, both in the United States and in other jurisdictions with small claims courts, as to whether it would be wise to prohibit legal representation altogether thus leveling the playing field for all litigants and/or to limit these courts' jurisdiction to only consumer claims thus shutting the door to large plaintiffs and redirecting them to the general civil procedure. Some jurisdictions indeed made such steps.⁷³ Quebec prohibited legal representation in small claims courts. Australia limited the jurisdiction of small claims tribunals to consumer claims and permitted legal representation only in those cases where all parties had consented. New Zealand, too, excluded advocates from the procedure and required claimants to prove that the matter for which adjudication was sought was indeed under dispute in order to prevent the use of small claims tribunals as a cheap forum for debt collection.

Another prominent feature of small claims courts was the emphasis placed on conciliation. Thus, in Australia, the tribunal would be charged with the duty to use its best endeavors to bring the parties to an acceptable settlement. Only after pursuing an acceptable settlement

⁷¹ This historical examination is largely informed by Whelan, Christopher (ed.). 1990. *Small Claims Courts Comparative Study*, Clarendon Press: Oxford.

⁷² See Weller, Ruhnka and Martin, *American Small Claims Courts*, p. 5, *ibid*.

⁷³ Many of the discussed common law jurisdictions have a federal structure or otherwise hosted a variety of small claims courts, each with its own specifics. Therefore, while some commonalities and trends are discussed herein, it should be kept in mind that there were wide variations of rules and features of small claims courts, even within one and the same country.

could a matter be adjudicated? Similarly, in New Zealand, the primary function of the tribunal was to attempt to bring the parties to an agreed settlement.⁷⁵

In continental Europe, the interest in small claims was limited and generally emerged later in time. One notable exception is Austria, which introduced a special procedure for small claims as early as 1873. These provisions were largely taken over in the Civil Procedure Code of 1895. These early small claims provisions were limited in the simplifications they introduced as compared to the common law jurisdictions. They regulated the content of the simplified protocol of the main hearing and further required that as a rule such cases should be decided in just one hearing. The judgment would normally be pronounced orally, within the same hearing. If both parties were present, a written copy of the judgment would be delivered only at the request of a party. If a party was not present at the hearing, a written copy of the judgment had to be delivered to both. Appeal of the judgment was restricted. The successful implementation of an electronic order payments system in Austria in the early 1980s reduced the need of the small claims procedure dramatically. After several restrictions on the original content of the procedure, the legislature finally annulled the special rules in 1983. The justification was that the maintenance of the small claims procedure would be superfluous in light of the existing restrictions on appeal. Nevertheless, Austria currently has several simplified rules that apply to claims under various thresholds and they have been examined in this comparative analysis.

SFRY's legal system was strongly influenced by the Austrian legal tradition. Therefore, SFRY was one of the pioneers in the introduction of small claims procedures in continental Europe. It did so in 1972. The provisions were applicable to claims with a value of less than 800 dinars and were very similar to the early Austrian provisions. They also regulated in much detail the content of the protocol of the main hearing and stipulated that the court judgment needed to be pronounced at the end of the main hearing. Grounds for appeal were again limited. Interestingly, SFRY small claims provisions differed from the Austrian ones in that they provided for a compulsory initial conciliation session in some types of small value disputes.

Most European jurisdictions that found it useful to create a special track for small claims did so without setting up special courts but by simplifying some aspects of the civil procedure at the courts of general jurisdiction. Furthermore, while the primary objective of common law countries appears to have been ensuring access to justice, especially for underprivileged groups, consumers, and small businesses, in continental Europe the primary purpose of such reforms appears to have been to achieve efficiency. Access to justice was seen as an added benefit, but small claims procedures were usually introduced in order to help courts allocate their limited resources in an efficient manner by making sure that no undue amount of effort would be spent on minor cases.

⁷⁴ See Yin and Cranston, *Small Claims Tribunals in Australia*, 1990. *Small Claims: A Comparative Study*, Clarendon Press: Oxford. p. 59.

⁷⁵ See Frame, *Claims Tribunal System in New Zealand*, 1990. *Small Claims Courts: A Comparative Study*, Clarendon Press: Oxford. p. 75.

Annex 5 Approaches to Regulating Small Claims

Different jurisdictions have taken different approaches to regulating small claims. They range from very detailed dedicated chapters in the civil procedure law, in which every possible simplification of the procedure is listed, through nonexhaustive lists of admissible simplifications, to very laconic, general rules that give judges discretion and leave it to jurisprudence to shape the ultimate scope of possible simplifications. Unlike BiH, the jurisdiction examined do not distinguish between civil and commercial small claims. Slovenia is the only other country examined that makes this distinction.

In BiH, the procedure applicable to small value cases is regulated in Art. 423 of the Civil Procedure Laws of RS and FBiH and Art. 426 of the Civil Procedure Law of BD. RS, there are also several special procedural rules on commercial cases that extend to small commercial claims. Apart from that, the provisions of the three laws regarding small claims are basically identical. In areas where the respective sections of the Civil Procedure Laws do not provide for special rules, the general civil procedure rules apply.

In Slovenia⁷⁶, Latvia⁷⁷ and Denmark⁷⁸ the small claims procedure is also regulated in dedicated chapters of the procedural law. In Estonia, the rules are listed in a single article⁷⁹ and some of their aspects are further developed in a few other provisions. The Estonian provision on small claims comprises a nonexhaustive list of manners in which the procedure could be simplified. The court is free to choose which simplifications to apply. In 2006, when this procedure was first introduced, it permitted judges to ease the procedure without specifying which aspects of the process could be simplified. This broad discretion made judges hesitant of whether and how to use the procedure. A legislative amendment of 2009 introduced the current open catalogue of simplifications, which made the procedure operational. Even though the list is nonexhaustive, practitioners report that judges stick to the specified simplifications and do not add additional ones.

⁷⁶ Chapter 30, Civil Procedure Law, Slovenia.

⁷⁷ Chapter 30.3, Civil Procedure Law, Latvia.

⁷⁸ Chapter 39, Civil Procedure Code, Denmark.

⁷⁹ Section 405, Civil Procedure Code, Estonia.

Section 405, Civil Procedure Code, Estonia

§ 405. Simplified proceeding

(1) The court adjudicates an action by way of simplified proceeding at the discretion of the court taking account of only the general procedural principles provided by this Code if the action concerns a proprietary claim and the value of the action does not exceed an amount which corresponds to 2,000 euros on the main claim and to 4,000 euros together with collateral claims. Amongst other things, upon conducting proceedings in such action, it is permitted:

1) to enter procedural acts in the minutes only to the extent the court deems necessary, and to preclude the right to file any objections to the minutes;

2) to set a term which differs from the term provided by law;

3) [repealed RT I, 21.05.2014, entry into force 01.01.2015]

4) to recognize persons not specified by law as natural representatives of participants in the proceeding;

5) to deviate from the provisions of law concerning the formal requirements for provision of evidence and to recognize as evidence also the means of proof not provided by law, including a statement of a participant in the proceeding which is not given under oath;

6) to deviate from the provisions of law concerning the formal requirements for serving procedural documents and for documents to be presented to the participants in the proceeding, except for serving an action on the defendant;

7) to waive written pretrial proceedings or a court session;

8) to take evidence at its own initiative;

9) to make a judgment in a matter without the descriptive part and statement of reasons;

10) to declare a decision made in a matter to be immediately enforceable also in other cases than those specified by law or without a security prescribed by law.

(2) In the case specified in subsection (1) of this section, the court guarantees that the fundamental rights and freedoms and the essential procedural rights of the participants in the proceeding are observed and that a participant in the proceeding is heard if he or she so requests. A court hearing need not be held for this purpose.

(3) The court may conduct proceedings in a matter in the manner specified in subsection (1) of this section without a need to make a separate ruling thereon. The participants in the proceeding shall still be notified by the court of their right to be heard by the court.

The most laconic provisions on small claims are available in Germany and Austria. In Germany, a single short text in its Civil Procedure Code gives the courts discretion in implementing the general rules in cases with a value of up to EUR 600. An additional text limits severely appeal for claims below the same threshold.

Civil Procedure Code, Germany

Section 495a

Proceedings performed at the court's equitably exercised discretion

The court may decide at its equitably exercised discretion on how to implement its procedure if the value of the claim does not exceed the amount of 600 euros. Upon corresponding application being made, the matter must be dealt with in oral argument.

In Austria, there are different monetary thresholds that are tied to different simplifications. This is not a small claims procedure in the classical sense of the term. Still, it is instructive to explore it because of the close links between the Austrian legal tradition and the legal systems of countries that formed part of the SFRY. It is also useful to note that there are systems in which different thresholds can unlock different types of procedural simplifications.

Annex 6 Electronic Survey

Survey results in Bosnian/Serbian/Croatian are available at

<http://pubdocs.worldbank.org/en/631931563396220423/ComponentFastTrackingSmallClaimsin-BiHAnnexSurveyResults>

Small Claims Survey

This survey is conducted in the framework of the Commercial Justice Technical Assistance Program implemented by the World Bank and financed by the UK Good Governance Fund. The purpose of the survey is to obtain information on the attitudes of BiH legal community towards the current procedural rules regarding small value litigation and the possibilities for their improvement. The results of the study will be used in a comparative legal analysis of small claims procedures in BiH and various jurisdictions.

1. What is your profession?
 - Judge
 - Judicial assistant
 - Attorney-at-law
 - In-house lawyer
 - Other (please, specify)

2. Which BiH entity do you work in (you can choose more than one answer)?
 - Federation BiH
 - Republika Srpska
 - Brcko District

3. How often do you work with small claims procedures?
 - Most of my work is with small claims
 - Approximately half of my work is with small claims
 - A small part of my work is with small claims
 - I do not work with small claims

4. What do you think about the level of the threshold below which the small claims rules are applicable?
 - The threshold is appropriate
 - The threshold is too high
 - The threshold is too low
 - Other (please, specify)

5. What are your impressions regarding court fees in small claims cases?
 - Parties usually pay them in advance
 - Parties usually do not pay them in advance
 - Other (please, specify)

6. Do you think that court fees in BiH could be reformed in one of the following manners (you can choose more than one answer)?
- Advance payment of the fees should be made mandatory except in cases where a party has been relieved by court from the obligation to pay the fee
 - A single fee should be due for examining the case in one instance (as opposed to separate fees for the claim, for the judgment and for the defendant's answer)
 - The fees should be reduced
 - The fees should be raised
 - No changes shall be made
 - Other (please, specify)
7. Do you think that the filing of small claims should be simplified in any of the following manners (you can choose more than one answer)?
- Introduction of forms for filing small claims
 - Introduction of an eportal for filing small claims
 - Providing assistance to the claimant by court staff in filing small claims
 - No changes shall be made
 - Other (please, specify)
8. Do you think the court should have discretion to decide whether to apply the small claims procedure or not based on the complexity of the case?
- Yes
 - No
 - Other (please, specify)
9. Do you think that the pretrial phase of a small claims case in BiH could be shortened in any of the following manners (you can choose more than one answer)?
- Eliminating the pretrial phase altogether and summoning the defendant to the main hearing together with the notification of the claim
 - Preserving the written part of the pretrial phase (i.e. the exchange of documents) but eliminating the pretrial hearing
 - Keeping the pretrial hearing but eliminating the documents exchange
 - Introducing shorter deadlines for the pretrial phase
 - No changes to the pretrial phase are necessary
 - Other (please, specify)
10. Do you think that any of the following simplifications of the rules on evidence could be introduced in small claims procedures (you can choose more than one answer)?
- Allowing the court more discretion in refusing to admit some evidence if it is not sufficiently relevant or its collection is too costly
 - Allowing the court to accept written statements of witnesses instead of questioning them under oath in a court hearing
 - Allowing the court to accept written statements of court experts instead of questioning them under oath in a court hearing

- Other (please, specify)
11. Do you think that any of the following simplifications regarding the hearings in small claims procedures could be introduced (you can choose more than one answer)?
- Allowing the court to examine the case solely in writing, unless any of the parties specifically requests a hearing
 - Simplifying the requirements to the protocol of the hearing
 - Requiring the court to decide the case in no more than one hearing
 - Other (please, specify)
12. Do you think that the content of the court judgment in small claims cases should be shortened/simplified compared to the judgment in general civil procedure?
- Yes
 - No
 - Other (please, specify)
13. Do you think that any of the following simplifications should be introduced also to the appellate procedure for small claims (you can choose more than one answer)?
- At the appellate level, small cases could be examined by just one judge opposed to a panel of three judges
 - At the appellate level, there could be no hearings for small cases.
 - At the appellate level the timelines for small claims could be shortened
 - There is no need for simplifications for small claims at the appellate level
 - Other (please, specify)
14. What do you think of the speed of small claims procedures in Federation BiH?
- They are much shorter than general procedure
 - They are slightly shorter than general procedure
 - There is no discernible difference
 - They are slightly longer than general procedure
 - They are much longer than general procedure
 - Other (please, specify)
15. What do you think of the speed of small claims procedures in Republika Srpska?
- They are much shorter than general procedure
 - They are slightly shorter than general procedure
 - There is no discernible difference
 - They are slightly longer than general procedure
 - They are much longer than general procedure
 - Other (please, specify)

16. What do you think of the speed of commercial small claims as compared to civil small claims in Federation BiH?
- Commercial are much shorter than civil
 - Commercial are slightly shorter than civil
 - There is no discernible difference
 - Commercial are slightly longer than civil
 - Commercial are much longer than civil
 - Other (please, specify)
17. What do you think of the speed of commercial small claims as compared to civil small claims in Republika Srpska?
- Commercial are much shorter than civil
 - Commercial are slightly shorter than civil
 - There is no discernible difference
 - Commercial are slightly longer than civil
 - Commercial are much longer than civil
 - Other (please, specify)
18. What are your recommendations for improving small claims procedures in FBiH?
Please, describe:
19. What are your recommendations for improving small claims procedures in RS?
Please, describe:
20. What are your recommendations for improving small claims procedures in Brcko District?
Please, describe:

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