About the Policy Spotlight

In 2016, the American Chamber of Commerce in Kosovo (AmCham Kosovo) began the publication of the ‘Policy Spotlight’ – a document that aims to focus on different economic policies. This document is also intended to outline the challenges for development of respective policies, in order to pave the way for addressing them. The Spotlight is published on a bi-monthly basis. Whereas this edition places the spotlight on Contract Enforcement in Kosovo, the following editions will center on other policies that are of interest to the private sector.

Spotlight on Contract Enforcement

This document provides an overview of the judicial system in Kosovo, with focus on contract enforcement, the quality of judicial system and the time and cost associated with resolving a dispute. Economic development and sustained growth are closely related to the efficiency of contract enforcement. Rule of law and protection of human rights require a well-functioning, predictable and accessible judiciary, through which courts can effectively enforce contractual obligations.

A strong and effective judiciary is associated with more developed credit markets, more rapid growth of small businesses and an overall higher level of development. Furthermore, contract enforcement is one of the key indicators which foreign investors look at prior to making a decision on their investments.

Enhancing the effectiveness of commercial dispute resolution has many benefits:

i. improves the doing business environment, fosters innovation and increases foreign direct investment (FDI);

ii. enables more reliable and efficient enforcements;

iii. provides incentives to the financial institutions to lower the interest rates; and

iv. reduces case backlogs and prevents them for the future.

Overview of Contract Enforcement

In an effort to enhance the efficiency of contract enforcement and thus make procedures faster and easier to enforce contracts, countries tend to introduce reforms, such as the case for new technologies of higher-income economies and periodic reviews to clear inactive cases for lower-income economies.
In addition to being a key indicator to economic growth and sustainability, and promoting efficiency in the commercial court system, good court practices are also essential for small businesses, in particular, given that courts interpret market rules and protect economic rights.

Furthermore, accountable and transparent courts encourage new business deals and relationships, because businesses can rely on courts if dealt with customers or business partners that fail to complete their liabilities towards them.

Speedy trials, in terms of procedures, time and costs of resolving a commercial dispute are essential for small enterprises in this regard. Businesses would manage to stay in the market if lacking the necessary resources to do so, instead of awaiting the outcome of a long court dispute (“Doing Business 2016–Kosovo”, p.77).

**Contract Enforcement - Kosovo**

**Where Does Kosovo Economy Stand Today?**

Contract enforcement and rule of law are often mentioned as two of the main problems facing Kosovo today. The inefficiency of courts, the high perception of corruption in the sector and many other negative elements have tarnished the reputation of the judicial sector. This in turn has a detrimental effect on the doing business environment, whereby investors are faced with an increased uncertainty and higher risks.

Businesses and experts alike lament the capacities and the professional expertise of judges to render decisions, particularly on commercial cases which often entail complex arrangements between parties. There are also numerous complaints regarding the efficiency and the professional capacity of courts to handle fiscal cases.

Given the situation described above, it must be noted that the sector overall has been in the focus of many international donor organizations, which have provided both technical and financial assistance to the judiciary. Recent years were marked with a number of reforms and the introduction of new mechanisms which have improved the contract enforcement situation to an extent, some of which have been described in paragraphs to follow.

According to Doing Business data, collected and provided by the Annual Doing Business Report in 2016, contract enforcement in Kosovo takes 330.00 days and costs 34.40% of the claim value.

![Graph showing how Kosovo and comparator economies rank on the ease of enforcing contracts](image-url)
The rankings provided in the chart below for comparator economies and the regional average ranking, both provide useful benchmarks for assessing contract enforcement efficiency in Kosovo. Kosovo introduced a private bailiff system in an effort to make enforcing contracts easier (p.78). Kosovo stands at 48 in the ranking of 189 economies worldwide, with regards to the ease of enforcing contracts.

**The time and cost for enforcing contracts in Kosovo**

Data collected based on the time and cost for enforcing contracts in Kosovo are reported by following a step-by-step evolution basis of a commercial sale dispute (80-81). Time refers to the days required to enforce a contract through the courts, whereas cost refers to the cost percentage of the claim, in which attorney, court and enforcement fees are included. As shown in the table below, the average time required to enforce a contract in Kosovo is 330 days, compared to Europe and Central Asia average, which is 481 days. However, the cost of enforcing a contract through the courts in Kosovo is higher than in Europe and Central Asia.

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Kosovo</th>
<th>Europe&amp; Central Asia Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time (days)</td>
<td>330</td>
<td>481</td>
</tr>
<tr>
<td>Filling and service</td>
<td>60</td>
<td></td>
</tr>
<tr>
<td>Trial and judgement</td>
<td>180</td>
<td></td>
</tr>
<tr>
<td>Enforcement of judgement</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>Cost (% of claim)</td>
<td>34.4</td>
<td>26.2</td>
</tr>
</tbody>
</table>

**Quality of judicial processes index**

The quality of judicial processes index is a measurement which indicates whether a certain economy has adopted the necessary practices in its court system the four areas:

i. Court structure and proceedings;
ii. Case management;
iii. Court management; and
iv. Alternative dispute resolution.

The extent of the quality and efficiency of judicial processes index refers to the sum of the scores on the above mentioned components and the index ranges from 0-18, with higher values indicating a more efficient judicial process.

The chart below indicates which of those good practices, tested based on judicial processes index and developed on the basis of internationally recognized good practices that promote judicial efficiency are available in Kosovo.
According to survey conducted by USAID, 81.72% of 900 businesses use written contracts for their business transactions. The usage of written contracts for business transaction has positively increased from 2011 to 2014. Nonetheless, businesses in Kosovo still deal with challenges and uncertainties, due to limited knowledge about judicial system in Kosovo, limited resources and capacities and low or no confidence on rule of law, which have impeded the operation and sustainable growth of businesses (USAID p. 14, 2015).

The efficiency of enforcing contracts, as assessed by the World Bank in the Annual Doing Business Report has become weaker in 2016, as compared to its higher ranking in 2015, from 46 to 48, respectively.

**Contract Usage in Kosovo**

Considering the legal reforms that the judicial system in Kosovo had to undergo in 2013, delays in solving cases, lack of accountability and transparency, a high perception of corruption, and challenges in enforcement of decisions, are key issues largely addressed by the private sector (EC Progress Report Input, p.13).

Data show that the resolution of dispute cases has increased in 2015, thus indicating a more efficient judicial system in this regard. Nonetheless, regardless of the increased number of resolved cases, the number of pending cases has increased by 31%. Such a mismatch is a reflection of lack legal support staff, considered crucial and necessary when dealing with a growing demand for cases filed within the commercial department.

Contract enforcement measures the quality and efficiency of commercial dispute resolution and as such, it is among the most significant elements for foreign investors, in particular, when choosing Kosovo as a potential destination to carry out their investments.

**Private enforcement agents**

![Quality of judicial processes index in Kosovo and comparator economies](image)

![Doing Business Report](image)
In this regard, “the private enforcement system has continuously helped in enforcement of decisions and raising awareness of debtors in fulfilling their obligations. One very simple example of this would be the significantly higher collection rates in public utility providers, such as electricity or waste collection, whereby debtors are increasingly paying debts on a voluntary basis. Similarly, an analogy can be drawn for fulfillment of business obligations due to the existence of a more efficient enforcement mechanism, which incentivizes voluntary fulfillment of debts” (V. p.15).

**Alternative Dispute Resolution Mechanisms**

Arbitration and Mediation are two alternative dispute resolution mechanisms which are used in commercial disputes worldwide.

**Arbitration**

As an alternative to traditional litigation, arbitration is characterized by speedier procedures, higher confidentiality, and offers an opportunity to parties for their contests to be decided upon by experts of the matter at hand. As such, arbitration is generally a less adversarial process, encouraging parties to maintain healthy business relationships. Arbitration also provides a less costly alternative, given the increased efficiency for solving disputes, resulting in reduced attorney and procedural costs.

While arbitration has a history dating back to the 15th and 16th centuries when the first rules of arbitration have been established, it has officially been used in the 20th century in Europe (CLE Training Manual on Arbitration). This alternative dispute resolution mechanism was widely developed in the Yugoslav Republic beginning from the 1970s, with very specialized arbitration institutions whose decisions are to this date used as legal precedents in other cases.

In the postwar Kosovo, the first law on Arbitration was adopted in 2007, and entered into force in 2008. This law is of a commercial nature and only applies to disputes of this nature.

Following the creation of the legislative framework, with the help of international donors, mainly USAID programs (such as SEAD, CLE, etc.) the Kosovo Chamber of Commerce (KCC) and the American Chamber of Commerce in Kosovo have each established their own alternative dispute resolution centers, namely the Permanent Arbitration Tribunal at KCC and the Arbitration Center at AmCham Kosovo (formerly known as Alternative Dispute Resolution Center). Over the years, both institutions have continuously worked in improving their capacities by creating very professional rosters of arbitrators, improving the existing capacities, and adopting the necessary accompanying internal regulations.

**Model Arbitration Clause**

“Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by arbitration administered by the American Chamber of Commerce in Kosovo in accordance with the Rules of Arbitration of the American Chamber of Commerce in Kosovo.”
Today the AmCham Arbitration Center at AmCham Kosovo counts a number of 40 arbitrators, of which a large part is international attorneys with extensive experience in different fields. Moreover, the center has continuously worked with the business community in improving contract enforcement by raising awareness on the benefits of arbitration and advising businesses to include arbitration clauses in their contracts. While arbitration can take place even without the existence of an arbitration clause, provided that parties agree to solve their dispute via arbitration after the contest has occurred, the presence of an arbitration clause is preferable in order to avoid the hesitancy of one of the parties to sign a post-contest arbitration agreement.

**Arbitration in Procurement Contracts**

The Public Procurement Regulatory Commission (PPRC) has included an arbitration clause in the standard form tender dossiers, however such a clause is perceived in some cases as a pathological clause, due to the fact that PPRC doesn’t allow for parties to remove references to litigation. As such, almost all Contracting Authorities are refusing to allow companies to select arbitration in their public procurement contracts. Among the initiatives undertaken in the past year by the American Chamber of Commerce in Kosovo to promote alternative dispute resolution mechanisms is also the proposal that the Law on Public Procurement foresees that in addition to traditional dispute settlement, inclusion of arbitration clauses in public procurement contracts be included in the law. Such a step would clarify parties’ rights to choose arbitration as opposed to litigation, and as such would contribute significantly in decreasing the time period required to resolve disputes and would relieve the burden on the judiciary. This has not been supported by Kosovo Assembly and henceforth not included in the Law on Public Procurement.

**Mediation**

Mediation is a mechanism in which a neutral person helps parties to come to an agreement on a potential dispute. As opposed to arbitration, mediation does not result in a binding decision, but rather is based on the willingness of the parties to come to an acceptable solution. Law No. 03/L-057 on Mediation provides the legal framework for the functioning of mediation as an alternative dispute mechanism in Kosovo.

In general, mediation is being reported as a success, and businesses are more prone to using it in comparison to commercial arbitration. One of the main reasons for this choice is the cost of mediation, which are drastically lower than the arbitration costs. The Ministry of Justice reports a rising number of cases that are solved through court referred mediation. The number of mediation cases at the AmCham Arbitration Center is also higher than the number of arbitration cases.

**Model Mediation Clause**

“In the event of any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, the parties agree first to try to settle the dispute through mediation administered by the American Chamber of Commerce in Kosovo in accordance with the Rules of Mediation of the American Chamber of Commerce in Kosovo before resorting to arbitration, litigation or some other dispute resolution procedure.”
In light of this and according to the National Survey on Use of Contracts 2015, while approximately 58% of the respondents still favor courts more, 12% and 3.7% have cited mediation and arbitration respectively, as a main way to solve contractual disputes. Similar reports conducted in 2014, around 22% of respondents have claimed that they prefer mediation, while arbitration was not ranked at all; courts still led with credibility at 47%.

**Way Forward**

Strong and effective contract enforcement mechanisms are crucial for the development of the private sector in Kosovo. Contract Enforcement indicators are often referred to by investors to determine risks and uncertainties associated with their investments in a given country. Considering this, it is crucial for Kosovo institutions to continue the judicial sector reform in close consultation with all interested parties. In order to facilitate contract enforcement mechanisms and to improve Kosovo’s position vis-à-vis other countries in the region, so far different parties have provided different recommendations on the way forward. From private sector’s viewpoint, the need for increasing the capacities of the judiciary, especially that of the commercial department, is crucial, be it in terms of the number and professional qualification of judges, or in terms of professional associates assisting these judges in handling caseloads.

In light of this, the possibility of establishing a special chamber for handling business disputes has also been brought up by the business community. Such a step would certainly be advisable only if it results in cases being handled more efficiently and by competent judges with extensive commercial background.

In addition, now is the time when businesses should give more attention to alternative dispute resolution mechanisms, namely arbitration and mediation, as key to improving the enforceability of their contracts. Coupled with speedy procedures and confidentiality, the efficiency of arbitration over traditional litigation, will inevitably give Kosovo businesses the push that they need to foster development.

All in all, the improvements noted in this document with regards to contract enforcement are encouraging in that the progress has been noted and reflected in the doing business indicators. Nonetheless, the way forward remains challenging. Promotion of arbitration and mediation, increasing the capacities of the judiciary, and introducing more professional mechanisms that treat commercial disputes, are a must if the country wants to be host to a doing business environment that encourages investments and fosters overall economic development.

**References**


National Survey on Usage of Written Contracts. USAID Contract Law Enforcement Program. 2015.