

The Foundation of the International Association of Defense Counsel
SURVEY OF INTERNATIONAL LITIGATION PROCEDURES: A REFERENCE GUIDE

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BOSNIA AND HERZEGOVINA

Responses submitted by:

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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

The jurisdiction in Bosnia and Herzegovina is a civil code jurisdiction.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

Civil proceedings follow the adversarial method. The parties are required to present their claims orally, meaning the facts on which these claims are based and the evidence on which these facts can be established.

The adversarial method is also used in criminal proceedings. However, criminal proceedings are based on the accusatory principle, meaning that only a public prosecutor may initiate criminal proceedings.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

Judges are appointed to their positions by the High Judicial and Prosecutor Council, an independent body established by law on BiH level.

In addition to formal administrative requirements (citizenship of BiH, law degree, bar exam, etc.), judges must have relevant professional experience, which may vary in accordance with the position of the appointed and the court of appointment.

For instance, a minimum of eight years is required to be appointed at the Court of Bosnia and Herzegovina or the Supreme Court of the Republika Srpska and Federation of Bosnia and Herzegovina. An appointment to the Court of Appeals of Brčko District, the District Court of Republika Srpska and Cantonal Court of the Federation of Bosnia and Herzegovina requires five years of professional experience. Three years are required for the First Instance Court and Municipal Court of the Federation of Bosnia and Herzegovina.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

There is a special procedure for the Commercial Court in Republika Srpska which is regulated separately by the Law on Civil Procedure, Chapter XXIX “Procedure in Commercial Disputes”.

Apart from that, courts may have different departments dealing with certain types of disputes, which, however, do not constitute special or separate courts.

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5. Is arbitration an option and when? If so, what rules are typically used?

In civil proceedings the parties are free to agree to resolve disputes by way of arbitration. This applies to all current or future disputes, unless provided otherwise by law.

In case of non-institutional, *i.e.* ad hoc arbitration, parties are free within the bounds of law to determine the rules of arbitration. For example, an arbitration agreement is valid only if concluded in writing and signed by the parties. Arbitrators are to be selected in an odd number.

In case of institutional arbitration, *e.g.* before the Foreign Trade Chamber of Bosnia and Herzegovina's arbitration court, the rules of procedure of this forum apply. In case of a foreign element to the agreement or dispute, the parties may choose a foreign arbitration forum.

Arbitration is not permitted in matters of criminal law.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

An arbitration award has the force of a binding court judgment for the parties if the arbitration agreement does not provide for the right to appeal before a higher level arbitration court.

In case of an existing arbitration agreement, the court will cease the legal action and dismiss the complaint regarding the same parties and the same matter in dispute.

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

In civil proceedings mediation between the parties is possible, but not mandatory. A party may file a claim or complaint before a court at any time, without any need for initiating mediation proceedings. The court may suggest mediation, but such proposal is not binding.

Mediation is neither mandatory in criminal law.

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8. What is the process for pre-hearing fact discovery (if any)?

In civil and criminal proceedings, there is no pre-hearing fact discovery. Parties are responsible for providing evidence for their own claims. After civil proceedings are initiated, a preliminary oral hearing is held during which the parties briefly present their arguments and propose evidence to be presented during the proceedings. The court then sets the trial program: It decides what will be discussed, which evidence will be taken and determines date and hour of the main hearing.

In criminal proceedings, the investigation is performed by the relevant prosecutor. During the investigation, the prosecutor must take into account both evidence for and against the accused.

(a) Are there provisions for mandatory document disclosures?

N/A

(b) Is there provision for oral examinations of the parties or others?

N/A

(c) Are there limits on the length of oral examinations?

N/A

(d) Are witness statements or summaries to be provided before the hearing?

N/A

9. What is the process for pre-hearing expert disclosure (if any)?

The same provisions as for the process for pre-hearing fact discovery (see question 8).

(a) Are expert reports or written summaries required to be exchanged?

N/A

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

N/A

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

N/A

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10. Are there other notable discovery rules?

N/A

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

As mentioned above, there is no pre-hearing conference in civil and criminal proceedings (see question 8). Moreover, during the preparation for the main hearing, the judge may hold a hearing with the parties (or the defense lawyer) to discuss issues that are relevant to the main trial.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

When the court's decision depends on solving a previous question or matter relating to whether there is a right or legal relationship, and this issue has not previously been decided by a court or other relevant authority (preliminary issue), the court may decide upon the issue prior to discussing the merits of the case, unless otherwise specified by law. The court's decision on a preliminary issue has legal effect only in the case in which the issue was resolved.

If expressly requested in the claim, the court will issue a judgment granting the plaintiff's claim without conducting a hearing when the defendant does not file a reply to the claim in a timely manner (default judgment).

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

Generally, there is no process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony.

During the preliminary hearing the parties propose evidence for their claims, including expert testimony, and the court decides which evidence shall be presented by the parties at the main hearing.

14. What is the standard for admissibility of expert evidence?

Expert evidence is admissible when the court lacks scientific, technical, or other specialized knowledge necessary to understand the evidence or to determine the facts.

The parties may apply for expert testimony, or the court decides to hear an expert witness by itself. Expert witnesses have to be registered at the court's list of approved expert witnesses. If not registered, an expert witness has the status of an ordinary witness.

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15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

Experts are appointed to and dismissed from a list of court experts by the Minister of Justice, on the proposal of the expert commission nominated by the Federal Minister of Justice. The list of experts is delivered to all courts and prosecutor offices in Bosnia and Herzegovina.

A written order for expertise is issued by the parties or the court. The order shall determine the facts on which the evaluation should be conducted.

If an expert institution exists or professional expertise can be performed by a state body, especially in complex matters, the order for expertise shall be assigned to that institution or body which appoints one or more experts

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

The jurisdiction in Bosnia and Herzegovina protects client attorney privilege. In general, the attorney is obliged to keep in secret everything that a client has entrusted, unless the attorney is absolved of this obligation on the basis of explicit or tacit agreement.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

N/A

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

There is no specialized body that decides upon this issue, but generally the court should decide upon the privilege disputes, depending on the circumstances of the case.

19. Briefly describe the trial process?

- (a) *Are there opening submissions, in what form and of what length?*
- (b) *What is the order of presentation of witnesses?*
- (c) *Who conducts examination and in what order?*
- (d) *What is the process for closing submissions?*

In respect of the main hearing, the judge opens the hearing and announces the subject of discussion.

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After that, the judge determines whether all invited persons are present, and if not, he/she checks whether the absent person is duly invited and has a valid reason for absence.

The main court hearing is taking place in the following order:

- 1) The claimant outlines the important issues of the lawsuit, including the presentation of evidence by reading the documents;
- 2) The defendant briefly presents the answer to the lawsuit and to the relevant statements of the Claimant.
- 3) In the hearing of evidence, the claimant presents his evidence first. This also applies to the witnesses and their interrogation.
- 5) The next step is the presentation of the other kind of evidence, including expert testimony;
- 6) After the presentation of all evidence, both parties starting with the claimant have the right to address the court with the closing remarks, both as to law and fact;
- 7) The court may allow the claimant to briefly comment on the final presentation of the defendant;
- 8) In any case the defendant has the last word.

20. Please identify any other notable trial procedures.

N/A

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

In civil proceedings the principle of contradiction is applied, meaning that each party has the burden of proof for its own claims. For example, in case of a lawsuit, the party bringing the lawsuit must prove all of its claims. The evidence should be evaluated by the judge, according to his/her discretion.

In criminal proceedings the burden of proof is on the prosecutor, who must prove beyond reasonable doubt the guilt of the defendant.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

In Bosnia and Herzegovina, three different types of damage are prescribed by the FBiH/RS Obligations Act:

- damage as a decrease of one's property (regular damage),
- preventing the increase of one's property (lost profits),
- causing another physical or mental pain or fear (non-pecuniary damage).

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Punitive damages do not exist in Bosnia and Herzegovina.

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24. Are there time limits for bringing claims? Responding to claims? Please describe.

FBiH/RS Law on Obligations provides the general statute of limitations for claims, whereby claims in FBiH in general expire within 5 years, if nothing else is prescribed by special laws, while in RS the general statute of limitations for claims is 10 years.

Furthermore, claims arising from periodical liabilities which are due annually or in shorter time periods expire within three years from the due date of each individual claim. Mutual claims arising from business agreements on trade of goods or services concluded between legal entities also expire within three years, as well as claims of rent.

Claims of damages expire within three years from the date on which the injured party found about the damage and the person who caused the damage. Such claims expire in any case within five years from the date on which the damage was caused.

If the damage was caused due to a criminal offense, and the deadline for prosecution is longer than the statute of limitations, the request for compensation of damages will expire when the statute for limitations for the criminal offence expires.

Statute of limitation of one year is envisaged for certain public utility expense claims and similar claims. Claims that are determined by the court based on a final and binding court decision or a decision of another administrative authority expire within 10 years.

Even after expiry of the claim it is possible to file a lawsuit. The court does not take the statute of limitation into account ex officio and it will dismiss the claim only if the other party objects that the claim has expired.

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

The courts in Bosnia and Herzegovina will take jurisdiction over claims against a foreign defendant according to criteria on jurisdiction set forth in the Law on Resolution of Conflict of Laws with Regulations of Other Countries in Certain Relations, i.e. the law on conflict of laws and also if the court of that foreign defendant's country would take jurisdiction over claims against citizens of Bosnia and Herzegovina in similar circumstances.

The parties may agree on the jurisdiction of a foreign court only if at least one of them is a foreign citizen or a legal entity with a foreign corporate seat, and if it is not a dispute which, under the provisions of the law on conflict of laws, or any other federal law, is within the exclusive jurisdiction of the court in Bosnia and Herzegovina.

Furthermore, the parties may agree on the jurisdiction of the court in Bosnia and Herzegovina if at least one party is a citizen or a legal entity with a corporate seat in Bosnia and Herzegovina.

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26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

It is not specifically provided if the defendant has opportunity to bring other potentially responsible parties into the proceeding, but it is provided that a person who has a legal interest that one of the parties in litigation succeeds, can join that party.

27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

In civil proceedings legal costs are recoverable in accordance with a loser pays costs system.

In criminal proceedings, as a rule the defendant pays for his/her own legal costs. If the defendant cannot afford to do so, a defense attorney will be awarded to him by the court.

28. Are contingency fees allowed?

Contingency fee is not envisaged. The lawyer has the right to request and receive a reward for the work done, and reimbursement of expenses incurred in connection with the work, in accordance with the provisions of the Tariff.

29. Is third party funding of claims permitted? Under what circumstances?

As stated above, in B&H a loser pays system is applied, and third party funding of claims is not recognized as such.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

Class action suits as such are not currently recognized in B&H law. However, it is possible that they may be introduced in the future.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

In Bosnia and Herzegovina the “Institution of Human Rights Ombudsman of Bosnia and Herzegovina”, as well as the “Institution of Ombudsman for Consumer Protection in B&H” have been established, while other consumer protection associations or organizations can also be established.

In accordance with the Law on Consumer Protection, the Ombudsman for consumer protection in Bosnia and Herzegovina is authorized to initiate proceedings before the competent court.

Moreover, the Association for the Protection of guarantors in Bosnia and Herzegovina is authorized to initiate proceedings

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before the relevant court for obtaining compensation in cases of treatment of a creditor or main debtor contrary to the provisions of Law.

In respect of criminal proceedings, they may only be initiated and conducted only at the request of the relevant prosecutor. However, everyone is entitled to submit a criminal complaint to the prosecutor.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

In accordance with the applicable legislation,

A preliminary hearing will be held, as a rule, not later than 30 days from receipt of the response to the lawsuit, i.e. the date of expiry of the deadline for submitting the response to the lawsuit.

(2) The trial/final hearing will, as a rule, take place no later than 30 days after the preliminary hearing.

(3) The court may order that the trial/final hearing be held immediately after the preliminary hearing.

In RS, an administrative part of Bosnia and Herzegovina where special commercial courts exist, for commercial procedures the final hearing will take place no later than 15 days from the date of receiving the response to the complaint, or from the date of the preliminary hearing.

However, in practice, the litigation process in civil proceedings often takes much longer. Some circumstances affecting the time of the main hearing are the backlog of cases, number of judges and holiday season.

For criminal procedures the period to get to the trial/final hearing is approximately 30 days. Depending on specific circumstances of the case, the time to get to the main hearing can be longer.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Appeal processes, as regular legal remedies, are available in litigation proceedings. Appeals can be generally brought against all decisions of the first instance court (judgments and resolutions). The appeals are generally brought to higher (second instance) courts.

In addition to appeals, additional extraordinary legal remedies may be initiated in certain cases, such as renewal of proceedings, which is decided by the court which conducted the proceedings, or revision of judgment, which is performed by the FBiH/RS Supreme Court.

Regarding the question of the appointment and the qualifications of the judges please refer to our answer to question number 3.

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34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

The Law on Civil Procedure does not proscribe any provisions regarding electronic trials or appeals. The court decides which evidence will be performed at trials, and judges have the right to allow the presentation of evidence e.g. on computer monitors, if the evidence is important for the hearing.

In criminal procedures, witnesses can opt to testify via video conference. The examination of witnesses may be recorded on audio or audiovisual equipment at all stages of the proceedings. Recorded examinations are obligatory in cases involving minors under sixteen years of age who have been injured by the offense and if there is a fear that the witness cannot be examined in a trial. However, technical capabilities can vary between different courts.

There are also specific rules regarding protection of witnesses which regulate the option to testify via audio or video conference. At the premises of the Court of B&H specially equipped rooms exist that are used in the trials for the hearing/protection of witnesses.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

In the civil and criminal procedures in B&H, the law does not foresee provisions regarding the use of graphics, computer animation and power point, either in the trials or the appeals. However, in practice, there are several cases where lawyers use graphics or power point to present evidence. In any case, the Court has the final say whether the evidence in question will be used as evidence in trial.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor/barrister distinction?

In B&H there is no solicitor/barrister distinction.

The parties are free to choose the lawyer during the whole litigation process. They are also entitled to change the lawyers for the pre/trial procedures and the trial.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

Compensation of damages in Bosnia and Herzegovina is regulated by the Obligations Act, which states liability when the tortfeasor caused the damage intentionally or by negligence.

Regarding the question of divided liability, the Obligations Act states that the damaged party which contributed to the damage or which caused the damage to be higher than it would otherwise be, is entitled only to proportionately reduced compensation. If it is impossible to determine which part of the damage stems from the actions of the damaged party, the

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court will award proportionate compensation taking into account the circumstances of the case.

Furthermore, regarding joint and several liability, the Obligations Act states joint and several liability in the following cases:

- (1) For damage that has been caused by several persons together;
- (2) For the abettor or the assistant, as well as the one that helped that the responsible persons were not discovered;
- (3) For persons who caused the damage by working independently of each other, if their respective shares cannot be determined;
- (4) When there is no doubt that the damage has been caused by some of two or more specific persons which are somehow affiliated, and it cannot be determined which of them caused the damage.

38. Is service of a complaint issued outside your country permitted in your country by “informal” means, or must the Hague Convention be followed?

By the “Hague Convention” we assume you are referring to the “Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Hague, 15 November 1965 entered into force 10 February 1969”. This Convention has been signed by Bosnia and Herzegovina and entered into force in Bosnia and Herzegovina on 01 February 2009; the Decision on ratification was published in the "Official Gazette" - International Treaties No. 12/08 by the Presidency of Bosnia and Herzegovina). Thus the provisions of the Convention must be followed.

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

The laws in B&H do not prohibit the export of relevant document outside our jurisdiction except in the field of the Law on Protection of Personal Data which states that personal data should not be exported to foreign countries if the recipient country does not meet the data protection standards of B&H. The foreign data processor has to abide by the same personal data protection principles effective in Bosnia and Herzegovina.

As an exemption, personal data can be transferred to a foreign country with consent of the relevant person, if this is necessary for the fulfilment of an agreement or legal claim, or for the protection of public interest.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

N/A

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

The Courts in Bosnia and Herzegovina use the principle of equality in disputes, which means that the court treats both sides equally.

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However, in employment disputes the courts generally treat the employee as the weaker party in the dispute, thus offering it greater protection.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

The draft of a new/amended Law on Civil Procedure FB&H is currently under way.

