FOREIGN INVESTORS COUNCIL IN LATVIA

Position Paper No 2

1 June 2012

Position Paper on Proposals for Facilitating Efficiency of Justice

1. Summary

Company disputes in Latvia are primarily resolved under the procedure laid down by the Civil Procedure Act (CPA) in a court of general jurisdiction or a court of arbitration. At the same time, the FICIL has already expressed its support for creation of either commercial courts or specialised departments of courts of general jurisdiction to facilitate the speed and quality of reviewing company disputes.

The substance of civil proceedings basically lies in that disputes between the parties regarding violated rights and interests protected by law are resolved according to the principles of equality and adversarial proceedings. However, present CPA regulation calls for constant improvement according to established problems of application of legal provisions and change of the actual situation.

2. Recommendations

The FICIL's Justice Efficiency working group has arrived at conclusions and proposals regarding necessary changes in the CPA provisions so that the underlying principles and the aim of the CPA could be better achieved, thus also achieving improvement in the business environment in Latvia.

The conclusions and proposals relates to:

1. facilitation the discipline of the participants of the matter:
    a. by decreasing postponement of reviewing of a matter, stating that it should depend only on the objective need for doing so, being based on the capacity of the court to adjudge the matter on the merits considering the evidence filed in the matter. The court decision to exercise the court's right to postpone the reviewing of a matter also must be sufficiently reasoned.
    b. by determining the procedure of submission of evidence that would discipline the participants of a matter and would reduce to the maximum the possibility of postponement of a matter because the participants of the matter have not managed to familiarise themselves with the submitted evidence;
2. shortening the proceedings:
    a. by stipulating the option to extend the range of matters that may be adjudicated on the merits through written proceedings by the agreement of the parties, thus facilitating the procedural economy;

Elizabetes iela 2, Room 539
World Trade Center "Rīga"
Phone +371 67217201; email: ficil@ficil.lv
Web: www.ficil.lv

b. determining more explicit regulation in relation to the approval of the settlement;
c. by increasing the state fee in large claims and decreasing – in written procedures;

3. communication between the participants of the matter:
   a. by stressing out the importance of the person's declared place of residence in communication with the court and to determine that the declared place of residence of the participant of a matter should be indicated as the primary address for serving of correspondence;
   b. by facilitating possibilities to submit written documents electronically on the condition that all participants of a matter have agreed to electronic submission of evidence;
4. requirements regarding courts of arbitration:
   a. by establishing certain requirements regarding for the founder of a court of arbitration;
   b. by determining additional qualification requirements for the candidate to the position of arbitrator;
   c. by increasing the liability of the arbitrator for legal proceeding of the arbitration process;
   d. by determining higher requirements for reviewing removal the arbitrator etc.

FICIL believes that these proposals can help to solve such problem issues as the long and opaque proceedings, different legal practices at courts of different levels and different court regions, activities and reputation of courts of arbitration that seems to be general knowledge. In the Global Competitiveness Report of 2010-2011 published by the World Economic Forum Latvia gained poor evaluation exactly in those positions that characterise the legal environment – Latvia was on the 117th place for the effective dispute resolution (formerly – the 97th place) and on the 118th place (formerly – the 104th place) for assessment of legal effectiveness of legal provisions. At the same time, the economic development and growth brings along faster and faster development of legal relations and civil legal transactions due to which well-arranged CPA and arbitration proceedings has the role of growing importance for the successful business development.

The FICIL expresses gratitude to the representatives of the Ministry of Justice and the Court Administration for their responsiveness and participation in working group meetings and discussion of proposals. The discussions that took place during meetings considerably contributed to formulation of the proposals here presented, with consideration of the standing of both businesses and the Government.

3. Rationale

Having assessed the present CPA provisions and the practice of their application in Latvia, the FICIL has arrived at the conclusion that the following changes are necessary:

1. SPEED OF PROCESS

1.1. Postponement of court hearing

- The FICIL proposes amending Sections 209 and 210 of the CPA with the aim of facilitating timely review of cases and decreasing postponement of court hearings and shortening proceedings.

  Postponement of review of a case should depend on objective need for doing so, based on the capacity of the court to adjudge the case on the

merits considering the evidence filed in the case. Postponement of a case due to the defendant's failure to express their attitude to the claim at all or making formal objections against it should not constitute grounds for postponing the case and hence delaying review of the case.

Therefore the FICIL suggests specifying in Section 209 Paragraph One Clause Two of the CPA that the court postpones reviewing a case "*if a party in the case who has been notified of the time and venue of the court hearing fails to appear for the court hearing for a reason that the court finds justified and, having assessed the opinion presented to and evidence filed with the court by the party in the case in advance, the court finds that it is not possible to review the case in the absence of that party*".

In the opinion of the FICIL, the issue of instances in which the court may decide to find a reason justifying why a party in the case failed to appear for the court hearing calls for additional assessment.

Section 74 Paragraph Seven Clause 2 of the CPA prescribes the obligation of the parties to timely notify in writing of reasons for which they are unable to appear for the court hearing, by enclosing evidence thereof. The law does not list reasons for non-appearance that may be considered justified – this has been left in the competence of the court. For the court to be able to assess and adjudge whether a person is or is not capable of participating in the court hearing and to decide whether that person's failure to appear in court might be justified, it might be necessary to determine that the party must present evidence that the prescribed mode of treatment (in the case of an illness) or other circumstances that can be proved indeed do not permit appearance of the party in the case at the court hearing.

The FICIL furthermore suggests specifying in Clause 210 of the CPA that a court decision to exercise the court's right to postpone review of a case should be sufficiently reasoned. Namely, upon establishing any of the instances listed in Paragraph One of the same Section the court should additionally justify why the case cannot be reviewed. In this way passing decisions on postponement of cases would actually be facilitated basically in the instances indicated in Section 209 of the CPA, while applying Section 210 only in rare exceptional instances. At the same time the FICIL suggests considering reducing the grounds for postponing review of a case, namely, the option to delete Section 210 Paragraph One Clauses 1 and 2.

1.2. Submission of evidence

- The FICIL proposes to amend Section 93 of the CPA with respect to the procedure for submission of evidence, stating additionally that: *"evidence must be submitted within the term specified by the court, but in any case not later than 14 days before the court hearing. If a party in a case fails to submit all evidence at their disposal or submits evidence after expiry of the above term and the court finds that by such conduct the adjudication of the case is being deliberately delayed, the court may impose a fine of fifty to two hundred fifty lats. The court may refuse acceptance of evidence that is not submitted according to the procedure or within the terms specified in*

this Act".

The FICIL indicates that the term for submission of evidence and the procedure for doing so should be such that it reduces to the maximum the possibility of postponement of a case because the parties in the case have not managed to familiarise themselves with evidence submitted.

The aim of the proposed amendments is to determine a procedure for submission of evidence that would discipline the parties in a case and so that all evidence at the disposal of the parties in a case is submitted upon raising the claim or providing explanations or within a reasonable term provided the party in a case can prove that such evidence became known after raising the claim or providing explanations. By enabling the court to determine the most suitable term for submission of evidence a relevant mechanism would be created for ensuring that the term for submission of evidence is determined commensurately to the nature and complexity of the case, at the same time providing the parties with the opportunity to timely familiarise themselves with the evidence submitted by the other party and to prepare for the court hearing.

At the same time the FICIL indicates that it would be necessary to amend the CPA so that not only copies of the claimant's statement of claim and the defendant's explanations are submitted according to the number of parties in the case, but a similar requirement for submission of document copies should be set for documents enclosed with the statement of claim or explanations. Presently the CPA states that the judge may determine that obligation (i.e. Section 129 Paragraph Three of the CPA), but this right is exercised comparatively seldom. Considering that the statement of claim or explanations are frequently supplemented with voluminous annexes of documents, the present procedure interferes with timely familiarisation of other parties in the case with all relevant materials, which in turn facilitates further delay of the process in general.

1.3. Written proceedings

- The FICIL proposes supplementing the CPA with new Sections 188.1 and 188.2 that would state the option to extend the range of cases that may be adjudicated on the merits through written proceedings by agreement between the parties, thus facilitating procedural economy.

  The amendments could provide as follows:
  *"**Section 188.1. Written review of a case by agreement between the parties***
  (1) The court may review the case through written proceedings if the parties mutually agree. In that event the court will as soon as possible decide on the procedural terms for submission of procedural documents and on the time for delivering judgment and notify the parties thereof. The name of the judge who delivered the judgment must appear in the judgment.

  (2) The parties may withdraw from the agreement indicated in Paragraph 1 only in the event of a material change in the procedural situation.

(3) Unless a party notifies the court of their intent to review the case through written proceedings, it is assumed that the party prefers verbal proceedings for review of the case.

Section 188.2. Cases subject to written proceedings
(1) The following must be reviewed through written proceedings:
1) simple debt recovery cases where amounts claimed do not exceed 50 000 lats;
2) if only written evidence is submitted and there is no dispute on the validity of obligations or subjection of the case to review by the court;
3) small claims.

(2) The court may schedule a preliminary court hearing to determine aggregation of the evidence in the case."

In the same context the FICIL indicates that, since written proceedings would facilitate procedural economy, the option to set a reduced state fee for cases reviewed through written proceedings should be considered because a reduced state fee might work as an additional incentive for the parties to agree on review of a case by written proceedings.

1.4. Settlement

- The FICIL proposes to amend Section 227 Paragraph three of the CPA to state that: *"The court will review the issue of approval of settlement at a court hearing within 15 (fifteen) days after the day when the court receives the settlement document. The court may approve the settlement in the absence of the parties, provided the authenticity of the signatures of the parties or their representatives under the wording of the settlement has been notarised and the wording of the settlement contains the acknowledgement of the parties that they are aware of the procedural consequences of settlement".*

  In the opinion of the FICIL more specific regulation is required in relation to approval of the settlement, considering that the former practice of approval of settlements differs from court to court, both by means of scheduling a special court hearing and postponing the issue of approval of the settlement to the date of the previously scheduled court hearing. It is therefore necessary to regulate this aspect by establishing a uniform procedure and term.

2. THE ROLE OF DECLARED PLACE OF RESIDENCE

- The FICIL proposes amendments to Sections 54, 56, 59, 128, 396 and 404 of the CPA to stress the importance of a person's declared place of residence in communication with the court and to determine that the declared place of residence of a party in a case should be indicated as the primary address for serving correspondence.

  According to the Place of Residence Declaration Act, the declared place of residence is any location related to real estate (with an address) freely chosen by the person where the person has voluntarily settled with intent to

live expressed directly or by silent consent, where the person has legal grounds to live and which the person recognises as a location where he or she can be contacted in legal relations with the Government and the local authority. Every person must declare his or her place of residence.

The FICIL suggests stating in Section 56.1 of the CPA that if court documents are served according to the procedure set in Section 56 of the CPA, it is considered that the person has been informed of the time and venue of the court hearing or procedural action or of the contents of the respective document and that the person has been served with court documents.

The FICIL proposes to state in Section 396 Paragraph Two of the CPA that: "*the debtor is considered warned provided the warning is dispatched by registered mail containing certification of the contents of the package to the registered office and the address indicated in the statement if this differs from the registered office of a legal person, and to the address of the declared place of residence and the address indicated in the statement if this differs from the address of the declared place of residence of a natural person, and provided 10 (ten) days have passed since the date of dispatching the warning"*. Warning a debtor of prospective litigation under special proceedings should be limited to dispatching a warning of the relevant content to their declared place of residence or the indicated address. The FICIL suggests similar regulation under Section 404 Paragraph Three Clause 3 in respect of uncontested enforced performance of obligations.

The declared place of residence of a party in a case should be set as their primary address for serving correspondence, with consideration of the option to state another address (e.g. actual place of residence, the representative's address) as the address for correspondence upon written application by the respective party in a case.

3. COURT MODERNISATION AND AVAILABILITY

3.1. Availability of case law

- The FICIL suggests ensuring access by the public to materials of case law and judicature.

Section 5 Paragraph Six of the CPA states that the court must consider judicature upon applying a legal provision. Judicature binds the judge on the basis of the principle of equality. The wording of the legal provision applicable to the particular legal relation is the same in different analogous cases (with the exception of amending such provision by legislation, of course). Hence, the consequences of applying the law should be similar in similar cases. Application of a legal provision is based on interpretation or construing; moreover, presently Latvian courts are becoming increasingly active in applying other legal methods that require higher qualification and more thorough substantiation. The approach of applying different legal methods and the results thereof are stated in writing in the motivation part of court rulings. Legal findings included in court rulings are applicable in

later similar cases, thus actually establishing the role of common law. A court using as judicature and basing its rulings on earlier rulings that are not publicly available and have not been published should not be tolerated.

A fundamental constitutional principle states that persons are entitled to know their rights. Public availability of court rulings will improve understanding of the content of the legal provision and the practice of application and hence predictability of the outcome of a dispute in law. It would further improve persons' level of awareness and understanding of the substance of legal regulations. In that case there are grounds to believe that fewer judgments would be appealed and revoked and there would be fewer applications to the court regarding issues already clarified by case law.

An anonymised database of court rulings should be made available to any interested person, while access to a non-anonymised court rulings database could be granted in the same manner as is presently available – to a particular range of persons that should comprise judges and court clerks – and by means of a comparatively simple authorisation procedure access to information should also be granted to employees of other law enforcement authorities, attorneys-at-law and scientists for the purposes of research.

3.2. Electronic circulation of documents

The FICIL suggests amending Section 111 Paragraph Two of the CPA to state that written evidence may be submitted electronically on condition that all parties in a case have agreed to electronic submission of evidence, as prescribed under Section 274 of the Code of Civil Procedure of the Republic of Estonia[1]. An electronic signature provides the option of due identification of a person while submission of documents electronically facilitates procedural economy and reduces litigation costs. This legal provision would state the following:

"(2) Written evidence must be submitted in the form of an original document or a duly certified copy, duplicate or excerpt, or electronically provided if the format of the electronic document is suitable for verification of the document and its storage in the court information system. If part of a written document or other writing is sufficient for clarifying facts that are significant for the case, an excerpt thereof may be submitted to the court."

To ensure circulation of electronic documents the FICIL proposes amending the CPL by supplementing it with a new Section 130.1 on electronic filing of the statement of claim, as prescribed under Section 336 of the Code of Civil Procedure of the Republic of Estonia[2]. This legal provision would state the following:

"*(1) Statements of claim and other documents to be submitted to the court in writing may be submitted electronically on condition that all parties in a case have so agreed and that the court has the option of producing*

[1] Code of Civil Procedure, passed on 20 April, 2005, available: http://www.legaltext.ee/en/andmebaas/ava.asp?m=022
[2] Code of Civil Procedure, passed on 20 April, 2005, available: http://www.legaltext.ee/en/andmebaas/ava.asp?m=022

printouts and copies thereof. Such electronic documents must be certified by an electronic signature.

(2) An electronic document is considered received by the court upon receipt of the document in the court's database. The sender will receive an automatic electronic confirmation of receipt of the electronic document. The court will immediately inform the sender if the court is unable to produce printouts and copies of documents received.

(3) The Cabinet of Ministers sets the procedure and requirements for submission of electronic documents to the court."

Taking into account that complete transfer to electronic circulation of documents might require significant additional investment of resources the FICIL suggests initially considering electronic submission and receipt of particular types of documents from mutually reliable systems (e.g. the Court Information System, register of execution files) that would not require significant additional investment. At the same time the FICIL stresses the importance of increasing the effectiveness of proceedings by means already specified under the CPA and in practice, e.g. sending the summons by an electronic mail message (Section 56 of the CPA), more effective use of court calendars and judiciary databases in the portal *tiesas.lv*, etc.

3.3. Securing a claim

- The FICIL proposes amending Section 141 of the CPA by specifying that an ancillary complaint may also be filed regarding the decision to secure a claim.

  Presently Section 141 of the CPA prescribes that an ancillary complaint may be submitted in relation to a decision indicated in Section 140 Paragraph Three of the CPA, a decision by which an application for securing a claim has been rejected and a decision by which an application for cancellation of securing a claim has been rejected. At the same time, the historical wording of the CPA before the amendments of 2006 provided for the right to appeal a decision on securing a claim.

  In its judgment of 30 March 2010 in case No. 2009-85-01 the Constitutional Court acknowledged that the right granted to the defendant under Section 140 Paragraph Five of the CPA to file an application for cancellation of securing a claim with the court that satisfied the application for securing a claim is not equal to the right to file an ancillary complaint. The Chamber of Civil Cases of the Supreme Court accepted and reviewed an ancillary complaint regarding decisions of regional courts by which applications for securing a claim were satisfied in cases No. C03011111 (06.04.2011.), No. C05042410 (15.11.2010.) and No. C02041310 (06.12.2010.), while pointing out the procedure for appealing a decision upon satisfying an application for securing a claim in cases No. C05039608 (09.07.2010.) and No. C04324007 (08.12.2010.) and revoking the decision of the judge of the regional court in case No. C33341010 (06.04.2011.) which rejected

initiation of appellate proceedings in relation to the defendant's ancillary complaint.[3]

Indicating the shortcomings of the procedure for appealing decisions related to securing a claim, on 28 February 2012, the 2nd Division of the Constitutional Court initiated the case "Regarding compliance of Section 141 Paragraph One of the Civil Procedure Act with Section 92 of the Satversme (Constitution) of the Republic of Latvia to the extent the former does not stipulate the right to file an ancillary complaint regarding a decision that satisfies an application for cancellation of securing a claim". Under the disputed provision the defendant may appeal a decision that rejects an application for cancellation of securing a claim, but the defendant may not appeal a decision that satisfies the same application.

In the opinion of the FICIL, in order to ensure fairness and equal access to the court it is necessary to provide that an ancillary complaint may be filed for a decision to secure a claim.

3.4. Procedure for contesting uncontested forced performance

- The FICIL suggests amending Section 406 of the CPA by supplementing it with Paragraph Three that would state that the debtor must provide evidence that a creditor's claim is not justified as to its substance (as in Section 137 of the CPA) and the court must assess substantiation of the debtor's request to suspend uncontested forced performance upon adjudication on satisfying or rejecting the request and to provide relevant reflection of the assessment in the court decision.

4. SCOPE OF STATE FEE

4.1. Scope of state fee in large claims

- The FICIL proposes amending Section 34 of the CPA by increasing the state fee for claims whose monetary value exceeds LVL 100 001.

  Although it is understandable and reasonable that the amount of the state fee for large claims is not proportionate to the amount of the state fee in smaller claims, the FICIL believes that the present formula for calculating the state fee in cases where the amount claimed exceeds LVL 100 001 calls for some improvement. It is not commensurate that in a case with an amount claimed of LVL 1000 the claimant actually pays a state fee of 15%, while in a case with an amount claimed of LVL 1 000 000 – the state fee is LVL 27 490 or approximately 0.03% of the claimed amount. To compare – the state fee for claims of LVL 1 000 000 is almost ten times higher in Estonia and approximately three times higher in Lithuania.

  The FICIL indicates that the comparatively small state fees in cases with considerable amounts claimed, for instance, LVL 100 000 and over, stimulate submission of statements of claim aimed at delaying performance of large-scale obligations, thus increasing the load on the courts without justification. We find that it is still possible to determine higher state fees

[3] Skat. Vanags J. "Ar prasības nodrošināšanu saistīto lēmumu pārsūdzēšana", available at: http://www.juristavards.lv/index.php?menu=auth&id=234709

for large claims in comparison with the present regulation of the CPA without threatening persons' right of access to the court.

At the same time the FICL indicates that the amount of the state fee for securing a claim should not be raised. Presently Section 34 Paragraph One Clause 5 of the CPA prescribes that the state fee payable on an application for securing a claim is 0.5 percent of the amount claimed but in any case not below 50 lats. Hence a situation arises where the fee payable for securing a claim in the case of a large claim is higher than the fee payable for raising the claim in general, although reviewing an application for securing a claim within legal proceedings is only a single separate procedural step in comparison with the overall review of the claim. It appears necessary to set a fixed upper margin for the state fee for securing a claim at a particular amount.

5. COURTS OF ARBITRATION

5.1. Requirements for founding a court of arbitration

- The FICIL suggests amending Section 486 Paragraph Three of the CPA by establishing certain requirements for the founder of a court of arbitration. Presently Section 486 states that a permanent court of arbitration may be founded by one or several legal persons without stating any additional requirements for a legal person as founder of a court of arbitration. Considering the flaws established so far in the operation of Latvian courts of arbitration, we suggest, for the purposes of ensuring authoritative and legal arbitration proceedings, requiring that a court of arbitration may be founded by associations of industries and companies and chambers of commerce the number of members, aims of operation and experience of which would give credibility to the institution of arbitration and provide a sufficient knowledge base for fair and professional resolution of cases.

5.2. Requirements for an arbitrator

- The FICIL proposes amending Section 497 of the CPA by imposing additional qualification requirements for a candidate to the position of arbitrator, that is, a requirement of higher education or at least relevant professional experience. Imposing qualification requirements relates to the obligation to resolve disputes and setting an enforceable arbitration award.

  In order not to restrict the freedom of choice of the parties the FICIL suggests that the law would state that by agreement between the parties a person who does not comply with the above requirements may be appointed as arbitrator – in which case the parties would themselves undertake responsibility for the capacity of the arbitrator candidate to deliver an appropriate arbitration award. The FICIL indicates that upon agreeing to resolve their dispute in a court of arbitration the parties should have the option to state other more particular requirements to be set for the arbitrator in the arbitration clause.

5.3. Liability of arbitrator

- The FICIL suggests amending the CPA by increasing the liability of the

arbitrator for legal proceeding of the arbitration process and determining liability for omissions by the arbitrator whereby the arbitrator fails to inform the parties of likely conflict of interests.

Section 497 of the CPA states that the arbitrator must honestly perform his duties, without submitting to any influence, he must be objective and independent. Under Section 501 of the CPA, as soon as the arbitrator becomes aware of circumstances that may cause reasonable doubts regarding the objectivity and independence of that person he must immediately disclose it to the parties.

The FICIL believes that the mechanism of liability of the arbitrator should be improved by facilitating the interest of the arbitrator in legal proceeding of the arbitration process.

5.4. Removal of arbitrator

- The FICIL suggests amending the CPA by setting forth higher requirements for reviewing removal of an arbitrator.

Presently Section 502 of the CPA provides that the parties may agree on the procedure for removal of an arbitrator. If the parties do not agree on the procedure for removal, in the case of a permanent court of arbitration removal is determined according to the regulations of the court of arbitration, but in the case of a court of arbitration established for resolving a particular dispute removal is determined by the arbitrator in person. If the arbitrator whose removal has been applied for does not withdraw from performance of his obligations the issue of removal is decided by the other arbitrators. Where the dispute is resolved by one arbitrator the issue of removal is decided by that arbitrator.

At the same time Section 536 Paragraph One Clause 3 of the Civil Procedure Act states that: "*the judge refuses to issue a writ of execution if the party against whom enforcement of the arbitration award is requested submits evidence that [..] the court of arbitration was not established or the arbitration process was not conducted according to the terms and conditions of the arbitration agreement or Part D of this Act.*" Part D of the CPA contains provisions requiring the objectivity and independence of arbitrators (for example, Section 497 Paragraph Three of the CPA).

It is therefore necessary to ensure that removal of an arbitrator is assessed as completely and objectively as possible already at the initial stage of the proceedings to avoid repeated review of the dispute. Considering that minimum requirements have been set forth for an arbitrator candidate that do not necessarily include knowledge of a legal nature, it is possible that the arbitrator is personally unable to objectively assess substantiation of removal.

For example, the UNCITRAL model law states that unless the parties have set another procedure, removal is decided upon by the members of the court of arbitration, but if removal is not accepted the decision may be appealed

to the court or another state authority within thirty days. In that case the decision of such court or competent authority is final and not subject to appeal. The court of arbitration may continue the arbitration process while the request is being reviewed. A similar procedure for reviewing removal is provided in the *Swedish Arbitration Act (1999)* and the *German Arbitration Act (1998).*

If a proposal to file the issue of removal of an arbitrator for review with a court of general jurisdiction is not supported, the FICIL suggests that the issue of removal is adjudged by the chairman of the court of arbitration if the dispute is reviewed by a single arbitrator. If the dispute is reviewed by several arbitrators, to determine that the issue of removal of a particular arbitrator is decided by other arbitrators. In that case, the arbitrator whose removal has been applied for is considered removed if at least a half of the arbitrators consider that removal is substantiated. These amendments could eliminate subjectivism to a certain extent in relation to adjudging the issue of substantiation of removal. The above issue should also be viewed in the context of the obligation of arbitrators to disclose circumstances that may cause reasonable doubts regarding the objectivity and independence of this person and liability for failure to comply with this obligation.

5.5. Electronic access to court documents

- The FCIL proposes amending the CPA by determining that a court of arbitration should ensure electronic (on the homepage of the court of arbitration) public access to such documents as the list of arbitrators, information on the education and professional qualification of the arbitrators and the regulation of the court.

  A number of legal provisions of the CPA state that unless the parties have agreed otherwise, the issue is decided according to the regulation of the court. It is in the interests of the parties to verify compliance of the regulation of the court of arbitration with the interests of the parties, the qualification of arbitrators and the capacity of the arbitrators to resolve the dispute. Therefore companies should have access to information on a court of arbitration and its arbitrators to agree on a suitable and professionally appropriate court of arbitration.

  The proposal of availability of statistics on decisions of courts of general jurisdiction regarding issue of writs of execution and refusals to issue writs of execution should be considered as it would allow the parties to indirectly assess the capacity of the court to deliver “enforceable” arbitration awards and the level of compliance with the procedural order at the court of arbitration.

5.6. Contents of arbitration award

- The FICIL suggests amending Section 530 of the CPA by supplementing the legal provision with the obligation of the court of arbitration to provide sufficient argumentation.

  Namely, the arbitration award should indicate why the court has given

priority to one piece of evidence in comparison with another piece of evidence and found some facts to be proved and others unproved. In the motivation part the court should indicate the facts established in the case, evidence on which the court has based its conclusions and arguments by which some or other pieces of evidence have been rejected. In this part the court should also indicate the regulatory enactments that the court was guided by and the legal assessment of the established facts in the case, as well as the court's conclusions regarding whether the claim is substantiated or not substantiated. Only if the defendant has recognised the claim in its entirety may the motivation part of the arbitration award contain only reference to the regulatory enactments that the court was guided by.

Present regulation determines that an arbitration award should contain a motivation, while the law does not further specify what the motivation should contain in its turn. This can lead to unjustified judgments. The Senate of the Supreme Court has issued protests exactly on the basis that a judgment has not been motivated[4]. The above amendments would only improve the quality of arbitration awards. Considering the principle of voluntariness of the parties in relation to dispute resolution in a court of arbitration, the legal provision that the judgment does not have to contain motivation if the parties so agree should be retained.

5.7. Determining the jurisdiction of a dispute

- The FICIL proposes amending Section 495 of the CPA by determining that in the event of a dispute subjection of the dispute to a court of arbitration should be decided by the city (district) court on the basis of an application by an interested party.

Presently, according to Section 495 Paragraph One of the CPA, a dispute regarding subjection of a case to a court of arbitration is reviewed by the court of arbitration itself. In the opinion of the FICIL, if the arbitration clause is included with the aim of bringing an action in a particular court of arbitration or if the court of arbitration is not objective or fair, adjudication in respect of the validity of the clause by the members of the court of arbitration is not purposeful and such adjudication cannot achieve the aim set forth by the law. It follows that supervision by a court of general jurisdiction over activities of courts of arbitration is advisable even at the initial stage of arbitration. The parties would be entitled to submit the application to the city (district) court until adjudication of the case on the merits. The application would be reviewed through written proceedings within one month. To discourage the parties from submitting unsubstantiated applications a state fee should be imposed on such application to the court. The court decision regarding subjection of the dispute would not be subject to appeal.

[4] See e.g. cass No. SPC-10/2008 and No. SPC-43/2008.