PART THREE

REFORM IN CIVIL LAW AND PROCEDURE

1. General

While the development of civil legislation does not always bear directly on corruption, it can provide conditions that are either favorable or hostile to the forms of corruption. The past thirteen years have seen fundamental changes in Bulgarian civil law in response to the need for new rules on civil relationships, given the transition from a planned to a market economy and the introduction of European standards in this area. The numerous legislative amendments, however, have not always been well-thought-over and consistent with each other and have entailed contradictory enforcement and, finally, inadequate rules and protection of the rights of the subjects of civil law. In addition, half-way, superficial and often unsuccessful reforms have failed to prevent corruption in the administration of justice in civil cases, whereas the enforcement of already adopted legislation has not revealed any tangible corruption-deterring potential. This virtually undermines the very idea of the rule of law or even the elements of statehood.

One of the explanations for that inconsistency and for the failure of man attempted reforms is that the changes are often drafted by experts lacking the required multi-faceted knowledge who are politically allied or connected with the interests of various economic groups. In addition, there has been a growing practice for judges to draft the reforms of their own activities, of prosecutors and investigators to do the same about their own work, for attorneys to be required to develop the rules on their operations, etc. In this situation, some inertia inevitably comes to surface and the majority of judges prefer the status quo in quite a good faith as they are tired of reforms. On the other hand, the stand of an insider is rarely sufficient to pinpoint the defects of any system. At the same time, if an attempt is made to overcome corrupt phenomena and practices, those benefiting from the status quo would be the ones to offer the most serious resistance.

The indiscriminate reliance on advice by foreign experts, and the automatic copying of legal rules existing elsewhere have not proven to be any more successful. This is also valid for the formalistic and mechanical transposition of provisions from the EU directives.

The disturbing findings about the situation with civil law and procedure (including the enforcement of judgments and the provision of collateral) generate the **need for a swift and radical anti-corruption reform** in respect of civil procedure and for a further systematic, coherent and consistent development of substantive civil law. To outline the parameters of that development and the specific reforms to be proposed, it is compelling to identify the existing problems and to carry out a serious and in-depth analysis of any factors that impede the problem-free development of a modern civil turnover in the setting of a free market economy and under the rule of law.

1.1. Problems in substantive civil law

Substantive civil law is aimed at providing comprehensive regulation of an extremely important sphere of social relations. Not only is it applied by judicial bodies, but it is also binding on all subjects of law. As long as the disputes resulting from alleged transgressions of the laws are resolved by the court, the shortcomings and inconsistencies in substantive law affect adversely the quality of the administration of justice and, hence, public trust in the Judiciary. The problems in substantive civil law are therefore interwoven with those in civil procedure and these two sets of problems should indeed be addressed jointly.

1.1.1. In the field of **property law**, the main spots of corrupt pressures could be said to exist in the following areas:

- **notarial law**

The imperfect rules on the operation of private notaries seriously undermine the notarial form of authentication and often pave the way to corruption or serve as an incentive to crime in civil relationships or in the course of court proceedings.

- **the system of registration of real estate transactions**

The existing system fails to provide **for genuine guarantees and certainty** in the case of real estate transactions. Real estate registers are currently kept and entries are made in the 100 regional courts scattered across the country, and in paper form. This generates enormous problems as far as the reliability of the information and legal certainty are concerned. For objective reasons, the process of changes (building up a national electronic cadastre and developing that cadastre into a nation-wide data base) launched with the enactment of the *Law on the Cadastre and on the Real Estate Registry* (in force since January 1, 2001) is lengthy and expensive, and would hardly be finalized soon. At the same time, that process has not been linked yet to the required changes in the system of registries in general, or in the system of company registration, in particular.

1.1.2. In the field of **commercial law** as well, there are statutory preconditions for actions that might, directly or indirectly, entail corruption:

- **company law**

Despite the attained high level of harmonization of Bulgarian company law with EC company law, **no satisfactory degree of certainty has been achieved yet** in the commercial and economic turnover, nor has it been put on a transparent and corruption-free basis. Such an objective has been pursued with the last amendments to the *Commercial Law* of June 2003 (published, SG, issue 58 of 2003) and in particular the detailed regulation of companies' transformation and conflict of interest prevention. In addition, while amendments have been initiated to protect minority shareholders, the excessive aspiration to uphold their rights sometimes yields the opposite effect - there have been cases of abuse against majority shareholders, and this serves as a vehicle to impede the

day-to-day operation of companies.

- **the legal framework of corporate insolvency**

Previous amendments to the rules on corporate insolvency have not resulted in any material acceleration of insolvency proceedings. **The potential therefore persists for attempts to obtain appropriate judgments more quickly by resort to corrupt methods**. References to the rules on execution laid down in the *Code of Civil Procedure* also contributed to complicating and delaying the proceedings. The number of cases instituted in previous years and the number of newly-opened insolvency proceedings remain excessive. The last amendments to the *Commercial Law* aim at to overcome most of these shortcomings, however it is too early for the results of their implementation to be predicted.

- **the system of company incorporation**

The status of company incorporation forms part of the problem with the status of registration in general. The inefficient system of court registration in Bulgaria[11] is among the factors that predetermine the high level of corruption in court. The existing registers in Bulgaria are primarily decentralized and the courts keep them in paper form. Some courts have experimented with automated information systems but electronic records have no legal effect as yet. As the volume of information in the registers is growing, the data become ever less accessible and handling those data becomes slower and slower, or even impossible. This, in turn, contributes to a **strong corruption pressure both when certain entries are made in the registers and when information from the registers is to be obtained**.

Given the non-contentious nature of incorporation procedure that develop before the company divisions of district courts, the judges are deprived of any genuine opportunity to control the lawfulness of the resolutions that are passed by a legal entity and are subject to registration, *e.g.* those for changing the members of company governing bodies. Work organization in company divisions is not based on unified standards that might ensure the speediness and reliability of the registrations and entries made, so these factors become dependent on non-magistrates (*e.g.* court clerks). The obsolete, or even antediluvian, manner of keeping the registers and browsing them for information, and the extremely complex procedure of modifying or rectifying the information in them form a powerful weapon to „take over the control of companies“ to the detriment of minority shareholders. People involved in registration proceedings believe that a number of courts have unwritten „rates“ for every service that is provided. Not only does that situation inhibit the normal development of business and turnover, it also **fuels the resistant public perception of corruption in the judicial system**.

1.1.3. In the field of **labor law**:

Irrespective of the positive developments in the legal framework of employment relationships designed to bring those in conformity with modern economic conditions, labor cases are still the largest share of all

[11] This is true both of the registration of legal entities in general, including those with non-for-profit objectives, and for the real estate register.

court cases in Bulgaria, while substantial unemployment persists. A number of essential issues are still on the agenda, namely to provide better guarantees for and protect the right to work as proclaimed by the Constitution, and to define the effects of the unlawful settlement of labor disputes. Employment relationships and labor disputes also mirror the problems which exist in other sets of connected legal relationships, such as administrative, civil service, social security, pension, social assistance and unemployment benefit relations, etc. which could transfer elements to corruption to labor cases.

1.1.4. Contemplated reforms in the field of **family law** have not taken place yet, regardless of the ongoing debate. The inadequate rules on **adoption** nurture myriad corrupt practices, sometimes with international involvement.

1.1.5. As regards **consumer protection**, consumers whose interests have been harmed are not yet able to defend their rights collectively (i.e. no class actions are possible).

Last but no least, account should be taken of the fact that in most cases corrupt practices linked to substantive civil law are due not to the imperfections of the legal framework *per se* but to the corrupt attitudes of the entire society, to defective civil procedure, to the flawed administrative law, to the lack of liability for public officials and to inefficiency of criminal legislation.

1.1.6. As regards **civil liability for criminal offences**, including corruption-related crimes, the *Draft Law on Forfeiture by the State of Property Acquired through Criminal Activity* (prepared by MoI) has kindled vivid discussions. Particularly debatable are the proposals to introduce a **supplementary pecuniary sanction** (parallel to and independent of any criminal liability), as well as **summary procedures**, referred to as **special procedures** for freezing and seizure with a view to forfeiture. While the draft law provides for a machinery for the quick freezing and forfeiture of assets derived from criminal activity (and this could enhance the combat against crime), it fails to provide any guarantees against the unlawful application of its measures so as to serve improper economic or political interests. The intended benefits of the future law could thus produce nega-

OPINION ON THE POSSIBLE INTRODUCTION OF FORFEITURE BY THE STATE (INCLUDING FREEZING AND SEIZURE) OF PROPERTY ACQUIRED TROUGH CRIMINAL ACTIVITY

	Yes	No	*Does not know/ No response*
It would be a tool to quickly forfeit and freeze assets derived from criminal activity, thus contributing to a more efficient suppression of corruption	70.0	18.3	11.7
A good idea but no sufficient guarantees against possible abuse	75.8	11.9	12.3
It would not contribute to deterring corruption	19.8	61.0	19.2

Source: CMS of *Coalition 2000*

tive effects in that the law could support corruption instead of preventing or penalizing it.

The polls conducted during the debates on the draft to identify the public opinions about the importance and the expected results of the draft have revealed a high level of approval and support of the measures proposed. This could be attributed to the awareness of the need to resist growing crime by resort to more stringent and quicker measures. At the same time, despite the large-scale approval of the draft and its expected positive effect as an efficient deterrent of corruption, many respondents have voiced concerns about possible abuse.

1.2. Problems in civil procedure

Unlike substantive civil law where the separate institutes exist relatively autonomously and the drawbacks of existing rules that entice into corrupt practices could be rectified relatively independently, this is impossible for civil procedure as, on the whole, it is of crucial importance to the combat against corruption in all its forms. This is so as, on the one hand, civil procedure is both a general technique of protecting substantive legal relationships and a key tool to resist corrupt phenomena.

On the other hand, civil procedure in its nature is a means to protect substantive civil rights and legal relationships in an environment of adversarial litigation and clashing interests of disputants where the resolution of a legal dispute depends on the pronouncement made by the competent authority (which consists in steps undertaken by natural persons forming the personal substratum of the authority in question). Therefore, civil procedure itself is a focal point where corrupt practices become easily visible.

The previous endeavors for reforms could be given a two-fold description:

1.2.1. **In the first place**, the law-maker has failed to even attempt to identify and incorporate in the legal framework the modern trends in the law of civil procedure. Instead, the Legislature undertook, yet in a rather straightforward manner, to reproduce old rules created and used in the past and not quite fit for the contemporary conditions. Moreover, those rules were not particularly familiar to that generation of Bulgarian lawyers who were supposed to apply them. The implementation of the reform naturally highlighted a number of flaws in the rules. The approach widely used to remedy those was rather „cosmetic“ in that the amendments designed to improve the rules not only failed to hit their target but in a number of occasions evoked other serious problems.

1.2.2. **Secondly**, those amendments were not provided with a sound material and financial basis and most of them turned out to be populist moves. Therefore, they only deepened the divide between the public and the Judiciary.

The numerous incompetent attempts to improve the rules of civil procedure have resulted in a situation which often amounts, for all practical purposes, to a **denial of justice**.

Besides, some other key factors have also contributed to the failures in civil procedure, such as:

- The inefficient or totally lacking criminal repression. This is the core reason for all sorts of abuse when adversarial proceedings, collateral proceedings or enforcement are in progress.

- The lack of working mechanisms for attaching disciplinary, administrative or civil liability to unlawful or improper behavior. The rules on liability (in all its forms) give the impression that „everything is allowed - or at least goes unpunished". A sustainable public disrespect for justice is thus perceived. This is a **negative factor of a particular weight** in itself. Those moods have recently been reinforced by the overall discontent with the work of the courts and by the day-to-day encounters of ordinary citizens with the impunity of individuals whose unlawful behavior (in the widest sense of this term) deserves the strictest possible sanctions but who tread the public domain as „successful people", in contrast to those who have „failed" because they have been law-abiding and respectful of the legal order.

All those factors generate legal nihilism and a total disrespect for law which could finally prevent the functioning of the state on the basis of the rule of law.

Some other specific problems of civil procedure deserve a special mention as well:

- The introduction of **three-instance procedure** has resulted mostly in a „lavish" civil procedure where the functions of the first and the second instance largely overlap; procedural discipline is poor as evidence can be submitted even when the case is reheard by the instance of cassation. There are no good reasons why all cases should be handled by all the three instances. It is especially unacceptable for the facts of a case to be established by two instances in a row which, moreover, have similar powers in that respect.

- **Irregular summoning** and the infinite dodges the parties are used to employ represent key factors for the lengthy proceedings in any individual case.

All previous changes have modestly attempted to place the burden of obtaining information about the procedural developments on the party itself. Nonetheless, there are still opportunities now (after several amendments along these lines since 1997) to delay the proceedings by interrupting the order of summoning, and also because of the need to serve notice that the written judgment is ready (after the end of the procedure before first and second instance).

- Substantial amendments to **enforcement procedure**: an area which is susceptible to corruption has remained almost unreformed over the past 13 years. The latest amendments to the *Code of Civil Procedure* (in force as from 11 November 2002) were geared towards improving and accelerating the proceedings. At the same time, one could be skeptical about the expected suppression of corruption as there are still statutory possibilities to procrastinate cases, *inter alia* by use of corrupt means.

SPREAD OF CORRUPTION IN DIFFERENT SEGMENTS OF CIVIL PROCEEDINGS

	%
Adversarial litigation	20.0
Collateral proceedings	5.9
Enforcement proceedings	14.8
Non-contentious litigation (including registration proceedings)	13.9
Other (please specify)	0.9
Equally spread in all segments	12.1
No corruption exists in civil proceedings	5.3
Does not know/No response	27.1

Source: CMS of *Coalition 2000*

• The existing framework of **enforcement and collateral procedures** reveals another shortcoming which is essential in terms of deterring corruption. In most cases collateral and enforcement (which largely predetermine the economic contents and the efficiency of the legal protection) are decided on by a district (usu. second-instance) court and the disputed facts can never be invoked again before the Supreme Court of Cassation. This entails all sorts of „inventions", let alone the fact that corrupt practices develop much easier at local level (for example, there could be an award by a reputable international arbitration court in favor of a party and the three-instance proceedings for recognition and enforcement of the award in Bulgaria could have been finalized successfully; later, the same party might fail to obtain collateral or to enforce the award and such cases could only be reviewed by district courts).

According to the results of the survey, one out of four magistrates is of the view that corruption is most widespread in adversarial litigation. It is noteworthy that this opinion is mainly shared by public prosecutors and investigators, whereas judges mostly believe corruption exists in non-contentious litigation (including registration proceedings) and enforcement.

2. The objective of reforms in civil law and procedure

The reforms are intended **to propose measures whereby all factors** whose manifestation hinder, in one way or another, the modern and efficient administration of justice in civil cases **should come under attack**. The result should be court orders and judgments of high quality, lawful and fair. In the long run, reforms in civil law and procedure should bring about a serious change in the current paradigm of all social relations which can be depicted as a superficial and formalistic perception of law and failure to respect the government institutions, coupled with high levels of crime and corruption even among those vested with the exercise of public functions, and all this to the detriment of the helpless ordinary citizen.

Apparently, there is a compelling need for a comprehensive and in-depth reconsideration of the „overall design" of the rules on civil law and procedure in all their aspects. Along these lines, it is very important, though insufficient, to draft a good model of a civil procedure law.

3. Proposed reforms

3.1. Amendments to commercial law

The half-way solutions and the inefficient amendments made so far have imposed the need for a fundamental and substantial reworking of insolvency procedure, as these are now endlessly inefficient and formalistic, and form a major source of corruption. The *Amendments to the Commercial Code* passed in June of this year contain some provisions to accelerate insolvency proceedings and to improve corporate governance (better legal guarantees for the participation of shareholders in the General Meeting, improved corporate management and supervision rules, and avoidance of conflict of interests). These should **reduce the chances for corruption and enhance transparency**.

Changes in this sphere are a must for the development of commercial and economic operations in the country on a non-corrupt basis. Those changes, however, should be carefully thought over and discussed with all stakeholders. That would help establish a statutory framework matching the everyday needs and avoid the turbulence of frequent amendments that generate instability and uncertainty.

3.2. Registration reform

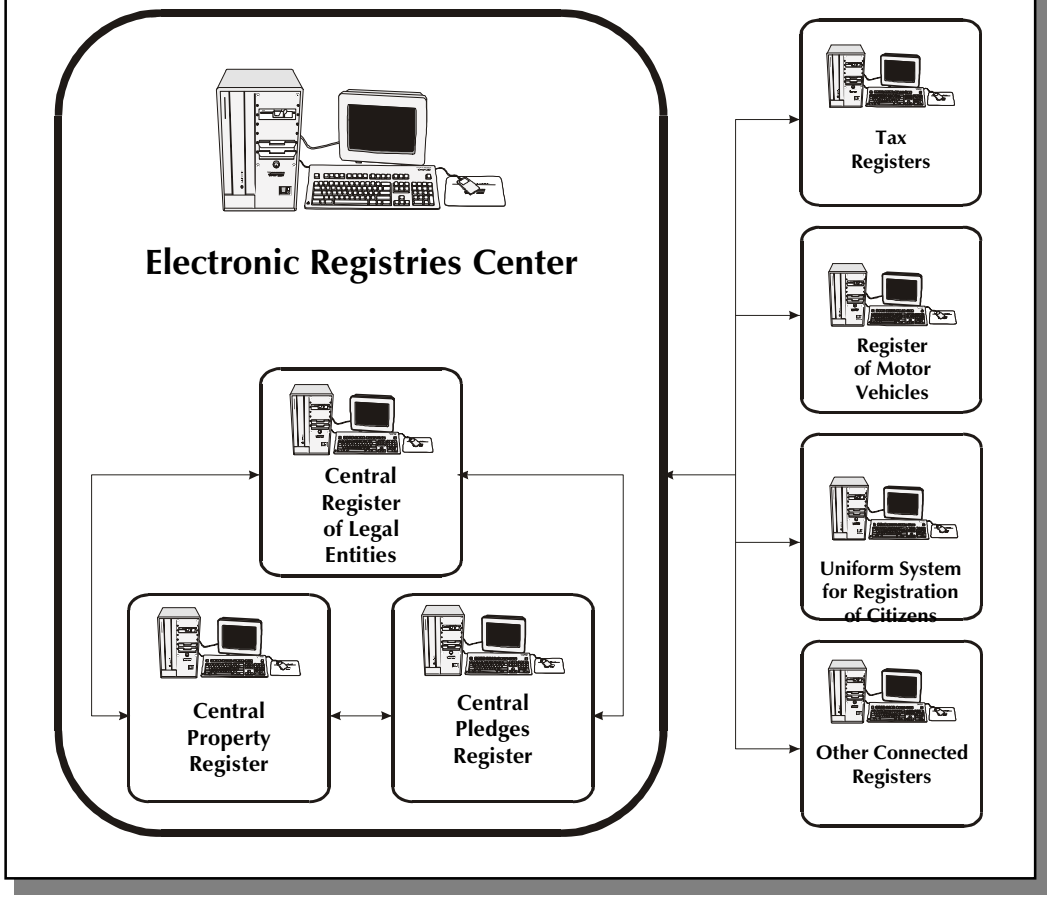
To meet the needs of modern turnover, the registration system should be centralized, kept in an electronic form and enable the making of entries and the provision of information by way of electronic real-time telecommunication. The persons concerned could thus notify any third party of newly-occurred circumstances and facts within the matter of hours, by way of electronic registration. Third parties, in turn, would be able to check the status at the register virtually at the time when transactions occur. The **possibilities for any illegal moves** in relation to registration and to the receipt of information **would thus be reduced to a minimum**.

A good possibility to modernize the registration system and to reduce its corruption potential would be to replace the current manual registration in court with registration at a Central Register of Legal Entities. This should be a public institution (a state agency) attached to a central authority (the Ministry of Justice or the Ministry of Economy, etc.).

The existence of such a Central Register would form the basis for building up an **Electronic Registries Center**.

The **Central Register of Legal Entities** could compile the registration data for all legal persons governed by private law and for all state-owned enterprises (political parties and trade unions will be excluded). The legal entities register could be merged with the Central Pledges Register. Such a single register would contain all the information on the persons and on any collateral provided by them, thus avoiding the useless duplication of information in the commercial register, and in the pledges register and the ensuing risks of mistakes and inconsistencies. In the longer run, we could think of merging the legal entities register and the real estate register so as to produce an **Electronic Registries Center**. Of course, this could only be done after the national electronic cadastre has been finalized and incorporated in the single national data-base. In parallel, the registration reform should gradually boost the merger of or linking to other existing or newly-set registers (tax registers, motor vehicle registers, etc.).

PROPOSAL FOR THE STRUCTURE OF THE ELECTRONIC REGISTRIES CENTER



The move to a **Central Register of Legal Entities** and to an **Electronic Registries Center**, coupled with the projected inclusion of the real estate register in that system, would act as a strong deterrent to corruption and would narrow down substantially the possibilities for any unlawful practices in the operation of the registers.

3.3. Amendments to labor law

The objective is to introduce **an adequate statutory framework to counter the discriminatory practices** of employers, as these essentially come down to a violation of the right to work as proclaimed by the *Constitution*.

- a national program (strategy) should be drafted for the abolition and prevention of discrimination with respect to employment and the professions;
- a legal definition should be provided of direct discrimination which should cover *inter alia* harassment at work (including sexual harassment);
- work of comparable value should be provided for and regulated;
- a list of supplementary payments should be drawn up in order to uphold the equal pay principle (s. 243 of the *Labor Code*);
- the employer (defendant) should assume the burden of proof in cases where allegations are made of discriminatory practices at the workplace;

- the idea is discussed to set up **labor courts** to meet the need for specialized, quick and competent administration of justice in labor disputes.

In the field of labor law, attention should be given to the practices of **indirect (hidden) discrimination** in the exercise of employment rights and obligations. The making or termination of contracts of employment partially depends on personal and political relationships and connections. Sometimes privileges or restrictions can be found which are based on nationality, origin, sex, race, color, age, political or religious belief, memberships of particular trade unions or other public organizations or movements, family, social or property status, or disability. These issues have not been debated yet but bear directly on the development of corrupt processes and on the possibility to prevent such processes right at the outset or as substantive legal relationships develop. They also affect the way in which cases are heard and resolved. Last but not least, this topic is particularly important and relevant in the context of aligning Bulgarian legislation with EC law, and needs to be specifically addressed.

3.4. Proposed reforms in civil procedure

3.4.1. The number of instances and other general issues of civil procedure

The entire paradigm of the existing three instances civil procedure should be revisited:

- It is recommended to introduce regular **two-instance procedure, with a possibility for an extraordinary review** by the Supreme Court of Cassation of all aspects of the substantive and procedural rules involved in a case, while carefully developing the criteria for allowing such reviews. The procedure under s. 231 *et seq*. of the *Code of Civil Procedure* should be kept.

It is unacceptable to preserve the proceedings before the second instance in their current form. The view that prevails in practice is that the appellate instance is „another first instance". Regretfully enough, that view is no more than a primitive textbook clichè (and regretfully, again, it is that view that underlies Interpretative Decision No. 1/99 of the Supreme Court of Cassation). Modern requirements would be matched far better if the appellate court just had the power to review the judgment and reverse it (this was in fact the second-instance procedure before the start of the reform). In addition, the admission of new evidence should only be confined to newly-occurred circumstances or to the disclosure of existing facts or evidence that could not have been known to (or established by) the parties despite their best care and good faith. The remittance of cases to the lower instance should only be reserved for judgments that are void and inadmissible (provided that it is still the court that has to pronounce) and to the most flagrant procedural violations.

The judgments should become final after the pronouncement of the second instance.

Rulings (*i.e.* court acts other than final judgments on the merits) which are explicitly subject to appeal by virtue of the law should be reviewed by the Supreme Court of Cassation.

- It is of the essence to define **the powers of the separate instances** and to avoid the unnecessary redundancy in their work[12]. The powers of the Supreme Court of Cassation should be regulated in such a way that the supreme instance could no longer be used as a regular instance in almost all cases. At the same time, a genuine possibility should be preserved for the Supreme Court of Cassation to perform its constitutional function to ensure the accurate and uniform application of the laws by all courts. It could also be provided that the Supreme Court of Cassation shall pronounce in cases where substantial financial interests are involved.

Irrespective of the technical form to be used for that purpose (the Supreme Court of Cassation could either stop acting as a regular instance and *extraordinary review* could be introduced similar to that existing before, or could alternatively keep its nature of a third regular instance with a possibility to pronounce selectively (like the Supreme Court of the United States), thus the work of the Supreme Court of Cassation would largely be relieved and its quality is expected to improve as a result of that. Indeed, the workload of that institution is currently unbearable.

On the other hand, the possibilities to remit the case back for rehearing by the lower instance (whichever it is) should be very limited.

- An alternative would be to keep the regular three-instance proceedings but sharply reduce the number of cases on which the Supreme Court of Cassation would pronounce (it should ensure the accurate and uniform application of the laws by all courts when it comes to fundamental issues of law-enforcement, and then (optionally) pronounce on cases where very large public or financial interests are at stake).

If the three-instance regular procedure is kept (regardless of whether the Supreme Court of Cassation would be empowered to pronounce selectively), parties should be allowed to „skip instances" where the issue at stake only concerns the correct application of substantive rules.

- The number of instances involved in the recognition and enforcement of foreign judgments and arbitral awards also needs to be reconsidered (two instances are recommended, the first of them being Sofia Court of Appeal (or the appellate courts) and the second being the Supreme Court of Cassation.

- The **participation of counsel in civil proceedings** should be radically revised. At present, attorneys bear no responsibility for any abusive exercise of procedural rights stemming from the law. Responsibility must be provided for, including suspension or disbarment for clearly unreasonable procedural steps (similarly to the arrangements in other countries, *e.g.* the United States).

As a guarantee for the liability of counsel, any steps on behalf of a party should be prohibited where there is authorized counsel, etc. A requirement should be introduced for the illness of a party or attorney

[12] The rules on the operation of the first instance will be addressed separately, see below.

involved in a case to be established only by „medical doctors of confidence" with the respective court. To that effect, stringent rules should be put in place to regulate not only the ethics of judges but also that of attorneys.

- Rules must be enacted to outlaw contempt of court; the existing obstacles to serving summonses and notices on natural and legal persons should be removed.

- Strict legislative action should be taken to counter the widespread tendency of the administration and the municipalities to disregard the orders of the court and effective legal liability (criminal and administrative) should be introduced for failure to respect court acts. The existing rule of s.296 of the *Criminal Code* is clearly inadequate to resist this trend which has become disturbing.

- The so-called „mandamus proceedings" should be introduced (an institute known to Bulgarian legal history and to the modern legal systems in many countries, *e.g.* the Czech Republic, Israel, etc.).

- The idea should be discussed of setting up specialized labor courts that should act as a sole fast-track instance (two instances should only be provided for some very important categories of labor disputes), with a possibility for review by the Supreme Court of Cassation (the principle of selection should apply here as well).

3.4.2. Changes in procedure at first instance

Procedure at first instance should be seriously revized. At present, the parties tend to disclose their cases step by step and any new submission or objection by one of them forces the court to grant leave for counter-allegations by the other party. The procedure thus gets procrastinated. Moreover, the parties are able to keep their trumps for the last minute of the procedure at first instance (and with the liberal regime of appellate proceedings, trumps can even be played on appeal). In order to avoid that, the following steps are suggested:

- A **compulsory exchange of memoranda between the parties should be required before an open hearing is scheduled**. The parties should be obliged to make (or otherwise be precluded from making) all their relevant allegations and induce any evidence at their disposal, including authenticated depositions by individuals who could be summoned as witnesses (if there are new rules on the involvement of experts in the proceedings, they should also be required to provide beforehand their expert opinions on the case). There should be a double exchange of papers. Thus, before the parties appear in the courtroom for an open hearing, they will have disclosed all their possible allegations and evidence.

Of course, the existence of such a system requires an **effective and working system of legal aid** for the people unable to engage in legal proceedings on their own account because of financial constraints.

One possible effect of that approach would be a larger number of settlements already at the outset of the process. Depending on the

evidentiary material collected prior to the court stage, the court should have the power to instruct (or oblige) the parties to resort to **mediation or conciliation** with the help of qualified experts. This could make even larger the number of settlements (especially if the facts of a case are more complex than its legal aspects). At the same time, account should be taken of the potential for corruption that would be inherent in that arrangement. Such a framework would help root out the attitudes dating back to the classical period of adversarial proceedings, *viz*. to fight with all forces and means and to use the procedural possibilities to the maximum extent, even though the factual and legal aspects of the case are clear from the outset.

- It is necessary to rethink the rules concerning the **statements by the parties to a case**. The current situation where the parties can factually „conceal truth or state untruth" in the process without any attaching liability is grossly unacceptable from the point of view of modern requirements. In particularly, the rule of s.114 of the *Code of Civil Procedure* should be reworded as it currently excludes the possibility for a defendant who is a legal person to answer questions.

- Any opportunity should be excluded to submit evidence (other than newly-occurred facts or newly-discovered or newly-created evidence within the meaning of s.231 of the *Code of Civil Procedure*) after the exchange of memoranda and papers between the parties. That, however, should be effected by way of precluding the possibility to induce evidence later, rather than by imposing sanctions (as the latter are usually inadequate).

- The rules on the various types of **evidentiary means** should be updated. This is especially relevant in light of the latest technological developments, *e.g*. the large-scale use of the Internet, the introduction of e-signatures and e-commerce. On the other hand, though, abuse of the existing rules has reached disproportionate dimensions. Such abuse is an essential tool that benefits corruption.

- The **role of expert witnesses** in the proceedings should be reconsidered. It is no secret that the existing form of involvement of experts in the process is a major technique whereby a judgment can be obtained for a given party, at odds with the facts and the law. On the other hand, the provision of s.291 of the *Criminal Code* is far too narrow and fails to provide a decent list of possible forms of bad-faith conduct by the experts. It is high time to also introduce an ethics code for experts.

Proposals have been made as well to rely on the experience of common law systems in involving experts: each party could draw in an expert who provides an opinion and the final assessment would be in the hands of the court. Initially that would certainly make the work of the courts more difficult but it seems to be the only possible exit from the current practice.

- The rules on the **modifications of the claim** should be changed and there should be an explicit mention that a plaintiff „may modify or complement his or her claim".

- The rules on **keeping minutes** at open court hearings should be

reformulated. Given the modern technical methods of recording the statements made by parties, witnessed and experts, it is no longer thinkable for proceedings to be recorded „under the dictation" of the president of the panel (or of the judge). This is especially inopportune with respect to witness testimony as witnesses face criminal liability for false statements[13].

- The provisions should be improved on the **award of costs and expenses** and it should be provided that „reasonable" expenses for counsel (or for the involvement of experts, if the rules on experts are modified) shall be subject to reimbursement; the flippant requirement that expenses should only be incurred to pay „one" counsel should be removed. An express possibility should be provided to recognize contingency fees - for example, one could think of awarding such expenses on a conditional basis, the expense should then be proven or agreements to retain counsel, authenticated by a notary, could be recognized.

- Minimum rules should be introduced on the so-called **class actions**.

- The rules on **fast-track proceedings** should be revisited, including those on **appeals against delays**. Such appeals should be lodged with the president of the court where the case is pending and this route should also be available in proceedings before the Supreme Court of Cassation (if the current workload of that institution remains unchanged).

3.4.3. Summoning and serving notice

The rules on summoning and those on serving notices should be fundamentally revised.

- The **initial summoning for hearings** should be based on new rules. The requirement that the initial summoning of all legal entities is to take place at the address of their management should be refined. As regards natural persons, there should be a rule on the situation where the summonsing officer is physically unable to contact the addressee of the summons as the entrance of the building is not readily accessible (*e.g.* in estates with heightened security arrangements where the access of outsiders is prohibited).

- The person who signs the summons should be required to enter in it all his or her names and the address, regardless of the capacity in which they receive the summons (for that purpose, even an amendment to the existing framework could empower the summonsing officer to check the signatory's identity papers).

- **Serious liability should attach to any failure of summonsing officers** to issue the summons as prescribed by law. It should be explicitly

[13] There is a very good probability for someone sentenced for perjury based on court hearing minutes drawn up „under the dictation of the president of the chamber" to succeed in proceedings against Bulgaria before the European Court of Human Rights for the existence of such a rule.

provided that such offences would entail „disciplinary dismissal". This proposal is based on the existing widespread practice of summonsing officers to receive bribes in order to fail to summon a party properly, and those bribes largely exceed the fine they face (50 Levs). At the same time, the profession of summonsing officers does not require any special qualification and there are many unemployed people who could perform those functions.

- Where the case is adjourned and the next hearing is not immediately scheduled, **the party should take care to inform itself of the date of the next hearing** (to obviate the possible abuse by judges acting in bad faith, a minimum period of 10 or 15 or any other number of days between the date of scheduling the case and the date on which the actual open hearing takes place could be envisaged, so that parties would not be forced to inquire every day).

- **The pronouncement of judgments in civil cases could take place in an open hearing** (and in line with the principle described, and with the facility proposed above, a party should keep track of when the hearing is to be held). In that situation it would become unnecessary to serve the party with notice that the text of the judgment and its reasons are ready as that is a major factor contributing to procedural delays. In addition, pronouncement in an open hearing would mean that the judge will face both parties, when delivering the judgment, as opposed to the parties learning about the judgment from the court registers.

- After a careful examination of the existing internal regulations and taking account of the relevant international instruments, a rule should be introduced that if an individual cannot be found at his or her permanent address for more than 15 days, the summons should be left at the municipality in question and the summoning should be deemed regular.

The introduction of a radical rule should be considered, namely that once a party has been properly summoned for the case, that party should bear the burden of informing itself about the development of the proceedings up to their end at all regular instances. This would certainly require the supply of technical equipment and facilities for the remote provision of information to those citizens who need it.

3.4.4. Collateral proceedings and enforcement

It is urgent to uphold the rights of those seeking protection in collateral and enforcement proceedings by allowing review by the Supreme Court of Cassation (as restricted and selective as that review might be). In relation to that, the following steps are suggested:

- The rules on **allowing and obtaining collateral** should be fundamentally changed. It should not be forgotten, though, that security may be necessary regardless of the type of action brought; such a need exists also where the effects of a legal proceeding could entail secondary legal relationships.

- Tthe **grounds for enforcement** should be reconsidered (*e.g.* is it appropriate to maintain grounds for enforcement like the ones in s. 237(e) of the *Code of Civil Procedure* (like promissory notes). Such grounds for enforcement may enable horrific abuse while the instruments listed in the provision are not used for their key functions as prescribed by law.

- The rules on **enforcement** should be entirely revised. The existing provisions on the different methods of enforcement are in a completely intolerable shape - the paradigm needs to be changed. The only acceptable modern solution about foreclosure is to have auctions with open bidding, coupled with an unrestricted right to submit bids.

- It is compelling to discuss and introduce private enforcement (due consideration being given to the rights and wrongs of the rules on private notaries).

As to the specific proposals for reform in civil procedure, a contradiction comes to light when that matter is analyzed. On the one hand, the proposed reform is aimed at curbing and combating corruption in the area of civil procedure and civil law. On the other hand, some of the proposed options for a new framework of civil procedure may be expected to give rise to new sources of corruption. It could be safely assumed that giving the courts wider freedom (selective pronouncement of the Supreme Court of Cassation, etc.) would generate such new hubs of corruption.

Nonetheless, the building up of a system of a high-quality and effective civil procedure should be given priority, as the very fact of its existence would serve as a guarantee that corruption will be reduced and fought against.