

## litigation and arbitration – legal changes published in September 2017

**Appeal in the interest of law no. 11/2017 was published in the Official Gazette of Romania, Part I, no. 750 of 19 September 2017, being applicable from that date, regarding "the interpretation and application of the provisions of Article 39 of the Government Emergency Ordinance No. 195/2002 regarding traffic on public roads".**

The High Court examined the complaint filed by the Ombudsman in order to determine the functional competence of the fine issuing officers - from the local police or the traffic police - to require the owner or the mandated user of a vehicle to communicate the identity of the person to whom they entrusted the vehicle for driving on public roads, as well as to apply the minor offense sanctions provided by the law, in the case of refusal to communicate the requested information. In line with the case-law, some courts rejected the lawsuits filed against the fines, considering that the local police citations complied with the legal provisions and acknowledging the functional competence of the local police officers to identify the minor offences and apply sanctions. However, other courts established that the local police do not have the functional competence to request the identification data of the persons guilty of breaching the legal norms, considering that the minor offense sanction can be applied only by the traffic police within the General Inspectorate of the Romanian Police. The High Court admitted the appeal in the interest of the law and established that in the interpretation and application of the provisions of Art. 39, art. 102 par. (1) point 14 and art. 105 point 10 of the Government Emergency Ordinance no. 195/2002 regarding traffic on public roads, referring to the provisions of art. 7 lit. h) of the Local Police Law no. 155/2010, only the investigating police officer has the competence to request the owner or mandated user of a vehicle to communicate the identity of the person to whom the vehicle has been entrusted for driving on public roads and to apply the minor offense sanctions provided for by law for refusal to communicate the requested information.

**The ECHR judgment in Gutău v. Romania was published in the Official Gazette of Romania, Part I, no. 755 of September 21, 2017.** The case originated from a trial brought against Romania by a Romanian citizen who denounces a violation of the right to a fair trial: he accused the High Court of having sentenced him to a criminal conviction without direct administration of the evidence on which he was acquitted by lower grade courts. In this case, the Court finds that the Alba County Court and the Alba Iulia Court of Appeals considered that the documents in the file, including the statements of several witnesses, justified the applicant's acquittal. It points out that the High Court did not have any new evidences to replace his acquittal with a criminal conviction for bribery and that the supreme court relied solely on the documents in the file, implicitly on the written statements obtained during the investigation stage and on the minutes drawn up by the court, containing the testimony of the witnesses. The Court notes that the Romania High Court strongly based its conviction for bribery, among other things, on witness statements filed with the lower courts, and without hearing the witnesses in question. The second appeal court had the power to assess the various information's obtained and the relevance of what the applicant wanted to present, but the applicant was found guilty based on testimonies that the first instance court had found insufficient to condemn. Under these circumstances, the refusal of the supreme court to hear witnesses before declaring the applicant guilty considerably limited the right to present a defense. The Court therefore consider that the conviction of the applicant for bribery given without hearing

the aforementioned witnesses, and although the two lower courts considered that the constituent elements of the offense were not fulfilled, is contrary to the requirements of a fair trial within the meaning of Art. 6 § 1 of the Convention.

**Decision of the Constitutional Court no. 518/2017 was published in the Official Gazette of Romania, Part I, no. 765 of September 26, 2017, applicable on the same date.**

It concerns the admissibility of the unconstitutionality exception of the provisions of art. 249 par. 1 of the Criminal Code of 1969 and of Art. 298 of the Criminal Code. The exception of unconstitutionality concerns the provisions of art. 249 par. 1 of the Criminal Code of 1969 and of Art. 298 of the Criminal Code on negligence at work, its authors asserting that the criticized provisions contain ambiguous provisions, which violates the constitutional principle of legality. The Court finds that the new criminal law greatly extended the scope of the negligence at work, and does not foresee that the loss or damage to the legitimate rights or interests of a natural person or a legal person is of some value, and that the injury has a certain intensity, which is such as to make it impossible to distinguish between disciplinary misconduct or inherent professional misconduct and negligence at work. Thus, the Court finds that the existing negligence at work allows the inclusion in its contents of any wrongdoing if the minimum prejudice to the rights or legitimate interests of a natural person or a legal person has been met. In those circumstances, the Court notes that the task of applying the 'ultima ratio' principle lies, first, with the legislature and, on the other hand, with the judicial bodies called upon to enforce the law. Thus, the responsibility to regulate and apply the provisions on negligence at work lies with both the primary/ delegated legislative authority (Parliament / Government) and the judicial bodies (the Public Ministry and the Courts). In other words, the Court finds the need for the legislator to comply with the legal omission ascertained in terms of the amount of damage or intensity / severity of the damage to the legitimate rights or interests of a natural or legal person to ensure the clarity and predictability of the criminal rule under examination. The Court also considered that "damage to legitimate rights or interests" implies the impairment, damage to a natural or legal person in its desire / concern to satisfy a law / interest protected by law. It has been argued that harm to a person's legal interests implies any violation, any physical, moral, or material harm to the interests protected by the Constitution and the laws in force, according to the Universal Declaration of Human Rights. The Court therefore accepted the objection of unconstitutionality and found that the provisions of Art. 249 par. 1 of the Criminal Code of 1969 and of Art. 298 of the Criminal Code are constitutional insofar as the phrase "its faulty fulfillment" in their content is understood as "by the violation of the law".