

## Litigation - legal changes published in February 2018

**The Decision of the Constitutional Court no. 33/2018 regarding the objection of unconstitutionality over the provisions of the Law for amending and completing the Law no. 304/2004 regarding the judicial organization** was published in the Official Gazette of Romania, Part I, no. 146 of 15 February 2018 and is applicable from the same date.

The Constitutional Court noticed that the drafting of the judgment, the final act and the resolution of the court by which the dispute between the parties is resolved shall be the result of the secret deliberation activity attended only by the judges who are members of the panel in front of which the debate took place. Only they can rule on matters of fact and law deduced from the judgment, in order to solve them. Therefore, the law expressly provides that the decision is drafted by one of the judges who participated in the case. Moreover, the drafting of a court decision is inherently related to its reasoning, the latter aspect representing, as stated above, an obligation of the judge of the case arising from the provisions of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. All these aspects are guarantees of the right of the parties to a fair trial, tried by an independent and impartial court, which is subject only to the law. In this respect, the Court considers that the statement of reasons for the judgment is an act inherent in the function of the judge of the case, is the expression of his or her independence and cannot be transferred to a third person.

The Constitutional Court upheld the objection of unconstitutionality and found that the provisions of art. 1 2, 4, 29 and 61 of the Law for amending and completing the Law no. 304/2004 on judicial organization are unconstitutional. Also, by the same Decision, the Constitutional Court rejected as **groundless** the objection of unconstitutionality formulated by the same authors and found that the other provisions of the Law for amending and completing the Law no. 304/2004 regarding the judicial organization are constitutional in relation to the criticisms made regarding the violation of the constitutional provisions of art. 1 par. (5) regarding the clarity and predictability of the law, art. 16 par. (1) on equality before the law and public authorities, art. 21 on free access to justice, art. 73 par. (3) on organic laws, art. 124 and art. 126 on the courts of law.

**The Decision of the High Court of Cassation and Justice no. 24/2017 on the examination of appeals in the interest of the law formulated by the Managing Board of the Constanta Court of Appeals and the Public Ministry regarding the interpretation and application of art. 72 and art. 15312 of Law no. 31/1990, in relation to the provisions of art. 1552 and 1554-1555 of the Civil Code of 1864 and of Art. 2030 of the Civil Code**, was published in the Official Gazette of Romania, Part I, no. 153 of 19 February 2018 and is applicable from the same date.

The HCCJ has been notified to give a decision to ensure the unitary interpretation and application of the provisions of art. 72 and art. 15312 of Law no. 31/1990, in relation to the provisions of art. 1552 and 1554-1555 of the Civil Code of 1864 and of Art. 2030 of the Law no. 287/2009 regarding the Civil Code, namely, if in a joint stock company, the statutory director whose mandate has expired, without the company extending the mandate expressly or appointing another director, has the prerogative of representation of the company. There are two main opinions in the case law: (i) In the first opinion, it was appreciated that the expiration of the director's mandate does not lead to the loss of the capacity to

legally represent the company, being able to represent the company after the expiration of the mandate, (ii) in the second opinion, it was considered that the expiry of the mandate of a company's director and the non-registration of another director did not give the former director the status of legal representative of the company without the explicit acceptance of the appointment as administrator. The HCCJ has established that, in the interpretation and uniform application of legal provisions, the director of a joint stock company whose mandate has expired without an act of appointing a new director and expressly accepting it, has the prerogatives of representation until the termination of the mandate is published in accordance with the law.

**The Decision of the High Court of Cassation and Justice no. 26/2017 regarding the examination of the appeal in the interest of the law declared by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the unitary interpretation and application of the provisions of art. 86 of the Criminal Procedure Code for the purposes of determining the procedural quality of the entity called the Insured Guarantee Fund for insured persons in the case of mandatory motor insurance to a bankrupt insurer and the limits of liability in criminal proceedings**, was published in the Official Gazette of Romania, Part I, no. 162 of 21 February 2018 and is applicable from the same date.

The HCCJ accepted the appeal in the interest of the law formulated by the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice and found that, in the interpretation and uniform application of the provisions of Art. 86 of the Code of Criminal Procedure, in the criminal proceedings, the Insured guarantee fund in the case of mandatory motor insurance with a bankrupt insurance company, is not a civilly liable party.

**The Decision of the Constitutional Court no. 21/2018 regarding the admission of the unconstitutionality exception of the provisions of art. 352 par. (11) and paragraph (12) of the Criminal Procedure Code** was published in the Official Gazette of Romania, Part I, no. 175 of 23 February 2018 and is applicable from the same date.

The subject of unconstitutionality is art. 352 par. (11) and paragraph (12) of the Criminal Procedure Code: "(11) When classified information is essential to resolving the case, as a matter of urgency, the court shall, request, total declassification, partial declassification, transfer to another classification or permit to access the classified information for the defendant's counsel" and "(12) If the issuing authority does not allow the defendant's counsel access to the classified information, they cannot serve to issue a solution of conviction, waiver of the punishment or postponement of punishment in the case".

The Court upheld the objection of unconstitutionality and (i) found that the phrase "court requests" in relation to the phrase "allowing access to classified information to defendant's counsel" in the provisions of Art. 352 par. (11) of the Code of Criminal Procedure is unconstitutional, and (ii) found that the phrase "issuing authority" in the provisions of Art. 352 par. (12) of the Criminal Procedure Code is unconstitutional because the criticized legislative solution breaks the right balance between the general and the private interests by attributing the decision to refuse access to the classified information with evidential value in the criminal proceedings to an administrative authority which is equivalent to an impediment to the defendant's right of information, with direct consequences on their right to a fair trial, an impediment that is not subject to any form of judicial control.

**The Decision of the Constitutional Court no. 22/2018 on the objection of unconstitutionality of the provisions of art. 102 par. (3), Art. 345 par. (3) and Art. 346 par. (4) of the Criminal Procedure Code** was published in the Official Gazette of Romania, Part I, no. 177 of 26 February 2018 and is applicable from the same date.

The subject of unconstitutionality is art. 102 par. (2) - (4), art. 345 par. (3) and Art. 346 par. (4) of the Criminal Procedure Code. From the analysis of the exception of unconstitutionality, the Court notes that the authors criticize, in fact, the provisions of art. 102 par. (3), Art. 345 par. (3) and Art. 346 par. (4) of the Criminal Procedure Code: (i) Article 102 (3): "*The nullity of the act by which one ordered or authorized submitting a piece of evidence or by which it has been submitted shall result in the exclusion of the evidence.*"; (ii) art. 345 par. (3): "*If the Preliminary Chamber judge finds irregularities in the referral or if they apply sanctions according to Art. 280-282 to acts of criminal prosecution carried out in violation of the law or exclude one or more of the pieces of evidence submitted, within 5 days from the notification of the conclusion, the prosecutor remedies the irregularities of the notification document and informs the preliminary chamber judge if they maintains the order for referral or request the return of the case*"; (iii) Art. 346 par. (4): "*In all other cases in which one has found irregularities in the notification, they have excluded one or more pieces of evidence submitted or applied sanctions according to Art. 280-282 on acts of criminal prosecution carried out in violation of the law, the preliminary chamber judge shall order the commencement of the trial.*" The Court (a) accepted the objection of unconstitutionality of the provisions of Art. 102 par. (3) of the Criminal Procedure Code and found that they are constitutional in so far as, by the expression "exclusion of the piece of evidence", one also means the deletion of the evidence from the case-file, and (b) dismissed as inadmissible, the exception of the unconstitutionality of the provisions of art. 345 par. (3) and Art. 346 par. (4) of the Criminal Procedure Code.