

litigation and arbitration - legal changes published in October 2018

Decision of the Constitutional Court of Romania no. 454/2018 regarding the objection of unconstitutionality against the provisions of art. I point 37 (referring to art. 402 of the Code of Civil Procedure) and point 58 (referring to art. 497 of the Code of Civil Procedure), as well as art. III pt. 3 (referring to art. XVIII par. (2) of the Law no. 2/2013) and point 4 (with reference to art. XVIII¹ of the Law no. 2/2013) of the Law for amending and supplementing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and supplementing other acts, was published in the Official Gazette of Romania, Part I no. 836 of 1 October 2018 and is applicable from the same date. The Court partially upheld the objection of unconstitutionality and found that art. III pt. 3 (referring to art. XVIII par. (2) of the Law no. 2/2013) and point 4 (referring to art. XVIII¹ of the Law no. 2/2013) of the Law for amending and supplementing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and supplementing other acts are unconstitutional.

Regarding art. III (4) of the Law, the Court found that it is understood from its wording that "*the date of entry into force of this law*" refers to the law subject to constitutional review, so that, from that date, the power to solve second appeals in respect of appraisable claims worth up to/over lei 200,000, are shared between the courts of appeal and the High Court of Cassation and Justice. This applies to decisions subject to second appeal from the date of entry into force of the law subject to constitutional review. According to paragraph (1), this division of competence concerns the processes commenced from the date of entry into force of the law subject to constitutionality control, and, according to par. (2), this will also apply to trials commenced between February 15, 2013 and the date of entry into force of the law subject to constitutional review. It follows that the division of jurisdiction relates to judgments subject to second appeal issued after the entry into force of this law subject to constitutional review, both in the proceedings which had begun before and after its entry into force, not ruling on the judgments subject to second appeal issued between July 20, 2017 and the date of entry into force of this law. It would therefore be understood that all second appeals are to be judged by the High Court of Cassation and Justice.

The Court found that since most money claims relate to claims less than lei 1,000,000 in order not to affect the fairness of judicial proceedings by overcrowding and hindering the supreme court's activity with such requests, and in the absence other mechanisms to overcome these difficulties, the legislator opted for a sharing of competence between the courts of appeal and the High Court of Cassation and Justice. However, this legislative solution, provided by the law under scrutiny, seeks only to resolve the second appeals lodged with regard to the judgments which may be made after the entry into force of this law subject to constitutionality control, both in the

earlier and subsequent proceedings and the second appeals in respect of the judgments which are likely to be subject to them following the decision of the Constitutional Court no. 369 of May 30, 2017 in the cases started after the entry into force of the new Code of Civil Procedure be judged by the High Court of Cassation and Justice. The Court found that art. III point 4 (with reference to Article XVIII¹) of the law contradicts art. 1 par. (5) of the Constitution, which enshrines the legal security of a person, a concept which is defined as a complex of guarantees of a constitutional nature or having constitutional value inherent in the rule of law, in respect of which the legislator has the constitutional obligation to ensure both a natural stability to the right, and also the optimal exercise of fundamental rights and freedoms.

The decision of the European Court of Human Rights in *Hulpe and Others vs. Romania* (revision) of 2018 was published in the Official Gazette of Romania, Part I, no. 836 of 1 October 2018 and is applicable from the same date.

The case originated in five claims against Romania, in which four Romanian nationals and a Romanian company brought the case before the Court under art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The claimants have lost the civil litigations which took place in their absence. They were notified of the procedure only by displaying summons on a door or on the gate of a building ("*summons by displaying*"). The ECHR found that the applicants had not established a causal link between the alleged breach and the alleged material damage; therefore, it dismissed the claims for damages. Furthermore, in the light of all the circumstances of the hereby cases, the Court has acknowledged that the applicants must have suffered non-pecuniary damage which cannot be compensated by simply finding an infringement, ordering compensations for non-pecuniary damage. In addition, the ECHR noted that art. 509 par. (1) point 10 of the Code of Civil Procedure allows the internal procedure to be revised to remedy the breaches found. With regard to the nature of the heads of claim submitted by the claimants and the reasons why the Court found a violation of art. 6§1 of the Convention, the Court considered that in these cases the most appropriate form of remedy would be the timely reopening of the proceedings in question upon request of the claimants.

Decision of the High Court of Cassation and Justice no. 17/2018 regarding the examination of the second appeal in the interest of the law formulated by the Board of the Suceava Court of Appeals regarding the interpretation of the provisions of art. 129 par. (2) point 2, art. 129 par. (3), art. 130 par. (2) and (3), art. 131, art. 136 par. (1), art. 200 par. (2) of the Code of Civil Procedure, in order to determine whether the procedural lack of material competence of the specialized section/department is an objection of public or private order has been published in the Official Gazette of Romania, Part I no. 872 of 16 October 2018 and is applicable from the same date. The HCCJ upheld the second appeal in the interest of the law lodged by the Suceava Court of Appeals, and consequently found that in the

interpretation and uniform application of the provisions of art. 129 par. (2) point 2, art. 129 par. (3), art. 130 par. (2) and (3), art. 131, art. 136 par. (1), art. 200 par. (2) of the Code of Civil Procedure and art. 35 par. (2) and art. 36 par. (3) of the Law no. 304/2004, the procedural lack of material competence of the specialized section/department is of public order. It was argued that the specialization of judges and sections of the courts is not regulated by the Code of Civil Procedure but by Law no. 304/2004 regarding the judicial organization, having the character of public order. The rules governing procedural (specialized) competence are clearly public order as they protect a public interest.

Decision of the High Court of Cassation and Justice no. 15/2018 regarding the examination of the second appeal in the interest of the law lodged by the Attorney General with the Prosecutor's Office attached to the High Court of Cassation and Justice regarding the establishment of the court competent to judge the claims submitted by convicts during the execution of their sentence, if at the time of their submission the convict is temporarily in a place of detention other than the one established for the execution of the sentence, according to art. 11 par. (5) of the Law no. 254/2013 regarding the execution of sentences and the deprivation of liberty ordered by the judicial bodies during the criminal trial, with subsequent amendments and completions, was published in the Official Gazette of Romania, Part I no. 885 of 22 October 2018 and is applicable from the same date. The HCCJ upheld the second appeal in the interest of the law lodged by the Attorney General with the Prosecutor's Office attached to the High Court of Cassation and Justice and consequently determined that the competent court to resolve the claims submitted by convicted persons during the execution of the sentence is the court with jurisdiction over the place of detention at the time the claim is submitted, regardless of whether the place of detention is represented by the penitentiary originally established or by the penitentiary established by the permanent or temporary transfer of the convicted person.