

litigation and arbitration - legal changes published in January 2020

Decision of the European Court of Human Rights of September 24, 2019, pronounced in Case Antohi v. Romania, which was published in the Official Gazette of Romania, Part I no. 15 of January 10th, 2020 and is applicable from the same date.

At the origin of the case is the Claim no. 48.093 / 15 against Romania, whereby Mr. Sorin Antohi notified the European Court of Human Rights on September 24, 2015, pursuant to art. 34 of the European Convention on Human Rights and Fundamental Freedoms. In fact, the Applicant claimed that, during the criminal proceedings against him, his right to a fair trial under art. 6 of the Convention was violated, arguing that the single judge of the first court, which ordered the conviction of the defendant, heard only the financial expert in question and rejected the defendant's requests to hear the three witnesses and to allow him to give a supplemental statement, none of the other testimonial evidence being presented directly to the judge who convicted the applicant in first court or the judges who maintained his conviction. The European Court of Human Rights, analyzing the circumstances of the case, decided to admit the claim made by the applicant pursuant to art. 6 of the Convention. In its reasoning, the Court upheld the aspects invoked by the applicant, considering that the direct hearing of the applicant and the witnesses was relevant in the circumstances of the case, given the importance granted to them with regard to the justification of the conviction. The court held that the right to the last word of the defendant cannot be assimilated to the right to be heard during the trial, and the mere availability of the transcripts of the statements cannot compensate for the lack of immediacy in the proceedings. The court held that the changes in the first-instance court's formation and the subsequent failure of the appellate court to hear the witnesses directly was tantamount to depriving the applicant of of the right to a fair trial.

The decision of the European Court of Human Rights of 23.06.2019, pronounced in the Tau v. Romania case, was published in the Official Gazette of Romania, Part I no. 49 of January 23, 2020 and is applicable from the same date.

At the origin of the case is the Claim no. 56.280/07 against Romania, whereby a Romanian, Mr. Ioan Tau, notified the Court on December 12, 2007, pursuant to art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In fact, the Applicant claimed that, in the criminal case opened against him for drug trafficking charges, the state violated his right to a fair trial under art. 6 §1 and §3 let. c) and d) of the Convention, showing that the first two dates when he was heard he was assisted by an ex officio lawyer, who, at the same time, was assisting the co-defendants F.D. and P.A., despite the fact that he had requested to be assisted by a chosen lawyer. The applicant also claimed that he was not given the opportunity to confront, in a public hearing, the witness F.D., whose statements were the basis of his conviction. The Court admitted the claims made under art. 6 of the Convention establishing that: a) the Romanian state must pay to the applicant, as moral damages, the amount of EUR 2,400, within three months, plus any amount that can be due as a tax; and b) from the expiration of the mentioned term and until the payment is made, these amounts must be increased by a simple interest, at a rate equal to the interest rate of the marginal lending facility practiced by the European Central Bank, applicable during this period and increased by three percentage points.

The decision of the Constitutional Court no. 731/2019 regarding the objection of unconstitutionality of the provisions of the single article, point 2 [with reference to art. 4, paragraph (1₁) and paragraph (1₃)], point 3 [with reference to art. 4, paragraph (3) and (4)], point 6 [with reference to art. 7, paragraph (1₁)], point 7 [with reference to art. 7, paragraph (4)], point 8 [with reference to art. 7, paragraph (5₁)] and point 9 [with reference to art. 8, paragraph (5) second thesis] of the Law for amending and supplementing Law no. 77/2016 regarding giving in payment of immovable assets in order to release the obligations assumed by loans, which was published in the Official Gazette of Romania, Part I no. 59 of January 29, 2020 and is applicable from the same date.

The court found that the provisions of the single article point 2 [with reference to art. 4 paragraph (1₁)], point 3 [with reference to art. 4 paragraph (3) and (4)], point 6 [with reference to art. 7 paragraph (1₁)], point 8 [with reference to art. 7 paragraph (5₁)] and point 9 [with reference to art. 8 paragraph (5) second thesis] of the Law for amending and supplementing Law no. 77/2016 regarding giving in payment of immovable assets in order to release the obligations assumed by loans are unconstitutional. In its reasoning, the Court found that the text of the law introducing measurable criteria upon which it is considered that in the mortgage loan agreements operates the principle of hardship, violates the Constitution regarding the ownership rights of the creditors, but it also has deficiencies in wording, clarity, precision and logic. Thus, the Constitutional Court found that the regulation of a situation of the intervention of hardship which capitalizes a certain exchange rate difference that is confined in the sphere of inherent risk, namely 20%, is not proportional to the legitimate pursued purpose, and thus it represents a violation of art. 44 of the Constitution and, implicitly, of art. 147 paragraph (4) of the Constitution, as a result of non-compliance with the constitutional requirements regarding the relationship between private ownership law and hardship (unforeseen circumstances). It also notes that the analyzed legal provision has wording deficiencies, as it does not establish the reference currency against which the 20% fluctuation of the currency rate of the loan agreement, respectively the national currency, is calculated. From this perspective, the law violates art. 1 paragraph (5) of the Constitution as regards to the quality component of the law and legal security. The Court notes that exceeding the indebtedness ratio by 20% is not explicitly or implicitly reported to the income level of the date of the loan agreement or at a later date. Therefore, the Court found that art. 1 paragraph (5) of the Constitution as regards to the quality component of the law and legal security is violated.

Decision of the High Court of Cassation and Justice no. 29/2019 regarding the examination of the appeal in the interest of the law formulated by the Attorney General of the Prosecutor's Office with the High Court of Cassation and Justice, which is the subject of Case no. 1,574 / 1/2019, which was published in the Official Gazette of Romania, Part I no. 63 of January 30, 2020 and is applicable from the same date.

The High Court granted the appeal in the interest of the law, stating that, in the unitary interpretation and application of the provisions of art. 65 paragraph (3) of the Criminal Code, the application of accessory penalties consisting in the prohibition of the rights provided by art. 66 paragraph (1) let. a), b) and d) -o) of the Criminal Code, the exercise of which was forbidden by the court as a complementary punishment, is not possible in the case of a conviction to a fine penalty.

Decision of the High Court of Cassation and Justice no. 18/2019 regarding the resolution of the referral made by the Suceava Court of Appeals - Section for criminal cases and criminal cases involving minors in Case no. 7.322/285/2017, by which the High Court of Cassation and Justice is requested to solve a question of law was published in the Official Gazette of Romania, Part I no. 66 of January 30, 2020 and is applicable from the same date.

The court admitted the referral, stating that the defendant's obligation not to drive certain vehicles, imposed by the judicial body during the preventive measure of judicial control according to art. 215 paragraph (2) let. i) of the Code of criminal procedure, does not constitute a suspension of the exercise of the right to drive, and its violation does not meet the typical elements of the offense provided by art. 335 par. (2) of the Criminal Code.