

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

**Decision of the High Court of Cassation and Justice no. 59/2017 on the issuing of a preliminary ruling on the application of art. 453 par. (1) of the Civil Procedure Code, published in the Official Gazette of Romania, Part I, no. 871 of November 6, 2017, applicable from the same date**, states that the provisions of art. 453 of the Civil Procedure Code applies irrespective of the subject matter of the dispute, meaning that the party who has lost the case will be ordered to pay the costs of this second trial involving, in the overwhelming majority of the cases, the settlement of certain procedural fault defenses from the first trial, finally settled. Consequently, the fact that the subject-matter of the claims is the obligation of the defendant to pay the costs of another proceeding has no relevance to the way the provisions of Art. 453 of the Civil Procedure Code apply in the second litigation. Therefore, the High Court has decided that in cases where the defendant is ordered to bear the costs of another litigation finally settled, the provisions of Art. 453 par. (1) of the Code of Civil Procedure remain applicable.

**The judgment of the European Court of Human Rights of 11.04.2017 in Costache and others v. Romania case was published in the Official Gazette of Romania, Part I, no. 874 of 07 November 2017 and is applicable from the same date.**

In 1995, the plaintiffs brought legal action against the General Council of Bucharest and the Local Council of District 6 in Bucharest, requesting the restoration of property right over a land in Bucharest. By a decision of 9 April 1998, the Bucharest Municipal Court, as first instance court, upheld the claim. The parties did not appeal the decision, therefore, it remained final. On January 27, 1999, the Bucharest Municipality, through the general mayor, citing, among others, the provisions of the Art. 322 par. (5) of the Civil Procedure Code, introduced an extraordinary appeal against the applicants, requesting the review of the final decision of 9 April 1998, claiming that a new document had been found in respect of the land claimed by the applicants. The appeal referred to a report drafted on 29 December 1998 by the Market Administration of District 6 of Bucharest, which stated that the land claimed by the applicants was occupied by a market. By a decision of 24 September 1999, the Bucharest Municipal Court upheld the action submitted by the Bucharest Municipality, through general mayor, arguing that the document had not been filed in the first instance trial and that it showed that the land claimed by the applicants was occupied by market. On January 29, 2002, the Bucharest Court of Appeal admitted the applicants' appeal, arguing that the document invoked by the Bucharest Municipality, through general mayor, was a document that did not comply with the requirements of art. 322 par. (5) of the CPC, since it did not exist at the date of the pronouncing of the final decision of 9 April 1998. In addition, the appeal court stated that, without objective reason, the national authorities did not raise before the court of first instance in the first trial, the matter of the legal situation of the land and could have recovered the investment made on the land claimed by the applicants by bringing separate proceedings against them, with the object of recovering the value.

By a final decision of 14 January 2003, the Supreme Court of Justice upheld the appeal declared by the Bucharest Municipality, through general mayor, arguing that although the document had not existed during the trial which ended with the final judgment of 9 April 1998, it targeted a pre-existing situation. In addition, the court concluded that the provisions of Art. 322 par. (5) of the CPC should be interpreted as referring to documents used by one of the parties in

order to prove, in the light of new evidence, facts which, in general, were not known by the court which pronounced the decision under review. In the light of the foregoing, the supreme court stated that the term "document" should be interpreted restrictively. Lastly, it was irrelevant that the document relied on by the party requesting the review had been obtained as a result of the checks in the other documents which existed at the time of the judgment of 9 April 1998 and which testified the same facts but which had not been submitted to the court which pronounced the judgment. The applicants brought their case before the Court on 28 August 2003.

The Court stated that one of the fundamental elements of the rule of law is the principle of legal certainty, which implies, inter alia, that a final decision pronounced by a court should not be appealed again. The Court notices that in the present case, the Supreme Court of Justice stated that the report submitted by the Bucharest Municipality, through general mayor, was a document that complied with the requirements of Art. 322 par. (5) of the CPC, although that document did not exist at the time of the final judgment of 9 April 1998, as required by the provisions of CPC. In addition, that court re-examined the substance of the case by making a different interpretation of the evidence already considered by the first instance court.

Therefore, The Court considered that there had been a violation of the two principles set out in its established case-law, meaning that the review should not be treated as a disguised appeal and that the national court admitting the reopening of the case should indicate why the new evidence could not have been obtained during the first set of proceedings. In the latter matter, the Court notes that the Supreme Court of Justice ruled that there were also other documents which existed at the time of the final judgment of 9 April 1998 and which testified to the same facts as the report of 29 December 1998. Although observing that these other documents were not submitted to the court which pronounced the final judgment in question, the Supreme Court of Justice did not examine the reasons for that omission. The foregoing considerations are sufficient to enable the Court to conclude that, by annulment of the final decision of 9 April 1998, the authorities did not maintain a fair balance between the case interests and therefore infringed the right of the first applicant to a fair trial.

**Decision of the High Court of Cassation and Justice no. 73/2017 regarding the pronouncement of a preliminary ruling on the dissolution of a matter of law, published in the Official Gazette of Romania, Part I, no. 914 of 22 November 2017, applicable from the same date.**

The High Court has been notified in order to rule on the following legal issue: "*If, in the event that the first instance refused the application for a penalty based on the provisions of Article 906 (1) and (2) of the Civil Procedure Code, the judgment pronounced is susceptible of being appealed*". The HCCJ stated that, with respect to Art. 906 par. (2) of the Civil Procedure Code, this rule is a derogating rule from the ordinary legal rule of law with regard to the possibility of appealing, the text expressly stipulating that the enforcement court shall issue, with the summons of the parties, a final resolution, which means that it can not be appealed, given the provisions of art. 634 par. (1) point 1 of the Code of Civil Procedure. Whereas art. 906 par. (2) establishes, in this respect, an exception to the rule mentioned in Art. 651 par. (4) of the Code of Civil Procedure, it follows that the text shall be strictly interpreted and applied in accordance with the principle of *exceptio est strictissimae interpretationis*. Therefore, the High Court stated that, with respect to the interpretation and application of the provisions of Art. 906 par. (1) and (2) of the Civil Procedure Code, the resolution of the settlement of

the request for payment of penalties on the debtor's day of delay for to do or not to do obligation, assessable in money, which can not be fulfilled by another person, is final, irrespective of the solution of the enforcement authority, namely the admission or rejection of the creditor's claim.

**Decision of the High Court of Cassation and Justice no. 60/2017 regarding the pronouncement of a preliminary ruling on the dissolution of a matter of law, published in the Official Gazette of Romania, Part I, no. 928 of 24 November 2017, applicable from the same date.**

The HCCJ has been notified in order to give a preliminary ruling on the correct interpretation of the provisions of Art. 2.431 of the Civil Code, referring to art. 632 of the Civil Procedure Code, with regard to the possibility of enforcing a right of claim secured by a legally concluded mortgage agreement and which, according to Art. 2.431 of the Civil Code, constitutes an enforceable title, if the right of claim itself is not established by a document which, according to the legal provisions, constitutes an enforceable title. The HCCJ stated that, in interpretation of the provisions of Art. 2.431 of the Civil Code, referring to art. 632 of the Civil Procedure Code, it is possible to enforce a claim secured by a valid mortgage agreement, which is an enforceable title, even if the right of claim itself is not established by a document which, according to the legal provisions, is an enforceable title.

**Decision of the High Court of Cassation and Justice no. 17/2017 regarding the unitary interpretation and application of the legal provisions regarding the appeal in the field of administrative litigation, published in the Official Gazette of Romania, Part I, no. 930 of 27 November 2017, applicable from the same date.**

The High Court of Cassation and Justice upheld the appeal in the interest of the law and consequently established the following: in the interpretation and uniform application of the legal provisions on the appeal in the matter of administrative litigation, against the judgments pronounced in this matter one can only use the second appeal, excepting the case mentioned in the provisions of art. 25 par. (3) of the Law on administrative litigation no. 554/2004.

**Decision of the High Court of Cassation and Justice no. 55/2017 regarding the pronouncement of a preliminary ruling on the dissolution of a matter of law, published in the Official Gazette of Romania, Part I, no. 943 of 29 November 2017 and applicable from the same date.**

The HCCJ has been notified for a preliminary ruling in order to state upon the following question: "*If the exemption from the payment of judicial stamp duty in the appeal, regulated by Article 28 of Government Emergency Ordinance 80/2013 on Fees judicial stamp duty, operates only if it is formulated by the plaintiff who was first exempted from the stamp duty regardless of the party submitting the appeal.*" The Court held that the provisions of Art. 28 of the Government Emergency Ordinance no. 80/2013 is to be interpreted as meaning that only the plaintiff who was exempted from the stamp duty in first instance benefits from the exemption from stamp duty in appeal.