GUARANTEES OF THE RIGHT TO A FAIR CIVIL TRIAL

Lawyer **Diana-Loredana JALBĂ**[1]

Abstract

In order to ensure the effective protection of human rights and provide for more than theoretical and illusory substantive rights, the need to define the right to a fair trial is emerging, along with the necessity that litigants become aware of the guarantees established by article 6 of the European Convention on Human Rights. Thus, the article aims to approach the ample issue regarding the litigants' right to a fair civil trial in light of current legal regulations, and in particular, in light of the jurisprudence of the European Court of Human Rights. Given the fact that the right to a fair civil trial involves establishing, throughout the trial, a set of rules of procedure aimed at creating a balance between the parties in the process - the so-called guarantees of a fair trial - in her scientific pursuits, the author analyzes both explicit and implicit guarantees of fair trial, highlighting relevant European standards as well as their degree of implementation in the national (procedural) law.

***Key words**: fair trial, fundamental right, CEDO, guarantees*

***JEL Classification**:* K33, K40

1. Introductory aspects

Given that for an effective protection of the human rights the establishment of substantive rights is not enough and fundamental procedural guarantees are also needed so as to strengthen the defense mechanism of these rights, it is well known that one of the most important guarantees is the one set out in art. 6 of the Convention, namely the right to a fair trial.

This scientific research had as a starting point, first of all, the abundant case law of the European Court of Human Rights concerning Romania in the sense of the existence of a high number of convictions during the recent years, precisely on the grounds of the failure to grant the right to a fair trial, the statistics showing that it is one of the most frequently invoked violations of art. 6.

Secondly, taking into account the provisions of the European Convention, especially in light of the case law of the European Court of Human Rights, the practice of the courts of law of Romania has shown an increasing implementation of the rules concerning the right to a fair civil lawsuit, the provisions of art. 6 representing the basis of many of the reasoning of the court rulings.

So, based on all these considerations and especially given that the provisions of the European Convention on Human Rights can be invoked directly before the national courts, *the need to define the right to a fair trial* emerges, with particular reference to the civil lawsuits.

Having no intention to be an exhaustive study, this scientific approach aims to examine the legal standards applicable to the issue of the fairness of the civil proceedings, from the perspective of *the requirements of procedural guarantees,* in relation to the new legislative changes represented by the enforcement of the new Code of Civil Procedure.

Thus, this article examines each guarantee of the right to a fair trial by highlighting the requirements established at European level and the degree of implementation in the national (civil procedural) law.

2. Guarantee mechanism

Regarding the guarantee mechanism offered by the right to a fair trial settled within a reasonable term, the subjects of the guarantee must be identified first of all. These are the litigant, as the beneficiary of this guarantee and the state, as debtor of the guarantee.

[1] Diana-Loredana Jalbă – Lawyer in Bucharest Bar Association, *SCA Răducan Licari Giambașu & Associates,* diana.jalba@rlga.ro.

Secondly, we must identify the guarantees that must be known in order to ensure the efficiency of the protection of the fundamental right in question. In the specialized literature [2], the guarantees of the right to a fair trial are classified as general, applicable to both civil proceedings and criminal proceedings, i.e. guarantees specific to a criminal suit.

Regarding the general guarantees of the civil proceedings, they are classified as *general* as they are applicable for the conducted judicial activity, without any differences between the public or private nature lawsuits. The following shall be considered general guarantees: the right to an independent and impartial court as set out by the law; the celerity of the judicial activity, the publicity of the process; the fair review of the case.

In its turn, the fair review of the case includes certain implied guarantees of a fair trial, namely the ones that are not mentioned *expresis verbis* in the content of Article 6. According to the doctrine and case law, they are the adversarial principle, reasoning of the decisions, equality of arms - which means that the examination of the case fairly entails, in fact, the compliance with all the general principles of the civil lawsuit.

Therefore, the various guarantees set out in art. 6 are closely interlinked, the compliance with one or the other guarantee being assessed by reference to the process as a whole.

3. Tribunal "established by law"

European Standard. Considering the national terminology, the analysis of this concept is carried out under the name of right to a court of law [3], an inherent right for the implementation of the rule of law principle.

The law should set out not only the powers of the court and the procedure, but the very way of creating it, because a judicial body that is not organized and established according to the will of the law maker, is, indeed, devoid of any legitimacy required in a democratic society.

In an opinion[4], the condition for the court to be set out in the internal la is a *sine qua non* requirement of the independence requirement, set out expressly in the text of the Convention, in other words there must be a series of procedural rules that guarantee its existence.

The term of law which is presented in art. 6 par. 1 refers not only to the legislation on the establishment of the jurisdiction of the judicial bodies, but to any other provision of the national law the breach of which, for example, leads to the unlawful participation of a member of the panel to the legal proceedings. In this case, matters that may arise from potential incompatibilities of the magistrate judges are considered, with the two internal procedural remedies, the abstention and the recusal.

In order to meet the requirements of the Convention, the court must be established by a predictable and accessible law, this requirement reflecting the rule of law principle inherent to the system of the Convention and its additional protocols.

It was noted, however, that based on the principle according to which the interpretation and enforcement of the national law rules are, primarily, under the competence of the national courts, the European Court of Human Rights has consistently noted that the judgments passed by the national courts cannot be argued unless flagrant violations of the national laws are found[5]. In this regard, the organization of the judicial system, as well as the regulation of the structure cannot be left at the discretion of the judiciary, in order to meet the requirements of "lawfulness" imposed by art. 6 par. 1 of the Convention.

The introduction of the term "established by law" in art. 6 of the Convention is meant to avoid leaving the organization of the judicial system at the discretion of the executive power and

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[2] Corneliu Bîrsan, *Convenția europeană a drepturilor omului: comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010, pp. 424-568.

[3] This aspect is also part of the specialized literature of Romania, so as to avoid a potential confusion with the tribunal, which is one of the forms of organization of tyeh Romanian courts of law.

[4] See R. Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații,* Vol. I, C.H. Beck Publishing House, Bucharest, 2007, p. 37.

[5] See the ruling of June 22nd, 2000 in case *Coëme and others v Belgium*, according to HUDOC.

ensure the regulation of the matter by means of a law passed by the Parliament. Therefore, this organization cannot be left at the discretion of the judicial authorities, even if they may have some power concerning the interpretation of the national law in this field.

National Standard. This requirement that the court be established by law is designed to ensure the suppression of the *ad hoc* exceptional jurisdictions established by the executive power in order to respond to specific circumstances, jurisdictions incompatible with the rule of law[6].

In this context, of the requirement of establishing the court by law, the legal provisions are clear and precise in the domestic legislation, clearly defining the powers of the courts involved in the administration of justice.

Thus, art.1 par. (1) of Law no. 304/2004 on the judicial organization refers to the courts established by law – "The judicial power is exercised by the High Court of Cassation and Justice and other courts established by law", while art. 3 of the same law sets out as follows: "The competence of the judicial bodies and the judicial proceedings are established by law".

The national laws includes provisions which establish the jurisdiction according to the matter (Chapter I of the New Code of Civil Procedure), the territorial jurisdiction (Chapter II of the New Code of Civil Procedure), the cases of extension of the jurisdiction (Chapter III of the New Code of Civil Procedure) and the procedure applicable in case of a conflict of jurisdiction (Chapter IV, Section I of the New Code of Civil Procedure).

Without going into details, we want to present only some concepts, as they are mentioned in the doctrine. The material competence– *rationae materiae* - involves a separation between the courts of different ranks and is regulated functionally (based on the type of the jurisdictional powers) and in terms of procedure (based on the scope, value or nature of the petition)[7]. The territorial jurisdiction is of three kinds: common law jurisdiction, alternative or optional jurisdiction and exclusive or exceptional jurisdiction[8]. The conflict of jurisdiction occurs when two or more courts or other bodies with jurisdictional activity claim jurisdiction over a case or, on the contrary, they claim to lack jurisdiction and decline competence[9].

At the same time, it should be stressed that the jurisdiction to hear cases is established by special laws regulating a particular activity, the provisions of the New Code of Civil Procedure setting out, in which concerns the material competence, that "the courts of law shall hear any other matters if set out by law to be under their jurisdiction".

On the other hand, the European Court of Human Rights has shown that a waiver to the "right to a court" occurs in arbitration, within the meaning of the aforementioned requirement of art. 6. Such a waiver has undeniable advantages for the stakeholders and for a proper administration of justice, and therefore, in principle, it is not contrary to the provisions of the Convention [10].

4. Independent and Impartial Court

We continue the initiated review, that of analyzing the guarantees established by art. 6, by mentioning the fact that the court must comply with other procedural guarantees as well, the most important of which are the independence and the impartiality of its members.

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[6] Mihaela Tăbârcă, *Drept procesual civil. Vol. I – Teoria generală*, Universul juridic Publishing House, Bucharest, 2013, p. 58.

[7] Viorel-Mihai Ciobanu, Gabriel Boroi, Traian Briciu, *Drept procesual civil. Curs selectiv. Teste grilă*, Issue 5, C.H. Beck Publishing House, Bucharest, 2011, p. 127.

[8] Of details see Gabriel Boroi (coordinator), *Noul cod de procedură civilă. Comentariu pe articole. Vol. I*, Hamangiu Publishing House, Bucharest, 2013, pp. 300-326.

[9] Viorel-Mihai Ciobanu, Gabriel Boroi, Traian Briciu, *op. cit.*, p. 172.

[10] Vasile Pătulea, *Sinteză teoretică şi de practică a Curţii Europene a Drepturilor Omului în legătură cu art. 6 din Convenţia Europeană a Drepturilor Omului. Dreptul la un proces echitabil. Dreptul de acces la un tribunal (aspecte speciale) (II)*, in "Dreptul" Magazine issue 11/2006, p. 264.

4.1. Independent Court. The European Standard of Protection

The independence of the court roughly consists of the absence of any subordination of the body with jurisdiction, both to the parties as well as to any form of power or other state authorities. The judge's independence entails the requirement of the settlement of the disputes without any interference from any state body or person.

The independence of the judicial power from the lawmaker and, in particular, from the executive power is a principle resulting from the separation of powers theory developed by Montesquieu. Therefore, the separation of the powers under the Constitution has as final purpose, among others, the generation of strong legal guarantees concerning the independence of the judges.

The executive and legislative bodies have a duty to make sure that judges are independent. Some measures taken by these bodies may, directly or indirectly, interfere with or change the exercise of the judicial power. Consequently, the executive and legislative bodies should refrain from taking any action that could undermine the independence of the judges. This means that the lawmaker cannot intervene in the legal proceedings in any form other than by the issuance of laws which the courts will be bound to enforce. The courts do not have, however, an absolute independence from the lawmaker, as they cannot refuse to enforce a law issued by the latter, by relying on their independence.

According to the Court, in order to determine whether the body with jurisdiction is independent, the following aspects must be taken into account: the manner of appointment of the judges, the length of the term of office of the judges, the existence of a legal framework which provides protection to the judges against external pressure and the possibility to check the appearance of independence.

Thus, the appointment by the government of the members of a court was not found incompatible with the concept of independence of the court. Regarding the length of the term of office, the Convention does not impose the obligation to appoint the judges for life or up until they reach a certain age, but admits the appointment of judges for determined periods of time, provided that they are irremovable while in office, the possibility of discretionary revocation of the judges coming against the independence principle. The guarantee against any external pressures aims at protecting the members of the court against their replacement during their term of office. Regarding the appearance of independence, which is reviewed in a very close connection with the appearance of impartiality, the doctrine[11] has revealed that it must be established by reference to objective organic and functional criteria, as "justice must not only be done, but it must be proven to have been done."

Furthermore, the independence of the judges requires Member States to forbid them to be members of political parties or interest groups or pressure groups.

Additionally, the independence of the judges refers to the whole activity under their jurisdiction, namely both the public procedure and previous activities, such as setting hearings, or subsequent activities, such as the deliberation or the drafting of the judgment.

At the same time, the independence that judges should benefit from cannot entail the absence of any review of their work, as the Court does not forbid judicial or disciplinary reviews of their work. Thus, it is possible for higher court to overrule the judgments of the lower courts or for judges to be sanctioned for their lack of punctuality, reverent attitude etc., measures which are not incompatible with the provisions of art. 6.

The Independence of the Court in the Romanian Law. The independence of the court involves two aspects, namely: the independence of the courts of law and the independence of the magistrate.

The independence of the courts of law has in view the fact that the court system by which justice is done is not part of and is not subordinated to the executive or legislative power [12].

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[11] See Jean-François Renucci, *Tratat de drept european al drepturilor omului*, Hamangiu Publishing House, Bucharest, 2009, p. 440.
[12] See art. 126 par. (1) and par. (3) of the Constitution of Romania.

In which Romanian is concerned, the issue of the compliance with the court independence requirement was invoked many times. In Vasilescu vs. Romania[13], the European Court noted, under art. 6 par. 1 of the Convention, that the Romanian prosecutors, acting as representatives of the Public Ministry, subordinated, first of all, to the general prosecutor and then to the Ministry of Justice, do not meet the condition of independence in relation to the executive power.

The independence of the judges is provided for by art. 124 par. (2) of the Constitution of Romania, which sets out that judges are independent and subject only to the law. This entails, just as in the case of the courts of law, that in the administration of justice, judges cannot be influenced by the executive or legislative power. Independence, as defined, does not exclude however the intervention of the courts of judicial review following the exercise of the right to appeal against court judgments.

Some of the internal means of guaranteeing the independence of the judges are, *inter alia*, the irremovability principle[14] - which means that the removal of judges is impossible without their free consent [15] and the institution of the Superior Council of Magistracy[16].

4.2. Impartial Court. European Standard

The impartiality of the court must, however, be differentiated from the concept of independence of the court. Thus, while independence entails the absence of any subordination, impartiality relies on the absence of any prejudice, weakness or personal feelings.

Under European case-law, impartiality is defined as the absence of any prejudice or preconceived ideas about the judgment to be delivered during a trial[17], aspect which must characterize each and every member of the panel of judges. In this regard, appearances have some significance, given the confidence that courts must inspire to the public in a democratic society.

The impartiality referred to in art. 6 par. 1 has, in the case-law of the European Court, two meanings: on the one hand, it envisages a subjective approach[18], consisting of the attempt to determine whether the personal beliefs of a judge may influence the settlement of a certain case (subjective impartiality), and, on the other hand, this term also includes an objective approach[19], that seeks to determine whether the judge offers sufficient guarantees to exclude any legitimate doubt in which he/she is concerned (objective impartiality)[20].

The lack of subjective impartiality occurs when the judge, due to some personal beliefs, becomes incompatible with his/her role of trying a case in a balanced manner.

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[13] CEDO, the ruling of June 22nd, 1998 in case *Vasilescu v. Romania,* published in official Journal no. 637/27.12.1999 in Beatrice Ramaşcanu, *Jurisprudenţa CEDO în cauzele împotriva României*, Hamangiu Publishign House, Bucharest, 2008, pp. 1-18. For the same solution in the lack of the guarantees of independence of the Romanian prosecutors see CEDO, the ruling of June 3rd, 2003 in case *Pantea v. Romania,* published in official Journal no. 1150/6.12.2004 in *Din jurisprudenţa Curţii Europene a Drepturilor Omului. Cazuri cu privire la România.*, Institutul Român pentru Drepturile Omului, Bucharest, 2005, pp. 195-250.

[14] The irremovability principle is instituted by art. 2 par. (1) of Law no. 303/2004 on the judicial organization: "*Justice is administered in the name of the law, it is the same, impartial and equal for all*".

[15] Irremovability is also regulates in the Constitution of Romania, as principile. Thus, according to art. 125 par. (1): "*Judges appointed by the President of Romania and irremovable, under the law*". Par. (2) of the same text sets out that "*Any proposals for appointment as well as the promotion, transfer and sanctioning of the judges fall under the competence of the Superior Council of Magistracy under the terms of its organic law*".

[16] For details see a study that is by far remarkable, Corneliu-Liviu Popescu, *Funcţionarea Consiliului Superior al Magistraturii în ipostază de instanţă de judecată şi dreptul la un proces echitabil*, in "Dreptul" Magazine no. 3/2005. Among other things, this text criticizes the term used by the constitutional lawmaker where the Superior Council of Magistracy is called "court of law". The author adds that, according to the case-law of the European Court, prosecutors are neither independent (as they depend on the executive power) nor impartial (being a party in the trial) and therefore their presence in the Supreme Council of Magistracy, which guarantees the independence of justice and which determines the professional career of judges, violates not only the independence of justice, the independence, impartiality and irremovability of the judges, but also the right to a fair trial, especially in terms of the equality of arms.

[17] See CEDO, the ruling of October 1st, 1982 in case *Piersack v. Belgium* in Vincent Berger, *Jurisprudenţa Curţii Europene a Drepturilor Omului,* issue no. 4, Institutul Român pentru Drepturile Omului, Bucharest, 2003, p. 204.

[18] See CEDO, the ruling of October 26th, 1984 in case *De Cubber c. Belgiei,* according to HUDOC.

[19] See CEDO, the ruling of February 24th, 1993 in case *Fey c. Austriei,* according to HUDOC.

[20] For some criticism regarding this classification, see Radu Chiriţă, *Independenţa şi imparţialitatea magistratului sau tipuri de neutralitate a puterii judiciare (II),* in „Revista Română de Drepturile Omului", issue 3/2007, pp. 34-46.

In which the assessment of the impartiality of a judge is concerned, the doctrine[21] shows that the concept of personal impartiality is more appropriate than the concept of subjective impartiality because, although such an approach has a subjective component, the assessment of the impartiality of a judge is not only subjective and therefore other objective elements must be taken into account in order to avoid any arbitrary solutions.

Objectively, impartiality is analyzed from the point of view of the judicial system the judge is part of, which is, therefore, an organizational structure which would allow a judge to control its own judgments[22]. From this point of view, what is relevant is the analysis of the compliance with the principle of separation of judicial functions, which is an objective element based on which the lack of the functional impartiality can be established, but which it does not in itself result in the ascertainment of the violation of art. 6 par. 1 of the Convention.

Impartiality in the Romanian law. Former and Current Regulations. Impartiality, as part of a fair trial, is the guarantee of the trust of the litigants in the magistrates and the institutions they work in, by which justice is done.

It is worth noting that, instead of grounding the civil procedure on a sound conceptual basis, the main purpose envisaged by the enforcement of the New Code of Civil Procedure is that of responding to the immediate practical needs. In this respect, the philosophy of the new regulation is that of a "small reform", attempting to transpose the impartiality requirement into the national law.

The priority of the transposition of the impartiality was so urgent that it resulted in the generalization of the impartiality. Besides the fact that it is included under the heading "Other cases of absolute incompatibility", impartiality includes all the other cases of incompatibility exhaustively. If in the earlier regulation incompatibility was a procedural incident that exclusively targeted the members of the court panel, being applicable only to the judges, the New Code of Civil Procedure sets out in art. 54 that the incompatibility provisions also apply accordingly to the prosecutors and assistant magistrates, judicial assistants and clerks, thus expanding the scope of the incompatibility to the other participants, which is why the incompatibility has become a procedural incident which also refers to the establishment of the court.

The New Code of Civil Procedure not longer distinguishes between the cases of incompatibility and the cases of recusal/abstention, but regulated all the situations regarding the establishment and structure of the court as cases of incompatibility. Moreover, in addition to the more rigorous regulation of the incompatibility, other provisions are included regarding the change of venue, which is also regulated as a remedy for the lack of impartiality.

Incompatibility – remedy of the lack of impartiality. The New Code of Civil Procedure, unlike the previous regulation [23], expressly establishes in art. 41 a solution adopted in the judicial practice, namely that an absolute incompatibility exists not only in case of the passing of a court ruling concerning the settlement of the case on the merits or the divestment of the court, but also in case of the issuance of an interlocutory report, if the judge participates in the trying of the case during the appeal proceedings.

Moreover, a judge who issues an interlocutory report or passes a judgment concerning the settlement of the case cannot judge the same case again, and not only during the appeal and second appeal proceedings but also not during the appeal for annulment or review. This solution is imposed by the case-law, as judges may file requests for abstention in these cases based on the provisions of the Convention or of the Magistrates' Code of Ethics, precisely to eliminate any doubt of the parties as to the impartiality of the judgment of these extraordinary means of appeal[24].

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[21] See Jean-François Renucci, *op. cit.*, p. 440.

[22] Please note that, for the purpose of an elastic implementation of the functional impartiality, the most representative decision may be case *Morel v. France*, which seems to best define the current stage of the European doctrine, despite a rigid interpretation of the impartiality by the subsequent judgements *Rojas Morales v. Italy* and *D.N. v. Switzerland*.

[23] These cases of absolute incompatibility are inspired by the cases of incompatibility mentioned in art. 24 of the Code of Civil procedure 1865 – "*(1) A judge who rules in a case cannot attend the judgment of the same case during the appeal or second appeal proceedings or in case of retrial after annulment. (2) Furthermore, a witness, expert or arbiter in the same case cannot take part in the proceedings.*"

[24] Gabriel Boroi (coordinator), *op. cit.*, p. 119.

Moreover, the reason for the introduction of the situation in which the same case is tried after referring it for retrial among the cases of absolute incompatibility is based on the requirement of the guarantees of impartiality of the judges during the retrial of the case in case of the admission of the appeal, of the overturn of the appealed judgment and the retrying of the case or the admission of the appeal, the overturn of the appealed judgment and the retrying of the case, precisely to avoid the judges to be tempted to pass the same judgment.

If a judge was a witness, expert, arbiter, prosecutor, attorney, judicial assistant, assistant magistrate or mediator in the same case, this shall also be deemed a case of absolute incompatibility. This case is justified by the presumption that judges who find themselves in this situation could not be objective in settling the case, being tempted to maintain the previous standpoint presented in the previous capacity.

Unlike art. 41 of the New Code of Civil Procedure, which refers only to judges, art. 42 of the New Code of Civil Procedure - Other cases of absolute incompatibility – also covers other persons, whether or not participating in the trial, which find themselves in a particular situation or are in a particular relationship with the judge which may cause concern regarding the impartiality of the judge. On the other hand, art. 42 of the New Code of Civil Procedure includes additional reasons for incompatibility strictly related to the judge.

The procedural means to invoke the lack of impartiality is the motion to dismiss on grounds of incompatibility - as absolute dilatory procedural motion, in the cases provided for by art. 41 of the New Code of Civil Procedure, as shown by the provisions of art. 45 of the New Code of Civil Procedure, the motion for recusal - as absolute dilatory procedural motion, in the cases provided for by art. 42 of the New Code of Civil Procedure or the motion for abstention - as absolute dilatory procedural motion, in the cases provided for by art. 42 of the New Code of Civil Procedure; the latter can be invoked only by the persons who find themselves in the situation of incompatibility, as a personal order.

5. Celerity of Proceedings – "Reasonable Term"

The European Standard of Protection. The concept of reasonable term of a civil trial is closely linked to the proceedings celerity principle. The Court noted that the obligation imposed on Member States to observe the reasonableness of the length of the proceedings is an obligation to achieve a specific result[25], Member States being unable to invoke the overloading of the courts or the inability of the judges to motivate the delays attributable to them[26].

The principle of availability operates in civil matters, but the substantiation of the civil law suit on this principle does not relieve the national judge of the task he/she has of ensuring the celerity of the proceedings.

In the concrete analysis of the cases subject to its judgment, the Court applies an algorithm of settlement in two stages: the first stage consists in the calculation of the term of the procedure, and the second consists in the assessment of the reasonableness of the term.

Thus, t**he initial moment** of this term (*dies a quo*) is the notification of the competent court – the day when the trial court was vested[27] with the settlement of the dispute – and covers the conduct of the proceedings in question, i.e. the ones of the trial court, as well as the ones of the appeal or second appeal courts.

The final moment of this term (*dies ad quem*) is the final settlement of the "appeal" regarding the right or obligation in question.

It should be noted that the reasonable term in civil proceedings may also include the length of certain preliminary administrative procedures, when the possibility of the referral to a court is subject to the national law and, necessarily, the completion of such proceedings. Moreover, this

[25] Jean-François Renucci, *op. cit.*, p. 221.
[26] CEDO, the ruling of November 26th, 1992 in case *Lombardo v. Italy*, according to HUDOC.
[27] For an analysis of the exceptional situation in which the moment deemed to be the starting point of a dispute is a time prior to the time of the referral of the case to the court and the final point occurs after the judgment date, see Radu Chiriță, *op. cit.*, pp. 183-186.

term shall also extend over the judgments enforcement procedure, being deemed an integral part of the concept of "trial" of art. 6.

In order to assess the reasonableness of the term, the European Court established, by its case-law, **criteria for determining the reasonableness** of the civil cases settlement terms: the complexity of the civil case to be tried, the judicial conduct of the parties, the judicial conduct of the authorities, and this latter criterion may also include, in certain circumstances, the importance of the dispute to the stakeholders[28].

Regarding the conduct of the parties, the Court noted that the use by the party of all the means available by means of the national procedure is not an aspect that could lead to the conclusion that the party can be deemed at fault regarding the reasonableness of the decision.

Regarding the conduct of the authorities, the ECHR stated that it is necessary to analyze whether long moments of inactivity of the competent bodies can be identified in the judicial activity or, on the contrary, unjustified delays in proceedings.

The European Court repeatedly sanctioned Romania for the violations committed regarding the performance of the civil proceedings within a reasonable term, more than half of the convictions regarding the violation of art. 6 being based on this reason.

The celerity of Romanian Civil Trials - regulation in national law. The trying of the cases within a reasonable term aims at eliminating any uncertainty the parties find themselves in by restoring, as soon as possible, the violated rights and the legality, which must govern all legal relationships in a state subject to the rule of law, which is the guarantee of a fair trial.

The Code of Civil Procedure of 1865 does not expressly regulate the civil proceedings celerity principle, but included a series of rules that ensure the settlement, within a reasonable term, of the cases brought before a court of law, irrespective of their nature[29]. In light of the case-law of the European Court of Human Rights, it has undergone material amendments with respect to the celerity of the civil proceedings, the most important regulation in this respect being Law no. 202/2010[30] on measures to accelerate the settlement of the cases, also called the "Small reform", which is meant to ensure both the celerity of the civil proceedings as well as the preparation for the implementation of the New Code of Civil procedure, its enforcement being considered "the big reform".

"Optimum and Predictable" Term. The celerity of the proceedings is now set out expressly in the national legislation, i.e. in art. 6 of the New Code of Civil Procedure. The New Code of Civil Procedure preferred to use the concept of "optimum and predictable term"[31] instead of the concept used by the Convention, the chosen concept defining practically the same proceedings celerity principle in a more explicit way.

The New Code has introduced several provisions[32] aimed at complying with the optimum and predictable term of a civil suit, precisely in the attempt to reinforce the idea of the conduct of fair trials and reduce future convictions in this regard.

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[28] In Jean-François Renucci, *op. cit.,* p. 469 a fourth criterion is mentioned: the stake of the dispute. the author claims that this criterion is sometimes taken into account by the state, as judges take into account the consequences the cases has on the personal and professional life of the plaintiff.

[29] The most important of these were the ones of art. 155 par.(1) and art. 156 par. (1) of the Code of Civil Procedure 1865, which allowed the delay of the proceedings, just once, based on the consent of the parties or for a well justified lack of defense, as well as the ones of art. 260 par. (1) and art. 264 par.(1) of the Code of Civil Procedure 1865, according which the delivery of a judgment could have been delayed for no more than 7 days, while the ruling was to be drafted within 30 days as of its delivery.

[30] Published in the Official Journal, Part I, no. 714 of October 26th, 2010.

[31] For a remarkable analysis see Mihaela Tăbârcă, *Principiul dreptului la un proces echitabil, în termen optim şi previzibil, în lumina noului Cod de procedură civilă,* in "Dreptul" Magazine issue 12/2010.

[32] Among which: art. 201 par. (3), (4) and (5) of the New Code of Civil procedure – according to which the first hearing must be set by the judge within 60 days as of the date of the resolution, term which can be shortened in urgent cases, according to the circumstances of the case; furthermore, according to art. 238 par. (1) of the New Code of Civil Procedure, on the first hearing the parties are legally summoned to the judge, after hearing the parties, will estimate the time needed for the inquiry of the case and will mentioned it in the report; for the judicial inquiry the judge is bound to establish short terms, even from one day to the other, the acknowledgement of the term concept being applicable – art. 241 par. (1) of the New Code of Civil Procedure.

Appeal against Delays in the Proceedings. The New Code of Civil Procedure brings along the concept of appeal against delays in the proceedings, regarding which the further judicial practice will prove if it represents exclusively a formal guarantee on the settlement of the suits in an "optimum and predictable" term or will find a real practical application, so as to be substantiated in a procedural remedy of ensuring the celerity and efficiency of the settlement of the civil law suits.

This remedy is available to any party, as well as to the prosecutor involved in the trial, these individuals being entitled to invoke the violation of the right to have the suit settled within an optimum and predictable term and to request the enforcement of any applicable legal measures in order to solve such situation.

The law regulates the cases where this procedure can be used [33], because a lack of defined circumstances could result in the submission of such appeals to the court even in cases which do not represent an actual delaying in the proceedings. Thus, an appeal can be filed if: the law sets out a deadline for completing the proceedings, for ruling or for providing the reasoning of a decision, deadline which expired without any result; the court set a deadline within which a trial participant should have fulfilled a procedural act, deadline which expired without the court enforcing the applicable legal measures against the debtor of the obligation; a person or an authority which is not a party has been bound to submit to the court, by a specified deadline, a document or data or other information originating from its records which were necessary for the settlement of the suit, and such deadline expired without the court enforcing the applicable legal measures against the debtor of the obligation; the court disregarded its obligation to settle the case within a optimum and predictable term by failing to take the legal measures or by the failure to perform ex officio, where the law so requires, a procedural act required for the settlement of the case, although the time elapsed since its last procedural act would have been enough taking the respective measure or for performing the procedural act.

In conclusion, the Appeal against Delays in the Proceedings instrument, although useful, must be used sparingly, as law theorists argue that in the current context of the overloading of the courts and the "marked legislative instability, which periodically generates waves of lawsuits"[34], the initiation of such procedures should be an exception and not the rule, so as to prevent an even greater obstruction of the work of magistrates.

6. Advertising of the Judicial Activity

European Standard of Protection. Art. 6 sets out that advertising is a distinct condition of the fairness of a trial. The European court noted that the importance of advertising the trying of a case for the general public's interest is particularly high, and therefore we can say that the advertising of the court proceedings is one of the ways of maintaining the confidence in the courts of law.

The advertising of the proceedings is not an absolute principle. In this regard, according to art.6 par. 1, second sentence, the access in the courtroom can be forbidden in expressly mentioned exceptional situations, the Court not allowing any implicit limitations.

The advertising guarantees have also been extended over the content of the court judgments, as the Court established that the advertising rule also entails the advertising of the content of the passed judgments, not just the advertising of the debates carried out before the court[35]. The public delivery of the judgment is an essential component of the parties' right to a fair trial, the objective envisaged by the enforcement of this requirement being, as shown in the case-law of the ECHR, that of ensuring the control of the judiciary power by the public for the achievement of the protected right.

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[33] Art. 522 par. (2) of the New Code of Civil Procedure.

[34] G. Boroi (coordinator), *op. cit.*, p. 1019.

[35] It was noted that, given the purpose of the enforcement of the obligation to deliver a judgment in public session, the provisions of art. 6 shall be deemed fulfilled if the judgment is published on the Internet. See the ruling of June 21st, 2005 in case *Bacchini v. Switzerland*, in Radu Chiriță, *Dreptul la un proces echitabil*, Universul Juridic Publishing House, Bucharest, 2008, p. 377.

Advertising in the national law. The advertising requirement, as provided for by art. par. 1 of the Convention, consists in the review of the case publicly – the advertising of the debates, which is achieved, on the one hand, by ensuring the access of the parties to the debates, as an inherent condition of the exercise of their procedural rights and, on the other hand, by ensuring the access of any person to the debates – and in the advertising of the delivery of the court judgments immediately after the panel's deliberation. The advertising concept is understood in a similar manner in the national law.

Advertising of the court hearing. This fundamental principle, also set out in the previous regulation in art. 121 par. (1) of the Code of Civil Procedure of 1865, is taken ad verbatim from art. 127 of the Constitution of Romania, being also regulated by art. 12 of Law no. 304/2004 on judicial organization.

This principle sets out that a civil trial is conducted, as a rule, before the court, in an open court hearing, in the presence of the parties and of any other person who wishes to attend.

The New Code of Civil Procedure establishes two exceptions to the court hearing advertising principle, so as not to be considered as having an absolute character: the circumstance of the hearing in chambers, in the cases expressly provided for by the law, and the circumstance of the hearing declared secret *ex officio* or upon request, in the cases where the hearing of the merits in a public session would prejudice the morality, public order, the interests of minors, the privacy of the parties or the interests of justice, according to art. 213 par. (2) of the New Code of Civil Procedure.

In which the first circumstance is concerned, for the judicial inquiry before the court of first instance, the rule is for the hearing to take place in chambers, unless the law sets out otherwise. Likewise, art. 240 par. (1) of the New Code of Civil Procedure sets out that the judicial inquiry must take place before the judge, in chambers, and art. 261 par. (1) of the New Code of Civil Procedure sets out that the evidence shall be adduced before the court the case was referred to, in chambers, unless the law sets out otherwise.

In which the second circumstance is concerned, art. 6 par. 1 of the Convention refers to the exception from the advertising principle, according to which the access into the courtroom may be prohibited to the press and the public throughout the trial or a part thereof so as not to prejudice the morality, public order or national security in a democratic society, when the interests of the minors or the protection of the private life of the parties to the trial so require, or when this is deemed absolutely necessary by the court when, in special circumstances, the advertising would be likely to prejudice justice.

Judgment delivery in public session. The delivery of the operative part of the judgement in public session is required by art. 402 of the New Code of Civil Procedure. According to the aforementioned regulation, the judgment shall be delivered, as a rule, in a public session, by the reading of the minutes by the presiding judge or one of the judges of the panel. This is a solemn moment of the trial, and the failure to comply with this requirement makes the judgment null and void [36].

The only exception, strictly provided for by the Code, is the one of art. 396 par. (2), when the postponement of the judgment is ordered and the Presiding judge establishes for the judgment to be delivered by making the solution available to the parties by means of the court registry.

7. Fair examination of the case

European standards. As for the fair case examination requirement, since the Convention does not define the term "fair", it results from the doctrine[37] that this term must be interpreted as ensuring the compliance with the fundamental principles of any lawsuit, especially the adversarial principle and the right to defense principle, both ensuring the full equality of the parties in the lawsuit.

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[36] Ioan Leş, *Noul cod de procedură civilă. Comentariu pe articole*, Vol. I, C.H. Beck Publishing House, Bucharest, 2011, p. 511.

[37] Viorel-Mihai Ciobanu, *Tratat teoretic şi practic de procedură civilă*, Vol. I – *Teoria generală*, Naţional Publishing House, Bucharest, 1996, p. 154.

Adversarial Principle**.** Under the adversarial principle, the parties notify one another about their claims, defenses and evidence they intend to use in court, by means of the written petitions addressed to the court; the case can be tried only after the legal subpoenaing of the parties; during the trial all parties are heard equally, including regarding the *de facto* or *de jure* circumstances raised by the court; in order to establish facts of the case, the evidence shall be allowed during a public hearing, after the parties first discuss them, and the court judgments are communicated to the parties in order to allow them to exercise their legal means of appeal.

In the *Grozescu vs. Romania case* the European Court of Human Rights ruled on the violation of art. 6 of the Convention by the failure to comply with the adversarial principle in the domestic judicial proceedings. In fact, the respondent plaintiff showed that during the domestic judicial proceedings, after the court postponed the ruling on the motion to dismiss on ground of the failure to pay the stamp duty for the appeal, the court, in its absence, allowed the submission to the case file, of the receipt proving the payment of stamp duty by the appellant and heard the latter on the substantiality of the appeal.

The Court noted that the domestic judicial proceedings were not conducted in a manner that was fair to both parties, by the failure to observe the appeal adversarial principle, allowing the appellant to present verbal conclusions before the court of appeal, in the absence of the respondent-plaintiff or its defender, and not notifying the content of the conclusions to the latter so as to enable them to dispute them.

Right to defense. The right to a fair trial means that any party has a reasonable opportunity to make its case before the court in a manner that does place it at a disadvantage, which is achieved by ensuring the right to defense.

The doctrine[38] shows that the right to defense can be construed in two ways: material and formal. From a material, broader, point of view, it consists of the full set of procedural rights and guarantees that are established by law in order to enable the parties to defend their legitimate interests: the right to file petitions, to be notified on the documents in the case file, to propose evidence, to file motions of recusal against judges and prosecutors, to participate in the hearings, to present conclusions, to exercise means of appeal. From a formal, narrower, point of view the right to defense means the right to hire a defender.

Standards set out in the Romanian law. The adversarial principle, one of the most expressive forms of procedural loyalty[39], is expressly regulated in art. 14 of the New Code of Civil Procedure, being included in the fundamental principles of a civil suit.

The adversarial principle is expressed by the adage *audiatur et altera pars*[40] – listen to the other side, which summarizes the essence of the entire process. It was suggestively shown[41] that, in fact, the principle is a set of rights and obligations to the court and to the parties, designed so as to confer to the judicial dialogue the desired balance to ensure the success of the proceedings, when applied.

It is difficult to define what elements are covered by the adversarial principle, on the one hand, and by the right to defense, on the other, the border between them being sometimes very subtle, and sometimes nonexistent, involving a chain reaction – the violation of the adversarial principle irreversibly leads to the violation of the rights to defense principle. Furthermore, the specialized literature[42] argues that the adversarial principle (and the guarantee of the compliance with this principle implicitly) is the means by which the principle of the active role does not affect the right to defense of the parties.

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[38] Viorel-Mihai Ciobanu, *op. cit.*, Vol. I, p. 127.

[39] For a remarkable study on the interference of the concept of loyalty with the civil procedure, see Ion Deleanu, *Loialitatea în perspectiva noului cod de procedură civilă*, in „Dreptul" Magazine 12/2012, p. 15.

[40] the adage belongs to Seneca.

[41] Steluta Ionescu, *Principiile procedurii judiciare în reglementarea actuală şi în noile coduri de procedură*, Universul Juridic Publishing House, Bucharest, 2010, p. 144

[42] Vasile Pătulea, *op. cit.*, p. 177

The adversarial principle governs the procedural activity from one end to the other. In order to align the national law to the requirements of the European law, various provisions of the New Code of Civil Procedure expressly refer to the adversarial principle.

The violation of the adversarial principle results in the nullity of the passed judgement, this being the sanction that was also established in the practice of the supreme court and under the old regulation[43].

The right to defense has the value of a constitutional principle is the Romanian law, as art. 24 of the Constitution sets out as follows *"(1) The right to defense is guaranteed. (2) Throughout the trial the parties shall be entitled to be assisted by a lawyer, either chosen or appointed ex officio."*

From a material point of view, this right includes all the procedural rights and guarantees, which give the parties the opportunity to defend their interests, and from a formal point of view it includes the right of parties to hire a lawyer.

The right to defense is ensured through the manner of organization and operation of the courts of law, which is based on the principles of lawfulness, equality of parties, gratuity, collegiality, advertising, judicial review, immutability and the active role of the court.

Lawfulness means the administration of justice in the name of the law by the courts of law provided for by law, within the limit of the powers conferred upon them by the lawmaker, as well as the judges' allegiance to the law alone; equality of the parties means their equality within the procedural relations with the court, but also within the relations between them, by allowing the same procedural rights and imposing the same obligations; gratuity means the obtaining of a judicial solutions without the payment of any fees; judicial review means the review, by a higher court, of the lawfulness and substantiality of the judgment passed by a lower court; immutability means the impossibility, in principle, to amend the framework of the dispute, in terms of the parties, scope and legal grounds; the active role of the court is not an interference with the interests of the parties, but a guarantee of the rights and of the achievement of their interests, having the sole purpose of finding the truth in the case in question.

8. Conclusions

This scientific presentation consists of a brief analysis of the explicit and implicit guarantees of the right to a fair civil trial as regulated by art. 6 of the European Convention on Human Rights and makes a comparison between the applicable European and national legislation.

We can therefore conclude that, based on the well established case-law, the "living instrument" character of the Convention always requires the consideration of the compatibility of the national provisions on the elements that make up the right to a fair trial, according to art. 6 of the Convention, with this text, by specifying and broadening its scope.

Therefore, we hope to have achieved the purpose of this work by the acknowledgement and familiarization with the procedural guarantees designed to protect and guarantee to litigants the right to a fair trial with the enforcement of the democratic principles of justice so as to ensure a fair civil lawsuit.

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