

The Concept of Public Policy in the Case of Annulment of Arbitral Awards

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Abstract

The present article focuses on drawing up the definition of "public policy" in respect of claims for annulment of arbitral awards. Public policy in this case is defined by certain nuances, which have been further developed by national and international case law. The purpose of the analysis is to provide a comprehensive presentation of this concept, through a comparative analysis, both in relation with the concept of public policy as outlined by the Civil Code, as well as in relation with the national and international doctrine and case law.

Keywords: arbitration in Romania, Romanian Code of Civil Procedure, public policy, arbitral rules, international private law, annulment of the arbitral award.

JEL Classification: K15, K33, K39, K49

1. Introductory remarks

The arbitral award is the final act of the arbitral proceedings and constitutes the purpose for which the arbitration agreement was concluded and for which the arbitral tribunal was constituted. The arbitral award is also the judicial act by which the arbitral tribunal concludes its mandate for the settlement of the dispute. The Romanian legislator has used the wording "arbitral award" to determine the final act of the proceedings before the arbitral tribunal. Moreover, the notion of *award* is used in state legislation in a broad sense, including judgments, decisions and conclusions handed down by the ordinary courts.²

According to Article 608 of the Code of Civil Procedure of 2010, "The arbitral award may be set aside only by a claim for annulment". Thus, an exclusion of other remedies, either ordinary or extraordinary, was inspired by the Model Law elaborated by UNCITRAL, significantly influencing the duration of the resolution of the arbitration process, eliminating the dilatory³ character which substantially hindered the arbitration procedure. The providing of a single means of appeal against arbitral awards has strengthened the speed of the arbitral process, which includes both grounds for setting aside decisions and grounds specific to court decisions. In this respect, the party who has received an unfavourable award, has no possibility to challenge the merits of the arbitral tribunal's decision. This aspect must also be taken into account in the context of the public policy concept.

However, the regulation of the claim for annulment of the arbitral award has provided security against possible abuse by arbitrators through the control that may be ensured by means of the judicial review.

As the claim for annulment represents the only means of review of an arbitral award, the legislator provided that the parties could not waive their right to submit a claim for annulment through the arbitration agreement (Art. 609 para. (1) of the Code of Civil Procedure). However, Art. 609 para. (2) of the Code of Civil Procedure provides that the waiver of the right to file a claim for annulment may be made only after the arbitral award has been rendered, i.e. when the parties are in full knowledge of the facts to decide such a measure.⁴

From the wording of Article 608 of the Code of Civil Procedure, the grounds for which an application for annulment of an arbitral award may be submitted are expressly and limitatively provided and refer, in particular, to the violation, in the course of the arbitral proceedings or by means

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² Viorel Roş, *Arbitrajul Comercial Internațional (International Commercial Arbitration)*, Regia Autonomă „Monitorul Oficial” Publishing House, Bucharest, 2000, p. 417.

³ Monica Ionaș Sălăgean, *Arbitrajul comercial (Commercial Arbitration)*, All Beck Publishing House, Bucharest, 2001, p. 138.

⁴ Ion Băcanu, *Controlul judecătoresc asupra hotărârii arbitrale (Judiciary control of the arbitral award)*, Lumina Lex Publishing House, Bucharest, 2005, pp. 14-15.

of the award, of provisions of an enforceable/organisational nature.

The grounds for setting aside the arbitral award provided for in Article 608 of the Code of Civil Procedure are:

- a) the dispute was not subject to settlement by arbitration;
- b) the arbitral tribunal resolved the dispute without an arbitration agreement or on the basis of a void or inoperative agreement;
- c) the arbitral tribunal was not constituted in accordance with the arbitration agreement;
- d) the party failed to appear at the time of the hearing and the summons was not duly served;
- e) the award was rendered after the expiry of the time-limit for arbitration provided for in Article 567, although at least one of the parties has declared that it intends to invoke the time-limit and the parties have not agreed to continue the proceedings, in accordance with Article 568 para. (1) and (2);
- f) the arbitral tribunal has ruled on matters not requested or has given more than requested;
- g) the arbitral award does not contain the operative part and the reasoning, does not indicate the date and place of the award or is not signed by the arbitrators;
- h) the arbitral award violates public policy, morality or mandatory provisions of law;
- i) if, after the arbitral award has been rendered, the Constitutional Court has ruled on the exception invoked in that case, declaring unconstitutional the law, ordinance or a provision of a law or ordinance which was the subject of that exception or other provisions of the contested act which necessarily and obviously cannot be dissociated from the provisions referred to in the referral.

2. The concept of public policy

According to the case law, public policy has been defined as a set of fundamental legal principles whose violation would be incompatible with the legal, economic and social system of the state concerned.⁵ In Germany, it has been held that "*a decision violates public policy if it conflicts with fundamental notions of justice, justice or violates principles that represent fundamental economic or national values*". In essence, Professor O. Căpățână points out that public policy is left to the discretion of the court "*the legal provisions avoid circumscribing it - not even by an enumeration - so as not to restrict the judge's discretion*".⁶ In a plastic way, public policy was defined by a British judge as follows: "*very wild horse and once you're mounted you don't know where it's going to take you. It can take you away from the law, it is never considered, except when other solutions fail*" (*Richardson v. Mellish*).⁷

Public policy, good morals and the mandatory provisions of the law are mentioned in Book IV, "Arbitration" of the Code of Civil Procedure, both with regard to the arbitration agreement and with regard to the dissolution of the arbitral award, as follows:

- i. art. 541 para. (2) establishes that, in the conduct of arbitration, the disputing parties and the competent arbitral tribunal may establish rules derogating from ordinary law, provided that such rules are not contrary to **public policy** and mandatory provisions of the law;
- ii. art. 544 para. (2) provides that, subject to **public policy** and morality and to mandatory rules of law, the parties may lay down, by arbitration agreement or by a written instrument concluded subsequently, either directly or by reference to a particular arbitration rule, rules concerning the constitution of the arbitral tribunal, the appointment, removal and replacement of arbitrators, etc.

In this context, it can be concluded that the legislator's intention was that public policy must be respected throughout the arbitral proceedings, which starts with the settlement of the arbitration agreement and ends with the delivery of a judgment.

The institution of public policy in domestic law belongs to that category of subtle, flexible

⁵ Bazil Oglindă, *Analiză comparativă între ordinea publică de drept internațional privat și ordinea publică de drept intern (Comparative view on the international law private order and national public policy)*, „Romanian Arbitration Magazine” no. 4 of 2007, p. 29.

⁶ O. Căpățână, *Efectele hotărârilor judecătorești străine în România (The effects of foreign court decisions in Romania)*, The Publishing House of the Romanian Academy, Bucharest, 1971, pp. 125-126.

⁷ Bazil Oglindă, *op. cit.*, p. 30.

legal institutions, due to the fact that it is not sufficiently defined by the law, therefore, the role of the interpreter is very important and, consequently, in the field to which we refer, it can be assessed by the arbitrator's wisdom following strictly inductive criteria. The differences between national legal systems, even within the same large legal system, are numerous. Thus, there may be regulations of legal relationships by means of dispositive rules in one legislation and imperative rules in another.⁸

It goes without saying that when an arbitration agreement infringes public policy, the judgment given on the basis of such an agreement is also liable to infringe public policy.⁹ By way of example, an arbitration agreement entered into by an incompetent person will be void, so an arbitral award made under such an agreement will also be void. Likewise, an arbitration agreement relating to certain property rights from which the parties cannot derogate, or to personal non-property rights, violates public policy¹⁰ and is to be sanctioned with absolute nullity, the judgment given in consideration of it following its finality. However, breaches of public policy and morality may also occur for reasons independent of the arbitration agreement.

In this context, it can be concluded that the legislator's intention was that public policy must be respected throughout the arbitral proceedings, which starts with the drawing up of the arbitration agreement and ends with the rendering of the award.¹¹

It goes without saying that when the arbitration agreement violates public policy, the award issued under such an agreement is also liable to violate public policy. By way of example, an arbitration agreement entered into by an incompetent person will be void, so an arbitral award made under such an agreement will also be void. Likewise, an arbitration agreement relating to certain ownership rights from which the parties cannot derogate, or to personal non-pecuniary rights, violates public policy and is to be sanctioned with absolute nullity, the award rendered in consideration of it having the same faith. However, breaches of public policy and morality may also occur for reasons independent of the arbitration agreement.

Public policy includes economic, social and political order, indicating the rules from which the parties to a legal relationship may not depart and the failure to comply with which is sanctioned by the bodies with these powers. Public policy also determines the limits of the free will of the parties to the legal relationship.

The cases referred to in Article 608 para. (1), letter h) of the Code of Civil Procedure do not enjoy a proper definition or criteria of determination, leaving it to the judge called to resolve the case to determine whether an arbitral award is likely to violate public policy, morality, or mandatory rules of law.

The concept of "public policy" is not, however, identical with that of "mandatory rules", otherwise there would be no justification for the separate reference to them in the legal text cited.¹² 'Good moral conduct' also concerns the protection of a general interest and represents a set of directives imposed by a social morality, "existing at a given time and in a given place, which, in parallel with public policy, represents a standard by which human behaviour is judged". Good morals are also part of "moral rules", which, lacking a legal definition, reflect principles that go beyond the sphere of law.¹³

Mandatory provisions of the law are to be understood as any other mandatory legal provisions other than those listed in the grounds provided for in Article 608(a) to (g) and (i). It is considered that the following criteria should be used to determine whether a rule is mandatory or not: the way in which the text is formulated, the purpose for which the legislator is aiming and the sanction for failure to comply with the provision in question.

The ambit of public policy in arbitration proceedings is quite limited, since most of the rules laid down in the Code of Civil Procedure are rules of a dispositive nature. Although some rules

⁸ Ibid, p. 30.

⁹ Viorel Roș, *op. cit.*, 2000, p. 474.

¹⁰ Ibid, p. 174.

¹¹ Ion Băcanu, *op. cit.*, 2005, p. 94.

¹² Viorel Mihai Ciobanu, *Unele aspecte privind executarea și desființarea hotărârii arbitrale (Certain issues concerning the enforcement and annulment of arbitral awards)*, „Romanian Magazine on Enforcement of Court Decisions” no. 1 of 2015, p. 7.

¹³ Ibid, p. 7.

concerning the arbitral procedure have an apparently mandatory wording, they are of an operative nature. In the majority of the instances, the operative character of legislative texts concerning the arbitral process is expressed by the phrase "unless the parties have provided otherwise", the arbitration agreement being an important landmark in the conduct of such proceedings. In the absence of specific provisions in the arbitration agreement, the arbitral tribunal has the prerogative to determine the procedural rules, the last resort for determining these rules being the rules of Book IV of the Code of Civil Procedure.

Where the parties have recourse to a permanent arbitral institution, the procedural rules of that institution shall be deemed to be part of the arbitration agreement, unless otherwise provided.¹⁴ Acceptance of the rules of the permanent arbitration institution has the value of an arbitration clause and compliance with them is equivalent to compliance with the legal requirement, i.e. compliance with public policy.

In this sense, the setting aside of an arbitral award cannot be done solely by reference to the provisions laid down in the Code of Civil Procedure, but by reference to the procedural public policy applicable to arbitration, i.e. the provisions ensuring a fair trial for the parties.

3. The concept of *public policy* in the case law of national courts of law

In practice, the ground for dismissal provided for in Article 608 para. (1)(h) is the one most frequently invoked.

However, in most cases, the reviewing courts have dismissed the claims for annulment submitted on the basis of this ground. Although this ground is often invoked, it cannot be a way of circumventing the other grounds laid down in the Code of Civil Procedure. This ground for annulment of the arbitral award may constitute a safeguard for the parties in the event that the other eight grounds could not sanction the violation of rules of public policy or morality. However, this ground for annulment should be circumscribed to the violation of the fundamental principles governing the arbitral procedure, as well as other rules relating to it and which are of a mandatory nature.

In this regard, the Bucharest Court of Appeal ruled that "with regard to the legal ground provided for in Article 354(i) of the Civil Procedure Code, the claimant does not show in concrete terms, not even how the operative part of the arbitral award violates public policy, good morals or the mandatory provisions of the law, being simply a generic allegation, without any conclusive or relevant evidence, so it must be dismissed as unfounded".¹⁵ The same court of law also held that "the applicant itself, in formulating its argument, refers to the unreasonableness of the judgment and not to any illegality grounds, as provided for in the text relied on".¹⁶

The High Court of Cassation and Justice¹⁷ has also ruled in the same sense that the legal ground provided for in Article 608 para. (1) letter (h) of the Code of Civil Procedure must not be a pretext for examining the merits and legality of an arbitral award in the review process of the dispute.

The former Supreme Court of Justice¹⁸ also held that "*none of the grounds set out in Art. 364 lit. a) - i) of the Code of Civil Procedure does not give the court the right to examine the manner in which the arbitral tribunal resolved the merits of the case, but only to see whether the formal conditions of the arbitration were not complied with, namely those relating to the existence of a legal arbitration agreement and the possibility that the dispute be resolved by arbitration, the constitution of the arbitral tribunal, the provision of the right of defence of the parties, the drafting of the arbitral award and compliance with the mandatory provisions of the law and the rules ensuring public policy and good morals*". Thus, the criticism of an arbitral award by way of an application for its annulment, which only invokes aspects relating to the merits of the case and the manner in which the arbitral tribunal assessed the evidence adduced in the case, i.e. to interpret and determine the incidence of the

¹⁴ Viorel Roş, *op. cit.*, 2000, p. 96.

¹⁵ Bucharest Court of Appeal, Vth Commercial Panel, Dec. no. 384 of 24 March 2004.

¹⁶ Bucharest Court of Appeal, Commercial Panel, Decision no. 1744 of 10 November 1997.

¹⁷ High Court of Cassation and Justice, Dec. No. 4393/2003, Published in the „Law Magazine”, 2005, No. 4, pp. 172-175.

¹⁸ Supreme Court of Justice, Commercial Panel, decision no. 1343/1997, cited in the „Romanian Arbitration Magazine” no. 4 of 2013.

legal provisions concerning the relationship between the parties, cannot be considered to have any bearing on the plea provided for in Article 608 para. (1) letter (h) of the Code of Civil Procedure.

As per the case law, it has also been concluded that¹⁹ a criticism that the arbitral award violates public policy, morality or mandatory provisions of law, with regard to the determining of the factual situation, or with regard to the interpretation and application of the dispositive legal provisions by the arbitral tribunal, does not fall within the scope of the argument provided for by Art. 608, but only criticism with regard to the violation of mandatory provisions of law, independently of the determined factual situation. Non-compliance with contractual provisions by the parties of a legal relationship does not constitute a ground for setting aside the arbitral award, so that the contractual relations between the parties are governed by the principle of freedom of will, which includes private law relationships, from which the parties may derogate.

If the grounds provided in view of setting aside an arbitral award are that the court erred in its assessment of the evidence adduced in the case, the arbitral tribunal cannot be held to have infringed any mandatory rule. **This is because the assessment of the evidence, the interpretation of the contract at issue and the determination of the incidence of the legal rules are matters relating to the assessment of the rights and obligations of the parties to the proceedings** and, implicitly, of the substance/lack of substance of the claims made, matters which do not entail the setting aside of an arbitral award, pursuant to Article 608 (1) (h) of the Code of Civil Procedure. The court reviews the legality of the arbitration award, not the merits of the case, so that the plea provided for in Article 608(1)(d) of the Code of Civil Procedure should not be a pretext for requesting the court to review the merits of the dispute.

The court granted the claim for annulment on the ground provided for in Article 608(1), letter h) of the Code of Civil Procedure when basic principles of the arbitration procedure were violated, such as the principle of adversarial proceedings, the right of defence, equal treatment.

Thus, in one case²⁰, the claimant submitted into the record a table on the calculation of penalties after the closure of the proceedings. This document was not communicated to the defendant and was not put to the parties for debate, but it was retained as evidence of the calculation of penalties in the reasoning of the arbitral award. The court granted the claim for annulment because it infringed the mandatory provisions on the rights of the defence and the adversarial principle.

It was also held²¹ that the amount of costs incurred in connection with the arbitral proceedings was not such as to set aside the arbitral award on the ground provided for in Art. 608 para. (1) (h) of the Code of Civil Procedure, as the rules concerning arbitral fees are not mandatory and not related to public policy or morality.

In another dispute²², the plaintiff argued that the court had infringed the mandatory rules of the law with regard to damages, in that they are only due to the extent that the fault of the party in question is proven: "given the nature of the relations established between the two parties, the fault for non-payment, even partial, of the goods delivered to the external customer, belongs to both parties, so that it appears necessary and justified for the plaintiff to bear part of it as well, since it did not react or reacted late to the commission agent's signals".

In another case on the dockets of the Bucharest Court of Appeal²³, the claimant argued that a judgment infringed public policy and the mandatory provisions of the law, as it infringed the rules of equity, since it provided a favourable decision to the party who has breached its obligations. In this case, the reviewing court dismissed the claim for annulment of the arbitral award, arguing that "the criticism that the mandatory provisions of the law have been infringed cannot be upheld because the arbitral tribunal has analysed down to the smallest detail the claims and arguments of both parties, referring to all the relevant documents, when rendering its decision".

¹⁹ High Court of Cassation and Justice, Commercial Panel, Decision no. 3622/2008, www.scj.ro.

²⁰ Bucharest Court of Appeal, Commercial Panel, Decision no. 895 of 15 April 1999.

²¹ Supreme Court of Justice, Commercial Panel, decision no. 4351/1998, Case law Bulletin. Published decisions for the year 1998, p. 282.

²² Bucharest Court of Appeal, 6th commercial section, Decision no. 1204 of 4 September 1998.

²³ Bucharest Court of Appeal, commercial section, Decision no. 1334 of 8 May 2000.

In another decision of the Bucharest Court of Appeal²⁴, an arbitral award was set aside because the arbitral tribunal did not respect in its analysis the sequence of obligations that were specific to a commission contract, and the claimant, the commissioner, had not concluded any commission contracts and thus the defendant's obligation to deliver the goods had not arisen: *"The Court finds that the arbitral award violated the mandatory provisions of the law, namely those governing the commission contract, contained in Articles 405-412 C. com., since the analysis of the commercial relations between the parties did not take into account the specific, legal nature of this type of contract, but, as the appointed super-arbitrator held, in his separate opinion, the entire reasoning of the claim and of the arbitral award, the Court considers, is as for a sale-purchase contract, in the performance of which, although the buyer has paid an advance, the seller would not have delivered the goods sold, with the consequence of owing late penalties and damages, being therefore wrong in relation to the special provisions governing the commission contract."*

As regards the parties' regulation of contractual obligations, the High Court of Cassation and Justice has established that these are the parties' attribute and represent suppletive rules, which are not violations of public policy "The interpretation of the contract, the payment of the price, represent situations agreed by the parties within the limits of their agreement of will, which did not violate imperative rules, public policy, or good morals. Only the interpretation of contractual terms in contradiction with those rules is subject to review by a claim for annulment; but factual issues, such as those raised by the appellant, require an examination on the merits, which is inadmissible. The binding force of the contract is imposed on the parties, but only with the force of a suppletive rule, thus engaging the relativity of the effects of the agreement. Therefore, the Court of Appeal judiciously found that there are no grounds, determinable by any of the points of Article 364 of the Civil Code, for the admission of the claim for annulment."²⁵

Another aspect to be mentioned with regard to public policy concerns the application of foreign law to the substance of the dispute or the recognition and enforcement of a foreign judgment in Romania.

It has been pointed out by the doctrine²⁶ that the public policy to which the arbitration rules refer is different from the public policy of ordinary judicial proceedings, and that the domestic public policy does not coincide with the public policy of private international law. Thus, it can be considered that the public policy of private international law may even constitute a ground for setting aside the foreign arbitral award.

It has been considered by the doctrine that "the public policy exception appears as a corrective measure, to the application of foreign laws, in the sense that the court is given the opportunity to assess the extent to which the application of foreign laws contravenes the fundamental principles of local law".²⁷

Also, recognition and enforcement of foreign arbitral awards on Romanian territory may be refused if the public policy of Romanian private international law is violated. The provisions of Article 1.097 of the Code of Civil Procedure enshrine such a principle, i.e. that "the decision is manifestly contrary to the public policy of Romanian private international law".

4. International private law public policy in the light of the arbitration case law

The difficulties encountered in domestic law in defining the concept of "public policy" are even greater when it comes to its meaning in private international law.

²⁴ Bucharest Court of Appeal Commercial Section Decision no. 1908 of 8 December 2003, www.sintact.ro.

²⁵ High Court of Cassation and Justice Commercial Panel, Decision no. 4788 of 18 October 2005, „Romanian Magazine of Business Law” no. 1 of 2006, www.sintact.ro. In the same sense, it was decided that: "In other words, the provisions of Article 969 of the Civil Code, which enshrine the principle of the binding force of contracts, are not rules of public policy and cannot be considered mandatory rules of law, given that the contracting parties may amend the contract by their mutual consent. Nor can this legal basis validly support a breach of good morals, since good morals are not expressly indicated" (High Court of Cassation and Justice, Commercial Division, Decision No. 3197 of 3 December 2009).

²⁶ Ion Băcanu, *op. cit.*, 2005, p. 95.

²⁷ Victor Babiuc, *Ordinea publică de drept internațional privat în practica arbitrală (International Private law public policy in the arbitration case law)*, „Romanian Private Law Magazine” no. 1 of 2007, p. 15.

The definition of this general issue of private international law was made by reference to its content: public policy is the means available to the court to prevent the application of a normally competent foreign law which contravenes to a fundamental principle of the system of law of the forum, i.e. of a State.²⁸

Public policy in private international law is an extension of the concept of public policy from domestic law to the sphere of private law relationships with a foreign element. The concept of "public policy in private international law" consists of the fundamental principles of domestic law, except that not everything that falls under public policy in domestic law, falls under public policy in private international law. The starting point for defining public policy under international law is the definition of public policy under domestic law. If public policy under domestic law is the area in which state authority is exercised, public policy under international law is logically the area which goes beyond the limits of the first concept.²⁹

For example, the interlocutory minutes of the hearing of 10 October 1968 rendered by the former Bucharest Arbitration Commission established the following principle: "a foreign law, in this case Swiss law, which, being applicable to foreign trade relations between the parties by virtue of the *lex contractus*, lays down time limitation periods longer than those provided for in Decree No. 167/1958, does not infringe the public policy of private international law". The time limitation periods - laid down by foreign law - inevitably replace those laid down by Decree No 167/1958 which, although mandatory, do not have the character of rules of public policy under private international law, so as to be capable of paralysing the effect of the provisions deriving from the legal system competent in the case at hand.³⁰

In that context, it may be argued that the scope of application of public policy under domestic law is not identical to the scope of application of public policy under private international law. This lack of identity has been established by both Romanian and foreign arbitral jurisprudence.

There is an obvious tension between the public order of domestic law and that of private international law, a tension that must be resolved by the courts: on the one hand, without circumventing the power/authority of the State by recognising judgments that are contrary to domestic laws and values; and, on the other hand, without circumventing the desire to respect the finality of foreign judgments and decisions. In the search for a solution to this tension, some countries' laws have decided that a much narrower concept of public policy should apply to foreign judgments than the usual domestic one that applies to national judgments.³¹

In *Eco Swiss China Time v. Benetton*³², Benetton sought the termination of a licensing agreement relating to the production and distribution of watches. The Arbitral Tribunal, applying Dutch law in a partial final award, ruled in favour of Eco Swiss and then, in a final award, awarded damages of USD 26 million. Benetton defended itself by claiming that this award violated public policy due to the nullity of the licence contract under Article 81 EC12 (e.g. Article 85) (but, even so, neither party nor the tribunal raised this objection during the trial of the dispute, but only upon enforcement of the award).

The dispute came before the Supreme Court of the Netherlands, which referred the case to the European Court of Justice, which found *inter alia* that the provisions of Art. 81 EC are indeed public policy in the light of the provisions of the New York Convention, but in the case at hand this does not apply, the judgment to pay the 26 million remaining valid. The Austrian Supreme Court³³ took a similar view. The failure to comply with the summons procedure, which leads to a violation of the adversarial principle and the rights of the defence, also constitutes grounds for invoking public policy under private international law.³⁴ In the practice of the Romanian courts, it has been decided that the exception is also applicable in the situation where the foreign law, although it regulates a method of

²⁸ Ibid, p. 15.

²⁹ Ibid, p. 17.

³⁰ Ibid, p. 16.

³¹ Bazil Oglindă, *op. cit.*, p. 30.

³² European Court of Justice, 1 June 1999, C-126/97, [1999] 2 All ER (Comm) 44.

³³ 3 Ob. 115/95, dated 23 February 1998, reported in (1999) Rev. Arb. 385; 3 Ob. 2372/96 m, dated 5 May 1998.

³⁴ O. Căpățână, *op. cit.*, 1971, p. 128.

summons, cannot reasonably lead to the defendant being effectively informed. Under Romanian law, the reasoning of judgments is mandatory. If foreign law does not impose this requirement, the question has been raised as to the ineffectiveness of the foreign judgment in Romania on this ground. Lack of reasoning does not constitute grounds for invoking public policy under private international law. This solution is all the more necessary as there was a period in Romanian law when judgments did not have to be reasoned. If foreign law requires a statement of reasons and the foreign judgment is not reasoned, recognition will be refused on the grounds that it could not take effect in Romania as long as it has no force in the country where it was issued.³⁵

In international practice, it has been concluded that this control of the international regularity of a foreign arbitral award cannot concern the content of its reasoning, but must relate to a series of criteria concerning the substance of the dispute. Such criteria may be the public policy of private international law and the principle of adversarial proceedings before the arbitral tribunal.³⁶

In a landmark case, the Inter Arab Investment Guarantee Corporation applied for the dismissal of the request for exequatur of a Jordanian award, initiated by the Arab International Investment Bank. One of the grounds was that the arbitral tribunal had qualified the contract concluded by the parties, without raising such qualification to the parties, the award being considered contrary to public policy under international law. Referring to the provisions of Articles 1502 and 1504 of the French Code of Civil Procedure, the French Court of Cassation did not identify any case of international irregularity. In commenting on this jurisprudential solution, it was held that, in domestic arbitration, the operation of the qualification by the arbitral tribunal of the concluded contract cannot be challenged even if public policy provisions were applicable. *A fortiori*, this qualification cannot be questioned in international arbitration. Consequently, there can be no question of a disregard of public policy under private international law through the mechanism of the qualification of the contract in dispute.³⁷

5. Final remarks

In conclusion, the above-mentioned illustrates the importance of the jurisprudential approach in identifying the content of public policy. The role of legal, historical and cultural traditions should not be omitted, as it reveals the benchmark on the basis of which the definition of a public order takes shape in Romanian and international private law.

It is essential to note that the annulment of the arbitral award on the grounds of public policy cannot concern aspects relating to the judgment on the merits of the dispute, but only breaches of the concept of public policy.

Although there is still some debate about the content of public policy and the difficulties in determining it are insurmountable, the examples of case law mentioned above are an important reference point in deciphering this issue.

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³⁵ Bazil Oglinda, *op. cit.*, p. 32.

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