SETTING ASIDE OF ARBITRAL AWARDS ON THE GROUND OF PUBLIC POLICY IN THE PRACTICE OF ROMANIA

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Abstract

There is no international convention on setting aside of arbitral awards, however the public policy ground is common to most legislations and it is provided by the Romanian law as well. The present paper assesses the Romanian courts' interpretation of the concept of public policy in this context.

The case law analysis reflects the fact that even though parties tend to misuse this ground by often invoking arguments pertaining to the merits of the case, courts have reinforced the principle that it is only when the arbitral award in itself breaches public policy, public morals or mandatory legal provisions that the award can be set aside.

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Introduction

Judicial control over an arbitral award can occur in two instances, namely opposition to recognition and enforcement, and setting aside proceedings.[1] Contrary to recognition and enforcement which is governed by the New York Convention, there is no international convention on setting aside arbitral awards.[2] Nevertheless, there is "a very strong trend toward convergence anchored in the UNCITRAL Model Law". The grounds for setting aside set forth in the Model Law, and adopted in most national laws on arbitration, are basically the same as the grounds for refusing recognition and enforcement provided in Article V of the New York Convention.[3]

Setting aside of an arbitral award has important consequences. First, it is obvious that the award will have no effect in the country were the award was annulled. In addition, if the award has been set aside by a competent authority "of the country in which, or under the law of which"[4] the award was made.[5], therefore "the place of the award or of the law under which it was rendered"[6], the award may be refused recognition and enforcement under Article V(1)(e) of the New York Convention.

Accordingly, the consequences of setting aside an award reach further that the country where the award was vacated. Bearing in mind such effects, and the lack of an international

[1] TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE 740 (4th ed. West Thomson Reuters 2009)
[2] *Ibid.*
[3] *Ibid.*
[4] United Nations Convention on recognition and enforcement of arbitral awards, art. V(1)(e)
[5] TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION A TRANSNATIONAL PERSPECTIVE 742 (4th ed. West Thomson Reuters 2009)
[6] *Ibid.*

convention in this field, the exact way in which setting aside the arbitral awards is regulated and implemented in the practice of different countries is undoubtfully of importance. The present thesis will give an overview of the practice of Romania in the field of setting aside of the arbitral awards on the ground of public policy thus illustrating the degree of court scrutiny over arbitral awards and hence the extent to which Romanian courts are favorable or not to arbitration as a dispute resolution mechanism.

The present work gives an English language overview of the Romanian practice, which as mentioned above can be equally interesting for a foreign person or entity in case it is party to an arbitration proceeding carried out in Romania. The methodology itself is not a commonly used one in the Romanian legal literature, since the Romanian doctrine mainly focuses on theoretical analysis of the legal framework and not on case law. On the other hand, the general civil law orientation towards the legal provisions rather than case law can sometimes amount to barriers to research, as courts are rather scarce in explanations and details on their holding. Under such circumstances, it is sometimes difficult to grasp the exact factual background, contrary to the lengthy court explanations specific to common law cases.

Although it is the most often invoked ground for setting aside, contrariness to public policy is almost never a reason for actual annulment. "At one time it was [even] said that 'there is no case in which this exception has been applied by an English court'".[7] The ground itself and its wording are vague enough to be used as a basis "where are points fail"[8]. However, it is very seldom that the interested party can prove that enforcement of the award will breach

[7] ALAN REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 456 (4th ed. Sweet & Maxwell 2004)
[8] *Ibid.*

the respective county's public policy. As a result, of such failure, the challenge is almost always rejected.

The main finding of the present peace of research is that even though the loosing party in the arbitration proceedings often tends to use the public policy ground as an ordinary appeal, in most of the cases the courts prove to have a correct interpretation of purpose and legal nature of the action for annulment of the arbitral awards. Hence, they refuse setting aside when the conditions are not fulfilled. To arrive to this conclusion, the present thesis will commence with a presentation of the Romanian legal background on setting aside arbitral awards and it will then analyze a few cases brought before the Romanian Supreme Court and the court of appeals during the last years.

1. Romanian legal framework regulating the setting aside of arbitral award

In Romania, an arbitral award can be set aside by means of the action of annulment of arbitral awards regulated by the Romanian Code of Civil Procedures. It was noted in the Romanian legal doctrine that the parties cannot renounce to their right to challenge the award[9]. However, pursuant to Art. 364[1], such renunciation can take place after the award was rendered. The challenge can be exercised within one month from the moment when the award was communicated to the parties[10]. Pursuant to Art. 365 (3), the court can suspend the enforcement of the award only if the interesting party pays a guarantee. In case the court admits the challenge and annuls the award, it shall decide on the merits within the limits set forth by the arbitration agreement. If new evidence is necessary, the court shall decide upon merits only after the analysis of this latter evidence[11].

The competent court to set aside the arbitral award is the court higher to the one which would be competent to decide upon the issue in the absence of an arbitration agreement, which court needs to be the competent court in the area where the arbitration took place[12]. The decision thus rendered can only be challenged by second-degree appeal[13] and not by ordinary appeal. Pursuant to the Romanian Code of Civil Procedures, in the case of the ordinary appeal the appellate, the court can review the first instance court's decisions under

[9] IOAN LEȘ, TRATAT DE DREPT PROCESUAL CIVIL [CIVIL PROCEDURES] 819 (4th ed. C.H. Beck 2008)
[10] Romanian Code of Civil Procedures, art. 365(2).
[11] IOAN LEȘ, TRATAT DE DREPT PROCESUAL CIVIL [CIVIL PROCEDURES] 819 (4th ed. C.H. Beck 2008)
[12] Romanian Code of Civil Procedures art. 365(1); Viorel Mihai Ciobanu, Din nou despre natura juridică a cțiunii în anulare a hotărârii arbitrale [Again about the legal nature of the action to set aside arbitral awards] 1 Dreptul 78 (2002)
[13] Romanian Code of Civil Procedures art. 366(2).

all its elements, whereas in the case of second-degree appeal the higher court can only verify if the decision was rendered in accordance with the legal provisions[14].

The grounds on which the award can be challenged are set forth in Art. 364 of the Code of Civil Procedures which reads as follows: "The arbitral award can only be set aside for one of the following reasons: (a) the dispute can not be solved through arbitration; (b) the arbitral tribunal decided upon the case without an arbitration agreement in this regard or on the basis of an arbitration agreement which was null or incapable of being performed; (c) the arbitral tribunal was not constituted in accordance with the agreement of the parties; (d) the party was absent to the hearings and it was not properly notified with regard to such hearings; (e) the arbitration award was rendered after the expiry of the term provided for in Art. 353^{3} [15]; (f) the arbitral tribunal decided on issues not falling within the terms of the submission to arbitration, or it failed to decide upon an issue falling within the terms of the submission to arbitration or it granted more that the party requested; (g) the arbitral award does not contain the holding and the grounds; does not specify the date and the place, is not signed by the arbitrators; (h) the holding contains dispositions which cannot be implemented; (i) the arbitral award breaches public policy, public morals or mandatory legal provisions"[16].

Accordingly, the arbitral award can be set aside exclusively on one of the grounds expressly provided by Art. 364 Code of Civil Procedures[17]. None of these grounds refers to the way in

[14] Gheorghe Beleiu et al., Acţiunea în anularea hotărârii arbitrale [Setting aside arbitral awards] 9 Dreptul 15 (1995)
[15] Pursuant to the Code of Civil Procedures art. 353, "If the parties have not otherwise agreed, the arbitral tribunal has to render an award within 5 months from its appointment." (unofficial translation of the author)
[16] Code of Civil Procedures, art. 364 (unofficial translation of the author)
[17] Ion Băcanu, Controlul judecătoresc asupra hotarârii arbitrale [The judicial review of an arbitral award] 11 Revista de drept comercial 178 (2004); Savelly Zilberstein, Ion Băcanu, Acţiunea în anularea unei hotărâri

which the arbitral tribunal decided the case and interpreted the facts, but only refer to the arbitration agreement, arbitral tribunal, procedural steps or the content of the award[18]. As was noted in the doctrine, "this ground does not represent an open gate whereby various grounds can penetrate, as it is shown in the relevant practice, but it is a sort of safety valve in the sense that, if the 8 previous grounds would not censor the breach of the mandatory legal provisions, such a breach would not remain without consequences."[19] "The scope of the ground provided for in paragraph (i) is represented by the breach of fundamental principles of arbitral proceedings as set forth in Art. 358 Code of Civil procedure"[20] Pursuant to said article "during the entire arbitral proceedings the parties need to be guaranteed equal treatment, the right to defense and the principle of contradictoriality."

The requirement that the award has to be in accordance with the public policy is meant to balance the extensive autonomy of the parties in arbitration[21]. An arbitral award can only be set aside on the ground of public policy in case of breach of the essential provisions meant to ensure a due and fair dispute resolution process, a due process. Not in case of any breach of Code of Civil Procedures regulating arbitration provisions, since the majority of such provisions are not mandatory and thus are subject to parties' derogations[22].

arbitrale. Natură juridică. Compunerea instanţei [Action of annulment of arbitral awards. Legal nature. Composition of the court.] 1 Revista de drept comercial 94 (2000); Savelly Zilberstein, Ion Băcanu, Desfiinţarea hotărârii arbitrale [Setting aside arbitral awards] 10 Dreptul 31 (1996)

[18] ION DELEANU, SERGIU DELEANU, ARBITRAJ INTERN ŞI INTERNAŢIONAL [NATIONAL AND INTERNATIONAL ARBITRATION] 295 (Rosetti 2005)

[19] Giorgiana Dănăilă, Acţiunea în anulare împotriva hotarării arbitrale [Setting aside of arbitral awards] 9 Revista de Drept Comercial 69 (2002) (unofficial translation of the author)

[20] *Ibid.*

[21] Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 126 (2005)

[22] *Idem* 128

2. The public policy ground

Art. 364 (i) is the most frequently invoked in the legal practice. The annulment on this ground is limited to the cases where the award itself is contrary to public policy such as, ignoring or breaching the *res judicata* principle[23]. Other circumstance that can lead to annulment under Art. 364 (i) would be breaching the secrecy of the decision making process. Art. 360^1 of the Code of Civil Procedure, which provides that the rendering of the award needs to be preceded by secret decision making process taking place with the participation of all the arbiters, is a mandatory legal provision the breach of which triggers the applicability of Art. 364 (i)[24] It was noted in the legal literature that Art. 364 (i) is applicable in case of breach of the principle of equal treatment, the right to defense or the contradictoriality principle[25]. It was also emphasized in the doctrine that, "[t]his ground for setting aside covers: failure to indicate the grounds for the holding, […], but not the tribunal's analysis of the merits of the case, the tribunal's holding on the legal issues and the way the tribunal applied the legal provisions"[26]

[23] MIHAELA TĂBÂRCĂ, GHEORGHE BUTA, CODUL DE PROCEDURĂ CIVILĂ COMENTAT ŞI ADNOTAT [COMMENTARY ON THE CODE OF CIVIL PROCEDURES] 1177 (Universul juridic 2008)

[24] Giorgiana Dănăilă, Deliberarea arbitrilor, luarea hotărârii arbitrale. Forma, cuprinsul şi efectele sale [Decision making of the arbitrators. Formal requirements, contents and legal effects] 7-8 Revista de drept Comercil 146 (2002)

[25] Ion Deleanu, Sergiu Deleanu, Desfiinţarea hotărârii arbitrale (Setting aside of arbitral awards) 2 Revista de drept comercial 41 (2001)

[26] Decision of Bucharest Court of Appeals no. 80 of May 19, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000525026.doc

3. Romanian legal practice on setting aside of awards on the ground of public policy

3.1. Failure to indicate the ground

A party relying on the public policy ground needs to clearly identify in its submission in which exact way it understands that the award breaches public policy, public morals or mandatory legal provisions. The court needs to assess the applicability of the ground and cannot proceed with a scrutiny on merits based on a general statement that the award breached public policy.

In a case decided by the Bucharest Court of Appeals in 2002 the action for annulment of the award was dismissed and the court noted that that the challenging party did not indicate precisely how exactly it understood that the award was contrary to public policy, public moral and mandatory legal provisions. Thus, the party only made a general allegation without any evidence in this regard[27]. In another case rejected challenge, decided in 2003 by the Bucharest Court of Appeals, the claimant did not invoke any of the legal grounds whilst all the submissions made reference to factual circumstances. According to the holding, it can not be inferred from the content of the challenge which basis for setting aside the challenging party is relying on.[28].

[27]Decision of Bucharest Court of Appeals no 1712 of December 12, 2002 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 128 (2005)

[28] Decision of Bucharest Court of Appeals no 45 of January 14, 2003 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 128 (2005)

In case no. 1295 of May 30, 2008, the Court of Appeals Cluj was seized with the appeal against the decision of the Commercial Tribunal Cluj concerning a challenge to set aside an arbitral award. The award was challenged on several grounds among which on the ground that it was contrary to public policy, public moral and mandatory legal provisions. The Commercial Tribunal found that the conditions for setting aside on this ground were not met "since the parties did not indicate the mandatory legal provisions which were breached, the reasons invoked by the parties (namely the tribunal's rejection of the party's submission concerning the other parties standing) […] not being covered by this ground"[29]. The arguments for setting aside under the public policy ground which were invoked by the claimant were in the view of the Commercial Tribunal "elements pertaining to the merits of the case and did not amount to breach of public policy, public moral or mandatory legal provisions.[30]"

In a case decided in 2001, the Court of Appeals Bucharest itself proceeded with a scrutiny on merits disregarding Art. 364. The Supreme Court when addressed with the second-degree appeal against said decision held that "from the holding […] it does not result that the court verified whether the challenge to set aside was admissible or not, but instead it proceeded directly with a scrutiny on the merits" [31]. Therefore, the Supreme Court proceeded with verifying the applicability of Art. 364 (i) and finding the contrary rejected the challenge to set aside[32].

[29] Decision of Cluj Court of Appeals no. 1295 of May 30, 2008, *available at* http://www.jurisprudenta.org/docs/33/2008/3300000000173369.doc
[30] *Ibid.*
[31] Decision of Bucharest Court of Appeals no 732 of December 6, 2001 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 129 (2005)
[32] *Ibid.*

3.2. Breach of due process rights as ground for setting aside under the scope of Art. 364 (i)

In case of challenges based on Art. 364(i) most often the challenging party invokes the breach of procedural public order, namely the breach of main principles governing arbitral proceedings: equal treatment of the parties, the right to a proper defense, the principle of contradictoriality.[33]. The courts found that breach of due process rights and more precisely the breach of the right to defend do constitute ground for setting aside under Art. 364 (i), however not in the cases when the parties rely on purely formalistic arguments.

In case no. 3711 of November 16, 2007[34], the Supreme Court of Justice held that non specifying in the arbitral award the challenge mechanism and the deadline until which such a challenge can be exercised does not amount to a breach of public policy. In the case at issue, an arbitral award was rendered by the Arbitral Tribunal attached to the Chamber of Commerce and Industry Oltenia, whereby the respondent was compelled to restitute the immovable goods and pay damages to the claimant. The respondent challenged the award before the Court of Appeals Craiova on several grounds including the Article 364(1) (i). Respondent alleged that the arbitral award is contrary to mandatory legal provisions namely Art. 261 (1) of the Romanian Court of Civil Procedure due to the fact that the award does not specify the challenging mechanism and the term during which such a challenge can be exercised. The Court of Appeals rejected the claim. The respondent appealed. Art. 261(1) (7) of the Romanian Court of Civil Procedures sets forth the elements that a court decision

[33] Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 129 (2005).
[34]Decision of the Supreme Court of Justice no. 3711 of November 16, 2007, *available at* http://www.scj.ro/SE%20rezumate%202007/SE%20r%203711%202007.htm

needs to contain. The Supreme Court held that it is actually Art. 361 of the Romanian Court of Civil Procedures which sets forth the mandatory elements of the arbitral awards, and mentioning the challenging mechanism is not among these elements. Furthermore, the respondent exercised the challenged in due term thus proving it suffered no harm. Due to this reasons the challenge that the award breached the said mandatory legal provision was rejected[35].

In a case decided by the International Arbitration Tribunal attached to the Romanian Chamber of Commerce and Industry[36], the tribunal held in favor of the respondent. The claimant challenged the award on the ground of Art. 364 (i) alleging that the award was contrary to public policy, public moral or mandatory legal provisions. In the analyzed case, the respondent did not submit a statement of defense. The claimant invokes Art. 118 of the Code of Civil Procedures according to which the statement to defense in court proceedings needs to be submitted before the opening of the hearings. Right before it was about to render an award the Arbitral Tribunal reopened the hearings, allowing the respondent to submit a statement of defense. The claimant requested a term in order to formulate its defense in connection with the respondent's claims. The claimant alleged that the Arbitral Tribunal did not grant it with sufficient time to formulate a proper defense and hence violated the due process, namely the right to formulate a proper defense. The Bucharest Court of Appeals dismissed the challenge on the grounds that the challenge is not covered by Art. 364 (i).

[35] Decision of the Supreme Court of Justice no. 3711 of November 16, 2007, *available at* http://www.scj.ro/SE%20rezumate%202007/SE%20r%203711%202007.htm

[36] Decision of the Supreme Court of Justice no. 4393 November 13, 2003, *available at* http://www.scj.ro/SE%20rezumate%202003/SE%20r%204393%202003.htm

The claimant appealed. Pursuant to claimant's allegations, by not submitting the statement of defense within the timeframe provided by the Code of Civil Procedures and the Arbitration Rules of the Arbitral Tribunal, the respondent had lost the right to do so. The Arbitral Tribunal ought to have rendered the award on the basis of the existing evidences and not reopen the proceedings on the merits. The claimant also reiterated its position that the Arbitral Tribunal breached its right to a proper defense when the Tribunal did not grant it with a delay to prepare its defense in accordance with the new evidence submitted by the respondent. The Supreme Court of Justice dismissed the appeal. The respondent proved through evidence attached to the file that it could not submit the statement of defense within the legal term due to objective reasons. Not accepting it on the later date, the Arbitral Tribunal would have breached the respondent's right to defense. Moreover, the claimant was duly informed about all the procedural terms and there was no request attached to the file whereby the claimant was asking for a delay which was not granted by the Tribunal. Therefore, the claimant's due process rights were not breached in the case at hand.

In another case before the Court of Appeals Bucharest, the challenging party also argued that its right to a proper defense was breached by the arbitral tribunal. The challenging party argued that its right to a proper defense was breached since although the record contained a power-of-attorney, the relevant party had concluded no engagement letter with its attorney and the said power of attorney did not contain the seal of the law firm, thus the representation of the party by its lawyer being null pursuant to the law governing the legal activity of attorneys. The court found that the challenge was not grounded since the alleged

formal imperfections of the party's representation were imputable to the relevant party and not to the arbitral tribunal[37].

On the ground that the party's right to defend was no respected, the Court of Appeals Bucharest annulled an arbitral award[38]. In the reasoning, the court mentioned that the award indicated the headquarters of the respondent at a different address that the one resulting from the file. The Supreme Court found that the award mentioned the name and address of the respondent as indicated by the claimant. The respondent was duly notified about the proceedings to this address. Since the respondent received all the notices and was present to the hearings, its due process rights were duly respected and the annulment was unlawful[39].

In another case, the court did grant the action for annulment of the award on the ground that the award breached the due process right to defense. The challenge[40] was introduced by the claimant against the two respondents on the ground of Art. 364 paragraphs (f) and (i) of the Code of Civil Procedure, namely that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; and that the award is contrary to public policy, public moral and mandatory legal provisions. The claimant grounded its challenge of the fact that the tribunal found that the claimant renounced to some of its claims

[37] Decision of Bucharest Court of Appeals no 1914 of December 9, 2003 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 130 (2005)
[38] Decision of Court of Appeals Bucharest no. 934 of December 28, 1998 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 131 (2005)
[39] Decision of Supreme Court of Justice no 324 of January 24, 2002 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 131 (2005)
[40] Decision of Bucharest Court of Appeals no. 76 of April 24, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000515636.doc

even though there was no evidence in this regard. The respondents requested setting aside on the basis of Art. 364(i) considering that the respondents based their submissions on the claims formulated by the claimant and they were not given the opportunity to adjust to the changes brought to the claim since such changes were not communicated to them. The respondents consider that their right to have a proper defense was breached and hence the award breaches public policy. The claimant requested the tribunal to find that the sale-purchase agreement was null and void and to oblige the respondents to pay damages for the unlawfully perceived rents. The court found that the claimant did not change its claim and thus the arbitral award deals with issues not falling within the terms of the submission to arbitration thus being contrary to Art. 364 (f) and (i). According to the holding, the tribunal breached the principle according to which the tribunal should only refer to the issues raised by the parties, principle embedded in Art. 129 (6) of the Code of civil procedure and the principle of contradictorialiy. In addition, the tribunal did not ensure the parties right to defense with regard to change of the scope of the claim taken into consideration for rendering the holding. On these grounds, the court annulled the award on the basis of Art. 364 (f) and (i)[41].

Another case dealing with the issue of breaching public policy based on the breach of the right to defense was decided by the Court of Appeals Bucharest. The claimant after the hearings were ended submitted a table concerning the method of computation of the damages. This evidence was not communicated to the respondent. The arbitral tribunal however, based the award on such evidence. The court found that the respondent's right to a

[41] Decision of Bucharest Court of Appeals no. 76 of April 24, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000515636.doc

proper defense was breached and it annulled the award[42]. The decision was challenged, but the Supreme Court dismissed the challenge founding in favor of the annulment[43].

3.3. Lack of jurisdiction of the arbitral tribunal, non-arbitrability of the case or composition of the tribunal invoked as ground for setting aside under Art. 364 (i)

Unfortunately, cases may occur when even courts make confusions between the grounds for setting aside. The Court of Appeals Galaţi admitted the challenge for setting aside against the award rendered by the Arbitral Tribunal attached the Chamber of Commerce and Industry Galaţi[44]. The Court of Appeals admitted the challenge of the basis or Art. 364 (i). However, the reasoning of the court referred to the fact that the arbitral tribunal did not have jurisdiction to decide the case since the contract provided that any dispute was to be settled "amicably, through arbitration or by the state courts according to the claimant's choice"[45] Pursuant to Art. 343 (2) of the Romanian Code of Civil Procedure, the arbitration clause has to set forth the scope of the dispute which the parties intend to solve by arbitration and the name of the arbitrators or the appointing mechanism. The dispute resolution clause between the parties, in the view of the Court of Appeals, did not comply with the aforementioned legal provision. Furthermore, the Court of Appeals reasoned that the respondent chose state jurisdiction whilst the decisions thus rendered were already *res judicata*, therefore addressing the arbitral tribunal with the same issues breached Art. 364 (a) and (c), namely that the dispute was not susceptible of being solved through arbitration and the composition

[42] Decision of Bucharest Court of Appeals no 895 of April 15, 1999 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 130 (2005)
[43] Decision of Supreme Court of Justice no 2941 of June 1, 2000 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 130 (2005)
[44] Supreme Court Decision no. 2756 of May 27, 2003, *available at* http://www.scj.ro/SE%20rezumate%202003/SE%20r%202756%202003.htm
[45] *Ibid.*

of the arbitral tribunal was not in accordance with the agreement of the parties. The respondent completed the file requesting the annulment of the award also on the ground that the dispute was not susceptible of being solved through arbitration and that the arbitral tribunal addressed the dispute on the basis of a null arbitration agreement. According to the respondent's allegations, the arbitration agreement was null since it did not comprise the name of the arbitrators or the way in which they should be appointed and incapable of being performed because it breaches the provisions of the Art. 343^3 of the Romanian Code of Civil Procedure in the sense that it does not exclude the jurisdiction of the state courts, but rather it provides for the alternative of choosing one of the other.

The claimant appealed and the Supreme Court found the appeal grounded. Pursuant to Art. 343^3 the jurisdiction of the arbitral tribunal excludes the jurisdiction of the state courts. The Supreme Court found that the appeal was grounded and since the "the award was not rendered in breach of Art. 364 (i) the challenge was wrongfully admitted the award wrongfully annulled"[46]. The Supreme Court held that the dispute between the parties is not a dispute one which cannot be solved by arbitration. Moreover, the court of appeals found that the Art. 364 (c), namely that the composition of the arbitral tribunal was not in accordance with the will of the parties, whereas the parties did not challenge the award on this ground. The Supreme Court held that there was a valid arbitration agreement. Additionally, the claimant had the option to choose between arbitration and state jurisdiction and it opted for arbitration[47].

[46] Supreme Court Decision no. 2756 of May 27, 2003, *available at* http://www.scj.ro/SE%20rezumate%202003/SE%20r%202756%202003.htm
[47] *Ibid.*

In case no. 93 of May 28, 2008 the Court of Appeals Bucharest was addressed with a challenge against an award rendered by the Arbitration Tribunal attached to the National Union of Handicraft and Production Cooperatives of Romania. In the case at issue, the claimant requested the tribunal to find that the respondent unlawfully sold a piece of land the owner of which was the claimant. The claimant requested the tribunal to oblige the respondent to hand over the land to claimant or pay damages. The arbitral tribunal found the claimant's submissions grounded and ordered the correction of the land book accordingly. The challenge to set aside was formulated by the respondent.

The court held that the request to set aside was grounded on Art. 364 (i), namely that the award breached the mandatory legal provisions. The claimant requested the court to find that the respondent sold a piece of land which was owned in fact by the claimant. Pursuant to the provisions of the Code of Civil Procedure if a party has a legal action whereby it can achieve a right it can not exercise an action whereby the court only acknowledge the existence of that right without actually ordering the restitution of the said right[48]. Therefore, the court found that in the instant case, the claimant had a legal action whereby the respondent should have been obliged to restitution. The arbitral award thus breaching the mandatory legal provisions. In addition, the arbitral award ordered changes in the Land Book. According to the Romanian legal provisions requests concerning the land books should be solved by the courts of first instance, thus the arbitral tribunal had no competence with regard to that issue.

[48] Romanian Code of Civil Procedures, art. 111.

The award rendered is thus contrary to mandatory legal provisions. After the annulment of the award the court proceeded with the scrutiny on merits.[49]

The Court of Appeals Ploieşti was seized with the appeal against the decision of the Dâmboviţa Court concerning the claim to set aside the arbitral award rendered by the Arbitral Tribunal attached to the Chamber of Commerce, Industry and Agriculture Dâmboviţa. The Dâmboviţa Court rejected the claim to set aside. The Court of Appeals found the claim to set aside grounded under Art. 364 (i). In the case at hand, the hearings took place on September 25, 2007. The decision was to be taken on October 1, 2007. At this latter date, the tribunal could not be duly constituted. Thus, the decision was to be taken on October 2, 2007. From the analysis of the file, the Court of Appeals found that it did not contain minutes of the meetings of September 25, 2007 and October 1, 2007. According to Art. 358[13] of the Code of Civil Procedure, the hearings need to be recorded in the minutes of the meeting which shall make mention about the constitution of the panel and needs to be signed by all the arbitrators. Bearing in mind that in the instant case the minutes were not drawn up, the said legal provisions were breached. Moreover, lacking the minutes of the meeting, one cannot verify whether the tribunal was duly constituted and whether all the arbitrators participated in the hearings and further to the decision-making process. Bearing in mind the above, the arbitral award was rendered breaching the mandatory legal provisions and was set aside on the basis of Art. 364 (i) Code of Civil procedure[50].

[49] Decision of Bucharest Court of Appeals no. 93 May 28, .2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000530927.doc

[50] Decision of Ploiesti Court of Appeals 822/13.06.2008, *available at* http://www.jurisprudenta.org/docs/42/2008/4200000000119318.doc

3.4. Breach of the principle of non retroactive applicability of legal provisions as ground for setting aside under Art. 364 (i)

In two cases with similar factual background the parties invoked the breach of the principle of non-retroactive applicability of legal provisions as grounds to set aside under Art. 364 (i). In case no. 7 of January 21, 2008[51] the Court of Appeals Bucharest dismissed a challenge to set aside. The award was rendered by the Tribunal of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry between H. Feroviar Român S.A: a Romanian company and Compania Naţională de D. Ferate CFR S.A., the state owned railways company. The Arbitral Tribunal granted the claimant's request only partially, thus the respondent was obliged to perform its pecuniary obligations arising out of one of the contracts concluded between the parties. Arbitral Tribunal however did not address the obligations arising out of the other contract concluded between the parties, since such contract did not contain an arbitration clause and the parties did not agree to submit to arbitration the disputes arising therefrom.

The respondent challenged the award on the ground of Art.364 (i). The respondent alleged that the tribunal applied a legal provision which was not in force at that time, thus breaching the constitutional principle of non-retroactive applicability of law. The regulation at issue referred to the tariffs applicable to contracts concluded by the Romanian railways company. The court established that the allegations were groundless since the arbitral tribunal applied the correct provisions. The respondent also alleged that the arbitral tribunal rendered the award in breach of the provisions of the Romanian Civil Code according to which the cause

[51] Decision of Bucharest Court of Appeals no. 7 of January 21, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000470933.doc

of a contract need to exist, need to be in compliance with the law and the public morals and the Civil Code provisions pursuant to which contracts need to be performed in good faith. With regard to these last claims the court held that this allegations refer to merits of the case and are not covered by Art. 364 (i)[52].

In case no. 39 of February 29, 2008, the same Court of Appeal Bucharest dealt with a similar case. The International Arbitral Tribunal attached to the Romanian Chamber of Commerce and Industry[53] rendered an award in favor of the same National Railway Company against the respondent another trade company. The parties concluded a contract which was subsequently extended twice. The object of the contract was granting the respondent the right to use the railway infrastructure against the payment of a consideration. The defendant failed to pay the consideration arising out of the contract. The arbitral tribunal rejected the respondent submission concerning the non-retroactive applicability of the additional tariffs. The tribunal held that the period concerned by the dispute is subsequent to the entering into force of the tariffs in question therefore they were applicable. The respondent challenged the award on the ground of Art. 364 (i). The challenge was grounded on an ample analysis on the merits of the case, the arguments being the same as the ones relied upon before the arbitral tribunal, namely applying different tariffs that the ones provided by the law, invoking the principle of non-retroactive applicability of the law. The court quoted the Decision no. 1343/1997 of the Supreme Court of Justice according to which: "None of the grounds provided for in Art. 364 paragraphs (a)-(i) of the Code of Civil

[52] Decision of Bucharest Court of Appeals no. 7 of January 21, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000470933.doc

[53] Decision of Bucharest Court of Appeals no. 39. of February 29, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000489435.doc

Procedure gives the court the right to analyze the way in which the arbitral tribunal decided upon the merits of the case, but only to assess whether the formal requirements for arbitration were fulfilled."[54] In the case at hand "the respondent only raised issues related to the merits of the case and which were analyzed by the arbitral tribunal […] and such issues are not tantamount to breach of public moral; moreover the mere indication of the mandatory legal provisions which were breached without submitting evidence in this regard"[55] could not form a basis for setting aside.

3.5. Arguments pertaining to the merits of the case do not fall under Art. 364 (i)

The challenge under Art. 364 (i) should not be used as an excuse to request a new scrutiny on merits[56]. As held by the Bucharest Court of Appeals, challenge to set aside is to be dismissed if the grounds invoked refer to the way the tribunal decided the merits of the case[57].

In case no. 3622 of December 2, 2008, the Arbitral Tribunal attached to the Romanian Chamber of Commerce and Industry held in favor of the claimant. The respondent challenged award on the ground of Art. 364 (i) of the Romanian Code of Civil Procedure, but the Court of Appeals Bucharest found the challenge inadmissible[58]. The respondent only

[54] Decision of Bucharest Court of Appeals no. 39 of February 29, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000489435.doc
[55] *Ibid.*
[56] MIHAELA TĂBÂRCĂ, GHEORGHE BUTA, CODUL DE PROCEDURĂ CIVILĂ COMENTAT ŞI ADNOTAT [COMMENTARY ON THE CODE OF CIVIL PROCEDURES] 1177 (Universul juridic 2008)
[57] Decision of Bucharest Court of Appeals no 3243 of 1999 in MIHAELA TĂBÂRCĂ, GHEORGHE BUTA, CODUL DE PROCEDURĂ CIVILĂ COMENTAT ŞI ADNOTAT [COMMENTARY ON THE CODE OF CIVIL PROCEDURES] 1177 (Universul juridic 2008)
[58] Decision of Supreme Court no. 3622 of December 2, 2008, *available at* http://www.scj.ro/SE%20rezumate%202008/SE%20r%203622%202008.htm

invoked elements related to the merits of the case, which were already analyzed by the tribunal when deciding the case and the said elements do not amount to breach of public policy. Moreover, pursuant to the holding of the court, the mere pointing out of the mandatory legal provisions which were, in respondent's view, breached without bringing new evidence in this regard; the mere claim that in the case at hand mandatory legal provisions were breached without rebutting in any way the comprehensive holding of the arbitral tribunal failed to convince the tribunal about the applicability of Art. 364 (i) in the case at hand[59].

The respondent challenged the decision of the Court of Appeals. The Supreme Court found the challenge groundless whilst agreeing with the holding of the Court of Appeals. Article 364 "does not cover objections concerning the factual situation extensively evoked by the respondent or the interpretation and applicability of the non-mandatory legal provisions, only objections concerning the breach of the mandatory legal provisions irrespective of the factual circumstances."[60] In case at issue, no mandatory legal provisions were breached. According to the Supreme Court, non-observance of the contractual provisions does not amount to a ground for setting aside under Art 364 (i). Pursuant to the holding "the contractual relation between the parties, being governed by the freedom of will principle, are private law relations, subject to derogations. The non-observance or the wrong interpretation of the contractual provisions, corroborated with the incident legal provisions do not amount to breach of public policy, public moral or mandatory legal provisions."[61]

[59] Decision of Supreme Court no. 3622 of December 2, 2008, *available at* http://www.scj.ro/SE%20rezumate%202008/SE%20r%203622%202008.htm
[60] *Ibid.*
[61] *Ibid.*

In a similar case, the challenging party also invoked the non-observance of the contractual provisions by the arbitral tribunal as reasons for setting aside under Art. 364(i). The Romanian Supreme Court of Justice held that the Court of Appeals wrongfully concluded that the arbitral award breached the mandatory legal provisions. In the case at issue, the Arbitral Tribunal attached to the Chamber of Commerce and Industry Prahova held that the lease contract between the parties was terminated by virtue of the law, the respondent being liable to pay damages, whist the claimant was to pay the reparation expenses. The Court of Appeal Ploieşti admitted the claimant's challenge against the arbitral award. It held that the reason why the claimant requested the termination of the lease contract, namely serious loss incurred by the claimant is not a reason for termination of the contract by virtue of the law, the arbitral award being thus incorrect. Also according to the decision of the Court of Appeals, the granting of damages was also wrong since the condition set forth by the contract, pursuant to which damages were to be granted in case of lack of payment of the rent for a period of two months, was not fulfilled. Thus, in the view of the court the imperative contractual terms were breach and therefore Article 969 of the Romanian Civil Code (stating the principle of *pacta sunt servanda*) as well.

The claimant exercised the second degree challenge against the decision of the Court of Appeals before the Supreme Court. The Supreme Court reinforced the principle that an arbitral award can be set aside exclusively for the reasons expressly provided in Art. 364 (1) of the Code of Civil Procedure. The Supreme Court added that before proceeding to any scrutiny on the merits the court need to verify the fulfillment of the conditions which could lead to the setting aside of the award. The Court of Appeal held that the conditions set for by

Art. 364 (i) were met without however identifying the mandatory legal provision which was breached. On the contrary, the Court of Appeals proceeded directly with the scrutiny of the merits, drawing the conclusion that the claimant was not entitled to request the termination of the contract. According to the Supreme Court, a scrutiny on merits would have been possible only if the court of appeals had established first that the condition set forth by Art. 364 (1) (i) of the Romanian Code of Civil Procedures were met (namely that the award was contrary to public policy, public moral or mandatory legal provisions). In the case at issue however, the Supreme Court criticized the decision of the Court of Appeals which examined the evidences, the contractual clauses, the way the parties fulfilled their contractual obligations and concluded that the arbitral awards is contrary to mandatory legal provisions. Therefore, the Supreme Court held that appeal is grounded and dismissed the challenge of the arbitral award[62].

Similarly, in case no. 747 of February 21, 2006[63], the Supreme Court of Justice held that "Art. 364 (1) (i) does not cover objections pertaining to the establishment of the factual circumstances, extensively evoked by the respondent, or with regard to interpretation and applicability of the non-mandatory legal provisions, only objections concerning the breach of mandatory legal provisions, irrespective of the factual circumstances." In the case at issue, the arbitral award was rendered by the International Commercial Tribunal attached to Bucharest Tribunal. The parties were the Agency of State-owned Lands as claimant and a trade company as respondent. The Agency of State-owned Lands (Agenţia Domeniilor

[62] Supreme Court Decision no. 801 of February 28, 2008, *available at* http://www.scj.ro/SE%20rezumate%202008/SE%20r%20801%202008.htm

[63] Supreme Court Decision no. 747 of February 21, 2006, *available at* http://www.scj.ro/SE%20rezumate%202006/SE%20r%20747%202006.htm

Statului in Romanian language) is a public institution established in 2001 within the Ministry of Agriculture, in charge with the privatization of agricultural companies and the concession of the agricultural lands owned by the state and administered by these companies. The award was challenged before the Court of Appeals Bucharest which court dismissed the challenge. The respondent challenged the decision on the ground that it was contrary to mandatory legal provisions. Thus, the respondent was unlawfully obliged by the arbitral tribunal to restitute claimant the amount of 3.302.870.490 lei, since the relevant legal provisions were not fulfilled. The Supreme Court found that "Art. 364 (i) does not cover objections with regard to the establishment of the factual situation or with regard to the application and interpretation of the non-binding legal provisions only with regard to the interpretation of the mandatory legal provisions, irrespective of the factual circumstances"[64].

In case 36/14.03.2008 Bucharest Court of Appeals reached the same conclusion. Accordingly, the court held that "[t]he non-observance of contractual provisions does not amount to a ground for setting aside of arbitral awards pursuant to Art. 364 (1) of the Code of Civil Procedure, whilst the factual circumstances and the way the tribunal interpreted the contractual provisions are not subject to court scrutiny by means of challenge to set aside."[65]

In case no. 15 of January 29, 2008[66] the Court of Appeal Bucharest was addressed with a challenge against an award rendered by the International Arbitral Tribunal attached to the

[64] Supreme Court Decision no. 747 of 21 February, 2006, *available at* http://www.scj.ro/SE%20rezumate%202006/SE%20r%20747%202006.htm

[65] Decision of Bucharest Court of Appeals no. 36 of March 14, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000496049.doc

[66] Decision of Bucharest Court of Appeals no. 15 of January 29, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000474753.doc

Romanian Chamber of Commerce and Industry. The Arbitral Tribunal held that the contract between the parties was terminated. The object of the contract was a conditional obligation and since the condition was not fulfilled the contract was terminated pursuant to the contractual provision in this regard. According to said contractual provision, the parties agreed to cooperate in order to obtain the necessary approvals for the access to the land from the relevant authorities. The transfer of the land was to be performed on condition that the documents would be obtained by the specified date.

The respondent challenged the award on two grounds including Art. 364(i). The respondent argued that the arbitral tribunal wrongly interpreted the contractual provisions since there was no conditional obligation between the parties; there was no contractual provision pursuant to which the failure to obtain the necessary documents leads to termination of the agreement and such interpretation is in breach of the *pacta sunt servanda* principle. The Court of Appeals dismissed the challenge on the ground of Art. 364(i), the objections pertaining to the merits of the case, namely to the way the arbitral tribunal interpreted the contractual provisions in dispute and the evidence. The respondent basically restates the arguments in used in the brief submitted to the arbitral tribunal. Pursuant to the decision of the court the challenge against an award is not an ordinary appeal whereby the court can analyze annex the factual circumstances of the case and totally or partially change the decision if it deems so. Since the decision is not contrary to public policy, public moral or mandatory legal provisions, the court cannot proceed with a new analysis on merits and a new interpretation of the evidence[67].

[67] Decision of Bucharest Court of Appeals no. 15 of January 29, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000474753.doc

In case no. 6 of January 23, 2008[68] the Court of Appeals Bucharest dismissed the challenge to set aside the arbitral award rendered by the International Arbitration Tribunal attached to the Romanian Chamber of Commerce and Industry whereby the tribunal partially granted the claimant's requests. The respondent alleges that the arbitral tribunal breached public policy. Pursuant to the respondent's allegation the claimant had no standing. The claimant obtained the right in dispute through assignment. However, pursuant to the respondent's allegations such right arising form a lease agreement was subsequently assigned, therefore the claimant contracted with an entity which no longer had the capacity of assignor since it had previously transferred the right. Moreover, in respondent's view the award breaches the will of the parties and the mandatory legal provisions regulating contracts. The seller guaranteed in the sale-purchase contract that the goods to be sold are fully assembled with equipments suitable for use. The buyer was subject to an enforcement procedure not connected to the dispute at hand. During such procedure some of the pieces of the equipments were seized thus rendering the equipments non-usable. By forcing the buyer to pay for such equipments the arbitral tribunal breached the agreement of the parties, in the respondent's view.

The court found the challenge groundless. The court noted that the respondent "bases its challenge on the claimant's lack of standing […] thus trying to determine the court to indirectly analyze the merits of the case before admitting the challenge and before annulling the award, which is not possible."[69] Therefore, the court decided that the respondent failed to identify actual and proved elements which could lead the court to the conclusion that the

[68] Decision of Bucharest Court of Appeals no. 6 of January 23, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000475327.doc
[69] *Ibid.*

award can be set aside pursuant to Art. 364 (i). The court thus concluded that the arbitral tribunal correctly analyzed the factual circumstances on the basis of the evidence, it adequately applied the contractual and legal provisions all respondent's allegations being groundless.[70]

In case no. 76 of April 4, 2008[71] the Court of Appeals Bucharest dismissed the challenge against the arbitral award rendered by the International Arbitral Tribunal attached to the Romanian Chamber of Commerce and Industry. The challenge was based on the ground that the decision was contrary to the mandatory legal provisions. According to the claimant's assertions, the arbitral tribunal failed to indicate the legal ground on which it based its decision and it disregarded the agreement of the parties, which is pursuant to the Civil Code's provisions mandatory. Pursuant to the contract, the guarantee only concerned curing the defects and replacing the equipments. Therefore, in no way could the claimant be held liable for any direct of indirect prejudice caused due to the non-functioning of the equipments. In addition, in the claimant's view the decision was illegal since a contract could only be terminated by the party which performed its obligations. In the analyzed case, according to the claimant's allegations, the respondent did not carry out its obligation of paying the price for the delivered goods within the contractual deadline. Due to these reasons, the claimant deems that the termination of the contract could not operate since the parties agreed to exonerate the claimant in case of non-functioning of the equipment.

[70] Decision of Bucharest Court of Appeals no. 6 of January 23, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000475327.doc

[71] Decision of Bucharest Court of Appeals no. 76 of April 22, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000514542.doc

The court held that the claimant failed to identify in what exact way the award was contrary to public policy or public moral. On the other hand, the alleged breached legal provisions were not mandatory legal provisions. Thus, according to the holding of the court the claimant only invoked issues pertaining to the merits of the case, basically restating the arguments presented before the arbitral tribunal and which were analyzed by the arbitral tribunal. Moreover, the fact that the arbitral tribunal did not indicate the legal ground on which it based its decision is not a ground under art. 364 for the setting aside of the arbitral awards in the court's view.

In case no 62 of March 28, 2008[72] the Court of Appeals Bucharest was addressed with the challenge to set aside an arbitral award rendered by the International Arbitral Tribunal attached to the Romanian Chamber of Commerce and Industry. The claimant requested the arbitral tribunal to find that the unilateral termination of the land use contract by the respondent (Agentian Domeniilor Statului) was wrongful. The arbitral tribunal granted the claim. The tribunal found that both parties were liable for negligence during the negotiations period since they failed to establish the consideration for the land use in accordance with the real situation. The respondent challenged the award on the ground that the award was contrary to mandatory legal provisions. The claimant pointed out that at the moment of conclusion of the contract the respondent was aware of the factual status of the land and by not objecting to it, the *pacta sunt servanda* principle (embedded in Art. 969 Civil Code) became applicable. Moreover, according to the claimant the land use contract provided that in the case where the area of the land diminished following the reconstitution of the property

[72] Decision of Bucharest Court of Appeals no. 62 of March 28, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000503039.doc

right[73] therefore it was impossible for the respondent not to know about that situation. Accordingly, the claimant contends that the arbitral tribunal wrongfully found that the misunderstandings between the parties occurred as a result of the restitution of lands pursuant to the Land Law no. 18 of 1991. The claimant pointed out that it chose to terminate the contract between them as a result of the respondent's failure to pay the consideration within 30 days after the deadline, therefore the tribunal wrongfully found that there was common fault since only the respondent breached the contractual obligation incumbent on it based on the *pacta sunt servanda* principle.

The court held that "according to the case law and legal doctrine the challenge for setting aside is not an appeal, therefore the court cannot scrutinize whether the holding is grounded or not, since the challenge is a specific procedural mechanism whereby mainly applicable in case the award breaches the arbitration agreement."[74] Pursuant to the court's holding the claimant based its challenge on Art. 364 (i) namely the breach of mandatory legal provisions, Art. 969 Civil Code, whereas the claimant's arguments for setting aside concern the alleged wrong interpretation and application of Art. 969 and not the breach thereof. Accordingly, from the content of the award it results that the arbitral tribunal interpreted the provisions of the land use agreement based on Art. 969 of the Civil Code and the other principles of contract law. Thus, it found that there was common fault of the parties during the negotiations and performance of the contract, therefore termination of the contract by claimant is unlawful. Therefore, the arbitral tribunal did not breach or ignore the Civil Code

[73] Such a scenario could take place on the basis of the Land Law 18 of 1991, which provided for the reconstitution of the ownership rights over lands seized during the communist regime.

[74] Decision of Bucharest Court of Appeals no. 62 ofv March 28, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000503039.doc

provisions and the claimant basically challenges the interpretation given by the arbitral tribunal to the said close.[75] The challenge to set aside was dismissed.

Similarly in case no. 84 of May 7, 2008 the Court of Appeals Bucharest held that "[a]lleging that the award breaches public policy, the award is contested on its merits, the challenge is formulated in such a way as if it would be an ordinary appeal without bearing in mind that the court can only scrutinize whether the award fulfils the legal conditions and not whether the decision is correctly grounded."[76]. Furthermore, in case 69 of May 5, 2008, the same court held that "all the objections concerned the holding and the way in which the arbitral tribunal interpreted the evidence […] which can not be in itself a ground for setting aside, failing the breach of an express mandatory provisions or public policy"[77]

Apart from the grounds presented above, other issues were raised as well in actions to set aside under Art. 364 (i). For instance, the Supreme Court of Justice held that the increased amount of the arbitration fees can not ground for setting aside under said article, since the rules concerning the arbitration fees are not imperative provisions[78]. In another case, an arbitral award cannot be set aside on the basis of the fact that the inequity breaches public morals, on the grounds that the award was rendered in favor of the party who breached its

[75] Decision of Bucharest Court of Appeals no. 62 ofv March 28, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000503039.doc

[76] Decision of Bucharest Court of Appeals no. 84 of May 7, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000520268.doc

[77] Decision of Bucharest Court of Appeals no. 69 of May 5, 2008, *available at* http://www.jurisprudenta.org/docs/2/2008/200000000520687.doc

[78] Decision of Supreme Court of Justice no 4351 of 1998 in Băcanu Ion, Controlul judecătoresc asupra hotărârii arbitrale [Judicial control over an arbitral award] 1 Revista de drept comercial 132 (2005)

obligations[79]. However, the Court of Appeals Bucharest annulled an award on the ground of Art. 364(1)(i) based on the fact that the award was rendered disregarding the statute of limitations[80].

[79] Decision of Bucharest Court of Appeals no 1366 of 2000 in MIHAELA TĂBÂRCĂ, GHEORGHE BUTA, CODUL DE PROCEDURĂ CIVILĂ COMENTAT ŞI ADNOTAT [COMMENTARY ON THE CODE OF CIVIL PROCEDURES] 1172 (Universul juridic 2008)

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Conclusions

The case law analysis carried out in the present paper, proved that the parties often have the tendency to use setting aside of arbitral award on the grounds of public policy as ordinary appeal mechanism against the arbitral award. This is of course contrary to the very nature of arbitration, which allows no appeal against arbitral awards.

Notwithstanding this tendency, the courts have reinforced that arbitral awards can only be set aside on the grounds expressly provided for in Art. 364 of the Romanian Code of Civil Procedures. Although vaguely formulated, the ground of public policy is only incident when the award itself breaches public policy, public morals and mandatory legal provisions. Therefore, it results from the analyzed case law that an arbitral award can only be set aside on the ground of public policy in case of breach of the essential provisions meant to ensure a due and fair dispute resolution process, a due process.

Courts have held that the party relying on the public policy ground has to clearly state on which ground exactly an award is contrary to public policy, since a general statement in this regard in not enough. Moreover, the arguments cannot pertain to factual circumstances or arguments submitted during the arbitration proceedings or to the way the tribunal interpreted the legal provisions.

It is unfortunate that in some of the case the courts themselves made confusion between the grounds for setting aside under Art. 364 (i) challenges which fell under other grounds for

setting aside, however in most of the cases the courts gave the correct interpretation, reinforcing the restrictive applicability of Art. 364 (i).

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