COMPARATIVE VIEW ON THE ROLE OF DOMESTIC COURTS IN ARBITRATION: THE ROMANIAN LAW VERSUS THE UNCITRAL MODEL LAW

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Abstract

This paper is a comparative study between the Romanian legislation and the UNCITRAL Model Law. Its main goal is to identify the similarities and differences between the law applicable in Romania and the soft law instrument mentioned above, with respect to the role of domestic courts in the arbitral procedure. Thus, we will see that – although, in abstracto, the differences between the international pursuit and the national approach can be important and are caused both by objective factors like national specificity, and by subjective factors like judicial internationalism - the Romanian legislation is in congruence with the UNCITRAL Model Law, despite the fact that it was not implemented per se in the Romanian legislation. Also, counterintuitively considering that arbitration is, by definition, an alternative to state courts, it will become evident that the role of domestic courts in arbitration, albeit limited by the applicable norms or by the parties' choices, is potentially decisive for certain administrative matters or pertaining to the course of the arbitral procedure, as well as essential when it comes to the setting aside of an arbitral award.

Keywords: *UNCITRAL model law, the role of domestic courts in arbitration, Romanian Code of Civil Procedure, soft law.*

JEL Classification: K15, K33, K39, K49.

1. Preamble

Although arbitration is, by definition, a dispute resolution method alternative to domestic courts, nonetheless, said courts have an important role in arbitration. For example, for certain administrative matters or pertaining to the course of the arbitral procedure. Or when it comes to the setting aside of an arbitral award. However, it should be noted that the involvement of courts in the arbitral procedure is limited to certain aspects and circumscribed by the applicable legislation and the parties' choices.

Applicable norms vary — not just from one legal system to the next but even within the same legal system, from one arbitral process to another — for aspects falling under party autonomy, considering that the parties have the freedom to decide even the jurisdiction of the arbitral tribunal.

Because on this inherent diversity, a series of soft law instruments have been adopted at the international level with the stated goal of establishing a unified legal framework for international arbitration. Among those, one of the most important is the UNCITRAL Model Law[4].

The UNCITRAL Model Law was adopted[5] to support countries' modernization efforts and the reform of their domestic legislation pertaining to international arbitration, while ensuring compliance with the specific characteristics and particular needs of international arbitration. It touches on all the stages of the arbitral procedure, starting with the arbitration agreement, going to the composition and jurisdiction of the arbitral tribunal, and up to the role of domestic courts in the setting aside of arbitral awards or pertaining to the recognition and enforcement of foreign arbitral awards.

This remarkably useful soft law instrument is the manifestation of the international consensus

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[4] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (hereinafter referred to as „*The UNCITRAL Model Law*").
[5] As per the goals stated by UNCITRAL. For details, see: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_ arbitration, consulted on 1.10.2020. For a historical analysis of UNCITRAL see Cristina-Elena Popa Tache, *Introduction to International Investment Law*, ADJURIS – International Academic Publisher, Bucharest, 2020, p. 159, 160.

on key aspects of the international arbitration practice, and was implemented by an overwhelming number of countries from different legal and economic systems throughout the world.

As derived from the working groups meetings for the UNCITRAL Model Law[6] — documented in the „*travaux préparatoires*" — for its adoption were considered aspects such as:

(i) the fact that international arbitration is as an efficient method of settling disputes arising out of international commercial relationships;

(ii) the need to create a unitary framework applicable to states with different economic (and legal) systems; and

(iii) the opinion of numerous arbitral institutions and renowned international arbitrators.

As for the effectiveness of the UNCITRAL Model Law, it should be noted that 84 countries and a total of 117 jurisdictions implemented domestic legislation based on it,[7] with Canada being the first country to adopt such legislation, in 1986, while the most recent jurisdictions to implement it were Argentina and United Arab Emirates, in 2018.

The harmonization of different legal frameworks was, nevertheless, relative, because most countries have applied a margin of appreciation in implementing it at the national level.[8] As the title suggests, the UNCITRAL Model Law was drafted to serve as a model for the legislative bodies of the countries willing to adopt it. Because of this, the countries adopting it were able to customize it, thus giving rise to differences between one country and the next as to the actual provisions implemented.

Therefore, not all countries have adopted the UNCITRAL Model Law, and, even in those countries that did, it was implemented with deference to their *national specificity* and to the characteristics of the legal system they are part of.[9]

This paper aims to analyze where the Romanian legislation sits with respect to implementing the UNCITRAL Model Law's provisions on the role of the courts in arbitration, focusing on the specifics of the Romanian approach.

As detailed below, although Romania has not implemented the UNCITRAL Model Law *per se*, certain provisions from the Romanian legislation follow the UNCITRAL Model Law, facilitating a juxtaposition also when it comes to the similarities between the two instruments, not just the differences.

2. Comparative view – generally

2.1. Relevant legal provisions

In the Romanian legislation, the provisions relevant to the role of courts in arbitration are contained in the Civil Procedure Code (CPC)[10], mainly in Book IV titled *"On Arbitration"*[11]. Other provisions of the Civil Procedure Code are also applicable[12], however, those do not concern exclusively the role of courts in the arbitral procedure.

As for the UNCITRAL Model Law, the relevant provisions when it comes to the role of courts in arbitration are mainly Part I, Chapter I, Article 5, titled *"Extent of court intervention"* and Article 6, titled *"Court or other authority for certain functions of arbitration assistance and*

[6] For details, see the minute of the 112th Plenary Meeting, 11 December 1985, available at: https://undocs.org/en/A/RES/40/72, consulted on 1.10.2020.

[7] For the detailed status of the implementation, see: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status, consulted on 1.10.2020.

[8] Loukas A. Mistelis, Julian D. M. Lew, *Pervasive Problems in International Arbitration International arbitration*, Ed. Kluwer Law International, 2006.

[9] For a detailed discussion on the implementation, see: Frédéric Bachand & Fabien Gélinas (eds.), *UNCITRAL Model Law after twenty-five years: Global Perspectives on International Commercial Arbitration*, Juris Net, NY, 2013.

[10] Law no. 134/2010, republished in the Official Journal of Romania, no. 247 from 10 April 2015, as subsequently amended and supplemented (hereinafter referred to as „The Civil Procedure Code" or "CPC").

[11] Articles 541-621 CPC.

[12] Mainly, articles: 128; 706; 713; 961; 973; 1069; 1111-11123; and 1124 -1133 of the Civil Procedure Code.

supervision". Other provisions of this soft law instrument are also applicable.[13]

2.2. Scope of application

Under Romanian Law, the Civil Procedure Code applies, pursuant to article 1.111 CPC, to *"any international arbitration, if the seat of the arbitral tribunal is in Romania and at least one of the parties did not have, at the time of conclusion of the arbitration agreement, its domicile or habitual residence in Romania, provided that the parties have not excluded in the arbitration agreement or thereafter, in writing, the application of these provisions"*.

An arbitration is considered international if it has "a foreign element".

The arbitrability of a dispute, according to article 542 CPC in conjunction with article 1.112 CPC, extends to disputes between "*persons enjoying full legal capacity*" (to act and to stand trial/to have and to exercise rights) except those disputes concerning *"marital status, legal capacity, inheritance and the distribution of estates, family relations, and rights which cannot be disposed of"*. Patrimonial disputes are arbitrable if *"they pertain to rights the parties may freely dispose of, provided that the law of the place of arbitration does not reserve such matters for the exclusive jurisdiction of the courts."*

We see that the first restriction mentioned above pertains to the subjective arbitrability of a dispute, while the latter two restrictions concern objective arbitrability as per Romanian law.

The scope of application of UNCITRAL Model Law is, per Article 1, *"international commercial arbitration, subject to any agreement in force between [a state] and any other State or States".* An arbitration is considered *international* in diverse situations set forth in the same Article. For example, if there's a foreign element, the parties to an arbitration agreement having *"at the time of the conclusion of that agreement, their places of business in different States"* or if there's a substantial connection with a State other than the one where the parties have their place of business, such as "*any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected".* Or, when "*the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country".*

Thus, the differences between the Romanian law and the UNCITRAL Model Law when it comes to the arbitrability of disputes — both objective and subjective — are evident, with the first instituting a stricter legal framework in defining both the persons allowed to participate in an arbitration and the specific disputes that are arbitrable. Also, we see differences in the interpretation of the term "*international* arbitration", with the Romanian law adopting a more encompassing legal definition, unlike the UNCITRAL Model Law which is stricter and has a more nuanced approach based on the actual facts circumscribing a dispute to this notion.

2.3. Extent of court intervention in the arbitral procedure

In the Romanian law, the general limits are set forth in paragraph 1 of article 547 CPC, allowing courts to *"eliminate the obstacles that might occur"* in the course of the arbitral procedure, *"as well as to carry out other duties"* that fall upon the court. However, article 553 CPC expressly rules out the jurisdiction of the courts when it come to the merits of a dispute resolved by arbitration.

In addition, article 547 paragraph 1 CPC in conjunction with article 128 CPC and with article 610 CPC set forth the subject-matter and territorial jurisdiction of the courts. The jurisdiction to decide on incidents occurring during the arbitration belongs to *"**the tribunal** in whose territorial limits the arbitration takes place",* while the jurisdiction for setting aside an arbitral award belongs to "***the court of appeal** in whose territorial limits the arbitration took place*".

Also, the Romanian legislation incorporates the principle of *Kompetenz - Kompetenz*, by virtue of article 1,119 CPC, recognizing the right of the Arbitral Tribunal to decide on its own

[13] Chapter I; Chapter II, Articles 8 and 9; Chapter IV, Section5, Article J; Chapter V, Article 27; Chapter VII, Article 34; and Chapter VIII (the latter not addressed in the present analysis).

jurisdiction without entrusting domestic courts with any attributions in this regard.

An interesting aspect is the fact that paragraph 2 of article 547 CPC includes a provision generally applicable to the role of the domestic courts in the arbitral proceedings, stipulating that the courts are to decide in all such cases *"urgently and expeditiously"* and that the judgment rendered is final.

It should be noted, however, that the courts can intervene in the arbitral procedure only as requested by an interested person and can't ascertain jurisdiction *ex officio*. This aspect is in line with the parties' right of disposition in civil proceedings set forth in article 9 paragraphs 1 and 2 CPC, which stipulates that the "*limits of the proceedings"* are outlined by the parties.

The UNCITRAL Model Law unequivocally mandates that the intervention of domestic courts be strictly defined by the provisions therein. As per Article 5, any other intervention of the court in the arbitral proceedings is prohibited. This aspect supports the principle of party autonomy in arbitration, as a defining feature of this alternative method of settling disputes. As per Article 6, the State adopting and implementing the Model Law has the right to decide the competent courts in certain respects.

Nevertheless, Part II of this soft law instrument acknowledges the potential need for court intervention in other circumstances, not covered here, pursuant to extrinsic norms.

The right of the Arbitral Tribunal to decide on its own jurisdiction is set forth in Article 16, with the UNCITRAL Model Law entrusting domestic courts with additional powers to review the issue of the jurisdiction of the arbitral tribunal - if the arbitral tribunal has ruled previously that it has jurisdiction - at the request of a party, made within 30 days from the communication of the arbitral award.

Concerning the finality of the court decisions, those not subject to appeal are flagged accordingly.

As such, we see that in the Romanian legislation there are additional limitations on the jurisdiction of domestic courts in matters pertaining to arbitration. The UNCITRAL Model Law extends, however, the jurisdiction of domestic courts, entrusting them to decide, in certain situations, on the jurisdiction of the arbitral tribunal. Also, it acknowledges that determining the competent courts on certain issues is the exclusive attribute of the State implementing the Model Law, while presuming the need for potential court interventions in situations not covered here, therefore encouraging the "customization" of this soft law instrument.

2.4. Procedural incidents pertaining to the jurisdiction of domestic courts

As per the Romanian legislation, the procedural incidents that might occur during the arbitration and for which domestic courts have a determining role are: *Lapse of arbitration*, set forth in article 568 CPC, *the application for the court to ascertain or decline jurisdiction*, set forth in article 554 CPC (applicable only to institutional arbitration), and *the arbitration exception*, set forth in article 1,069 CPC.

Under the UNCITRAL Model Law the courts have general jurisdiction, limited in accordance with Article 5, leaving it to the countries that adopt/implement these provisions to establish the institutions with *"authority for certain functions of arbitration assistance and supervision"* when it comes to the *appointment, recusal, or replacement of arbitrators*, *the jurisdiction of the arbitral tribunal*, and *the setting aside of the arbitral award*, as per Article 6. As to the correspondence of these provisions with the procedural incidents encountered in the Romanian legislation and mentioned above, the jurisdiction of domestic courts for the aspects in question is set forth in Article 8 of the UNCITRAL Model Law.

So, the Romanian law is also harmonized with the UNCITRAL Model Law when it comes to the role of domestic courts in resolving procedural incidents that may arise during arbitration.

2.5. Interim measures

In arbitration, interim measures are broader than in the usual meaning given in civil proceedings before the courts and include interim measures *per se*, emergency injunctions, and court assistance in taking evidence (both factual and legal).

In the Romanian legislation, arbitration related interim measures are set forth in article 585 CPC and allow both for alternative jurisdiction of the courts to issue interim measures, and for exclusive jurisdiction of the courts for the enforcement of interim measures (including those ordered by the arbitral tribunal but not complied with voluntarily). As per the Romanian law, the assistance of the courts in this matter becomes incidental at the request of the parties and can be requested even before the actual start of an arbitration.

The UNCITRAL Model Law entrusts the courts with wide jurisdiction to issue and implement interim measures pertaining to arbitration. Also, it differentiates between:

(a) Measures ordered by the arbitral tribunal to be enforced by the courts, as provided for in Article 17 H, in conjunction with Article 17 I. The aim of these provisions is to limit the situations when courts refuse the implementation of interim measures, and to ensure that courts always take into account the specificities of arbitration when deciding.

and

(b) Interim measures directly ordered by the courts, as provided for in Article 17 J in conjunction with Article 9. Such measures may be requested by the parties, both before the commencement of arbitration and after the arbitration proceedings have been instituted.

At the same time, the UNCITRAL Model Law brings into question an aspect not mentioned in the Romanian legislation, *i.e.* the preliminary orders of the arbitral tribunal. Article 17 C stipulates that such orders, although binding on the parties, cannot be enforced by a court.

Therefore, the Romanian law and the UNCITRAL Model Law have similar approaches in the case of interim measures in arbitration, except that the latter addresses the effects of the preliminary orders issued by the arbitral tribunal, aspect that can be determined in the Romanian legislation only by analogy with ordinary civil proceedings, pursuant to article 235 of the Civil Procedure Code.

2.6. Coercive measures

In the Romanian legislation, the courts have jurisdiction to order several types of coercive measures pertaining to the arbitral procedure:

(a) *Compelling witnesses and experts*, aspect entrusted exclusively to the courts, pursuant to article 589 CPC in conjunction with article 547 CPC.

(b) *Compelling authorities to present documents,* pursuant to article 590 CPC in conjunction with article 547 CPC. It should be noted that although the arbitral tribunal can directly inquire with the authorities for information (held by the authorities in question about their acts and actions) that is necessary for the resolution of the dispute, only the courts have jurisdiction to compel them to provide the requested information. However, pursuant to article 298 CPC, said authorities can still refuse to provide information even when requested by the courts, provided that it touches on matters pertaining to national defense, public safety, or diplomatic relations.

(c) *Compelling other persons to present documents*, signatory or non-signatory of the arbitration agreement.

The UNCITRAL Model Law does not expressly provide for coercive measures, but the provisions pertaining to interim measures (*i.e*. Article 17 J in conjunction with Article 9) can be applied by analogy. However, the limits applied to court intervention under Article 5 would have to reconciled with, aspect that can be resolved by giving deference to the applicable domestic rules, as mentioned in the Explanatory Note of the UNCITRAL Secretariat set forth in Part II B (b) 17 of the UNCITRAL Model Law.

As such, we observe that in the case of coercive measures pertaining to arbitration, the Romanian law explicitly provides for the jurisdiction of the courts with a better-defined procedural

framework, while in the UNCITRAL Model Law jurisdiction can be ascertained by courts only by analogy with other relevant provisions contained therein and by drawing from provisions extrinsic to this soft law instrument.

2.7. Court assistance in taking evidence

Under Romanian law, domestic courts do not have explicit jurisdiction pertaining to the taking of evidence in arbitration, however, the provisions concerning interim and coercive measures, discussed above in sections 2.5 and 2.6 respectively, are applicable. We reiterate that court assistance in such matters becomes incidental at the request of the parties and may be requested even before the actual commencement of the arbitration in the case of interim measures, and only after the commencement of arbitration when it comes to compelling information from authorities.

In the UNCITRAL Model Law, they have explicit jurisdiction in this respect, pursuant to Article 27, and may act in accordance with their own rules of procedure for this matter. It should be mentioned that here, unlike in the Romanian legislation, court jurisdiction is ascertained only at the direct request of the arbitral tribunal, or if the requesting party has the consent of the arbitral tribunal.

Accordingly, in the UNCITRAL Model Law there's a restriction placed upon the right of the parties to request courts' assistance in taking evidence, as well as a strengthening of the role of the Arbitral Tribunal in providing evidence, unlike in the Romanian law which is more permissive with the right the parties on this issue. At the same time, however, the latter sets forth time limits that are not established in the UNCITRAL Model Law.

2.8. Measures concerning the arbitrators

Under Romanian law, the courts have authority to decide on a series of issues, namely:

(a) *Appoint arbitrators*, in accordance with article 561 CPC in conjunction with article 547 CPC. Jurisdiction is vested in the courts when the parties do not agree on the appointment, when a party refuses to appoint an arbitrator, or if no agreement is reached on the appointment of the presiding arbitrator.

(b) *Decide on the challenge of and replace arbitrators*, as *per* article 562 CPC (establishing various grounds) in conjunction with article 563 CPC. In addition to the grounds provided for the challenge of judges, set forth in articles 42 *et seq.* CPC (*e.g.* if they are related up to the 4th degree with one of the parties or its representative, if they or their close relatives have an interest in the case, *etc.*) arbitration specific grounds are established (*e.g.* if an arbitrator does not meet the arbitration agreement criteria). As *per* article 564 CPC, the replacement of an arbitrator is ordered in case of recusal, revocation, or death of the arbitrator, or in any other case when the arbitrator is prevented from fulfilling his or her duties.

(c) *Decide on the liability of arbitrators*, according to art. 556 CPC (providing that arbitrators are liable, under the law, for any damage caused). Jurisdiction on this issue is vested in courts by analogy with the procedure applicable to ordinary civil proceedings, in the situations listed in article 556 CPC (*e.g.* if the arbitrators violate their duties in bad faith or gross negligence after accepting the appointment, or if they do not respect the confidentiality of the procedure).

The UNCITRAL Model Law, in accordance with Article 11 in conjunction with Article 6, provides that if the parties do not agree, a party refuses the appointment, or an appointing authority fails to perform any task entrusted to it the court has jurisdiction, unless an alternative method of appointment is provided for in the arbitration agreement. It should be noted that the court's decision on this issue is final.

Article 13 confers jurisdiction to domestic courts for the *revocation of arbitrators*, on the strict grounds set forth in Article 12, *i.e.* reasonable doubts as to impartiality or independence or if the arbitrator does not meet the criteria agreed upon by the parties. The jurisdiction of the court is ascertained only if the arbitrator in question - although notified by the interested party within 15 days of finding out the grounds for recusal - refuses to withdraw or if the arbitral tribunal rejects the

challenge. There's a time limit imposed on the parties for exercising the right to address the court with a challenge, namely 30 days after receiving notice of the decision of the arbitral tribunal. The court's decision on this issue is also not subject to any appeal.

For the *replacement of arbitrators*, the relevant provisions are Article 14 in conjunction with Article 6.

The issue of *liability of arbitrators* is not addressed in the UNCITRAL Model Law.

Consequently, we see that the Romanian legislation is harmonized to a large extent with the approach from the UNCITRAL Model Law in this respect, the only major difference between the two concerning the liability of the arbitrators. In fact, the Romanian legislation is dissonant in this regard not only with the UNCITRAL Model Law but also with the legislation of countries with a highly developed arbitration practice, such as the U.S., where arbitrators are considered immune from civil liability, to the same extent as judges.[14]

2.9. Measures on costs

In the Romanian legislation, the courts are vested with additional, explicit authority to verify the arbitration costs, according to article 598 CPC in conjunction with article 547 CPC.

What distinguishes this mandate from most other entrusted to the courts in arbitral proceedings (perhaps except for those relating to the setting aside of the arbitral award) is that here the court acts as a court of judicial control, the application for verification of costs having the legal nature of a *de novo* appeal. Thus, according to article 598 CPC, the court will: *"examine the validity of the measures ordered by the arbitral tribunal and shall establish" ... "the amount of the arbitrators' fees and other arbitral expenses, as well as the means of" ... "payment".* The decision issued by the court on this matter is binding and final.

In the UNCITRAL Model Law, the courts are not vested with explicit authority for this matter. However, a *per a contrario* interpretation of the provisions set forth in Part II B (b) 17 shows that for matters not addressed here court intervention is presumed, but outside the framework of the UNCITRAL Model Law.

Therefore, the Romanian legislation has a more direct approach, while the UNCITRAL Model Law only acknowledges the possibility of a court intervention on this issue without directly regulating it.

2.10. Other instances allowing for court intervention in the arbitral procedure

As per Romanian law, domestic courts have jurisdiction to resolve any obstacles *"that might occur during the arbitration"*, as per article 547 CPC. This is a non-exhaustive provision, hence allowing courts to also ascertain jurisdiction in other, indeterminate instances.[15]

At the same time, domestic courts have an additional function pertaining to arbitration, unrelated to their role to carry out the administration of justice, *i.e.* to archive the arbitral files, as per article 607 CPC. This provision institutes a correlative obligation for the Arbitral Tribunal to deposit the arbitral file with the competent court under article 547 CPC, after rendering and communicating the arbitral award.

In the UNCITRAL Model Law there are no such additional functions stated explicitly, on the contrary, the extent of court intervention is limited as per Article 5. However ―although the UNCITRAL Model Law emphasizes in Part II B (b) 17 that it deliberately aims to limit the jurisdiction of the courts strictly to the aspects governed by it in order to *"[p]rotect[..] the arbitral process from unpredictable or disruptive court interference",* which would presumably impede on the essential features of this alternative dispute resolution method ― it acknowledges that there are certain issues that, albeit not expressly regulated here, nevertheless call for potential court

[14] *Restatement, Third, of the U.S. Law of International Commercial and Investor-State Arbitration*, section 3.10 (The 2019 proposed draft).

[15] While observing the limits allowed for court intervention, as discussed above, in section 2.3.

intervention. Such issues are to be governed by rules extrinsic to it.

As a result, the differences between the Romanian legislation and the UNCITRAL Model Law in this respect are more at the textual and procedural level, than at the doctrinal level.

3. Setting aside the arbitral awards

3.1. Relevant legal provisions

With respect to the setting aside of arbitral awards under Romanian law, the relevant provisions are contained in the Civil Procedure Code (CPC), Book IV "*On arbitration*", Title V "*Annulment of the arbitral award*", articles 608 to 613. The grounds for vacating the arbitral award are set forth in article 608 CPC, titled *"Request for annulment".*

As to the UNCITRAL Model Law, the relevant provisions are set forth in Chapter VII, titled "*Challenge of the arbitral award*", Article 34 "*Application for setting aside as exclusive recourse against arbitral award".*

3.2. Jurisdiction to set aside an arbitral award

Under Romanian law, article 610 CPC provides that the *"nationality"* of the arbitral award is decided by the place of arbitration. Thus, Romanian law applies to annulment proceedings concerning arbitral awards rendered in Romania. The Court of Appeal at the place of arbitration has jurisdiction over such proceedings.

The same approach was adopted by the UNCITRAL Model Law, Article 34 para. (2), and Article 6 para. (2) providing that the jurisdiction to set aside an arbitral award belongs with the courts at the place of arbitration.

This geographical criterion for establishing jurisdiction for the judicial review of arbitral awards is enshrined not just in most national legislations, but also in the relevant international treaties. As such, Romanian law is consistent with the international approach.

3.3. Grounds for setting aside the arbitral award

With respect to the grounds for annulment of the arbitral award under Romanian law, these are set forth in article 608 CPC titled "*Annulment proceedings*". There are nine limited and exhaustive grounds, of strict interpretation, that cannot be extended by analogy.

Based on their nature, the grounds for annulment fall in two categories: (i) some of the grounds concern irregularities arising from exceeding the limits of arbitrability and non-compliance of the arbitral procedure with the arbitration agreement; and (ii) other grounds concern the non-compliance of the arbitral procedure with the fundamental principles of civil procedure.[16]

It should be emphasized that the grounds for setting aside an arbitral award can never concern the factual situation, nor the evidence administered **—** merits-based reviews are not available.[17]

The annulment grounds set forth in the Romanian legislation, generally follow the **annulment grounds set forth in Article 34 of the UNCITRAL Model Law**, with small textual discrepancies and the addition of certain specific grounds.

Following, we present the differences between the grounds for annulment set forth in the Romanian law versus those in the UNCITRAL Model Law:

(a) With respect to the first ground for setting aside set forth in article 608 CPC, para. (1), subpara. (a) (*i.e. the dispute was not subject to settlement by arbitration*) there is a significant difference between the Romanian law and the UNCITRAL Model Law. Unlike Article 34 paragraph (2) subpara. (b) of the UNCITRAL Model Law, the Romanian law does not grant the vested court

[16] Rațiu Adrian, Năstase Gheorghe, Court *intervention in the arbitration proceedings,* „Romanian Arbitration Journal" no. 1 from 2013.
[17] T. Prescure, R. Crișan, *Commercial Arbitrations. Alternative means to settle monetary claims,* Universul Juridic Publishig House, Bucharest, 2010, p. 251.

the power to examine *ex officio* any issues related to arbitrability and public policy. According to the Romanian Civil Procedure Code, in annulment proceedings, courts can make an analysis of these grounds only pursuant to a specific request to that effect from the parties.[18]

(b) The ground set forth in article 608 para. (1) subpara (b) of the CPC (*the arbitral tribunal has settled the dispute in absence of an arbitration agreement or based on an invalid or ineffective arbitration agreement*) is consistent with the UNCITRAL Model Law. However, there is a difference, namely that Article 34 paragraph (2), subpara. (a), point (i) of the UNCITRAL Model Law does not explicitly provide for the absence of an arbitration agreement, the text mentioning only invalid arbitration agreements.

(c) Article 608 para. (1) subpara. (c) of the CPC (*i.e. the arbitral tribunal was not appointed in accordance with the arbitration agreement*) provides that non-compliance with the requirements for the appointment and constitution of the tribunal shall represent a ground for annulment of the arbitral award, similarly to Article 34 paragraph (2), subpara. (a), point (iv) of the UNCITRAL Model Law. This ground also includes non-compliance with the standard of independence and impartiality of arbitrators. In this case, the Romanian law adopts a slightly different position from the UNCITRAL Model Law by explicitly listing the cases of incompatibility of arbitrators in article 562 of the CPC. In the case of the UNCITRAL Model Law, Article 12 allows for such a challenge "*if circumstances exist that give rise to justifiable doubts as to his impartiality or independence*", the standard being, thus, a more generic one. In this respect, the vested court will decide, on a case-by-case basis, with the help of certain tools such as the IBA[19] Guide to Conflicts of Interest in International Arbitration.[20]

(d) Article 608 para. (1) subpara. (d) of the CPC provides that if one of the parties is absent *from the (oral) hearings due to lack of appropriate notice* this shall constitute grounds for annulment of the arbitral award. Article 34 paragraph (2), subpara. (a), point (ii) of the UNCITRAL Model Law is more comprehensive, in the sense that the arbitral award may be set aside if the party was not given proper notice of the appointment of an arbitrator, of the arbitral proceedings, or was otherwise unable to present his case. However, it should be noted that the lack of a proper notice about the appointment of the arbitrator does not constitute *per se* a ground for the annulment of the arbitral award according to Romanian law. Nevertheless, this reason could lead to the annulment of the arbitral award pursuant to art. 608 para. (1) subpara. (h) of the CPC, to the extent that a breach of public policy could be argued.

(e) The grounds set forth in article 608 para (1) subpara. (e) CPC concern the situation when *the arbitral award was rendered after the expiration of the limitation period provided for in article 567 CPC, even though at least one of the parties has invoked the lapse of arbitration and the parties have not agreed to continue the arbitration in accordance with article 568 para (1) and (2)*. This ground is not found in the UNCITRAL Model Law, which does not include specific provisions about limitation periods or the lapse of arbitration, unlike Romanian law.

(f) The grounds set forth in article 608 paragraph (1) subpara. (f) of the CPC sanctions *the conduct of an arbitrator that exceeds his or her mandate*, rendering an award on matters that were not raised by the parties (*i.e. extra petita*) or grants more than the parties have requested (*i.e. ultra petita*). The UNCITRAL Model Law also includes this ground, in Article 34, paragraph (2), subpara. (a), point (iii), with the difference that this article grants domestic court's jurisdiction for partial annulments of arbitral awards, insofar as issues not covered by an arbitration agreement can be separated from other aspects of an award.[21]

(g) The grounds set forth in article 608 para (1) subpara. (g) CPC concern arbitral awards lacking *certain essential elements (ratio decidendi, date, reasoning, place of arbitration, signatures).* Although Article 31 of the UNCITRAL Model Law mentions the same elements to be included in the arbitral award, their absence does not constitute a ground for setting aside the arbitral award.

(h) Concerning the ground set forth in article 608 para (1) subpara. (h) CPC, allowing for the

[18] C. Leaua, F.A. Baias (eds.), *Arbitration in Romania. A practitioner's Guide,* Kluwer Law International, 2016, Chapter 4.02 (Ștefan Dudaș), p. 217.
[19] The International Bar Association.
[20] C. Leaua, F.A. Baias, *op. cit.*, Chapter 4.02 (Ștefan Dudaș), p. 223.
[21] Ibid, p. 226.

setting aside of awards that are contrary to public policy, it should be noted that, under the UNCITRAL Model Law, it can be invoked *ex officio* by domestic courts, as set forth in Article 34 para (2) subpara. (b) point (ii).

3.4. Time-limits

The application for setting aside an arbitral award, **under Romanian law** (according to article 611 CPC), may only be made up to one month from the date on which the party making that application had received the award, or, if a request had been made for a correction or interpretation of the award or for an additional award, from the date on which that request had been disposed of by the arbitral tribunal. When it comes to the grounds set forth in article 608 para (1) subpara. (i) CPC, the statute of limitation is three months from the date the Constitutional Court decision was published in Part I of the Official Journal of Romania.

The UNCITRAL Model Law, in Article 34 para (3) allows for a longer statute of limitation than the Romanian Civil Procedure Code, that is three months from the date on which the party making that application had received the award, or, if a request had been made under Article 33[22] for a correction or interpretation of the award or for an additional award from the date on which that request had been disposed of by the arbitral tribunal.

4. Conclusions

This paper analyzed the role of domestic courts from the perspective of the Romanian legislation on one hand, and from the perspective of the UNCITRAL Model Law on the other hand.

We saw that, counterintuitively, considering that arbitration is, by definition, an alternative to state courts — and although limited by the applicable norms or by the parties' choices — the role of domestic courts in arbitration is potentially pivotal for certain administrative matters or pertaining to the course of the arbitral procedure, as well as essential when it comes to the setting aside of an arbitral award.

Although, i*n abstracto,* the differences between the international pursuit and the national approach can be important — and are caused both by objective factors like *national specificity*, and by subjective factors like *"judicial internationalism"*[23] — the Romanian legislation is in congruence with the UNCITRAL Model Law, despite the fact that it was not implemented *per se* in the Romanian legislation.

The UNCITRAL Model Law has had a major impact on harmonizing the legislation pertaining to arbitration, globally. The number of states that adopted domestic legislation based on the it is overwhelming, and, to this day, there is a continued expansion of the implementation of the UNCITRAL Model Law, which shows an increased interest of the international community to establish a unified legal framework for international arbitration in order to facilitate harmonious international economic relationships.

Unfortunately, the fact that Romania has not adopted the UNCITRAL Model Law but instead came up with its own norms, trying to mirror some of the aspects from the UNCITRAL Model Law, has led, in many situations, to the isolation of the Romanian arbitration practitioners from the international practice and has limited the potential influence of other countries' jurisprudence as persuasive authority for Romanian courts.

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[22] Article 33 of the UNCITRAL Model Law.

[23] *"Judicial Internationalism" i.e.* the interpretation and implementation of transnational/supranational legal norms in such a manner as to give *national specificity* the least possible effect. For obvious reasons this is not always possible, with factors like domestic *public order*/*public policy* being incident, so diverse objections are usually raised against the uniform application of transnational/supranational legal norms (*e.g.* the doctrine of the *margin of appreciation*, often encountered in the context of human rights law). As for arbitration, such objections are not always justified considering the characteristics of this alternative method of dispute settlement (mainly, party autonomy), nonetheless, exist. For a discussion on judicial internationalism see F. Bachand & F. Gélinas (eds.), *op. cit.*, Chapter 9 (Quentin Loh), p. 184, and Chapter 11 (Frédéric Bachand), p. 231. For details on the correspondence between the notions of p*ublic order* and *public policy* see C. Leaua, F.A. Baias, *op. cit.*, Chapter 1.01 (Ștefan Deaconu), p. 16, footnote 16, and Chapter 3.04 (Ioan Schiau), p. 148, footnote 404.

In conclusion, this paper aimed to identify the similarities and differences between the Romanian legislation and the UNCITRAL Model Law, insofar as the role of domestic courts pertaining arbitration is concerned. The goal was to serve as a useful analytical tool, in order to correlate the domestic legislation with the international practice form the countries that implemented in their legislation the soft law instrument in question.

Bibliography

1. C. Leaua, F.A. Baias (eds.), *Arbitration in Romania. A practitioner's Guide,* Kluwer Law International, 2016.
2. Frédéric Bachand & Fabien Gélinas (eds.), *UNCITRAL Model Law after twenty-five years: Global Perspectives on International Commercial Arbitration*, Juris Net, NY, 2013.
3. Cristina-Elena Popa Tache, *Introduction to International Investment Law*, ADJURIS – International Academic Publisher, Bucharest, 2020.
4. Loukas A. Mistelis, Julian D. M. Lew, *Pervasive Problems in International Arbitration International arbitration*, Ed. Kluwer Law International, 2006.
5. Rațiu Adrian, Năstase Gheorghe, Court *intervention in the arbitration proceedings*, „Romanian Arbitration Journal" no. 1, 2013.
6. T. Prescure, R. Crişan, *Commercial Arbitrations. Alternative means to settle monetary claims*, Universul Juridic Publishig House, Bucharest, 2010.
7. UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
8. Law no. 134/2010 on the Code of Civil Procedure, republished in the Official Journal of Romania, no. 247 from 10 April 2015, as subsequently amended and supplemented.