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Arbitration Yearbook**

Hungary





Hungary

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A. Legislation and rules

A.1 Legislation

International arbitration in Hungary continues to be governed by Act LXXI of 1994 on Arbitration (the “Hungarian Arbitration Act”). However, it is important to highlight that the Hungarian Parliament has adopted the new Act on the Civil Procedure Code³ (the “New Civil Procedure Code”), which enters into force on 1 January 2018. Further, the Hungarian government has accepted the concept of the new act on private international law (the “New Private International Law Act”). Both regulations are going to have an effect on arbitration in practice. According to the concept and the ministerial argument of the new act, legislative amendments must be made to the Hungarian Arbitration Act. We will give an insight into the impact of the new legislation under Section C. In Section A, we provide the milestones of the last decade’s arbitration-related changes to legislation.

A.1.1 Significant legislative changes to the Hungarian Arbitration Act in the last 10 years

The Hungarian Arbitration Act is a very stable piece of Hungarian legislation, as it is quite rarely amended compared to the average law. In the first years of the last decade, no significant change to the arbitration regulations were reported. Subsequently, there were more considerable legislative changes.

A.1.1.1 Arbitrability of disputes related to the national assets of Hungary

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³ Act CXXX of 2016 of the Civil Procedure Code.

An important act⁴ entered into force in 2012. Pursuant to the provisions of the National Assets Act, in any civil law contract concerning national assets located within the borders of Hungary, those who are entitled to dispose of such national assets may only stipulate the jurisdiction of a Hungarian ordinary court and may not stipulate the jurisdiction of any arbitration court in relation to any dispute that may arise in relation to such contract. (Further, in these cases, only Hungarian law may govern and only the Hungarian language may be used in the contract as the governing language.) Thus, this previous provision excluded the possibility of using arbitration to resolve disputes relating to national assets located in Hungary. The effect of this previous amendment was terminated by the legislators in 2015. This means that after a period of three years, during which the possibility of arbitration was restricted in a questionable manner, the power of the arbitration courts was restored on 19 March 2015.

A.1.1.2 Arbitration clauses in consumer contracts ruled by Civil Code⁵

According to the Section 6:104 (1) i) of the Civil Code, arbitration clauses in consumer contracts are to be considered unfair unless the parties to the consumer contract individually negotiated this term or it is expressly prescribed by law. Therefore, if the arbitration clause is part of the general terms and is not negotiated individually by the parties to the consumer contract, the arbitration clause is to be considered unfair. The unfair contract term will then be null and void.

A.2 Institutions, rules and infrastructure

There are four main permanent arbitration courts operating in Hungary,⁶ which are as follows: (i) the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (“HCCI Arbitration Court”); (ii) the Energy Arbitration Court; (iv) the

⁴ See Section 17 (3) of the Act CXCVI of 2011 on the National Assets.

⁵ The new Hungarian Civil Code entered into force on 15 March 2014.

⁶ Note that on 1 January 2012, the Permanent Arbitration Court of Telecommunication Matters ceased operating.



Arbitration Court of Financial and Capital Markets; and (iv) the Arbitration Court attached to the Hungarian Chamber of Agriculture.

The HCCI Arbitration Court, seated in Budapest,⁷ continues to be the most frequently used and most well-known permanent arbitration court in Hungary. This court is also considered the most prestigious one due to its age; in 2014, it celebrated the 65th anniversary of its foundation.

The Energy Arbitration Court is also seated in Budapest and started to operate in 2009. This court is non-exclusively authorized to proceed in legal disputes on rights and obligations arising from the articles of acts on gas supply and electricity, and from contracts concluded between license holders under the scope of these acts, provided that the parties referred such matters to arbitration and that they are free to dispose of the subject matter of the proceeding.⁸ The Energy Arbitration Court targets traders, power stations and industrial customers. The roll of arbitrators consists of industry experts and lawyers with considerable experience in the energy sector. The Rules of Proceedings⁹ of the Energy Arbitration Court are similar to the Rules of Proceedings of the HCCI Arbitration Court. Still, it is worth pointing out that the Energy Arbitration Court endeavors to complete the proceedings within five months from the formation of the arbitral tribunal.¹⁰

The Arbitration Court of Financial and Capital Markets has exclusive jurisdiction over domestic and international arbitration cases arising in these industries, while the arbitration court attached to the Hungarian Chamber of Agriculture is designed to adjudicate arbitration cases of companies in the agricultural sector.

⁷ For further information, visit www.mkik.hu (also in English).

⁸ See Section 1.2 of the Memorandum of the Energy Arbitration Court. In our view, the jurisdiction of the Energy Arbitration Court may also be established on the basis of Section 3 (1) of the Hungarian Arbitration Act, ie, not only in energy-related disputes.

⁹ See www.eavb.hu.

¹⁰ See Section 6 of the Rules of Proceedings of the Energy Arbitration Court.

B. Cases

B.1 Relying on “lack of jurisdiction” in cancellation cases

A customer brought an arbitration case before the Arbitration Court of Financial and Capital Markets against the Hungarian subsidiary of a multinational financial institution in connection with one of the largest fraud cases in the Hungarian financial sector. At the beginning of the arbitration, the respondent objected to the jurisdiction of the arbitration court, which had established jurisdiction over the case. Although it is allowed to request the Metropolitan Court to review such decisions in a non-litigious procedure, the respondent did not do so. Instead, the respondent continued to participate in the arbitration procedure, and presented a defense on the merits of the case. The FCM Arbitration Court decided against the respondent (now the plaintiff in the cancellation case), who requested the Metropolitan Court to cancel the arbitral award, arguing that the award dealt with a difference not falling within the terms of the submission to arbitration. The claimant (now the defendant in the cancellation case) argued that the respondent could no longer dispute the issue of the scope of the submission to arbitration because, although the remedy was available, the respondent had not challenged the arbitration court’s decision on the issue of jurisdiction in the non-litigious procedure. The Metropolitan Court refused to cancel the award on the basis of this argument, among other reasons.

The respondent requested an extraordinary judicial review of this judgment by the Supreme Court. According to the respondent, the fact that it had not initiated the non-litigious procedure did not prevent it from relying on the “lack of jurisdiction” argument later, in the cancellation case.

The Supreme Court¹¹ rendered its judgment in 2007.¹² Although the Supreme Court did not cancel the arbitral award for other reasons, it

¹¹ In the interim, the name of the Supreme Court has been changed to the Curia of Hungary.

¹² The Supreme Court’s judgment was published under No. BH 2007.193.



shared the respondent's view that it could rely on "lack of jurisdiction" in the cancellation case even if it did not raise this issue before the Metropolitan Court immediately after the arbitration court established its jurisdiction, but only after the award was made.

The Supreme Court reasoned that the non-litigious procedure before the Metropolitan Court and the cancellation case are two different and separate legal remedies, and only the Hungarian Arbitration Act itself could expressly restrict the grounds for cancellation. As the Hungarian Arbitration Act does not contain such an express restriction, the respondent was allowed to request cancellation for "lack of jurisdiction" despite the fact that it did not initiate the non-litigious procedure earlier.

B.2 Corporate disputes: Previous arbitration clauses may be "lost"

The claimant initiated a damages claim before the HCCI Arbitration Court, which granted an interim award, in which it established the legal ground for the damages portion of the claim. The respondent requested the competent state court to cancel the interim award because the HCCI Arbitration Court had no jurisdiction to proceed in the case.

The respondent's arguments were based on the fact that: (i) its company's original articles of association (as well as the founding owners' consortium agreement) contained an arbitration clause concerning corporate disputes; (ii) however, later, the articles of association were amended by 90% majority vote and, as a result of the amendment, among others things, the arbitration clause was replaced by a submission to the competence of a specific state court (which clearly implies submission to the jurisdiction of state courts).

The first instance court refused to cancel the interim award on the basis that an arbitration clause in the articles of association was not a true corporate law element of the articles, but rather a civil law agreement embedded into the articles. Therefore, the arbitration clause could have been replaced only in accordance with civil law

requirements (ie, by the mutual agreement of all parties) and not by a majority vote.

The Supreme Court, however, cancelled the interim award for the lack of jurisdiction in an extraordinary judicial review procedure.¹³ The Supreme Court established that the relevant rules of corporate law provide that if the members of a company want to use arbitration in their corporate disputes, then they have to incorporate the necessary arbitration clause into the articles of association. Therefore, this arbitration clause qualifies as an organic part of the articles, and may be amended/terminated in accordance with the applicable corporate law rules governing the amendment of articles of associations.

B.3 The *res judicata* effect of arbitral awards — Issue clarified by the Supreme Court

The substantive aspect of *res judicata* means¹⁴ that the parties, courts and authorities are bound to a final and binding judgment and the same dispute may not be re-litigated, that is, decided more than one time. The Hungarian Code of Civil Procedure¹⁵ currently in force gives a clear statutory definition, as it substantially provides that the final and binding nature of a judgment excludes the possibility that the same parties (including their legal successors) will assert a new claim against each other on the same factual basis and on the same legal ground.

The Supreme Court, in a recent public decision¹⁶ finally settled the issue of the *res judicata* effect in relation to arbitral awards.

¹³ No. Gfv.XI.30.064/2009/8.

¹⁴ The formal aspect of *res judicata* means that a final and binding judgment may no longer be challenged by an appeal. This does not mean that no remedy is allowed at all against a final and binding judgment. For example, extraordinary judicial review of final and binding judgments may be requested from the Curia of Hungary, which is a special and limited remedy in the Hungarian court system.

¹⁵ Act III of 1952 on the Code of Civil Procedure.

¹⁶ Decision No. BH2010.191.



According to Section 58 of the Hungarian Arbitration Act, the arbitral award will have the same effect as that of an ordinary, binding court decision. However, the Hungarian Arbitration Act, unlike the Hungarian Code of Civil Procedures, which contains rules on the proceedings and the judgments of the ordinary courts, does not expressly state that arbitral awards also have a *res judicata* effect.

The Supreme Court held that arbitral awards have the same *res judicata* effect as judgments issued by ordinary courts. The Supreme Court also determined that the application of *res judicata*, as a legal principle, is a constitutional requirement not only in ordinary court proceedings, but also in the proceedings of arbitration courts.

B.4 Arbitration court liability for damages

There were two court decisions¹⁷ rendered in 2014 relating to this topic. In these decisions, the Curia of Hungary declared that the arbitration courts' liability for damages can be established on the basis of the general non-contractual liability rules of civil law, notwithstanding any contractual exclusion or limitation clauses, for example in the arbitration court's rules of proceedings.

The following conditions must be met to establish an arbitration court's liability: (i) the general criteria of non-contractual liability; and (ii) the obviously unlawful judicature or interpretation of law affecting the merits of the arbitration court's award.

It was also declared that a previous invalidation proceeding (as a remedy being used against the allegedly unlawful award) is not a prerequisite to the establishment of the arbitration court's non-contractual liability, because the invalidation proceeding is an extraordinary remedy (and its subject is different anyway).

¹⁷ Curia's judgments no. Pfv.III.21.148/2013/4 and Pfv.IV.20.816/2014/11.

B.5 Involuntary liquidation prohibits initiation of arbitration

According to a judgment of the Szeged Court of Appeal,¹⁸ an insolvent debtor company in involuntary liquidation is prohibited from initiating an arbitration procedure due to creditor protection rules. Therefore, an arbitration clause becomes unenforceable when the company that executed it becomes subject to an involuntary liquidation procedure.

C. Trends and observations

C.1 Statistics of the last decade

According to HCCI Arbitration Court's statistics for the last 10 years, in the vast majority of the cases heard before the HCCI Arbitration Court, the disputed amount was relatively low, since in 63% of the cases, the disputed amount did not exceed HUF 10 million (approximately USD 34,500) and in 88% of the cases, this did not exceed HUF 100 million. More significant cases, where the disputed amount exceeded HUF 100 million are quite rare and only 2% of the cases exceeded HUF 1 billion. Cases usually ended up with an arbitral award; 74% of the cases in the last decade did so. Only 18% of the closed cases were ended by orders and another 8% by termination orders.

The statistics of the last decade show a decrease in the number of both domestic and international cases filed with the HCCI Arbitration Court. In 2006 the number of domestic cases was 369 and there were 42 international cases brought for HCCI arbitration. Over the last 10 years, presumably due to the economic recession, these numbers were reduced. In 2015, the number of domestic cases was 129, 16 of which were international.

In these international cases, the vast majority of the involved foreign parties came from Central European countries like Germany, Austria,

¹⁸ No. EBD2014.G.4.



Slovakia and Romania; however, a significant number of foreign parties are from France, Italy and the Netherlands.

C.2 Expected impact of the New Civil Procedure Code on arbitration

As we have mentioned in A.1, the New Civil Procedure Code and the New Private International Law Act will have an impact on arbitration.

According to the ministerial reasoning of the New Civil Procedure Code, the Hungarian Arbitration Act will need to be reviewed after the New Civil Procedure Code is accepted. Experts agree that the arbitration procedure, as an alternative dispute resolution tool, is connected to the civil procedure law. The main issue during the codification of the New Civil Procedure Code was how arbitration should be regulated, if by the Civil Procedural Code or by a separate act. The reason for a separate act is that arbitration is not part of the ordinary judicial system and in general, the Civil Procedural Code does not apply to arbitration cases. Despite this, the Hungarian arbitration system needs to be reviewed, as well as the competence of arbitration courts and their relationship with state courts.

Furthermore, the New Civil Procedure Code clarifies some relevant procedural provisions, which were considered confusing in the currently applicable regulation, as well as implements relevant court practice. In addition, the New Civil Procedure Code allows a request for a preliminary injunction before the state court during the arbitration procedure. Sections 108 and 109 resolve the contradiction between the currently applicable rules of the Arbitration Act and the Civil Procedure Code. Therefore, it may apply to preliminary injunctions without needing to initiate a legal procedure before the state courts.

Pursuant to Section 270, the court might use evidence from other proceedings. The legislature probably made this provision in light of cost efficiency and to avoid duplicating evidence taking.

C.3 The choice of applicable law in arbitration cases

According to its concept, the New Private International Law Act must be applied to contracts that do not fall within the scope of Rome I.¹⁹ According to the New Private International Law Act's concept, in the absence of a chosen law (which might be either the state law or the law of the arbitration court), the applicable law will be that which is the most closely connected to the contract.

According to the concept of the New Private International Law, the parties should be entitled to choose the applicable law to their agreement upon arbitration (which may either be a separate agreement or an arbitration clause set out in the main contract). The aim of this legislation is to apply the principle of "separability" to such agreements, on the basis of which it should be the parties' option, with regards to the arbitration agreement, to choose a law to apply to their agreement that is different from the law that applies to the main contract.

¹⁹ Regulation (EC) No 593/2008.