

Hungary: Are Interim Measures Hard to Enforce?

Kluwer Arbitration Blog

July 18, 2017

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Please refer to this post as: Alexandra Bognár, 'Hungary: Are Interim Measures Hard to Enforce?', Kluwer Arbitration Blog, July 18 2017,

<http://arbitrationblog.kluwerarbitration.com/2017/07/18/hungary-interim-measures-hard-enforce/>

The Hungarian Parliament recently passed new legislation on arbitration (*Act LX of 2017 on Arbitration*, the "2017 Act") that will reform Hungarian arbitration law as of 1 January 2018.

The 2017 Act, considering both the shortcomings of the current Hungarian legislation (*Act LXXI of 1994 on Arbitration*, the "1994 Act") and the amendment of the UNCITRAL Model Law on International Commercial Arbitration adopted in 2006 (the "Model Law"), repositions arbitration by reforming the choice of arbitrators, the institutional system of Hungarian arbitration panels, and the power of the panels ordering interim measures and preliminary orders.

Interim measures in arbitration today

Though interim measures are recognised in the 1994 Act, their effectiveness is somewhat questionable and worrisome for parties seeking quick and effective legal protection. As such, it has long been a shortcoming of arbitration in Hungary.

Under the 1994 Act, the arbitration tribunal may order either party to implement interim measures to the extent the tribunal deems necessary. The 1994 Act adds that the interim measure shall remain in force until a new decision of the arbitration tribunal is adopted to replace it or until it makes an award in the same matter. In line with international practice, the arbitration tribunal has the power to impose interim measures even prior to the commencement of the arbitration proceedings.

On the other hand, such an order would only be effective between the parties, but not towards third parties (eg it does not have absolute effect restricting parties not participating in the procedure). In other words, the decision of the arbitration panel is not enforceable under Hungarian law. Therefore the success of an interim measure imposed by arbitral tribunals greatly depends on the voluntary compliance of the party against whom it is imposed. The consequences of non-compliance, however, would ultimately be drawn up in the final award, although the arbitration panel is powerless to "penalise" the non-performing party in due time.

The above regulation is not in conformity with international arbitration practice and makes arbitration less effective in Hungary compared to regular court proceedings, where such an order would be enforceable.

Interim measures by means of regular court assistance

The ineffectiveness of arbitration panels is currently addressed by court assistance provided for under

the 1994 Act, namely that the parties are entitled to turn to the regular court either before or during the arbitration proceedings for assistance in imposing interim measures.

Regular court assistance in light of an arbitration procedure is already very exceptional, not to mention interim or protective measures, which would automatically lead to the fragmentation of the case with (sub)proceedings before multiple courts or panels. Despite its rarity, court assistance has the benefit that regular court decisions are enforceable, unlike decisions by an arbitration panel.

By forcing the parties to turn to the courts for effective legal protection, this scenario, while a safer solution for the party requesting the interim measure, clearly has not made arbitration more favourable.

Interim measures and preliminary orders in the future

The 2017 Act departs from the differentiation between interim measures ordered by an arbitration panel and a regular court, elevating the decisions of the arbitration panel to the same level as those of the regular court. The 2017 Act will thus broaden the authority of arbitration panels.

The provisions on interim measures are adopted almost verbatim from the Model Law, clarifying both the means of interim measures and the circumstances the panel should analyse. Thus, the arbitral tribunal may grant interim measures upon the request of the party if (a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (b) there is a reasonable chance that the requesting party will succeed on the merits of the claim.

By explicitly stipulating that the above orders of the arbitration panel should be enforced in accordance with the rules of judicial enforcement (ie the same way as regular court orders), the 2017 Act makes up for the legislative deficiencies of the 1994 Act.

The 2017 Act will introduce preliminary orders, too. A party may submit a request for an interim measure together with an application for a preliminary order directing the other party not to frustrate the purpose of the interim measure requested, ie without the prior notification of the opposing party.

In addition, the arbitral tribunal will have the power to order security in connection with the above orders of the parties. The tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure while it must require the party applying for a preliminary order to provide security unless the tribunal considers it inappropriate or unnecessary to do so.

The above innovations will to a certain extent eliminate uncertainties about interim measures, hopefully making arbitration more attractive for contractual parties in dispute and convincing them to agree in arbitration more frequently.