

Is There Finally a (Partial) Solution to the 2017 Hungarian Arbitration Act's Controversial Requirement that Arbitrators Reimburse Fees If the Award is Set Aside?

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As reported in earlier blog posts on the Kluwer Arbitration Blog, [fn] See, e.g., Zoltán Novák, New Arbitration Act in Hungary, Kluwer Arbitration Blog, 15 October 2017; Alexandra Bognár, Hungary: Are Interim Measures Hard to Enforce?, Kluwer Arbitration Blog, 18 July 2017; Ioana Knoll-Tudor, The 2018 Hungarian Arbitration Act: Implications of the New Setting Aside Provisions, Kluwer Arbitration Blog, 15 July 2018. [fn] Hungary's newly adopted Arbitration Act (Act No. LX of 2017, hereafter the "2017 Arbitration Act") is based on the UNCITRAL Model Law as amended in 2006 and governs both domestic and international arbitrations within Hungary commencing on or after 1 January 2018. The declared aim of the 2017 Arbitration Act is to reaffirm arbitration as a modern, efficient and effective alternative to state courts and to increase Hungary's competitiveness as a venue for domestic and international commercial arbitration. [fn] Explanatory Note, T/15361 Draft Act on Arbitration, 26 April 2017. [fn] Since its adoption, the 2017 Arbitration Act has been amended in important aspects in an effort to further clarify and better align its provisions with international best practice. Most recently, effective as of 10 July 2019, the 2017 Arbitration Act was amended for the third time to revise the rather unusual and highly controversial requirement that arbitrators conducting proceedings in Hungary reimburse all fees if their award is subsequently set aside by the Hungarian courts. This requirement, the result of the somewhat unfortunate codification of existing Hungarian arbitral practice in the 2017 Arbitration Act, has been criticized as a "populist measure" [fn] Philippe Cavalieros, *Le nouveau droit hongrois de l'arbitrage sous le prisme de la responsabilité de l'arbitre*, *Revue de l'arbitrage* 2018, No. 3, p. 555.[fn] and has led some commentators to warn arbitrators against accepting appointments on tribunals seated in Hungary.

This blog post briefly presents the initial wording and origin of the contested provision (1) and revisits some of the main criticisms levied against it (2). It then presents the revised wording of the 2017 Arbitration Act (3) and concludes with considerations for the future (4).

1. The Initial Wording and Origin of the Requirement that Arbitrators Reimburse Fees If the Award is Set Aside

In its initial form, Section 57(2) of the 2017 Arbitration Act provided that

“if the arbitral award is annulled, no arbitrator fee shall be due in respect of the arbitral proceeding that resulted in the annulled award and the members of the arbitral tribunal that rendered the annulled award shall not be entitled to arbitrator fees”.

Based on the premise that arbitrators have a duty to the parties to render an enforceable award, and taking the view that the grounds for setting aside awards are largely aimed at sanctioning egregious irregularities in the conduct of the proceedings and in the rendering of the award by the arbitral tribunal, by introducing Section 57(2) in the 2017 Arbitration Act, the Hungarian legislator meant to increase the accountability of arbitrators and thereby to enhance the attractiveness of arbitration in the eyes of the users.^[fn] Explanatory Note, T/15361 Draft Act on Arbitration, 26 April 2017.^[/fn] The idea that the parties should not be required to bear the costs of the second proceeding if the award is set aside and the arbitration is resumed has long been part of Hungarian arbitration practice. Although the previously applicable 1994 Arbitration Act did not contain rules on the proceedings to be conducted following the setting aside of an award, the 2011 Rules of Arbitration of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (“HCCI Arbitration Court” and “2011 HCCI Rules of Arbitration”) provided that, following the setting aside of an award, the dispute must be resubmitted to the same arbitral tribunal that rendered the annulled award. It further provided that this tribunal would not be entitled to fees in respect of the second proceeding (Article 20(7) of the 2011 HCCI Rules of Arbitration). Thus, pursuant to the 2011 HCCI Rules of Arbitration, while the arbitrators did not have to reimburse the fees for the proceeding that resulted in the annulled award, they had to conduct the second arbitration and render a second award without additional remuneration.

In 2017, the Hungarian legislator decided to codify the rules on the resumption of arbitration proceedings following the setting aside of awards directly in the 2017 Arbitration Act by adopting a slightly amended version of Article 20(7) of the 2011 HCCI Rules of Arbitration. Contrary to Article 20(7), which had required the resubmission of the dispute following annulment to the same tribunal that had rendered the annulled award, Section 47(5) of the 2017 Arbitration Act allows the parties to choose between resubmitting their dispute to the original arbitral tribunal and submitting to a different tribunal. Rather than requiring the original tribunal to conduct a second arbitration without remuneration (as Article 20(7) of the 2011 HCCI Rules of Arbitration had done), Section 57(2) of the 2017 Arbitration Act provided that the arbitrators who sat on the first tribunal must reimburse the fees for the proceeding that had led to the annulled award. These fees could then be used to fund the second arbitration. By introducing this requirement into the 2017 Arbitration Act, the Hungarian legislator made it applicable not only to proceedings administered by the HCCI Arbitration Court but to all arbitration proceedings seated in Hungary.

2. The Main Criticisms Levied Against the Requirement that Arbitrators Reimburse Fees if the Award is Set Aside

The Hungarian arbitration community largely welcomed the new requirement in Section 57(2), at least in principle, although some criticized its unintended consequences and questioned the practical feasibility of the measure.^[fn] [Zoltán Novák, New Arbitration Act in Hungary, Kluwer Arbitration Blog, 15 October 2017](#); [Ádám Boóc, Remarks on the New Hungarian Act on Arbitration \(Act LX of 2017\), Romanian Arbitration Journal, 2019/2, pp. 93-105](#); [Tamás Sárközy, A választottbíráskodás státuszkérdéseiről az új választottbírósjogi törvény alapján](#), in: *A kereskedelmi választottbíráskodás évkönyve 2018* (ed.: János Burai-Kovács), HVGOrac Budapest 2019, p. 92; [Róbert Szakál, Gondolatok a választottbíráskodás felelősségi kérdéseiről](#), in: *A kereskedelmi választottbíráskodás évkönyve 2018*

(ed.: János Burai-Kovács), HVGOrac Budapest 2019, p. 154.[/fn] Stronger criticism was formulated by foreign commentators.[fn]Philippe Cavalieros, *Le nouveau droit hongrois de l'arbitrage sous le prisme de la responsabilité de l'arbitre*, *Revue de l'arbitrage* 2018, No. 3, p. 539-559; [Ioana Knoll-Tudor, The 2018 Hungarian Arbitration Act: Implications of the New Setting Aside Provisions](#), *Kluwer Arbitration Blog*, 15 July 2018.[/fn] The main criticisms levied against the Section 57(2) requirement were that it sanctioned all three members of the tribunal equally and irrespective of who was at fault for the setting aside of the award and that the sanction applied even if an arbitrator alerted in a dissenting opinion to certain irregularities which later led to the annulment of the award. The fact that Section 57(2) applied irrespective of the annulment ground retained by the state court was also criticized. Requiring arbitrators to reimburse fees received previously was seen as a practical impossibility, especially for arbitrators based outside of Hungary. The partial annulment of awards and the treatment of arbitrators' expenses were cause for further concern. In addition, it was pointed out that the Section 57(2) rule could disrupt the collegiality and proper functioning of arbitral tribunals. Some argued that as a consequence of Section 57(2), foreign arbitrators would be particularly reluctant to accept appointments on tribunals seated in Hungary. It was feared that instead of rendering arbitration more attractive by improving the quality of awards and increasing Hungary's reputation as a seat of arbitration, the obligation to reimburse arbitrator fees would hurt the image of arbitration, decrease the quality of awards and discourage tribunals from choosing Hungary as their seat.

3. The Revised Wording of the 2017 Arbitration Act

Even before Section 57(2) could be tested in practice, in response to the above criticism, the Hungarian legislator decided to amend this controversial provision of the 2017 Arbitration Act. With effect of 10 July 2019, Act No. LXVI of 2019 revised Section 57(2) to read: "if the arbitral award is set aside, in case the proceedings are resumed following the setting aside, the parties shall not be required to pay the fees of the arbitral tribunal...". The revised wording of Section 57(2) thus no longer requires arbitrators who rendered the annulled award to reimburse their fees. At the same time, the Hungarian legislator did not depart from its earlier position according to which parties cannot be required to pay arbitrator fees twice to obtain a single enforceable award. Thus, a new solution had to be found to fund the costs and arbitrator fees of the second arbitration. The solution eventually adopted by the Hungarian legislator only deals with arbitration proceedings conducted under the auspices of the HCCI Arbitration Court. Section 62 of the 2017 Arbitration Act was amended to task the Presidium of the HCCI Court of Arbitration with establishing a separate reserve fund from which the arbitrator fees of the second proceeding are to be drawn when the arbitration is resumed following the setting aside of the award. The revised Section 62 also provides that where the funds available in the separate reserve fund are insufficient to cover the arbitrator fees of the second tribunal, such fees shall be provided by the Hungarian Chamber of Commerce and Industry. At the same time, in respect of *ad hoc* and foreign institutional proceedings seated in Hungary, the revised 2017 Arbitration Act remains silent. It is thus not entirely clear what would happen if, for example, an ICC award rendered by a tribunal seated in Budapest were subsequently annulled by the courts and if the parties were to choose to resubmit their dispute to arbitration. Could the parties claim, by reference to Section 57(2) of the 2017 Arbitration Act, that they are not liable to pay the fees of the second tribunal? If so, who would be required to pay the fees for hearing the resubmitted dispute, and with what funds? The revised 2017 Arbitration Act does not answer these questions – it is thus a partial solution at best.

4. Concluding Remarks and Considerations for the Future

As a result of this third amendment to the 2017 Arbitration Act, arbitrators sitting on tribunals in Hungary are no longer at risk of receiving a reimbursement claim for fees from many years previous if their award is set aside, which should come as a relief to many. Although the establishment, funding and functioning of the new separate reserve fund for resumed proceedings administered by the HCCI Court of Arbitration will no doubt face a number of difficulties in practice, the solution adopted by the Hungarian legislator is likely to contribute to improving the HCCI Court of Arbitration's attractiveness to experienced Hungarian and foreign arbitrators. At the same time, the Hungarian legislator's partial solution, which leaves *ad hoc* and foreign institutional proceedings seated in Hungary in a vacuum, is likely to continue to attract criticism from the international arbitration community. If Hungary wishes to secure a place in the ranks of recommended seats of arbitration, a further amendment to the 2017 Arbitration Act may be necessary - one restricting the application of the revised Section 57(2) to arbitrations administered by the HCCI Court of Arbitration.