The New York Convention in the Hungarian Court Practice in Two Decades – Formalistic Yet Pro-Arbitration Approach

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This post analyses the decisions of Hungarian courts rendered under the New York Convention ("Convention") and published in the last two decades. The decisions were initially made available to the international arbitration community in the ICCA Yearbook of Commercial Arbitration series. This case law of 20 years is summarized below by identifying the main directions of the application of the Convention in Hungary.

The "Commercial Nature" Reservation – Liberal Interpretation

While Hungary took an active part in the preparation of and acceded to the Convention in 1962, arbitration played only a marginal role before the 1989-90 change of the political regime. As a result, court decisions in relation to the Convention began to be published from the mid-90s onward.

The main "heritage" from the pre-90s era are the two reservations that Hungary made based on Article I(3) of the Convention. While the narrowing of the Convention's material scope for awards made in the other Contracting States has not posed problems in court practice, the utility of qualification of commercial relationships under the national law has raised some interpretative problems.

In one case, a commercial agency contract that was subject to Swiss law had to be interpreted by the local court based on Hungarian law. At first, the court concluded that an agreement between two independent persons, without any subordination, could not be qualified as an employment relationship. Then, the court qualified the parties' relation as commercial since, by setting common business goals, they strived for gaining individual profit.[fn]Case No. BH 2007.130.[/fn]

However, in another case the first instance court concluded wrongly that the transfer of ownership would be a relevant factor when assessing the commercial nature of the relationship. The court of the second instance corrected this decision by establishing that a lease agreement with an option for the subsidiary of the tenant to enter into a leasing agreement with the landlord shall be considered as a commercial relationship.[fn]Case No. BH2004.369.[/fn]

Although Hungarian courts were able to provide an interpretation in favour of the application of the Convention in the above cases, it must be admitted that the legal uncertainty around the concept of "commercial relationship" is still fueled by a "legislative gap". Indeed, from 1994 this concept is not defined by Hungarian law, and even the new Hungarian Civil Code that entered into force in 2014 fails to provide any interpretative guidance.

For this reason, there are voices not only from practitioners but also from scholars that this reservation should be abandoned.[fn]RAFFAI, Katalin: Interpretation and Application of the New York Convention in Hungary. In: BERMAN, George (ed.): Recognition and Enforcement of Foreign Arbitral Awards. The Interpretation and Application of the New York Convention by National Courts. Springer 2017, p. 435-436.[/fn]

Formalities and Translations in Article IV – Formalistic Approach

When it comes to Article IV of the Convention, regulating the formalities to be fulfilled by petitioners, we can say that instead of a flexible and pragmatic approach, Hungarian courts turned to formalism in the last years.

Except for a few cases, where, in accordance with Article VII of the Convention, bilateral treaties could take priority over the provisions of the Convention,[fn]Case No. BH2004.416.[/fn] the non-compliance with Article IV(1)-(2) led to the rejection of the application seeking the recognition of foreign awards.

Unlike certain other jurisdictions (for example, Germany), where the arbitration agreement does not need to be submitted at all in the recognition procedure,[fn]ICCA'S Guide to the interpretation of the 1958 New York Convention. 2011. International Council for Commercial Arbitration. 75.[/fn] Hungarian courts did not grant the recognition where the arbitration agreement was missing, or in cases where it was submitted as a simple photocopy, without legalization by a notary public.[fn]Case No. BH1999.270., Case No BH2004.19. and Case BH2002.582.[/fn]

In one particular case, the Supreme Court even stressed that in the recognition procedure the arbitration agreement shall be submitted, and its existence cannot be established on the basis of other evidence, *e.g.*, on the grounds that the award debtor acknowledged the existence of the arbitration clause in its request for arbitration.[fn]Case No. BH2004.285.[/fn] The same approach was taken in those cases where petitioners submitted the arbitral award in a simple copy without legalization.[fn]Case No. BH1999.223.[/fn]

When it comes to translations, although in some countries, like Switzerland or the Netherlands, the translation of the award and the arbitration agreement is not always required,[fn]ICCA'S Guide to the interpretation of the 1958 New York Convention. 2011. International Council for Commercial Arbitration. 77.[/fn] Hungarian courts are conservative in this regard and the recognition was not granted in cases where the arbitral award was submitted in a simple translation, or without an attestation clause from the translator.[fn]Case No. BH2004.19. and Case No. BH1999.223.[/fn]

It must be noted that the refusal of recognition due to formalistic approach characterized rather the early years until the mid-2000s, while in the next decade there was no published decision rejecting the application for recognition of the foreign award for reason of non-compliance with formalities.

Lastly, it must be admitted that, in almost all of the above cases, Hungarian judges allowed to cure the formal defects by ordering the lower courts to conduct a new procedure in which the award creditor could satisfy the formal requirements.

Grounds for Refusal in Article V – Pro-Arbitration Approach

While Hungarian courts sometimes can be blamed for excessive formalism and for the lack of pro-arbitration approach in applying Article IV of the Convention, when it comes to the interpretation of the grounds for refusal set forth in Article V, that is certainly not the case.

As a starting point, it was laid down in several decisions that the recognition and enforcement procedure cannot serve as a "remedy" against the arbitral award, so the "review on the merits" is not allowed.[fn]Case No. BH+ 2015.209 and BH+2013.31.[/fn]

Hungarian courts also confirmed that Article V of the Convention sets forth an "exhaustive list" on which recognition and enforcement may be refused, and therefore they ignored other defences, like the diminution of the claim in other enforcement procedure, or ongoing litigation with third parties.[fn]Case No. BH2007.130. and No.1996.375.[/fn]

While it is commonly accepted that the court of recognition is not entitled to requalify the facts determined by the arbitral tribunal, one could say that some court decisions have gone too far in the application of the principle of "non révision au fond" when they rejected to examine whether an arbitration agreement existed between the parties in case of legal succession in respect of the arbitration clause, or whether the tribunal had jurisdiction to hear the dispute in the context of Article V(1)a)-c) of the Convention.[fn]Cases No. BH+ 2015.209 and BH+2013.31.[/fn]

When it comes to "due process violations" in the context of Article V(1)b), in one particular case, the recognition of the award was granted based on the fact that the summons to the hearing in the arbitration proceedings had been properly served. Even if the debtor returned the mail to the arbitration tribunal with the indication "refused", later he acknowledged that the summons was duly received by him.[fn]Case No. BH2004.416.[/fn]

Another decision highlighted that the "burden of proof" regarding the violation of due process under Article V(1)b) lies on the shoulders of the award debtor.[fn]Case No. BDT2006.1315.[/fn] This principle was applied by other Hungarian courts in respect of the other grounds for refusal set forth in Article V(1), too.

Regarding Article V(1)e) of the Convention, the court confirmed that the "suspended award" defence could not be invoked by the award-debtor based on the pure fact that he started setting aside procedure in the country of origin, where the courts of this country have not suspended the enforceability of the said award.[fn]Case No. BH+ 2013.31.[/fn]

It is well-settled case law of Hungarian courts that the recognition may be refused on the basis of "public policy" in accordance with Article V(2)b), if the recognition of the foreign award would have consequences beyond the legal relationship of the parties and it would manifestly or severely violate the fundamental rights, domestic social values and socio-economic order. In one of the analysed cases, the court rightly pointed out that the payment of the high amount awarded by the arbitral tribunal had an impact on the individual situation of the award-debtor, but it did not violate the interest of the society and the public, so the recognition was granted.[fn]Case No. BH2007.13.[/fn]

Hungarian courts were also reluctant to rely on public policy to refuse recognition when the award debtor referred to the failure of the arbitral tribunal to postpone the hearing despite its request, or when the debtor relied on ongoing criminal procedures against its former managing director.[fn]Case No. BH2003.505.and Case No. BH+2015.209.[/fn]

Finally, we must highlight that, while there were cases where recognition was refused because of non-compliance with formalities under Article IV, it is a telling fact in support of the pro-arbitration approach of Hungarian courts that the award debtors could not successfully resist the recognition and enforcement by invoking the grounds for refusal in Article V of the Convention.

Conclusion

As shown in this post, Hungarian courts can be characterized by a mixture of formalism and pro-arbitration approach when applying the Convention. It is undisputed that a rather strong formalistic approach can be felt in respect of the fulfilment of formalities and translation matters. However, the liberal interpretation of the reservation and the pro-arbitration policy in respect to the grounds for refusal of recognition and enforcement of foreign awards proves that Hungary has its place among the pro-arbitration jurisdictions.