

# Kluwer Arbitration Blog

## Limits of Arbitral Competence: Lessons from a Hungarian Domain Name Dispute

Zoltán Novák (Taylor Wessing Budapest) · Thursday, January 30th, 2020

For a number of years, most Hungarian [domain name disputes](#) have been decided by an Alternative Dispute Resolution Forum (hereinafter: ‘Forum’) operated by the Council of Hungarian Internet Providers (‘*Internet Szolgáltatók Tanácsa*’, abbreviated as ‘ISZT’). Although the procedure conforms to the [Uniform Domain Name Dispute Resolution Policy](#) established by the Internet Corporation for Assigned Names and Numbers (‘ICANN’), its origins in Hungary go back to a 2003 Hungarian Supreme Court decision, which held that an agreement referring domain name disputes to arbitration under the rules set up by ISZT was null and void. The decision – rendered in setting aside proceedings against an arbitral award – touched upon interesting questions about the source and limits of arbitral competence, which remain valid to this day. This post will summarize the said decision and analyze the question of whether the submission by a domain name applicant to arbitration of all disputes concerning the domain name in question can constitute a valid offer to arbitrate with third parties claiming that the registered domain name infringes on their rights.

### The Road to the Supreme Court

It is important to note at the outset that no government or governmental organization is in charge of the Domain Name System (‘DNS’). The worldwide DNS is managed through a hierarchical structure under the command of ICANN, a US-based non-profit entity, which has contracts with accredited registries around the world to administer domain names in the corresponding top-level domains. The Governmental Advisory Committee to ICANN has adopted a [general principle](#) that DNS is a public resource in the sense that domain names must be managed in the public interest. Nevertheless, domain name administration is still under limited state or public policy control and in most countries subject to self-regulation.

In this hierarchical system, ISZT serves as the registry for the country-code top-level domain for Hungary, .hu. For this purpose, ISZT set up its Domain Registration Rules and Procedures (‘Registration Rules’) requiring domain name providers – so-called registrars – to apply them as general terms in the individual domain name registration contracts they concluded with domain name applicants under the .hu domain. The Registration Rules also included dispute resolution provisions referring domain name disputes to what was called an *ad hoc* arbitral procedure under ISZT’s own rules.

The domain name at issue in the dispute was registered by a registrar ('Registrar') on behalf of an applicant ('Applicant') according to the Registration Rules. A few months later another company ('Complainant') called on the Applicant to cease using the said domain name, arguing that it was identical to its well-established company name. After the Applicant failed to comply with the demand, the Complainant requested arbitration under the ISZT Rules, which resulted in upholding the Complainant's claim. The Applicant applied to a state court for the setting aside of the arbitral award and the case ultimately came before the Hungarian Supreme Court.

### **The Reasons for the Supreme Court Decision**

After considering a variety of reasons, the Court ultimately set aside the award on the basis that the arbitral proceedings under the ISZT Rules were *ad hoc* in name only. Upon a close examination of the Rules, the Court concluded that they in fact provided for the proceedings to be *administered* by ISZT as a *permanent* arbitral institution. Under Hungarian law, however, permanent arbitral institutions could only be established by a chamber of commerce – while ISZT was nothing more than an association. The Court thus held that, by submitting the dispute to an institution whose operation was not mandated by statute, the arbitration agreement itself was in violation of law and therefore invalid.

In *dicta*, moreover, the Court also held that submission to arbitration by the domain name applicant of any and all disputes concerning the domain name through a mere acceptance of ISZT's general terms violated Hungarian law and public policy. As the Registration Rules had to be applied to every registration of a domain name under the .hu top-level domain, the Supreme Court interpreted these Rules as compulsory regulations for the whole sector of domain name delegation. The Court argued that such a "compulsory" stipulation of arbitral competence violated both the Hungarian arbitration legislation and the Constitution.

First, the Hungarian Arbitration Act in force back then provided that a specific range of cases may only be reserved for the exclusive jurisdiction of an arbitral institution by statute. Since the Registration Rules seemed to give exclusive competence in this area to arbitral tribunals under the auspices of ISZT without such statutory mandate, the Rules were found to be in breach of the Arbitration Act and therefore invalid.

Second, considering that the Constitution bestowed on everyone the right to resort to a state court – and that such fundamental rights could only be regulated in an Act – the Supreme Court held that, by establishing an exclusive competence of an arbitral institution for the whole sector of domain name delegation, the Registration Rules deprived applicants from this constitutional right. In this regard, the Court seemed to implicitly agree with ICANN's Governmental Advisory Committee that domain names are to be treated as public resources and concluded that, by delegating all domain name disputes to the realm of private justice without a statutory mandate, the self-regulation of the sector went too far. In this sense, the argument was based on public policy considerations.

### **Criticism of the Supreme Court Decision**

While the Court's conclusion had merit, its argumentation, in the view of this author, was

mistaken. What the Court considered to be public policy reasons for the invalidity of a submission to arbitration through the acceptance of the Registration Rules could more helpfully be analyzed in terms of party consent to arbitration.

Several objections can be raised against the Supreme Court's reasoning. Firstly, the Registration Rules of ISZT did not, in fact, purport to compulsorily regulate the whole sector of domain name delegation. Nothing prevented Hungarian domain name applicants from registering a domain name under a top-level domain other than 'hu'. For instance, the applicants were free to opt for domain names under '.com', in which case the Registration Rules with their provision of binding arbitration simply did not apply.

Secondly, although the decision correctly concluded that the Applicant's acceptance of the Registration Rules could not bind the Applicant to submit to arbitration any and all disputes in connection with the domain name, it presented legally questionable arguments to justify this conclusion. In fact, the justification was to be found not so much in constitutional law or public policy as in the ordinary law of contracts.

The acceptance of the Registration Rules in and of itself could only establish an arbitration agreement between the Applicant and the Registrar, the parties to the domain delegation agreement. With regard to third parties, the domain applicant's acceptance of the Registration Rules could at most be regarded as a "standing offer" to arbitrate that the third party could later accept. Construction of the acceptance of the Registration Rules as a "standing offer" to arbitrate, however, fails for two main reasons.

Firstly, the acceptance of the Registration Rules by domain name applicants was not addressed to third parties. From the latter's point of view, the acceptance of the Registration Rules by the applicant could at most be regarded as a unilateral, unaddressed legal declaration. Now, both the previous and the current Hungarian Civil Code provide that unaddressed, unilateral declarations have legal effect only insofar as explicitly specified by statute. Regarding domain name applications or related submissions to arbitration, however, there is no such statutory provision. Therefore, the submission to arbitration could not have legal effect with regard to third parties to whom it was not addressed.

Secondly, pursuant to both the Hungarian arbitration legislation and the [New York Convention](#), an arbitration agreement must relate to "a defined legal relationship". In an application for domain registration, however, the only defined legal relationship is between the applicant and the registrar. From an arbitration law perspective, a general reference to possible future disputes that may arise between the applicant and third parties concerning the domain name cannot be regarded as sufficiently defined.

For these two reasons, the acceptance of the Registration Rules by the domain name applicant cannot be regarded as a standing offer to arbitrate that any third party in any way affected by the domain registration could later accept. This is a more compelling reason why the Registration Rules could not establish a binding arbitration agreement between the Applicant and the Complainant.

## What Has Happened Since?

Following the Supreme Court's decision, [ISZT amended its Registration Rules](#). Most importantly, the amendment established the Forum – involving an ISZT-mandated body of adjudicators – to hear disputes between domain name applicants and third parties<sup>1)</sup> claiming that the registered domain name infringes on their right to use that name.

In accordance with ICANN's Uniform Domain Name Dispute Resolution Policy, the filing of a domain registration request by a domain name applicant is considered submission to the Forum's jurisdiction even in relation to third parties. If a complainant claims that the domain name infringes on their rights, the Forum has jurisdiction to order the cancellation or transfer of the disputed domain name, which registrars then must implement. Importantly, however, the Forum's decisions can be challenged before state courts, in which case the registrar shall suspend the implementation of the ruling for the pendency of the court procedure. The changes, in effect, mean that the previous compulsory arbitration procedure was replaced by a special adjudicatory process, which, although still binding on the domain applicant, now merely serves as a first instance forum with the possibility to resort to court.

Although parties are still free to refer their disputes to arbitration under the ISZT Rules, the setup of the Forum has significantly decreased the number of cases settled by arbitration.

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## References

- <sup>1</sup> In Hungary, third parties can claim under any right to use the disputed domain name (which can be trademark, competition law or even the general law of persons).

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