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Hungary: Steps Towards Differentiating Between Domestic and International Procedural Public Policy

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Drawing a well-defined line of demarcation between domestic and international public policy when enforcing foreign arbitral awards sends a clear pro-arbitration message from national courts in any jurisdiction. Does Hungarian case law come close to this level of sophistication? This post analyses this question in the context of procedural public policy, and it does so based on two recent appellate court decisions rendered in the context of enforcement of arbitral awards in accordance with the New York Convention.

Public Policy Explained

The concept of public policy, or *ordre public*, has often been criticized for its vagueness, and as an often-cited, almost two centuries old English judgment puts it pertinently, public policy "is a very unruly horse and when once you get astride it you never know where it will carry you".[1)]

Yet the principle that public policy violation can be a ground to refuse the recognition and enforcement of a foreign arbitral award is a cornerstone of international arbitration, and it had been already codified by Article 1 (2) (e) of the Geneva Convention 1927.

Serving as a safety net in the contemporary legal framework of international arbitration to protect national values and interests, the public policy exception was maintained and confirmed by both Article V (2) b) of the New York Convention and Article 36 (1) b) ii) of the UNCITRAL Model Law.

While legal theory differentiates between domestic public policy, embodying the fundamental values and mandatory rules of a given jurisdiction, and international public policy, encompassing those rules that are applied by domestic courts in cross-border cases, the dividing line between these dimensions is often missing or is blurred in court practice.

For instance, under Hungarian case law, the distinction between domestic and

international public policy remains blurred, despite the fact that the country has been the signatory of the New York Convention from the very beginning, and has been a Model Law jurisdiction since 1994.

In relation to substantive public policy, the Hungarian case law is scarce, but at least two Supreme Court judgments (cases Nos BH.2003.127. and BH 2007.130, respectively) have already shed some light on the line of demarcation between domestic and international public policy. For example, based on these decisions, it can be argued that the unusually high attorney's fees can be a ground for setting aside domestic awards, but they cannot serve as a ground to refuse the recognition of foreign arbitral awards for violation of public policy.

However, up until now, case law has been silent on similar questions dealing with procedural public policy. But based on two recent appellate court decisions, both rendered in New York Convention cases dealing with enforcement of arbitral awards, Hungarian courts seem to be making the first steps towards the distinction between domestic and international dimensions of procedural public policy.

Decision of the Budapest Regional Court of Appeal

The first case, No ÍH2019.94, involves the recognition and enforcement of a foreign arbitral award rendered in the institutional setting under the auspices of the International Centre for Dispute Resolution ("ICDR"). The case involved a legal dispute arising in relation to a franchise agreement.

The losing party resisted the enforcement in Hungary *inter alia* on the ground that they did not have knowledge about the arbitral proceedings, and therefore they could not submit their defence during the proceedings. In their opinion, the enforcement of an award that was rendered in such arbitral proceedings is not reconcilable with the principle of due process as enshrined in Articles XXIV and XXVIIII of the Hungarian Fundamental law. Consequently, the recognition of such an award would violate the Hungarian public policy.

The first instance court established that the documents in the arbitral proceedings have been duly delivered to the representative of the losing party at the front desk of a restaurant, and these facts have been confirmed by the documents of the arbitral proceedings and by the arbitral award itself.

Based on the above factual background, the first instance court concluded that neither procedural irregularities set forth in Article 5 (1) b) nor the violation of public policy in Article 5 (2) b) of the New York Convention could be successfully invoked by the losing party, and therefore the enforcement was be granted.

The Budapest Regional Court of Appeal upheld the first instance decision, but it decided to slightly modify the justification. When it comes to the public policy exception, the second instance court recalled that this ground of refusal can be established only in exceptional cases when the rules that are violated form directly the basis of the social and economic order.

For this reason, the second instance court firmly rejected to examine the issue of delivery of documents and its alleged consequences on the procedural rights of the losing party under the lens of public policy set forth in Article 5 (2) b), and thus limited the examination of the losing party's allegation of the potential violation of the due process principle set forth in Article 5 (1) b) of the New York Convention.

This line of demarcation, as drawn by the Budapest Regional Court of Appeal, indicates an approach according to which only flagrant violations of basic principles of domestic law can lead to the scrutiny of the international arbitral award based on public policy, while common procedural irregularities do not attain this threshold.

Decision of the Szeged Court of Appeal

In the second case, published under No. ÍH2021.22, the winning party sought the recognition of an award rendered by a tribunal of the Commercial Arbitration Court of the Ukrainian Chamber of Commerce and Industry.

The losing party invoked the public policy exception both on substantive and on procedural grounds.

In the framework of the procedural defence, the point of the losing party was that the arbitral award allegedly had not been served upon him. Therefore, in addition to the infringement of the Ukrainian procedural provisions, they were unable to pursue further domestic remedies available against the award. This, in their opinion, violates the Hungarian public policy.

The Szeged Court of Appeal held that the absence of the service of the arbitral award upon the losing party, in and of itself, does not automatically entail the loss of remedies against the arbitral award in the country of origin. Therefore, the violation of public policy cannot be established on this ground.

It is notable that in the framework of procedural public policy, the Szeged Court of Appeal referred to a Hungarian Supreme Court judgment, No. BH 2012.98., which had been rendered under similar factual circumstances, but in an enforcement procedure of a court judgment governed by the Brussels I Recast Regulation ("Brussels I").

In that case, the party resisting enforcement of the court judgment alleged the violation of public policy under Article 45 (1) of Brussels I, relying on the supposed absence of the service of the Finnish state court decision. The Hungarian court, after setting a deadline for them to file for remedy in front of the Finnish courts, finally allowed the enforcement of the foreign judgment because the party resisting enforcement failed to demonstrate that they actually pursued the said remedy.

Hungarian Courts Live Up to the Standard

While in domestic cases the Hungarian courts show a tendency to set aside arbitral

awards on purely procedural grounds, as in cases Nos BH2016. 122. and EH 2010.2150, the decisions rendered in the two above-mentioned international cases indicate a more restrained attitude.

According to this latter approach, the party resisting the enforcement of a foreign court judgment or arbitral award must show serious procedural irregularity and the real effects of the alleged procedural breach on the merits of the case, in the absence of which the violation of procedural public policy cannot be invoked with success to refuse recognition and enforcement.

To this end, the two Hungarian appellate courts showed that they interpret Article V (2) b) of the New York Convention narrowly when it comes to the public policy exception on procedural grounds.

In addition, by applying the same procedural public policy test under two different supranational legal sources, the two above-mentioned court decisions show that the Hungarian higher courts have started to adopt a unified approach of this concept in international cases.

The sophisticated distinction made between domestic and international public policy is an important sign of the pro-arbitration approach of these appellate courts in the field of recognition and enforcement of foreign arbitral awards, and the author of this article hopes that Hungarian courts will follow this path in the future.

References

↑1 Richardson v. Mellish (1824)

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