
Kluwer Arbitration Blog

New Concession Arbitration Court in Hungary: An Uneven Playing Field

András Dániel László (LFB - László Fekete Bagaméry, Attorneys at Law) · Thursday, September 16th, 2021

Would you agree to arbitrate in a forum where the opposing party has the last word about the tribunal's composition? This is what the new Hungarian Concession Arbitration Court, scheduled to start operation in October 2021, proposes.

The Name of the Game

The Hungarian government loves playing with arbitration. In 2012, they prohibited arbitration in matters relating to national assets (that is, assets in the exclusive ownership of the central government or the local municipalities). In 2015, [they abolished the prohibition](#) for the sake of a controversial transaction with Russia relating to the expansion of Hungary's nuclear plant. In 2017, [they revamped the entire Hungarian arbitration law](#) by adopting a new Act on Arbitration, merging the three well-established commercial arbitration institutions. More precisely, the Permanent Arbitration Court for Money and Capital Markets and the Permanent Arbitration Court for Energy Matters were merged into the Permanent Arbitration Court Attached to the Hungarian Chamber of Commerce and Industry, which was renamed as Commercial Arbitration Court and it is generally referred to as the [HCCI Arbitration Court](#). The official reasoning of the bill laconically mentions that the change was intended to ensure efficiency and professionalism by merging matters in the institution with the largest caseload. To give some perspective, note that, under Hungarian law, permanent arbitration institutions can only be set up by a legislative act.

The Concession Arbitration Court

In May 2021, the government decided to establish a new arbitration institution - the Concession Arbitration Court ("CAC") - to arbitrate disputes relating to concessions. In other words, the primary task of this institution will be to resolve disputes arising out of or in relation to contracts for the exercise of activities in the exclusive

competence of the state and typically relating to national assets.

The new institution is set up within the framework of a substantial amendment of the Hungarian concession laws (primarily by the enactment of [Act XXXII of 2021 on the Supervisory Authority of Regulated Activities](#) and some additional amendments). They include the extension of activities that can only be exercised as a concession and the creation of a new government authority, the Supervisory Authority of Regulated Activities (“Authority”). The Authority is tasked with the exclusive, centralized tendering and supervising of concessions. Its president is appointed by the prime minister for a term of 9 years.

The legislative changes are conspicuously timed together with the issuance of two widely criticized [mega tenders for 35-year concessions \(renewable for another 35 years\)](#) for the operation, maintenance, and development of the entire Hungarian motorway network and for the operation of the entire Hungarian waste management infrastructure.

Chapter IV of the [Act XXXII of 2021 on the Supervisory Authority of Regulated Activities](#), scheduled to enter into force as of 1 October 2021, establishes the CAC, operated by the Authority. To the best of this author’s knowledge, the regulation was introduced without any public discussion, consultation or providing at least some information either to the general public or to the arbitration community. In fact, it went largely unnoticed.

Flimsy Official Reasoning

The official reasoning for the establishment of the CAC is short and surprisingly similar to the stated reasons behind the previous elimination of the well-established arbitration institutions – [the promotion of efficiency and expertise](#). However, it fails to give any specifics as to why the recently set up mega-institution – the HCCI Arbitration Court – could not ensure the required expertise and efficiency. Indeed, it is difficult to see why the new institution would be more efficient or professional than the existing HCCI Arbitration Court. The differences between the organizational rules of the two institutions are minor; the wording of the relevant part of Chapter IV of [Act XXXII of 2021 on the Supervisory Authority of Regulated Activities](#) is largely a copy/paste of the relevant rules of Chapter XII of [Act LX of 2017 on Arbitration](#) setting up the HCCI Arbitration Court. The conditions to be listed in the roll of recommended arbitrators are the same with the exception of the requirement of the Hungarian bar exam or public administration exam.

A Tilted Playing Field

There are, however, some small but crucial differences between CAC and the HCCI Arbitration Court. In case of both institutions, it is their respective boards that act as appointing authority if the parties or the party-appointed arbitrators cannot agree on the chair of the tribunal (see Article 27 (1) c) of the [Act XXXII of 2021 on the](#)

Supervisory Authority of Regulated Activities, and Section 62 (1) c) of the [Act LX of 2017 on Arbitration](#) respectively). The board of the HCCI Arbitration Court is appointed by different stakeholders with a majority of board members appointed by organizations independent from the government (three board members, including the president, are appointed by the Hungarian Chamber of Commerce and Industry, while the Hungarian Energy and Public Utility Regulatory Authority, the Budapest Stock Exchange, the Hungarian Banking Association and the Hungarian Bar Association each appoint one member). The board members of the CAC, on the other hand, will be appointed without exception by the Authority. Furthermore, while the board members of the HCCI Arbitration Court can only be removed by the appointing body for unworthiness and upon the reasoned motion of 4 of the 7 board members, the Authority can remove the members of the board of the CAC any time, without cause.

Thus, if the parties or the party appointed arbitrators cannot agree on the chair of the tribunal in a concession arbitration before the CAC, the freely removable appointees of an organ of the Hungarian government – that is (directly or through another organ or entity) necessarily one of the parties to any dispute relating to a concession agreement – will decide upon the chair of the tribunal.

In the light of the above rules, it is only a minor detail that board members of the CAC do not even need to have arbitration experience. Anyone with only 5 years of experience of (amongst other requirements) “regularly acting as representative in concession related or arbitration matters” can be appointed to the board of the CAC.

Equally troubling is that the employees of the secretariat of the CAC are public servants employed by the Authority, according to Section 27 (4) of the [Act XXXII of 2021 on the Supervisory Authority of Regulated Activities](#). As public servants, the employees of the Secretariat shall comply with the instructions of their employer – which in this case is an organ of one of the parties to the dispute.

The CAC will, of course, only have jurisdiction if the parties agree to it in the concession agreement. The names of the board members, the procedural rules, and the arbitrators on the CAC’s list are also not yet known. The enforceability of awards rendered by panels chaired by appointees of the board of the CAC may nevertheless appear questionable. Even if the composition of such a panel was formally in accordance with the parties’ agreement and Hungarian law (as required by Article V (1) d) of the New York Convention), the right to an independent tribunal should not be a waivable right.

In any case, it is unfortunate that after facing criticism for [weakening the independence of the judiciary](#), instead of reversing its policies, the Hungarian government appears to have chosen to create an arbitration institution for concession contracts with questionable independence, outside of the spotlight focused on state courts.


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