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The 2018 Hungarian Arbitration Act: Implications of the New Setting Aside Provisions

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On 17 May 2018, the Central European University and Jeantet co-organized a conference to discuss the new Hungarian Arbitration Act (the "**New Act**"), following the first months of its entry into force on 1 January 2018 (the "**Conference**"). The Conference was held in Budapest and the organizing committee was composed of *Csongor Nagy (CEU, University of Szeged), Davor Babic (CEU, University of Zagreb), Markus Petsche (CEU) and Ioana Knoll-Tudor (Jeantet, Budapest & Paris)*. The debates were divided into four panels in which selected issued raised by the New Act were discussed by speakers practicing in Hungary and in other regional and international jurisdictions.

Closing the debates, a panel composed of *Zsolt Okány (CMS, Budapest), Moritz Keller (Freshfields Bruckhaus Deringer, Vienna)* and *Philippe Cavalieros (Simmons & Simmons, Paris)* and moderated by *Ioana Knoll-Tudor* examined in detail the modifications brought by the New Act in relation to the setting aside proceedings. Three specific novelties of the New Act have been addressed by the panel, namely (1) the suspension and rectification of setting aside proceedings, (2) the effect of setting aside an award on the arbitrators' fees, and (3) the stay of enforcement of the award during the setting aside proceedings.

1. The Suspension and Rectification of Setting Aside Proceedings

Although based on the UNCITRAL Model Law as amended in 2006, the New Act brought significant changes to the provisions applicable to Hungarian commercial arbitration. It notably introduced the possibility for State courts to suspend setting aside proceedings to give the arbitral tribunal an opportunity to eliminate the grounds for setting aside. Building upon Article 34(4) of the 2006 UNCITRAL Model Law, Section 47(4) of the New Act reads as follows:

> *"At the justified request of either party, the court may suspend the hearing in the proceedings for the setting aside of the arbitral award, for a maximum of 90 days so that the arbitral tribunal, within the limitations set by Section 46, may re-initiate the arbitral proceedings or undertake any other procedural measures with which, in the opinion of the arbitral tribunal, the cause of invalidity can be eliminated. In this case, the arbitral proceedings terminated by the award shall continue for the purpose and duration determined by the court. The setting aside of the award adopted in the re-initiated arbitral proceedings may be requested by an amendment*

> *of the claim or by a counterclaim within 60 days from the receipt of the award.*"

1.1 The Duration of the Suspension

As discussed by the panel, the duration of the suspension of the setting aside proceedings is not certain. While the court may suspend the proceedings "*for a maximum of 90 days*", the arbitral proceedings can also be re-initiated and continue "*for the purpose and duration determined by the court*". It is, therefore, not clear whether the court may extend the suspension beyond 90 days. According to one panelist, the duration of the suspension is flexible since the purpose and duration of the suspension are determined by the court. For another, however, 90 days should be mandatory since the purpose of the suspension is precisely to offer to the arbitral tribunal a possibility for a short and effective review of the award. If the ground for setting aside was lack of due process, would 90 days be sufficient to address such a question (especially in a large arbitration)? Should the court fix the time limit, or should this be left to the agreement of the parties? From an arbitrator's perspective, there is a logistical issue: while arbitral institutions such as the ICC require prospective arbitrators to provide their availabilities for the two years following their appointment, under the New Act, the unplanned commitment of an arbitrator would be requested for a period of 90 days in order to render a fully-fledged decision. As noted by one panelist, this situation is similar to that of an emergency arbitrator, except that the arbitrator may not be alone, in case of a three-member panel.

1.2 The Mission of the Arbitral Tribunal

Section 47(4) of the New Act also suggests that judges may interfere with the mission of the arbitral tribunal. No further clarification is given as to how exactly State courts should remit the challenged award to the arbitral tribunal. However, judges should refrain from specifying the issues to be reviewed or from indicating their thoughts on the validity of the award, since the arbitral tribunal should decide by referring to the statement of claims in the annulment procedure. Yet, some judges' attitude could infringe the principle of absence of State court's intervention in the arbitral process. Moreover, since there is a risk for arbitrators not to be in position to be paid their fees if the award is set aside (as it will be discussed below), if a State court enjoins an arbitral tribunal to carefully review a specific issue, arbitrators would probably feel compelled to comply with such indication in order to secure the enforcement of the award and their full payment.

1.3 Article 34(4) of the 2006 UNCITRAL Model Law in Other Jurisdictions

The purpose of Article 34(4) of the 2006 UNCITRAL Model Law is to offer an opportunity to "save" the award and similar provisions are found in the Netherlands (Article 1065a of the Dutch Code of Civil Procedure) and in Belgium (Article 1717.6 of the 2013 Law on Arbitration). In Germany, courts can remit the award to the arbitral tribunal without suspending the setting aside proceedings: rectification by the tribunal will occur instead of the annulment procedure before the courts. French law does not provide for a suspension of setting aside proceedings. Without going as far as the New Act, French law alleviates the risk of setting aside an award by dismissing as valid grounds for annulment some legal requirements of the arbitral award (e.g., lack of the arbitrator's name or lack of the date the award was rendered).

2. The Effects of Setting Aside an Award: No Arbitrators' Fees?

Section 57(2) of the New Act provides that, in the event an award is set aside, the arbitrators will

not be entitled to their fees, irrespectively of the reason of the setting aside:

> *"If the arbitral award is set aside, the arbitral proceedings terminated by the set aside award shall be free from arbitrator's fees, and the arbitral tribunal that adopted the set aside award shall not be entitled to a fee. In the continued proceedings following the setting aside, the parties shall not be obliged to pay administrative costs.*"

If some arbitral institutions, such as the ICC, introduced negative incentives for arbitrators if the award is not rendered within the allocated time (e.g., reduction of their fees), Section 57(2) of the New Act is of a different nature. As noted by the panel, this provision sanctions arbitrators for substantive matters over which they bear no control: While a delay in rendering an award may be directly attributable to arbitrators, only a few grounds for setting aside fall within the scope of arbitrators' influence.

The panel has identified two main consequences of Section 57(2) of the New Act. ***First***, in addition to the reimbursement of its fees, a party could claim it is entitled to the amount granted in the annulled award. By way of illustration, parties under French law often argue the loss of opportunity (*perte de chance*). In a 2015 decision, a 114 million award was set aside because it was rendered only once the time limit during which the tribunal was supposed to render its award had elapsed. After the setting aside, the parties had agreed to settle but one of them sued the arbitrators for the difference between 114 million and the settlement amount. French courts considered that, by settling, the parties had lost the right to sue for such a difference. ***Second***, the obligation to reimburse the fees will inevitably create tensions among the arbitrators. The possible consequences of not complying with the procedural timetable could affect the serenity of the collegial decision-making process, even leading some arbitrators to withdraw from the tribunal. Through repercussion, more and more liability actions could be initiated by arbitrators against their colleagues. Similarly, the number of dissenting opinions could increase in an attempt for arbitrators to distance themselves from the content of an award that could be successfully set aside, triggering the reimbursement of fees. As a consequence, it could be more and more difficult to appoint arbitrators willing to sit on cases to which the New Act applies.

3. The Stay of the Enforcement of the Award During Setting Aside Proceedings

While the previous Hungarian Act on Arbitration only referred to the possibility to suspend the enforcement of the award, Section 7(5) of the New Act supplemented this reference by adding a set of conditions that have to be met in order to obtain a stay of enforcement of the award during setting aside proceedings. These conditions are:

(i) the parties' ability to bear the burden of the award's enforcement, and

(ii) the likelihood of the party succeeding in the setting aside proceedings.

These conditions are similar to those required for granting an interim measure.

Conclusion

The aim of the Conference was to bring together Hungarian and international practitioners to

discuss the possible implications of the New Act from a comparative perspective. Having entered into force only on 1 January 2018, the provisions of the New Act have not yet been tested in practice. Therefore, the international arbitration community will follow closely the evolution of these provisions and their interpretation by Hungarian courts and arbitral tribunals.

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