

Litigation - Hungary

Court practice in setting aside arbitration awards

Author

Contributed by Nagy és Trócsányi

Iván Janitsáry

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Introduction

A recent, unpublished study, which was prepared by a Supreme Court judge in order to assist in the amendment of Hungary's arbitration legislation, has summarised Hungarian court practice in connection with arbitration.⁽¹⁾ The study is particularly valuable because it considers a number of court rulings that are unavailable to the public. This update considers some of the study's findings, particularly in connection with the courts' annulment of arbitral awards.

Hungary has been a member of the New York Convention since 1962. The backbone of its arbitration legislation is the Arbitration Act 1994,⁽²⁾ which closely follows the United Nations Commission on International Trade Law (UNCITRAL) Model Law 1985. In keeping with this model, the only recourse against an arbitral award is an application to the competent court to set aside⁽³⁾ the award. The grounds for annulment⁽⁴⁾ are the same as in Article 34⁽²⁾ of the UNCITRAL Model Law and Article V of the convention.

With some exceptions, annulment proceedings follow the general rules of civil procedure. A significant exception is that judgments setting aside awards cannot be appealed⁽⁵⁾ - as a rule, all Hungarian first instance judgments can be appealed. However, in practice an extraordinary remedy offers a limited scope of appeal. As in most civil cases in which the value of the dispute exceeds a certain amount,⁽⁶⁾ a party to the judgment may appeal to the Supreme Court to review the final judgment on the grounds that the trial court erred on a point of law.⁽⁷⁾ Depending on whether the court's judgment was materially incorrect, the Supreme Court may wholly or partly uphold, amend or annul it and may order that the case be remitted to the court.⁽⁸⁾ The study of court practice in respect of arbitration covers a number of related issues.

Time bar

An application becomes time-barred 60 days after the relevant party receives the award. All grounds for annulment must be raised within this period. The statement of claim may not be extended to further grounds after the expiry of the 60-day period, even if new evidence emerges.⁽⁹⁾

Grounds for setting aside an award

The court may consider only the grounds for annulment that the claimant has explicitly raised by reference to the appropriate provisions of the act. The court may not consider other grounds on its own initiative,⁽¹⁰⁾ irrespective of other manifest violations. In this respect, the court is bound by the statement of claim.

Arbitration agreement in general terms of contract

The author of the study suggests⁽¹¹⁾ that an arbitration clause inserted into general contractual terms is an 'unusual provision'⁽¹²⁾ within the meaning of the rules that apply to the formation of contracts by unilaterally pre-established general terms.⁽¹³⁾ As with any non-customary provision in general terms, an arbitration clause becomes a part of the contract only if:

- the party that sets out the general terms draws the other party's attention to the unusual clause before the conclusion of the contract; and
- the other party explicitly accepts the clause.⁽¹⁴⁾

It can be strongly argued that this approach should be confined to business-to-consumer relationships, and that the test of whether a general term is customary should be subjective, taking into consideration all circumstances and especially the parties' previous dealings. Some Supreme Court decisions have followed this approach.⁽¹⁵⁾ However, it may be beneficial to take a more conservative approach when drafting general terms.

Public policy

The Supreme Court annulled the provisions of an award that required the claimant to pay the defendant's legal fees in an amount of Ft290 million (approximately €1.16 million), which was 9% of the value in dispute. The court considered that although the arbitral tribunal had violated no provision of law, the amount was so disproportionate to the presumed workload of the successful party's counsel during the 16 months of arbitration that the award was contrary to the general public opinion.⁽¹⁶⁾

In another case the court stated *obiter* (ie, in passing) that no post-award facts or evidence may form the basis of a claim for annulment for violation of public policy, irrespective of the nature of such facts or evidence.⁽¹⁷⁾ No arbitral tribunal can be said to have violated public policy on the basis of something of which its members were unaware when rendering the award. The court further stated that in litigation, the Code of Civil Procedure provides that certain new evidence may give rise to a retrial, but this is not the case in arbitration.

As the allegations in this case were about fraudulently produced evidence, the decision was severely criticised.⁽¹⁸⁾ The author of the study argues that fraud, even if it is unknown to the tribunal, should be grounds for annulment, although she considers that this would require an amendment to the act. However, it can be cogently argued that this view is manifestly wrong: it is not the tribunal that violates public policy in such cases, but the fraudulently obtained award. Fraud, irrespective of the tribunal's awareness of it, clearly represents grounds for setting aside an award under the existing act.

Although other similar judgments on this point have previously been issued, parties agreeing to arbitration in Hungary should be aware of the court's prevailing approach and the difficulties that they may face in seeking annulment and alleging fraud after the arbitration.

Res judicata

In a recent case⁽¹⁹⁾ the court confirmed that arbitral awards have the same *res judicata* effect as state court judgments - that is, the matter is considered to have been judged. As the notion of *res judicata* is part of Hungarian public policy, an award that does not take into account the *res judicata* effect of a previous award conflicts with such policy. The boundaries of the *res judicata* effect are determined by the decisions made in the award, and such decisions are set out in the dispositive part and in the reasoning of the award. In passing, the Supreme Court mentioned that *res judicata* is a concept of procedural law, so the aforementioned principles apply only if the parties do not chose a foreign law to govern their arbitration proceedings.

Judgments *ultra petita*

The Supreme Court's position is that if an award is set aside on the grounds that the composition of the tribunal or the arbitration procedure was not in accordance with the parties' agreement or the act, only the whole award may be set aside,⁽²⁰⁾ irrespective of whether the claimant sought only a partial annulment or whether the decisions made in the award can be separated. For example, if an arbitrator fails to disclose a fact that may call into question his or her independence or impartiality, the entire award must be set aside. This is a rare exception to the rule that the court is bound by the statement of claim.

For further information on this topic please contact [Iván Janitsáry](mailto:ivan.janitsary@nt.hu) at Nagy és Trócsányi by telephone (+36 1 487 8700) or by fax (+36 1 487 8701) or by email (janitsary.ivan@nt.hu).

Endnotes

(1) Katalin Muranyi, "Summary of state courts' practice in connection with arbitration", November 17 2009.

(2) Act 71/1994, as amended.

(3) In this update the terms 'annulment' and 'setting aside' refer to the invalidation (as

opposed to cassation) of an arbitral award.

(4) Article 55 of the Arbitration Act.

(5) *Id*, Article 57.

(6) Ft1 million (approximately €3,700); see Article 272(2) of the Act on the Code of Civil Procedure (3/1952), as amended.

(7) Article 57 of the Arbitration Act and Articles 272 to 275 of the Act on the Code of Civil Procedure.

(8) Article 275(3) and (4) of the Act on the Code of Civil Procedure.

(9) Decisions EBH2008.1796 and Gfv.XI.30.556/2008/4.

(10) Decision Gfv.X.30.296/2009/5, quoted in Muranyi, page 51, note 1.

(11) Page 55, note 1.

(12) Decision BH2001.131.

(13) Articles 205(A) to (C) of the Act on the Civil Code (4/1959), as amended.

(14) EBH2003.825, quoted in Muranyi, page 55, note 1. These rules apply only if the contract is governed by Hungarian law.

(15) Decision Gfv.XI.30.259/2006/7, quoted in Muranyi, page 55, note 1.

(16) Decision BH2003.127.

(17) Decision EBH2008.1796.

(18) Muranyi, page 65, note 1.

(19) Decision EBH.2009.1969.

(20) Decision Gfv.X.30.141/2010/24, quoted in Muranyi, page 29, note 1.

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