

Arbitration - Hungary

Interpreting new restrictions on arbitration

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Criteria for restriction Analysis and implications

The National Assembly has passed an act that amends the Arbitration Law (71/1994). The amending statute - which was proposed by an individual member of Parliament, rather than the government - entered into force on June 13 2012.⁽¹⁾

Criteria for restriction

The new law restricts the right to refer a matter to arbitration in certain circumstances.

First, a matter may be referred to Hungarian institutional arbitration only if:

- the registered seats of both parties are in Hungary;
- the dispute arises out of a contract that concerns rights *in rem* or tenancies in immovable properties located in Hungary; and
- the governing law of the contract is Hungarian law.

Moreover, the language of the proceedings must be Hungarian.⁽²⁾ The same restriction applies if the parties have no registered seat in Hungary, but each has its "business establishment" (ie, permanent establishment) in Hungary.

Second, arbitration is unavailable in matters concerning items of national property located in the Hungarian territory.⁽³⁾

Analysis and implications

These restrictions apply to proceedings commenced on or after June 13 2012. Agreements that are contrary to these mandatory provisions are void. In principle, arbitration agreements concluded before that date should not be affected, but this is subject to challenge.

The amending statute, especially its mandatory application in proceedings commenced on or after its entry into force, raises certain constitutional issues, including the violation of several international treaties.

First limitation

It is well known that claims which have rights *in rem* as their object fall within the exclusive jurisdiction of the forum of the place in question. However, if such claims are arbitrable under national law, it is difficult to understand what makes arbitral institutions better suited to hear such claims than *ad hoc* tribunals. The restriction on the language of proceedings is even more puzzling, particularly as it appears that if the same claim were to arise between two parties, one of which was not Hungarian, the restriction would not apply.

This amendment covers not only claims with rights *in rem* as their object, but also any claim arising out of a contract that concerns rights *in rem* or tenancies in immovable properties in Hungary. If the new provision is broadly interpreted, it could affect future disputes where there is only a loose connection to rights *in rem*.

Hungary's arbitration law is based on the 1985 version of the UN Commission on International Trade Law Model Law. This is the first time that it has been amended by a private member's bill, rather than by a government measure. As a consequence, the bill was not backed by ministerial explanations as to why the changes were deemed necessary, which would normally be the first port of call when examining the aims of new legislation. Courts and arbitral tribunals are left without assistance in deciding certain questions. For example, when does a contract concern rights *in rem*? What qualifies as a 'business establishment' and should the term be interpreted

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autonomously or as defined in other laws?(4)

Disputes about the law governing the contract could give rise to jurisdictional challenges and could lead to parallel proceedings. Where there are several claims, the dispute may be split and handled differently on the basis of whether a particular claim is caught by the new provision.

Second limitation

The term 'national property' is defined in the Law on National Property (196/2011). It is a broad concept with blurred boundaries. According to the law, all property owned by the state or local government is national property. This includes material objects, but also things as disparate as rights, company shareholdings, emission units and Hungarian airspace. As 'national property' is a new legal concept, it has never been interpreted by the courts. Parties that intend to conclude or amend an agreement with a central or local government entity should consider carefully whether the agreement could be deemed to concern national property.

When the Law on National Property entered into force on January 1 2012, it introduced a provision that favoured national courts over arbitral tribunals. This provision is binding on all parties that are entitled to make arrangements concerning items of national property.(5) It requires such persons to choose Hungarian law and the Hungarian language for all civil law contracts and to opt for the exclusive jurisdiction of the Hungarian courts.(6) This requirement also applies to amendments made to existing agreements after January 1 2012.(7) This provision restricts the choice of "persons entitled to dispose of national property"; the new amendment to the Arbitration Law essentially complements this restriction prohibiting arbitration proceedings where national property is concerned.

The general ban on arbitration may be interpreted as extending to investment arbitration; as such, parties may seek to rely on it when resisting enforcement in Hungary of any investment arbitration awards against Hungary. This interpretation is supported by the explicit ban on institutional and *ad hoc* arbitration with a seat in or outside Hungary.

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Endnotes

(1) Act 65/2012 on the Amendment of Act 71/1994 and on the Amendment of Act 4/1959 on the Civil Code (*Official Gazette* 2012/71).

(2) Section 1 of Act 65/2012 and new Sections 2(3) and (4) of the Arbitration Act.

(3) Section 2 of Act 65/2012 and the new Section 4 of the Arbitration Act.

(4) See, for example, Section 7(2) of the Act on Public Company Information, Company Registration and Winding-Up Proceedings (5/2006).

(5) Section 17(3) of the Law on National Property.

(6) The exclusion of arbitral tribunals has recently been challenged before the Constitutional Court in two applications. Legal scholars, including the chairman of the leading Hungarian arbitration institution, have also voiced their concerns; see, for example, László Kecskés and Tilk Péter, *Európai Jog* [European Law] 2012/2, pp 15-25, and Lukács Józsefné and László Kecskés (eds), *Választottbírók könyve* [Book of arbitrators], HVG-Orac, 2012, Budapest, pp 213-230.

(7) Section 17(1) of the Law on National Property.

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