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About some novelties of the new Arbitration Act

I. The main reasons for creating the new Act

The main reason and motivation behind the adoption of Act LX of 2017 on Arbitration (hereinafter referred to as: Arbitration Act) was to contribute towards increasing the country's competitiveness by reforming the arbitration dispute resolution system. The question rightly so arises as to how the regulation of arbitration might affect the legal and economic competitiveness of a country. This is primarily achieved through the fact that a well-functioning arbitration system reflects foreign investors that the country has a high legal culture and a reliable legal system. It is very closely related to the question of trust on which arbitration is based. The new Act intends to restore this trust towards the Hungarian permanent commercial arbitration system.

As perceived by the legislators, a high-quality, professional and quick arbitration dispute resolution system may make the domestic investment environment more attractive for foreign businesses and investors thus improving Hungary's competitiveness. Accordingly, the purpose of the new Act is to transform domestic arbitration for the economic operators into a real alternative to the ordinary courts or foreign courts of arbitration.

The creation of the new codes of procedures, notably the new Code of Civil Procedure (hereinafter referred to as Civil Procedure Act¹), and also the fact that more than twenty years have passed since the creation of the former Arbitration Act² raised the necessity of creating a new arbitration act.

It was expected from the new Act to take the last two decades of international regulatory trends into consideration, in particular, the 2006 Amendments to the UNCITRAL's³ Model Law⁴. It was also targeted by the new Act to replace the regulatory shortcomings of the old

1 Act CXXX of 2016 on the Code of Civil Procedure.

2 Act LXXI of 1994 on Arbitration.

3 The United Nations Commission on International Trade Law.

4 Section 3 (3) of the Arbitration Act serves this purpose as well. According to this section, the provisions of this Act must be interpreted following the requirement for the sound practices of rights, along with the explanations of the 2006 Amendments to the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL) Model Law on International Commercial Arbitration. These explanations were published by the UNCITRAL, and its Hungarian translation can be found on the website of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry's (hereinafter referred to as: Commercial Arbitration Court). We agree with the position of Zsolt Lajer that requirement of taking these explanations into account does not mean that these explanations are mandatory to follow. However, taking into account that the provisions require that the persons applying the Act be

Arbitration Act and to place the organisational framework of the Hungarian permanent arbitration on new foundations.

Overall, we can say that the primary purpose of the legislator was to strengthen confidence in the domestic arbitration by the adoption of the new Act. Several innovations of the new Arbitration Act support this purpose such as:

- Making intervention possible [Section 37];
- In the case of annulment, the arbitration proceedings can be reopened [Section 47 (4)];
- The institution of retrial [Section 48-52]; and
- Publishing the recommendations of the Commercial Arbitration Court on procedural matters [Section 62 (1) d)].

The following sections present some of the new legal institutions of the Arbitration Act, trying to dispel the concerns expressed against them.

II. Retrial

A new legal institution of the Arbitration Act is retrial the adoption of which provoked some serious professional debates. Critics argue that one of the main advantages of arbitration is that the arbitration award is final. However, this advantage is now lost due to the potential reopening of the case. For this reason, the parties will include a clause in their contract, stating that in the case of a dispute a foreign arbitration court shall have jurisdiction. The legal institution for retrial is therefore dramatically jeopardising the willingness for using domestic arbitration, according to critics.

In our view, these fears are unfounded. Further examination of the Arbitration Act's relevant provisions on retrial is necessary to support our view.

According to Section 48 of the Arbitration Act 'In the absence of any provisions to the contrary, during retrial the rules applying to the basic proceedings shall be applied *mutatis mutandis*. According to Section 49 unless the parties have agreed otherwise the conditions of retrial shall apply within one year from receipt of the arbitration award, if the party refers to a fact or evidence that he did not assert in the basic proceedings through no fault of his own, provided that when adjudged they could have resulted in a decision more favourable to the party.

Section 50 adds that complex: 'the permissibility of the petition for retrial shall be resolved by a ruling by the arbitration panel adopting the contested award. No legal remedy may be requested against the ruling. Before the decision on permissibility, the arbitration panel may hear the parties. The Act also states that the petition for retrial shall be rejected if:

- a) it was submitted one year after the receipt of the appeal,
- b) are not suitable for making a decision more favourable for the party, or

acquainted with the explanations and decide whether or not to follow them. All of this may also be relevant regarding the annulment of the arbitration award.

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- c) the party did not assert the fact or evidence raised in the petition in the basic proceedings through his own fault.

Section 51 of the Arbitration Act states that if the arbitration council decided on the permissibility of the reopening of the proceedings and the application is likely to succeed then the arbitration council may suspend enforcement of the judgment.

Finally, Section 52 lays down that when retrial is allowed, the proceedings shall be conducted within the limits of the petition, and compared to its result the arbitration panel shall maintain the contested award in its effect or shall adopt a new decision, in addition to abrogating the award fully or partly.

It is evident that retrial procedure is a relatively flexible legal institution of the new Act, as both the parties as well as the arbitration panel are entitled to different options and discretion.

This new legal instrument aims to create an opportunity for the parties to request a review of the arbitration award, in case of a reference to a fact or evidence that was unknown during the basic proceedings before the award. Of course, the new Act shall also ensure the rapid completion of the arbitration. All the parties have a legitimate need for a fair judgement to decide upon the legal dispute. The retrial procedure has been created to satisfy this need, based on the later emerged facts or evidence, the erroneous award can be corrected. For this, the invalidation of the award may not be suitable since the Hungarian judicial practice does not allow to use the cancellation procedure for a quasi-retrial procedure (this is a reference to the retrial procedure within civil proceedings provided for by the Civil Procedure Act) (EBA 2008.1796., BH 2009.57.).

The parties may diverge from the rules of the Arbitration Act only if it is permitted by law. The rules of retrial are dispositive therefore the conditions for retrial procedure may be defined by the parties differently from the Act; they can even exclude the retrial procedure in their contract. Thus, the parties themselves to decide whether their primary interest is the completion of the procedure or to maintain the possibility that based on facts or evidence may arise later on, the facts of the case and the error of judgment shall be corrected.

The debate about the retrial procedure also suggested that it may put the domestic arbitration awards in danger concerning their international enforceability. In this connection, reference should be made to paragraph (1) e) of Article V of the Convention⁵ on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on 10 June 1958. It states that the recognition and enforcement of the arbitral award to the party's request against whom they intend to enforce it can only be denied if this party proves to the competent authority – from which they request the recognition and enforcement – that the arbitral judgement has not yet become mandatory to the parties. Or the competent authority of the country in which the judgement has been made put aside or suspended the decision. Section 53 (1) of the Arbitration Act lays down that the scope of the arbitral award is the same as the final court judgment. This means that the judgement is mandatory for the parties regardless of the possibility for the reopening of the procedures, in the same way as the ordinary court final judgment is binding, regardless of the retrial provided. Consequently, the fact alone that Hungarian law allows for retrial, enforcement of a domestic arbitral award cannot be denied abroad.

5 The New York Convention was published in the Law-Decree No. 25 of 1962.

Regarding the retrial procedure it should be noted that the guide attached to the Commercial Arbitration Court's Rules of Procedure (hereinafter referred to as Rules of Procedure) effective from 1 February 2018 contains the following provision: "*The Parties shall exclude the possibility of a retrial procedure covered in Chapter IX of Act LX of 2017 on Arbitration.*" The parties therefore have the right to do so on the basis of the above. However, the waiver contained in the guide raises several questions. In our opinion, it would have been more elegant to leave it up to the concerned parties to decide, whether they wish to make the retrial possible. In this regard, of course, the responsibility of the legal representatives may not be disregarded.

Finally, it should also be recalled that the 2008 Swiss Code of Civil Procedure (ZPO), in Sections 396–399⁶ under the provisions relating to domestic arbitration regulates a legal instrument called *Revision* which is similar in many respects to the retrial. This is even more radical compared to the Hungarian legislation because in addition to the subjective 90-day time limit⁷ from the date of fact discovery, Section 397 (2) of ZPO sets the objective time limit of 10 years for the submission of the application.⁸ Moreover, an important distinction is that while the Arbitration Act assigns the judgement on the permissibility of the application to the arbitration court bringing the judgement in the main proceedings, this will be decided by the state courts under the Swiss ZPO.

In our view, as the Act provides the opportunity to the parties to exclude the possibility for reopening of proceedings in their arbitration agreement, therefore the criticism that the legal institution of reopening of proceedings will deter parties from using domestic arbitration has no merit. However, we can imagine that in the future the legislator will approximate the regulations on retrial and the annulment of the arbitration award even in a form that the conditions contributing towards retrial will become the cause for invalidation.

III. Intervention

The legal instrument of intervention is regulated by neither the old Arbitration Act nor the UNCITRAL Model Law therefore creating the possibility of intervention is one innovation of the Arbitration Act. It was essential to regulate that the third party's (intervener) rights are not affected by the parties' choice to settle their legal dispute in front of an arbitration court rather than an ordinary court since the third party (intervener) did not influence the choice of dispute resolution platform. As opposed to the ordinary civil litigation the third party was not allowed to intervene earlier in the arbitral proceedings.

Based on Section 37 of the Arbitration Act at the request of any of the parties, the arbitration panel shall inform the person who has any legal interest as to the outcome of the arbitration proceedings that he may intervene in the proceedings in order to facilitate the success of a party with an identical interest. An appeal cannot take place against the decision taken by the arbitration panel in the subject of authorising intervention.

6 Schweizerische Zivilprozessordnung vom 19. Dezember 2008

7 Zsolt Lajer is aspiring the Arbitration Act to enact such a subjective timeframe. See: LAJER i. m. 179.

8 There is no preclusive period in case of a crime.

The intervener may submit evidence and may take part in the hearing and in acts of procedure the purpose of which is to conduct an inspection.

The codification of the legal institution of intervention makes it possible for a person not involved in the arbitration agreement to also participate in the arbitration proceedings if the intervener has a legal interest in the success of one of the parties.

However, it is important to emphasise that the arbitration panel should authorise the intervention. In the case of an enabled intervention, the intervener can facilitate the advancement of the party of the same interest by submitting its evidence and position. The Act specifies the permitted actions of the interferer: presenting evidence, participation in the hearing and site inspection. This list also indicates that the intervener has no right to submit a statement that his/ her supported party allowed to do so. (e.g. presenting legal argument, procedural application, making declarations). The intervener has no right of access to the files either. Thus the main practical advantage of the interference is that the intervener can take part in the hearing and indirectly support the party regarding a question of fact although the interveners have no right to put forward a declaration or to present facts on their right in general.

The parties may not exclude the possibility of intervention in their agreement. However, for an intervention to occur, one of the parties should submit a request as the intervener cannot enter in the proceedings without a request made by either party. Another condition is that the arbitral panel shall permit the intervention to the arbitration proceeding.

One of the advantages of arbitration is its confidential nature. Some argued that making possible the intervention is jeopardising the confidential nature of the arbitration process as it allows the participation of persons not involved in the arbitration agreement. A proposal that intervention should only be allowed if all parties consent has been made. However, it should be appreciated that this make this legal instrument redundant because clearly, the other party is not necessarily interested in helping his opponent in getting a supporter to enter the proceedings in order to assist the opponent to win the case.

Indeed, it cannot be disputed that even in case of intervention, confidentiality of the proceedings shall be ensured. The question is: should the Act guarantee confidentiality by making the opponent's consent and agreement a condition for the possibility of intervention. In our view, even without stating this, the Arbitration Act creates the possibility of intervention without damaging the confidential nature of arbitration.

Finally, it is important to emphasise that the agreement of the parties or the rules of procedure of the arbitral tribunal may determine procedural obligations relating to the intervener, which can ensure the confidentiality of the proceedings.

IV. Interim measures

The old Arbitration Act allowed the arbitral tribunal to issue an interim measure to ensure the immediate legal protection. Section 26 of the old Arbitration Act authorised the arbitral tribunal to take any necessary measures regarding the subject of the debate. However, in the absence of detailed rules the old Act did not provide any guidance as to what type of action is possible and what conditions should the arbitral court consider in

connection with the granting of the interim measures. Moreover, the old Act did not assure the enforceability of interim measures.⁹

In order to make the arbitration proceedings more efficient the lack of regulations in the past has been remedied by adopting the innovations of the UNCITRAL Model Law 2006 Amendments by the new Arbitration Act.

Under Section 18 (1) of the Arbitration Act unless the parties have agreed otherwise, the arbitration panel may adopt interim measures in a ruling at the request of any of the parties. Before closing the debate by the award the arbitration panel instructs the party by the interim measure to act as defined by the law. In this connection, the party applying for the interim measure must substantiate that:

- a) without such measures a detriment that cannot be eliminated by the compensation awarded by the arbitration court will occur, which exceeds the detriment that in the case of adopting the measures the party affected by the measures presumably incurs, and
- b) that the petitioner's demand will lead to success on the merits of the case. Deliberation of this possibility shall not bind the arbitration panel during any of its later deliberations.

Thus pursuant to the new Act, interim measures are only possible at the request of the parties the old Arbitration Act the new Arbitration Act also determines derogating rules. This means that the parties may diverge from the detailed arrangements of the Act, or even exclude the possibility of an interim measure in their agreement. The new Arbitration Act also ensures the enforceability of interim measures.

However, it should be pointed out that since the Act only permits the arbitration panel to adopt interim measures, so it is not possible to set up a temporary measure before the formation of the panel.¹⁰ Under some circumstances, this may even cause problems.¹¹ Under the Act, setting up an interim measure is only possible until the order terminating the proceedings has been issued. In this connection, Section 33 (5) of the Rules of Procedure lays down that the party may claim interim measure either before the arbitration proceedings or during the proceedings.

While recognising that more detailed regulation of the interim measure was justified, some criticised the new Act for making interim measures possible only in the form of an order. According to this view, only the domestic enforceability is provided for such an order.

The Arbitration Act differs from the recommendation of the UNCITRAL Model Law as it allows interim measures to be ordered only in the form of an order, and it does not

9 LAJER: i. m. 178.

10 The Act is not clear on whether the parties and the Rules of Procedure can decide the preliminary and/or interim measures to take place before the establishment of the arbitration council. We agree with Zsolt Lajer, who states that according to the dispositive nature of restrictions in Arbitration Act Section 2, the parties are only entitled to the right to exclude the application of these two institutions. See: LAJER i. m. 178.

11 In this regard, Zsolt Lajer suggested that the Arbitration Act should permit the arbitrator who accepted the applicant's appointment, to take preliminary or interim measures with a lasting effect until the formation of the arbitration council. Regarding the Arbitration Court of Commerce, the bearer of this right should be a person from the arbitration-referral list, appointed by the Presidency; fee to be paid by the applicant. See: LAJER: i. m. 178–179.

permit the arbitration court to order an award when ruling on the request for interim measures. However, the reason for this is that in the domestic procedural law the award, partial judgement, and interlocutory judgement refers solely to the judgement that decides fully or partially on the merits of the dispute. Therefore, within the framework of the Hungarian legal system interim measures may only be ordered in the form of an order. It could have caused jurisdictional confusion if the Arbitration Act used the term ‘award’ for a legal instrument with an entirely different content.

Some also criticised the provision for stating that in order to the interim measure to be granted, the applicant would have to substantiate that claim has merits to lead to success. Instead, the Act, following the UNCITRAL Model Law recommendations, might demand a confirmation that there is the reasonable possibility that the action will lead to success.

Regardless of word usage, in order to dispel the suspicions of premature judgement, the Arbitration Act states that the arbitration council’s any later consideration is not bound by the consideration underlying the decision regarding the applicability of the interim measures.

Furthermore, it has been also criticised that the Section 22 of the Arbitration Act allows the arbitration panel that at in cases without a request and without notifying the parties in advance modify, suspend and abrogate any interim measures. This part of the legislation is different from the one proposed in the Model Law recommendations. However, it was justified to allow the arbitration panel to modify, suspend, and repeal the interim measures in order to prevent damage if they detect that “the decision was unfounded and has become devoid of purpose”.

Finally, it is important to highlight that in the Arbitration Act system, the interim measures are closely linked to the institution of the preliminary measures as well. Under Section 20 (1) Arbitration Act unless the parties have agreed otherwise, the party applying for the interim measures can at the same time propose preliminary measures to oblige the opposing party, in order for the sought interim measure’s purpose not to become unfeasible. Section 20 (2) puts forward that the arbitration panel may adopt a preliminary order if it deems that service of the petition for the interim measure to the requested party will entail the risk that the purpose of the interim measure will become impossible.

V. The scope of the Act

According to the original Section 1 (1) of the Arbitration Act the new Act shall be applied the provisions of this Act shall be applied if the venue of the arbitration is in Hungary. Based on the original text of the Arbitration Act, the Act might be applied on ad hoc arbitral tribunals if the place of arbitration is in Hungary. However, in the case of the permanent arbitration procedure the Arbitration Act only applies when the Permanent Court of Arbitration is based in Hungary.

The scope of the new Act, based on the original text did not cover the procedure conducted in Hungary off any foreign-based Permanent Court of Arbitration. The adequacy of the legislation was questioned, especially in the case of those permanent arbitration courts, which operate with international organisations such as the Arbitration Court attached to the International Chamber of Commerce.

The legislator has recognised this problem. The National Assembly has amended the Arbitration Act in the context of Act LIV of 2018 on the protection of business secrets.¹² The amendment lays down that the provisions of the Arbitration Act shall apply if the venue is in Hungary. Thus on the basis of the amendment, there are no obstacles to foreign-based permanent arbitration procedure to take place in Hungary. When applying the Arbitration Act the foreign-based Permanent Court of Arbitration will conduct its proceedings under the Hungarian law. Accordingly, if the parties agree to apply the Arbitration Act in the case of a foreign-based Permanent Court of Arbitration, it can be only a Hungarian ordinary court that grants the annulment of the arbitration award.

VI. Contractual relationships

Finally, it is essential to discuss an issue that is not dealt with neither in the previous nor in the new Arbitration Act or in the Rules of Procedure, the practical significance of which is outstanding, namely: in between whom the contractual relationship occurs during the arbitral proceedings? Emphasising of course that in this respect there is a significant difference between the permanent and ad hoc arbitration.

In this connection, two positions emerged:¹³

- a) the contractual relationship is established between the parties involved in the legal dispute and their appointed arbitrators;
- b) a contractual relationship is established between the applicant and the Permanent Court of Arbitration. A similar contractual relationship arises between the defendant and the Permanent Court of Arbitration as well. According to Section 32 of the Arbitration Act, the arbitration proceedings shall start on the day on which the defendant received the statement for referring the dispute to the arbitration court

Based on the second position, there is no contractual relationship between the parties and the arbitrators hearing the dispute. The arbitrators are not agents of the parties; thus they cannot be instructed by the parties, and one party cannot call back his/her previously nominated arbitrator during the proceedings. Accordingly, contractual liability for damages does not come into play between the arbitrator and the parties. The arbitrators enter into a contractual relationship with the permanent arbitration court by issuing a statement to carry out their activities.

It is also worth mentioning that this issue has already appeared on the level of judicial decisions although, even the judicial practice is far from homogenous. The arbitrators' responsibility, however, has not been established even in those matters where the arbitrators

12 Act no. LIV of 2018 on the protection of business secrets has been adopted by the National Assembly on 20 July 2018, and it has been published in the Hungarian Official Gazette (Magyar Közlöny) 123. issue of 2018

13 These issues are discussed in connection with the arbitrators' status by Tamás Sárközy. See: Tamás SÁRKÖZY: *The arbitration status issues on the basis of the new Arbitration Act*. Law Gazette 2018/1. 44.

shared the above mentioned first opinion, that is, a contractual relationship emerges between the parties involved in the legal dispute and their appointed arbitrators.¹⁴

VII. Summary

The new Arbitration Act brought significant changes in domestic arbitration. The procedural rules have not changed fundamentally but several new legal instruments has been established. In our view, these do not compromise the willingness for the use of arbitration, in fact, increase the credibility of this dispute resolution platform. At the same time, there is no doubt that specific issues need to be clarified in a future amendment.

Also, it is important to point out that the Arbitration Act has completely transformed the domestic permanent arbitration system. However, this transformation would be complete only if the Permanent Commercial Arbitration Court had an independent legal personality and could separate itself organisationally from the Hungarian Chamber of Commerce and Industry. That would mean more than Section 3:32 of the Civil Code currently sets out that the Hungarian Chamber of Commerce and Industry as a legal entity confers the Permanent Commercial Arbitration Court with a legal personality.¹⁵ In our view, it would be reasonable to create complete independence for the Commercial Arbitration Court in the future thus significantly strengthening its position compared to the foreign arbitral tribunals.

14 On the liability of arbitrators. See: LEITNER, MAX: *Die Haftung des Schiedsrichters*. Manz'sche Verlags- und Universitätsbuchhandlung, Wien, 2016. 278. p.

15 Tamás Sárközy has also proposed a solution for this. See: SÁRKÖZY i. m. 42.