

ÁDÁM BOÓC *

A Brief Introduction to Hungarian Arbitration Law

I.

The antecedents of modern arbitration—similarly to several institutes of modern private law—can be found in Roman Law, where arbitration was considered as a way of private dispute resolution.¹ As a leading source in Roman law we can refer to D. 4, 8, which has the following title: *De receptis: qui arbitrium receperint ut sententiam dicant*. When analyzing the features of arbitration in Roman Law, special attention should be paid to the term of *compromissum*, which meant the settlement of the parties to submit themselves to the jurisdiction of an arbitrator, who was called *arbiter ex compromisso*.² The term of *compromissum* on the field of arbitration still plays a particular role in several jurisdictions in Latin America.³

Concerning the appointment of the arbitrator in Roman law, the most important source in the Digest is perhaps the following sentence: “*Arbiter ex compromisso sumptus cum ante diem, qui constitutus compromisso erat, sententiam dicere non potest.*”⁴ This regulation means that the *arbiter ex compromisso* cannot judge the case before the parties reached a consensus regarding the appointment of the arbitrator. This rule highlights the importance

* PhD. Research Fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30
E-mail: adambooc@gmail.com

¹ In this regard see especially: D. Roebuck–B. De Loynes de Fumichon: *Roman Arbitration*. Oxford, 2004.

² It should be born in mind that *arbiter* had another meaning in Roman Law, too. It also meant a judge who had special knowledge on a particular field, which was necessary to the appropriate judging of the case. See esp.: Földi A.–Hamza G.: *A római jog története és intézményei* (History and Institutes of Roman Law). Budapest, 2007¹². 161.

³ See in this regard: Boóc Á: A kereskedelmi választottbíráskodás egyes sajátosságai Dél-Amerikában (Some Particular Features of Commercial Arbitration in Latin-America). *Állam- és Jogtudomány*, 48 (2007) 289–332.

⁴ See: Alf, D. 4, 8, 50.

of the consensual nature of arbitration, which is undoubtedly one of the most fundamental principles of modern arbitration, as well.

Regarding the early Hungarian Medieval Law we can state that the persons who acted as quasi-arbitrators can be considered more as mediators than real judges. We can refer to the II. Decretum of St. Stephen, according to which ten gold coins should be given to the arbitrators and mediators for fulfilling their duty.⁵

It is not until the 13th and 14th century in Hungary that arbitrators could be regarded—to some extent—as real judges who could reach an award based on the same proofs as the ordinary judges. Practically speaking, there are two circumstances which have to be highlighted: (a) concerning the procedure of the arbitrators and their award they had to prepare a report either to the ordinary judge or to the administration of the county; (b) in case they failed to do so the report could be enforced by an order from the King.

It is worth mentioning that this phenomenon can be detected in modern law as well. Namely, that there is an important connection between ordinary judges, judicial system, and arbitrators. The arbitrators have to make sure that the award is authentic. In case they fail to fulfill their duties there is always a state control.

Concerning the possible direct effect of the arbitration agreement we can refer to a very interesting point of the *Planum Tabulare*, which is a compilation of decisions of the Hungarian Superior Court (*Curia*) from the 18th century. In Decision 11 we can read the following: “*Si is invalidatoriam litem in foro tabulari contra compromittentes suscitet vel illam continuat, ac illi qui ad compromissum influxerunt, propter initu, compromissum institutum difficultent, tunc illud coram foro tabulari arreptum institutum condescendit, quia actor facto suo ab ordinaria juris via recedendo iudicem sibi delegit, cuius iudicio stare debet.*”⁶ According to this quotation if there is a valid arbitration agreement and one of the parties commences an ordinary judicial procedure, the respondent may raise an exception based on a jurisdictional issue (*genus actionis vulgo institutum*). The ordinary judge then will reject the claim, based on this procedural issue. As a consequence, we can state that this procedural step does not create *res judicata*.

Regarding possible legal remedies against the award of the arbitral panel we can mention *Decretum* of 1729 (*de causis von appellabilibus*), which states that no appeal can be submitted against the award of the arbitral panel.

⁵ “*Decem (pensae) autem arbitris et mediatoribus condonentur.*” See: Fabinyi T.: *A választott bírászkodás* (The Arbitration). Budapest, 1926². 23.

⁶ See: Fabinyi: *op. cit.* 23 sqq.

As a very interesting point in the history of the Hungarian arbitration law, we can refer to the *Procedural Order of 1786 of Joseph the 2nd*. This order contained the regulation, according to which if there is an apparent cheat in the procedure there is a possibility to commence another–ordinary–lawsuit within 14 days after the receipt of the award.

It is also worthy mentioning Act No. LIV of 1868, which regulated that in the case one of the parties failed to appoint an arbitrator within the given time-limit, the ordinary judge would fulfill this task based upon the application of the other party.

The *Provisional Civil Procedure of 16. 09. 1852* contained a modern feature, which is even typical of the arbitration agreements in the 20th century. The Provisional Civil Procedure stated that the parties may submit their legal dispute under the jurisdiction of an arbitration panel if they were allowed to dispose of the legal dispute in this manner, and if they were allowed to reach an out-of-court agreement concerning the legal dispute.

As it is known in the early years of the 20th century, a code on Civil Procedure was promulgated in Hungary. It was the Act I of 1911 on Civil Procedure. The Title XVII of this Code contained regulations on arbitration. The following questions were covered by these provisions:

- Arbitration agreement;
- Appointment of Arbitrators;
- Liability of Arbitrators;
- Jurisdiction of the Arbitral Tribunal;
- Procedure of the Arbitral Tribunal (proofs, legal representation, etc.);
- Award of the Arbitral Tribunal;
- Challenge of the award of the Arbitral Tribunal.

Concerning the liability of the arbitrator we have to refer to a separate act, the Act VIII of 1871. This act ruled that if there was an official crime committed by the arbitrator, he would also lose the ability to become an arbitrator.

Regarding the challenge of the award, it should be highlighted that the award could be challenged–based on Section 784 of the Code on Civil Procedure of 1911–if there was an arbitrator on the panel who had been successfully challenged previously? or if the would-be challenging party could not reach a challenge without his own fault before the award of the arbitral tribunal. Unlike the modern arbitration act, there is no reference to public policy in the challenge in this Act.⁷

⁷ See in that regard: Burián L.: Gondolatok a közrend szerepéről (Thoughts on the Role of Ordre Public). In: Kiss D.–Varga I. (ed.): *Magister artis boni et aequi. Studia in Honorem Németh János*. Budapest, 2003. 99–122.

The well-known political and economic changes in 1948 in Hungary had an impact on arbitration as well. Because of the new political era and economic structure, the commercial arbitration in traditional sense ceased to exist to a large extent, but unlike the law of the stock exchange, there was a so-called “survival” of commercial arbitration.

There was a sort of compulsory arbitration among the member states of the Council for Mutual Economic Assistance (CMEA). It was regulated by the *Moscow Convention (Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technological Co-operation)*. This convention was promulgated in Hungary by Law-Decree No. 23 of 1973. The aim of this convention was that in commercial disputes among CMEA countries, the method of the dispute resolution was the compulsory arbitration based on this convention.⁸

In order to integrate Hungary into the international legal framework of international commercial arbitration it should be taken into account that Hungary has ratified the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10. June 1958*. It has been promulgated into the Hungarian law by Law-Decree No. 25 of 1962. Hungary has promulgated the Geneva Convention of 1961 by Law-Decree No. 8 of 1964.⁹

As it is known a new Code on Civil Procedure was promulgated in Hungary; this was the Act No. III of 1952. The original version of this Act did not contain any regulation on arbitration. In 1972 this Act was amended with Chapter 24 on Arbitration. Chapter 24 included only four sections, lacking many important rules due to political-economic reasons. The main problems of this regulation can be summed up as follows. On the one hand the scope of application was quite narrow: according to Section 360 (1) c) arbitration could be applied between economic organization, supposing there had been an authorization by act, law-decree or governmental-decree. On the other hand the possibility to challenge the award was only allowed in case of *ad hoc* arbitration. At that time there was only one arbitration institute in Hungary: The Arbitration Court attached to the Hungarian Economic Chamber, which is the legal predecessor of the Hungarian Commercial and Industrial Chamber.

⁸ See: Szász I.: *A KGST Általános Szállítási Feltételek. Egységes törvény a nemzetközi kereskedelemre* (General Supplying Conditions of CMEA. Uniform Law on International Commerce). Budapest, 1974. 308–310.

⁹ See in detail: Faragó L.: *A szocialista országok választottbíráskodásának néhány alapelve* (Some General Principles of the Arbitration of the Socialist Countries). *Jogtudományi Közlöny*, 21 (1966) 214–216.

The awards of this Court had been regarded as legally binding and thus enforceable.

Later on—approaching the economic and political changes of the ‘80s—there had been a change in the regulation which resulted in arbitration gaining a much broader application. As an example, we can mention Act VI of 1988 on economic associations. This act provided the possibility of submitting legal disputes, between the members of the economic associations and between the members and the company, to the jurisdiction of an arbitration court.

Regarding the legal framework of arbitration the next important step might be considered the modification of the Hungarian Civil Code (Act No. 4 of 1959) in 1993 with an effective date of 1st November, 1993. After this modification the Section 7 (2) of the Civil Code gave economic organizations the possibility to conclude arbitration clauses for legal debates. At that time, in order to create a valid arbitration clause both of the parties had to be economic organizations.

It should be kept in mind that after the promulgation of Arbitration Act this regulation was changed. It was, and still is today, sufficient if one of the parties is an economic organization and the subject matter of the legal dispute concerns its activity.

In that regard we cannot avoid mentioning a very important dogmatic question: Should this basic regulation be incorporated into the Civil Code? In Hungary, the codification of the new Civil Code is under progress. According to the Draft of the new Civil Code it is not necessary to have any regulation on arbitration (alternative dispute resolution) in a private law code. (As it is currently known; the new draft has not been adopted, yet.)¹⁰

II.

The present act on arbitration in Hungary is Act No. LXXI of 1994 on Arbitration. In spring 1994, the Government accepted the draft of the arbitration act. There were Parliamentary elections at that year and after the elections the new Government made some minor changes. Still, in 1994 the Arbitration Act was

¹⁰ See in that regard: Boóc Á.: A kereskedelmi választottbíráskodás egyes kérdései (Some Questions of Commercial Arbitration). In: Balogh M. (ed.): *Diszciplinák határain innen és túl* (Within and Beyond the Bades of Disciplines). Fialat Kutatók Fóruma 2. – 2006. Budapest, 2007. 121¹⁵.

presented to Parliament and they adopted the new Act on Arbitration. The Act was promulgated and it became effective on 13. 12. 1994.¹¹

The new Act is based on UNCITRAL Model Law on International Commercial Arbitration, as adopted on 21 June, 1985. Unlike the Law of the Russian Federation on International Commercial Arbitration which has been in force since the 14th of August 1993, the Hungarian Act is not a verbatim translation of the Model Law.¹² It is an adaptation of the Model Law, which means that there are some minor diverging points in the Hungarian text.

The Act contains 65 sections, having the following structure:

- General Provisions;
- Composition of the Arbitral Tribunal;
- Jurisdiction of the Arbitral Tribunal;
- Procedure of the Arbitral Tribunal;
- International Arbitral Proceedings;
- Proceedings of the Court;
- Miscellaneous and Closing Provisions.

The Hungarian Arbitration Act follows the *monist* conception, which means that the Act also regulates the domestic and the international arbitration procedure.¹³

Some of the important features of the Hungarian Arbitration Act can be summed up as follows. Section 6 of the Act contains the possibility of *waiver*, which is based on the principle of prohibition of *venire contra factum proprium*. It means that if a party knows that there is a breach of the agreement of the parties or the regulation of the Arbitration Act, and in spite of that this party still keeps on participating in the procedure, it has to be considered as if the party had waived to seek any legal remedies in this issue.¹⁴

¹¹ For *travaux préparatoires* of this act see especially: Szász I.: A választottbíráskodásról és szabályozásáról (On Arbitration and on its Regulation). *Gazdaság és Jog*, 2–3 (1993) 8–11.

¹² See esp: Gellért Gy.: Új törvény a választottbíráskodásról (New Act on Arbitration). *Magyar Jog*, 45 (1995) 449–460; Horváth É.: A választottbíráskodásról szóló törvény általános rendelkezései a gyakorlat tükrében (The General Regulations of the Act on Arbitration with Special Emphasis on the Practice). *Jogtudományi Közlöny*, 50 (1995) 171–178.

¹³ For practical application of the Hungarian Arbitration Act, see: Horváth É.: A választottbíráskodásról szóló törvény gyakorlati alkalmazása (Practical Application of the Act on Arbitration). *Jogtudományi Közlöny*, 54 (1999) 335–340.

¹⁴ Section 6 of the Act states: “A party who knows that any provision of this Act from which the parties may derogate or any requirement of the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to

It should be highlighted that the number of the arbitrators must be odd in order to enable the panel to reach a decision. It is interesting to mention that under the Civil Procedure of 1911 the parties could appoint an even number of arbitrators.

It is important to refer to section 11, first sentence: “*The arbitrators are independent and impartial, they are not representatives of the parties.*” This regulation is very similar to the Model Law. It should be pointed out that the reference to the fact that the arbitrators are not representatives of the parties can be reasoned with some Anglo-Saxon, esp. American, traditions: there is a dissenting role of party-appointed arbitrator in the American arbitration tradition.

The Hungarian Act is also lacking the definition of independence and impartiality. In order to try to find some sort of interpretation of these terms we can refer to the *IBA Guidelines on Conflicts of Interest in International Arbitration* (Approved on 22 May, 2004 by the Council of the International Bar Association), and secondly to the relevant legal literature.¹⁵

It should be kept in mind that if the arbitral tribunal dismisses the application for challenge of one of the parties, then this party may seek legal remedy in a competent county court.

The Hungarian Act (section 24) contains the principle of *Kompetenz-Kompetenz*, which means that the Arbitral Tribunal may rule on its own jurisdiction.¹⁶ We have to stress that if one of the parties appoints an arbitrator or participates in the appointment of an arbitrator, it does not exclude the party from providing an exception against the jurisdiction of the Arbitral Tribunal.

Chapter seven of the Act deals with international arbitration procedure. It is important to know that in international cases the competent arbitration court is always the Arbitration Court, attached to the Hungarian Chamber of Commerce and Industry. The reason for this regulation is that this arbitration court is a legal successor of the arbitration court attached to the Hungarian Economic Chamber, and therefore, this court has enough experience in this matter. This part of the Act should be interpreted in accordance with the provisions of the New York Convention as well.

such non-compliance immediately or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.”

¹⁵ See in detail: Boóc Á.: Megjegyzések a választottbíróknak az eljárásból való kizárásáról (Remarks on the Challenge of Arbitrator). *Állam- és Jogtudomány*, 47 (2006) 445–467.

¹⁶ See: Horváth É.–Kálmán Gy.: *A nemzetközi eljárások joga, különös tekintettel a választottbíráskodásra* (The Law of the International Procedures, with Special Emphasis on Arbitration). Budapest, 1999. 112–113.

The intervention of the state court into the arbitral process can be divided as follows:

- Appointment of the arbitrator if the party fails to appoint his arbitrator;
- Legal help to the arbitral tribunal in the question of proof or interim measure;
- Challenge of the Award;
- Recognition and Enforcement of the Award.

This part is also in accordance with the UNCITRAL Model Law. In Hungary, the time-limit for challenging the award is 60 days from the receipt of the award of the Arbitral Tribunal. It should be stressed that the challenge of the award is not a form of appeal. There is an award of the Hungarian Supreme Court, which confirms it (BH 1996.159), so the legal practice also supports this interpretation.

According to par. 55 (2) b) one can also challenge the award if the award breaches *public policy, ordre public*. There is a leading case of the Supreme Court of Hungary (BH.1997.489), which clarifies the notion and interpretation of *ordre public, public policy* in Hungary. According to the reasoning of the case the breach of the *ordre public* should mean the breach of a fundamental right granted by the Constitution, and even more, the term of *ordre public* should also protect the ethical, political ideas of the society. The reasoning provides a framework how to interpret the breach of the *ordre public*.

It is wonderful to see that the application of arbitration is getting more and more popular in Hungary.¹⁷ It is also nice to experience that Hungarian and foreign investors seem to realize the advantages of this way of dispute resolution. It does not seem to be an overstatement that there is a trend in Hungary which makes arbitration an important way of dispute resolution, and also that arbitration is likely to become a real alternative to civil litigation in commercial issues.¹⁸

¹⁷ This is also supported by the activity of the Hungarian arbitral institutions. In that regard, we would like to refer to Arbitration Court Attached to Hungarian Chamber of Commerce and Industry and the Arbitration Court Attached to the Money and Capital Market. Concerning Arbitration Court Attached to Hungarian Chamber of Commerce and Industry see: www.mkik.hu, while regarding Arbitration Court Attached to the Money and Capital Market, see: www.valasztottbirosag.hu.

¹⁸ For actual questions of arbitration in Hungary with special emphasis on the practice see especially: Balog L.: A kereskedelmi választottbíráskodás aktuális kérdései (Some Actual Questions of Commercial Arbitration). *Gazdaság és Jog*, 15 (2007) 39–44.