Litigation - Hungary

Recognition of foreign awards: practical problems, possible solutions

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Introduction

Recognition of foreign awards is a necessary step to subsequent enforcement or reliance on the *res judicata* effects (ie, the effects of a matter having been judged) of an award in domestic litigation. Recognition proceedings in Hungary are a form of so-called 'non-suit proceeding' - they are contentious court proceedings brought by an award creditor against an award debtor. No *ex parte* applications are allowed.(1)

Once an application is filed, and provided that the underlying documentation is complete, the court forwards the application to the award debtor and invites its comments. If the award debtor objects to the recognition, there is usually a second submission from the applicant; in complex cases there may be a series of such exchanges. The court's decision is usually based on written submissions and exhibits only; no hearing is held. An appeal of a first instance decision to a regional court of appeal is available as of right. In second instance proceedings a tribunal of three judges rules on the appeal. In most cases a judicial review by the Supreme Court may be available if one of the parties claims that the second instance court erred on a point of law.

Procedural issues

A simple recognition case, in which there is no objection and no appeal, may last from one to four months from the date of filing of the application. A case that is fought vigorously at all instances may take between 18 and 24 months, or even longer in exceptional cases. Furthermore, enforcement proceedings may not be commenced until the award is recognised. The length of the process is not only a function of the two or three possible stages of proceedings.

Although first instance proceedings are under the exclusive competence of county courts (ie, higher courts), in practice such cases are heard by judge secretaries - junior legal professionals who have passed the central state examination for judges, lawyers and public attorneys, but who have not yet been appointed as judges. Judge secretaries usually work in the courts for one to three years before their appointment. Given the small number of recognition applications, the judge-to-be will almost certainly be dealing with a foreign award for the first time.

Their lack of familiarity with such cases leads to longer proceedings and narrow - sometimes very narrow - interpretations of the law. In an unreported case, a judge secretary issued an order in which the Pest County Court recognised a foreign award. On appeal, the recognition order was annulled and the county court was ordered to recommence the recognition proceedings. The same judge secretary ordered the applicant to resubmit all of the underlying documents. In such circumstances applicants may try to convince the court that it is unnecessary to file the award and arbitration agreement (and the translations thereof) a second time; otherwise, they have no choice but to comply with the order. The less time-consuming and less expensive solution will depend on the circumstances, and in particular on whether another original copy of the award is available.

Counsel involved in recognition proceedings should be prepared to provide far more assistance to the court than they would do in a case before an experienced judge. The increased cost of guiding a judge secretary through the maze of a complex recognition case may well be worth the investment when it comes to an appeal or judicial review. If recognition is necessary, as the award debtor is reluctant to pay, it is likely that the latter will use whatever legal avenues are open in order to resist recognition.

Another option is to try to avoid judge secretaries. This is very difficult, as internal case allocation and administrative organisation are at each court's discretion. However, a party may apply to the court for interim or security measures. By law, judge secretaries may not grant interim measures.(2) Even if the application has no reasonable hope of success, it may result in the entire case being assigned to a judge.

Problems in legislation

Pursuant to Article IV of the New York Convention, applicants must submit:

- the original award or a duly authenticated copy;
- the original arbitration agreement or a duly certified copy; and
- certified translations of the award and the agreement.

Hungarian law defines the term 'duly authenticated' in relation to an award or arbitration agreement in Ministry of Justice Decree 12/1962 (X 31), which (like all legislation) is binding on the courts. Section 4 of the decree reads as follows:

"*The authentic document in Article IV of the Convention is:*

a) the authentic copy made by the permanent court of arbitration of its own decision;

b) the decision of the ad hoc *court of arbitration, certified by a notary public;*

c) the arbitration agreement, certified by the notary public."(3)

Although the term 'authentic document' does not appear in Article IV of the convention, the definition in Section 4(a) is seldom problematic in practice. The term 'permanent court of arbitration' may cover either the administering institution or the tribunal, as applicable.

However, the requirements of Sections (b) and (c) may cause difficulties. Beyond the fact that public notaries, as the term is understood in Hungarian law, are unknown in common law jurisdictions, having a third party attest to the authenticity of an international award or arbitration agreement is antithetical to commercial arbitration. It runs counter to the private and confidential nature of arbitration and the more relaxed formal requirements of arbitration agreements, quite apart from raising a series of theoretical and practical questions. What is a notary public required to certify in respect of an award or an arbitration agreement: the identity of the members of the tribunal and the parties to the arbitration agreement; the fact that an award was made or an arbitration agreement entered into. The point at which a notary public should certify an award or an arbitration agreement is also unclear: when the award is signed (which usually happens at different times in different countries), or at a later date? When the arbitration agreement is concluded or anytime thereafter? It is not even clear what form such certification should take. Should the notary public endorse the award or the contract containing the arbitration clause, or should he or she issue a separate certificate?

The decree was drafted in the early 1960s and might have been suitable for a protectionist state behind the Iron Curtain, but it is irreconcilable with modern principles of international arbitration and is impossible to comply with in practice. For the first 40 years of its existence, it was hardly ever applied and thus was never tested, but in the past 10 years practitioners and the courts have rediscovered it. Although the legal culture shock has apparently not reached the legislature yet, foreign parties continue to face practical problems when seeking recognition and enforcement in Hungarian courts.

The only reason that Section 4(b) - on the certification of awards by *ad hoc* tribunals - does not cause problems is that it is always less problematic in practice for the award creditor to obtain further copies of an award from the former members of the tribunal (or from the depository, if the award was deposited with a court or other organisation).

However, the problems caused by Section 4(c) - on the certification of an arbitration agreement - are much more serious and often represent an insurmountable obstacle to recognition. If the original arbitration agreement is missing, it may be very difficult to obtain a notarial certification. It is therefore essential that parties keep the original arbitration agreement. In a recent unreported case, the dispute arose out of three individual agreements, two of which were signed on the same sheet of paper, while the third was concluded by an exchange of faxes. A judge secretary requested that the applicant submit its original 'half' of the agreement, signed only by the applicant, and the other party's reply message containing the other signature received by fax. The reply bearing both signatures - copies, not originals - was deemed insufficient in itself.

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Endnotes

(1) The non-admissibility of *ex parte* applications also explains why a foreign EU judgment can usually be enforced more rapidly than a foreign award made in the same foreign EU state. (See Article 41 of EU Regulation 44/2001.)

(2) Article 12/A(3) of the Code of Civil Proceedure (Act 3/1952 on the Code of Civil Proceedure, as amended).

(3) The decree has no official English translation. The Hungarian text uses the same word to refer to 'authenticated' and 'certified'. Note that the French version of the convention also uses the same word - '*authenticité*' - in relation to awards and arbitration agreements.