

## **Connection between the arbitration and the national assets in Hungary before Act VII. of 2015**

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### **ABSTRACT**

Arbitration in Hungary is governed by Act LXXI of 1994 on Arbitration , which was based on the UNCITRAL model law. The Act, amended several times since its enactment in 1994, governs domestic, ad hoc and institutional (permanent) arbitration and has a specific chapter on international arbitration. The first „station” of the legislative procedure connecting arbitration and national assets is indeed Act CXCVI. of 2011 on National Assets (hereinafter: „National Assets Act”), which entered into force on January 1, 2012. The National Assets Act had a negative effect on this type of alternative dispute resolution method, since in connection with national assets – with the adoption of Section 17 (3) – it excluded the opportunity of arbitration.

Keywords: arbitration, hungary, international, commercial, investment, constitution, national assets

## **I. Summary on the concept of arbitration and its european and hungarian history:**

The economic challenges of the 20th century, the globalization of commerce and the emergence of multinational companies called for alternative dispute resolution methods which were suitable to replace the slow, cumbersome procedures of national courts. For economic actors one of the most effective solution offered is the utilization of arbitral procedures.

Defining the term arbitration is by no means easy, since neither the legal literature nor the legislation established a standard definition for it. The document „*Dispute settlement – international commercial arbitration*” issued by the United Nations only establishes the main criteria which are considered as essential characteristics of arbitration. These are the following: arbitration is a special technique for solving legal disputes, a private legal procedure which leads to the final and legally binding establishment of rights and obligations of the parties to the dispute, and of which consensuality is a basic characteristic.

According to the most widely accepted views in Hungarian legal literature, arbitration is a dispute resolution method which – based on the consensus of the parties to the dispute – goes on before „private courts” that are different from ordinary national courts and are entitled to adopt final and binding decisions (awards). Therefore, arbitral courts are dispute resolution forums where the procedure is based on the private autonomy of the parties, the contractual provisions on which the parties agreed.<sup>1</sup>

Arbitration can either be domestic or international. The classical division within international arbitration distinguishes between occasional (ad hoc) and institutional (permanent) arbitration. Ad hoc arbitration provides great freedom to the parties, since they are not only able to decide that instead of an ordinary national court they wish to settle their dispute before an alternative forum, but they can appoint the arbitrators as well. Institutional arbitration is a stricter form of arbitration, having its own list of registered arbitrators, rules of proceedings and organizational structure. Such arbitral courts are usually attached to chambers of commerce, and apart from international and foreign trade matters they frequently act in domestic business disputes as well.<sup>2</sup> In order to determine the international nature of arbitration, both domestic and international legislators as well as the representatives of legal literature developed different solutions. The european legal literature usually connects the determination of international nature to the countries where the parties belong, the subject of the dispute or to a combination of those.<sup>3</sup>

### ***1.1. The scope of arbitration***

Arbitral courts are acting councils which are composed of one or more arbitrators authorized by the parties via private declarations of will – instead of national courts – to decide on the civil legal dispute.<sup>4</sup> The act determines the rules of arbitral procedure in a dispositive manner, leaving room to the will of the parties, provided that the seat of the ad hoc or institutional arbitral court is in Hungary.<sup>5</sup> The scope of the act includes both the ad

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<sup>1</sup> Éva Horváth – György Kálmán: Law applicable to international procedures – commercial arbitration. Osiris Kiadó, 1999, page 44. and Csongor István Nagy: Private International Law, HVG Orac Kiadó, 2012, pages 270-271.

<sup>2</sup> Ferenc Mádl– Lajos Vékás: Private international law and the law governing international business relations ELTE Eötvös Kiadó, 2012, page 490.

<sup>3</sup> Zoltán Csehi: Arbitral court and private international law. In: 60th birthday tribute to professor László Kecskés. Pécs, 2013., pages 173-174.

<sup>4</sup> Schwab-Waleter-Baumbach: Schiedsgerichtsbarkeit. 1. o.

<sup>5</sup> Act LXXI. of 1994 on Arbitration (hereinafter: „Arbitration Act”) 1. §

hoc arbitrational courts established to decide on a single legal dispute and the so called permanent (institutional) arbitrational courts, irrespective of their arbitral activity being domestic or international.<sup>6</sup>

Act LXXI. of 1994 on Arbitration (hereinafter „Arbitration Act”) – similarly to the regulations of other countries – does not determine the definition of ad hoc and permanent (institutional) arbitrational courts, however, in the course of the legislative procedure concepts regarding the establishment of a legal definition arose. The Arbitration Act merely sets forth that in Hungary permanent (institutional) arbitrational courts shall only be established by a chamber of commerce, or more chambers of commerce are entitled to establish a joint arbitrational court, since chambers of commerce are capable of ensuring the proper organizational-institutional background required for the operation of a permanent arbitrational court.<sup>7</sup>

However, Hungarian regulations allow that in certain cases arbitrational courts (other than the arbitrational courts attached to chambers of commerce) regulated by special laws may act. Such arbitrational court is the Permanent Court of Arbitration of the Financial- and Capital Market, which has been established by the Act on Securities. To the procedures of these forums established by different acts the Act on Arbitration is only applicable in case the act which established that certain court of arbitration does not provide for special rules of proceedings.

The determination of precise definitions regarding permanent and ad hoc courts of arbitration have been left to the legal practice and the jurisprudence. The most prominent difference is that while permanent arbitrational courts operate within permanent organizational structures and on the basis of (normative) rules of proceedings – like an actual institution –, ad hoc arbitrational courts are established by the parties themselves in order to decide on a specific legal dispute which arose between them, therefore, with adopting its decision the ad hoc arbitrational court ceases to exist. The rules of proceedings of an ad hoc arbitrational court is established by the parties with regards to the specific legal dispute between them, however, they have the option to apply the rules of proceedings of a permanent arbitrational court.<sup>8</sup>

Currently five permanent arbitrational courts are operating in Hungary. The Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry and the Court of Arbitration attached to the Hungarian Chamber of Agriculture have a general competence, i.e. they are entitled to commence all the procedures which are set forth in the Arbitration Act. However, from the above mentioned arbitrational courts only the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry is entitled to act in international matters. The Permanent Court of Arbitration of the Financial- and Capital Market, the Permanent Court of Arbitration of Sports and the Permanent Court of Arbitration of Energetics have special competence, they may act in special cases set forth by law, however, compared to the other two forums with special competence the Permanent Court of Arbitration of the Financial- and Capital Market may act in international matters as well.<sup>9</sup>

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<sup>6</sup> László Kecskés – Józsefné Lukács (editor): Book of Arbitrators page 202

<sup>7</sup> Arbitration Act 2. § (1)

<sup>8</sup> Kecskés-Lukács (editor), id. mű, pages 202-203.

<sup>9</sup> Dr. Éva Horváth: International Arbitration. HVG Orac Kiadó, Budapest, 2010. pages 138-139.

## ***1.2. The arbitration agreement***

The arbitration agreement is an agreement between the parties regarding that in case a legal dispute may arise, or has arisen from their legal relationship (both contractual or non-contractual), they wish to settle such dispute before an arbitral court.<sup>10</sup>

The arbitration agreement can be concluded as an element of another contract (arbitration clause), or as an individual agreement.<sup>11</sup> With regards to the date of the conclusion there are several options as well: it is considered typical that the parties – for example simultaneously with the signing of a purchase agreement – conclude the arbitration agreement included in the purchase agreement, however, it is also possible for the parties that anytime following the conclusion of a commercial agreement – for example when the particular legal dispute occurs – they decide to sign the arbitration agreement and turn to an arbitral court.<sup>12</sup>

An arbitration clause included in another agreement shall not be considered as a standard clause, therefore it only becomes part of the agreement if it is expressly accepted by both parties following a separate notification thereof.<sup>13</sup> This logic is followed by the court decision as well which sets forth that in case the parties agree that their agreement – which contains an arbitration clause – is concluded for a definite term, however the fulfilment of the agreement continues following the expiration of the definite term, the implicit conduct of the parties does not result in the reservation of the arbitration clause.<sup>14</sup>

The arbitration agreement is valid in writing only. The lack of an opposing statement by one of the parties regarding the offer of the other party shall not be considered as an agreement concluded as a written agreement.<sup>15</sup> Likewise, in case a written agreement exists solely between the creditor and the principal debtor, but the guarantor did not accept the arbitration clause in writing, the arbitration procedure shall have no place in the legal dispute between the creditor and the guarantor.<sup>16</sup>

However, the Act on Arbitration does not interpret the requirement of 'in writing' too strictly: it considers an agreement concluded via correspondence, telegram, teletype or other devices which are capable of recording the message of the parties as an agreement concluded in writing. It is identical with the above mentioned situation if one of the parties states in its statement of claim, and the other party does not deny in its response that an arbitration agreement has been concluded between them.<sup>17</sup> In case a claim is enforced via set-off claim, the conclusion of a written arbitration agreement can be established if the claimant states – with a statement included in the minutes, and in the knowledge of the set-off claim submitted by the claimant – that it has no complaint regarding the competence and the composition of the arbitral court.<sup>18</sup>

The arbitration agreement or clause is independent from the agreement in which it is included, from which the possible legal dispute may arise, the event itself in case of which the parties set forth the arbitration procedure. If that would not be the case, then the invalidity of the agreement „giving rise” to the arbitration clause/agreement would affect the arbitration clause/agreement, which would lead to unreasonable obstacles in arbitration practice, since in

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<sup>10</sup> Arbitration Act; Section 5. (1)

<sup>11</sup> Arbitration Act; Section 5. (2)

<sup>12</sup> Horváth, id. mű, page 142.

<sup>13</sup> Court decision 2012. 296

<sup>14</sup> Court decision 2005.397.

<sup>15</sup> Court decision 2004. 941.

<sup>16</sup> Court decision 1997.11.

<sup>17</sup> Arbitration Act Sections 5. (3)-(4)

<sup>18</sup> Court decision 2007.1705.

many cases the submission of the parties is aimed towards the establishment of whether an agreement between them (for example a purchase agreement) is valid or invalid.<sup>19</sup>

### ***1.3. The role of national courts***

Regulating the connection between national (ordinary) courts and arbitration courts is one of the most important matters in a country's legal system, since while the competence of ordinary judges is derived from the State, the competence of arbitrators is attributable to the parties electing them, therefore they wield official authority as well. Arbitration is none else but the division of powers within the judiciary branch of power: the cooperation of public and non-public authorities in the service of justice and legitimate enforcement of claims.<sup>20</sup> This division of powers – or competence –, just like in the case of the State, naturally requires a system of some kind of supervision, monitoring, since in lack of such the limitations of power vanish and the power becomes absolute.<sup>21</sup> To prevent this from happening the Arbitration Act explicitly determines the situations when a national court may exercise its powers in the course of an arbitration procedure.<sup>22</sup> These statutory provisions ensure that the agreements of the parties are treated respectfully and the national courts do not interfere unnecessarily in the resolution of legal disputes via arbitration.<sup>23</sup> Since apart from the indicated situations ordinary courts have no competence are not entitled to act in cases where the parties concluded an arbitration agreement. E.g. regarding the establishment of the nullity of the order terminating the arbitration procedure a national court shall have no competence.<sup>24</sup> Likewise, national courts shall have no competence in the resolution of a legal dispute in connection with the articles of association in case the parties set forth the competence of an arbitration court.<sup>25</sup> From the perspective of the arbitration clause a legal dispute arising between the company and its member because of a resolution adopted by the company shall be considered as a legal dispute in connection with the articles of association.<sup>26</sup>

## **II. A short summary on the regulation of arbitration in Hungary**

Arbitration in Hungary is governed by Act LXXI of 1994 on Arbitration, which was based on the UNCITRAL model law. The Act, amended several times since its enactment in 1994, governs domestic, ad hoc and institutional (permanent) arbitration and has a specific chapter on international arbitration.

Disputes may be settled by way of arbitration if: (i) at least one of the parties is professionally engaged in business activities; and (ii) the legal dispute arises out of or in connection with this activity; (iii) based on the subject matter of the dispute, the parties are free to submit the dispute to arbitration; and (iv) arbitration was stipulated in an arbitration clause or arbitration agreement. The Act allows the parties to agree on the number of arbitrators, the appointment procedure and the rules of the arbitration proceedings. If the parties do not provide an appointment procedure for the tribunal in the arbitration clause the provisions of the Act shall apply. There are currently four permanent arbitration courts

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<sup>19</sup> Horváth, id. mű, page 143.

<sup>20</sup> Zsolt Okányi: Arbitration in Hungary regarding domestic and international matters (2009) page 23.

<sup>21</sup> W. Michael Reisman: Systems of Control in International Adjudication and Arbitration 1 (1992). In: Reisman-Craig-Park-Paulsson: International Commercial Arbitration. 963. o.

<sup>22</sup> See: Act LXXI. of 1994 on Arbitration

<sup>23</sup> Kecskés- Lukács, id. mű, page 206.

<sup>24</sup> Court decision 2004.20.

<sup>25</sup> Judicial review 2000.99.

<sup>26</sup> Judicial review 1998.182.

operating in Hungary, each with its own rules of procedure. County courts have a limited scope of supervision over arbitration.

This includes certain competences regarding the appointment and removal of arbitrators if the parties are unwilling to cooperate, the right to annul arbitral awards and the duty to verify if a foreign arbitral award is enforceable in Hungary

Arbitral awards have the same effect as final and binding judgments of ordinary courts of law. Domestic and foreign arbitral awards are enforced by courts in accordance with the general rules of judicial enforcement.

Hungary joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1962. The instrument was implemented by Law Decree No. 25 of 1962.<sup>27</sup>

### **III. The importance of international investment arbitration with regards to international investments**

#### *III.1. Summary on international investments and investment protection*

The development which came as a result of the social-economical-political recovery following the second world war and the strengthening of economic relations between different countries had been the most prominent aspect of progress shown by countries which were slowly 'finding themselves' (again). A particularly high emphasis was placed on international relations which were concluded between private individuals / companies with the necessary assets and the countries hosting the investment. The investments established in such way meant / mean capital or financial investments established for a definite term with a potential risk and economic value, contributing to the development of the country in which the investment took / takes place. The general characteristics of investments had been determined by the court of arbitration in the *Salini Costruttori S.p.A. vs Morocco* case. Despite it being the basis of the ICSID's decision on more than one occasion, we cannot say that it is generally accepted, since there are contradictory cases as well. It is questionable whether the determination of this definition in the *Salini* case shall be considered a mere opinion or as an actual definition.

Nowadays the majority of international investments are direct or portfolio investments.

To this day, investment relations are the driving force behind the economy of countries, offering undisputable advantages to both the investors and the host countries while involving significant risk factors in the same time. The investors usually need to take into consideration – apart from economical risk factors – social-political risk factors as well, especially in countries which require more capital import due to their economical instability (for example nationalization, state bankruptcy ect.). Naturally, the investors are seeking to grab every opportunity which is able to protect them as a shield against such sources of threat. The most effective weapons are bilateral and multilateral international treaties created in the spirit of investment protection.

The great advantage of international treaties concluded in the spirit of investment protection is that they allow arbitration procedures in case of legal disputes arisen out of investment relationships.<sup>28</sup> It has not always been this way, however. The first treaties on

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<sup>27</sup> Arbitration in Europe Norton Rose Group- Hungary 2008 p. 02.

<sup>28</sup> Tamás Kende – Boldizsár Nagy – Pál Sonnenvend – László Vali (editor): International law. Complex Kiadó, 1519-1522 e-book

investment protection – in order to solve the legal disputes between parties – even regulated the institution of diplomatic immunity: an investment dispute – as a grievance suffered by the foreign investor – is a violation of international law committed against the country of the investor, and as such, it can be settled before an international court. The fewness of such cases found in the practice of the International Court of Justice reveals that it is not the most appropriate way of solving investment disputes.

Ignoring the utilization of diplomatic tools and choosing arbitration instead makes dispute resolution way more effective, which is one of the most important factors for the parties to the dispute.

### **III.2. The International Centre for Settlement of Investment Disputes (ICSID)**

As the result of the specific nature of investment relations, legal disputes may arise which require other, alternative dispute resolution methods than the ones applied by ordinary judicial forums. The balance of powers between the parties taking their seat at the negotiating table is not equal, since countries – as a result of their sovereignty – strive to solve legal disputes on their own grounds, by their own „set of rules”, while the opportunities for enforcement of interest for a private individual are much more limited.<sup>29</sup>

Basically, there are three known methods for the settlement of investment disputes between host countries and investing private individuals / legal persons. The parties may choose ad hoc arbitration or the procedure of a permanent international court of arbitration. However, turning to the International Centre for Settlement of Investment Disputes is without doubt one of the most effective ways of solving investment disputes.

For the settlement of legal disputes in connection with investment matters the Treaty offers two alternatives: the methods of conciliation and arbitration. The term 'final and binding effect' provides the simplest way to describe the difference between the two methods. Arbitration without doubt presents the more effective way, therefore the rules applicable to it are stricter. For example if the parties already gave their consent to the procedure, they are no longer entitled to withdraw it unilaterally, since the submission to arbitration excludes all other remedies (Washington Treaty, Article 25. Paragraph (1)).

### **IV. The provisions of the Act on National Assets with regards to arbitration, and the effect it has thereon**

The first „station” of the legislative procedure connecting arbitration and national assets is indeed Act CXCVI. of 2011 on National Assets (hereinafter: „National Assets Act”), which entered into force on January 1, 2012. The National Assets Act had a negative effect on this type of alternative dispute resolution method, since in connection with national assets – with the adoption of Section 17 (3) – it excluded the opportunity of arbitration. In this case, the legislators successfully carried out a regrettable reform in the system of Hungarian arbitration, which raises lot more concerns than the benefits it has to offer, since the most recent legislative act adopted Act CXCVI. of 2011 on National Assets which –

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<sup>29</sup> László Kecskés – Józsefné Lukács: Book of Arbitrators, HVG-ORAC Lap- és Könyvkiadó, Budapest, 2012., page 100.

hiding behind the mask of increased national assets protection – expressly prohibits the opportunity of arbitration with respect to legal disputes in connection with national assets.<sup>30</sup> Section 17 (3) of the National Assets Act contains the following provision:

„In case of legal disputes regarding civil law contracts the subject of which are national assets located in territories under Hungarian sovereignty, solely the exclusive jurisdiction of a Hungarian court – excluding arbitration – , Hungarian as applicable law and Hungarian as the prevailing language may be established by the authorized with the right of disposal. For the settlement of such legal disputes arbitration shall not be established by the authorized with the right of disposal.”<sup>31</sup>

It is obvious that not even the adoption of the above mentioned section of the National Assets Act met the requirements of constitutionalism and rule of law. Section 17 (3) has been created in two steps. First, two members of the parliament submitted their proposals for amendment regarding Section 17, the wording of which is completely identical with the wording of Section 17 (3) currently in force, with the exception that the disputed phrase was missing from it at the time. In the original proposal, the part “excluding arbitration” could not have been interpreted as if it would be directed towards the exclusion of arbitration, in fact – based on grammatical interpretation – it could have been considered as if it would allow an exception from the general rule, i.e. it would have made arbitration an option to choose.<sup>32</sup>

The Minister of National Development – on behalf of the government, before the final vote – proposed the last phrase of the final text, which completely altered the proposal for amendment. As a result of this, a statutory regulation has been created which not just raises constitutional issues, but completely ignores the so far perfectly-functioning arbitration practice as well. The countless advantages of arbitration (cost-effectiveness, faster procedure, the expertise of arbitrators and their great experience in legal practice) especially attracted business associations to utilize this kind of dispute resolution method. Unfortunately Section 17 (3) of the National Assets Act created an uncertain legal environment for business actors in Hungary, which might cause significant financial conflicts of interest throughout the whole country.

The prohibition of arbitration on a statutory level was a false step by Hungarian legislation. We saw a classic example of the legislator sticking to its ideas, and striving to carry them forward so hard, that meanwhile it forgets the constitutional-legal requirements which should have been taken into strict consideration in the course of the legislative procedure. „Law is a restriction that might as well save lives”— said Titus Livius, a historiographer of ancient Rome centuries ago. Despite that this case is not specifically about the lives of humans, the issue is extremely important: economic freedom, the credibility of the state and the cohesiveness of its legal system are at stake as the result of false legislative steps.<sup>33</sup>

In terms of the objective pursued, i.e. to protect national assets, the least effective tool has been chosen by the legislator which is not in compliance with the provisions of the Fundamental Law of Hungary and obligations arising out of international treaties to which Hungary is a signing party. On the basis of this the Court of Arbitration attached to the

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<sup>30</sup> Economy and Law (HVG Orac)- Gergely Hajdú: Analysis by the Constitutional Court regarding the effects of the provisions of the National Assets Act on arbitration (2014) page 19.

<sup>31</sup> National Assets Act Section 17 (3).

<sup>32</sup> Economy and Law (HVG Orac)- Gergely Hajdú: Analysis by the Constitutional Court regarding the effects of the provisions of the National Assets Act on arbitration (2014) page 20.

<sup>33</sup> Economy and Law (HVG Orac)- Gergely Hajdú: Analysis by the Constitutional Court regarding the effects of the provisions of the National Assets Act on arbitration (2014) page 21.



Hungarian Chamber of Commerce and Industry, the Hungarian Chamber of Commerce and Industry and Safe Tender Consulting Kft. – in their constitutional complaint lodged on June 25, 2012 – requested the Constitutional Court to establish the annulment of Section 17 (3) of the National Assets Act, since it collides with international law and the provisions of the Fundamental Law of Hungary.<sup>34</sup>

#### **IV.1. Constitutional issues**

The analysis of Section 17 (3) from a constitutional perspective leads to the result of ‘collision with law’ from several aspects, therefore – in order to ensure a transparent and logical reasoning – I wish to present the individual storylines one-by-one.

#### **IV.2. Violation of Article Q) of the Fundamental Law of Hungary:**

The compliance with, and the enforcement of international treaties is an obligation, moreover an exact command, the ignorance of which is contrary to the regulations of the Fundamental Law of Hungary. Being a party to international treaties as well as the conclusion of bilateral agreements are necessarily accompanied by the obligation of the state to create harmony, coherence between its domestic law and the obligations under international law. This places a dual obligation on Hungary: on the one hand, domestic law shall not be contrary to obligations under international law; on the other hand, the competent authorities have to adopt acts which facilitate the implementation, enforcement of obligations under international law.<sup>35</sup>

Relevant international treaties violated by the entry into force of Section 17 (3) of the National Assets Act:

- a. Paragraph (2) of Article II. of Act 8 of 1964. on the implementation of the European Convention on International Commercial Arbitration done at Geneva on April 21, 1964 provides the opportunity for member states to exercise limitations – via declaration – regarding the rights and obligations established by the Convention; namely, in situations determined by the Convention an arbitration agreement shall only be concluded by legal persons which qualify as “public organisations with legal personality”. However, Hungary did not exercise any limitations at the signing of the Convention, therefore Section 17 (3) of the National Assets Act is contrary to the Convention and Paragraphs (1) and (2) of Article Q) of the Fundamental Law of Hungary.<sup>36</sup>
- b. The violation of Act 25 of 1962 on the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York on June 10, 1958 is direct as well, however, Paragraph (1) of Article II. of the European Convention on International Commercial Arbitration done at Geneva on April 21, 1961 – in the absence of reservation – places public organisations with legal personality under arbitral procedure, and this provides that the last phrase of Paragraph (1) of Article II. of the above mentioned New York Convention shall not be interpreted in a way that it prohibits the legal disputes of public organisations with legal personality in Hungary to be decided by arbitral tribunals.<sup>37</sup>

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<sup>34</sup> Codification and public administration: Zsolt Cseporán: The development of the arbitration clause in connection with national assets page 65.

<sup>35</sup> Decision of the Constitutional Court 2014/2

<sup>36</sup> Codification and public administration: Zsolt Cseporán: The development of the arbitration clause in connection with national assets page 66.

<sup>37</sup> Kecskés – Tilk: The collision of the prohibition of the arbitration clause with international law and the Fundamental Law of Hungary page 17.

c. In order to avoid the violation of Act of 1987 on the implementation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done at Washington on March 18, 1965, the ICSID – based on Paragraph (4) of Article 25 of the Convention – should have been notified by Hungary about the sphere of disputes in respect of which Hungary does not submit itself under the approval of the ICSID. However, in the absence of such the cited provision of the Act on National Assets is contrary to the Convention.

#### **IV.3. Violation of Paragraph (1) of Article B of the Fundamental Law of Hungary:**

Even the circumstances of the adoption of Section 17 (3) of the Act on National Assets raises several issues not compatible with the constitutional requirement of rule of law. The separation of powers, the protection of the private sector from state interference and the legislative process taking place within the framework of legality are all phenomena which are necessary conditions for the operation of democracy and rule of law.<sup>38</sup>

Collusion between the relations of the state's public authority and private law It is beyond dispute that the increased protection of national assets can be a reasonable objective for a state, however – given the circumstances – in this case the objective of the legislators was the protection of the state's interests by enforcing public authority in its contractual relationships, which leads to the violation of one of the basic requirements of rule of law.<sup>39</sup>

In connection with this an example can be found in the practice of the Constitutional Court, according to which a provision of law has been nullified by the plenum since it included the collusion of the state's public and private rights: it wished to ensure a dominant position for itself by enforcing its public authorities. With regards to this Decision 59/1991. (XI.19.) of the Constitutional Court is worth pointing out, according to which: „In the private sector the qualification of the state as public authority and owner shall be consequently distinguished”. Based on this, the state appears as a mere business actor in these relationships, therefore in these situations it shall not be entitled to exercise public authority. And this situation violates Paragraph (1) of Article B) of the Fundamental Law of Hungary, moreover it simultaneously results in the abuse of legislative powers, which will be presented in detail later on.

#### **IV.4. The violation of Paragraph (3) of Article T) of the Fundamental Law of Hungary**

Finally – as a last reason – it has to be emphasized that with the entry into force of Section 17 (3) of the Act on National Assets the following provision of the Fundamental Law has been violated: “A provision of law shall not be contrary to the Fundamental Law of Hungary”. In this case it can be stated that – even in the absence of the previously mentioned concerns – this provision is generally violated by the cited phrase of the Act on National Assets.

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<sup>38</sup> Economy and Law 2014/10 (HVG Orac)- Gergely Hajdú: Analysis by the Constitutional Court regarding the effects of the provisions of the National Assets Act on arbitration (2014) page 21.

<sup>39</sup> Hajdú: i. m. page 22.

## V. A new legislative process

However, following the closure of the Constitutional Court's procedures the issue became actual once again, since with Bill no. T/2250. on the investments in connection with the sustainment of the capacity of Paks Nuclear Power Plant<sup>40</sup> and on the amendment of relating laws (hereinafter: "Bill") submitted on December 1, 2014 a new legislative process was launched.<sup>41</sup>

The proposal of the Minister of National Development (the Government) is important in connection with the subject since it contains such basic provisions relating to national assets and arbitration which take the domestic regulation of these topics to a completely different direction.<sup>42</sup>

According to Section 33 (1) of the Bill the following provision takes the place of Section 17 (3) of the Act on National Assets:

„Except as provided by international treaties, in case of legal disputes regarding civil law contracts the subject of which are national assets located in territories under Hungarian sovereignty, solely the exclusive jurisdiction of a Hungarian court, Hungarian as applicable law and Hungarian as the prevailing language may be established by the authorized with the right of disposal. The exclusiveness of the jurisdiction of Hungarian courts does not affect the right of agreeing on arbitration.”<sup>43</sup>

The connected argument reveals us the opinion – which is the opposite of the previous legislations – of the legislator regarding the proposal:

“ The amendment of Act CXVI of 2011 on National Assets is not connected closely to the investments carried out in relation to the Paks Nuclear Power Plant, but it is trying to broadcast a much more important message towards those who apply the law: by the amendment of the Act on National Assets and the temporary regulations related to the amendment the legislator disambiguates a very important international legal principle, namely that an interstate agreement shall be considered as a *lex specialis*. However, the practice of law had known and used this principle for a long time, therefore this regulation is not novelty at all, and it is not a retrospective legislation.”

In addition, the proposal abrogates Section 4. of Act LXXI of 1994 on Arbitration procedures<sup>44</sup>. With this abrogation the proposal would also deregulate several rules which are restricting the application of arbitration agreements in some cases. According to this, arbitration could be used in several occasions being regulated in Chapters XV-XXIII of Act III of 1952 on the Code of Civil Procedure.<sup>45</sup>

## VI. Questions occurred after the amendment

However, on the one hand the concerns raised by the previous law seems to have been taken away by the proposal, as well as the dubious commitment of the Constitutional Court

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<sup>40</sup> The Paks Nuclear Power Plant (Hungarian Paksi atomerőmű), located 5 kilometres (3.1 mi) from Paks, central Hungary, is the first and only operating nuclear power station in Hungary. Altogether, its four reactors produce more than 40 percent of the electrical power generated in the country.

<sup>41</sup> Codification and public administration: Zsolt Cseporán: The development of the arbitration clause in connection with national assets page 65.

<sup>42</sup> Codification and public administration: Zsolt Cseporán: The development of the arbitration clause in connection with national assets page 66.

<sup>43</sup> T/2250

<sup>44</sup> See the 35th Section of the proposal.

<sup>45</sup> Act III of 1952 on the Code of Civil Procedure

seems to be reconciled, but on the other hand several concrete questions could be raised in relation with the new proposal which could be a trailing of the coat for the legislator.<sup>46</sup>

1. The fate of the constitutional requirements imposed by the Constitutional Court  
The Court in its 14/2013 (VI. 17.) AB regulation imposed a constitutional requirement referring to Section 4. of the Act on Arbitration procedures and to Section 17 (3) of the Act on National Assets. However, the entry into force of the proposal extinguished the ground on which the imposed requirement was based. This fact questions the reasonableness and the need for the requirement set forth by the Constitutional Court.<sup>47</sup>

## VII. Questions raised by the proposal

Although on the one hand, the proposal raised several serious issues with its style of regularization, the doubts of the Constitutional Court and the animosity towards the regulation seems to be ceased by the new proposal. On the other hand however, many more questions could and will be asked regarding the proposal, and these questions need to be, or at least should be answered.

1. The fate of the constitutional requirements imposed by the Constitutional Court  
The Court in its 14/2013 (VI. 17.) AB regulation imposed a constitutional requirement referring to Section 4. of the Act on Arbitration procedures and to Section 17 (3) of the Act on National Assets. However, the entry into force of the proposal extinguished the ground on which the imposed requirement was based. This fact questions the reasonableness and the need for the requirement set forth by the Constitutional Court.<sup>48</sup>

2. The system of the arbitral clause:<sup>49</sup>

By overruling Section 4. of the Act on Arbitration Procedures, the proposal would put an end not only to the restrictions found in the Act on National Assets, but to the restriction of implementing an arbitration clause in Hungarian jurisdictions in an arbitration agreement.<sup>50</sup>

## VIII. Conclusion

According to the above mentioned, we can set out that the proposal laid down an environment, where completing the positive requirements- ie. i) at least one of the parties has to be a person or an undertaking engaging in economical activity and the dispute has to be related to this activity, ii) the parties can freely stipulate the subject of the proceeding, iii) the fact that the parties will settle their disputes through arbitration has to be set forth in an arbitration agreement<sup>51</sup> – of an arbitration clause would be enough and the previous negative regulation should not be considered anymore. On the one hand this new system is really

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<sup>46</sup> Gergely Hajdú: The constitutional test of the relation between the Act on National Assets and the Act on Arbitration. Law and Economy 2014/10. sz. 21.

<sup>47</sup> Gergely Hajdú: The constitutional test of the relation between the Act on National Assets and the Act on Arbitration. Law and Economy 2014/10. sz. 21.

<sup>48</sup> Vö. László Sólyom: Arbitration in Hungary. Osiris, Budapest 2001. 367-368.

<sup>49</sup> The parties may also wish to stipulate in the arbitration clause: the law governing the contract; the number of arbitrators and the place of arbitration; and/or the language of the arbitration. In principle, parties should also always ensure that the arbitration agreement is in writing and carefully and clearly drafted.

<sup>50</sup> Vö. László Sólyom: Arbitration in Hungary. Osiris, Budapest 2001. 367.o

<sup>51</sup> Vö. Vbt.

beneficial, but on the other hand it could give ground for another huge pack of questions, regarding the system of the restrictions connected to the arbitration clauses.<sup>52</sup>

So as we can see, the problem connected to the relation of the restrictions regarding the usage of the arbitration clauses and the Act on National Assets seems to be solved by the proposal, though the proposal raises a lot of doubts which could pop concerns up regarding the constitutionality and rightfulness of Hungarian laws regulating the arbitration procedures.<sup>53</sup>

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<sup>52</sup> Codification and public administration: Zsolt Cseporán: The development of the arbitration clause in connection with national assets page 71.

<sup>53</sup> Codification and public administration: Zsolt Cseporán: The development of the arbitration clause in connection with national assets page 72.