MEANS OF INTERFERENCE INTO ARBITRATION BY STATE COURTS: COMPARATIVE ANALYSIS OF THE UNCITRAL MODEL LAW, GERMAN AND HUNGARIAN LAW

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1. INTRODUCTION

Nowadays, international commercial arbitration is widely considered as an effective alternative of state court jurisdiction, it has become an essential feature of today's globalized economy. The more popular and widespread international commercial arbitration gets, the more urgently the question rises: what kind of relationship is there between arbitration and the activity of state courts? Has arbitration been acknowledged as a totally separate institution with is own methods and devices or is it subsidiary to state courts in the meaning of the word that the latter might have some effect on it?

Before answering these questions, let us examine the theoretical basis and necessity of arbitration. The first factor is that the legal culture of a certain country affects the possibility of institutionalizing arbitration. Furthermore, it is also one of the logical consequences of party autonomy and freedom of contracting, i.e. if a party obliges himself through private law contracts, he also has the right to enforce performance of the contract by arbitration and not being obliged to turn to state courts. This is required by the idea of constitutional state, too, which implies that in the 21st century, exclusivity of state court jurisdiction is not appropriate because special needs of special sectors must be taken into account as well. The interests of the parties are best fulfilled if there are several ways of dispute resolution besides just state courts.

The necessity of arbitration lies in the following factors. First, inflexible and not easily modifiable procedural rules of state court jurisdiction do not harmonize with the interests of the parties who would prefer freer, quicker and more effective procedure and a decision serving their interests at the most. Another factor deriving from strict procedural rules of state court jurisdiction is that the procedure is public which might be disadvantageous and awkward for the parties who would prefer not to 'publicize' their confidential business-related affairs. Similarly disadvantageous may be the course of judicial control of court decisions. On one hand it might be preferable because it allows of avoiding incorrect decisions but on the other hand, it can unreasonably prolong the procedure and raises its costs. This is not very useful in a dynamically changing economy. Turning to a broader aspect, in international legal disputes, a party may be afraid of foreign procedural rules, i.e. those of the state court making the decision[2].

Institutionalization of arbitration has several consequences. Firstly, obligations of the constitutional state will not be shared between state jurisdiction and arbitration: safeguarding legality of dispute resolution and excluding arbitrariness will be a common and mutual obligation of the two institutions. Therefore, state jurisdiction and arbitration are becoming equal and co-operative entities. State jurisdiction stands by arbitration without interfering into it unnecessarily. Requesting the help of state courts is not compulsory but a possibility.

Arbitration is a separate legal institution with its own advantages which are the following:

- The procedure is quicker, therefore, it does not interfere into the normal course of business for a longer time which might reduce the costs as well.
- The procedure is not public, thus, the concerned companies etc. do not have to fear for being forced 'to wash their dirty linen in public'.

[2] Prof. Dr. Günther Hirsch: Schiedsgerichte – ein Offenbarungseid für die staatlichen Gerichte?, SchiedsVZ Zeitschrift für Schiedsverfahren 2/2003, p. 49-50.

- Arbitrators have special skills and knowledge possession of which could not be expected from state court judges dealing with so many different cases and issues. Thus the parties may feel the procedure more convenient and favourable, being aware of the fact that the judges making the decision are experts of the field concerned.
- Coming to the closing point of a procedure, another advantage of arbitration is that the decision is utter and it can be enforced immediately (with special exceptions of course) by related international conventions.

The issue of the relationship between arbitration and state court jurisdiction arises at this point of the analysis. Regarding the status of the two institutions within the system of dispute resolution, state jurisdiction is situated at one end of an imaginary line of process, while arbitration, as an alternative of state jurisdiction, can be placed somewhere in the middle between state jurisdiction and 'self-help' which is situated at the other end of the imaginary line. The ideal relationship between arbitration and state jurisdiction would be a complementary one where both institutions would add something to the other one according to the interests and requests of the parties.

State courts have two main functions concerning arbitration: firstly, they 'roll over' the arbitration process if it is stuck (e.g. they nominate an arbitrator if one of the parties failed to do it, or play an important role in determining the scope of arbitral jurisdiction); secondly, they have control over arbitration to some extent (e.g. when setting aside an award by the arbitral tribunal).

This article will examine the relationship between state court jurisdiction and arbitration according to the UNCITRAL Model Law (hereinafter: MAL), German and Hungarian law. Before the thorough analysis, these sources of law will be introduced briefly. The MAL, accepted on 21 June 1985[3] and adopted by 42 countries so far[4], creates the foundations for the unification of the rules of arbitration by consolidating advantageous characteristics of regulations and international experience so far and by comprehending requirements in order to make arbitration more effective. Therefore, the MAL is eligible for implementation into domestic laws and for winding up 'double regulation' by national and international provisions. The MAL is being revised continuously by UNCITRAL Working Group II. (International arbitration and conciliation) which plays an important part in specification, actualization and unification of international commercial arbitration regulations. Both examined countries have adopted the MAL with slight individual differences which will be introduced in this study. The German regulation can be found in Book 10 (Zehntes Buch) of the ZPO (German Code of Civil Procedure) from Art. 1025 to 1048. Hungary, on the contrary, has a separate source of law on arbitration, i.e. 'Act of the Parliament No. 71 of 1994 on Arbitration' ('1994. évi LXXI. törvény a választottbíráskodásról').

[3] By UNCITRAL decision no. 40/72 and confirmed by the UN General Assembly.

[4] Australia, Azerbaijan, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran (Islamic Republic of), Ireland, Jordan, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, Republic of Korea, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; within the United States of America: California, Connecticut, Illinois, Oregon and Texas; Zambia, and Zimbabwe (status of 26 September 2003, source: http://www.uncitral.org/en-index.htm)

2. MEANS OF STATE COURT INTERVENTION INTO ARBITRATION – IN GENERAL

The MAL recognizes state court intervention into arbitration in nine main cases, which are:

1. the substantive claim is brought before a state court (Art. 8.)
2. awardable interim measures by a state court (Art. 9.)
3. appointment of arbitrators (Art. 11.)
4. challenge procedure (Art. 13.)
5. termination of the arbitrator's mandate (Art. 14.)
6. jurisdiction of the arbitral tribunal (Art. 16.)
7. court assistance in taking evidence (Art. 27.)
8. setting aside an arbitral award (Art. 34.)
9. recognition and enforcement of an arbitral award (Art. 35-36.)

These cases can be divided into two groups.

The first one includes cases in connection with appointment, challenge and termination of the mandate of an arbitrator (Art. 11, 13, 14.), jurisdiction of the arbitral tribunal (Art. 16.) and setting aside an arbitral award (Art. 34.). The latter cases are referred to in Art. 6 MAL as functions which shall be borne by the court or other authority (e.g. chamber of commerce etc.) designated by each State. This designation does not mean that only one court or other authority would have the right to deal with these cases, instead, assigning certain *types* of courts or authorities would be preferable. Therefore, the wording of the MAL should not be interpreted too narrowly. Thus, designating a whole court or one of its chambers is not necessary either, assigning the task to the chairman of a court or a tribunal would suffice as well, since there are only administrative questions to decide on. The MAL allows for the designation of other outsider authorities e.g. international arbitration commission, institution or other institute dealing with international affairs. However, the two examined national laws stick to the 'traditional' solution: the ZPO[5] gives this power to the *Oberlandesgericht* (Provincial Court of Appeal) distinguishing several cases, and the Hungarian Arbitration Act[6] designated the county court which makes the decision in non-litigation process[7].

The remaining functions, i.e. court assistance in taking evidence (Art. 27.) recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection (articles 8 and 9), and recognition and enforcement of arbitral awards (articles 35 and 36).

After all, what does state court intervention mean? The Explanatory Note to the MAL[8] explains that the current tendency is to urge limitation of state court intervention. Art. 5 MAL provides that "/i/n matters governed by this Law, no court shall intervene except where so provided in this Law". This rule, however, does not answer the question what exact role state courts have

[5] ZPO Art. 1062.
[6] Art. 51. An exception is the ordering of interim measures which is the obligation of the municipal court on the territory of which taking evidence can be carried out the most effectively. (Art. 37)
[7] Except for the proceedings on setting aside an arbitral award. There is no remedy against the decision. (Art. 53)
[8] www.uncitral.org/english/texts/arbitration/ml-arb.htm

but it "guarantees the reader and user that he will find all instances of possible court intervention in this Law, except for matters not regulated by it (e.g., consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits)"[9].

In the following chapters, the means of intervention provided for in the MAL, the ZPO and the Hungarian Arbitration Act will be presented and compared, and practical cases will be analysed.

3. ARBITRATION AND SUBSTANTIVE CLAIM BEFORE COURT (ART. 8 MAL)

According to Art. 8 MAL, a court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. By such an action, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court. Art. II (3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the New York Convention) sets out nearly the same criteria but Art. 8 MAL refers to each and every court of a state and it is not restricted to arbitration agreements where the place of arbitration is in the same country where the court is. Art.8 MAL is imperative, therefore, a certain legal dispute must be referred to arbitration unless the exceptions apply. Thus, the possibility of referring a case to arbitration is a negative consequence of the arbitration agreement because the disputes are always resolved by arbitration regardless of whether or not the arbitration clause contains the exclusion of state courts.

Now, let us examine the national laws. The ZPO[10] contains exactly the same provision apart from two differences. While the MAL designates 'submitting his first statement on the substance of the dispute' as deadline, the German law provides for 'the first oral hearing'. The other difference concerns the role of state courts by saying that prior to the constitution of the arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible[11].

The Hungarian Arbitration Act is a bit different because here, the court before which an action was brought in a case which is the subject of the arbitration agreement, must dismiss the claim without issuing a warrant or terminates the proceedings on the request of any party except when the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed[12]. In the latter case, a party must request termination before the submission of the counterclaim, and legal effects of the claim remain in force until 30 days[13]. The difference compared to the MAL is that, in the latter cases, it refers the dispute to arbitration. Yet, the Hungarian Act is not against arbitration either, whatsoever it repeats the wording of the Mal by stating that arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court[14].

[9] MAL Explanatory Note, B. 1. b) 16.
[10] ZPO Art. 1032.
[11] ZPO Art. 1032 (2)
[12] Art. 8 (1)
[13] Art. 8 (1), (2)
[14] Art. 8 (3)

Practical cases show that interpretation of Art. 8 MAL is not always unanimous. Several courts have stood for narrow interpretation and exceptionality[15], while in the *Nanisivik I.* case[16] the court explained that referring the case to arbitration is compulsory if the requirements of Art. 8 MAL have been fulfilled, and so is the termination of the state court proceedings even if some issues are not subject to arbitration. This latter rule was refined in *Traff et al. v. Evancic et al*[17]. where the court ruled that the state court proceedings must be terminated if any aspect of the dispute must be resolved by arbitration. The contrary point of view, presence of 'residual jurisdiction' of the state courts was stressed in another case[18] which contends that the court may refuse to refer the dispute to arbitration if it finds that one of the parties named in the proceedings is not a party to the arbitration agreement, the dispute is not subject to the arbitration agreement, or if the application came too late.

An important feature of a substantive claim before court is the significance of deadline. Deadline according to the MAL is 'submitting his first statement on the substance of the dispute', i.e. 'entry of appearance'. The consequence of missing the deadline is that the state court proceedings cannot be stayed and the dispute cannot be referred to arbitration. The Working Group drafting the MAL originally intended to include in the provision that "the failure of the party should have a wider effect precluding that party from relying on the arbitration agreement also in other contexts and proceedings"[19]. In the end, these lines were not incorporated into the text because they could not find a sufficiently general wording which applies to all aspects of the question. Nevertheless, we can contend in general that the aim of the provision on pursuing arbitral proceedings is to preclude dilatory tactics by the parties.

Relevant practical cases prove that keeping the deadline is a key issue. The question is how to interpret the 'entry of appearance'. The easiest issue is if the defendant participates in the litigation process from its commencement. The British Columbia Supreme Court[20] qualified this as the defendant's approval of state court proceedings and did not refer the case to arbitration. The Ontario Court of Justice stressed that the requests of staying the state court proceedings is late if it is submitted along with the counterclaim. The right procedure is, the court stated, to apply for the stay after receiving the statement of claim but before submitting a statement of defence[21]. Similar decisions were made when the court stated that there was no dispute to be referred to arbitration if the defendant had admitted the claim as to liability and quantum[22]. However, admission of liability can be a difficult question on its own. For example, in the *Zhan Jiang E & T Dev Area Service Head Co. V. An Hau Company Limited* case[23], the court explained that admission of liability in a letter and offering compensation does not constitute unequivocal admission of liability. Nevertheless, a decision contrary to the few above was made in *A. Bianchi S.R.L. v. Bilumen Lighting Ltd.* where the court explained that "the delay in invoking

[15] Navionics v. Flota Maritima Mexicana S.A. et al - http://www.interarb.com/clout/clout015.htm
[16] Nanisivik Mines Ltd. And Zinc Corporation of America v. Canarctic Shipping Co. Ltd. - http://www.interarb.com/clout/clout070.htm

[17] http://www.interarb.com/clout/clout180.htm
[18] Gulf Canada Resources Ltd. v. Arochem International Ltd. - http://www.interarb.com/clout/clout031.htm
[19] A/CN.9/246, 22.
[20] Queensland Sugar Corp. v. „Hanjin Jedda" (The) - http://www.interarb.com/clout/clout181.htm
[21] ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH - Mealey's International Arbitration Report, May 1995, p. 11.
[22] Joong and Shipping Co. Limited v. Choi Chong-sick (alias Choi Chong-sik) and Chu Ghin Ho Trading as Chang Ho Company - http://www.interarb.com/clout/clout063.htm
[23] http://www.interarb.com/clout/clout061.htm

the arbitration clause and the step undertaken in the judicial proceedings did not amount the renunciation of the arbitral procedure (...) and mandatory nature of the provision and the absence of judicial discretion required that the parties be referred to arbitration"[24].

Besides keeping to the time-limits, subject-matter issues play also an important role in admitting a case to be referred to arbitration. The High Court of Hong Kong favoured the validation of the parties' rights at the highest level possible, and laid down that if the parties express their intention to arbitrate, the dispute *can* be referred to arbitration even if an unspecified third country, a non-existent organization or non-existent rules were contained in the arbitration agreement[25]. The situation gets a bit more complicated if the parties do intend to arbitrate but somehow their agreement contains an arbitration and a state court clause at the same time. In such a case the court ruled that arbitration is not excluded even if there is a provision of referring legal disputes to a state court, whatsoever, this question must be decided upon by the arbitral tribunal since the arbitral tribunal decides on its own jurisdiction (Kompetenz-Kompetenz)[26].

Another court decision concerns the scope of referring a case to arbitration. Accordingly, if one defendant requests stay of the state proceedings and reference to arbitration, a concessive court decision does not extend to other co-defendants[27]. A further important subject-matter aspect may be the personality of the arbitrator. No doubt that the state court did not refer the dispute to arbitration when it found out that doing so would lead to the awkward situation that one of the contracting parties would have been an arbitrator, because in doing so, spirit of arbitration and the principle of impartiality would have been harmed[28].

4. INTERIM MEASURES BY A STATE COURT (ART. 9 MAL)

The possibility of ordering interim measures amounts to an important exception from the general principle that state court cannot interfere into arbitration proceedings. It is also supported by the fact that, all in all, it is not contrary to the parties' intentions and does not stay arbitral proceedings, whatsoever, ordering interim measures fosters the efficiency of arbitration and the expected results.

Art. 9 MAL, Art. 1033 ZPO and Art. 37. (1), (2) of the Hungarian Arbitration Act provide for the criteria of ordering interim measures by a state court. "It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure." (MAL). The wording 'not incompatible' should mean that requesting interim measures is not incompatible with the arbitration agreement, it is neither prohibited, nor to be regarded as a waiver of defence. The provision applies to any country to the court of which the request is made, it may not be treated as an objection against or disregard of a valid arbitration agreement. This argumentation was

[24] http://www.interarb.com/clout/clout186.htm

[25] Lucky-Goldstar International (H.K.) Limited v. Ng Moo Kee Engineering - http://www.interarb.com/clout/clout057.htm
[26] Mind Star Toys Inc. v. Samsung Co. Ltd - http://www.interarb.com/clout/clout032.htm; Rio Algom Limited v. Sammi Steel Co. - http://www.interarb.com/clout/clout018.htm
[27] Stancroft Trust Limited, Berry and Klausner v. Can-Asia Capital Company, Limited, Mandarin Capital Corporation and Asiamerica Capital Limited - http://www.interarb.com/clout/clout017.htm
[28] Charbonneau v. Les Industries A.C. Davie Inc et al - http://www.interarb.com/clout/clout066.htm

followed in a court decision[29] when stressing that "interim court orders designed to protect the applicant from the risk of being unable to enforce a final arbitral award were not incompatible with arbitration", furthermore, staying the proceeding would not set aside the interim measure because the original claim does not merge into the arbitration award.

What do national laws provide for the issue of interim measures? ZPO[30] uses the expression 'preliminary interim measures of protection' which should be related to the subject of arbitration. The Hungarian law[31] deals with measures of protection separately which can be ordered if the party requesting it proves existence, quantum and expiry of the claim with an official document or a private document representing conclusive evidence. The certification by the domestic arbitral tribunal proving that arbitration process has been commenced must be submitted along with the request.

Practical cases point to the core of ordering interim measures. The most important questions are: what can be regarded as an interim measure and under what circumstances can a court order them?

Answering the first question, two examples must be cited. In one case the court decided that a *Mareva* injunction falls under the scope of Art. 9 MAL since the protection afforded by it is capable of reducing in the risk of the amount of the claim[32]. Yet, in *Vibroflotation A.G. v. Express Builders Co. Ltd.*[33] the court found that issuing a *subpoena duces tecum* does not fall under the scope of Art. 9 MAL but Art. 27 MAL applies to it.

A very general answer was given to the question on the circumstances of ordering an interim measure in *Delphi Petroleum Inc. v. Derin Shipping and Training Ltd.*[34] where the court explained that a court jurisdiction to order interim measures according to Art. 9 MAL but it should avoid taking measures conductive to dilatory tactics of the parties.

As practical cases have shown as well, Art. 9 MAL is closely related to Art. 27 MAL, problems of interpretation and delimitation might occur. The latter provision will be examined later with regard to these problems.

5. APPOINTMENT OF ARBITRATORS (ART. 11 MAL)

The main rule in appointing arbitrators is the most entire freedom possible in determining the procedure of appointing their arbitrators[35]. This is only restricted by means which can be used if the parties did not make such an agreement or if any of them acted contrary to it.

According to the examined legal sources, two main spheres must be introduced: the situation if the parties did not agree on the appointment of the arbitrators at all, and if there is such an agreement but it is not fulfilled accordingly. Looking at the first issue, the MAL, the ZPO and

[29] Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd. - http://www.interarb.com/clout/clout071.htm
[30] ZPO Art. 1033.
[31] Art. 37. (1), (2)
[32] Katran Shipping Co. Ltd. v. Kenven Transportation Ltd. - http://www.interarb.com/clout/clout039.htm
[33] http://www.interarb.com/clout/clout077.htm
[34] http://www.interarb.com/clout/clout068.htm
[35] Art. 11 (2) MAL, ZPO Art. 1035 (1), Hungarian Arbitration Act Art. 14. (1).

the Hungarian Arbitration Act are unanimous in the question that failing such an agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator. If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in accordance with article 6[36], and the same applies in cases with a sole arbitrator.[37]

The second issue is also the same in all three legal sources. This affects the situation when the agreement on the procedure of appointing the arbitrators is not fulfilled accordingly. The concordant provisions contain that in such a case a party fails to act as required under such procedure, or the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority specified in accordance with article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment[38]. These provisions are aimed at ensuring continuity of the procedure and avoiding dilatory tactics of the parties[39]. Therefore, the right to ask for state court assistance cannot be waived either.

After having clarified the procedure of appointing arbitrators, the question rises what factors the court should consider by the appointment. All three legal sources are unified in the opinion that regard must be taken to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties[40]. This provision was emphasized and refined by the High Court of Hong Kong when explaining that when appointing an arbitrator on behalf of the party in default, the court is obliged to ensure that no sense of grievance is felt, however unreasonable that attitude might appear to others[41].

The two examined national laws govern the question more or less the same but there are slight differences. The MAL provides that a court decision on appointing an arbitrator shall be subject to no appeal[42] and the MAL Commentary also lays down that the decision is final[43]. This rule is not followed by either national laws[44].

[36] In Germany the Oberlandesgericht (ZPO Art. 1062), in Hungary the county court (Art. 53); cf. Supra 6.
[37] Art. 11 (3) MAL, ZPO Art. 1035 (3), Hungarian Arbitration Act Art. 14. (2)-(4).

[38] Art. 11 (4) MAL, ZPO Art. 1035 (4), Hungarian Arbitration Act Art. 15.
[39] A relevant case is *Safond Shipping Sdn. Bhd. V. East Asia Sawmill Corp.* - (http://www.interarb.com/clout/clout060.htm) where the court found that it is contrary to the spirit of arbitration, constitutes a breach of the obligation to arbitrate and unacceptable defiance to the court proceedings if the party in default, will not, on the order of the court, appoint his arbitrator.
[40] Art. 11. (5) MAL, ZPO Art. 1035. (5), Hungarian Arbitration Act Art. 16.
[41] Fung Sang Trading Limited v. Kai Sun Sea Products and Food Company Limited - in: Yearbook Commercial Arbitration XVII, Deventer, Netherlands, Kluwer, 1992, p. 289-303.
[42] Art. 11 (5) MAL
[43] Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary-General (A/CN.9/264)
[44] ZPO Art. 1035, Hungarian Arbitration Act Art. 11-17.

6. CHALLENGE PROCEDURE (ART. 13 MAL)

Similarly to the appointment of arbitrators, parties are free to agree on the challenge procedure as well[45]. Next, the structure of the provision follows that of the appointment of arbitrators by saying that failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days (ZPO: two weeks) after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any ground for challenge, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.[46]

The next provision is shared by all three regulations concerning the fact that if a challenge under any procedure agreed upon by the parties or under the request of challenge is not successful, the challenging party may request, within thirty days (in the wording of the ZPO: 'one month' but the parties can agree on a different time-limit as well) after having received notice of the decision rejecting the challenge, the court or other authority to decide on the challenge; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award[47].

The right to turn to state courts in deciding upon the challenge cannot be waived – not even is cases where the forum provided for in Art. 6 MAL is an 'other authority'. Also, it is a "compromise solution with regard to the controversy of whether any resort to a court should be allowed only after the final award is made or whether a decision during the arbitral proceedings is preferable. Thus, advantageous features of both apply because it prevents dilatory tactics, removes the challenged arbitrator in time and saves time and costs as well. The important requirement of quick procedure in arbitration is not violated either, since the court can interfere during the course of the arbitral proceedings, there is a strict deadline for the party to make the request, and the court makes a final decision. Therefore, principles of arbitration are not harmed even if in the end the court finds that the challenge was unfounded.

7. TERMINATION OF THE ARBITRATOR'S MANDATE (ART. 14 MAL)

The three legal sources[48] are unanimous in providing for the termination of the arbitrator's mandate except for the order of the rules which is different in the Hungarian Arbitration Act. All of them lay down that if an arbitrator becomes de iure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority to decide on the termination of the mandate. This decision shall be subject to no appeal according to the MAL, but the ZPO and the Hungarian Arbitration Act do not contain such a provision. Furthermore, if an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground for challenge. The three sources of law use different expressions in determining the reason for the

[45] Art. 13 (1) MAL, ZPO Art. 1037 (1), Hungarian Arbitration Act Art. 19 (1).
[46] Art. 13 (2) MAL, ZPO Art. 1037 (2), Hungarian Arbitration Act Art. 19 (2).
[47] Art. 13 (3) MAL, ZPO Art. 1037 (3), Hungarian Arbitration Act Art. 20. The MAL does but the two national laws do not contain that such a decision by the court is subject to no appeal.
[48] Art. 14 MAL, ZPO Art. 1038, Hungarian Arbitration Act Art. 21-22.

termination of the mandate. The MAL and the ZPO include "an arbitrator becomes de iure or de facto unable to perform his functions or for other reasons fails to act without undue delay an arbitrator becomes de iure or de facto unable to perform his functions or for other reasons fails to act without undue delay", while the Hungarian law mentions "an arbitrator does not meet the requirements of challenge because a change that occurred after the arbitrator accepted the nomination, or the arbitrator became de facto unable to perform his duty". The Explanatory Note states that the most flexible word of broadest meaning is 'failure', and determines which factors should be taken into account in determining whether the arbitrator committed such a failure. These are e.g. what the arbitrator was obliged to under the arbitration agreement; if the arbitrator did not act at all, did he cause undue delay in the exact circumstances and did it constitute a 'failure'; how can the failure be evaluated in the light of efficiency of the arbitrator's work and his abilities?[49]

In practice, the most common cases of court ('other authority') intervention are in connection with acting in undue delay, significantly less cases concern the issue of becoming unable to perform the functions. In addition, Art. 15 MAL[50] provides some more reasons for terminating an arbitrator's mandate and in those cases a substitute arbitrator is appointed. These reasons are withdrawal from the office for any other reason or revocation of the arbitrator's mandate by agreement of the parties or 'any other case'.

8. JURISDICTION OF THE ARBITRAL TRIBUNAL (ART. 16 MAL)

Before analysing the relevant provisions of the MAL, the ZPO[51] and the Hungarian Arbitration Act[52] regard has to be paid to a terminological issue. While the MAL speaks about 'jurisdiction', the ZPO uses the word 'Zuständigkeit' and the Hungarian Act 'hatáskör'. The latter two are not unambiguous equivalent to 'jurisdiction', they rather extend to 'scope authority' which comes into question only a positive decision was made concerning jurisdiction which means in those legal systems that that particular country has the right to deal with the case. However, the word 'jurisdiction' will be used with regard to the latter statement but assuming that they have the same meaning concerning these provisions.

According to the MAL, the arbitral tribunal may rule on its own jurisdiction[53], including any objections with respect to the existence or validity of the arbitration agreement (Kompetenz-Kompetenz). For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso iure the invalidity of the

[49] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, www.uncitral.org/english/texts/arbitration/ml-arb.htm.
[50] The same as ZPO Art. 1039 and Hungarian Arbitration Act Art. 23.
[51] ZPO Art. 1040.
[52] Hungarian Arbitration Act Art. 24-25.
[53] This means that it is the arbitral tribunal that shall decide on its own jurisdiction first and foremost. The court referred to this finding in *Fung Sang Trading Limited v. Kai Sun Sea Products and Food Company Limited* (cf. Supra 40) where the plaintiff turned to the court to appoint an arbitrator. The court decided that in doing so, it may not deal with the question whether there was a valid arbitration agreement between the parties, because its first duty is to decide upon its own jurisdiction. Consequently, it held that the decision of the arbitral tribunal was neither final nor exclusive but subject to immediate review under Art. 16 (3) MAL. The same opinion was shared by the Supreme Court of Bermuda in *Skandia International Insurance Company and Mercantile & General Reinsurance Company and various others* where it found that a challenge to the existence, validity and scope of the arbitration agreement was a matter to be first determined by the arbitral tribunal under Art. 16 (3) MAL.(http://www.interarb.com/clout/clout127.htm)

arbitration clause (separability)[54]. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified[55]. The arbitral tribunal may rule on a plea the arbitral tribunal does not have jurisdiction either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award[56]. The ZPO and the Hungarian Arbitration Act literally follow these rules except that they do not provide for the fact that the decision shall be subject to no appeal, however, Art. 53 of the Hungarian Act includes a general provision that "the court – except for the procedure of setting aside an arbitral award – conducts non-litigation process without the cooperation of lay assessors. The decision shall be subject to no appeal". Another difference to the wording of the MAL is that the ZPO uses a time limit of 'one month' instead of 'thirty days'.

According to Art. 16 MAL, decision of the arbitral tribunal concerning its own jurisdiction is subject to court control[57]. If jurisdiction of the arbitral tribunal was decided upon in the award on the merits, the objecting party may initiate court control by requesting setting aside of the award. The situation is the same if the jurisdiction of the arbitral tribunal was decided upon as a preliminary question because dilatory tactics of the parties shall be prevented. Three protection mechanisms were included into the proceedings: short time-limit of thirty days, exclusion of appeal and that arbitral proceedings can be continued in between. The disadvantage of the solution is, however, that lengthy proceedings and taking evidence may lead to considerable waste of time and money. Advantages and disadvantages are hard to weigh at a general level, therefore, in exact cases, discretion should be given to the courts in order to be able to decide with regard to the given circumstances whether instant court control is needed or a procedural ruling which can be contested only in an action for setting aside the award on the merits.[58]

Art. 16 MAL does not deal with the case if the arbitral tribunal finds that it has no jurisdiction to hear the case. A previous draft of the MAL contained a relevant provision that "A ruling by the arbitral tribunal that it has no jurisdiction may be contested by any party within 30 days before the Court specified in Art.6.". The aim of the provision was not to force the arbitrators to continue the proceedings but to obtain a decision on the existence of a valid arbitration agreement. The drafters had the opinion that such an arbitral ruling is final and binding concerning these arbitration proceedings but did not answer the question whether the substantive claim is to be decided by the state court or the arbitral tribunal. Therefore, as such a

[54] Art. 16 (1) MAL
[55] Art. 16 (2) MAL
[56] Art. 16 (3) MAL
[57] In *International Civil Aviation Organization (ICAO) v. Tripal Systems Pty. Ltd.* the court held that once the arbitral tribunal had declared itself competent, the Superior Court would be competent to review this decision in accordance with Art. 16 (3) MAL, if a party requested so. (http://www.interarb.com/clout/clout182.htm)
[58] Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary-General (A/CN.9/264): Article 16, para 13.

provision was not incorporated in the MAL, it is up to the national source of law on arbitration or civil procedure to determine whether court control can be requested against the decision of the arbitral tribunal denying its own jurisdiction[59].

9. COURT ASSISTANCE IN TAKING EVIDENCE (ART. 27 MAL)

Significance of the MAL providing for court assistance in taking evidence lies in two main aspects. First, before the introduction of the MAL, some national laws did not contain any regulation on the issue, i.e. nowadays, it has become a general requirement for the countries to implement such rules. Secondly, the MAL creates the frame for a detailed national regulation which is, of course, elaborated by the countries themselves with regard to national habits and characteristics of civil procedure.

Again, the MAL and the ZPO contain nearly the same wording, while the Hungarian Arbitration Act has a little bit different text and structure. According to the MAL and the ZPO[60], the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of the State assistance in taking evidence. The first important factor is that the requesting party must also ask for the approval of the arbitral tribunal which prevents dilatory tactics. The second one is that the 'court' in this place is not the same as what is provided for in Art. 6 MAL (specified in ZPO Art. 37 and Hungarian Arbitration Act Art. 53 – cf. para 5-6.). Instead, the court on the territory of which the taking of evidence is the most expedient. The court may execute the request within its competence and according to its rules on taking evidence. A Canadian Court decision dealt with the interpretation of this very question and held that a court may assist in taking evidence but "it should avoid taking measures conductive to dilatory tactics of the parties". Since according to the Federal Rules of Procedure, the witness whose testimony is sought may have information on an issue in the action. This requirement was not met because the issue concerned was already decided upon by the arbitrator and the court "was not satisfied that the evidence before it demonstrated that the witness had any information"[61].

Now, there is one difference between the provisions of the MAL and the ZPO. The latter adds to the above rules that court assistance cannot only be requested in taking evidence but also in other judicial acts, and that the arbitrators are entitled to participate in any judicial taking of evidence and to ask questions.

This is how the Hungarian Arbitration Act comprehends the issue: "if taking evidence caused significant hardship or disproportionate rise of costs, the municipal court, by request of the arbitral tribunal, provides legal aid in taking evidence and applying coercive instruments necessary for the latter"[62]. This is a slightly different wording compared to that of the MAL and ZPO but a more important one is that the Hungarian law provides for measures of protection in the same article while the latter two have different articles for interim measures of protection and court assistance in taking evidence[63].

[59] Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary-General (A/CN.9/264): Article 16, para 15.
[60] Art. 27 MAL, ZPO Art. 1050.
[61] Delphi Petroleum Inc. v. Derin Shipping and Training Ltd. - http://www.interarb.com/clout/clout068.htm
[62] Art. 37 (3)
[63] Cf. Chapter 3.

By examining Art. 9 MAL, the importance of the relationship between Art. 9 and 27 MAL has already been mentioned. A court decision explained the core of the question[64]. In the instant case, the court ruled that a *subpoena duces tecum* does not qualify as an interim measure in the meaning of Art. 9 MAL, instead, it is governed by Art. 27 MAL. The court held that the subpoena was issued in accordance with Art. 27 MAL and with the approval of the arbitral tribunal. Nevertheless, such a subpoena can only be applied for in relation to an evidentiary hearing which, in that case, was held months, years before the application. Therefore, the court clarified that for court assistance in taking evidence, proper integration into the taking evidence by the arbitral tribunal is needed.

10. SETTING ASIDE AN ARBITRAL AWARD (ART. 34 MAL)

The reason why this provision was incorporated into the MAL is that previously several national laws had no separate regulation on judicial review of arbitral awards. In many cases the same rules applied to them as to normal state court decisions. This was not appropriate because the difference of state jurisdiction and arbitration requires different reasons of recourse and one of the most essential advantages of arbitration, quick procedure could not be present. MAL initiated a separate and individual regulation for arbitral awards where setting aside an arbitral award become the only possibility of recourse. The Working Group did not specify what kind of awards can be subject to recourse, and , in lack of time, it did not give a definition of 'award'.[65]

Again, this provision is nearly the same in all three legal sources[66] except that the Hungarian Act also provides that the arbitral award shall not be subject to an appeal, solely setting aside the award can be requested. According to the MAL, an arbitral award may be set aside by the court specified in article 6 in two main cases: if it is requested by a party or if the court finds any of the reasons to do so. The first group includes the following reasons for setting aside: a party to the arbitration agreement was under some incapacity in drafting the arbitration agreement; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside[67]; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law[68].

[64] Vibroflotation A.G. v. Express Builders Co. Ltd. - http://www.interarb.com/clout/clout077.htm; cf. Chapter 3.
[65] Report of the Working Group on International Contract Practices on the work of its sixth session A/CN.9/246, 129., paras. 192-194.
[66] Art. 34 (1) MAL, ZPO Art. 1059 (1), Hungarian Arbitration Act Art. 54.
[67] This latter requirement is not fulfilled if the requesting party refers to its breach by stating that the parties did not agree on the form of the award and objects to incoherent and incomprehensible reasons given by the arbitrators. *Navigation Sonamar Inc. v. Algoma Steamships Limited and others* http://www.interarb.com/clout/clout010.htm
[68] Art. 34 (2) a) MAL, ZPO Art. 1059 (2), Hungarian Arbitration Act Art. 55 (1)

The second group contains the circumstances under which a court by itself may set aside an arbitral award, which are: the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or the award is in conflict with the public policy of this State[69]. Definition of public policy is not always easy. In international practice a court held that an award is contrary to public policy if it undermines the integrity of international commercial arbitration e.g. fraud, corruption, bribery or serious procedural irregularities[70]. In Hungarian practice, the High Court of Hungary expressed that public policy does not mean only the most important constitutional values but also political aims and conceptions[71].

This list of reasons for setting aside an award is exhaustive and cannot be interpreted extensively[72]. Looking further at the reasons for refusing enforcement and recognition of an award, nearly the same list can be found, i.e. the MAL and the ZPO mentions exactly the same reasons, while the Hungarian law refers only to the last two[73]. The significance of this lies in the fact that the party can choose between requesting the court to set aside or to refuse recognition and enforcement of the award. This results the "salutary effect of avoiding 'split' or 'relative' validity of international awards, i.e. awards which are void in the country of origin but valid and enforceable abroad"[74]. A good practical example for this can be found in Art. 1059 (3) ZPO which provides that no application for setting aside the award may be made once the award has been declared enforceable by a German court.

Looking at the time factor concerning requesting the setting aside of an arbitral award, different solutions can be found: within three months according to the MAL and the ZPO[75] and within sixty days (term of preclusion) according to the Hungarian Arbitration Act[76]. These time limits can be extended by not more than one month according to the ZPO[77] if the request was made for correction and interpretation of an award or making an additional award. Art. 34 (3) MAL refers to correction, interpretation and additional award but it differs from the regulation by the ZPO, because the MAL provides only that the time limit is calculated from the date on which that request had been disposed of by the arbitral tribunal.

[69] Art. 34 (2) b) MAL and ZPO Art. 1059 (2) 2. are unanimous that these circumstances can only be found by the court, while the Art. 55 (2) of the Hungarian Arbitration Act does not mention this. Yet, logically, the two are the same because the court examines the case only if the parties requested it to do so and set aside the award only if it (the court) finds that the dispute is not subject to arbitration or the award is contrary to public policy. Furthermore, the MAL and the Hungarian Arbitration Act, by the last reason for setting aside, mentions that *the award* is contrary to public policy, while the ZPO provides that *recognition and enforcement* of the award should be contrary to public policy.

[70] *Zimbabwe Electricity Supply Commission v. Genius Joel Maposa* – The court held that since the arbitrator did not commit any moral turpitude, the award cannot be set aside by referring to an alleged conflict with public policy. Harare High Court Judgment No. HH23198.

[71] Judgement by the High Court of Hungary No. *Gf.VI.30.848/1997/8.*

[72] See: *D. Frampton & Co. Ltd. v. Sylvio Thibeault and Navigation Harvey & Fréres Inc.* - http://www.interarb.com/clout/clout012.htm

[73] Art. 36 (1) MAL, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. V., ZPO Art. 1060, Hungarian Arbitration Act Art. 59.

[74] [74] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, commentary to Art. 34, para 13., www.uncitral.org/english/texts/arbitration/ml-arb.htm

[75] Art. 34 (3) MAL, ZPO Art. 1059 (3).

[76] Art. 55 (1), (3)

[77] ZPO Art. 1059 (3)

Now let us turn to the question of what special effects the request of setting aside the award may have. The MAL and the ZPO[78] provide for suspension of the setting aside proceedings incorporated into the latter[79]. Suspension is important because it enables the arbitral tribunal to reconsider a special aspect of the case without being obliged to make a completely new decision. The MAL contains that the court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside. The ZPO simply states that the court, when asked to set aside an award, may, where appropriate, set aside the award and remit the case to the arbitral tribunal. In practice, the court sets a time-limit for the arbitral tribunal to reconsider the issue until which recognition and enforcement of the award are suspended, too and if the arbitral tribunal fails to take the appropriate measures, the setting aside procedure is continued. Concerning the scope of remission to the arbitral tribunal, a very characteristic decision was made in *D. Frampton & Co. Ltd. v. Sylvio Thibeault and Navigation Harvey & Fréres Inc.* where the court held that „the court cannot draw authority from Art. 34 (4) MAL to refer the matter back to the arbitral tribunal and request that it reconsider a question which was not originally considered by the arbitrators"[80].

The two examined national laws contain special provisions in addition to those harmonizing with the MAL. The ZPO, for example, lays down that setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute[81]. The Hungarian Arbitration Act further explains that complementary rules on the procedure of the state court are those of the Hungarian Code of Civil Procedure, except that the decision of the court should be subject to no appeal but the party may request recourse against a legally binding court decision[82].

11. RECOGNITION AND ENFORCEMENT OF AN ARBITRAL AWARD (ART. 35-36 MAL)

Recognition and enforcement are not unanimously provided for in the MAL, the ZPO and the Hungarian Arbitration Act. Therefore, the three sources of law will be analysed separately.

Turning to the MAL, the question is why such a provision was incorporated into the MAL if the New York Convention deals with the whole issue separately. The reason is that besides already existing bilateral and multilateral treaties, a supplementary network of recognition and enforcement was needed in order to provide equal treatment for domestic and international awards and to unify domestic legal provisions. Art. 35 contains general rules while Art. 36 provides for the grounds for refusing recognition and enforcement.

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to

[78] Art. 34 (4) MAL, ZPO Art. 1059 (4).
[79] In common law systems, suspension is a separate procedure.
[80] http://www.interarb.com/clout/clout012.htm
[81] ZPO Art. 1059 (5)
[82] Hungarian Arbitration Act Art. 57.

the latter provisions and those concerning grounds for refusing recognition and enforcement (i.e. Art. 36)[83]. During the course of the recognition/enforcement process, the court cannot reconsider the case[84]. The binding force mentioned in the provision appears between the parties from the date of the court decision. In a more general aspects, to achieve the expected results, reciprocity is not needed between the country where the award was made and the country at the court of which recognition or enforcement is sought. It is very important that the provision distinguishes between recognition and enforcement. It is logical that recognition is not only the condition of enforcement but also an individual institution.

Art. 35 (2) MAL determines the criteria of submitting a request on recognition or enforcement to the court. Accordingly, the party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language. This provision, which is the same as Art. IV of the New York Convention, sets maximum standards, therefore it would not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions[85]. This also means that no more and no stricter rules can be applied by a State, as has been found in *Murmansk Trawl Fleet v. Bimman Realty Inc.* Where the court found that, in order to be enforceable, it was not necessary that a foreign award be confirmed under the law of the place where the arbitral award was issued. This conclusion was also supported by the fact that public policy favours the avoidance of delays once the parties have chosen a way of dispute resolution which is aimed at more efficient (and quick) dispute resolution[86].

Art. 36 (1) MAL provides that recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only on any of the grounds listed. These grounds are the same as those in Art. V of the New York Convention and the grounds for setting aside an award (Art. 34 MAL), yet, compared with the latter there is one more ground for refusal which can be invoked by the party, i.e. the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. Apart from this, all grounds are the same in setting aside and refusal of recognition or enforcement in the MAL, thus, the drafters wanted to give the possibility to the parties to choose between the two, irrespective of the country in which the award was made and is intended to be recognized or enforced.

In order to avoid parallel procedures, Art. 36 (2) provides that if an application for setting aside or suspension of an award has been made to a court referred to in the paragraph containing the extra ground for refusal[87], the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security. Detailed procedural rules are not provided for in the MAL because they depend on those of the certain country dealing with the issue.

[83] Art. 35 (1) MAL
[84] In *Robert E. Schreter v. Gasmac Inc.*, the court followed this opinion and held that the case cannot be re-opened unless serious procedural irregularities or conflict with public policy is found. http://www.interarb.com/clout/clout030.htm
[85] Note to Art. 35 (2) MAL
[86] http://www.interarb.com/clout/clout117.htm
[87] Art. 36 (1) a) v.

Rules of the MAL are not exactly followed by the ZPO and the Hungarian Arbitration Act. The ZPO deals with recognition and enforcement of domestic and foreign awards separately. Art. 1060 (1) ZPO provides that enforcement of a domestic award takes place if it has been declared enforceable. Concerning grounds for refusal, Art. 1060 (2) provides that an application for a declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside[88]. Grounds for setting aside shall not be taken into account, if at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected; also in cases where a party may request setting aside or refusal, if the time-limits of application[89] have expired without the party opposing the application having made an application for setting aside the award. From these provisions it is evident that the German regulation emphasizes the connection between the alternatives of setting aside and recognition/enforcement of an arbitral award. Therefore, the procedure is simpler and dilatory tactics are also avoided because e.g. recognition/enforcement cannot be refused if a prior application for setting aside the award was refused on the same grounds.

Rules of recognition and enforcement of foreign arbitral awards can be found in Art. 1061 ZPO which shall be subject to the provisions of the New York convention and other treaties on the recognition and enforcement of arbitral awards shall remain unaffected[90]. If the declaration of enforceability is to be refused, the court shall rule that the arbitral award is not to be recognized in Germany[91]. If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made[92].

The Hungarian Arbitration Act emphasizes that effect of an arbitral award is the same as that of a legally binding court judgement and it is to be enforced according to the Act on Court Enforcement[93].

Enforcement can be refused only in two cases: if the court finds that the dispute is not subject to arbitration according to Hungarian law, or if the award is contrary to the Hungarian public policy[94]. These possibilities are consonant to the second group of grounds for setting aside or refusal in the MAL. Although not all questions are explicitly settled by the Act, the Hungarian Code of Civil Procedure is not a background source of law in all cases, only if the parties agreed to its application or if the arbitral tribunal having the right to decide upon its procedure admits to it. The 'real' supplementary source of law to the Hungarian Arbitration Act is the New York Convention[95] according to which grounds for refusal of recognition/enforcement are the same as those of setting aside an award.

The Hungarian Act uses provisions similar to the German regulation. Hence, recognition and enforcement are to be refused if the award was set aside by the court; if no setting aside proceedings were initiated but the court finds that the subject-matter f the dispute is not capable of arbitration or the award is contrary to public policy. Official commentary to the Act

[88] ZPO Art. 1059 (2)
[89] ZPO Art. 1059 (3)
[90] ZPO Art. 1061 (1)
[91] ZPO Art. 1061 (2)
[92] ZPO Art. 1061 (3)
[93] Act of Parliament No. 53 of 1994, as provided by the Hungarian Arbitration Act Art. 58.
[94] Hungarian Arbitration Act Art. 59.
[95] Enacted by 1962. évi 25. tvr. Hungary made a reservation to the Convention the application of which it allows only in connection with recognition and enforcement of awards made in any other Contracting State and deriving from legal relationships which are qualified as commercial according to Hungarian law.

explains that "this is necessary because by those two grounds legal interest if the state is that the award be not enforceable, therefore, refusal of enforcement does not depend only on whether the party requested refusal of enforcement. It is also possible that the arbitral award was made before the court decision on the lack of jurisdiction of the arbitral tribunal and enforcement of the arbitral award. The court is not obliged to enforce this award, not even when the other party did not request setting aside, because a court decision affirming its own jurisdiction binds all parties (this is suggested by public policy)[96].

Art. 60 of the Hungarian Arbitration Act harmonizes with Art. 35 (2) MAL in providing that "the party referring to or requesting enforcement of an arbitral award shall supply the duly authenticated original award or a duly certified copy thereof (thus, the award shall not be put into court deposit); and if the award is in a language other than Hungarian, a duly certified translation is to be supplied.

Summarizing the analysed provisions we can contend that these national provisions are those which were mentioned before, i.e. which fill in the framework of the MAL with specific domestic rules harmonizing with the civil procedure regulation of that certain country.

SUMMARY

It is a saluted fact that the UNCITRAL Model Law on International Commercial Arbitration has been adopted by numerous countries of the world. In order to ensure further unification and effectuation of arbitral proceedings, even more countries should follow its exemplary provisions. Implementation of the MAL into national laws and its completion with domestic legal features enable developed countries to own an up-to-date arbitration regulation. Taking over this example might help developing countries to create their own rules and integrate their legal regulation into a globalizing system of arbitration.

German and Hungarian law have fulfilled the latter requirement, as proven in this comparative analysis. Unification of the rules of arbitration is being realized at a high level but, of course, with regard to unique legal characteristics of each country, full unification cannot be effectuated.

In globalizing economy, advantageous features of arbitration may be strengthened by unification because if the different arbitration rules of different countries have the same core, participants of an international arbitration procedure shall not have to face unknown legal provisions and cross-border boundaries of arbitration can easily be eliminated. The model law provides for protective procedural measures, therefore, international commercial arbitration cannot be hindered by the countries who wish to protect their own interests by sticking to their own rules of procedure. Hopefully, more and more countries will decide to adopt the model regulation in order to ensure a more global system of international commercial arbitration.

[96] Commentary to the Hungarian Arbitration Act, Commentary to Art. 58-60.

BIBLIOGRAPHY

Analytical commentary on draft text of model law on international commercial arbitration: report of the Secretary-General (A/CN.9/264)

Hirsch, Günther Prof. Dr.: Schiedsgerichte – ein Offenbarungseid für die staatlichen Gerichte?, in: SchiedsVZ Zeitschrift für Schiedsverfahren 2/2003

Huber, Peter Prof. Dr.: Das Verhältnis von Schiedsgericht und staatlichen Gerichten bei der Entscheidung über die Zuständigkeit, in: SchiedsVZ Zeitschrift für Schiedsverfahren 2/2003

Mádl Ferenc – Vékás Lajos: Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga, Nemzeti Tankönyvkiadó, Budapest 1997.

Mealey's International Arbitration Report, May1995.

Report of the Working Group on International Contract Practices on the work of its sixth session (1983) - UNCITRAL Yearbook, vol. XV : 1984

Report of the Working Group on International Contract Practices on the work of its sixth session A/CN.9/246

Várady Tibor – John J. Barceló – Arthur Taylor von Mehren: International commercial arbitration: a transnational perspective, West Publishing Co. 1999.

Yearbook Commercial Arbitration XVII., Deventer, Netherlands, Kluwer, 1992

www.dis-arb.de

www.mkik.hu

www.uncitral.org

www.interarb.com/clout

LIST OF LEGAL AUTHORITIES

UNCITRAL Model Law on International Commercial Arbitration

Act of Parliament No. 71 of 1994 (Hungary) on arbitration and official commentary [1994. évi LXXI. törvény a választottbíráskodásról és a törvény indoklása]

German Code of Civil Procedure [Zivilprozessordnung, referred to as: ZPO] (http://bundesrecht.juris.de/bundesrecht/zpo/htmltree.html)

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards