

Comments of the Hungarian delegation on draft Article 17 of the EAR

Hungary hereby provides its comments on draft Article 17 of the Expedited Arbitration Rules (formerly Expedited Arbitration Provisions).

Despite the practical reasons detailed by some arbitral institutions during the informal consultations, Hungary is of the opinion that draft Article 17 should not be included.

We share the view expressed by Switzerland, that setting a special procedure for seeking early dismissal of claims that lack merits would create additional steps in the proceeding that will certainly cause delay and extra costs. Parties acting in bad faith may use this procedural tool for delaying the proceedings.

In case of an ungrounded plea for early dismissal or preliminary determination the tribunals shall have to prepare two awards in 30-45 days: one upon the dismissal of the plea („ruling on the plea”) and the other in the merit of the case. Especially this would be the case if there is only one round of submissions in the procedure. It is an unnecessary burden on the tribunal and may lead to the delay of the proceeding.

Furthermore, the legal nature of the resolution ruling on the plea may raise further questions in some legislations. In some cases (such as early dismissal, preliminary determination) the ruling would be, by nature, an award in the merit of the case, in some other cases (inadmissibility of certain evidence etc.), it would be a rather procedural one. In our view it is questionable whether such ruling (either the substance of the ruling or its cost-allocating provisions) would be enforceable in some states under the applicable national law on enforcement.

It is also questionable whether this ruling would be considered as an „arbitral award” or „has yet become binding” award in the sense of Article I and Article V 1 (e) of the New York Convention, taking into account the fact that in many situations the final award or a later procedural ruling may stipulate otherwise than the said ruling or simply override it.

When it comes to recognition and enforcement of such ruling and a later award it should be also examined whether there is any conflict between them, which examination may also lead to the delay of the recognition and enforcement process.

The Working Group may wish to consider not to include draft Article 17 in the Expedited Arbitration Rules.