

Subject : [Updates] UNCITRAL Working Group II (Dispute Settlement), 73rd Session/Observer, CEPANI, The Belgian Centre for Arbitration and Mediation comments on Working Paper 216 dated January 13, 2021.

1. WP.216, page 3 :

Extract :

B. Form of the work

6. The Working Group may wish to confirm that the EAPs should be presented as an appendix¹ to the UARs (A/CN.9/1043, para. 22). In so doing, the Working Group may wish to consider the user-friendliness of the EAPs, taking into account the fact that an explanatory note is also being prepared to accompany the EAPs.

Comment :

CEPANI is of the opinion that an Annex is preferable over a separate set of rules. For information purposes only, CEPANI went even a step further in the modification of the CEPANI Arbitration Rules in 2020. While the 2013 CEPANI Rules provided for two separate sets of rules,¹ the specific rules governing the expedited arbitration proceedings have now fully been integrated in article 29 of the 2020 Rules.²

2. WP.216, page 4 :

Extract :

9. The Working Group may wish to consider the following text for the explanatory note on draft provision 1:

(1) Draft provision 1 provides guidance on when the EAPs apply (A/CN.9/1010, para. 23).² It notes that express consent of the parties is required for the application of the EAPs (A/CN.9/1010, paras. 21 and 27).

Comment :

It should be considered whether parties should be given guidance as to which parameters to apply for application of EAP. One option would be to give possible options in the model clause, which could list possible parameters (e.g. indicating a financial threshold or otherwise).

¹ https://www.arbitrationbelgium.com/Arbitration%20Rules/rules_en.pdf (see Section II of the Rules).

² <https://www.cepani.be/wp-content/uploads/2020/07/RULES2020ENGJULY2020-1.pdf>

3. WP.216, page 5 :**Extract** :

13. While the explanatory note could provide some guidance on these interactions, it might be difficult to illustrate the various instances, particularly as parties are free to modify any of the rules. Nonetheless, **the Working Group may wish to consider the following formulation for insertion in the EAPs or in the explanatory note to provide some clarity on this interaction:**

For the avoidance of doubt and unless otherwise agreed by the parties, the following rules in the UARs do not apply to arbitration under the EAPs: Article 3(4)(a) and (b)³; Article 6(2)⁴; Article 7⁵; Article 8(1)⁶; first sentence of Article 20(1)⁷; first sentence of Article 21(1)⁸; Article 21(3)⁹; first sentence of Article 22¹⁰; and second sentence of Article 27(2)¹¹.

The phrase “these Rules” as found in the UARs¹² should be read to include the EAPs in the context of expedited arbitration.

Comment : This would be useful, but preferably in an explanatory note.

4. WP.216, page 6 :**Extract** :

41). **The Working Group may wish to confirm that the elements to be taken into account by the arbitral tribunal are better placed in the explanatory note than in the draft provision** (see para. 19(4) below, [A/CN.9/1010](#), paras. 44–48; [A/CN.9/1043](#), para. 49). **Furthermore, the Working Group may wish to consider whether the arbitral tribunal should be required to provide the reasons for its determination** ([A/CN.9/1043](#), para. 42).

Comment:

CEPANI agrees that the arbitral tribunal should be required to provide the reasons for its determination as is generally the case for procedural decisions. This will especially be the case here, considering that the arbitral tribunal will need to establish that circumstances are *exceptional* (see supra Draft Provision 2.2). This being said, CEPANI agrees that the elements to be taken into account by the arbitral tribunal are better placed in the explanatory note, and should not be included as an express requirement in Art. 2.

5. WP.216, page 8 :**Extract** :

A/CN.9/1043, paras. 51 and 52). There may also be instances where an arbitrator resigns, for example, if the arbitrator appointed under the EAPs believes his schedule of future commitments does not allow him to conduct non-expedited arbitration (A/CN.9/1043, para. 53).

Comment:

CEPANI raises the question whether resignation would generally be an appropriate solution in this context? In any case, the situation where a more *relaxed* schedule (as the arbitral tribunal would decide to move *out* of the EAP) would justify a resignation, would appear to be unusual.

6. WP.216, page 10 :

Extract :

26. The Working Group may wish to consider whether draft provision 3(2) and the text in the explanatory note (see para. 24(4) above) would suffice for this purpose (A/CN.9/1043, para. 32). Otherwise, it may wish to revise the note to the model statement of independence as follows for expedited arbitration:

Note: Parties should consider requesting from the arbitrator the following addition to the statement of independence:

I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently, expeditiously and in accordance with the time limits in the Rules and the Provisions.

Comment:

CEPANI is of opinion that a different model of statement of independence is not necessary. Stressing the strict deadlines in either case (whether under UAR or EAP) is necessary; however drawing the arbitrator's attention to the fact that there are even shorter deadlines under EAP can be done through correspondence concerning the statement of independence by the parties and/or the appointing authority.

7. WP.216, page 12 :

Extract :

(8) With respect to the last item on the above list, the presentation of the complete case is being required for the sake of efficiency. It does not, however, mean that all evidence has to be communicated at this stage, which may be burdensome and counterproductive. This is highlighted by the words "as far as possible" and the claimant may decide to only make reference to the evidence to be relied upon (A/CN.9/1003, paras. 81 and 101; A/CN.9/1043, para. 63). For example, written witness statements need not be submitted with the notice of arbitration. In practice, the claimant would identify in its statement of claim (i) any witness whose testimony it would rely on, (ii) the subject matter of the testimony and (iii) any subject matter for which the claimant intended to submit expert reports (A/CN.9/1043, para. 62). It would be preferable to determine which evidence is to be submitted during the consultation between the arbitral tribunal and the parties (see para. 46(3) below).

Comment:

Except in cases of urgency, a Claimant has the time to build up its case before bringing it. In this regard, it seems counterproductive not to require Claimant in principle to submit his evidence from the outset to the extent possible. The default rule should indeed be that a Claimant should be as complete as possible under the circumstances. Suggestion to rephrase para (8), especially the second half, so as to not encourage a Claimant not to submit a complete request for arbitration.

The wording of para 8 should be a bit stronger and encourage Claimants to and try to submit a full case.

8. WP.216, page 13 :**Extract :**

the respondent to delay the constitution of the arbitral tribunal. **In light of the above, the Working Group may wish to confirm that the 15-day time frame for communicating the statement of defence shall begin with the constitution of the arbitral tribunal.**

Comment:

Disconnecting the constitution of the arbitral tribunal from the Answer/SoD and providing a 15-day time frame from constitution appears reasonable.

9. WP.216, page 14 :**Extract :**

37. **Considering the above, the Working Group may wish to confirm the following formulation regarding designating and appointing authorities in expedited arbitration (A/CN.9/1043, para. 74):**

Comment:

Agreed

10. WP.216, page 17 :**Extract :**

(1) Draft provision 8 addresses how a sole arbitrator is to be appointed in expedited arbitration. If the parties agreed on more than one arbitrator, articles 9 and 10 of the UARs apply (A/CN.9/1003, paras. 64–65; A/CN.9/1010, para. 67).

Comment:

Draft provision 8 only provides for a sole arbitrator, which is the default rule under the EAP. What happens if the parties have agreed on the EARs but also on three arbitrators? This would be a derogation of Draft provision 8. Would Draft provision 8 prevail (which would possibly be problematic for enforcement in some jurisdiction). Alternatively, is the constitution of the Tribunal in that case automatically governed by the UARs?

11. WP.216, page 17 :

Extract :

(5) *It should, however, be noted that draft provision 5(1) provides the respondent 15 days to respond to the notice of arbitration, which should also include a response to the claimant's proposal of a sole arbitrator. Therefore, it would be prudent for the claimant to consider such response before engaging with the appointing authority (if previously agreed by the parties). If the respondent foresees that an agreement cannot be reached (A/CN.9/1003, paras. 60 and 62; A/CN.9/1010, para. 61), it could engage with the appointing authority at the same time it communicates the response to the notice of arbitration.*

Comment:

Typo

12. WP.216, page 20 :

Extract :

Draft provision 11 (Hearings)

The arbitral tribunal may, after inviting the parties to express their views and in the absence of a request to hold hearings, decide that hearings shall not be held.

Comment:

CEPANI wishes to raise yet another issue in that respect: one of the problems in practice is not so much the holding of a hearing as such (which cannot be denied if a party requests), but rather the schedule and duration of the hearing (i.e. whether witnesses and experts are heard or not). Should it not be considered to add that, even if a hearing is requested, the arbitral tribunal may decide to limit the scope of the hearing after consulting the parties, in light of the circumstances of the case (as part of its power to decide on evidence)?

13. WP.216, page 22 footnote 18:

Extract :

¹⁸ The Working Group may wish to confirm that even within the 30-day time frame, amendments would not be allowed if the arbitral tribunal considers them inappropriate (see art. 22 of the UARs).

Comment:

In that case, CEPANI would suggest to add to the first phrase of draft para. 55(3) the following (addition in bold) :

*“Draft provision 13 replaces the first sentence of article 22 of the UARs, **which otherwise remains in force.**”*

14. WP.216, page 23 :

Extract :

57. Draft provision 14 is based on the understanding that in expedited arbitration, the arbitral tribunal should be able to limit and entirely prohibit the parties from submitting written statements in addition to the statement of claim and the statement of defence (“further written statements”). While some doubts were expressed on whether draft provision 14 need to be retained in the EAPs (A/CN.9/1043, para. 101), it reflects drafting suggestions made in that regard (A/CN.9/1043, para. 102).

Comment:

See comment above n°7 regarding the fact that it may seem counterproductive not to require Claimant in principle to submit his evidence from the outset, to the extent possible.

15. WP.216, page 24 :

Extract :

1. The arbitral tribunal may decide which documents, exhibits or other evidence the parties should produce. The arbitral tribunal may decide to limit a party from requesting the other party to produce documents, exhibits or other evidence.

2. The arbitral tribunal may decide which witnesses, including expert witnesses, shall testify to the arbitral tribunal. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, shall be presented in writing and signed by them.

Comment:

See comment n°12 above regarding the scope of hearings.

16. WP.216, page 25 :

Extract :

(4) Draft provision 15(2) states the general rule that the arbitral tribunal may choose which witnesses (including expert witnesses) presented by the parties can testify. It further provides that the default rule in expedited arbitration is that witness statements are to be in “written” form (A/CN.9/1003, para. 100; A/CN.9/1010, para. 105). Paragraph 2 thus replaces the second sentence of article 27(2) of the UARs. While the rules for meeting the requirements of “in writing” and “signature” through electronic communication vary depending on the jurisdiction, it should be noted that article 9(2) and (3) of the United Nations Convention on the Use of Electronic Communications in International Contracts provides a functional equivalence rule (A/CN.9/1043, para. 103).

Comment: See comment n°12 above regarding the scope of hearings.

17. WP.216, page 25 :**Extract** :Remaining issue

62. The Working Group may wish to decide whether draft provision 15 should be retained in the EAPs or whether it would be sufficient to provide guidance in the explanatory note. Following that decision, the Working Group may wish to consider combining draft provisions 14 and 15.

Comment:

CEPANI is in favour of keeping. The possibility to limit document production and witness hearing is key to achieve speed. An express provision that reaffirms the arbitral tribunal's powers helps against due process paranoia.

18. WP.216, page 25 :**Extract** :

Draft provision 16 (Award)

1. Unless otherwise agreed by the parties, the award shall be made within six months from the date of the constitution of the arbitral tribunal.

2. The period of time for making the award may be extended by the arbitral tribunal in exceptional circumstances after inviting the parties to express their views.

[3. The arbitral tribunal shall state the reasons when extending the period of time for making the award.]

[4. The period of time for making the award may be extended [once]. The additional period of time shall be no longer than [three] months. In any case, the overall extended period of time shall not exceed 12 months from the date of the constitution of the arbitral tribunal.]

Comment:

CEPANI advises prudence in this respect. While it is of crucial importance to allow for flexibility where necessary, too wide a discretion for the arbitral tribunal to self-extend the time frame for rendering the award could be problematic in some jurisdictions. We note for example that, under the old Belgian Law on Arbitration in force until 2013, some had argued that a possibility for an arbitral tribunal to self-extend the time limit to render an award would go against Public Policy, as this would allow tribunals to put off a decision indefinitely. The Belgian Law on Arbitration currently in force, which is based on the UNCITRAL Model Law, expressly allows parties to empower either a third party or the arbitral tribunal to extend the deadline to render the award (if any such deadline applies, considering that there is no statutory time limit). Provisions such as Draft Provision 16 paragraphs 2 and/or 4 could possibly address this concern. Another possibility would be for the appointing authority to be given this power, if the parties do not agree.

19. WP.216, page 26 :

Extract :

(3) *Draft provision 16 should be read together with article 34 of the UARs, in particularly paragraph 3. Unless the parties have agreed that no reasons are to be given, arbitral tribunals in expedited arbitration shall also state the reasons upon which the award is based. This is because requiring the arbitral tribunal to provide a reasoned award can assist its decision-making and reassure the parties as they will find that their arguments have been duly considered (A/CN.9/969, paras. 85–86; A/CN.9/1003, para. 110; A/CN.9/1010, para. 121). The absence of reasoning in an award may impede any control mechanism, as the court or other competent authority would not be in a position to consider whether there were grounds for setting aside the award or refusing its recognition and enforcement.*

Comment:

This paragraph 64 (3) does not appear to address Draft Provision 16(3). Draft Provision 16.3 addresses a different issue: i.e. whether the arbitral tribunal should give reasons for extending the time limit, which should take the form of a procedural order.

This being said, CEPANI is of opinion that the question whether the award should state reasons is important and should at the very least be (re)confirmed in the guidance note. Some jurisdictions do not allow parties to dispense the arbitral tribunal from giving reasons. CEPANI therefore suggests that this paragraph (3) reflects this better: for example: “Unless the parties have agreed that no reasons are to be given ***and to the extent that such agreement is permitted under the applicable laws***, arbitral tribunals in expedited arbitration shall also state the reasons upon which the award is based”...

20. WP.216, page 26 :

Extract :

Remaining issue 1 – time frame for rendering the award

65. With regard to the time frame for rendering the award, paragraph 1 reflects the preference expressed for six months as that would sufficiently highlight the expedited nature of the proceedings and would be in line with the duration provided for in other institutional rules on expedited arbitration (A/CN.9/1003, para. 103; A/CN.9/1010, para. 113; A/CN.9/1043, para. 106). Others preferred nine months, in light of the likely international and ad hoc nature of the proceedings under the EAPs and that a nine-month period would ensure that an extension does not become systematic (A/CN.9/1010, para. 114). The Working Group may wish to confirm that the six-month time frame in paragraph 1 is appropriate.

Remaining issue 2 – circumstances for extending the time frame

66. The Working Group may wish to consider whether the words “in exceptional circumstances” in draft provision 16(2) needs to be further elaborated in the EAPs or in the explanatory note (A/CN.9/1010, para. 118). For example, the Working Group may wish to consider whether some of the elements to be considered by the arbitral tribunal upon request by a party to withdraw from expedited arbitration (see para. 19(4) above) could apply in this context. Alternatively, some examples of circumstances which would justify an extension of the time period could be provided in the explanatory note.

Remaining issue 3 – unintended lapse of the time frame

67. With respect to paragraph 2, a question was raised whether the EAPs should address the situation where the time frame has lapsed against the will of the parties or of the arbitral tribunal. A lapse might result in an unintended termination of proceedings or the annulment of the award if it was rendered after the time frame (A/CN.9/1010, para. 120). The Working Group may wish to

Comment:

Regarding issue 1: CEPANI is of opinion that 6 months as from the appointment of the arbitral tribunal is reasonable. CEPANI's expedited proceedings provide for a 4 month time frame, but given the *ad hoc* nature and in light of the likely international aspect of the procedures, six months appears more reasonable.

Regarding issue 2: CEPANI would suggest to further expand this point in the explanatory note, by way of a non-exhaustive list of examples (as para. 19 (4))

Regarding issue 3: CEPANI is of opinion that it would be useful to address this issue in the guidance note. This can be done in relation to Draft Provision 16 (1) as part of the power to agree on extensions. Moreover, parties should also be able to rectify any unintended lapse by subsequent agreement (yet some jurisdictions may approach this issue very stringently).

21. WP.216, page 27:

Extract :Remaining issue 4 – reasons for the extension

68. Paragraph 3 is in square brackets as it reflects differing views expressed with regard to whether the tribunal would be required to provide the reasons for extending the time frame for the rendering of the award (A/CN.9/1003, para.106; A/CN.9/1010, para. 118). On the one hand, such a requirement could delay the process as providing reasons could be time-consuming. On the other, it could limit extensions and be useful for the parties as they would be aware of the reasons for the extension (A/CN.9/1043, para. 108).

Remaining issue 5 –limitations on extension

69. Paragraph 4 addresses the questions of whether the number of extensions should be limited and whether there should be a limit on the extended period (A/CN.9/1003, para.106; A/CN.9/1010, para. 119). The general aim is to preserve the expeditious nature of the proceedings and to prevent a prolonged process due to multiple, unlimited extensions.

70. A wide range of views were expressed, including a view that paragraph 4 could be deleted to provide flexibility with regard to the extensions and in light of the various circumstances that could arise. On the other hand, it was pointed out that without such limitations, it would be difficult to ensure that awards are rendered in a short time frame as arbitral tribunals could in practice extend the time frame indefinitely.

71. Differing views were also expressed on the appropriate number of extensions (for example, once or twice) and the maximum time period of an extension (for example, 3 or 6 months). The possibility of limiting the overall extended period while allowing for multiple extensions was also mentioned. It was also stated that the parties could be involved in determining the terms the extension (A/CN.9/1043, para. 109).

Remaining issue 6 – consequences of non-compliance by the arbitral tribunal

72. Draft provision 16 does not address the consequences of non-compliance by the arbitral tribunal of the time frame therein. The Working Group may wish to confirm that such consequences (for example, (i) reduction of arbitrator's fees with the possible involvement of the appointing authority provided for in article 41(3) of the UARs or (ii) replacement of the arbitrator which may not necessarily ensure efficiency, A/CN.9/969, para. 55; A/CN.9/1003, para. 108) are better mentioned in the explanatory note.

Remaining issue 7 – other time frames

73. The Working Group may wish to consider whether the time frames prescribed in the UARs (article 37 on the interpretation of the award, article 38 on the correction of the award and article 39 on an additional award) need to be modified in expedited arbitration.

Comment:

Regarding issue 4: CEPANI refers to comment above under n°19: procedural orders should always state reasons. Also, arbitral tribunal will have to show that exceptional circumstances are met. However, this should not be included as an express requirement in the EAP but could be included in the guidance note.

Regarding issue 5: see general comment n°18 above. Unlimited extensions could be problematic, if this gives the arbitral tribunal overly broad (or even unrestricted) powers to extend the time period to render the award. CEPANI would suggest to address this concern by adding “*unless the parties agree otherwise*”, as this underscores the possibility for Parties to agree to such extensions.

Regarding issue 6: CEPANI is of the opinion that this would appear very difficult to enforce in an *ad hoc* context. The consequence thereof being that the arbitral tribunal is *functus officio* (which may expose liability in some extreme cases).

Regarding issue 7: CEPANI is of opinion that the time frames are fairly short and do not need to be modified in principle in expedited arbitration.

22. WP.216, page 28:**Extract :**

75. While doubts and concerns were expressed (A/CN.9/969, paras. 20 and 116; A/CN.9/1003, paras. 83 and 84; A/CN.9/1010, para. 124), it was also felt those tools could improve the overall efficiency of arbitration (A/CN.9/1010, para. 123). It was viewed that while the use of those tools would be within the inherent power of the arbitral tribunals under article 17(1) of the UARs, providing them explicitly in the EAPs could make it easier for the tribunals to utilize them and could discourage frivolous claims by parties (A/CN.9/1003, para. 85; A/CN.9/1010, para. 123).

76. The Working Group may wish to consider the following formulation regarding pleas as to the merits and preliminary rulings:

Comment: CEPANI is of opinion that such tools are inappropriate in EAPs, but would be very useful for *regular* proceedings under the UAR.

Any early dismissal would still require discussion to ensure that the Parties’ due process rights are respected. Adding such a layer of discussion, with possible separate submissions in the EAPs – which try to limit such submissions – would appear to be counterproductive. Accordingly, such tools do not appear to create benefits in an EAP setting.

CEPANI’s suggestion would therefore be to not include this issue as Draft Provision 17 in the EAP, although it should be considered whether this can be added to the UAR (as a provision, an annex or in another form) if this would fall within the mandate of WG II. Early dismissal could indeed be useful to reduce the scope of a regular arbitration. In the framework of regular proceedings, having such a discussion on early dismissal is less problematic and could therefore increase efficiency.

23. WP.216, page 29 :**Extract** :**P. Model arbitration clause for expedited arbitration****Model arbitration clause for contracts**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Expedited Arbitration Provisions.

Note. Parties should consider adding:

(a) The appointing authority shall be . . . [name of institution or person];

(b) The place of arbitration shall be . . . [town and country];

(c) The language to be used in the arbitral proceedings shall be . . .

Comment:

Situations where parties would want to submit *any* dispute may be rare. Rather, they may wish to submit certain disputes only, e.g. based on financial threshold or otherwise. As the EAPs are aimed at *ad hoc* arbitration, it is important that any threshold should be determined on an objective basis. As suggested above, the parties may be offered guidance on this point, either in the draft arbitration clause or in the guidance note.

24. WP.216, page 29 :**Extract** :**Possible waiver statement**

The parties hereby waive the right to request withdrawal from of expedited arbitration as provided in draft provision 2.

82. The statement above reflects a suggestion that even if a withdrawal mechanism were to be provided in the EAPs (see draft provision 2), it should be mentioned that parties could waive in advance their right to request withdrawal from expedited arbitration (A/CN.9/1010, para. 38). However, the inclusion of such a statement in the EAPs may compel parties with less bargaining power to agree to waive their rights in advance. **The Working Group may thus wish to consider whether the above statement should be presented along with a model clause to the EAPs or mentioned in the explanatory note to draft provision 2.**

Comment:

Such a waiver does not appear to be recommendable.

25. WP.216, page 29 :**Extract** :**Elements to be considered when parties refer their dispute to arbitration under the EAPs**

When considering whether to refer their dispute to arbitration under the EAPs, the parties should take into account, among others, the following elements (A/CN.9/1003, paras. 30, 40 and 41; A/CN.9/1010, para. 47; A/CN.9/1043, para. 57);

Comment:

See comment under n°23 above. Should examples of language regarding thresholds not be reflected in the draft arbitration clause or in the guidance note?

26. *WP.216, page 30 :*

Extract :

83. The list above can be useful for the administering institution or the arbitral tribunal when suggesting expedited arbitration to the parties (A/CN.9/1003, paras. 28 and 31). The list could also provide a basis for arbitral institutions that model their institutional rules based on the EAPs and wish to include a set of criteria which would automatically trigger expedited arbitration (A/CN.9/1010, para. 26). Arbitral institutions may also consider introducing a financial threshold, which has the advantage of providing a clear and objective standard (A/CN.9/1003, para. 38).

Comment:

Parties may also wish to add such thresholds. This should be done in the arbitration agreement, hence the suggestion to add language to the draft arbitration clause or in the guidance note. See comments under n°23 and 25 above.

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