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## Early dismissal and preliminary determination

### Note by the Secretariat

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## A. Introduction

1. The Commission, at its fifty-fourth session in 2021, requested Working Group II to discuss the topic of early dismissal and present the results of its discussions to the fifty-fifth session of the Commission in 2022.<sup>1</sup>
2. At its seventy-fourth session, Working Group II considered the topic of early dismissal and preliminary determination based on a note by the Secretariat (A/CN.9/WG.II/WP.220).<sup>2</sup> It was generally felt that the topic of early dismissal and preliminary determination was a significant issue in international arbitration and that it should be addressed in the context of the UNCITRAL Arbitration Rules. However, the Working Group was not able to reach a conclusion on the appropriate form of such work including whether an express rule should be included in the UNCITRAL Arbitration Rules (A/CN.9/1085, para. 66).
3. At the end of its session, the Working Group requested the Secretariat to present different illustrative options to the Commission based on the views expressed during its deliberations. The options to be presented to the Commission were: (i) a guidance document on early dismissal and preliminary determination as inherent powers of the arbitral tribunal under the UNCITRAL Arbitration Rules; (ii) a simple and generic rule accompanied by a commentary; and (iii) a detailed rule (including the types of pleas, standard of review, and a two-stage procedure) to be accompanied by a commentary (A/CN.9/1085, para. 67).
4. Accordingly, this note contains the three legislative options for consideration by the Commission reflecting the deliberations at Working Group II and inputs from States and other interested stakeholders after the session. As the options are presented to merely illustrate the different legislative approaches, they contain and suggest policy choices, which are not identical or consistent with each other. Each option should be read on its own. The detailed content as well as the drafting style (for example, the extent to which the content of the commentary should be in the rule itself and vice versa) will need to be adjusted once a decision on the legislative option is made.

## B. Legislative options

### 1. Guidance text

*Article 17 of the UNCITRAL Arbitration Rules provides discretion to the arbitral tribunal to conduct the arbitration in a manner it considers appropriate provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity to present its case. In exercising its discretion, the arbitral tribunal should conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.*

*One such discretionary power is the ability of the arbitral tribunal to dismiss a claim, a counterclaim as well as a claim for the purposes of set-off (referred to below as a "claim") that is manifestly without merit or to make a preliminary determination to that effect.<sup>3</sup> The arbitral tribunal may also rule that certain issues of fact or law supporting a claim are manifestly without merit.*

<sup>1</sup> Official Records of the General Assembly, Seventy-third Session, Supplement No. 17 (A/76/17), paras. 25(g), 186, 214(b) and 242.

<sup>2</sup> In addition, examples of provisions on early dismissal and preliminary determination and guidance text were provided to the Working Group. Available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/early\\_dismissal\\_provisions.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/early_dismissal_provisions.pdf).

<sup>3</sup> Whether a defence can also be the subject of dismissal and whether the standard to be applied in dismissing a claim should be manifest lack of "legal" merit would need further consideration.

*Such discretionary power can be exercised upon the request by a party or by the arbitral tribunal's own initiative. It can be exercised without going through all phases of the proceedings and without examining all issues of the case.<sup>4</sup> A party raising such a plea should do so as promptly as possible after the submission of the claim or the communication of the issues of fact or law supporting the claim.*

*Similarly, the arbitral tribunal may rule that a claim is outside its jurisdiction or beyond the scope of its authority. In accordance with article 23(2) of the UNCITRAL Arbitration Rules, such a plea should be raised by the party no later than in the statement of defence or as soon as the matter alleged to be beyond the scope is raised during the proceedings. In both cases, a later plea is possible if the arbitral tribunal considers the delay justified.*

*Whether to allow any of the above-mentioned pleas to proceed is a question left to the arbitral tribunal taking into account the circumstances of the case and the need to avoid unnecessary delay and expense and to provide a fair and efficient process. The arbitral tribunal would also need to consider at which stage of the proceedings the plea is raised. Typically, the arbitral tribunal would require the party raising the plea to provide justifying grounds and to demonstrate that a ruling on the plea will expedite the proceedings or will have a material impact on the outcome of the proceedings even if the issues of fact or law supporting a claim were assumed to be correct, no award could be rendered in favour of the other party). This could prevent a plea being misused by the parties to delay the proceedings.*

*If the arbitral tribunal allows a plea to proceed or so decides on its own initiative, it will typically invite the parties to express their views and provide guidance on the procedure it will follow, possibly indicating a time frame within which it will make a ruling. This would ensure that parties have a reasonable opportunity to prepare and present their case.*

*The arbitral tribunal should make a ruling as soon as practicable and within the time frame, if so indicated. If the arbitral tribunal concludes that a final award could not be rendered, it may issue an order for the termination of the proceedings in accordance with article 36(2) of the UNCITRAL Arbitration Rules.*

*If the arbitral tribunal rules that a claim is manifestly without merit, the claimant will not be able to raise the same claim at a later stage of the proceedings. The same applies to a claim found to be outside the jurisdiction or beyond the scope of the authority of the arbitral tribunal as well as issues of fact or law found to be manifestly without merit.*

*On the contrary, if any of the above-mentioned pleas is not allowed to proceed or is rejected, the party that had raised the plea will be allowed to make the argument that the claim lacks merit at a later stage.*

## 2. A simple and generic rule with commentary

### Rule X

1. *The arbitral tribunal, at the request of a party or on its own initiative, may at any time during the proceedings determine that:*

*(a) A claim, a counterclaim, or a counterclaim for the purposes of set-off (a "claim") is manifestly without merit; or*

*(b) Issues of law or fact supporting a claim are manifestly without merit.*

2. *The arbitral tribunal shall make a ruling in accordance with paragraph 1 after inviting the parties to express their views.*

<sup>4</sup> While the arbitral tribunal is able to exercise the discretion at any stage of the proceedings, the guidance text may suggest that it is advisable to exercise such power at an early stage as the underlying objective is to enhance the efficiency of the proceedings.

## Commentary to Rule X

(1) Rule X provides that the arbitral tribunal has the authority to determine that a claim, a counterclaim or a claim for the purposes of set-off (referred to below as a “claim”) is manifestly without merit and dismiss the claim either at the request of a party or on its own initiative.<sup>5</sup> It further provides that the arbitral tribunal may do the same for allegations of fact or law to support a claim. Although the use of such a procedural tool is within the inherent powers of the arbitral tribunal under article 17(1) of the UNCITRAL Arbitration Rules, Rule X expressly provides for such a tool to make it easier for arbitral tribunals to utilize it. The arbitral tribunal may exercise the power without going through all phases of the proceedings and without examining all issues of the case.<sup>6</sup>

(2) In accordance with paragraph 1, a party may request the arbitral tribunal to determine that a claim or issues of fact or law supporting a claim are manifestly without merit. The party making the request should do so as promptly as possible after the submission of the claim or the communication of the issues of fact or law supporting the claim. It would be advisable for the arbitral tribunal to require the party to indicate the grounds justifying the request and to the extent possible, demonstrate that a ruling by the arbitral tribunal will expedite the proceedings or will have a material impact on the outcome of the proceedings (for example, even if the issues of fact or law supporting a claim were assumed to be correct, no award could be rendered in favour of the other party). This could prevent delays caused by such requests.

(3) Pleas as to the jurisdiction of the tribunal are addressed in article 23 of the UNCITRAL Arbitration Rules. A plea that the arbitral tribunal does not have jurisdiction will need to be raised no later than the statement of defence. A plea that the arbitral tribunal is exceeding the scope of its authority will need to be raised as soon as the matter alleged to be beyond the scope is raised during the proceedings. In both cases, a later plea is possible if the arbitral tribunal considers the delay justified.

(4) Whether to proceed with the determination in paragraph 1 is within the discretion of the arbitral tribunal and it should not be understood that the arbitral tribunal has to make a determination upon a request by a party. The tribunal will typically take into account the overall circumstances of the case and at which stage of the proceedings the determination is to be made. It will also take into account the grounds and arguments provided by the requesting party as well as the views of the other parties.

(5) If the arbitral tribunal were to proceed with the determination, it should provide guidance to the parties on the procedure it will follow so that the parties can prepare and present their case. Afterwards, the arbitral tribunal should make a ruling as soon as practicable as in an order or award in accordance with paragraph 2.

(6) If the arbitral tribunal determines that a claim or issues of fact or law are manifestly without merit, the same claim or issues of fact or law cannot be raised at a later stage of the proceedings. On the contrary, if a request by a party in accordance with paragraph 1 is not allowed to proceed or is rejected by the arbitral tribunal, the party that made the request can argue that the same claim or issues of fact or law lack merit at a later stage. That party would also be able to raise a plea as to the jurisdiction of the arbitral tribunal in accordance with article 23 of the UNCITRAL Arbitration Rules.

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<sup>5</sup> Supra note 3.

<sup>6</sup> Supra note 4.

### 3. A detailed rule with commentary

#### Rule Y

1. *The arbitral tribunal, at the request of a party or on its own initiative, may at any time during the proceedings rule that:*
  - (a) *A claim, a counterclaim, or a counterclaim for the purposes of set-off (a “claim”) is manifestly without merit;*
  - (b) *Issues of law or fact supporting a claim are manifestly without merit; or*
  - [(c) A claim is manifestly outside its jurisdiction or a matter is manifestly beyond the scope of its authority].*
2. *A party should make the request referred to in paragraph 1 as promptly as possible and no later than 30 days after the submission of the claim or the communication of the issues of law or fact supporting a claim. The arbitral tribunal may admit a later request if it considers the delay justified.*
3. *The party shall specify as precisely as possible the facts and the legal basis justifying its request. The party shall also demonstrate that a ruling by the arbitral tribunal will expedite the proceedings and be material to the outcome of the proceedings.*
4. *Within 30 days from the date of the request by the party, the arbitral tribunal shall determine, after inviting the parties to express their views, whether it will rule on the request.*
5. *If the arbitral tribunal determines that it will rule on the request, it shall indicate a period of time within which it will make the ruling and invite the parties to express their views.*
6. *The arbitral tribunal may rule by issuing an order or making an award on the merits.*
7. *A ruling by the arbitral tribunal, including a determination not to consider the request by a party, shall be without prejudice to the right of that party to object, in the course of the proceeding, that a claim or issues of law or fact supporting a claim lack merit.*

#### Commentary to Rule Y

(1) Paragraph 1 of Rule Y provides that the arbitral tribunal has the authority to determine that a claim, a counterclaim or a claim for the purposes of set-off (referred to below as a “claim”) is manifestly without merit and dismiss the claim either at the request of a party or on its own initiative (subparagraph (a)).<sup>7</sup> It further provides that the arbitral tribunal may do the same for issues of fact or law supporting a claim (subparagraph (b)). Although the use of such a procedural tool is within the inherent powers of the arbitral tribunal under article 17(1) of the UNCITRAL Arbitration Rules, Rule Y expressly provides for such a tool to make it easier for arbitral tribunals to utilize it. The arbitral tribunal may exercise the power without going through all phases of the proceedings and without examining all issues of the case.<sup>8</sup>

*[Note to the Commission – Paragraph 1(c) is in square brackets because it reflects a proposal made at the Working Group that the tool provided for in Rule Y should be available in a situation where it is alleged that the arbitral tribunal manifestly lacks jurisdiction or is manifestly exceeding the scope of its authority. If the subparagraph is included, this would introduce a higher threshold than that in article 23 of the UNCITRAL Arbitration Rules and the procedure for handling such allegations]*

<sup>7</sup> Supra note 3.

<sup>8</sup> Supra note 4.

*(including the time frames within which the request should be made)<sup>9</sup> would need to be considered in light of the procedure in article 23. The following paragraphs of Rule Y would also need to be modified to reflect the inclusion.]*

(2) Paragraph 2 introduces a 30-day time frame within which a party needs to make the request referred to in paragraph 1. The time frame commences with the submission of a claim or when the other party raises issues of law or fact supporting a claim. However, flexibility is provided to the arbitral tribunal to extend the time frame, if it considers the delay justified. Such a request by a party should not have any effect on other time frames, for example, the time frame within which the respondent needs to submit its statement of defence. This will prevent the request from being used as a dilatory tactic.

(3) Paragraph 3 indicates the requirement to be met by the party making the request referred to in paragraph 1. In short, the party needs to provide justifying grounds and demonstrate that a ruling by the arbitral tribunal will expedite the proceedings and have a material impact on the outcome of the proceedings.

(4) Paragraphs 4 and 5 provide for a two-stage process. Paragraph 4 indicates that the arbitral tribunal shall first determine within 30 days of the request whether it will consider the request. The arbitral tribunal shall invite the other parties to express their views on this procedural question. This has the advantage that the parties need to spend time and effort arguing on the substance of the request only after the arbitral tribunal decides that it will consider the request. The arbitral tribunal may extend the period of time in paragraph 4 and the parties are free to agree on a different time period.

(5) If the arbitral tribunal decides to consider the request or decides to make a ruling on its own initiative, it should indicate a period of time within which it will make the ruling. The time frame should be reasonably short yet sufficient for the tribunal to make the ruling (for example, 60 days) as the objective of Rule Y is to streamline the proceedings. The arbitral tribunal should endeavour to meet the indicated time frame and if there are any delays, it should explain the reasons.

(6) Before making its ruling, the arbitral tribunal should give the parties a reasonable opportunity to present their views in accordance with paragraph 5. This would allow parties to express their positions focusing on the substance of the claim or issues of law or fact.

(7) According to paragraph 6, the arbitral tribunal may make a ruling either through an order or in an award on the merits. In both instances, it is advisable for the arbitral tribunal to state the reasons, unless the parties have agreed that no reasons are to be given. If the arbitral tribunal considers that no award could be rendered in favour of a party, it may order the termination of the proceedings in accordance with article 36(2) of the UNCITRAL Arbitration Rules.

(8) If the arbitral tribunal rules that a claim or issues of fact or law are manifestly without merit, the same claim or issues of fact or law cannot be raised at a later stage of the proceedings. Paragraph 7 addresses the situation where the arbitral tribunal disallows the request to proceed or rules that the alleged claim or issues of fact or law is not “manifestly without merit”. The paragraph clarifies that the party that had made the request can argue that the claim or issues of fact or law lack merit at a later stage of the proceedings even if its request had been rejected by the arbitral tribunal. However, it will be possible for the arbitral tribunal to allocate the costs that arise from the request to the party that made the request. This may discourage the abuse by the parties of the tool provided for in Rule Y.

<sup>9</sup> Article 23 of the UNCITRAL Arbitration Rules provide that a plea with regard to the jurisdiction shall be raised no later than in the statement of defence (or in the reply to the counterclaim or the claim for the purposes of set-off) and that a plea that the arbitral tribunal is manifestly exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope is raised during the arbitral proceedings.

## C. Way forward

5. The Commission may wish to note that a similar provision is being considered by Working Group III (Investor-State Dispute Settlement Reform) as it develops procedural reforms to enhance the efficiency of investor-State dispute settlement and to address frivolous claims in that context (see documents [A/CN.9/WG.III/WP.192](#) and [A/CN.9/WG.III/WP.214](#)).

6. The Commission may wish to consider whether the topic of early dismissal and preliminary determination deserves further work by a working group or by the secretariat. It may wish to provide guidance on the legislative approach to be further developed, including elements therein that deserve further consideration.

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