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Early dismissal and preliminary determination

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Additional note on early dismissal and preliminary determination	2



I. Introduction

1. At its seventy-sixth session, the Working Group II considered the topic of early dismissal and preliminary determination based on Section B of [A/CN.9/1114](#). Upon review of the guidance text, the Working Group decided that the text should be presented as an additional note of the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings (the “Notes”) ([A/CN.9/1123](#), para.40).¹

2. At the end of the session, the Working Group requested the Secretariat to prepare a revised version of the guidance text for brief consideration by the Working Group at its seventy-seventh session before it is presented to the Commission for its consideration as its fifty-sixth session in 2023 ([A/CN.9/1123](#), para. 40).

II. Additional note on early dismissal and preliminary determination

3. The Working Group may wish to consider the following revised version of the guidance text.

1. Many arbitration rules² provide 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 each party is given a reasonable opportunity to present its case. In exercising its discretion, the arbitral tribunal should conduct the proceedings in a manner that avoids unnecessary delay and expense and provides 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 or defence that is manifestly without merit or to make a preliminary determination to that effect (referred to below as “early dismissal”). This includes the early dismissal of a counterclaim and a claim for the purposes of set-off.

2. The early dismissal process would typically be initiated by a request of a party, which should be made as promptly as possible following the submissions of the statement of claim or defence. The process could also be initiated by the arbitral tribunal, provided that the arbitral tribunal invites the parties to express their views on this possibility.

3. In determining whether to proceed with the early dismissal process (regardless of whether it is upon the request of a party or on its own initiative), the arbitral tribunal would need to take into account the circumstances of the case, the stage of the proceedings, the need to avoid unnecessary delay and expense, and the need to provide a fair and efficient process. The arbitral tribunal would usually require the party making the request to provide justifying grounds and may require that party to demonstrate that the early dismissal process will expedite the overall proceeding. This could prevent a request for early dismissal from being misused by the parties to delay the proceedings.

4. The arbitral tribunal may rule that a claim is outside its jurisdiction or beyond the scope of its authority. Many arbitration rules recognize this authority by arbitral tribunals and give direction to parties as to when, during a proceeding, they should raise any request as to lack of jurisdiction.³ An arbitral tribunal’s ruling on such a request of lack of jurisdiction (or when the tribunal raises the question of its jurisdiction *sua sponte*), should not be governed by the heightened standard of “manifestly without merit,” which would apply instead if a party

¹ *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17 (A/77/17)*, paras. 194 (b) and 226–229.

² See, for example, article 17 of the UNCITRAL Arbitration Rules (as revised in 2010).

³ See, for example, article 23(2) of the UNCITRAL Arbitration Rules (as revised in 2010).

seeks “early dismissal” of a claim or defence, including for the reason that the claim or defence allegedly falls outside its jurisdiction.

5. Upon determining that the early dismissal process would proceed, the arbitral tribunal should invite the parties to express their views and indicate the procedure it will follow (which should ensure that parties have a reasonable opportunity to prepare and present their case), possibly indicating a time-period within which it will make a ruling. Such time-period should be reasonably short yet sufficient for the arbitral tribunal to make the ruling. As the aim would be to enhance the efficiency of the overall proceeding, it is advisable that the early dismissal process is initiated at an early stage of the proceeding, as appropriate.

6. The arbitral tribunal should make a ruling as soon as practicable and within the indicated time-period. Depending upon the nature of the ruling and its impact on the proceeding, the arbitral tribunal may not need to continue the proceedings or examine all other issues of the case.

7. A ruling on early dismissal may take the form of an order or an award depending on the circumstances. For example, if the arbitral tribunal decides to deny the request, it may issue an order to that effect. If the arbitral tribunal may decide that a claim or a defence is manifestly without merit and there are other claims or defences remaining, the arbitral tribunal may issue a partial award. The arbitration tribunal would then continue with the proceedings to consider the remaining claims. If the arbitral tribunal decides that all the claims are manifestly without merit, it may issue a final award to that effect or may order the termination of the proceeding.

8. The arbitral tribunal should provide reasons when making a ruling. If such reasoning is not mandatory according to the applicable law, parties may agree that no reasons are to be given.

9. If the arbitral tribunal rules that a claim or defence is manifestly without merit, the party will not be able to raise the same claim or defence at a later stage of the proceedings. If, however, the arbitral tribunal rejects a request for early dismissal or does not dismiss a claim or defence, the party that made the request for early dismissal will be allowed to make the argument that the claim or defence lacks merit at a later stage in the proceeding.

Placement of the new Note

4. The Note on early dismissal could be placed after Note 10⁴ entitled “Practical details regarding the form and method of submissions”. This would however require a renumbering of the subsequent Notes.

5. Alternatively, the Note on early dismissal could be included at the end as Note 21 and the 2023 Notes could include the following addition “with new Note 21 on early dismissal” in the title, which would provide for a high level of visibility.

⁴ The Notes on Organizing Arbitral Proceedings consists of Note 1: Consultation regarding the organization of arbitral proceedings; procedural meetings, Note 2: Language or languages of the arbitral proceedings, Note 3: Place of arbitration, Note 4: Administrative support for the arbitral tribunal, Note 5: Costs of arbitration, Note 6: Possible agreement on confidentiality; transparency in treaty-based investor-State arbitration, Note 7: Means of communication, Note 8: Interim measures, Note 9: Written statements, witness statements, expert reports and documentary evidence, Note 10: Practical details regarding the form and method of submissions, Note 11: Points at issue and relief or remedy sought, Note 12: Amicable settlement, Note 13: Documentary evidence, Note 14: Witnesses of fact, Note 15: Experts, Note 16: Inspection of a site, property or goods, Note 17: Hearings, Note 18: Multiparty arbitration, Note 19: Joinder and consolidation, and Note 20: Possible requirements concerning form, content, filing, registration and delivery of the award.

Addition to the preface of the Notes

6. In light of the call to increase efforts to promote and raise awareness of the Notes and ensure the visibility of the newly included note on early dismissal ([A/CN.9/1123](#), para. 40), the Working Group may wish to suggest to the Commission to highlight the addition in the preface of the Notes, by adding a sentence along the following lines: “In 2023, UNCITRAL adopted an additional guidance text on early dismissal and preliminary determination, which has been included as Note [indication of the number of the Note].”

Title of the Notes

7. The Working Group may wish to consider the title of the revised Notes:
- (i) The UNCITRAL Notes on Organising Arbitral Proceedings including guidance on early dismissal and preliminary determination, or
 - (ii) The UNCITRAL Notes on Organising Arbitral Proceedings including the in 2023 newly adopted Note on early dismissal and preliminary determination, or
 - (iii) The UNCITRAL Notes on Organising Arbitral Proceedings (with an additional note on early dismissal and preliminary determination).
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