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Report of Working Group II (Dispute Settlement) on the work of its seventy-fourth session (Vienna, 27 September–1 October 2021)

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I. Introduction

1. The Commission, at its fifty-first session in 2018, agreed that Working Group II should be mandated to take up issues relating to expedited arbitration.[1] Accordingly, the Working Group commenced its consideration of issues relating to expedited arbitration at its sixty-ninth session (New York, 4–8 February 2019), which continued until the seventy-third session (New York, 22–26 March 2021).

2. The Commission, at its fifty-fourth session in 2021, adopted the UNCITRAL Expedited Arbitration Rules (the "Expedited Rules") and the new article 1, paragraph 5 of the UNCITRAL Arbitration Rules (the "UARs"), prepared by the Working Group.[2] The Expedited Rules came into effect on 19 September 2021. The Commission also approved the Explanatory Note to the UNCITRAL Expedited Arbitration Rules (the "Explanatory Note") in principle and tasked the Working Group with its finalization at the current session.[3]

3. During the deliberations on the Expedited Rules, support was expressed for providing arbitral tribunals with tools to dismiss non-meritorious claims and defences as well as to make preliminary determinations. Based on that support, the Working Group decided to suggest to the Commission that it be mandated to consider and develop a draft provision further for possible inclusion in the UARs at the current session (A/CN.9/1049, para. 60).

4. The Commission, at the fifty-fourth session in 2021, considered that suggestion by the Working Group. While some concerns were expressed (including the divergence in approaches in different jurisdictions and also in the context of investment arbitration), the Commission requested the Working Group to discuss the topic of early dismissal upon finalizing the Explanatory Note and present the results of its discussions to the fifty-fifth session of the Commission in 2022.[4]

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its seventy-fourth session from 27 September to 1 October 2021. The session was organized in accordance with the decision by the Commission to extend the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex I) until its fifty-fifth session.[5] Arrangements were made to allow delegations to participate remotely as well as in person at the Vienna International Centre.

6. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Colombia, Croatia, Czechia, Dominican Republic, Finland, France, Germany, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Lebanon, Libya, Malaysia, Mexico, Pakistan, Peru, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

7. The session was attended by observers from the following States: Angola, Armenia, Bahrain, Bulgaria, Burkina Faso, Cambodia, Egypt, El Salvador, Kuwait, Morocco, Netherlands, Norway, Oman, Panama, Qatar, Slovakia, Sweden, Tunisia and Uruguay.

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[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 252.
[2] Ibid., *Seventy-sixth Session, Supplement No. 17* (A/76/17), para. 189.
[3] Ibid., paras. 188 and 214.
[4] Ibid.
[5] Ibid., para. 248.

8. The session was further attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Environment Programme (UNEP);

(b) *Intergovernmental organizations*: Cooperation Council for the Arab States of the Gulf (GCC), Mercado Común del Sur (MERCOSUR) and Permanent Court of Arbitration (PCA);

(c) *Non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Society of International Law (ASIL), Arbitral Women (AW), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociación Venezolana de Arbitraje (AVA), Barreau de Paris, Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Centre for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Center for International Legal Studies (CILS), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIARB), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICA), German Arbitration Institute (DIS), Hong Kong International Arbitration Centre (HKIAC), Hong Kong Mediation Centre (HKMC), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Law Institute (ILI), International Union of Notaries (UINL), Israeli Institute of Commercial Arbitration (IICA), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), Nigerian Institute of Chartered Arbitrators (NICArb), Russian Arbitration Center at the Russian Institute of Modern Arbitration (RAC at RIMA), Saudi Center for Commercial Arbitration (SCCA), Swiss Arbitration Association (ASA), Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ) and Vienna International Arbitration Centre (VIAC).

9. According to the decision made by the Commission (see para. 5 above), the following persons continued their offices:

Chair: Mr. Andrés Jana (Chile)

Rapporteur: Mr. Takashi Takashima (Japan)

10. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.II/WP.218); (b) Draft Explanatory Note to the UNCITRAL Expedited Arbitration Rules (A/CN.9/WG.II/WP.219); (c) Draft provision on pleas as to the merits and preliminary determination (A/CN.9/WG.II/WP.220).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Adoption of the agenda.
3. Finalization of the Explanatory Note to the UNCITRAL Expedited Arbitration Rules.
4. Consideration of issues relating to early dismissal and preliminary determination.
5. Adoption of the report.

III. Finalization of the Explanatory Note to the UNCITRAL Expedited Arbitration Rules

12. The Working Group engaged in the finalization of the Explanatory Note as presented in document A/CN.9/WG.II/WP.219. Delegations were invited to submit editorial comments (including those on translation) in writing to assist the secretariat in preparing the publication of the Explanatory Note.

1. Introduction (A/CN.9/WG.II/WP.219, paras. 1–3)

13. With regard to paragraph 1, the Working Group agreed to replace the phrase "the rights of the parties to" with the phrase "the need to preserve".

2. Section A – Scope of application (A/CN.9/WG.II/WP.219, paras. 4–18)

14. To better indicate that consent of the parties was the sole criterion for the application of the Expedited Rules, it was agreed that paragraph 4 should be formulated as a single sentence as follows: "Article 1 provides that express consent of the parties is required for the application of the Expedited Rules."

15. As there was no need for the parties to agree to preserve the three-member tribunal, it was agreed that the penultimate sentence in paragraph 6 should read: "Similarly, if a three-member arbitral tribunal was constituted in accordance with the UARs, the parties may wish to consider appointing a sole arbitrator in accordance with article 8."

16. A suggestion to delete paragraph 9 in its entirety did not receive support, as it appropriately reflected the deliberations of the Working Group on how article 1(2) of the UARs would apply in the context of expedited arbitration.

17. A suggestion was made that paragraph 12 should not mention that parties were required to provide "convincing and justified reasons", as this was not an obligation specified under the Expedited Rules. That suggestion did not receive support, as the current wording reflected the understanding of the Working Group that parties wishing to withdraw from expedited arbitration after having agreed to the Expedited Rules should provide justifiable reasons and that the tribunal could refer to them when making the determination under article 2 of the Expedited Rules.

18. It was agreed that the word "limited" before the word "circumstances" in paragraph 12 should be replaced with the word "certain" to avoid the impression that there were defined limits to the circumstances.

3. Section B – General provision on expedited arbitration (A/CN.9/WG.II/WP.219, paras. 19–24)

19. A suggestion to add the words "in written form, by e-mail" after the phrase "when communicating with the parties" in the first sentence of paragraph 24 did not receive support, as it was considered to be captured by the phrase "a wide range of technological means".

20. It was agreed that the phrase in the second sentence of paragraph 24 "without the physical presence of the parties as well as remotely" should be elaborated to read "without the physical presence of the participants and in different locations" to clarify that the parties, the arbitrator, witnesses and experts do not need to participate in person and can also do so from different locations.

4. Section C - Notice of arbitration, response thereto, statements of claim and defence application) (A/CN.9/WG.II/WP.219, paras. 25–39)

21. The Working Group agreed to delete the phrase "the number of arbitrators" in the seventh bullet point in paragraph 29, as the default rule in the Expedited Rules was a sole arbitrator.

5. Section D – Designating and appointing authorities (A/CN.9/WG.II/WP.219, paras. 40–46)

22. The Working Group agreed that the last sentence of paragraph 42 should read as follows: "…. is able to make the request to the Secretary-General of the PCA immediately upon the lapse of the 15-day time frame in article 5(1)."

23. A suggestion to delete paragraph 43 did not receive support as the paragraph provided useful guidance to the claimant before engaging the Secretary-General of the PCA.

6. Section E – Number of arbitrators (A/CN.9/WG.II/WP.219, paras. 47-49)

24. The Working Group agreed that no modification was necessary in section E.

7. Section F – Appointment of the arbitrator (A/CN.9/WG.II/WP.219, paras. 50-59)

25. Considering that the default rule in the Expedited Rules was a sole arbitrator, it was agreed that the first sentence of paragraph 57 should be revised to indicate that article 6(5) of the UARs required the appointing authority and the Secretary-General of the PCA, when exercising the functions under the Expedited Rules, to give the arbitrator, if appointed and when appropriate, an opportunity to present views. It was further agreed to add the phrase "and comments thereon" after the words "any proposal" in the last sentence of paragraph 57.

26. It was agreed that paragraph 58 should mention that the appointing authority could require the prospective arbitrator to make a statement as provided in the annex to the Expedited Rules.

8. Section G – Consultation with the parties (A/CN.9/WG.II/WP.219, paras. 60-65)

27. It was agreed that the last sentence of paragraph 62 should be revised as follows: "Similarly, if the parties indicate that they intend to present witnesses, whether statements by witnesses shall be in writing and the time for the presentation of the witness statements could be discussed during the consultations."

9. Section H – Time frames and the discretion of the arbitral tribunal (A/CN.9/WG.II/WP.219, paras. 66–70)

28. The Working Group agreed that no modification was necessary in section H.

10. Section I – Hearings (A/CN.9/WG.II/WP.219, paras. 71-76)

29. It was agreed that the word "would" in the second sentence of paragraph 75 should be replaced with the word "might" to give flexibility to the arbitral tribunal in determining whether the request was made at an appropriate stage of the proceedings. Consequently, it was agreed that the last sentence of paragraph 75 should read as follows: "Insofar, article 11 could have the effect …"

11. Section J - Counterclaims and claims for the purpose of set-off (A/CN.9/WG.II/WP.219, paras. 77–78) and section K – Amendments and supplements to a claim or defence (A/CN.9/WG.II/WP.219, paras. 79–80)

30. The Working Group agreed that no modification was necessary in sections J and K.

12. Section L – Further written statements (A/CN.9/WG.II/WP.219, paras. 81)

31. It was agreed that the word "reinforces" in the first sentence of paragraph 81 should be replaced with the word "emphasises".

13. Section M – Evidence (A/CN.9/WG.II/WP.219, paras. 82–83)

32. It was agreed that the third sentence of paragraph 82 should be revised as follows: "The second sentence reaffirms the discretionary power of the arbitral

tribunal to disallow a procedure where a party requests another party to produce documents (often referred to as document production phase).”

14. Section N – Period of time for making the award (A/CN.9/WG.II/WP.219, paras. 84–94)

33. To indicate that article 16 dealt with the time frames for rendering the final award rather than an interim award, it was agreed that section N could begin with the following sentence: “Article 16 provides the time frame for making the award, which refers to the final award.”

34. While a suggestion was made that the second sentence of paragraph 84 should be deleted, it was generally felt that the sentence properly reflected the rule in article 16(1) of the Expedited Rules. Another suggestion was that the sentence should mention the possibility for the parties to eliminate any time frame. That suggestion did not receive support. It was said that while the parties were free to do so under article 1 of the Expedited Rules, the focus of that sentence should be the possibility for the parties to agree on a time frame different from that in article 16(1).

35. A further suggestion was that section N should address the possible consequences of non-compliance by the arbitral tribunal of the requirements in article 16, including the time frames therein. In support, it was mentioned that reference could be made to adjustments of the fees by the appointing authority in accordance with article 41(4) of the UARs. However, the Working Group agreed that it would not be necessary to include such reference in the Explanatory Note.

36. To address the interpretation and correction of an award as well as an additional award after the lapse of the time frame in article 16, it was agreed that a paragraph should be added in section N as follows: “Article 16 should also be read together with articles 37 and 38 of the UARs, which respectively provide that the interpretation and the correction form part of the award. If the final award was made within the time frame in article 16, any subsequent interpretation or correction to that award after the lapse of the time frame shall not affect the timeliness of the final award for the purposes of article 16. Similarly, an additional award made in accordance with article 39 of the UARs after the lapse of the time frame in article 16 shall not affect the timeliness of the award made within that time frame.”

37. A wide range of views were expressed on whether to retain the last sentence of paragraph 86. One suggestion was to delete the sentence as it could incentivize parties to modify the time frames in the Expedited Rules and to agree on a time period longer than the 9 months as provided in paragraph 2. Another suggestion was that the last sentence of paragraph 84, which stated the autonomy of the parties to agree on a time frame different from that in article 16(1), could be expanded to include a reference to article 16(2). Yet another suggestion was to retain the sentence as it reiterated the autonomy of the parties to modify the time frames within the context of article 16(2). In support, it was said that the sentence could focus on the fact that parties could agree on a time period longer than the maximum period provided in paragraph 2, while an agreement on a shorter period was also possible. In that context, a suggestion was made to delete the word “maximum” in the first sentence of paragraph 86, which, however, did not receive support.

38. After discussion the Working Group agreed to retain the last sentence of paragraph 86 outside square brackets and revised as follows: “In addition, as parties are free to modify any time frame in the Expedited Rules, paragraph 2 does not prevent the parties from agreeing on a time period that is longer than 9 months”.

39. The Working Group then discussed the square bracketed text in paragraphs 87 and 88, which were intended to address the situation where the parties had agreed to a time period different than the 9 months as provided in paragraph 2. To simplify the text, it was agreed that the first sentence of both paragraphs should refer to the “time frame provided for in paragraph 2”, which should be understood to mean the 9-month time frame therein or any other time frame agreed by the parties. In that regard, it was

also agreed that the last sentence of paragraph 92 should be revised to state that the arbitral tribunal would be able to render an award even after the extended period of time provided for in paragraph 2 without any specific reference to 9 months.

40. A suggestion was made that the phrase "because a time frame exceeding that would likely be opposed by the parties" in the last sentence of paragraph 89 should be deleted. In response, it was stated that there would be merit in alerting the arbitral tribunal that it needed to seek the agreement of the parties for an extension and that the interest of the parties needed to be taken into account. Accordingly, it was agreed that the second sentence of paragraph 89 should be revised as follows: "Nonetheless, to obtain the agreement of the parties, the extended time frame requested by the arbitral tribunal should be reasonable taking into account any concerns of the parties, and be sufficient for the arbitral tribunal to render the award".

41. While it was suggested that paragraph 92 should emphasise that the withdrawal from expedited arbitration required a request by a party, it was noted that that paragraph should be read in conjunction with paragraph 91 which conveyed that requirement. A suggestion to delete the second sentence of paragraph 92 was not supported.

42. With regard to paragraph 93, a suggestion was made that the Explanatory Note should provide further guidance on how events that had a disruptive effect on the proceeding could be handled in expedited arbitration, particularly with regard to the time frames provided for in article 16. As examples, references were made to the impossibility of the arbitrator to perform his or her functions, a challenge of the arbitrator and a party's non-payment of the required deposits. A suggestion was made that in the situation of impossibility, the arbitrator could be relieved, under the applicable law or general principles of law, of his or her obligation to conduct the proceedings, including to render the award, and that the time period under article 16 could be extended accordingly. Another suggestion was to rely on the rules in the UARs, for example, article 15, which provided that in the case of replacement, the proceedings would resume at the stage where the arbitrator ceased to perform his or her functions. It was said that that would in practice have the effect of suspending the time period in article 16. It was also mentioned that article 43(4) of the UARs provided the arbitral tribunal with the power to suspend the arbitral proceedings, which would have the effect of the time period in article 16 ceasing to run during the suspension. With respect to the challenge of the arbitrator, it was said that the arbitrator could utilize the mechanism provided for in article 16(2) and (3) of the Expedited Rules to extend the time period for rendering the award, should he or she consider that the decision on the challenge would not be made before the lapse of the time frame in article 16. It was said that the same could apply in cases where the incapacitated arbitrator was able to recover, in other words, where the incapacitation was temporary. It was generally felt that the Explanatory Note did not need to address all possible scenarios but should aim to point to the rules in the UARs and the Expedited Rules, which could provide solutions depending on the case.

43. After discussion, it was agreed that paragraph 93 should be revised as follows: "It should be noted that article 16 does not aim to address the instances of de jure or de facto impossibility of the arbitrator to perform his or her functions. In such situations, article 12(3) as well as articles 13 and 14 of the UARs will likely lead to the termination of the arbitrator's services and his or her replacement. In the case of replacement, article 15 of the UARs provides that the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions. In practice, this would have the effect of suspending the time period in article 16 of the Expedited Rules from the time the replaced arbitrator ceased to perform his or her functions to the date of replacement. If the new arbitrator considers that the remaining time would not be sufficient to render an award, he or she could rely on the extension mechanism in article 16. Also, if an arbitrator is temporarily unable to perform his or her functions and is not replaced, the arbitrator as well as the parties could rely on the extension mechanism in article 16 to cope with any delay that may have occurred during such a period." An additional paragraph would be inserted after paragraph 93

to read as follows: “A similar solution applies if the arbitral tribunal suspends the proceedings in accordance with article 43(4) of the UARs, due to non-payment of the required deposits. In that case, the time period in article 16 would cease to run during the suspension.”

44. While a number of suggestions were made to delete paragraph 94 in its entirety or parts thereof, it was generally felt that the paragraph as a whole reflected the various views expressed in the Working Group and the Commission on whether an award rendered under the Expedited Rules should contain reasons. It was, however, agreed that the last sentence of paragraph 94 should be clarified to read: “The absence of reasoning in an award could have an impact on the control mechanism and its scope, as such reasoning might be necessary for the court or any other competent authority to consider whether some of the grounds for setting aside the award or refusing its recognition and enforcement exist”.

15. Section O – Model arbitration clause for expedited arbitration (A/CN.9/WG.II/WP.219, paras. 95–96)

45. The Working Group agreed to replace the words “should agree” in the second sentence of paragraph 95 with the words “should consider adding” so as to avoid giving the impression that an arbitration clause missing some of the elements listed in the model clause would be invalid.

46. With regard to paragraph 96, it was agreed that the words “their dispute” could be replaced by the words “a dispute that has arisen or could arise in the future” so as to not give the impression that the parties could agree to refer a dispute to the Expedited Rules only after it had arisen.

16. Section P – The Expedited Rules and the Transparency Rules (A/CN.9/WG.II/WP.219, paras. 97–102) and section Q – Time frames in the Expedited Rules

47. A view was expressed that the use of the Expedited Rules should be limited to commercial arbitration and that they would not be suitable for investment arbitration.

48. The Working Group agreed that no modification was necessary in sections P and Q.

IV. Consideration of issues relating to early dismissal and preliminary determination

49. Upon finalization of the Explanatory Note, the Working Group engaged in a discussion on the topic of early dismissal and preliminary determination, mainly whether to develop a draft provision for possible inclusion in the UARs or to prepare a guidance document.

50. At the outset, it was mentioned that the use of such a procedural tool was more frequent in the context of investment arbitration. It was further mentioned that Working Group III was in the process of developing a framework for the early dismissal of frivolous claims in its broader consideration of investor-State dispute settlement (ISDS) reform. While views were expressed that the further discussions on the topic should be deferred to Working Group III, it was generally felt that the Working Group could discuss the topic and inform Working Group III of its deliberations for coordination purposes. In that light, the Working Group agreed to adopt a generic approach when considering the topic, with the understanding that the tool to be developed would be used in a wide range of arbitrations, including in investment arbitration.

1. General remarks

51. The Working Group engaged in a preliminary discussion on the topic of early dismissal and preliminary determination. A wide range of views were expressed including:

- The underlying objective for providing for such a procedural tool should guide the work of the Working Group;
- Such a tool could improve the overall efficiency of the arbitration proceeding and should be designed so as to not result in prolongation or additional costs; therefore, safeguards should be put in place to prevent abuse by the parties; in addition, the existence and the use of such a tool could foster amicable settlement of the dispute at an early stage;
- Due process should be preserved, including the right of the parties to present their case;
- The use of such a tool was more common in certain jurisdictions, while not so often used in others; practice in some jurisdictions showed that arbitral tribunals, more often than not, preferred to reject such a request and err on the side of caution in order to have a more complete view of the circumstances of the case;
- Several arbitral institutions had introduced express provisions in their institutional rules and those institutions have confirmed that the tool was being used in practice while other institutions had decided deliberately not to include such a provision and provided guidance to the users;
- Providing an express provision could make it easier for arbitral tribunals to utilize such a tool and could discourage frivolous claims by parties; the use of such a tool, if not expressly provided in the UARs or the parties' agreement, could create complications when enforcing the award; therefore, clarity would be crucial for arbitral tribunals to utilize and for parties to have a better understanding of the mechanism;
- A rule, if prepared, should be simple and provide flexibility to the arbitral tribunal in its utilization; furthermore, it should not result in inadvertently limiting the existing discretion under article 17(1) of the UARs;
- The use of the tool was within the inherent powers of the arbitral tribunal under article 17(1);
- An express provision was not necessary and at most, guidance could be provided on the basis of articles 17, 23 and 34 of the UARs; an express provision would be an example of overregulation of the arbitration process, which should be avoided;
- Caution should be taken in introducing such a tool in the UARs, as it could lead to abuse and cause further costs and delays;
- An express provision would privilege a particular tool over others and could introduce disruptive motion practice into the UARs;
- There was the need to examine whether certain jurisdictions prevented arbitral tribunals from using the tool in the absence of a rule or an agreement by the parties;
- The consequences of the ruling by the arbitral tribunal (either dismissing a claim or not upholding a plea to dismiss a claim) on the parties' right to raise the claim or to present the same request at a later stage of the proceedings should be clarified; and
- The ad hoc nature of the UARs would need to be taken into account.

2. Consideration of draft provision X

52. The Working Group examined draft provision X as contained in paragraph 7 of document A/CN.9/WG.II/WP.220 with the understanding that the views expressed

would be useful in making progress regardless of the final form of work and that such views would be without prejudice to the final position of the delegations on whether to include such a provision in the UARs.

53. With regard to the heading of draft provision X, various suggestions were made, including the need to highlight the "speediness/rapidness" of the procedure and its "expedited" nature, the "early" stage at which the pleas were to be made, the result of "dismissal of claim", "preliminary determination" or "summary disposition". It was felt that that matter ought to be revisited when there was more clarity on the substance of the rule, if prepared.

54. With regard to the interaction of draft provision X with article 23 of the UARs, differing views were expressed including:

- The two provisions should be distinguished – one addressing jurisdiction and another addressing merits of the case;
- Manifest lack of jurisdiction or competence of the arbitral tribunal should be one type of plea to be included in draft provision X; and
- It should be possible to utilize the procedure provided for in draft provision X for pleas as to the jurisdiction under article 23 to the extent relevant.

55. With regard to paragraph 1 of draft provision X, a number of views were expressed including:

- Subparagraphs (a) and (b) should be merged;
- Subparagraph (a) was sufficiently broad to cover other subparagraphs and "manifestly without legal merit" therein was an acceptable standard of review although further guidance would be useful;
- The lack of the legal capacity of the parties at the time of the submission of the claim should be included as a one type of plea;
- Subparagraph (b) should not be included as issue of fact or law were part of the claim and it could open doors for too many pleas; in addition, the consequences of dismissing issues of fact or law on the claim or defence itself were not clear;
- Claims and defences should not be treated on an equal footing, given that dismissal of a defence would not have the same impact on the overall proceedings as the dismissal of a claim as the dismissal of a defence would not terminate the proceedings; if a plea were to be allowed only at the early stages of the proceedings, including defences in the scope might not be appropriate; furthermore, the possibility to dismiss a defence in the context of ISDS could unduly limit a respondent State from properly defending its case;
- Subparagraph (c) should be deleted, as admissibility of evidence was different from an assessment of the legal merits, and was already addressed in article 27(4) of the UARs; and
- Subparagraph (d) should be removed or revised to ensure clarity.

56. After discussion, it was generally felt that paragraph 1 of draft provision X could read as follows: "A party may raise a plea that a claim or defence was manifestly without legal merit". It was widely felt that subparagraph (c) should not form part of the provision. It was felt that whether "defence" should be covered in such a provision as well as whether certain elements of subparagraphs (b) and (d) could be included therein would need to be further discussed. Similarly, whether to include pleas on the manifest lack of jurisdiction would need further consideration, also in light of article 23 of the UARs.

57. With regard to paragraphs 2 and 3, a wide range of views were expressed, including:

- There should be no time frames in draft provision X providing the parties and the arbitral tribunal flexibility in utilizing the tool;
- Paragraphs 2 and 3 as well as other details could help parties better understand the decision-making process of the arbitral tribunal;
- The detailed procedure should generally be left to the arbitral tribunal; including procedural details such as those in paragraphs 2 and 3 could add another stage within the proceedings and increase the time and cost required;
- Time frames should be provided to streamline the process but may need adjustments, taking into account the time periods in article 23(2) and other articles of the UARs;
- There should be a maximum time limit when a party can make the plea;
- Raising a plea should not result in the extension of other time frames, for example, for the submission of the statement of defence;
- Parties raising a plea should meet certain requirements such as those referred to in paragraph 3 (for example, providing the basis of the plea and demonstrating that the plea would expedite the overall process);
- An additional requirement should be that the ruling on the plea would be "material" to the outcome of the proceedings given that the purpose of the tool was not limited to expediting the process;
- While paragraph 3 provided useful guidance on the requirements to be met, such requirements would need to be further aligned with the standard of review to be met in paragraph 1;
- The initiation of the early dismissal process should not be limited to the parties and the arbitral tribunal should also be able to do so;
- Early dismissal of claims or defences manifestly without legal merit was only one of several means for an arbitral tribunal to effectively manage the proceedings and the UARs enabled the arbitral tribunal to apply those means without the need of any additional regulation; and
- Instead of regulating a specific approach as in draft provision X, it should take the form of guidance or a general provision that might be included as an additional paragraph in article 17 of the UARs to read as follows: "At the request of a party or at its own initiative, the arbitral tribunal may, at any stage of the proceedings, identify any issue of law or fact which it deems suitable for early determination in advance of the full examination of other issues. Having heard the parties, the arbitral tribunal may decide such issues in a preliminary or final manner on its own merits."

58. While views diverged on paragraph 2, it was felt that the requirements in paragraph 3 would ensure that the arbitral tribunal would have sufficient information to rule on the plea and that parties would not be able to use the mechanism to delay the proceedings.

59. With regard to paragraphs 4 and 5, a wide range of views were expressed, including:

- There was merit in the two-stage process, which would structure and streamline the proceedings;
- In the two-stage process, parties should be given the opportunity to express their views before the arbitral tribunal made a ruling on the plea, which would have the advantage that the parties need to spend time and effort arguing whether a claim or defence should be dismissed only after the arbitral tribunal decided that the issues were suitable for early dismissal and that the tribunal was prepared to rule on the plea;

- Time frames in paragraphs 4 and 5 should be adjusted so as to give sufficient time to the parties to express their views and to the arbitral tribunal to make a determination or a ruling;
- There was no need to provide details on the time frame or the steps to be taken, which could limit the arbitral tribunal's ability to adapt the procedure to the case at hand; accordingly, the detailed procedure for making a determination or a ruling should be left to the arbitral tribunal;
- Rather than taking a two-stage process, it might be preferable if the arbitral tribunal were to make the determination and the ruling at the same time; and
- The arbitral tribunal should be given the authority to allocate costs for unsuccessful pleas.

60. With regard to paragraph 6, the following views were expressed:

- The arbitral tribunal should be required to provide reasoning in its ruling on the plea; and
- The extent to which a party could argue that a claim or defence lacked merit at a later stage of the pleadings when a plea for early dismissal had not been allowed or rejected should be clarified.

3. Possible form of work

61. The Working Group considered the possible form of work on the topic of early dismissal and preliminary determination:

- A detailed provision similar to draft provision X, which would list the types of pleas allowed and introduce a standard of review as well as the relevant procedure;
- A provision highlighting in generic terms the inherent powers of the arbitral tribunal to make early or preliminary determinations on aspects other than jurisdiction; and
- A guidance document on the use of those powers under the UARs.

62. While it was emphasized that the different forms would not be mutually exclusive, views diverged on the appropriate form of work and it was suggested that the Working Group should present different options for consideration by the Commission.

63. As to the timing of work, it was stated that caution should be taken in recommending revisions to the UARs, as it might be problematic if the UARs were revised too frequently, leading to multiple successive versions and making it difficult for users to ascertain which version would apply. In that context, reference was made to the revision of the UARs in 2010, in 2013 to incorporate the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, and in 2021 to incorporate the Expedited Rules. It was said that deliberations on an express rule might be timelier when the Commission had identified the need for a broader revision of the UARs. Furthermore, it was said that there was no urgency to include such a rule in the UARs and that work could be deferred to Working Group III or postponed until that Working Group concluded its work on an early dismissal mechanism to avoid overlap. It was also said that work on the topic could be done in sequence, possibly starting with the preparation of a guidance document.

64. Views were expressed that a rule on early dismissal should not apply in the context of arbitration under the Expedited Rules.

65. In response to those concerns, it was recalled that the Commission had requested the Working Group to discuss the topic in relation to the UARs and to present the results of its discussion at the fifty-fifth session of the Commission in 2022. It was noted that the UARs were generic in nature, while the work of Working Group III focused on the use of such tools in the ISDS context. It was observed that the need

for an express provision and its scope might be different in the ISDS context, as was being considered by Working Group III. It was also observed that it would be the Commission that would determine whether to task a working group with further work on the topic and when to do so. It was also mentioned that the Commission would ensure coordination between Working Groups II and III.

4. Way forward

66. 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 UARs. However, the Working Group was not at this stage in a position to determine the form of such work nor whether an express rule should be included in the UARs. Delegations generally remained flexible with regard to the different approaches.

67. Accordingly, the secretariat was requested to present the different illustrative options to the Commission based on the views expressed during the deliberations. It was widely felt that 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 UARs; (ii) a simple and generic rule expressly providing for such powers and a commentary thereto; and (iii) a detailed provision including the types of pleas, standard of review, and the two-stage procedure for early dismissal and preliminary determination as well as a commentary thereto. The secretariat was requested to obtain inputs from States as well as experts when preparing those options for the Commission.

V. Other business

68. The Working Group was informed that a colloquium was scheduled to take place in New York from 28 March to 1 April 2022 to discuss future work in the area of dispute settlement. The colloquium would identify the scope and nature of possible legislative work on dispute resolution in the digital economy and discuss the desirability and feasibility of work on adjudication. At the close of the session, views were exchanged on the detailed topics to be addressed at the colloquium as well as its organization.