



MIAMI INTERNATIONAL ARBITRATION SOCIETY (MIAS)

REPORT OF THE MIAS TASK FORCE ON ISSUES PRESENTED TO WORKING GROUP II RELATED TO EARLY DISMISSAL AND PRELIMINARY DETERMINATION TO BE CONSIDERED AT THE SEVENTY-SEVENTH SESSION OF UNCITRAL WORKING GROUP II (6-10 FEBRUARY 2023, NEW YORK)

The MIAS Task Force on Issues Presented to Working Group II has reviewed the Note by the Secretariat, A/CN.9/WGII/WP.230, dated November 24, 2022, on “Early dismissal and preliminary determination”. The MIAS Task Force supports the issuance of the Note and offers the following reformulation of the guidance text proposed to be added to the UNICTRAL Notes on Organizing Arbitral Proceedings.

Proposed Revised Guidance Text	MIAS Comments
<p>1. The arbitral tribunal may conduct the arbitration in a manner it considers appropriate provided that the parties are treated with equality and are given a reasonable opportunity to present their case. In exercising this discretion, the arbitral tribunal should avoid unnecessary delay and expense and provide a fair and efficient process for resolving the parties’ dispute.</p>	<p>This text is essentially the same as the first two sentences of Paragraph 1 of the Secretariat’s proposed text and comes from Article 17(1) of the UNCITRAL Arbitration Rules.</p>
<p>2. One such discretionary power is the ability of the arbitral tribunal to dismiss as manifestly without merit, a claim or defence, a counterclaim, or a claim for purposes of set-off (referred to here as “early dismissal”).</p>	<p>This text is a shortened version of the last two sentences of Paragraph 1 of the Secretariat’s proposed text.</p>
<p>3. A party may seek permission to submit a request for early dismissal to the arbitral tribunal at any time. If a request is made, the arbitral tribunal should permit a response from any other party in a timely manner. The arbitral tribunal may also at any time invite the parties to express their views on the possibility of early dismissal.</p>	<p>This text represents a slight modification of Paragraph 2 of the Secretariat’s text to clarify that a “request” does not represent the submission of briefing, but rather represents a letter or similar communication to the arbitral tribunal seeking permission to submit a request for early dismissal. (An “application” or “petition” or “motion” could be</p>



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	<p>substituted for “request.”) MIAS’s proposed text provides for a response to be made and then adopts the Secretariat’s text that the arbitral tribunal can invite the parties to express their views.</p> <p>MIAS believes that a request should be permissible at any time but as explained below, the timing of the request will affect the arbitral tribunal’s discretion on whether to grant it.</p>
<p>4. Where appropriate to enhance the efficiency of the overall proceeding, it may be advisable to permit the initiation of, or to initiate, the early dismissal process at an early stage of the proceeding.</p>	<p>This text appears in Paragraph 5 of the Secretariat’s proposed text but has been moved up to present what MIAS believes is a better sequence of the process.</p>
<p>5. A request for early dismissal and a response thereto, should address, without limitation, the following:</p> <p>(a) Whether the legal issue presented lends itself to resolution without the need to receive evidence;</p> <p>(b) Whether the parties agree that there are no material issues of fact in dispute; and</p> <p>(c) Why initiation of the early dismissal process will expedite the proceeding without compromising the fairness of the proceeding.</p>	<p>The Secretariat’s proposed text refers to “justifying grounds” in Paragraph 3. MIAS suggests greater specificity than this. It also suggests separating the grounds offered by the requesting party from the additional considerations that the arbitral tribunal should consider (see next paragraph).</p> <p>Early dismissal will require that there be no material facts in dispute and that a legal question be presented. MIAS believes that this should be expressly stated.</p>
<p>6. In deciding whether to grant the request to initiate the early dismissal process, the arbitral tribunal would need to take into account, without limitation,</p> <p>(a) The grounds offered by the requesting party;</p> <p>(b) The stage of the proceedings;</p>	<p>The arbitral tribunal’s discretion will be informed by at least the factors listed here. Some are like those listed in Paragraph 3 of the Secretariat’s proposed text. But MIAS suggests adding the status</p>



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<p>(c) Whether there have been exchanges of documents;</p> <p>(d) The scope of legal briefing required to decide the request;</p> <p>(e) The time required to address the request;</p> <p>(f) The expense associated with the request; and</p> <p>(g) The need to provide a fair and efficient process.</p>	<p>of documentary exchanges and the scope of briefing required.</p>
<p>7. Upon determining that the early dismissal process would proceed, the arbitral tribunal should indicate the procedure it will follow, ensuring that parties have a reasonable opportunity to prepare and present their case. In indicating the procedure, the arbitral tribunal should also take into account the time within which it will make a ruling.</p>	<p>This proposed text is like the Secretariat’s proposed text in Paragraphs 5 and 6.</p>
<p>8. 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.</p>	<p>This is the same text as appears in the second sentence of Paragraph 6 of the Secretariat’s proposed text.</p>
<p>9. 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 decides 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.</p>	<p>This includes the same text as appears in the second sentence of Paragraph 7 of the Secretariat’s proposed text.</p>



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<p>10. 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.</p>	<p>This is the same text as appears in Paragraph 8 of the Secretariat’s proposed text.</p>
<p>11. 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.</p>	<p>This includes the same text as appears in the second sentence of Paragraph 9 of the Secretariat’s proposed text.</p>
<p>12. Note that 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. An arbitral tribunal’s ruling on such a request of lack of jurisdiction (or when the tribunal raises the question of its jurisdiction <i>sua sponte</i>), is not governed by the heightened standard of “manifestly without merit,” but by a determination of the scope of disputes governed by the applicable arbitration agreement.</p>	<p>This paragraph is based on Paragraph 4 of the Secretariat’s proposed text. The discussion of jurisdiction in the Secretariat’s text seemed to be better placed at the end of the proposed Note instead of in the middle of it.</p>

Respectfully submitted,

MIAS TASK FORCE ON ISSUES PRESENTED TO WORKING GROUP II

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