United Nations A/CN.9/WG.II/WP.220

General Assembly

Distr.: Limited
3 August 2021

Original: English

United Nations Commission on International Trade Law
Working Group II (Dispute Settlement)
Seventy-fourth session
Vienna, 27 September–1 October 2021

Draft provision on pleas as to the merits and preliminary determination

Note by the Secretariat

Contents

V.21-05744 (E)

A. Introduction

1. At its seventieth and seventy-first sessions, the Working Group considered draft provisions on early dismissal (a tool for arbitral tribunals to dismiss claims and defences that lacked merit) and preliminary determination (a tool that would allow a party to request the arbitral tribunal to decide on one or more issues or points of law or fact without undergoing every procedural step) for possible inclusion in the UNCITRAL Expedited Arbitration Rules (A/CN.9/969, paras. 20 and 21; A/CN.9/1003, paras. 82–87; A/CN.9/1010, paras. 122–129).

2. Deliberations in the Working Group were based on institutional rules that contained express provisions for such tools, for example:

- International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rule 41(5) – Preliminary Objections;
- Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, Rule 29 – Early Dismissal of Claims and Defences;
- Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2017, Article 39 – Summary procedure; and
- Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, Article 43 – Early Determination Procedure.

3. A wide range of views were expressed (A/CN.9/969, paras. 20 and 116; A/CN.9/1003, paras. 83–85; A/CN.9/1010, paras. 123–125), including the following:

- Such procedural tools could improve the overall efficiency of the arbitration proceeding;
- While the use of those tools would be within the inherent power of the arbitral tribunals under article 17(1) of the UNCITRAL Arbitration Rules, providing them explicitly could make it easier for the tribunals to utilize them and could discourage frivolous claims by parties;
- Arbitral institutions have introduced such provisions in their institutional rules and those institutions have confirmed that the tools were being used in practice;
- The use of such tools could raise due process concerns (for example, when not expressly provided as a rule, to which the parties had agreed) and could create complications at the enforcement stage;
- The use of such tools might be more appropriate in the context of investment arbitration whereby claims were based on investment treaties;
- The use of such tools was not necessarily limited to expedited proceedings but could also be applied in non-expedited proceedings, as they aimed at dismissing a claim or defence at the early stages of the proceedings, rather than accelerating the proceedings;
- While common in certain jurisdictions, parties and arbitrators from other jurisdictions might not be so familiar with such tools;
- Rules providing for early dismissal and for preliminary determination should be merged to avoid overlap; and
- Such tools could be subject of abuse by the parties and might also result in delays, while appropriate time frames within the rules could address such concerns.

4. The Working Group, at its seventy-third session (New York, 22–26 March 2021), decided to not include a provision on early dismissal or preliminary determination in the UNCITRAL Expedited Arbitration Rules (A/CN.9/1049, para. 59). This was based on previous deliberations in the Working Group and the divergence in views on whether such a rule should be placed in the Expedited Arbitration Rules. Instead

views had been expressed that the appropriate placement of such a provision should be in the UNCITRAL Arbitration Rules.

5. Considering the support that had been expressed in the Working Group for providing arbitral tribunals with tools to dismiss non-meritorious claims and defences as well as to make preliminary determinations, the Working Group decided to suggest to the Commission that it be mandated to consider and develop a draft provision for possible inclusion in the UNCITRAL Arbitration Rules.

6. The Commission, at the fifty-fourth session in 2021, considered the suggestion by the Working Group. Some concerns were expressed noting that there were divergent approaches in different jurisdictions and that such tools were more often utilized in the context of investment arbitration. After discussion, the Commission requested Working Group II to discuss the topic of early dismissal at its seventy-fourth session and present the results of its discussions to the Commission in 2022.[1]

B. Draft provision on pleas as to the merits and preliminary determination

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

Draft provision X (Pleas as to the merits and preliminary determination)

1. A party may raise a plea that:

(a) A claim or defence is manifestly without legal merit;

(b) Issues of fact or law supporting a claim or defence are manifestly without merit;

(c) Certain evidence is not admissible;

(d) No award could be rendered in favour of the other party even if issues of fact or law supporting a claim or defence are assumed to be correct;

(e) ...

2. A party shall raise the plea as promptly as possible and no later than 30 days after the submission of the relevant claim/defence, issues of law or fact or evidence. The arbitral tribunal may admit a later plea if it considers the delay justified.

3. The party raising the plea shall specify as precisely as possible the facts and the legal basis for the plea and demonstrate that a ruling on the plea will expedite the proceedings considering all circumstances of the case.

4. After inviting the parties to express their views, the arbitral tribunal shall determine within [15] days from the date of the plea whether it will rule on the plea as a preliminary question.

5. Within [30] days from the date of the plea, the arbitral tribunal shall rule on the plea. The period of time may be extended by the arbitral tribunal in exceptional circumstances.

6. A ruling by the arbitral tribunal on a plea shall be without prejudice to the right of a party to object, in the course of the proceeding, that a claim or defence lacks legal merit.

8. The Working Group may wish to first consider whether draft provision X should be further developed for possible inclusion in the UNCITRAL Arbitration Rules. The

[1] *Official Records of the General Assembly*, *Seventy-sixth Session, Supplement No. 17* (A/76/17), under preparation.

Working Group may, as an alternative, wish to consider whether a guidance document would serve a similar purpose, illustrating that articles 17(1) and 34(1) of the UNCITRAL Arbitration Rules, respectively recognizing the broad discretion of the arbitral tribunal to conduct the proceedings and to make separate awards on different issues at different times, would allow an arbitral tribunal to make an early dismissal or preliminary determination. The guidance text would aim at providing more insights on the procedure that could be followed, building on the content of the draft provision. It may be noted that a similar approach has been followed by the International Chamber of Commerce (ICC), which provided guidance as to how an application for the expeditious determination of manifestly unmeritorious claims or defences may be addressed within the broad scope of Article 22 of the ICC Arbitration Rules, in its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the 2021 ICC Rules of Arbitration (1 January 2021).[2]

9. The heading "pleas as to the merits and preliminary determination" of draft provision X mirrors the heading of article 23 of the UNCITRAL Arbitration Rules, "pleas as to the jurisdiction of the arbitral tribunal". The Working Group may wish to consider the appropriateness of the heading and possible alternatives. In that context, the Working Group may wish to consider the interaction between draft provision X and article 23 of the UNCITRAL Arbitration Rules.

10. Paragraph 1 of draft provision X lists the type of pleas that a party can raise. The Working Group may wish to develop the list further. As to the standard to be applied, it was considered that the "manifestly without merit" standard provided a sound basis (A/CN.9/1010, para. 127).

11. Paragraph 2 introduces a time frame within which a party would be able to raise a plea. Paragraph 3 requires the party raising the plea to provide grounds justifying the plea. This would address concerns about the possible abuse of the tool by the parties resulting in delays (A/CN.9/1010, para. 124).

12. Paragraphs 4 and 5 provide for a two-stage process with the arbitral tribunal first determining whether to consider the plea and then deciding on the merits. Both paragraphs include a time frame within which a decision (on procedure and on the merits of the plea) needs to be made by the arbitral tribunal. The Working Group may wish to consider whether the two-stage process should be combined into a single stage with a single time frame.

[2] Available at https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/ (see paras. 109–114).