Kluwer Arbitration Blog

Preliminary Determinations – Path to Efficiency OR Treacherous Shortcut?

Francis Hornyold-Strickland, Duncan Speller (Wilmer Cutler Pickering Hale and Dorr LLP) · Thursday, April 21st, 2016

Preliminary determinations provide a potential mechanism to streamline proceedings, but should be used with caution. This article examines the increased attention given to preliminary determinations in international arbitration. First, it explains what preliminary determinations are and how they differ from summary judgment procedures. Second, it examines the change in recent years, in the use of preliminary determinations in international arbitration. Third, it offers non-exhaustive guidelines as to their possible use. Fourth, it compares preliminary determinations to the other procedures that can also help to streamline cases.

A preliminary determination is a decision made by an arbitral tribunal, typically in a partial award, determining some but not all of the issues in dispute. For example, a preliminary determination may involve the determination of a discrete issue before other issues are determined in a final award. The aim of a preliminary determination is to decide, early on in the arbitral process, an issue that can either help to streamline the rest of the arbitration by narrowing the list of issues in dispute, or, occasionally, by disposing of the arbitration in its entirety. A binding determination on some issues in dispute can also, in some circumstances, guide the settlement range, and provide impetus to settlement.

Possible instances of preliminary determination include decisions in relation to: (1) the tribunal's jurisdiction; (2) pure contractual interpretation; (3) pure questions of law; (4) questions of fact; (5) mixed questions of fact and law; and (6) public policy. Examples of preliminary determination have included: (a) determining the factual question of whether a Respondent's net asset value at the time of a relevant breach was positive or negative; (b) making a preliminary award on the tribunal's jurisdiction; (c) determining whether an arbitration agreement has come into existence at all; and (d) whether a tribunal could apply U.S. antitrust law.

A preliminary determination is different to a summary judgment, as that term is used in United States or English Court proceedings. Like summary judgement, a preliminary determination involves a final and binding determination on an issue or issues. Unlike summary judgment, however, a party generally has the full right to present its case and any evidence prior to the preliminary determination being reached. A preliminary determination typically does not involve the dismissal of claims on a *prima facie* basis as a result of a decision that they do not have a real prospect of success.

Historically, arbitrators have been reluctant to use summary judgment. In part, this is to go do with a fear of rendering an unenforceable award: arbitrators have been cautious of leaving awards open to challenge or attempts to resist recognition and enforcement on the grounds of due process violations (e.g., that a party was not allowed to present its case fully).

In recent years, there has been increasing attention to preliminary determinations as a possible device in the arbitrators' case management armoury. This attention has often been coupled with discussion about proposals to enhance the speed and efficiency of international arbitration.

In practice, arbitral tribunals increasingly raise the possibility of preliminary determinations with the parties at an early phase of the arbitration. Moreover, a number of recent revisions to arbitration rules make specific reference to preliminary determinations. For example, the 2010 International Bar Association ("IBA") Rules [Articles 2(3)(b), 3(3)(14), 4(4) and 8(3)(e)] and the International Dispute Resolution Centre ("ICDR") Rules [Articles 19 and 20] both now expressly refer to the use of preliminary determinations. The 2014 LCIA Rules, for example, do not expressly refer to preliminary determinations but do expressly envisage that a tribunal may make separate awards on different issues at different times [Article 26.1].

Despite the increasing consideration of preliminary determinations, there is a lack of concrete guidance as to when they are and are not appropriate. This involves a nuanced and careful exercise of judgment, particularly given the due process issues involved.

In appropriate cases, preliminary determinations can focus the issues in dispute and save considerable time and expense. In other cases, however, preliminary determinations can protract the overall time necessary for the resolution of the dispute and create an additional layer of delay and expense, as well as giving rise to concerns about whether the parties have had a fair and reasonable opportunity to present their case. Indeed, the English courts have commented that preliminary determinations can sometimes be "treacherous shortcuts."

The following non-exhaustive and non-prescriptive guidelines are offered for discussion and comment:

First, parties and/or tribunals should generally restrict preliminary determinations to questions of jurisdiction, pure law or contractual interpretation.

Secondly, where the determination of a preliminary factual question can streamline the arbitration, the tribunal should: (a) ascertain whether the factual question is sufficiently discrete for preliminary determination: (b) if so, direct the full exchange of relevant evidence for that question, but no more; (c) seek the consent of both parties for a preliminary factual determination to avoid subsequent concerns that a party did not have the right to a full exposition of their case, based on all the relevant facts.

Thirdly, the parties should have the opportunity to make submissions on the issues to be determined and whether they are suitable for preliminary determination.

Fourth, the tribunal should define at the outset the issues to be determined, the procedure for that determination and the timetable. There should not be any "moving of the goal posts" in relation to the issues directed for preliminary determination after submissions have already been made and/or evidence has already been presented on those issues.

These guidelines are far from exhaustive and will not necessarily be suitable in all cases. Nevertheless, the guidelines do provide a structured and concrete series of considerations that parties and tribunals can take into account in determining whether a preliminary determination is suitable in a particular case.

Whether a preliminary determination is appropriate is necessarily a case specific and issue specific question. The parties and the tribunal should ask whether a preliminary determination is more likely to help or hinder the expeditious and fair resolution of a particular case. In making this determination, the tribunal should also take into account whether a party will have a fair and reasonable opportunity to present its case on all relevant issues. Under the New York Convention and most national arbitration laws, the protection of a party's right to a fair and reasonable opportunity to present its case is paramount (and indeed mandatory).

In addition to preliminary determination, it is possible for the tribunal to encourage the parties to streamline proceedings through the use of other, alternative/complementary, procedures. These can include, among others: (a) case management conferences (these are, in fact, required under Article 24(1) of the ICC Rules); (b) lists of issues; and (c) directions from the tribunal on material issues. They can be used as alternatives to preliminary determination or as complements to it, as appropriate.

One of the great advantages of international arbitration is its procedural flexibility, and the range of procedural options open to the parties and the tribunal. However, that flexibility only has value if the parties and the tribunal are aware of all the procedural options open to them, and consciously evaluate what is most suitable for a particular case. A tribunal that keeps in mind all the procedures available to it, not just one or some, will be best placed to respond to the demands of the particular case in issue. It is, therefore, important that the increased focus on preliminary determinations does not blind tribunals or parties to the other procedural options available and the possibility of tailoring the bespoke procedure that is most suitable for the case.

In conclusion, in appropriate cases and provided the parties' procedural rights are respected, preliminary determinations can provide an effective procedure to streamline the arbitral process. However, there is also a need for caution, including to ensure that the parties' right to a fair and reasonable opportunity to present their case is properly respected. Moreover, the parties and the tribunal should not be so fixed on the possibility of a preliminary determination that they overlook the many and varied other tools available in efficient and effective case management.

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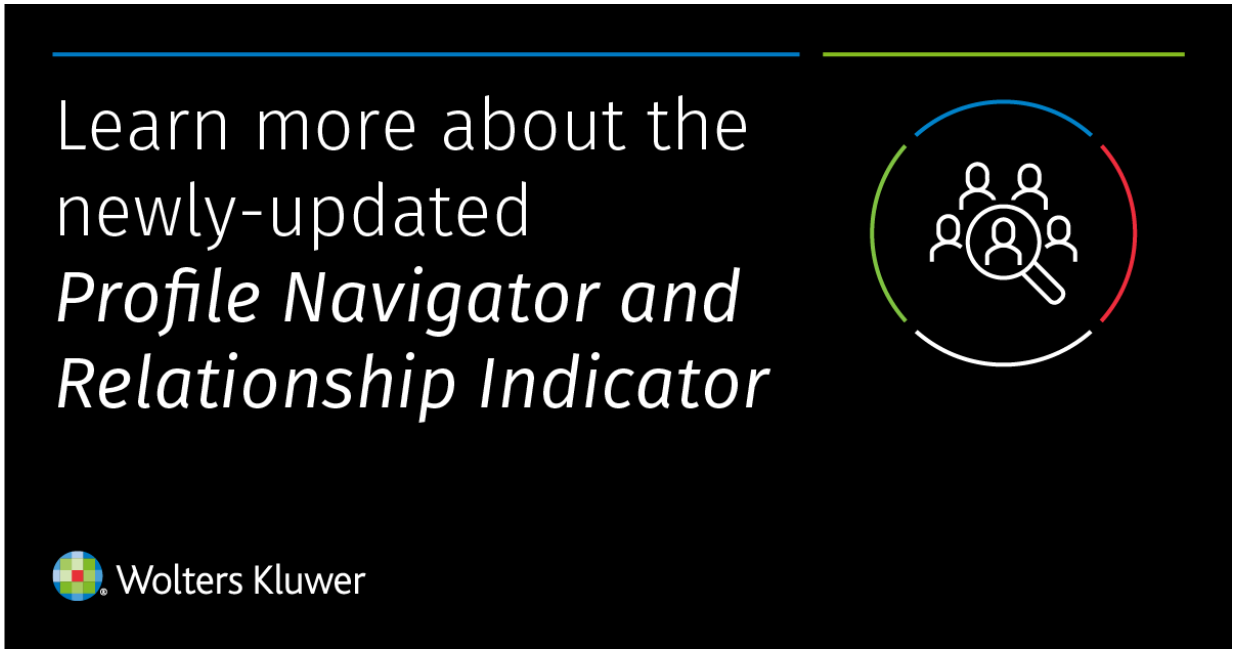

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