# Increased Efficiency through Arbitral Decisions on Preliminary Issues?

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Time and cost efficiency is the most commonly praised argument in favor of arbitration as opposed to state court litigation. The exchanges within the arbitral community as regards strategies to streamline arbitral proceedings in an effort to increase their efficiency are abundant. The issue, quite apparently, ranks high on the hot topic lists of counsel and arbitrators alike.

One particular proposal for increased efficiency that has been floating around lately concerns the possibility of arbitral tribunals issuing decisions on preliminary issues already at an early stage of the proceedings, rather than leaving every aspect of the case to be tackled in the final award. The advantage of such approach, it is argued, lies in the "uncluttering" effect decisions on preliminary issues would have on the overall proceedings. The dispute would become focused on the pertinent issues, while the parties would, as a result, become more inclined to consider settlement options with the self-evident side-effect of saving time and costs.

For counsel with a strong litigation background, the proposal does not necessarily transpire the genius of true innovation. The codes of civil procedure in many jurisdictions provide that courts may limit the proceedings, already at the very early stage of the procedure, to the resolution of certain preliminary, yet pertinent, issues. In Austria, a civil law jurisdiction, the courts may, for instance, at their full discretion, rule on procedural matters such as jurisdiction, *lis pendens* or *res judicata* in a preliminarily manner and thus sequester them from the material law aspects of the case (Section 261 of the Austrian Code of Civil Procedure, ACCP). Moreover, the courts may proceed by issuing a partial judgement (*Teilurteil*) if the state of the proceedings so permits, or by issuing an interlocutory judgement (*Zwischenurteil*) if the claim stands confirmed in terms of the merits of the case, but remains still undetermined in terms of quantum (Sections 391, 393 ACCP). In the end, whether a court will in fact decide on a preliminary issue already at the very outset of the proceedings much depends on the decisiveness of the respective issue for the whole case.

Unlike national court proceedings, arbitration offers its users greater flexibility when it comes to the question of how the dispute resolution process should be organised and, with that, the manner in which preliminary issues should be dealt with. Generally, aside from providing for the possibility of arbitral tribunals rendering partial awards on key issues, institutional arbitration rules are rather silent when it comes to the issue of arbitral decisions on preliminary issues. One particular provision that stands out in this respect is Article 23 (1) d of the Rules of Arbitration of the International Chamber of Commerce (ICC): unless the arbitral tribunal considers it inappropriate, the terms of reference to be drawn up as a particular feature of ICC arbitration may include a list of issues to be determined by it. The express purpose of this provision is for parties and arbitrator(s) alike to ascertain the most salient

questions of fact and law already at the opening phase of the proceedings. The exercise may not only prove helpful in pinning down the material law questions that lie at the heart of the dispute. Viewed from the angle of efficiency, it also allows parties and counsel alike to ascertain those issues which should ideally be dealt with in a preliminary manner.

Where institutional arbitration rules do not offer a solution, the principle of party autonomy in international arbitration does. In other words, wherever there is a meeting of the parties' minds, there will also be a way to vest the arbitral tribunal with the power of taking up certain aspects of the case and deciding on them as a preliminary matter. Without a doubt, the devil will be in the detail: should the arbitral tribunal be allowed to take up preliminary issues at its own discretion or only upon a party's express request? In the latter scenario objections by the opposing party will be the likely result unless the arbitral tribunal is empowered to take a preliminary issue despite a party's objection. In the latter scenario a lot will also depend on the personal engagement of the arbitrator(s) since agreeing on a tool for procedural efficiency is only one side of the equation. Whether the tool will be used clearly is the other.

Either way, devising the most appropriate approach in any particular case will always imply considerations of economic reasonableness. In the end, it will always be upon the parties and their respective counsel to weigh the pros and cons of spending considerable efforts on streamlining the arbitration proceedings by agreeing on a mechanism to deal with preliminary issues. Nevertheless, the willingness to compromise and to hand over (even more) procedural control to the arbitral tribunal will be elemental if efficiency in international arbitration is to be bolstered in the future.