

Does Bifurcation Really Promote Efficiency?

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On its face, bifurcating the proceedings is usually an attractive proposition. It ought to make sense in most proceedings to hive off certain discrete issues for early determination by the tribunal in the hope of streamlining the process or, possibly, eliminating the arbitration entirely. The generally accepted view is that bifurcation of proceedings promotes efficiency. However, an examination of the limited available empirical data on bifurcation of disputes shows that, contrary to this view, bifurcation does not always necessarily result in the tribunal issuing a final award more promptly.

In this article, the author challenges the assumption that bifurcation always promotes efficiency and emphasizes the need to examine each case on its own merits before ordering bifurcation.

I. INTRODUCTION

Bifurcation of an arbitration, namely the dividing of the arbitration into a number of separate phases of proceedings, is relatively common in international commercial arbitration and, increasingly, in investment treaty arbitration.

Traditionally, the term bifurcation was usually employed to denote the division of the arbitration into two phases: (i) determination of liability; and (ii) determination of quantum. Particularly in light of the increase in International Centre for Settlement of Investment Disputes (ICSID) jurisprudence, bifurcation is also now frequently used to describe the treatment of jurisdiction as a discrete issue, with further phases of liability and quantum taking place as necessary. In this article, the term “bifurcation” will be used to denote the process in which discrete issues are determined by the tribunal by way of a partial final award.

The use of bifurcation is by no means confined to arbitration proceedings, but the flexibility of procedure afforded by arbitration means that tribunals can be creative both in terms of whether and how they decide to delineate the proceedings. For example, a tribunal could identify a discrete sub-issue within an overarching objection to jurisdiction and determine that the issue should be dealt with as a preliminary issue. Similarly, the manner in which quantum was to be calculated could be determined as a stand-alone issue, leaving the actual arithmetic to quantify the damages to be calculated at a later date.

In international arbitrations, it is often possible to come up with a number of issues which may be determined separately, ranging from determining the governing law of the arbitration, addressing limitation issues, identifying factual issues which might

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narrow the scope of the dispute, to the more familiar phases of dealing with jurisdiction before the merits, or liability before quantum.¹

II. ACCEPTED VIEW: BIFURCATING A DISPUTE PROMOTES EFFICIENCY

The accepted view is that bifurcating a dispute can (and often does) promote efficiency. This view is promulgated by Meg Kinnear:

In complex arbitrations, bifurcation allows the dispute parties and the tribunal to focus first on the merits of the case, to save costs and time and perhaps to settle on the quantum of damages or other discrete issues. It is especially useful to determine issues of jurisdiction or applicable law on a preliminary basis if they can be decided without tribunal fact-finding or on the basis of agreed-upon facts.²

Similarly, in its Protocol to Promote Efficiency, Debevoise & Plimpton states that its arbitration team would “explore whether bifurcation or determination of preliminary issues may lead to a quicker and more efficient resolution.”³ The use of bifurcation was further promoted as a “means by which practitioners may successfully limit the duration and cost of proceedings” by Thomas J. Tallerico and J. Adam Behrendt.⁴

Given the criticisms that international arbitration is taking longer and costing more than, allegedly, it used to, could an increased use of bifurcation in international commercial arbitrations form part of a number of solutions to this problem? The difficulty with testing this hypothesis is, as ever in international arbitrations, the lack of empirical data. Certainly, distinguished commentators such as those quoted above appear to hold the view that bifurcation should be considered in almost every case and adopted by the tribunal if appropriate. It is an attractive notion that bifurcating a dispute could “limit the duration and cost of proceedings,”⁵ but this may not necessarily prove correct.

III. AN ANALYSIS OF THE (LIMITED) AVAILABLE EMPIRICAL DATA

Although the accepted view appears to be that splitting a case into discrete issues is likely to save time and costs, it is difficult to test this hypothesis. The author contacted a number of international commercial arbitration institutions to ascertain whether they maintained statistics on bifurcations, but none of the institutions contacted were able to provide such information.⁶ The only readily available source of data about international

¹ In a recent UNCITRAL case the author was involved in, the tribunal, of its own volition, identified a discrete preliminary issue relating to jurisdiction and ruled that the parties address that issue first, before, if necessary, proceeding to the rest of the jurisdictional objections and then to issues of liability, then quantum.

² MEG KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11 1135–1139 (2006).

³ See <www.debevoise.com/files/News/2cd13af2-2530-40de-808a-a903f5813bad/Presentation/NewsAttachment/79302949-69b6-49eb-9a75-a9ebf1675572/DebevoiseProtocolToPromoteEfficiencyinInternationalArbitration.pdf>.

⁴ Thomas J. Tallerico & J. Adam Behrendt, *The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings*, 20 J. INT'L. ARB. 295 (2003).

⁵ *Id.* at 295.

arbitrations and their bifurcation, therefore, arises out of the growth of investment arbitrations in recent years and the practice of publication of ICSID awards.

Ideally, to test whether bifurcating a case does result in the case being resolved in less time, one would have to compare a case that was bifurcated to the *same* case without bifurcation. However, this is not possible in practice. Thus, as the next best alternative, one must resort to comparing *different* cases, cognizant of the fact that cases can vary significantly in terms of factual and legal complexity. Clearly, there are many reasons for a case taking a longer time to be decided than others, not only whether the case is bifurcated. Nonetheless, the empirical evidence, however imperfect, can be illustrative.

The author reviewed 174 concluded ICSID cases reported on ICSID's website.⁷ Of these, forty-five proceedings were bifurcated and 129 were not. Forty-three of the forty-five cases that were bifurcated were split between a jurisdiction and a merits phase. The remaining two cases had hived off issues to be dealt with as preliminary matters. The forty-five cases that were bifurcated took an average of 3.62 years to conclude, including nine that settled⁸ and one that concluded in an award by consent after the decision on jurisdiction.⁹ Of the 129 cases which had not been bifurcated, the author excluded those that did not reach a final award.¹⁰ The sixty-eight remaining cases took, on average, 3.04 years to reach a final award.

The author also reviewed nineteen concluded ICSID Additional Facility cases. Of these, ten proceedings were bifurcated in some way, eight of these were split between a jurisdiction and a merits phase, the remaining two were split into liability and quantum phases. The ten cases that were bifurcated took an average of 3.39 years to reach a final award,¹¹ the nine cases that were not bifurcated took an average of 2.96 years to reach a final award.

Accordingly, the limited empirical data does not support the view that bifurcating proceedings limits the duration of the dispute. In some cases, bifurcation appears to promote settlement, but not in all cases. As ever, the data should be treated with caution, particularly given the exclusion of the concluded ICSID cases that settled before final award; however, it does challenge the general assumptions about bifurcation.

⁶ The author contacted the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the Stockholm Chamber of Commerce and the International Centre for Dispute Resolution (ICDR) to establish whether they maintained statistics in relation to the bifurcation of arbitration proceedings. None of the institutions maintained statistics on the use of bifurcation in international arbitrations. The ICC maintains statistics on partial awards, but it is not possible to extrapolate from this the number of ICC proceedings that are bifurcated.

⁷ See <www.worldbank.org/icsid>.

⁸ These nine cases were: *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2; *Kaise Beaux-ite Co. v. Jamaica*, ICSID Case No. ARB/74/3; *Mobil Oil Corp. et al. v. New Zealand*, ICSID Case No. ARB/87/2; *Lanco International, Inc. v. Argentina*, ICSID Case No. ARB/97/6; *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4; *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13; *Aguas del Tunari S.A. v. Bolivia*, ICSID Case No. ARB/02/3; *Impreglio S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3; and *Camuzzi Int'l S.A. v. Argentina*, ICSID Case No. ARB/03/7.

⁹ *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6.

¹⁰ These cases either settled or were discontinued for lack of payment.

¹¹ Interestingly, only two of the cases were dismissed at the jurisdiction stage.

IV. IS BIFURCATION AVAILABLE ... AND APPROPRIATE?

Given the above, tribunals should be cautious about proceeding with a twin-track approach to a case without good cause. A party may be advocating bifurcation to delay and obstruct the arbitration, rather than to make it more efficient.

Generally a tribunal will have the authority to order bifurcation, if appropriate. Most international arbitration institutional rules are silent about bifurcation, but allow the tribunal to adopt a flexible approach to procedure. Article 14(1) of the London Court of International Arbitration (LCIA) Rules is a good example:

The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times: (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute.

Unusually, the International Centre for Dispute Resolution (ICDR) Rules make express provision for bifurcation:

[T]he tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.¹²

Although bifurcation is not expressly mentioned, there was a presumption in Article 21 of the 1976 UNCITRAL Rules that jurisdictional objections would be heard as a preliminary issue.¹³ The 2010 UNCITRAL Rules appear to have removed this presumption, and give the arbitral tribunal full discretion to decide whether to bifurcate preliminary issues:

The arbitral tribunal may rule on a plea referred to in paragraph 2 [i.e., a jurisdictional objection] either as a preliminary question or in an award on the merits.¹⁴

There is also a pro-bifurcation presumption in Article 186(3) of the Swiss Private International Law Act which states that: "In general, the arbitral tribunal shall rule on its own jurisdiction by means of an interlocutory decision." Section 32 of the English Arbitration Act 1996 also allows for the determination of a preliminary point of jurisdiction.¹⁵

¹² ICDR Arbitration Rules, art. 16, available at <www.adr.org>.

¹³ "In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award." UNCITRAL Arbitration Rules 1976, art. 21, available at <www.uncitral.org>.

¹⁴ UNCITRAL Arbitration Rules 2010, art. 23.

¹⁵ "(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal. A party may lose the right to object (see section 73). (2) An application under this section shall not be considered unless—(a) it is made with the agreement in writing of all the other parties to the proceedings, or (b) it is made with the permission of the tribunal and the court is satisfied—(i) that the determination of the question *is likely to produce substantial savings in costs*, (ii) that the application was made without delay, and (iii) that there is good reason why the matter should be decided by the court." (emphasis added). Available at <www.legislation.gov.uk/ukpga/1996/23/contents>.

The issue of whether or not to bifurcate a proceeding must be looked at in the light of all information available to the tribunal. As most tribunals will have the authority to split proceedings in some way, then tribunals need to determine whether bifurcation would be appropriate in the case before them. Tallerico and Behrendt counseled that bifurcation of issues concerning liability should “always be considered.”¹⁶ They set out a list of considerations for the tribunal to take into account when determining whether or not to order bifurcation. These included:

- the amount and type of evidence needed to support each issue;
- whether the evidence necessary for a later phase will overlap or will be mutually exclusive;
- whether the evidence necessary for a later phase of the hearing will be prejudicial or inflammatory;
- whether evidence necessary for a later phase of a hearing is sensitive or if there is a strategic reason to withhold certain key evidence until a later phase;
- whether resources will be conserved by bifurcation or would increase costs with multiple phases;
- whether a second phase of the arbitration will be voluminous;
- the effect that bifurcation may have on discovery (if allowed);
- whether bifurcation will somehow result in prejudice or unfair advantage;
- whether bifurcation will result in greater convenience to witnesses, the parties or the tribunal;
- whether bifurcation will act to expedite the proceedings and help to conserve resources.¹⁷

Reaching a firm conclusion on any one of these considerations is likely to be challenging, given the competing interests of the parties and also the overriding desire to produce an efficient process. The checklist of considerations is useful, however, in that it highlights the difficulty a tribunal will face in reaching the “correct” decision on bifurcation, and whilst bifurcation should certainly be considered, tribunals should not necessarily order it purely on the assumption that bifurcation might reduce time and costs of the arbitration.

V. WHEN PROBLEMS CAN ARISE

There is no denying that in certain cases, bifurcating proceedings can produce results: preliminary issues can be disposed of and opportunities for settling the dispute may arise.¹⁸ However, applying the adage that work expands to fit the time available to it, then it is possible that counsel pleading one discrete issue will take a similar amount of time as when pleading a number of issues. Further, there is a danger in attempting to

¹⁶ Tallerico & Behrendt, *supra* note 4, at 295.

¹⁷ *Id.* at 297.

¹⁸ Although note that only 10 out of 45 of the ICSID cases that were bifurcated appear to have settled.

identify and isolate discrete issues at an early stage of proceedings. Although there is a great emphasis on “front-loading” a case in international arbitration, far more than would be seen, for example, in a proceeding before a U.S. court, by their very nature cases do develop, witnesses’ recollections are triggered by review of documents, documents are located and parties begin to piece together a case which might be very different after twelve months of proceedings than it was at the beginning of the arbitration.

As the case progresses it may become clear that issues cannot be unraveled from each other but, instead, are so entwined that bifurcation will only result in facts being pleaded twice. For example, in the investment treaty field, it may be superficially attractive for the issue of state attribution to be addressed as a preliminary issue, leaving other jurisdictional questions to be determined once the state attribution question is resolved. This argument is compelling on its face, because the issue of state attribution, if determined in favor of the respondent, may well be capable of ending the arbitration completely. However, on closer examination it may be that state attribution cannot be pleaded in a vacuum and the parties will need to make full submissions to the tribunal on the facts of the dispute, which are likely then to be repeated in any further phases of the arbitration.¹⁹

The most problematic part of bifurcation is the difficulty of proceeding with an arbitration in the face of a partial award between the parties that may be subject to set aside proceedings in national courts. “Formal” bifurcation will require a tribunal to issue an award in relation to a particular phase of the arbitration. Once a partial award is rendered, a successful party may find itself fighting on two fronts. For example, an award in the claimant’s favor on liability may be challenged in the courts of the seat of arbitration or in another court that the defendant may be able to persuade to take jurisdiction over the matter. This will be expensive and distracting for the claimant, who will need to go on and prove its case in the quantum phase. Further, if the liability phase has determined the manner in which damages will be calculated (rather than the actual calculation of those damages) then the quantum phase may be jeopardized while the partial award determining the manner of the calculation is challenged.

In the NAFTA case of *S.D. Myers v. Canada*,²⁰ conducted under the UNCITRAL Rules, the tribunal bifurcated proceedings in the first procedural order, determining that:

As a first stage of the proceedings the Tribunal will determine (in a partial award) liability issues and issues as to the principles on which damages (if any) should be awarded, leaving the calculation of the quantification of such damages, if any, to a second stage.

¹⁹ “There is no point in spending time and money on a complicated factual investigation if the dispute may be resolved by the determination of a legal point as a preliminary issue. It may emerge, however, that the correct legal interpretation to be put upon the clause which limits, or purports to limit, liability depends on the facts; and that, in order to ascertain and understand the factual situation, it is necessary to enquire fully into all the circumstances of the case, with the assistance of both fact and expert witnesses on each side.” NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 363–437 (2009).

²⁰ For a case summary see <www.biicl.org/files/3921_2002_sd_myers_v_canada.pdf>.

The tribunal subsequently issued an award on liability separately from the award on damages. The respondent filed an application to set aside the partial award on liability and then applied for a stay of the next phase of the arbitration on damages. The tribunal refused to order the stay and ultimately the respondent sought to set aside the further partial award on damages and costs, which was eventually consolidated with the application to set aside the partial award on liability before the Federal Court of Canada.²¹

Given the possible difficulties with issuing a partial award it may, in certain circumstances, be preferable for the tribunal to designate specific issues to be dealt with as separate issues rather than by a formal bifurcation of the proceedings. This is where the flexibility of arbitration comes into its own. For example, in the *Aminoil*²² arbitration between Aminoil and the Government of Kuwait relating to a concession for the exploitation of natural gas in Kuwait, with hundreds of millions of dollars at stake, the tribunal identified seven specific issues and, in an order to the parties, the tribunal set out the issues the parties were to address, the order in which they were to be taken and which side was to speak first on each issue. According to Redfern and Hunter:

[T]here is no doubt that this positive intervention by the arbitral tribunal led to a significant saving in time and money for both parties—and, in the end, to an outcome that both parties regarded as fair.²³

VI. CONCLUDING REMARKS

The procedure that is ultimately adopted in an arbitration is usually heavily influenced by the background of the tribunal and, to a slightly lesser extent, the background of the parties' counsel. There will also often be significant tactical issues at stake in considering whether to seek to persuade the tribunal to bifurcate a dispute. As ever, parties will advocate their own interests. Although it is true that sometimes these interests will align in relation to saving time and costs of the arbitration, this is not always the case, particularly where there is disparity between the parties in terms of financial security. A tribunal should be suspicious of a party's motives in advocating bifurcation and alert to whether identifying a preliminary issue results in a genuine saving of time or not. Having granted bifurcation, one assumes amongst other reasons on the grounds of saving time and costs, then the tribunal must be careful to imposed truncated timetables upon the determination of the discrete issue, otherwise one of the perceived benefits of bifurcation will be lost. The empirical data, limited as it is, does demonstrate that bifurcating proceedings may not necessarily result in parties getting to a final award any more quickly, although there may be other advantages to splitting the proceedings in a particular way. The assumption that bifurcation is always beneficial in terms of saving costs and time in international arbitration may not always be warranted and, as ever, each case should be looked at on its own merits.

²¹ KINNEAR ET AL., *supra* note 2, at 1135–10.

²² 21 I.L.M. 976 (1982), discussed at paras. 6.42, 6.51, and 6.52. See also BLACKABY ET AL., *supra* note 19, at 376.

²³ BLACKABY ET AL., *supra* note 19, at 376.