

ASA Below 40, Spring Seminar

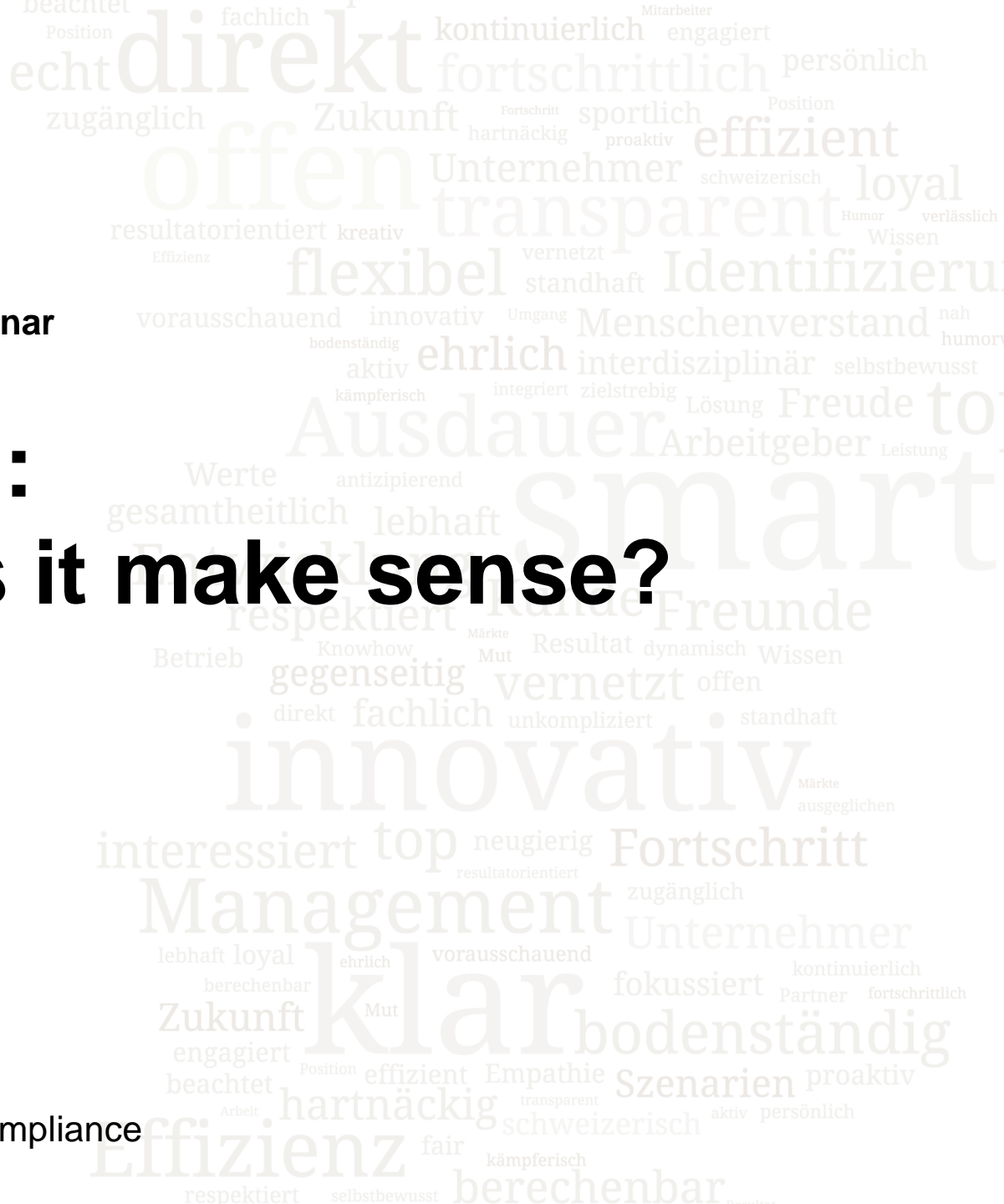
# Bifurcation: When does it make sense?

Geneva – 12 May 2017

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**1 for all.** Legal | Tax | Compliance



# Overview

- I. What is bifurcation?
- II. What are possible forms?
- III. When does it make sense?
  - a. Parties' perspective
  - b. Tribunal's perspective
- IV. Practical considerations

# What is bifurcation?

- Definition: the dividing of arbitration proceedings into two or more separate phases
- The Tribunal's power to bifurcate
- General context: saving time and costs

# What are possible forms (I)?

- Number of phases gives the name: bifurcation, trifurcation etc.
- What can be divided?
  - Jurisdiction
  - Res Judicata
  - Statute of Limitation
  - Applicable Law
  - Liability
  - Quantum
  - Factual Issues
  - Legal Issues
  - Substantive Information Requests

# What are possible forms (II)?

- Most common:
  - Jurisdiction – Merits
  - Liability – Quantum

# When does it make sense?

## Parties' perspective

### I. Claimant

- Rarely requested by Claimant
- Possible scenarios for a Claimant to request or agree to bifurcation:
  - Claimant has a substantive information request (action by stages)
  - Respondent brought up objection regarding a specific preliminary issue in a substantiated way – e.g. statute of limitation
  - Strategy aims at settlement (e.g. strong case on liability – weak case on damages)

# When does it make sense?

## Parties' perspective

### II. Respondent

- Generally requested by Respondent
- Two general scenarios for a Respondent to request bifurcation:
  - Preliminary issue (objection) that may limit or terminate the proceedings
  - Delay and obstruction

# When does it make sense?

## Tribunal's perspective (I)

- Arbitral Tribunal must balance chances and risks
- Criteria to take into account:
  - Amount of time and costs that may be saved
  - Are issues separate or intertwined
  - Is evidence overlapping or not
  - Signs for obstruction and delay
  - Issues of due process
  - *Prima facie* evidence to justify a bifurcation
- For certain types of proceedings bifurcation is “standard” (e.g. patent claims)



# When does it make sense?

## Tribunal's perspective (II)

- Problem: Tribunal's limited knowledge of the case at time of decision
- Change in party behavior after issuance of preliminary award ("mood-swings")
- Impact on fees

# Practical considerations

- Case by case assessment necessary
- Check your *lex arbitri* (fight on two fronts)
- Know your institutional rules (scrutiny)
- Bifurcation requests should be made as early as possible and as substantiated as possible
- A successful bifurcation requires that content and decision form are clear for Parties and Tribunal

**Thank you!**

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