



Beware! Pitfalls of Bifurcation in Practice

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STRUCTURE

- Bifurcation and trifurcation – potential scenarios
- What considerations should be taken into account when bifurcating proceedings?
- What might the pitfalls of bifurcation be in practice?
- What does the empirical data tell us?
- Conclusion
- Further thoughts and experiences?

BIFURCATION AND TRIFURCATION – POTENTIAL SCENARIOS (1)

- Liability – Quantum
- Jurisdiction – Liability
- Quantum – Liability (“Reverse Bifurcation”)

BIFURCATION AND TRIFURCATION – POTENTIAL SCENARIOS (2)

- Discrete factual issues
- Discrete legal issues
- Discrete issues of quantum
- Issues of governing law, limitation, state attribution
- Jurisdiction – Liability – Quantum (“Trifurcation”)

WHAT CONSIDERATIONS SHOULD BE TAKEN INTO ACCOUNT?

- Is the request frivolous?
- Will it result in a worthwhile reduction of the proceedings?
- Are the issues discrete or intertwined?
- Are there any causation issues?
- Does the evidence overlap?
- Are there issues of due process?
- Is it “efficient”; “practical”; “convenient”?

WHAT MIGHT THE PITFALLS OF BIFURCATION BE IN PRACTICE?

- Long and costly individual proceedings leading to longer overall proceedings
- Partial awards and related challenges – parties “fighting on two fronts”
- Issue of definition of the bifurcated stages – parties preparing different cases
- Strategic disadvantage
- Any other?

WHAT DOES THE EMPIRICAL DATA TELL US?

- **Out of 174 concluded ICSID cases:**
 - 45 bifurcated
 - Average of 3.62 years to conclude
 - 68 non-bifurcated (and not settled or discontinued)
 - Average of 3.04 years to reach final award
- **Out of 19 concluded ICSID Additional Facility cases:**
 - 10 bifurcated
 - Average 3.39 years to reach final award
 - 9 non-bifurcated
 - Average 2.96 years to reach final award

Source: Lucy Greenwood, Does Bifurcation Really Promote Efficiency? *Journal of International Arbitration* (Kluwer Law International 2011, Volume 28, Issue 2) pp. 105-111

CONCLUSION

- Whether or not to bifurcate involves significant cost and strategic considerations for parties in international arbitration
- Responsibility of parties and tribunals – falls into the wider debate about time and cost in international arbitration
- Caution
 - Use where the factors outlined above have been carefully weighed
 - Use where bifurcation “may genuinely be expected to result in a more efficient resolution of the case.” (Art. 41 ICC Commission on Arbitration, *Report on Techniques for Controlling Time and Cost in Arbitration*)

FURTHER THOUGHTS & EXPERIENCES?

- Experience of bifurcating proceedings in the context of disputes in particular industries (*e.g.*, IP claims, construction claims)?
- Experience of bifurcating proceedings under national laws which favor or require an early decision on jurisdictional issues (*e.g.*, Swiss Private International Law Act, Art. 186(3))?

Thank you for your attention.

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