



The potential of bifurcation or “summary judgment” in arbitration

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Introduction

Bifurcation, trifurcation ♦ Summary judgment

- Two procedural mechanisms for increased efficiency of the arbitral proceedings
- The two faster ends of the proceedings
 - ❖ The sequential disposition of the issues (bifurcation/trifurcation)
 - Full hearing of the issues in question
 - ❖ The summary disposition of the case
 - Early expedited summary decision on more limited information and evidence

Bifurcation or trifurcation (I)

- **What** is bifurcation or trifurcation?
- **Whether** a case should be bifurcated?
- **When** is it appropriate to bifurcate issues?
 - ❖ *The determination of one issue might eliminate the need to arbitrate the remainder of the parties' dispute*
 - ❖ Check-list of considerations

Bifurcation or trifurcation (II)

- **How** to slice the case? Bifurcation scenarios
 - ❖ Jurisdiction – Merits
 - ❖ Limitation issues – Merits
 - ❖ Applicable law – Merits
 - ❖ Preliminary issues – Liability
 - ❖ Liability – Quantum / Quantum – liability (*reverse bifurcation*)
 - ❖ Jurisdiction – Merits – Quantum (*trifurcation*)
 - ❖ Different counts of liability
 - ❖ Undisputed facts
 - ❖ Other creative forms

The potential

- **Efficiency** of the proceedings
 - ❖ Speed
 - ❖ Cost saving
 - ❖ Narrow the scope of the dispute
 - ❖ Focus on the merits
 - ❖ Incentive to settle
- **Other**
 - ❖ Strategic and psychological effect

Summary judgment

- A distinctively common law mechanism

... The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law....

Rules 56(a) of the Federal Rules of Civil Procedure (United States)

Is summary judgment *arbitration compatible*?

- Most major international arbitration rules are silent on Summary Judgment
 - ❖ Main exception: Article 41(5) and (6) ICSID Arbitration Rules
- The flexible nature of arbitration and the cultural barriers
- No *per se* violation of due process

The potential

- The main benefits
 - ❖ Time
 - ❖ Cost savings
- And also
 - ❖ A tool against frivolous and meritless claims and defenses
 - ❖ Counter dilatory tactics
 - ❖ Limit evidence and arguments aiming at credibility only
 - ❖ Narrow the issues
 - ❖ Settlement incentive

The pitfalls and challenges

- Due process
 - ❖ Risk of challenge
 - ❖ Enforcement concerns
- Arbitrator's interest \neq State courts policy
- Narrow the issues
- Delays
- Costs

What are your views and experiences?

- Experience with successful motions for summary judgment in arbitration?
 - ❖ Before civil law trained arbitrators?
 - ❖ Proceedings with seat in a civil law jurisdiction?
- Quid of motion to dismiss for failure to state a claim?
- Do you see a need for arbitration rules to adopt powers enabling *summary disposition* of issues or claim?



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Thank you!

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