CHAPTER II

ARTICLES

E. BIFURCATION OF PROCEEDINGS IN INTERNATIONAL ARBITRATION – STILL A ROAD AHEAD

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Introduction

With the fast approaching entering into force of the amended ICSID Arbitration Rules, scheduled for 1 July 2022, and this marking the first time a major legal instrument regulates in detail the matter of bifurcation of proceedings, it seems appropriate to shed light on some of its most controversial aspects.

Bifurcation of proceedings is a legal concept that has received multiple definitions. The term "bifurcation" itself has been the subject of multiple critiques. And, adding to this, its advantages are also often questioned. It is somewhat ironical that a concept called bifurcation would be involved in such ambiguity. However, one thing is certain: arbitral tribunals, at least, in investment arbitrations that are made publicly available, continue to bifurcate proceedings – depending on the definition used, sometimes even without their acknowledgment.

In this paper, we will formulate some opinions on bifurcation, its potential advantages and risks, as well as the criteria to decide when to bifurcate proceedings, taking into account decisions on bifurcation rendered by arbitral tribunals throughout the past two decades.

2. General remarks on the definition of bifurcation

According to some authors, bifurcation consists of "dividing the arbitration proceedings into different phases, and deciding different issues (e.g., jurisdiction, liability, quantum and costs) in different awards" and where this took place all but the "final award" would be deemed "partial awards"[1], while for others it consists of "the split of the arbitral proceedings in distinct phases, each contemplating ad hoc pleadings, possibly hearings, and ending with a decision on a discrete matter", regardless of the consent of both parties or even against their common decision[2]. These two examples of definition demonstrate the narrower and the wider visions under which bifurcation is commonly looked upon. Essentially, bifurcation of proceedings may be perceived as indicating the split of the decision made by the arbitral tribunal through partial decisions[3] (wide concept) or as indicating the split of, not only the knowledge by the tribunal of the questions brought by the parties, but also of the submission of written pleadings, production of evidence and the occurrence of oral hearings, i.e., of the arbitral procedure itself (narrow concept).

Some commonly used practical examples of the wide concept and the narrow concept are, respectively, the possibility given to the arbitral tribunal to resolve the matter of the competence of the arbitral tribunal through an interlocutory decision, separately from the resolution of the questions underlining the merits of the case[4] and the separation between the proceedings relating to the verification of the requirements for civil liability and the ones relating to the determination of the quantum of damages[5]. However, it appears to us that in practice the first example may also correspond to bifurcation in the narrow sense, considering that resolving jurisdictional objections may demand the submission of written pleadings, production of evidence and the occurrence of oral discussion – however, when that is the case and the objections are complex, tribunals have excluded bifurcation in order to avoid a first very long phase that could still be followed by a second phase, hindering procedural economy[6].

There are many other examples that may be given, such as the discussion of defences based on limitation of liability that do not dispose of the whole case but narrow the scope of the arbitration[7]. Moreover, just as the quantum phase may be bifurcated from the matter of liability, one of the conditions of liability may also be bifurcated: for example, causality may be addressed before than the remaining conditions, if there is a high likelihood that there is no causal link between a conduct and certain damages, which could lead to the dismissal of the entire liability claim. This may also be the case, among others, of the criteria for the determination of the quantum, of the relevant valuation date, or of the type of recoverable damages[8]: establishing these matters may lead to more certainty of the parties when making their submissions regarding damages and

[1] AJacob Grierson & Annet Van Hooft, "Part IV: Procedure Before the Arbitral Tribunal", in Jacob Grierson & Annet Van Hooft eds, Arbitrating under the 2012 ICC Rules, Kluwer Law International 2012, footnote 464.
[2] Massimo V. Benedettelli, "To Bifurcate or Not to Bifurcate? That Is the (Ambiguous) Question", 29(3) Arb. Int'l (2013), p. 493.
[3] António Sampaio Caramelo, Temas de Direito da Arbitragem, Coimbra Editora, 2013, pp. 190-191.
[4] Idem, p. 191.
[5] António Menezes Cordeiro, Tratado da Arbitragem, Almedina, 2015, p. 400.
[6] For example, in the case Lion Mexico Consolidated LP v. United Mexican States, where a request for bifurcation was denied regarding one objection because it would require opening a document production phase within the jurisdictional phase, which the tribunal wished to avoid, so as not to delay the proceedings. Lion Mexico Consolidated LP (Claimant) v. United Mexican States (Respondent), ICSID Case No. ARB(AF)/15/2, Decision on Bifurcation, May 29, 2017, § 10.
[7] Stefano Castagna, "The Bifurcation Games. How Arbitrators Buy Their Lottery Ticket", in Stavros Brekoulakis (ed), Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Kluwer Law International 2021, Volume 87 Issue 3, pp. 358 – 380, pp. 369.
[8] Massimo V. Benedettelli, op. cit., p. 499.