Revisiting Bifurcation and Efficiency in International Arbitration Proceedings

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In 2011, the author published an analysis of available empirical data on bifurcation of disputes in this journal. The article, 'Does Bifurcation Really Promote Efficiency?'(28(2) J. Int'l Arb. 105–11 (2011)) tested the 'generally accepted view that bifurcation of proceedings promotes efficiency' by analysing the available data on the time taken for bifurcated cases to conclude and comparing that data with time taken for non-bifurcated cases. The author noted that ideally, to test whether bifurcating a case does result in the case being resolved in less time, the comparison should be made between a case that was bifurcated to the same case without bifurcation. However, this was not possible in practice. Thus, the next best alternative approach, that of comparing different cases was adopted, although it was recognized that cases can vary significantly in terms of factual and legal complexity. Nonetheless, the empirical evidence, however imperfect, can be and was illustrative. This article revisits the available data relating to the bifurcation of international arbitration matters and expands the previous discussion.

1 INTRODUCTION

The definition of bifurcation is the 'division of something into two branches or parts'.[1] In both the commercial arbitration and the investment treaty world, the possible division of proceedings is something that arises for discussion relatively frequently, although it is difficult to discern from the available data, certainly in relation to commercial arbitrations, how often proceedings are actually split in practice.[2]

In international arbitration the process of bifurcation was, traditionally, the division of the arbitration into two phases: (1) liability; and (2) quantum. In recent years bifurcation in commercial arbitrations can be more complicated than a simple division of the proceeding into two phases. Bifurcating disputes might now include, amongst others, the concepts of hiving off preliminary issues for discrete consideration; having a twin track approach for discrete liability issues; addressing

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1 *See* https://en.oxforddictionaries.com/definition/bifurcation (accessed 29 May 2019).

2 Between 2000 and 2017, there were 115 decisions on bifurcation in ICSID proceedings; data in relation to commercial arbitrations is not readily available, *see* https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf (accessed 29 May 2019).

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jurisdiction prior to consideration of the merits; and adopting creative approaches to the separate treatment of liability and quantum. In investment treaty arbitrations, bifurcation remains relatively straightforward and largely arises where there is an objection to jurisdiction.

The definition of bifurcation as the 'division of something into two branches or parts' is something of a misnomer, as it implies that both branches continue concurrently. Essentially, bifurcation is a procedural device aimed at reducing the risk of having to hold a final hearing on the merits, by determining a dispositive issue first. In a 'successful' bifurcation, the parties will proceed along one track until the matter terminates and will never have to use the second track for that dispositive issue.

Intuitively, it seems that bifurcating a dispute is an efficient route to take. *Per* ICSID Secretary General 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.[3]

In *To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question*,[4] Professor Massimo Benedettelli succinctly summed up the positive impact of bifurcation, if certain situations arise:

> Bifurcation may then be a source of efficiency if the earlier determination of a matter by the arbitral tribunal: (i) eliminates the need for the parties to address certain issues which become moot as a result of the earlier decision, and/or (ii) clarifies the scope of other issues which may be relevant for the subsequent deliberation on the claims and counterclaims and/or (iii) settles the entire dispute by finding in favour of a defence raised by a party on a point of procedure or on the merits.

In international arbitration, cases are often voluminous and highly complex. Bifurcation can be superficially attractive because it allows the arbitrators to focus on preliminary matters or reduce the scope of the dispute. This attraction may only be of face value if it is not, in fact, possible to properly hive off the issue in question, or if the determination of the issues in question does not either dispose of the issue such as to lead to a termination of the proceeding or significantly narrow the remaining dispute.

Before discussing this in more detail, it is useful to try and put the vexed question of whether bifurcating an arbitration makes the process inherently more

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[3] Meg Kinnear et al., *Investment Disputes Under NAFTA an Annotated Guide to NAFTA Chapter 11* 1135–39 (Kluwer Law International 2006).

[4] 29(3) Arb. Int'l 493 (2013).

efficient into context. In order to do this, we need to look at the available data on bifurcated proceedings in international arbitration. We are, however, constrained by the lack of access to information on the conduct of international arbitration proceedings.

2 AVAILABILITY OF INFORMATION ON INTERNATIONAL ARBITRATION PROCEEDINGS

The principle of confidentiality in international arbitration frequently frustrates the researcher. Conducting empirical research into international commercial arbitration proceedings is almost impossible due to the paucity of available information.

Traditionally, the major arbitral institutions have been reluctant to publish awards. The International Court of Arbitration at the International Chamber of Commerce does publish extracts of selected redacted awards and procedural orders, but they are often not very useful in terms of the information they contain. Extracts are generally not released until three years after the arbitration proceedings have closed. The Stockholm Chamber of Commerce also publishes selected redacted awards or decisions with the parties' consent. The other major international arbitration institutions will not publish awards without the express consent of the parties.

There is some light on the horizon. In due course, the website Arbitrator Intelligence, together with Wolters Kluwer, will publish 485 international arbitration awards, sanitized where appropriate to protect confidential information. This is a major step in improving access to information as to how international arbitration proceedings are conducted. Being able to review how commercial arbitrations are really conducted will be invaluable, but the data is not yet available. In light of this, the update to the 2011 research regarding the effect of bifurcation on duration of proceedings was limited to investment treaty cases published on the International Centre for Settlement of Investment (ICSID) website.[5] By its nature, investment arbitration throws up particular challenges and it is difficult to translate findings in relation to investment treaty cases to commercial arbitration matters. In the absence of accessible data on commercial arbitration cases, however, it is the best proxy available.

Confining the analysis to investment treaty arbitrations also means that we are unable to consider the situation where a bifurcated issue is decided, does not dispose of the proceedings, but significantly narrows the issues remaining to be considered by the tribunal. As the vast majority of bifurcated investment treaty arbitrations are bifurcated to address jurisdictional challenges (which generally leads to an all or nothing decision), there is insufficient information to consider other forms of bifurcation.

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[5] *See* www.worldbank.org/icsid (accessed 29 May 2019).

3 ANALYSING THE DURATION OF BIFURCATED ICSID PROCEEDINGS

I tested the hypothesis that bifurcation should promote efficiency as far as possible given the constraints in obtaining data discussed above. In 2011, I reviewed 174 concluded ICSID cases.[6] 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. Of the 129 cases which had not been bifurcated, I excluded those that did not reach a final award.[7] The sixty-eight remaining cases took, on average, 3.04 years to reach a final award.

For this article I reviewed thirty-eight ICSID cases that resulted in a final award between 1 January 2016 and 31 December 2018 to see if similar conclusions could be drawn. Of those cases, twelve proceedings were bifurcated. I analysed the time period from the constitution of the tribunal to the rendition of the final award disposing of the proceedings. The average length of time for all cases to reach a final award was three years six months. The cases that were bifurcated took an average of four years three months to conclude. The non-bifurcated cases took, on average, three years two months to reach a final award. Unlike in 2011, for this article I looked more closely at the bifurcated cases in which the jurisdiction challenge had succeeded and where it had not. As would be expected, those bifurcated cases where jurisdiction had not been established concluded, on average, after two years and four months, whereas those bifurcated cases where the jurisdiction challenge failed took an average of five years two months to conclude.

This issue was also considered by the ICSID working group in relation to the proposed amendments of the ICSID Rules and it is useful to compare the results they received with my analysis above.[8] The working group reviewed sixty-three cases which concluded with an award between 1 January 2015 and 30 June 2017. The working group looked at the time taken from the constitution of the tribunal to the rendition of a final award. The average length of time for all cases reviewed by the working group was three years seven months. In relation to the twenty-nine bifurcated proceedings amongst the cases reviewed by the working group, the data told a very similar story to the cases I reviewed. Where the bifurcated proceeding was 'successful', i.e. an award on jurisdiction was rendered which disposed of the proceeding, the average length of time from constitution of the tribunal to the award was approximately two years one month. Where the proceeding continued after the

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6 *See* www.worldbank.org/icsid (accessed 29 May 2019).
7 These cases either settled or were discontinued for lack of payment.
8 *See* https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf (accessed 29 May 2019).

jurisdiction phase, the average time was five years two months. Where proceedings were not bifurcated, the working group found the average time to an award to dispose of the proceedings was approximately three years one month.

Looking at my conclusions and those of the working group, it can clearly be seen that where jurisdiction was upheld in bifurcated proceedings and there was a final award, the proceedings took, on average, approximately two years longer than non-bifurcated proceedings and eighteen months longer than the general average. Where the bifurcated proceedings led to an award declining jurisdiction, the proceedings were around eighteen months shorter than the average.

The data therefore supports the conclusion that if a separate phase of proceeding terminates the proceeding, then that proceeding will, on average, conclude more quickly than a proceeding where jurisdiction and merits are heard together. If, however, the jurisdiction challenge is unsuccessful, then the data shows that the proceeding will take significantly longer to conclude.

For bifurcation to 'work' in the sense of saving time and costs in an arbitration, not only must it be used surgically and with precision, but it must succeed, in that the 'branch' that has been severed from the main arbitration must be successfully and permanently severed and result in a final award disposing of the proceeding, otherwise the exercise will increase time and costs, rather than saving them. In 2011, I concluded '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'.[9] I would now go further than this in light of the additional research on duration of 'unsuccessful' bifurcated proceedings and suggest that the assumption that bifurcation might reduce time and costs of the arbitration is flawed. Far from making this assumption, I would argue that the data suggests there should be a presumption against agreeing to bifurcate proceedings (on efficiency grounds) unless a tribunal can be confident that it is more likely than not that determination of the bifurcated issue (which is usually a jurisdictional objection) will result in termination of the proceeding.

4 ROLLING THE DICE AS TO WHETHER BIFURCATION 'WORKS' OR NOT

In relation to bifurcating jurisdiction and the merits, is certainly true that, as the tribunal in *Mesa Power v. Canada* stated, it is 'good practice … not to impose the burden of full-fledged proceedings on a party that disputes being subject to arbitration'.[10] I would venture, however, that the burden of full proceedings

[9] 28(2) J. Int'l Arb. 105–11 (2011).

[10] *Mesa Power Group LLC v. Canada*, UNCITRAL PCA Case No. 2012-17, Procedural Order No. 2, 18 Jan. 2014, para. 6, cited in *'the Appropriate Use of Bifurcation as a Means for Promoting Efficiency and*

should not be imposed upon a party who *validly* disputes being subject to arbitration. The working group concluded 'bifurcation is not the best option for all cases with jurisdictional objections'.[11] If there is a valid objection to jurisdiction, which is upheld, then bifurcation is a time (and cost) saving option, if there is not, then there is a significant time (and cost) penalty on the parties.

Bifurcation works in terms of saving time (and therefore cost) if the separate phase of proceedings becomes the only phase of proceedings, namely, the challenge to jurisdiction succeeds. A corollary of this should be that arbitrators should only order bifurcation where they can be reasonably certain that the jurisdictional challenge is meritorious. Presently, bifurcation is a blunt tool which can be effective (in terms of shortening the duration of a case) only in certain circumstances (where the jurisdictional challenge succeeds). Essentially, arbitrators are largely rolling the dice as to whether the bifurcated issue is one that will dispose of the proceedings. If they get the decision wrong, then the data for investment treaty arbitrations shows that they will be looking at a significantly longer timescale to deliver a final award.

In an article written almost twenty years ago, Professor John Gotanda proposed a mathematical equation to determine the question of whether to bifurcate or not.[12] The equation compared the expected cost of bifurcated proceedings (assuming that the jurisdictional objection fails and the matter proceeds to a final award on the merits); and the cost of a consolidated proceeding in which jurisdiction and merits are heard and determined together. Professor Gotanda contended that if the expected costs of both phases of the bifurcated proceedings exceeded the expected costs of the combined proceeding, the arbitral tribunal should decide against bifurcation. In practice, it is almost impossible to estimate the costs involved in the different courses of action with any certainty. The available data on duration set out above could, theoretically, assist with an analysis along these lines.

5 CONSIDERATION OF THE REQUEST TO BIFURCATE

In August 2018 the ICSID working group published a working paper containing proposals for amendments to the ICSID Rules which addressed, amongst other issues, bifurcation[13] The current ICSID rule 41 allows for the possibility of bifurcation but does not provide detail as to the procedure to be followed. The

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Fairness in Investment Arbitration' by Jola Gjuzi, at 183, Ch. 1 of International Challenges in Investment Arbitration, Edited by Mesut Akbaba, Giancarlo Capurro.

11 *Ibid*.

12 John Yukio Gotanda, *An Efficient Method for Determining Jurisdiction in International Arbitrations* 40(11) Colum. J. Int'l L. (2001).

13 https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf (accessed 29 May 2019), Working Paper (#1) was circulated to Member States on 2 Aug. 2018 and posted on the website on 3 Aug. 2018.

new proposed rule addressing bifurcation provides guidance on the timing of an application to bifurcate a matter, the procedure to be followed and factors for the tribunal to consider in determining whether to bifurcate a matter. Significantly, although in the consultation period prior to this working paper a number of member states had advocated for bifurcation to be allowed more often, or even automatically, when jurisdiction objections are raised, the working group did not agree that bifurcation should be automatic. The approach taken by the working group was supported by the empirical data regarding the impact of bifurcation on the duration of proceedings. In March 2019, ICSID issued an updated working paper (Working Paper # 2) which responded to comments received in relation to Working Paper #1.

There are two issues to consider in relation to requests to bifurcate proceedings (1) the timing of the request and any deadlines for the tribunal's decision whether to permit bifurcation or not and (2) the factors that the tribunal should take into account in reaching its decision.

In relation to timing, tribunals usually allow one round of submissions on bifurcation, with time limits. The ICSID working group reviewed sixty cases in which bifurcation was requested and determined decisions on bifurcation took on average twenty-eight days from the last submission, with a range of 2 to 159 days depending on the circumstances of the case. The working group found that in the majority of cases (forty-six cases), the decision on bifurcation was rendered less than forty days after the last submission. After consultation, the working group shortened the proposed deadline of thirty days from the last submission for the tribunal to issue its decision on whether or not to bifurcate to twenty days. The suggestions for timing of the request for bifurcation are sensible and the deadlines workable, yet the challenge will be to ensure that a tribunal is able to put itself in a position at an early stage of a proceedings to determine whether the bifurcated issue is likely to succeed.

Factors that are generally considered by tribunals in exercising their discretion to bifurcate are whether jurisdiction can be determined separately (or whether the issues are so intertwined as to make it impossible to deal with jurisdiction as a separate issues) and the complexity of the jurisdictional challenge (the more complicated the challenge, it appears the more likely a tribunal is to hear jurisdiction and the merits together) and the likelihood of success.

The CIArb Guidelines on Jurisdiction Challenges describe the way a tribunal should exercise its discretion as follows:

> When deciding whether to split the jurisdictional challenge from consideration of the merits, arbitrators should consider the likelihood of success of the jurisdictional challenge and whether it can be determined without considering the merits of the underlying claim. Where jurisdictional challenges are well-founded and/or can be separated from the merits,

> arbitrators should normally separate the jurisdictional challenge from the merits and decide on the challenge first. Arbitrators should also take into account the views of the parties and any possible delay to the arbitral proceedings and increase of costs which may result. b) Conversely, if the challenge is closely related to the substantive issues of the dispute, or where the arbitrators consider it to be a mere tactical device to delay the proceedings, arbitrators should continue with the proceedings and incorporate their decision on jurisdiction into the final award on the merits.[14]

The proposed new ICSID rule states *"in determining whether to bifurcate, the Tribunal shall whether bifurcation could materially reduce the time and cost of the proceeding and all other relevant circumstances"*. Working Paper #1 noted *"[T]ime and cost savings are likely if the proceeding on jurisdiction leads to an award on jurisdiction disposing of the case. However, if jurisdiction is upheld and the case continues on the merits, the proceeding could be longer and more expensive"*.[15] Following comments after the publication of Working Paper #1, Working Paper #2 stated *"case efficiency and procedural economy [was] identified as a consideration in all cases"*.

In *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*[16] the tribunal allowed the bifurcation of the matter, stating,

> The Claimants will not be prejudiced by bifurcation, other than in the increased costs occasioned by the jurisdiction application and consequent delay in the event that they are successful in opposing it. It is within the discretion of the Tribunal, as Respondent accepts, to compensate Claimants for these costs.

The tribunal did not comment in detail on the merits of the jurisdictional challenge, save that it held that it did not *"regard the Respondent's objection [to jurisdiction] as frivolous"*.

The data shows that if the Respondent's objection to jurisdiction was not frivolous but did not succeed before the tribunal then the parties would be looking at an additional eighteen months for the arbitration. Although it is entirely correct in theory that parties can be compensated in costs for those additional months, it is very difficult for a tribunal to be in a position to accurately quantify the costs of the additional time, let alone be comfortable in awarding them.

Does the arbitration community need to look at developing a more rigorous test for when bifurcation should be granted, by raising the bar in relation to what parties need to show to achieve a bifurcated proceeding? In light of the significantly longer timescale if jurisdiction is upheld, it appears that 'not frivolous' may not be a sufficiently high bar to justify the risk of extending proceedings. It must

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[14] https://www.ciarb.org/media/1327/2015jurisdictionchallenges.pdf (accessed 29 May 2019) Commentary on Article 4.

[15] ICSID Working Group.

[16] ICSID Case No. ARB/12/2.

follow that only a tribunal which is sure a jurisdictional challenge will succeed should order bifurcation (on efficiency grounds), but in order to persuade a tribunal of the merits of its challenge to jurisdiction, a party must argue the challenge in detail, and the opposing party must respond in detail, which is effectively pre-empting the bifurcation itself.

6 CONCLUDING REMARKS

In the list of factors to be taken into account by the tribunal in determining whether or not to order bifurcation discussed above, the most influential factor must be the likelihood of success on the merits of the bifurcated issue. Whilst other factors, such as separation of the issues, of course come into play, I would argue that unless a party can demonstrate to the satisfaction of the tribunal that it has a significant likelihood of success on the merits of the bifurcated issue, then bifurcation should not be ordered.