It is my great honor and pleasure to be able to present to you my opinion on the subject of bifurcation. My issue is under the larger topic "*Thing Big* - Bifurcation of the arbitration proceedings - to bifurcate or not to bifurcate".

I intend to address the following issues:

First, if the decision is made to bifurcate, why then?

Second, whether the bifurcation is somehow a fork in the road, and who is to determine this, the Arbitral Tribunal or the parties to the dispute,

Third, whether the bifurcation is simply a procedural tool or if this also relates to the subject matter of the dispute.

Introduction

The bifurcation of an arbitration procedure is the splitting of the proceedings into at least two parts. It is a practice seen in international commercial arbitration (further also only "commercial arbitration") as well in investment arbitration, even though splitting the proceedings into more than two parts is is so often met in the practice of both.

The difference between these two kinds of settlements of commercial and investment disputes as to the subject matter of the dispute is obvious. Nevertheless the procedural issues as to the division of the proceedings are quite similar from the procedural point of view.

Bifurcation

First, if the decision is made to bifurcate, why then?

Any arbitration is based on an arbitration agreement between at least two parties, giving the Arbitral tribunal the power to decide the dispute that has already arisen or that will arise in the future. This difference is well established, but nevertheless the agreement is not the only source of the discretion of the Tribunal of how to proceed to establish the factual background of the case and how to settle the dispute. The Arbitral Tribunal has to follow the Rules of Arbitration and lex fori that apply.

In any case the goal and aim of the Arbitral Tribunal is to issue a final decision in the arbitration proceedings at the earliest moment.

However, if the Arbitral Tribunal is not able to issue a final award on the merits it has to deal with issues of at least a procedural nature, and it should deal with preliminary issues before going on to the merits, specifically when the Arbitral Tribunal lacks jurisdiction or on the liability before the quantum i.e. [this is unclear to me], before dealing with any amount of damages. Thus the Arbitral Tribunal should decide whether bifurcate or not.

Beside the given two reasons for bifurcation we can encounter others as well. The Arbitral Tribunal could bifurcate in order to decide the preliminary legal issue of the applicable law and for the sake of effectiveness when deciding only on the most important claim. Nevertheless there is another issue of which of the claims within the relief is the most important. In that sense we could refer to an opinion held by Veijo Heiskanen in *Arbitrary and Unreasonable Measures* when "from the point of view of arbitral decision-making (...) in cases where the claimant asserts a number of alternative or cumulative claims, there is a pragmatic way of establishing a priority between the various causes of action such that it would allow the tribunal to dispose of the case by dealing with only one of them rather than addressing each of them one by one."[1] Some exmeples willl be given by me further.

In common practice, the Arbitral Tribunal should decide about bifurcation whether it might avoid the need to arbitrate about the merits of the case and about the rest of the parties' claims and to bring a prompt resolution of preliminary issues before coming to the subject matter of the dispute. The discretion of the Arbitral Tribunal should then be concentrated primarily to resolve any legal issues before moving further in the proceedings.

Second, there is the query of whether the bifurcation is somehow a fork in the road, and who is to determine this, the Arbitral Tribunal or the parties to the dispute.

The bifurcation could and should be proposed by the parties when they believe that the resolution of the proposed issue should bring an end to the arbitration without dealing with the merits.

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[1] Arbitrary and Unreasonable Measures Veijo Heiskanen, in Standards of Investment Protection, Oxford Press, p. 88 (http://www.bing.com/search?q=Arbitrary+and+Unreasonable+Measures+Veijo+Heiskanen&form=CMDTDF&pc=CMDTDF&src=IE-SearchBox)

One can imagine that the respondent could reserve its right to bring forward jurisdictional objections in its statement of defence before a decision on whether those jurisdictional objections should be heard as preliminary issues can be determined. In that sense the bifurcation is an important fork in the road and there is no place for any possible dilatory tactic of the party even if it could be sometimes met.

All procedural as well as any other objections should then be raised by the parties at the earliest possibility in order to ensure time- and cost-efficient proceedings. It is a prerequisite in any arbitration procedure that the respondent should raise its objections to jurisdiction (if any) as can be identified at the given stage of the proceeding.

In every case, the role of the Arbitral Tribunal is a dominant one and the chosen way how to proceed further in the dispute falls to the sole discretion of the Arbitral Tribunal.

Third, the question of whether bifurcation is simply a procedural tool, or if this also relates to the subject matter of the dispute.

The bifurcation is a procedural tool with a basic impact on the merits of the dispute. The decision on bifurcation is made by the Arbitral Tribunal in commercial arbitration usually in the form of a procedural order and in investment arbitration in the form of an arbitral award on jurisdiction but the *vice versa* solution as to the form of decision is also seen in practice.

Should the Arbitral Tribunal reach the conclusion that it does not have jurisdiction then the continuation of the dispute is rendered unnecessary.

Similarly should the Arbitral Tribunal come to conclusion that there is no liability then the dispute about the amount of damages is also superfluous.

The Arbitral Tribunal, in dealing with preliminary legal matters such as its jurisdiction, liability, or applicable law and having bifurcated the proceedings decides actually in fact at the same time about the subject matter of the dispute. [this is not entirely clear to me]

Given that neither the arbitration rules nor the applicable law provide for a clear rule the question might arise whether a specific claim should be given more or less importance as to the issue of bifurcation.

Thus the question may be whether the Arbitral Tribunal should first deal with the most important claim as a basic claim for the dispute, and as a reason and challenge for bifurcating of the proceedings, or whether the Arbitral tribunal has to deal with all possible claims at the same time without bifurcation.

In the days when commercial disputes were less complicated, parties were willing to accept the rough and ready dispensation of justice. This is not so today when commercial transactions are far more detailed and technical, with modern parties demanding more transparency and assurance that their contractual rights are enforced with legal precision and accuracy.[2] [is this a direct citation?] ICCA Congress 2012 Singapore

In my opinion the answer is not quite simple when and whether to bifurcate then. It might be presumed that the task of an Arbitral Tribunal is formally not limited and that the complexity of the dispute will give guidance to the tribunal whether to resolve the procedural and legal issues separately or simultaneously, bearing in mind the costs and delay on one hand. On the other hand the tendency in recent arbitrations is that the arbitral proceedings are, specifically in investment arbitration, actually a challenging task.

It is a unique task for the Arbitral Tribunal to find its best way based on what has been said. There is only a general approach presumed but with a specific path to be found by the Arbitral Tribunal in every given case.

Bifurcation in commercial and investment arbitration

The reasons for bifurcation might be quite formal in investment arbitration, made by an arbitral award, either by the award on jurisdiction or an award on liability, despite the Rules that aply.

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[2] ibid, para. 48.

As reported by UNCTAD in a 2010 report on "Latest Developments in Investor-State Dispute Settlement", "of the total 357 known disputes, 225 were filed with the International Centre for Settlement of Investment Disputes (ICSID) or under the ICSID Additional Facility, 91 under the United Nations Commission on International Trade Law (UNCITRAL) Rules, 19 with the Stockholm Chamber of Commerce, eight were administered by the Permanent Court of Arbitration in The Hague, five with the International Chamber of Commerce (ICC) and four are ad hoc cases. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In four cases the applicable rules are unknown so far. [where is the end to the citation here? I don't see an end quote] HERE

Any of the said investment arbitration are not barred of bifurcation by the applicable rules, i.e. specifically in an ICSID and ad hoc UNCITRAL arbitration, the issue of an award on jurisdiction is a common practice not an exception.

The bifurcation in a commercial arbitration is less formal and the rules of institutional arbitration apply. One could encounter an informal bifurcation every time whether a plea of a lack of jurisdiction is raised. Nevertheless, the Arbitral Tribunal has to decide the plea of jurisdiction although the proceedings might not be formally bifurcated by a separate decision of the Arbitral Tribunal. The evidence is then constrained only to the preliminary matter and any other evidence should be barred. Should the arbitral tribunal come to the conclusion that it does not have jurisdiction then this is the end of the story.

The same is valid for the investment arbitration even though the issue is greater. Due to the character of these disputes the arbitral tribunal would face not only a jurisdictional plea based on the possible validity of an arbitration clause (given by the treaty) but regularly also the plea is based on the issues of the facts *rationae personae*, *ratione mat*eriae, *rationae voluntaris* and *ratione temporis*, that should lead the arbitral tribunal to decide on bifurcation.

The arbitral tribunal is free to decide whether to rule on jurisdiction and other core issues for the ongoing proceedings first and then to stop or continue to deal with the subject matter of the dispute or to proceed without any bifurcation according to the UNCITRAL Arbitration Rules (1976 and 2010), ICC, LCIA, VIAC, SCC, AAA, NAFTA, CAFTA, ICSID, ICDR, national law and UNCITRAL Model Law. Diverse rules do come to the same solution because do not forbid a bifurcation, although AAA and ICRD do expressly allow

bifurcation without any other set of conditions. Actually the Arbitral Tribunal has a full discretion on how it will proceed.

Built on arbitral practice the 'soft law' of procedure operates in tandem with the firmer norms imposed by statutes, treaties and institutional rules such as the UNCITRAL Model Arbitration Law, as well as the International Bar Association instruments on conflicts-of-interest[3] and evidence[4] and the American College of Commercial Arbitrators compendium of 'Best Practices' for arbitral proceedings.[5]

> For matters of plain procedure, (i.e., by setting the schedule and organizing the hearings), arbitrators have wide discretion while they usually resolve the procedural issues by recourse to experience and guidelines harvested from the arbitration practice. With respect to issues that contain elements of both substance and procedure, arbitrators could look to norms synthesized from various cases and awards even if the Arbitral Tribunal is not bound by previous decisions. At the same time, it must pay due consideration to earlier decisions of international tribunals and has a duty to adopt solutions established in a series of consistent cases. The Arbitral Tribunal, subject to the specifics of a given treaty and of the circumstances of the actual case of commercial arbitration, has a duty to seek to contribute not only to the harmonious development but "of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law"[6].

Procedural or issues of the legal matter

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3 IBA Guidelines on Conflicts of Interest in International Arbitration (2004) (http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Projects.aspx#guidelines)

4 Newly revised IBA Rules on the Taking of Evidence in International Arbitration, adopted on 29 May 2010, http://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx

5 ibid 3 , page 1-

6 See e.g., Saipem SpA v The People's Republic of Bangladesh, ICSID Case No. ARC/05/07, 30 June 2009, para. 90. On the precedential value of ICSID decisions, see Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse?, Freshfields Lecture 2006, Arbitration International 2007, pp. 368 et seq.

How complicated the plea on lack of jurisdiction in commercial arbitration might be was defined by author William W. Park in 2006[7]

The same source[8] gave similar examples as to the investment arbitration as concerning the plea on lack of jurisdiction. Arbitration under investment treaties might raise many jurisdictional issues including amongst others: nationality, the nature of an "investment", assignment, absence of prior "friendly negotiations", non-exhaustion of local remedies, and a fork in the road between a local and international forum.[9]

Bifurcation from the point of view of the practice in investment arbitration

We can choose other cases as cited above to illustrate the possible practice of bifurcation in investment arbitrations as the chosen public cases of arbitration of the investors raised against the Czech Republic as well the Slovak Republic could show.

In the case of Eastern Sugar B.V. (The Netherlands) v the Czech Republic the Arbitral Tribunal it should have been *prima facie* obvious that jurisdiction was present then the

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, from whom I respectfully cite the following examples:

- when an arbitration clause was signed by a corporate affiliate and claim was brought against an "un-mentioned" company;
- when the clause was based on a "group of companies" doctrine and applied also against corporate affiliates;
- when the right to arbitrate of an employer on the basis of an "exchange" of letters is contested by the employee [7],
- when there is lack of jurisdiction because of *lis pendens* by parallel proceedings in two countries,
- when there is a consolidation of claims in arbitration arising from separate contracts without a parties' agreement or the applicable arbitration rules allowing that in the matter.

[8] The Arbitrator's Jurisdiction to Determine Jurisdiction, William W. Park, ICCA Congress, Montréal 2006, 13 ICCA Congress Series 55, "Selected Scenarios of Jurisdiction in Practice", p. 148 ff.

[9] Pierre Lalive, *Some Objections to Jurisdiction in Investor-State Arbitration*, in INTERNATIONAL COMMERCIAL ARBITRATION: IMPORTANT CONTEMPORARY QUESTIONS 376 (2002 ICCA Congress, London).

arbitral tribunal have reserved and postpone the decision on its jurisdiction into the merits phase.[10] [11]

In the case Ronald S. Lauder v. the Czech Republic[12], In the preliminary phase the Tribunal decided that the issue of jurisdiction would be joined to the merits and that no separate decision on jurisdiction would be taken - unless the Arbitral Tribunal would hold that a separate determination would shorten the proceedings, and considered that a bifurcation of liability and remedy would not be helpful. [13]

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[10] Notice of Arbitration was raised on 22 April 2004 [this sentence is unclear to me]. The Czech Republic filed its full answer and a plea of lack of jurisdiction on December 30, 2005. According to the Czech Republic, Eastern Sugar brought two heads [?] of claim. The first relates to the Czech Republic's alleged failure to enact and enforce a workable sugar regime, and admittedly did not raise issues of arbitrability. The second head of claim however was based on legitimate expectations that allegedly had been frustrated by the Czech Republic's adoption of rules that differ from the EU sugar regime. This claim, the Czech Republic argued, cannot be heard by an arbitral Tribunal to the extent that it related to a time after 1 May 2004, the Czech Republic's EU accession. From this time forth, only the European Commission would be competent to deal with such issues.

In the Partial Award the Arbitral Tribunal first discussed procedural issues and accepted *its* jurisdiction thereby rejecting the plea on lack of jurisdiction and then turned to the merits. By the Partial Award from 27 May 2007 the Respondent was ordered to pay to the Claimant the amount of EUR 25,400,000 in principal with the interest at the rate at 7 percentage points above the repo rate as published from time to time by the Czech National Bank. [11]

[12] the final award was rendered on 3 September 2001. The Notice of arbitration was brought on 19 August 1999.

[13] The Arbitral Tribunal also took note of the absence of an agreement between the Parties to consolidate or coordinate the parallel UNCITRAL arbitration between CME and the Czech Republic. In this case the arbitral tribunal decided that it had jurisdiction to hear and decide this case and that the Respondent committed a breach of its obligation to refrain from arbitrary and discriminatory measures. The claim for a declaration that the Respondent committed further breaches of the Treaty was denied and all claims for damages were denied. The Arbitral Tribunal found, after having examined and dismissed each of these claims, that only the arbitrary and discriminatory measures standard had been breached despite the fact that the claimant alleged the impairment, including expropriation, breach of fair and equitable treatment, failure to provide full security and protection, and failure to ensure minimum standard of treatment under international law. However, even though the tribunal found that a breach had occurred, it decided that no compensation was due because the losses sustained by the claimant were not caused by the said arbitrary and discriminatory measures.

In the case CME Czech Republic B.V. (CME) vs. The Czech Republic[14] The Arbitral Tribunal here chose quite another approach although the factual as well the legal background was quite similar. The only difference was that the Claimant was a company registered in the Netherlands and there was the Netherland Czech BIT. The tribunal bifurcated the proceedings between liability and quantum first. After the partial award on liability[15] the tribunal proceed in the dispute and finally come to the conclusion of breaches of treatment standards. [16].[17]

In the case SALUKA INVESTMENTS B.V. Claimant v. THE CZECH REPUBLIC.[18] The Tribunal decided first to resolve whether it has jurisdiction to hear and determine the counterclaim presented by the Respondent. On 7 May 2004 the Tribunal handed down its *Decision on Jurisdiction over the Czech Republic's Counterclaim* ("Decision on Jurisdiction over Counterclaims"). The Tribunal decided that it was without jurisdiction to hear and determine the Counterclaim put forward by the Respondent in its Counter-Memorial.[19] In the further course of proceedings the Arbitral Tribunal issued a partial award on 17 March 2006 that the Tribunal had jurisdiction to hear and decide the dispute which the Claimant. Nevertheless the claim based on expropriation was declined. The Arbitral Tribunal retained jurisdiction; claims based upon the Czech Republic acting unfairly and discriminatorily –

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[14] the Claimant initiated the arbitration proceedings on 22 February 2000 by notice of arbitration pursuant to Art. 3 of the UNCITRAL Arbitration Rules.

[15] CME Czech Republic B. V. v Czech Republic (UNCITRAL), Partial Award, 13 September 2001. In accordance with Art. 15.1 of the UNCITRAL Arbitration Rules, the Arbitral Tribunal decided to conduct the arbitration in the manner it considered appropriate.

[16] CME Czech Republic v Czech Republic (UNCITRAL), Final Award, 14 March 2003.

[17] ibid. 4, para 16The Respondent in respect to jurisdiction requested that the Tribunal should hold summary threshold proceedings whereas the Claimant's position was that the jurisdictional issues should be considered in conjunction with the hearing of the merits because the issues (in substance) had been fully presented. As a damage irreversibly losses in a TV broadcasting business in a case of expropriation the Arbitral Tribunal ordered by the final award (on quantum) from 14 March 2003 to pay the amount totalling to 269.814.000 USD with interest on the said amount at the rate of 10% from 23 February 2000 until the date of payment on of the claimant's. The amount of damages ordered was roughly equivalent to the country's entire health care budget. These cases (also) illustrate that an entirely new source of state accountability and liability has emerged

[18] an ad hoc UNCITRAL arbitration was initiated by a Notice of Arbitration from 18 July 2001. In the course of the proceedings the Claimant, in its Objections to Jurisdiction over the Czech Republic's Counterclaims, placed primary reliance on the fact that while the Tribunal had jurisdiction over Saluka, it had no jurisdiction *rationae personae* over Nomura, which (not Saluka) was the entity against which every head of counterclaim was in terms and in substance directed. Nomura was a legal entity incorporated in the United Kingdom and had not consented to be a party to the arbitration.

[19] SALUKA INVESTMENTS B.V. Claimant v. THE CZECH REPUBLIC (UNCITRAL), Partial award, 17 March 2006, para 20

contrary to the treaty.[20] The dispute was settled in connection with the claims raised by Nomura out of this arbitration.

In the case PHOENIX ACTION, LTD. v. THE CZECH REPUBLIC (ICSID Case No. ARB/ 06/5). The Arbitral Tribunal analyzed the existence of a protection and came to the conclusion that the Tribunal lacked jurisdiction over the Claimant's request.[21] The proceeding was not bifurcated. The Arbitral Tribunal decided in its final award that the dispute brought by Claimant before the Centre is not within the jurisdiction of the Centre and the competence of the Tribunal.[22]

In the case Austrian Airlines AG v The Slovak Republic[23] The Tribunal, after having bifurcated the proceedings, issued a final award that it lacked jurisdiction over the claims, as neither the claim for expropriation nor the other claims brought by the Claimant were covered by the arbitration provisions appearing in the Treaty.

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[20] ibid 17. para 511 an ad hoc UNCITRAL arbitration was initiated by a Notice of Arbitration from 18 July 2001. In the course of the proceedings the Claimant, in its Objections to Jurisdiction over the Czech Republic's Counterclaims, placed primary reliance on the fact that while the Tribunal had jurisdiction over Saluka, it had no jurisdiction *rationae personae* over Nomura, which (not Saluka) was the entity against which every head of counterclaim was in terms and in substance directed. Nomura was a legal entity incorporated in the United Kingdom and had not consented to be a party to the arbitration.

[21] the award was dispatched to the Parties on 15 April 2009. The Request for Arbitration was registered by the Centre for Settlement of Investment Disputes ("ICSID") on 23 March 2006. he Respondent denied the jurisdiction of ICSID and contended that "The purported investor, Phoenix, acquired the Benet Companies for the precise purpose of bringing their pre-existing and purely domestic disputes before an international judicial body", adding that "such abusive treaty-shopping is directly at odds with the fundamental object and purpose of the ICSID Convention and the BIT". Article 41 of the ICSID Convention makes plain that the Tribunal is the judge of the Centre's jurisdiction and its own competence. In order to determine the existence of its jurisdiction in any given case, an ICSID tribunal has to analyze the fulfillment of the requirements of the Washington Convention, and the requirements of the contract, the national law, the BIT or the multilateral treaty providing for the submission of investment disputes to ICSID arbitration.

[22] PHOENIX ACTION, LTD. v. THE CZECH REPUBLIC, ICSID Case No. ARB/06/5, Award 7 April 2009

[23] the Arbitral Tribunal rendered the Final Award on 9 October 2009. The Claimant filed a Notice of Arbitration on 8 April 2008 under the UNCITRAL Arbitration Rules 1976. On 20 August 2008, the Tribunal, *inter alia*, invited the Respondent to advise whether it intended to raise jurisdictional objections. On 29 September 2008 the Claimant requested *inter alia* that the Tribunal order the bifurcation of liability and quantum. On 22 October 2008, the Respondent submitted its views and did not oppose the Claimant's request for bifurcation of the merits and quantum phases of the proceedings. By letter of 28 October 2008, the Tribunal confirmed that the timetable contemplated in PO 1 would apply to issues of liability and, as the case may be, of jurisdiction, issues of quantum being left for a potential subsequent phase. The Claimant submitted its Statement of Claim on 19 December 2008.

In the case Mr William Nagel, United Kingdom v The Czech Republic, Ministry of Transportation and Telecommunications, (SSC No. 049/2002)[24] on 25 April 2003, the Arbitral Tribunal decided that this phase of arbitration should only concern the liability issue and that questions of damages should be reserved for a possible further phase of the proceedings. The Arbitral Tribunal found itself competent to take a position on the preliminary issue and concluded that the claims based on the Treaty must have been dismissed.

The case of Oostergetel, Laurentius v The Slovak Republic is not accessible yet to the public.[25] Nevertheless, the arbitral proceedings were bifurcated and by the (final) Award the tribunal rejected all claims[26]

Conclusion

The arbitrators should aim to get, as soon as possible, a *prima facie* picture of the factual and legal background of all claims raised by the parties and asses and decide which answers might play the priority role, whether only the pure proceedings matters as the jurisdiction liability concerns or whether the Arbitral Tribunal should start with the issues of the merits in order that our arbitration industry shall remain acceptable for the users– in the new terminology with the key speaker at the ICCA congress Mr Sundaresh Menon in Singapore 2012- (…) some answers are better than others in the delivery of an accurate award that rests on a reasonable view of what happened and what the law says. Finding that reality in a fair manner does not always run quickly or smoothly.[27]

We should keep in mind this aim when dealing with the issue of bifurcation in commercial as well as in investment arbitration.

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[24] a Final Award was rendered on 9 September 2003. The dispute arose in connection with an invitation to participate in a process to establish a GSM operator in the Czech Republic. The request for arbitration was submitted to the Arbitration Institute of the Stockholm Chamber of Commerce *{"the SCC Institute")* on 30 May 2002. The Czech Republic's reply to the request for arbitration, dated 25 July 2002, was submitted to the SCC Institute on 29 July 2002. On 20 December 2002, the Arbitral Tribunal decided, at Mr Nagel's request and with the Czech Republic's consent, that the initial Statement of Claim and Statement of Defence should be limited to the issue of liability. Mr Nagel submitted his Statement of Claim on 14 February 2003. The Czech Republic submitted its Statement of Defence on 21 March 2003. The main hearing on the liability issue was held in Stockholm on 14-16 July 2003.

[25] by the Award on Jurisdiction issued on 30 April 2010 when the jurisdiction *prima facie* of the Arbitral Tribunal was determined. The arbitration lasted from 8 March 2006 to 23 April 2012

[26] Press release by the Slovak Finance Ministry (http://www.finance.gov.sk/En/Default.aspx?CatID=10&id=72)

[27] ibid 8.

the more complicated a dispute, the more challenging the task of fixing the right case management tools. But we need the right case management skills in international disputes either of a commercial or investment nature.

The skirmishing parties have to be well satisfied by a decision either on bifurcation or on the merits.

And this is the main task for learned, skilled, and quite well-prepared practitioners that are involved in the arbitration.

In closing I would wish to the al community of practitioners in arbitration to think big and small as well, and hope for success in this challenging task, wishing you a good afternoon today.

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