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16 November 2012

*To bifurcate or  
not to bifurcate?*

# To bifurcate or not?

- If the decision is made to bifurcate, why then?
- Is the bifurcation somehow a fork in the road?
- Who is to determine this, the Arbitral Tribunal or the parties to the dispute?
- Is the bifurcation simply a procedural tool? Or does this also relate to the subject matter of the dispute?
- Should a plea on jurisdiction and a specific claim be given more or less importance as to the issue of bifurcation?
- Should the Arbitral Tribunal first deal with the most important claim as a basic claim for the dispute?
- Or does the Arbitral tribunal have to deal with all possible claims at the same time without bifurcation?

# UNCTAD report 2010

- 357 disputes in investment arbitration by
  - 225 at the International Centre for Settlement of Investment Disputes (ICSID)
  - 91 ad hoc cases under the UNCITRAL Arbitration Rules
  - 19 cases at the Stockholm Chamber of Commerce
  - 8 cases at the Permanent Court of Arbitration
  - 5 cases at the ICC
  - 4 other ad hoc cases
  - 1 case at the Cairo Regional Centre for International Commercial Arbitration

# Pleas on lack of jurisdiction in investment arbitration based on the issues of the facts

- *ratione personae*
  - The dispute must oppose a Contracting State and a national of another Contracting State
- *ratione materiae*
  - The dispute must be a legal dispute arising directly out of an investment
- *ratione voluntaris*
  - The Contracting State and the investor must consent in writing that the dispute be settled through given arbitration
- *ratione temporis*
  - The Treaty must have been applicable at the relevant time

# Some examples of bifurcation in practice

## **Ronald S. Lauder v The Czech Republic (UNCITRAL)**

The issue of jurisdiction was joined to the merits

Final Award (on the merits and jurisdiction)

No monetary compensation granted

## **CME Czech Republic B.V. (CME) v The Czech Republic (UNCITRAL)**

Proceedings bifurcated between liability and quantum first

Partial Award (on liability)

Final Award (on the merits)

Compensation 269,814,000 USD plus interest

# Some examples of bifurcation in practice

## **Eastern Sugar B.V. v the Czech Republic (UNCITRAL)**

*Prima facie* jurisdiction

Decision on jurisdiction reserved until the merits phase

The plea on lack of jurisdiction rejected

**Final Award** (on the merits)

Compensation of EUR 25,400,000 plus interest

## **Saluka Investments B.V. v The Czech Republic (UNCITRAL)**

Arbitration bifurcated

Decision on Jurisdiction over Counterclaims:

Jurisdiction over counterclaim rejected

Jurisdiction as to further claims reserved

The dispute was settled without reaching any further award

# Some examples of bifurcation in practice

## **Phoenix Action, LTD. v The Czech Republic (ICSID Case No. ARB/06/5)**

Proceedings not bifurcated

### **Final Award**

The dispute was not within the jurisdiction of the ICSID and the competence of the Tribunal

## **William Nagel v The Czech Republic (SCC No. 049/2002)**

Arbitration bifurcated

Questions of damages reserved for a possible further phase

### **Final Award**

All claims were dismissed

# Some examples of bifurcation in practice

## **Austrian Airlines AG v The Slovak Republic (UNCITRAL)**

Proceedings were bifurcated

**Final Award** (on Jurisdiction)

Tribunal lacked jurisdiction  
over all claims

## **Oostergetel, Laurentius v The Slovak Republic (UNCITRAL) not published**

Proceedings were bifurcated

Award on jurisdiction - jurisdiction was upheld

**Final Award**

All claims were rejected

- Thank you for your attention