THINKING BIG – BIFURCATION OF ARBITRATION PROCEEDINGS – TO BIFURCATE OR NOT TO BIFURCATE [1]

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Abstract: The question of the separation of arbitration proceedings into two or more parts (bifurcation), primarily a typically into a procedural part and a merits part, includes at least three issues: whether the decision should be made to bifurcate or not, and then why; whether the bifurcation is somehow a fork in the road, and who is to determine this – whether the Arbitral Tribunal or the parties to the dispute; and whether the bifurcation is simply a procedural tool, or if this also relates to the merits of the dispute. The bifurcation of the arbitration proceedings is a practise seen both in international commercial arbitration and in investment arbitration. The immanent goal of the Arbitral Tribunal is to issue a final decision in the shortest time. In so far, however, as the Arbitral Tribunal is not able to issue a final decision on the matter itself, it has to deal with issues of a procedural nature – whether jurisdiction is given to it, or in the decision on whether the claim has a basis before deciding on its amount. Apart from the two mentioned reasons for bifurcation we can encounter others. It is an issue of a pragmatic manner, by which the priorities are determined and it is possible to shorten the process. The parties should have their objections while at the same time be able to raise them at the earliest possible opportunity, in order to ensure a timely and expense-effective procedure, when the role of the Arbitration Tribunal is the dominant and chosen means; how to proceed further in the dispute falls, by exception, to the deliberation of the Arbitral Tribunal. Bifurcation is a procedural instrument with impact on the fundamental factual basis of the dispute. In the event that the Arbitral Tribunal reaches the conclusion that it is not appropriate, then continuing with the dispute is unnecessary, just as when coming to the conclusion that there does not exist any liability, the claim for higher damages is unnecessary.

Resumé: Otázka rozdělení rozhodčího řízení na dvě nebo více částí (bifurcation), zejména a typicky na část procesní a na část meritorní, zahrnuje nejméně tři otázky, zda má být o rozdělení rozhodnuto a z jakého důvodu, zda je bifurkace jakýmsi rozcestím a kdo je k tomu povolán, zda rozhodčí soud nebo strany sporu, a zda je bifurkace jen procesním nástrojem anebo souvisí i s meritem sporu. Rozdělení rozhodčího řízení je možnou praxí jak v. mezinárodní obchodní arbitráži, tak i v investiční arbitráži, když z procesního hlediska je to prakticky stejné. Imanentním cílem rozhodčího řízení je vydat konečné rozhodnutí v. co nejkratší době. Pokud ovšem není rozhodčí tribunál schopen vydat konečné rozhodnutí ve věci samé, musí se

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vypořádat s otázkami procesní povahy, zda je dána pravomoc anebo při rozhodnutí o základu nároku před rozhodováním o jeho výši. Kromě uvedených dvou důvodů rozdělení řízení se můžeme setkat i s dalšími. Jde o pragmatický způsob, kterým se stanoví priority a umožní se zkrácení řízení. Strany by měly přitom vznést své námitky při nejbližší možnosti, aby bylo zajištěno časově a nákladově efektivní řízení, když role rozhodčího tribunálu je dominantní a zvolený způsob, jak dále postupovat ve sporu spadá výlučně na rozhodnutí rozhodčího senátu. Bifurkace je procesní nástroj s dopadem na samotnou podstatu sporu. v. případě, že rozhodčí soud dospěje k závěru, že není příslušný, pak pokračování ve sporu je zbytečné, stejně jako pokud dospěje k závěru, že neexistuje žádný závazek, je spor o výši náhrady škody zbytečný.

Key words: bifurcation, procedural tools, merits of the case, competence, ratione personae, ratione materiae, ratione temporis, ratione voluntaris, liability before quantum, Arbitral Tribunal, commercial arbitration, investment arbitration, UNCITRAL arbitration, ICSID

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1. Introduction

The bifurcation of arbitration proceedings would include at least three issues to deal with. The first issue should be whether or not the decision is made to bifurcate, and then why; the second, whether the bifurcation is somehow a fork in the road, and who is to determine this – whether the Arbitral Tribunal or the parties to the dispute; and the third, whether the bifurcation is simply a procedural tool, or if this also relates to the subject matter of the dispute.

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

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

First, any arbitration is based on an arbitration agreement between at least two parties, giving the Arbitral Tribunal the power to decide a 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 for 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* which apply.

The immanent 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 at least with issues of 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. before dealing with any amount of damages. Thus the Arbitral Tribunal should decide whether to bifurcate or not.

Besides these two reasons given 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 the claim within the relief is the most important. In this 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."[2]

In common practise, the Arbitral Tribunal should decide about bifurcation and whether or not it might avoid the need to arbitrate about the merits of the case and about the rest of the parties' claims in order 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 on resolving any legal issues before moving further in the proceedings.

[2] Veijo Heiskanen, Arbitrary and Unreasonable Measures. 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).

Second, there is the question of whether or not the bifurcation is somehow a fork in the road, and who is to determine this – whether 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.

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 this sense 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 sometimes be 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 proceedings.

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

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

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 practise.

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

Similarly, the Arbitral Tribunal could come to the conclusion that there is no liability, and therefore the dispute about the amount of damages is superfluous.

The Arbitral Tribunal, in dealing with preliminary legal matters, such as its jurisdiction, liability, or the applicable law, and having bifurcated the proceedings actually decides in fact at the same time about the subject matter of the dispute.

Given that neither the arbitration rules nor the applicable law provide for a clear rule, the question might arise as to 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 bifurcation 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.[3]

In my opinion the answer is not quite so simple as when and whether to bifurcate at any given time. 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 on 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 presumed general approach, but with a specific path to be found by the Arbitral Tribunal in every given case.

2. Bifurcation in commercial and investment arbitration

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

As reported by UNCTAD in a 2010 report on "Latest Developments in Investor-State Dispute Settlement",[4] "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".

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

Bifurcation in a commercial arbitration is less formal, and the rules of institutional arbitration apply. One could encounter an informal bifurcation every time, whether or not a plea of a lack of jurisdiction is raised. Nevertheless, the Arbitral Tribunal has to decide the plea of jurisdiction even though the proceedings might not be formally bifurcated by a separate decision of the Arbitral Tribunal. The evidence is

[3] Sundaresh Menon, SC, Keynote address, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere),* ICCA Congress 2012, Singapore, para 48, http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf.

[4] Latest Developments in Investor–State Dispute Settlement, IIA Issues Note No. 1 (2010), UNCTAD/WEB/DIAE/IA/2010/3, p. 2 (http://unctad.org/en/docs/webdiaeia20103_en.pdf).

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 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 a plea based on issues of the facts *ratione personae*, *ratione materiae, ratione voluntaris* and *ratione temporis*, that should lead the Arbitral Tribunal to decide on bifurcation.

The Arbitral Tribunal is free to decide first whether to rule on jurisdiction and other core issues for the ongoing proceedings, 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. The diverse rules do come to the same solution because they do not forbid a bifurcation, although Art. 16.3 of the AAA International Dispute Resolution Procedures Rules[5] and ICRD[6] do expressly allow bifurcation without any other set of conditions. In fact, the Arbitral Tribunal has full discretion on how it will proceed.

Built on arbitral practise, 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[7] and evidence[8] and the American College of Commercial Arbitrators compendium of 'Best Practices' for arbitral proceedings.[9]

For matters of plain procedure (i.e. by setting the schedule and organizing the hearings), arbitrators have wide discretion, while they usually resolve procedural issues by recourse to experience and guidelines harvested from the arbitration practise. 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

[5] Art. 16.3 AAA (Art 16.3 ICRD) Rules states as follows: The tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. (http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail and http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037&revision=latestreleased).

[6] Established in 1996 as the international division of the American Arbitration Association, the International Centre for Dispute Resolution (ICDR) is one of the most recognized and prominent providers of international dispute resolution services in the world. (http://www.adr.org/aaa/faces/aoe/icdr).

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

[8] 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.

[9] Protocols for Expeditious, Cost-Effective Commercial Arbitration, College of Commercial Arbitrators, 2010, http://www.thecca.net/CCA_Protocols.pdf.

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 "of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law."[10]

3. Procedural or issues of the legal matter

How complicated the plea on lack of jurisdiction in commercial arbitration might be 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, 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 etc.[11]

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, a fork in the road between a local and international forum,[12] applicable law issue.[13]

4. Bifurcation from the point of view of the practise in investment arbitration

We can choose other cases cited above to illustrate the possible practise 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. v. Czech Republic (UNCITRAL), the Arbitral Tribunal determined that it should have been *prima facie* obvious that jurisdiction was present; then the Arbitral Tribunal reserved and postponed the decision on its jurisdiction into the merits phase. 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. In the Award the Respondent was ordered to pay to the Claimant the amount of EUR 25,400,000 in principal with interest at a rate 7 percentage points above the repo rate published from time to time by the Czech National Bank.[14]

[10] *Arbitral Precedent: Dream, Necessity or Excuse?*, Gabrielle Kaufmann-Kohler, Freshfields Lecture 2006, Arbitration International 2007, p. 368 *et seq.*

[11] *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 et seq.

[12] *ibid.*

[13] Pierre Lalive, *Some Objections to Jurisdiction in Investor-State Arbitration*, in International Commercial Arbitration: Important Contemporary Questions 376 (2002 ICCA Congress, London).

[14] Eastern Sugar v. Czech Republic, Partial Award, 27 May 2007, paras. 181 et seq., 387 et seq.

In the case of Ronald S. Lauder v. Czech Republic (UNCITRAL), the Tribunal decided in the preliminary phase 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. 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 a 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.[15]

In the case of CME Czech Republic B.V. (CME) vs. Czech Republic (UNCITRAL),[16] the Arbitral Tribunal chose quite a different approach than the approach of the Arbitral Tribunal in the proceedings of Ronald S. Lauder v. the Czech Republic, although the factual as well the legal background were quite similar. The only difference there was that the Claimant, CME, was a company registered in the Netherlands, and there was the Netherlands-Czech Bilateral Investment Treaty (BIT) to apply. In respect to jurisdiction the Respondent 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. The Arbitral Tribunal decided to conduct the arbitration in the manner it considered appropriate in accordance with Art. 15.1 of the UNCITRAL Arbitration Rules. The Tribunal bifurcated the proceedings between liability and quantum first.[17] The Tribunal came to the conclusion that there were breaches of treatment standards. As damage for irreversible losses in a TV broadcasting business in a case of expropriation the Arbitral Tribunal ordered in its final award (on quantum) on 14 March 2003 payment of an amount totalling 269.814.000 USD, with interest on the said amount at the rate of 10% from 23 February 2000 until the date of payment to the Claimant. The amount

[15] Ronald S. Lauder v. Czech Republic, Final Award, 3 September 2001, para. 16(vii), 166.

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

[17] CME Czech Republic B. V. v. Czech Republic (UNCITRAL), Partial Award, 13 September 2001, para. 46.

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]

In the case of Saluka Investments B.V. v. Czech Republic (UNCITRAL), the Tribunal decided first to resolve whether it has jurisdiction to hear and determine the counterclaim presented by the Respondent. The 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 *ratione personae* over Nomura, which 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. On 7 May 2004 the Tribunal handed down its Decision on Jurisdiction over the Czech Republic's Counterclaim.[19] The Tribunal decided that it was without jurisdiction to hear and determine the Counterclaim put forward by the Respondent in its Counter-Memorial. 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 had raised.[20] The Arbitral Tribunal retained jurisdiction about claims based upon the Czech Republic acting unfairly and discriminatorily, i.e. contrary to the treaty, and the claim based on expropriation was declined. The Arbitral Tribunal did not render any final award in the proceeding due the fact that the dispute was settled outside of this arbitration and in connection with the claims raised by Nomura.

In the case of Phoenix Action, Ltd. v. Czech Republic (ICSID Case No. ARB/06/5), the Request for Arbitration was registered by the Centre for Settlement of Investment Disputes ("ICSID") on 23 March 2006. The 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 had 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. The Arbitral Tribunal analyzed the existence of a protection and came to the conclusion that the Tribunal lacked jurisdiction over the Claimant's request. The proceeding

[18] CME Czech Republic v. Czech Republic (UNCITRAL), Final Award, 14 March 2003, para 620 et seq.

[19] Saluka Investments B.V. v. Czech Republic (UNCITRAL), Decision on Jurisdiction over Counterclaims, 7 May 2004, para 83.

[20] Saluka Investments B.V. v. Czech Republic (UNCITRAL), Partial award, 17 March 2006, para 20, 511.

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.[21]

In the case of Mr William Nagel (United Kingdom) v. Czech Republic, Ministry of Transportation and Telecommunications, (SSC No. 049/2002) on 25 April 2003, the request for arbitration was submitted to the Arbitration Institute of the Stockholm Chamber of Commerce ("the SCC Institute") on 30 May 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. The Arbitral Tribunal decided[22] that the primary phase of arbitration should concern the liability issue only, while questions of damages should have been reserved for a possible further phase of the proceedings. The Arbitral Tribunal found the competence to take a position on the preliminary issue and concluded that the claims based on the Treaty must be dismissed due the fact that the investment was not protected under the treaty.[23]

In the case of Austrian Airlines AG v. Slovak Republic (UNCITRAL), the Claimant filed a Notice of Arbitration on 8 April 2008. 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 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. The Arbitral Tribunal confirmed that the timetable contemplated in Procedural Order No 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. The Tribunal, after having bifurcated the proceedings, rendered the Final Award on 9 October 2009,[24] 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.

The case of Oostergetel, Laurentius v. Slovak Republic is not fully accessible yet to the public.[25] Nevertheless, its arbitral proceedings were bifurcated by Decision on Jurisdiction,[26] and in its (final) Award the Arbitral Tribunal rejected all claims.[27]

[21] Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award 7 April 2009.

[22] Mr William Nagel (United Kingdom) v. Czech Republic, Ministry of Transportation and Telecommunications, SSC No. 049/2002, Award on Jurisdiction issued on 30 April 2010.

[23] Mr William Nagel (United Kingdom) v. Czech Republic, Ministry of Transportation and Telecommunications, SSC No. 049/2002, Final Award, 9 September 2003, para. 335, 336.

[24] Austrian Airlines AG v. The Slovak Republic, Final Award, 9 October 2009.

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

[26] Oostergetel, Laurentius v. Slovak Republic, Decision on Jurisdiction, 30 April 2010, para. 39, 190 (decision), Final Award, 23 April 2012, para. 62, (http://www.italaw.com/sites/default/files/case-documents/ita1073_0.pdf).

[27] Oostergetel, Laurentius v. Slovak Republic, Final Award, 23 April 2012, para. 341 (relief) (http://www.

5. Conclusion

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 assess and decide which answers might play a priority role, whether only the pure procedural matters as concerns the jurisdiction liability, or whether the Arbitral Tribunal should start with the issues of the merits, while 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.

This aim should be kept in mind when dealing with the issue of bifurcation in commercial as well as in investment arbitration. The more complicated a dispute, the more challenging the task of fixing the right case management tools. The right case management skills are certainly needed in international disputes, whether 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 who are involved in arbitration. The community of practitioners in arbitration must think big, and small as well, in order to secure much success in their challenging task.

italaw.com/sites/default/files/case-documents/ita0933.pdf).