

THE BIFURCATION OF THE ARBITRATION PROCESS IN THE COURT OF ARBITRATION OF THE SANTO DOMINGO CHAMBER OF COMMERCE AND PRODUCTION

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Summary: *The bifurcation or separation of the arbitral procedure is the discretionary power of the arbitral tribunal to decide, in advance and separately from the merits, potentially determining issues that could resolve the dispute in whole or in part.*

Keywords

Diligence, efficiency, effectiveness, procedural economy, bifurcation, separation, preliminary question, due process, time, costs, procedural order, ex officio action.

LOCAL REGULATIONS

1.- Article 25.1 of the Arbitration Rules of July 21, 2011 (RA) and Article 26.1 of the Sports Arbitration Rules of March 10, 2015 (RAD) require the court to instruct "... the case as soon as possible, efficiently and effectively...", which is in line with the spirit and motives of the Commercial Arbitration Law No. 489-08 (LAC) of "... to resolve in an adequate, rapid and definitive manner the conflicts that arise in the transactions of national and international trade..."**(1)**. In order to comply with this duty of diligence and procedural economy, these articles empower arbitrators to "... adopt the procedural measures that it deems appropriate...". among which is the bifurcation or separation of the procedure, in the cases and situations that merit it, the object of this work.

2.- The arbitrator's prerogative to bifurcate or separate the process has never been expressly provided for in any of the arbitration rules of the Chamber of Commerce and Production of Santo Domingo Inc. Such a

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prerogative was implicitly included in Article 25 of the rules of procedure of the former Conciliation and Arbitration Council of May 6, 2005, as one of the "... means that it deems appropriate...", "... to instruct the case as soon as possible...", as well as in the current versions of the respective rules of the Court of Arbitration of July 21, 2011 (RA) and the Sporting Court (RAD) of March 10, 2015, in its articles 25.1 and 26.1 indicated above, under the formula: "... the Arbitral Tribunal may, after consulting the parties, adopt such procedural measures as it deems appropriate...", "... that they are not contrary to the agreement of the parties...". Consequently, if the parties have agreed in the arbitration clause or commitment or in the mission report, that the arbitrators will not bifurcate the process without their prior consent, they lack the power to dispose of it ex officio, without giving the parties a reasonable opportunity to present their positions in this regard, thus exceeding their mandate.

INCIDENTS LIKELY TO CAUSE FORKING

1.- They generally arise at the beginning and are *prima facie* known by the Court's Executive Firm, which, in turn, empowers an arbitral tribunal so that it is the one that hears the request for bifurcation or separation and decides whether to order it or join the incident or incidents to rule them jointly with the merits in a final award. Below are some of the incidents expressly foreseen by RA and RAD:

a) The validity or existence of the arbitration clause or commitment: art.6.2 of RA and art. 7.2 of RAD:

"If the defendant submits one or more allegations that question the validity or scope of the arbitration clause or arbitration agreement, the Governing Law Firm shall decide, prima facie, the power of attorney of an Arbitral Tribunal, so that it may be the latter to hear and decide such arguments. In this case, the decision of the Management Firm does not prejudice the jurisdiction of the Arbitral Tribunal, which can only be decided by it".

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b) The voluntary or forced intervention of third parties: art. 9.1 of RA and art. 10.1 of RAD:

"9.1.- The Arbitral Tribunal may, at the request of one of the parties, accept the intervention in the arbitral proceedings of one or more third parties as parties, provided that the third party is a party to the arbitration agreement, specific claims are made against it and there is a direct and legitimate interest in the outcome of the arbitration. The Arbitral Tribunal may issue a single award or several awards, with respect to all parties involved in the proceedings.

10.1.- The Arbitral Tribunal may, after its constitution, either at the request of one of the parties or at the initiative of a third party, accept the intervention in the arbitration proceedings of one or more third parties as parties, provided that the intervening third party is a party to the arbitration agreement, specific claims are made against it and there is a direct and legitimate interest in the outcome of the arbitration. The Arbitral Tribunal may issue a single award or several awards, with respect to all parties involved in the proceedings.

(c) The competence of the arbitral tribunal: art.10.1 of RA and art. of 11.1 of the RAD:

"10.1.- Without prejudice to those cases in which there is no arbitration agreement or arbitration clause or that they are contrary to the Rules or that they are not applicable to them, in which the Management Firm may decide prima facie that the arbitration will not continue, the Arbitral Tribunal is the only one with the quality to decide on its own jurisdiction, including on the exceptions relating to the existence, validity or scope of the arbitration agreement, or any others whose weighting prevents entering into the merits of the dispute.

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11.1.- *Without prejudice to the foregoing, with regard to the powers of the Management Firm, once empowered, the Arbitral Tribunal is the only one with the authority to decide on its own jurisdiction, including on the exceptions relating to the existence, validity or scope of the arbitration agreement, or any others whose weighting prevents entering into the merits of the dispute.*"

d) Assurance of confidentiality of privileged information that one of the parties contributes to the process and that must be kept out of the reach of the others in the process: art. 25.4 of RA and art. 26.4 of RAD provide:

"The Arbitral Tribunal may take measures designed to protect commercial or industrial secrets and confidential information."

2.- Article 44 of Law 834 of July 15, 1978, sets forth some of the means of inadmissibility that may also cause bifurcation, such as: statute of limitations, lack of quality or right to act, the authority of res judicata, the predetermined period **(2)**:

"Art. 44. Any means that tend to make the adversary declare his application inadmissible, without examination of the merits, for lack of right to act, such as lack of quality, lack of interest, prescription, pre-fixed period, res judicata, constitutes an inadmissibility."

3.- There are also innumerable causes of bifurcation that can originate in preliminary issues, such as the authenticity of a document **(3)**; the question of applicable law **(4)**; quantification of damages **(5)**; the arbitrability of the dispute **(6)**, among others.

CRITERIA FOR ORDERING SEPARATION OR BIFURCATION

1.- None of the "*Complementary Rules to the CRC Arbitration Rules*" dated December 1, 2011, contains a guide regarding when the need to bifurcate or separate is imposed, in the presence of the different cases or

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procedural situations that may arise. In fact, in the part "III Instruction of the process" of "Guidelines for arbitrators in the conduct of an arbitral process" of the aforementioned rules, the power of arbitrators is briefly indicated to: "...to accumulate them in order to decide them in the final award or, depending on their nature, to resolve them immediately...".; without explaining or indicating which situations or circumstances would justify their immediate judgment separately or deferred together with the merits:

"The court shall invite the parties to present the procedural motions before the first hearing. If they arise subsequently, the tribunal must consider the opportunity in which they are presented. The court may join them to decide them in the final award or, depending on their nature, resolve them immediately by means of a procedural order whose reasons may be reserved to be contained in the final award."

2.- Our Supreme Court of Justice and the Constitutional Court have judged that the right of defense of the parties is not violated when the incidents are accumulated to be decided together with the merits:

"Considering that, as stated in the contested judgment, at the hearing held on July 20, 2000, both parties appeared in the case, the appellant requesting the personal appearance of the parties, to which his counterpart objected, for which reason the Court a-qua again invited the parties to conclude on the appeal; that the present appellant presented conclusions on the merits and the respondent conclusions tending to the nullity of the appeal and, in the alternative, to the inadmissibility of the same, to which the appellant subsequently objected; that on these conclusions the Court reserved the judgment, to decide it at the appropriate time; that in so doing the Court a-qua has acted in accordance with the law, since the joinder of procedural incidents is admitted in order not to eternalize the proceedings; that, as has been judged by this Supreme Court of Justice, the judges of the merits may by means of a single judgment, but by different

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provisions, decide, as has been done in the species, all procedural incidents that are promoted, provided that the parties have been put in a position to conclude on them, as has happened, in this case." (7)

"i. And it is that the judges may, at the time when an exception or a means of inadmissibility is presented to them, join said incident to be ruled together with the merits, this for the purposes of speed and procedural economy, which in no way violates the right of defense of the parties involved." (8)

INTERNATIONAL REGULATIONS

1.- By contrast, the separation and/or bifurcation of the arbitral process has been expressly contemplated for several years, in the various rules of international arbitration. Here are some in effect:

UNCITRAL Arbitration Rules, 2021

"3. The arbitral tribunal may decide on the exceptions referred to in paragraph 2 as a preliminary matter or in an award on the merits. The arbitral tribunal may continue its proceedings and render an award, notwithstanding any challenge to its jurisdiction pending before a tribunal." (9)

2022 ICSID Arbitration Rules:

"Rule 42 Fork

(1) A party may request that an issue be addressed at a separate stage of the proceedings ("bifurcation request").

(2) If the request for bifurcation relates to a preliminary objection, Rule 44 shall apply.

(3) The following procedure shall apply to requests for a fork other than those referred to in Rule 44: (a) the request for a fork shall be filed as soon as possible; (b) the request for a fork shall indicate the issues to be forked; (c) the Tribunal shall set

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deadlines for submissions on the fork application; (d) the Tribunal shall issue its decision on the application for bifurcation within 30 days of the last filing on the application; and (e) the Tribunal shall fix any time necessary for the continuation of the proceedings.

(4) In deciding whether to fork, the Court will consider all relevant circumstances, including whether: (a) the fork would significantly reduce the time and cost of the proceeding; (b) the decision of the issues to be diverged would dismiss all or a substantial part of the dispute; and (c) the issues to be considered at separate stages of the proceedings are so closely linked that they would render the fork impractical.

(5) If the Court orders the fork under this rule, it shall suspend the proceedings in respect of those matters which are to be dealt with at a later stage, unless otherwise agreed by the parties.

(6) The Court may decide of its own motion at any time whether a matter should be dealt with at a separate stage of the proceedings." (10)

Permanent Court of Arbitration (PCA) Rules, 2012

"Declination of the jurisdiction of the arbitral tribunal. Article 23.3. The arbitral tribunal may decide on the exceptions referred to in paragraph 2 as a preliminary matter or in an award on the merits. The arbitral tribunal may continue its proceedings and render an award, notwithstanding any challenge to its jurisdiction pending before a competent authority." (11)

Commercial Arbitration Rules of the American Arbitration Association (AAA), dated September 1, 2022:

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"R-33. The arbitrator may, at his discretion, conduct the proceedings with a view to the expeditious resolution of the dispute and may direct the order of evidence, bifurcate the proceedings and direct the parties to focus on the presentation of the aspects whose judgment resolves all or part of the case." (12)

Dispute Resolution Centre International Arbitration Rules, 1 June 2014

"Article 20.3: Processing of the Procedure. The court may decide on preliminary matters, bifurcate proceedings, direct the order of evidence, exclude testimony or other evidence that is redundant or irrelevant, and order the parties to focus their submissions on issues the resolution of which allows the decision of all or part of the case." (13)

Effective Conduct of Arbitration by the International Chamber of Commerce (ICC), dated November 11, 2016

"4. ADVANCE DETERMINATION OF CONTROVERSIAL ISSUES. PRESENTATION: Question: Under what circumstances would it be desirable for the arbitral tribunal to separate certain issues so that they can be resolved early by means of a partial award? A number of issues lend themselves to being dealt with in this way: First, there may be fundamental issues that could be decisive for arbitration as a whole; for example: • whether the arbitral tribunal has jurisdiction over the dispute; • whether the dispute is time-barred; • whether there is any type of liability; • whether the dispute is susceptible to arbitration; • whether the parties have the capacity to sue or be sued. For example, if a court decides that it does not have jurisdiction over the dispute, the result would be a final award dismissing all claims brought in arbitration. If the arbitral tribunal decides that it does have jurisdiction, then the decision would result in a partial award and the arbitration would continue, unless the tribunal's decision leads to a settlement. The same pattern

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would apply, *mutatis mutandi*, to the other examples mentioned above.

Second, there may be specific issues that it would be convenient to separate so that they can be decided by means of a partial award, despite the fact that their resolution would not be decisive for the entire arbitration. Early resolution of a given issue could reduce or simplify the issues to be decided in the remainder of the arbitration or could facilitate a settlement. Such issues may include: • a decision on the interpretation of a contractual provision; • a decision on the applicable law; • a decision on certain crucial conflicting facts;

• a decision on an issue that significantly affects a party's exposure to one or more requests, such as the determination of the types of damages that can be compensated.

For example, a decision on applicable law could save the time and money associated with filing the case based on alternative applicable rights. This analysis is also applicable to the other examples mentioned above. **OPTIONS**

• Do not set aside any issue for early resolution. • Set aside one or more issues for early resolution by issuing an award. **PROS AND CONS:**

Determining one or more issues in a partial award early can resolve the entire dispute, simplify the rest of the arbitration, or facilitate a settlement. However, if the partial award does not achieve any of these objectives, the early decision will entail an additional investment of time and money. Also, separating a certain issue, rather than resolving it together with the rest, may affect the way in which the court decides on some issues.

COST/BENEFIT ANALYSIS Separation of determining issues for arbitration as a whole. A cost/benefit analysis of this issue is complicated, as the decision must be made on the basis of considerations that are still uncertain. The parties, when they decide to separate an issue, do not know what the decision of the arbitral tribunal will be. For example, in a case involving liability and tort issues, if the court rules early that there is no liability, a great deal of time and money can be saved since there will be no need to exchange briefs and conduct hearings

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regarding damages. On the other hand, if the court determines that there is liability, unless such a decision encourages the parties to settle the case, there must be a damages phase, and the fact that the issue of liability has been broken off may increase the length and total costs of the proceedings.

Given these uncertainties, the cost/benefit analysis must be converted into an appreciation of probabilities and an estimate of potential costs.

When deciding whether to break off any issue, it might be helpful to estimate the possible outcomes, as well as the time and money required, by examining the following questions:

- What is the probability that the tribunal's decision will be determinative of the entire arbitration?*
- If the tribunal's decision is not going to be determinative of the entire arbitration, what is the likelihood that the tribunal's early resolution of the issue will lead to a settlement of the case?*
- What is the additional time and cost that will likely result from an early decision on the issue, compared to the likely overall costs, i.e. how much more time and money will be needed if the arbitration is divided into two stages rather than just one?*

The answers to these questions can help to decide whether or not it is advisable to break down an issue for early resolution. The following factors would tend to favour the separation of an issue for early resolution:

- There is a high probability that a decisive decision will be made;*
- There is a high probability of reaching a transaction, even when the decision is not resolute;*
- The remaining stages are likely to be long and costly;*

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- *The additional cost of early decision is low. It is possible to make the decision whether or not to separate an issue by weighing these factors together. Separating issues in a partial award that does not resolve the entire arbitration.*

A similar cost/benefit analysis would be applied in this case, although the relevant questions would be slightly different:

- *What is the probability that the court's advance decision on a given issue will significantly reduce or simplify the rest of the issues to be resolved in arbitration?*
- *What is the probability that the early decision on a certain issue will lead to a settlement in the case?*
- *To what extent could an early decision on a particular issue increase the length and cost of the procedure? Again, weighing the answers to these questions together can help decide whether it will be appropriate to set aside a particular issue for early resolution.*

QUESTIONS TO BE ASKED

- 1. Does the case include determinative or specific issues that can be decided in an independent award?*
- 2. Would the arbitral tribunal's early resolution of such issues be appropriate in light of the cost/benefit analysis discussed above?*

- 3. Early termination (a) would potentially resolve the dispute in its entirety; (b) facilitate a transaction; or (c) would it simplify the rest of the arbitration?*

OTHER POINTS TO CONSIDER: Article 37(5) of the Rules allows the arbitral tribunal, when deciding on the allocation of the costs of arbitration, to take into account the extent to which each party has conducted the arbitration expeditiously and cost-effectively. The arbitral tribunal may condemn the losing party in the early ruling on a potentially determinative issue if it considers that the party acted in bad faith or otherwise failed to act promptly and profitably.

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There may be logistical reasons that justify setting aside one or more issues for early resolution, such as the availability of witnesses, hearing facilities, attorneys, or arbitrators. Likewise, such separation can allow a complex case to be conducted in a more orderly manner. There may also be compelling reasons to decide some issues in advance in an arbitration; for example, whether claims under different arbitration agreements can be analyzed together in a single arbitration. The separation of an issue for decision in a partial award could be agreed by the parties or determined by the arbitral tribunal in the absence of an agreement between the parties." (14)

JURISPRUDENCE

1.- It is worth citing the precedent of the investment arbitration of *Michael Ballantine and Lisa Ballantine v. Dominican Republic*, in which the arbitral tribunal rejected the bifurcation requested by the DR, for the prior judgment of its objection based on the alleged dominant and effective nationality of the claimants and therefore, the non-application of the DR-CAFTA Treaty, considering the non-substantial nature of the objection raised. (15)

2.- In another investment arbitration case between *Lee Chin vs. Dominican Republic*, the arbitrators accepted the bifurcation requested by the respondent so that its preliminary objections of lack of consent to arbitration and the inapplicability of the CARICOM Treaty could be decided in advance, establishing that the substantial and serious nature of the objections, their separability from the substance of the matter and their preclusive effect were combined. which, if successful, would make it unnecessary to examine the other aspects of the dispute, thus benefiting from procedural economy in time and costs (16).

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PROCEDURAL ORDER OR AWARD?

1.- Unless otherwise agreed by the parties in the arbitration or arbitration clause or in the mission report, the arbitration panel is empowered to order or not, at its discretion, even *ex officio*, the bifurcation or separation of the process, since it is a simple administrative measure that does not prejudge the merits and is provided for by means of a procedural order. not subject to appeal and of mandatory compliance, the breach of which could entail the obligation to compensate, as enshrined in articles 25.5 of RA and art.26.5 of RAD:

"The parties are obliged to comply with all procedural ordinances issued by the Arbitral Tribunal. Failure to comply with a procedural ordinance could entail the obligation to compensate, at the expense of the party who fails to comply with it."

CONCLUSIONS

The advisability or appropriateness of the separation or bifurcation must be revealed *prima facie* by the arbitrators' examination of the factual or procedural situation, without the need to ponder issues related to the merits of the case.

The arbitral tribunal must verify the serious nature of the request for the purpose pursued and/or the consequences that it would produce, in any case, unrelated to unjustifiably delaying the process but aimed at its effective and efficient conduct.

The arbitral panel must verify both the separability of the objection that allows its weighing and ruling without prejudging or influencing substantive aspects, and its substantial nature that would lead to resolving essential aspects of the dispute.

Finally, the benefits must be greater than the inconveniences that the bifurcation may entail, in terms of time and costs for both the parties and the arbitrators, without causing prejudice to the parties, preserving their procedural rights.

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