

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER CHAPTER 10 OF THE DOMINICAN
REPUBLIC-CENTRAL AMERICA-UNITED STATES FREE TRADE AGREEMENT AND
THE UNCITRAL ARBITRATION RULES (2010)**

DAVID AVEN ET AL. V. THE REPUBLIC OF COSTA RICA
(UNCT/15/3)

PROCEDURAL ORDER NO 2

On the Respondent's Request for Bifurcation

Tribunal

Eduardo Siqueiros T., Presiding Arbitrator
C. Mark Baker, Arbitrator
Pedro Nikken, Arbitrator

Secretary of the Tribunal

Francisco Grob

February 4, 2016

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A. Procedural Background

1. The Arbitral Tribunal issued Procedural Order No. 1 on September 10, 2015, which contains, *inter alia*, the procedural calendar that was agreed to among the parties and the Tribunal for this arbitration proceeding;
2. In accordance with section 21 of Procedural Order No. 1, and as required by the procedural calendar, Claimants submitted on November 27, 2015 their Memorial (including all documents, witness statements and expert reports on which the Claimants rely);
3. On December 18, 2015, Respondent submitted a petition and argued that by reason of procedural economy the case warranted bifurcation of the liability and the damages phases of the arbitration, and invited Claimants to comment. If an agreement was reached amongst the parties, Respondent added, an amendment to the procedural calendar could be submitted to the Tribunal;
4. Claimants objected on December 22, 2015 to the submission, and alleged that Respondent had failed to set out a concrete proposal and a rationale therefor;
5. Respondent filed on December 24, 2015 a formal petition to bifurcate the proceedings, and essentially argued that until the Tribunal resolves the question of whether Respondent has breached its obligations under CAFTA-DR, there was no need for the Tribunal to consider the purported assessment of *quantum*; in the Respondent's view, the request advances efficiency and procedural economy. Respondent also stated that it was not in a position to consider the application but until it received and examined Claimants' Memorial;
6. In light of the formal request to bifurcate, the Tribunal allowed Claimants to comment by January 15, 2016;
7. In their filing of January 15, 2016, Claimants requested that the application be rejected, and indicated that: (i) Respondent had failed to properly refer to and explain the standards at the seat of arbitration to justify their petition, (ii) justify the alleged savings in time and money by the adoption of the proposed bifurcation. Conversely, Claimants submitted arguments and elaborated on the standards that the Tribunal must consider in issuing its decision. It added that the request was untimely, and that Respondent failed to explain what has changed between the date the procedure was agreed during the session that took place on September 3, 2015 and the date of the bifurcation request;
8. Respondent requested to submit a reply, and the Tribunal accepted. On January 19, 2016 Respondent submitted arguments that supported its petition to bifurcate, including elements under applicable law and the specific facts of the case. It concluded that issues of liability and *quantum* can be easily delineated in the Memorial and other documents submitted by Claimants;

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9. Finally, the Claimants responded on January 25, 2016 to the communication of Respondent and, among other arguments, stated that their original Notice of Arbitration summarized the basis of the claim and that the period elapsed since then was not relevant. They reaffirmed that it is the burden of the requesting party to provide compelling reasons that justify the bifurcation, which Respondent has failed to do, and requested that the agreed procedural calendar be maintained.

In consideration of the above, the Tribunal issues the present order and decides on the request submitted by Respondent.

B. Authority of the Arbitral Tribunal

10. These proceedings are conducted in accordance with the UNCITRAL Arbitration Rules, as revised in 2010, except as modified by Section B Chapter 10 of the Dominican Republic-Central America-United States Free Trade Agreement. Further, since the seat of the arbitration is London, United Kingdom, the Tribunal is also required to take into account the standards established by the *lex arbitri* – the English Arbitration Act 1996. Both the Claimants and the Respondent are in agreement on this point, and have expressed so in their respective filings.
11. Pursuant to Article 17.1 of the UNCITRAL Arbitration Rules, the arbitral tribunal may conduct the arbitration in the manner as it considers appropriate, “... *provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case.*” Further, it is a duty established in the same article that “... *in exercising its discretion, [the arbitral tribunal] shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute*”.
12. Under Section 33 of the English Arbitration Act, there is a similar authority and duty, as it establishes that the tribunal shall “... (a) *act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters failing to be determined ...*”.
13. There are no provisions in either the UNCITRAL Arbitration Rules or the English Arbitration Act dealing with bifurcation of the proceedings, whether on the subject of liability and *quantum* or otherwise. Nonetheless, the Arbitral Tribunal has the authority to resolve the request submitted by Respondent to bifurcate the proceedings under the general principles of management of an arbitration proceeding.

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C. Analysis of the Request

14. The Tribunal has given ample opportunity to the parties to express their views on the subject. Each has submitted their arguments, and has been able to comment on the counterparty's position and reply. The Tribunal does not require further arguments.
15. Respondent supports its request by stating that by bifurcating the proceedings, the Tribunal "... will very possibly avoid unnecessary delay and will most certainly avoid unnecessary costs ...", and cites various authors who refer to the time and cost of quantification of damages. It also states that the facts of this case allows the Tribunal to decide on the question of liability without reference to the evidence and testimony on *quantum*; in other words, liability needs not rely on the evidence in support of *quantum*.
16. Claimants, on the other hand, have basically argued that the Respondent has the burden of explaining the advantages that would arise from bifurcation, and that it has failed to submit such explanation; there needs to be compelling reasons justifying it, which Respondent have not identified.
17. Claimants have also expressed that rather than shortening the duration of the proceedings, it is most likely that these will be longer than what all parties involved expected and agreed at the time the procedural calendar was set. Respondent accepts that there would be no saving of time in terms of a hearing on liability, but proposed that subsequent pleadings and a short hearing could be scheduled only if a *quantum* phase was necessary by reason of a finding on liability by the Tribunal.
18. Claimants cite an author (Massimo V. Benedettelli, "*To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question*") who proposes that in assessing the virtues and pitfalls of bifurcation "... three main factors need to be considered: (i) the matter on which an early decision by the arbitral tribunal is sought, (ii) the form in which such decision is to be taken at the end of the bifurcated phase pursuant to the applicable law or rules and (iii) the interests that bifurcation may serve or jeopardise". The Arbitral Tribunal agrees with such assessment.
19. The Arbitral Tribunal does not find that there are elements in the petition of Respondent that would justify bifurcation of the proceedings. Should the request be accepted, there is no element that has been put forward to the effect that the procedural calendar agreed among the parties and recorded as part of Procedural Order No. 1 of September 10, 2015 would be altered in any significant manner in saving of time and costs, and it is unlikely that the evidentiary hearing on the merits of liability would be, or even could be, changed in light of the tight periods needed by and requested by counsel to submit their respective memorials.
20. Besides, the parties contemplated in the procedural calendar originally proposed, and accepted by the Tribunal, sufficient time to prepare and submit their respective Memorials, including their expert witness report on damages. Attempting at this stage to shorten the periods by reason of the eliminating such the expert report of Respondent (and further comments as part of the Reply and Rejoinder) until a further phase seems unlikely as well. Claimants have

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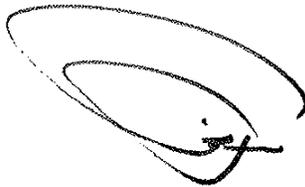
already submitted their expert witness report of Mr. Manuel A. Abdala on *quantum*. The inverse is possible, this is, that the proceedings would need to be extended if the Claimants were to succeed in their arguments on liability. In such case, a further round of submissions and a hearing to examine experts would be required, with uncertain availability at this time of the parties' counsel, experts, and the arbitrators.

21. The above considerations are, by themselves, sufficient to reject the petition to bifurcate because there appear to be no significant efficiency achieved in cost or time. However, there is an additional issue for the Tribunal to consider, and this deals with the timing of the request. The Tribunal deems that the request is untimely, because it was submitted after Claimants had already submitted their own expert witness report. Although Respondent has argued that it submitted the bifurcation request only after learning how Claimants plead their case, there is insufficient information that Respondent has supplied on how this impacted its position that allows the Tribunal to weigh-in in its decision. On the other hand, regarding the equality between the Parties, there is an element of unfairness of having allowed the Claimants submit their expert witness report, and shortly thereafter submit a request that would allow the Respondent to delay any submission, if applicable, for months, if not more.

D. Decision

22. For the above reasoning, the Arbitral Tribunal rejects the request submitted by Respondent to bifurcate the proceedings, and the procedural calendar agreed to by the parties and incorporated into Procedural order No. 1 shall continue as scheduled.

Date: February 4, 2016



On behalf of the Tribunal

Eduardo Siqueiros T.
Presiding Arbitrator