



School of International Arbitration



School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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Award Name and Date: Cairn Energy PLC, Cairn UK Holdings Limited v. The Republic of India – PCA Case No. 2016-7 – Procedural Order No. 4 – Decision on the Respondent’s Application for Bifurcation – 19 April 2017

Case report by: Volodymyr Ponomarov**, Editor Diego Luis Alonso Massa***

Summary: The Tribunal rendered a decision on the Respondent’s Application for Bifurcation. In its decision, the Tribunal confirmed that Article 21(4) of the UNCITRAL Arbitration Rules (1976) was tilted in favor of bifurcation. However, the Tribunal also pointed out that the Tribunal itself retained a full discretion to determine whether, in the circumstances of the case, the bifurcation was appropriate.

The Tribunal also concluded that there was no exhaustive list of the criteria for deciding the issue of bifurcation. The Tribunal noted that the decision on whether to hear a jurisdictional objection as a preliminary question or to join it to the merits stage of the proceedings depended on the circumstances of a particular case. The bottom line of the Tribunals’ analysis was whether bifurcation promoted fairness and procedural efficiency.

Given the circumstances of this case, the Tribunal was not persuaded that the bifurcation would promote either fairness or procedural efficiency and denied the Respondent’s Application for Bifurcation.

Main issues: Bifurcation, Tribunal’s Discretionary Power to Decide on Bifurcation, Criteria for Bifurcation.

Tribunal: Dr. Laurent Lévy (President), Mr. Stanimir A. Alexandrov (Appointed by the Claimants), Mr. J. Christopher Thomas, QC (Appointed by the Respondent)

Claimant’s Counsel: Mark McNeill, Robert Nelson (Shearman & Sterling), Harish Salve SC (Blackstone Chambers), Paul Hally (Shepherd and Wedderburn), Niti Dixit, Uday Walia (S&R Associates)

Respondent’s Counsel: Shreyas Jayasimha, Mysore Prasanna (Aarna Law), Salim Moollan QC, Chester Brown, Adam Board (Essex Court Chambers).

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Digest:

1. Facts of the Case

Cairn Energy PLC and Cairn UK Holdings Limited (the Claimants) filed a claim against the Republic of India for violation of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Promotion and Protection of Investments of 1994 (India - United Kingdom BIT (1994)).

The economic sector is defined as mining and quarrying, including hydrocarbons (oil and gas).

On 31 March 2017, the Tribunal denied the Respondent's Application for a Stay of the Proceedings.

This case is tightly connected with Vedanta Resources PLC v. Government of India and with the domestic Indian proceedings before the Income Tax Appellate Tribunal.

2. Procedural Background

On 18 April 2016, during the first procedural hearing, the Respondent indicated that it intended to wait until the Claimants filed their Statement of Claim before formulating its objections to jurisdiction and admissibility, and proposed to determine whether such objections should be heard in a preliminary bifurcated phase thereafter (¶ 1).

On 21 April 2016, the Tribunal informed the Parties that, once the Respondent wished to raise objections to jurisdiction and/or admissibility upon receipt of the Statement of Claim, it could file a request for bifurcation as soon as reasonably possible, otherwise the Respondent would be required to submit its Statement of Defense in full (¶ 2).

On 6 June 2016, the Respondent filed an Application for a Stay of the Proceedings (¶ 3). On 28 June 2016, the Claimants filed their Statement of Claim (¶ 4).

On 8 July 2016, the Respondent indicated that it would await the Tribunal's decision on its Stay Application before filing any application for bifurcation (¶ 6). Further, by a separate letter dated the same day, the Respondent requested a hearing on its Stay Application (¶ 9).

In its letter of 4 August 2016, the Tribunal granted the Respondent's request for a hearing on its Stay Application (¶ 10).

On 6 October 2016, on the eve of the stay of the proceedings hearing, the Respondent filed its Application for Bifurcation and requested a hearing on that application (¶ 14).

In its Letter 1 of 3 November 2016, the Tribunal denied the Respondent's request for a hearing on its Application for Bifurcation. However, the Tribunal agreed that the application would be briefed in two rounds, with the first round taking place before the filing of the Respondent's Statement of Defense, and the second round taking place thereafter (¶ 17).

On 31 March 2017, the Tribunal issued Procedural Order No. 3 whereby the Respondent's Stay Application was denied (¶ 24).

3. Analysis by the Tribunal

The Tribunal addressed three main issues: (i) whether the UNCITRAL Rules created a presumption in favor of bifurcation, and if yes, to what extent the Tribunal had discretion in this regard, (ii) what were the criteria to be considered when exercising Tribunal's discretion (iii) whether bifurcation was warranted in the present case.

3.1 Whether the UNCITRAL Rules created a presumption in favor of bifurcation, and if yes, to what extent the Tribunal had discretion in this regard

Both Parties agreed that Article 21(4) of the UNCITRAL Rules created a presumption in favor of bifurcation. However, the Claimants called it a "soft" presumption and emphasized that the decision whether to bifurcate the proceedings or not rested within the Tribunal's discretion. The Respondent objected to the Claimant's characterization of the presumption as "soft", but agreed that the Tribunal retained the full discretion to join any preliminary objections to the merits. Both Parties also agreed that Article 15(1) of the UNCITRAL Rules conferred upon the Tribunal a broad discretion over the conduct of the proceedings. Both Parties cited *Glamis Gold* case in this respect (¶ 70).

However, the Parties took an opposite stance on how the Tribunal should exercise its discretion in the present case (¶ 71). The Respondent suggested that, given the textual differences between the 1976 UNCITRAL Rules and the 2010 UNCITRAL Rules, tribunals should in principle rule in favor of bifurcation (¶ 72).

When dealing with this suggestion the Tribunal cited the second edition of a Commentary to the UNCITRAL Arbitration Rules by David Caron and Lee Caplan, where they noted that the current neutral version of the provision on bifurcation of 2010 UNCITRAL Rules allowed the tribunal to decide whether to rule on such a plea "as a preliminary question or in an award on the merits." (¶ 72).

The Tribunal agreed with the Respondent that before reaching any decision the Tribunal must consider the substantiality of the objection, the cost in time and money to the parties of a preliminary ruling (e.g. whether such a ruling would entail written filings or an oral hearing), and the practicality of bifurcating the proceedings to address jurisdiction preliminarily, especially where jurisdictional issues are intertwined with the merits (¶ 73).

The Tribunal concluded that, under the 1976 UNCITRAL Rules it was required to give serious consideration to a request that an objection to its jurisdiction should be heard as a

preliminary question. However, the Tribunal pointed out that it retained full discretion to determine whether, in the circumstances of the case, that objection should be heard preliminarily or be joined to the merits (¶ 75).

3.2 What are the criteria to be considered when exercising Tribunal's discretion

The Respondent submitted that the factors to be considered for the purposes of bifurcation are those identified in *Glamis Gold*, and those which were adopted by the tribunals in *Philip Morris* and *Emmis*, namely:

- a. Whether the objection to jurisdiction is substantial (in the sense of not being frivolous);
- b. Whether, if granted, the objection to jurisdiction would result in a material reduction of the proceedings at the next phase; and
- c. Whether the bifurcation is impractical, in the sense that the preliminary issue raised is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost (¶ 76).

The Tribunal agreed that the above factors should be taken into consideration when determining whether jurisdictional objections should be bifurcated. However, the Tribunal stated that such approach ignored the fact that these factors constitute a stand-alone test. In particular, the Tribunal stated, if factors (a) and (b) were answered in the affirmative and factor (c) - in the negative, the Tribunal should not necessarily bifurcate a jurisdictional objection (¶ 77).

The Tribunal also referred to *Accession Mezzanine* and *Apotex*, where it was found that fairness and procedural efficiency were the determining factors that should guide the Tribunal's discretion. The Tribunal also noted that in *Glamis Gold* the factors enumerated above were deemed non-exhaustive (¶ 78).

The Tribunal concluded that when considering whether to hear a jurisdictional objection as a preliminary question or to join it to the merits, it should answer the following questions: whether in the circumstances of this particular case, bifurcation promoted fairness and procedural efficiency? And in answering that question, the Tribunal may consider, *inter alia*, the factors identified in *Glamis Gold*. (¶ 81).

3.3 Whether bifurcation is warranted in the present case

The Tribunal agreed with the Respondent, that the objections it has raised met some of the criteria cited in *Glamis Gold Philip Morris and Emmis*, in particular:

- a. It was not the Tribunal's task at this stage to judge whether the Respondent's objections were justified in substance. However, the Tribunal could not turn a blind eye on the fact that the Respondent's objections might be successful.
- b. The Claimants did not deny that any of these objections, if upheld, might either put an end to the dispute or significantly reduce its scope. The Tribunal found, however, that a bifurcated phase would not dispose of all preliminary considerations, because only

two out of four Respondent's preliminary objections were subject to bifurcation (¶ 82).

The Tribunal was not persuaded that a bifurcation would promote fairness or procedural efficiency in this case.

The Tribunal considered, in particular, the following factors:

- a. A year had passed since the first procedural hearing took place in April 2016. At that time, the Respondent insisted on awaiting the Claimants' Statement of Claim before filing its objections to jurisdiction and its request for bifurcation. The Tribunal noted that the Respondent was committed to filing that request as soon as reasonably possible, failing such it agreed that it would submit its Statement of Defense in full.
- b. The Claimants filed their Statement of Claim in June 2016. On three occasions, the Tribunal reiterated that the Respondent should file its request for bifurcation, but the application was not forthcoming. The Tribunal also explicitly stated that its decision on the request for bifurcation would take into consideration whether it was timely made.
- c. The Claimants suggested that the hearing scheduled for 7 October could be used to
a. discuss both the Stay and Bifurcation Applications. The Respondent rejected the proposal and filed its Application for Bifurcation on the eve of that very hearing.
- d. The Tribunal agreed with the Respondent that under Article 21(3) of the UNCITRAL Rules (1976), it had the right to withhold the filing of its objections to jurisdiction (and its Application for Bifurcation) until the filing of its Statement of Defense. But the Tribunal noted that the Respondent's decision had had an impact on the procedural calendar and on the efficiency of this arbitration.
- e. The Tribunal also pointed out that it had just recently decided on the Respondent's Stay Application in March 2017 and it caused significant delay to the determination of the Application for Bifurcation.
- f. The Tribunal concluded that the Respondent did not file its Application for Bifurcation as soon as it would have been possible. In these circumstances the Tribunal ordered the Respondent to submit its full Statement of Defense in an attempt to exercise its discretion under Article 15(1) reasonably and with a view to preserving fairness between the Parties.
- g. The Tribunal was not persuaded that it should bifurcate the proceedings, because the other tribunal in the related case *Vedanta Resources PLC v. Government of India* bifurcated first two Respondent's preliminary objections.

For the above reasons, the Tribunal stated that the consideration of the Respondent's Application for Bifurcation had been delayed significantly. The Parties had already submitted their main memorials and evidence, considerable time had already elapsed since the commencement of this arbitration, and the procedural timetables had been agreed upon by the Parties. Satisfying the Respondent's Application for Bifurcation would require the allocation of the same time to brief and hear the Respondent's preliminary objections as the time to

brief and hear the entire case. The Tribunal thus concluded that bifurcating these proceedings would not increase procedural efficiency and would not result in very significant savings even if a bifurcated case would result in a dismissal, which in any event would not occur significantly earlier than the release of an Award on the merits; to the contrary, it might significantly increase time and costs (§ 84).

The Tribunal also noted that the significant delays in time could aggravate the dispute and increase the amounts claimed as damages. Indeed, the Respondent had seized and held the Claimants' shares in Cairn India Limited and was constantly threatening to sell them. In addition, significant interest and penalties might have accrued to the amounts assessed by India, thus potentially increasing the amount in dispute (§ 85).

The Tribunal considered among other factors the outcome of the Respondent's objections to jurisdiction and admissibility when determining the costs of these proceedings. Considering that any prejudice to the Respondent caused by non-bifurcated proceedings could be compensated by an award on costs, the Tribunal noted (as the *Apotex* tribunal did), that the balance of procedural fairness bore less heavily on the Respondent than on the Claimants should the bifurcation be denied. (§ 86).

Finally, the Tribunal considered its reasoning in terms of procedural fairness as well as economical sufficiency and noted that two out of four Respondent's preliminary objections cannot be addressed separately from the merits of the dispute (§ 87).

4. The Tribunal's Decision

The Tribunal denied the Respondent's Application for Bifurcation (§ 90).