Is there utility in dissenting opinions in international arbitration?

Matt Molloy – 20/04/2023

Acknowledgements

This work represents the final part of what started as a "lockdown" project – an LLM in International Dispute Resolution at Queen Mary University London. Half the course was more familiar territory (international commercial arbitration ("ICA")), the other more of an unexplored world (investment treatment arbitration ("ITA")). The course leaders and tutors have made the journey an enjoyable one for which I thank them collectively. My supervisor's enthusiasm, charm and guidance warrants a special thank you. Similarly, the twenty-four practitioners who gave me the benefit of their time and experience. Finally the individual who has endured proofing my attempts at academic work in a subject that is perhaps alien to them, but now less so to me. As a fictional film character once said "*ça été émotif*"![1]

[1] Ritchie, 1998 – "Big Chris"

Abstract

"There is a broad division of philosophy and practice as to whether the giving of dissenting opinions should be permitted…….the dissenting opinion does not form part of the award itself: it is not an 'award', but an opinion."[2]

This paper considers the competing arguments for and against dissenting opinions in international arbitration and addresses the question as to whether they have utility. The paper assumes that the tribunal consists of three arbitrators. The question is considered in the context of ICA and ITA. The conclusion is that there is and that, although there is commonality between ITA and ICA, there is additional utility in ITA on account of its distinguishing features.

[2] Blackaby et al., 2015 p9.129-130

Chapter 1: Introduction

1. This chapter sets out the aims of the research, explains the methodology adopted and summarises the conclusions reached. The purpose of this paper is to consider the competing arguments for and against dissenting opinions in international arbitration and to address the question of whether they have utility. The question is considered in the context of ICA and ITA. The paper includes a review of published work on the subject and the results of interviews with twenty-four practitioners.

2. Chapter 2 provides the context for the research, including the legal framework in which dissenting opinions exist and identifies national arbitral laws and institutional rules which provide for and/or enable dissenting opinions. It also introduces the discussion on the appropriateness of dissenting opinions in the literature.

3. Chapter 3 consists of a review of literature and published work on the subject and, in particular, the desirability of dissenting opinions. The review follows the debate chronologically and focusses on the reasons given for competing views on the subject. The starting place for the debate is 25th October 1985 when the International Chamber of Commerce ("ICC") Commission established a Working Party to consider dissenting opinions.[3] The appropriateness of dissenting opinions was contentious and formed the subject matter of Alan Redfern's seminal 2003 Freshfields lecture - Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly[4]. This was countered by Peter Rees and Patrick Rohn in 2009[5] and on 22nd November 2011 the Chartered Institute of Arbitrators ("CIArb") hosted a debate between Alan Redfern and Peter Rees on the proposition "*This House considers Dissenting Opinions in international arbitration to be unwelcome.*"[6] The use of dissenting opinions also featured prominently in Jan Paulson's criticism of party nominated arbitrators in 2010[7] and the entertaining exchanges between Albert Jan van den Berg and Charles Brower (and his co-authors) between 2010 and 2018.[8]

[3] ICC, 1991, p 2/12
[4] Redfern, 2004
[5] Rees & Rohn, 2009
[6] Van den Berg, 2015, p.390
[7] Paulson, 2010
[8] Van den Berg, 2010 & 2015, Brower et al, 2013 and 2018

4. Chapter 4 sets out the results of interviews conducted with practitioners. All practitioners were interviewed on a confidential basis and were provided with an undertaking that their anonymity would be preserved. The interviewees were asked to share any experiences they had of dissenting opinions in international arbitration and asked to share their views on utility. They were also asked whether they thought the position differed between ICA and ITA. Twenty-one of those interviewed considered that dissenting opinions had utility. Of the three who disagreed, the reasons given included the greater chance of challenge, dissatisfaction of the losing party, the lack of precedential value and the potential to delay deliberations and the award. Of the fifteen who considered themselves sufficiently informed to be able to comment, fourteen were of the view that there was a difference between ICA and ITA (with one considering that there probably was). The main difference proffered was that ITA took place within the public international law arena and the fact awards and opinions are typically published.

5. Chapter 5 contains a critical analysis of the reasons given in the literature and shared by those interviewed in support of the proposition that dissenting opinions have no utility and/or are unwelcome. The reasons given against dissenting opinions and why they have no utility are analysed first before an analysis of the reasons given in support of dissenting opinions and why they have utility. In conducting my analysis, I consider the extent to which the position differs between ICA and ITA.

6. Chapter 6 sets out the conclusions from the critical analysis. Although there is evidence that dissenting opinions can result in successful challenge to an award, this is not considered to be a bad thing especially if the reasons for the challenge relate to a procedural error which would have otherwise gone undetected. The absence of precedential value has more credence in ICA, but in ITA there is a view that there is a *de facto* doctrine of precedent. Further, there is a view that dissenting opinions can serve to develop public international law and assist the parties and their representatives in future cases. Although dissenting opinions have been cited as evidence of bias on the part of a party nominated arbitrator, it is considered that the system of a three party tribunal provides sufficient protection of the integrity of the process. The paper concludes that there is utility in dissenting opinions as they can serve to increase the quality of the award, preserve an arbitrator's independence and intellectual honesty, identify fatal procedural error and (in the ITA arena) contribute to the development of the law.

Chapter 2 – Context

7. In international arbitration, Tribunals are typically, but not exclusively, comprised of three members.[9] This is said to be reflected in the number of express agreements for three versus one,[10] the UNCITRAL Model Law[11] and Rules[12] (which are said to reflect international consensus[13]) and the ICSID Convention[14] which prescribe that there shall be three arbitrators unless otherwise agreed. It has been said to be conventional wisdom that, where economically viable, three arbitrators is preferable to one.[15] The reasons cited are that it improves quality and improves party confidence on account of the ability to select "its" arbitrator[16]. Although this is not a universal view[17] (and some rules assume a sole arbitrator unless there is good reason for there to be three[18] or leave it to the institution's discretion[19]), this paper proceeds on the basis that there are three arbitrators.

8. In circumstances where there is a tribunal of three, national arbitral laws[20] and institutional rules[21] provide that, unless the parties otherwise agree, a majority award can be made. Although this appears to be almost universal[22] there are relatively few express provisions for the minority arbitrator to express and/or publish a dissenting opinion. The most notable exception is the ICSID Convention.[23] It is evident that the provision for individual dissenting opinions was not included in earlier drafts, but their inclusion was overwhelmingly approved.[24] The text of Article 48(4) is permissive in terms of the form of dissenting opinion, and can vary from a simple vote against the majority, a statement of dissent without a full opinion, or a detailed and fully reasoned dissenting opinion.[25]

[9] Kirby, 2009 p.340-343
[10] Ibid, n.9
[11] Article.10
[12] Article.7(1)
[13] Ibid, n.9
[14] Article.37(2)
[15] Ibid, n.9
[16] Ibid n.9
[17] Ibid, n.9, P343-355
[18] SIAC Rules, Article 9.1
[19] HKIAC Rules,-Article 6.1
[20] E.g. Article.29 of the UNCITRAL Model Law, Article.48(1) of the ICSID Convention, Section 22 (2) AA1996
[21] E.g. Article.26.5 LCIA Rules, Article.32.1 of the ICC Rules
[22] I have not found any instances where a majority Award cannot be given.
[23] Article.48(4)
[24] Schreuer, 2022, Article.48:p.112-126
[25] Ibid, n.24

9. Examples of national arbitration laws where dissenting opinions are expressly permitted are Spain, Portugal, Norway, Romania, Poland, Lithuania, Estonia, Bulgaria, Turkey, Algeria, Israel, China, Indonesia, Brazil, Panama, Peru, Columbia, Ecuador, Venezuela, Bolivia, Guatemala, Costa Rica, El Salvador and Quebec.[26] However, the majority of national arbitration laws contain no express provision for dissenting opinions.[27] Similarly, neither do most arbitration rules.[28]

10. Although arbitration rules are silent on permitting dissenting opinions, it is evident that this does not render them impermissible.[29] Consistent with this, commentators have set out options for tribunals when faced with a dissenting opinion.[30] Although somewhat historic, the appropriateness of and logistics for administering dissenting opinions was the subject of an ICC working party set up in 1985 and who proceeded to produce a final report in 1991 which recommended "practice guidelines" to be implemented by the ICC Secretariat and Court and incorporated in a handbook for ICC arbitrators.[31] The view at the time of publication of the final report was that dissenting opinions should be communicated at the same time as notification of the award unless the ICC Court concluded that such communication is prohibited by law and/or where it jeopardised recognition or enforcement in the place where enforcement may be sought.[32]

11. The appropriateness of dissenting opinions has been the subject of debate and exchanges between academics and practitioners since the 1980s. This is the subject of Chapter 3, where the historic debate and competing views in literature are presented. For present purposes, it is sufficient to highlight Alan Redfern's Freshfields 2003 Lecture, where he categorised dissents as "good", "bad" and "ugly".[33] Redfern's view was that it would be unfortunate if the ability to communicate a dissenting opinions encouraged arbitrators to do so and posed the question as to whether the then perceived leniency towards dissents had gone too far.[34]

[26] Arroyo, 2008, p440-441
[27] Ibid, n.26, p441-442
[28] Ibid, n.26
[29] Ibid, n.27
[30] E.g. Arroyo, 2008,who sets out 25 options at p.459-466, and Rees & Rohn, 2009, who provide four "guidelines" at p.340-346
[31] ICC, 1991, p11/12
[32] Ibid, n.31
[33] Ibid, n.4, p226-229
[34] Ibid, n.4, p241-242

Redfern also highlighted a point initially made by Richard Mosk J and Tom Ginsburg that a dissent may give rise to doubts about the independence or impartiality of the arbitrator whose dissent favoured the party who appointed them.[35] This point also featured in Jan Paulson's critique of party nominated arbitrators[36] and the exchanges between Albert Jan van den Berg and Charles Brower (and his co-authors) between 2010 and 2018 as evidence of bias of party nominated arbitrators.[37]

12. An aspect of the debate as to whether dissenting opinions are appropriate in arbitration highlights the distinction between arbitrators and judges, especially judges in common law jurisdictions where the principle of *stare decisis* prevails and judgments in higher courts have a precedential value and can aid in the development of the law. Although there is no general principle of *stare decisis* in international arbitration, there is a school of thought that, in ITA, there is a *de facto* doctrine of precedent.[38] One significant feature is the fact that awards in ITA are typically published and involve questions of public international law. In contrast ICA typically concerns private law between contracting parties. Thus, the question arises as to whether the appropriateness and/or utility of dissenting opinions differs between ITA and ICA. This question forms part of the practitioner interviews which is the subject of Chapter 4.

[35] Ibid, n.4, p234 citing Mosk & Ginsburg, 1999, p.275
[36] Ibid, n.7
[37] Van den Berg, 2010 & 2015, Brower et al, 2013 and 2018
[38] E.g. McLachlan et al, 2017, p.3.172 and Commission, 2007, p.129

Chapter 3 – The Debate

13. The debate in the literature is primarily focussed on the desirability of dissenting opinions and whether dissenting opinions should be permissible at all. As well as looking at wider policy issues, commentators also examine specific examples of dissents and the extent to which they suggest bias on the part of the dissenter.

14. In 1985 the ICC established a Working Party, chaired by Martin Hunter, to consider, amongst other things, dissenting opinions. In its first interim report published in 1986, the majority view was that it was neither practical nor desirable to suppress dissenting opinions in ICC arbitrations and that the ICC should neither encourage nor discourage them.[39] Thereafter the Working Party was tasked with providing guidelines for the logistics of providing dissenting opinions. In its submission to the ICC Commission on 2nd April 1987, the French National Committee ("FNC") strongly disagreed with the conclusions of the Working Party's second report and recommended that the ICC Rules should prohibit the giving of dissenting opinions and requested that a member of the FNC join the Working Party.[40]

15. The minority opinion of the Working Party was that, although dissenting opinions may be appropriate in certain national legal systems, it was inappropriate to introduce such concepts into international arbitration. The disadvantages cited were that they highlighted the link between the arbitrator and the party who selected them, arbitrators would no longer feel obliged to search for a unanimous decision and it may introduce a debate on the merits in the ICC Court, thereby lengthening the time for publication.[41]

16. Following the FNC's involvement and discussions, the Working Party produced its final report in 1991. The discussion noted that some commentators considered that communication of a dissenting opinion could represent a disclosure of the tribunal's deliberations and affect enforceability of the award. However, the conclusion was that the publication of dissenting opinions was desirable unless publication was prohibited under a certain law. Although the

[39] Ibid, n.3, p 3/12
[40] Ibid, n.3
[41] Ibid, n.3

Working Party recommended that its practice guidelines should be incorporated into an ICC handbook,[42] this does not appear to have materialised.

17. There is a view that the frequency of dissenting opinions in itself demonstrates that there is a need for them.[43] In his paper concerning the position under Swiss Law, Levy argued that the prohibition of dissenting opinions could induce arbitrators to undermine the majority through the use of obstructive tactics. Consequently, he recommended a code of ethics for their use. Although there were proposals to incorporate guidance in the IBA Code of Ethics, again this never materialised. The proposal was that, subject to the applicable law or rules, a dissenting arbitrator had the right to make it known but that they must avoid any breach of the confidentiality of the deliberations unless, in an extreme case, to highlight any fundamental procedural irregularity.[44]

18. In 1992 Werner expressed the view that dissenting opinions are not necessarily a legal issue, but one of policy or ethics.[45] He shared a view that dissenting opinions would not necessarily violate confidentiality and may merely coincidently represent a reflection of a shared outlook with the party who appointed them. He also suggested that, unless the dissent identified a procedural defect in the proceedings, it would not affect the enforceability of an award.[46] Finally, he drew an analogy between the utility of dissents in common-law jurisdictions and public international law cases on the one hand and ICA on the other. For example, in common-law jurisdictions and international law courts, judgments can serve to expose alternative views of facts and the law, enrich debate amongst scholars and practitioners, strengthening the majority's reasoning/award or prepare the way for case-law reversal. His view was that these reasons apply equally to ICA.[47]

19. In his seminal 2003 Freshfield Lecture concerning dissenting opinions in ICA (published in 2004), Alan Redfern repeated the concerns that dissenting opinions risked breaching confidentiality and undermining the authority of the award. His view was that a "good" dissent was one that was short, polite and restrained and gave an example of Sir Gerald Fitzmaurice

[42] Ibid, n.3, p 11/12
[43] E.g., Levy, 1989 p.42
[44] Ibid, n.43
[45] Werner, 1992, p.25
[46] Ibid, n.45 p.25-27
[47] Ibid, n.45, p.27

QC's dissent in *Aminoil*[48] in which, notwithstanding his disagreement with the majority, he found himself agreeing with the operative part of the award for a number of reasons, including "questions of realism". It was suggested that it was sometimes necessary to set aside legal arguments as a matter of pragmatism.[49]

20. At the other end of the spectrum, Redfern identified an "ugly" dissent as one where the dissenter does not merely disagree with the majority but attacks the way the arbitration was conducted. As an example he cited *CME v Czech Republic* which led to all three arbitrators giving evidence in Swedish Court of Appeal proceedings and the lifting of the veil of confidentiality.[50] Redfern also emphasised the differences between common law judgments and judge and an award and arbitral tribunal, noting the differences regarding precedential value, right of appeal and the fact that arbitrators were selected and paid by the parties.[51] He concluded that perhaps the time had come to question whether the leniency towards dissents had gone too far.[52]

21. Although the focus of his paper was the options available to a tribunal when faced with a dissent, Manuel Arroyo provided a neat summary of the arguments in favour of and against dissents since the 1980s in an article published in 2008.[53] The arguments in favour were it was a fundamental right of any arbitrator to give a dissent, intellectual honesty should prevail over collegial solidarity, dissent can produce better awards in terms of reasoning and avoid fatal procedural irregularity, dissents promote arbitral responsibility, dissents can help build confidence in the process by showing the losing party they have been heard and if published, they can contribute to the development of the law. Arguments against were that dissents may violate the secrecy of deliberations, weaken the authority and persuasiveness of the award,) harm the legitimacy of the process by highlighting the connection between the arbitrator and the party who appointed them, harden views and discourage deliberation, raise costs and

[48] 1982
[49] Ibid, n.4, p.223, 226-227
[50] Dissenting Opinion dated 11 September 2001, Partial Award dated 13 September 2013, SVEA Court of Appeal judgment 15 May 2003
[51] Ibid, n.4, p233 & 238-239
[52] Ibid, n.4, p.242
[53] Arroyo, 2008

time required to render the award and increase the likelihood of challenge or lead to non-enforcement.[54]

22. The role of dissenting opinions has been the subject of comment by Justice Ruth Bader Ginsburg, albeit in the context of the US judicial system, where she has referred to the common law tradition of independence of the individual judge, the transparency of the process and utility of an impressive dissent to lead to an improvement/refinement of the majority opinion.[55] Nevertheless, she recognised the value of unanimous opinions in situations where the rule of law was of greater importance than being legally correct.[56]

23. In 2009 Rees & Rohn sought to answer the question as to whether dissenting opinions could fulfil a beneficial role.[57] Although dissents were allowed, it appeared to them that the prevailing view at that time was that dissenting opinions should be discouraged.[58] This was certainly the view expressed by Schwebel in the 1996 Freshfields Lecture,[59] Sutcliffe and Greenwood in 2009, [60] and Baker and Greenwood in 2013.[61] Rees & Rohn concluded that they dissents could be beneficial, specifically citing that a well-reasoned dissent would put positive pressure on the majority to justify their conclusions and that, save for identifying a serious procedural flaw, a dissent would not weaken the authority of an award in real terms. They also posited the question as to whether it was really a bad thing for serious flaws to be revealed to an appellate or enforcement court.[62]

24. In 2011, Jan Paulson identified what he perceived to be a moral hazard in international arbitration and pointed towards a (then) recent study which revealed that in more than 95% of ICA cases where dissenting opinions were given, they were written by the arbitrator nominated by the losing party. He noted that this was consistent with ITA.[63] Although he accepted that, in itself, a dissent did not point to a failure of ethics, his view was that dissenting

[54] Ibid, n.53, p.457
[55] Ginsburg, 2010
[56] Ibid, n.55, p.7
[57] Ibid, n.5, p.330
[58] Ibid, n.5, p.330, n.3
[59] Schwebel, 1997, p152.
[60] Sutcliffe & Greenwood, 2009, p.4
[61] Baker and Greenwood, 2013, p.40
[62] Ibid, n.5, p335-336, 339
[63] Ibid, n.7, p.348

opinions undermined confidence in the process and provided proof that *unilateral* appointments were inconsistent with what he considered was a fundamental premise of arbitration – the *mutual* confidence in the arbitrators.[64]

25. Building on Paulson's view and responding to Redfern's question as to whether the leniency towards dissents had gone too far, in 2009 (but published in 2011) Albert Jan van den Berg examined the situation in ITA and noted that, based on approximately 150 awards published at that time, there were thirty-four published dissents, of which almost 100% were issued by the arbitrator appointed by the losing party. His view was that the only reason a dissent was justified was when something had gone fundamentally wrong in the process, e.g. a serious violation of due process, or when the arbitrator's personal safety was at risk as a result of threat.[65]

26. Paulson and van den Berg's view was countered by Charles Brower and Charles Rosenberg in 2013 in what has been referred to as the *Nightingale Article*, arguing that the presumption that party-appointed arbitrators were untrustworthy was "wrongheaded" and that the *moral hazard* was overstated.[66] This was also the view of Mourre in an earlier article.[67] *The Nightingale Article* highlighted that, in a debate on the worth of dissenting opinions hosted by the CIArb between Alan Redfern and Peter Rees on 22nd November 2011 ("the CIArb debate"), 78% of the audience disagreed with the proposition that dissenting opinions were unwelcome in international arbitration. Their view was that dissenting opinions play an important role in international arbitration and, particularly, ITA.[68]

27. Brower & Rosenberg's view was that it was imperative to examine dissent from an ITA (and not ICA) perspective on the basis that it represented a form of public law adjudication at international level that does not only affect the parties to the arbitration.[69] They also noted that, of the thirty-four dissents examined, a number were benign, involved incidental matters or were actually concurring (i.e. an opinion which reached the same conclusion as the majority

[64] Ibid, n.7, p349
[65] Jan van den Berg, 2011, p.831
[66] Brower & Rosenberg, 2013
[67] Mourre, 2010.
[68], Ibid, n.66, p27
[69] Ibid, n.66, p.28

but for different reasons) and highlighted that the study excluded the case of *Tokios Tokelės*[70] where the presiding arbitrator dissented. As well as advocating that dissents strengthen the majority's reasoning/award, and do not in themselves result in a breach of confidentiality, they cited four examples of awards which embraced dissenting views expressed in earlier cases, arguing that this demonstrated that dissenting opinions can contribute to the development of investment law. They also referred to the fact that dissenting opinions in turn generate scholarly debate with specific reference to the dissenting opinion of Professor Thomas Wälde in *Thunderbird*. [71]

28. The question of dissents in the development of law is seen by some to be absent in the ICA context.[72] In contrast, in ITA, it is argued that dissents play an important role [73] In support of this, they point towards the increase in precedent-based reasoning and argument in ITA since its inception.[74] Perhaps more significantly, and notwithstanding the absence of binding precedential authority, it is said that the role of arbitrator in ITA arguably imposes a wider social and public policy responsibility upon an arbitrator than a judge whose focus is on national policy [75] Although awards do not in themselves evidence state practice or directly represent a secondary source of customary international law, it is said that they nevertheless play an important role in the development and evolution of customary rules in international law.[76]

29. Van den Berg responded to the Nightingale Article in 2015, repeating his view that, until the time came that the international arbitration community had addressed his concerns, there should be a stay on the publication of dissents in ITA. His view was that the *Nightingale Article* was remarkable because it knocked down a "straw man", i.e. it addressed different propositions to that proffered.[77] Although he acknowledged the reference to dissent in the four cases identified by Brower and Rosenberg, his view was that the actual effect was

[70] 2004
[71] Ibid, n.66,p.39 and also p.35-37, citing Helman International v Egypt, Tza Yap Shum v Republic of Peru, Aguas del Tunari S.A. v Republic of Bolivia and SGS v Paraguay
[72]E.g., Lee, 1011 p.27-28
[73] Martinez-Fraga ad Jack Samra, 2012
[74] Ibid, n.73, p.476
[75] Ibid n.73, p.463.
[76] Dumberry, 2016, p.270
[77] Van den Berg, 2015, p.383

"meagre".[78] He also referred to an explanation provided by Alan Redfern regarding the CIArb debate, noting that Peter Rees had "*cleverly turned the event into a debate about free speech…with a brilliant slide showing photographs of dictators – Hitler, Mussolini, Stalin, Gaddafi and* ***Redfern***" ![79], such that the result (forty votes against the motion and nine for it) should be viewed in that context.[80]

30. For completeness, although Charles Brower and Jawad Ahmad referred to van den Berg's response in an article published in 2018, the focus of that article was to counter arguments in favour of eliminating conventional ITA and replacing it with an international investment court.[81] However Paulson and van den Berg's criticism of dissenting opinion was the subject of further comment in 2018 by Uluc and Sutton, with them arguing that dissenting opinions were not only integral to an arbitrator's quasi-judicial capacity but encouraged well-reasoned awards [82] Uluc and Sutton also contended that the absence of the availability to dissent would actually be regressive and that any concern as to bias was better addressed by guidance or regulation of the practice of how dissenting opinions are delivered.[83] A central facet of their reasoning was that the suppression of dissent in favour of unanimity was a threat to freedom of expression and independence.[84] Others adopt the same view.[85]

[78] Ibid, n.77, p388
[79] My emphasis added
[80] Ibid, n.77, p.391
[81] Brower and Ahmed, 2018
[82] Uluc and Sutton, 2018, p.220
[83] Ibid, n.82, p274
[84] Ibid, n.82, p.273-274
[85] E.g., Söderlund, 2019

Chapter 4 – Practitioners' views

31. In total, interviews with twenty-four practitioners were conducted either via telephone , online meeting platform or in-person. Practitioners were approached on account of their experience in international arbitration and were either known to the author personally, by reputation or had been recommended The interviews took place between 20th January 2023 and 13th March 2023 and were conducted on a confidential basis. The interviewees were given an assurance that their anonymity would be preserved, that no answers given would be attributed to them by name and that the interviews would not be recorded.

32. All of the practitioners were qualified lawyers, most of whom had sat as arbitrators in international arbitration. Some had also acted as counsel. The majority were Senior or King's Counsel and a third had also sat as Judges (either full-time or part-time) in England and Wales, including at appellate level. The majority (twenty-three) had experience of ICA, and twelve had experience of ITA..

33. The practitioners were asked whether they had experience of dissenting opinions in international arbitration and, if so, to share their experience and any thoughts they had of that experience. They were also asked whether they considered dissenting opinions had any utility and whether they thought there was any difference between ICA and ITA.

34. Twenty of those interviewed had experience of dissenting opinions in international arbitration. Of those, four had actually given a dissenting opinion themselves. In response to the question as to whether there was utility for dissenting opinions, three considered that there was no utility with the remaining twenty-one considering that there was. Of the fifteen who considered themselves sufficiently informed to be able to comment, fourteen considered that there was a difference between ICA and ITA and one said there *probably* was.

35. What follows is a summary of the result of each interview conducted. Each interviewee has been ascribed a number (P1, P2, etc.). There is no reference to their gender and thus no use of gender specific pronouns. For the record, three of those interviewed were female.

36. **P1** has sat as arbitrator in ICA and had experience of dissents, albeit that they were rare. They are currently a full-time judge. Their view was that dissents preserved an arbitrator's

independence, although they expressed a view that, ultimately, the end result is probably more important than the reasons. However, they considered that dissents strengthen the award and that an arbitrator should not sacrifice independence for the sake of unanimity.

37. **P2** was formerly a judge, now a full time arbitrator and had experience of dissents, although they were rare. They observed that the dissent was usually in favour of the party who had appointed the dissenter. Their view was that there probably was utility to the party who lost, especially if it affected enforcement in countries which were not considered to be pro/supportive of arbitration. Their thoughts on the difference between ITA and ICA was that the law in ITA was at an earlier stage of development and therefore relatively new points of principle were being dealt with, such that publication of the diverging views could be beneficial in the development of the law in these areas.

38. **P3** was counsel and arbitrator and had experience of dissents. Their current view was that the parties want a result and enforceability and dissents help neither. Their preference was for dissents to be set out in the body of the award such that the losing party knows why they have lost. They were strongly of the view that a dissent would make the award more robust as no self-respecting majority would publish an award without dealing with the dissenter's reasons. Their view was that ITA was currently in a state of turmoil - "*all over the place*". Although they accepted that ITA awards are not binding as such, the obvious reason for making awards and dissents public was that they concern matters of public international law, whereas in ICA it is the opposite.

39. **P4** was formerly counsel, now sitting exclusively as a part-time judge and arbitrator, and had experience of dissents. Their view was that the only utility for a dissent is that the losing party feels better and that it potentially supports the reasons for the party having selected "their" arbitrator (assuming the dissent was from their appointee). They considered that a dissent could affect enforcement; their personal view was that dissents should be avoided if possible. They shared their experience that, in practice, deliberations can involve a certain degree of negotiation "behind the scenes" such that points of disagreement which do not materially affect the outcome can be conceded in the interest of unanimity.

40. **P5** was formerly counsel and full time arbitrator, but recently retired, had experience of dissents and has actually give dissents on two occasions. On those occasions, they could not

with a clear conscience agree with the majority. One resulted in the award being remitted to tribunal for correction from the enforcing Court, which was duly done to reflect their dissent. They explained that dissents can take different forms, from dissent in an award on a "no-names" basis, then with names, then with names and reasons and then the "big gun" approach of a fully reasoned dissenting opinion as a separate document. Their experience was that dissents were rare and generally frowned upon. However, they were clear that confidentiality must be preserved. They had one experience of an "unsavoury" dissent (not by them) where it was clear that one arbitrator would not and could not find against the party who had appointed them. Fortunately, such occasions were rare in practice.

41. **P6** was counsel and arbitrator, and had three experiences of dissents when acting as counsel. Their perception was that there was utility in that it enabled the majority to come up with the right decision and strengthen the award, rather than a half-way house or compromise. Regarding the question of influencing the arbitrator, they confirmed that as an advocate you would understandably seek to get the right "horse for the course" and someone who you either knew or could predict how they would decide on certain points, rather than someone who would be obviously favourable on account of the fact you nominated them. Their perception was that although there was a "s*niff*" of an arbitrator favouring the party who had nominated them in some ICA cases, it was more of a "*stench*" in ITA. However, the key difference in ITA is that the awards are public and the treaty interpretation points and principles being dealt with are often similar such that certain arbitrators are known for their published articles, awards and dissents such that it may actually be easier to identify and select someone whose view would suit your case depending on whether you are representing a state or an investor.

42. **P7** was formerly counsel, part-time judge and arbitrator, now retired. They had experience of dissents. They highlighted the difference between dissents in common law appellate courts, where new points of law would require resolving or reversing established points of law in time, and arbitration where what is required is an answer, with limited appeals on points of law e.g. Section 69 of the English Arbitration Act 1996 (if parties agree). There was a perception that some arbitrators dissent because of vanity issues or for the publicity it brings. The fact that there have been published cases, e.g. ("*F-v-M*")[86], where the dissenting opinion

[86] 2009

resulted in an ICC arbitration award (seated in London) being remitted to the tribunal as a result of a finding of serious irregularity under Section 68 of the English Arbitration Act 1996, demonstrates that there can be utility where the dissent identifies an issue with the majority's reasoning. In that instance, the serious irregularity was found by the Judge to be the fact the majority had made a finding on a discrete issue which had been neither pleaded by one party nor conceded by the other.

43. **P7** (continued) They cited one particular experience (where acting as counsel) where it was quite clear that the dissenter's intention was to wreck the award such that it would be annulled. Another, where acting as co-arbitrator, although the other co-arbitrator was pleasant during the course of proceedings and deliberations, they proceeded to write a "poisonous" dissenting opinion accusing the majority of secret meetings and excluding them from deliberations, which resulted in the award being challenged at the seat. In relation to the difference between ICA and ITA, their view was that there were more academics practising as arbitrators than in ICA and that their opinions and published work would be well known on particular topics. It was thus understandable that parties would select an arbitrator who had views which were consistent with what was required for them to win a case.

44. **P8** was formerly a partner in a law firm, but now practiced as a full time arbitrator. Although they had no direct experience of dissents, they thought that there must be utility as case law shows that there is. In relation to the difference between ICA and ITA, they considered that the main difference was that the treaties considered were often a "boilerplate" type and that, as the awards and dissents are published, it can help lawyers and parties to understand how they can/are being interpreted which can help in future cases. However, publication was very rare in ICA cases.

45. **P9** was a governmental lawyer and now a full time arbitrator, primarily practising in the field of public international law. They had direct experience of dissenting opinions, but had only delivered one in twenty-seven years of sitting as an arbitrator in ITA. The reason for their dissent was because of a strongly held belief that the chair and other appointed arbitrator (who were not from a public international law background) did not understand the applicable law and/or applied it incorrectly. They therefore couldn't agree with the majority and considered it would have been intellectually dishonest to do so. Consequently, they wrote a dissenting opinion which was appended to and published with the final award.

46. **P9** (continued) They gave one experience of an "airmiles" arbitrator (i.e. very busy travelling between hearings and little time and availability to write an award) who was presiding in a matter in which they were co-arbitrator. They recalled the presiding arbitrator having limited time to read in, flying in to the venue on the first day of the hearing and having only one day available in their diary immediately after the final day of the hearing for deliberations. During the deliberations, the presiding arbitrator disagreed with the two party appointed arbitrators (who did have time to prepare and read in), but was ultimately persuaded to alter their view on condition that one of the party appointed arbitrators drafted the award.

47. **P9** (continued) Over time, they have tended towards adopting a more pragmatic approach. They recall one co-arbitrator, who was a former US supreme court judge, had shared their experience of the Supreme Court with them, explaining that, in some cases, having prepared an opinion which went one way, by the time it came to you to deliver your opinion, the case had already been decided in a way which was contrary to how you had decided (e.g. four of the seven judges had already gone one way), such that what was actually best was to accept and agree with the majority, unless it was of fundamental importance that the dissenting opinion was in the public domain. In arbitration, they now tend to search for unanimity through persuasion, but accepted that that may not always be possible or desirable.

48. **P10** has been a full time arbitrator for the last 10 years, but previously ran a busy law practice and was a law professor. They had experience of sitting as arbitrator in ITA and ICA and of dissenting opinions. They made the contextual point that ITA is relatively young and that there have and are much less arbitrations than ICA, jokingly suggesting there are probably more PhDs and LLM dissertations on the subject than there are cases or published awards! Thus, although there is more data publicly available, we should not lose sight of the fact that ICA has a longer history and is more prevalent and that, in ICA, dissenting opinions are extremely rare.

49. **P10** (continued) A key difference as an arbitrator in ICA is that the tribunal is typically more collegiate, whereas less so in ITA. Presiding in ITA can be a lonely experience where it is not uncommon to have two diametrically opposed views on a critical point, such that the presiding arbitrator has to effectively decide the case based on their views, but taking into account the opposing views of the party nominated arbitrators on the points of principle and submissions which were disagreed. Their view was that, in ICA there is much value added for having a

tribunal of three from different backgrounds or disciplines, with the product of the deliberations being a collective effort and benefitting from the expertise across the tribunal.

50. **P10** (continued) Although it is rare to have dissent in ICA, there is nevertheless sometimes a genuine difference of opinion of a point. In those circumstances, they would adopt an incremental approach (with five iterations) from most desirable – i.e. record the fact within the award that it was a majority decision without naming the dissenter or provide reasons – to the least desirable – i.e. a separately published fully reasoned opinion. The intermediate positions would add the names and reasons and be included within the award.

51. **P10** (continued) In ITA there is a view that some arbitrators are looking to establish their reputations as arbitrators and that they see value in the publicity associated with a dissent. Their view was that all was not well with ITA at the moment in terms of the questioning of the legitimacy of the system. Although the evidence points towards dissenters finding in favour of the party appointing them, such dissents need to be intellectually honest. As a matter of jurisprudence, they considered it correct that the dissents can have utility in the development of the law in an area which is relative young.

52. **P11** has acted as counsel and has sat as a part-time-judge, but now only practises as an arbitrator. They did have experience of dissent in ICA. Their view was that, if as a tribunal member you did not agree, it was only right and proper that you had the freedom to disagree; such dissent would also ensure that the majority award was thoroughly reasoned and addressed the reasons of dissent. It was also good for the losing party to know why they had lost and a fully reasoned dissent delivered by a member who in good conscience did not agree with the majority would give the losing party (and their lawyers) the comfort that their case was arguable and not obviously bad.

53. **P11** (continued) Of their three experiences of dissents, only one could be said to have been unpleasant and was when they had acted as chair. In that case, the dissenter was not prepared to sign the award and published a lengthy opinion after the majority had delivered the majority award. Their view was that the party appointed arbitrator had probably been chosen because their view on a particular point was known to that party. In the other two instances, as a co-arbitrator they held a different view on a discrete issue which was recorded on an anonymous basis within the award, so therefore not strictly a dissenting opinion.

54. **P12** was a former appellate level judge, now full time arbitrator specialising in sports arbitration. They had no personal experience of dissents in arbitration, but plenty as a judge. Obviously the landscape and purpose of dissent in national courts is different to arbitration, but they considered that, even as a judge, it may be more desirable to have unanimity than dissent, for example in an appeal in a criminal case where there was no significant point of law in issue. In contrast, in commercial or civil law cases it can be helpful as part of developing the law. By analogy, in ICA, development of the law is not relevant. They accepted that the position in ITA was probably different.

55. **P13** previously practised as counsel, but now as a full time arbitrator and adjudicator. They had limited experience of dissents and had always managed to obtain agreement when they had been chair. They considered there was little point in a dissent in ICA, but could see that there were two possible benefits to the dissenting arbitrator, one may be that the appointing party would think favourably of them (!) and secondly, the dissenter may have a sense of professional pride in publishing their view.

56. **P14** practised mainly as counsel, but sometimes as arbitrator and had no experience of dissents or ITA. Their concern as counsel with a dissent would be enforceability issues in certain jurisdictions, but they had changed their previously held view as to utility, and now considered consensus was not always desirable especially if it meant an arbitrator signing something that they did not agree with.

57. **P15** was a retired judge now full time arbitrator. In their fifty years of practise as counsel or arbitrator they had had only two experiences of dissenting opinions in international arbitration. They were wholly in favour of arbitrators reaching unanimous decisions as otherwise a dissent may well lead to a greater chance of challenge and, at the very least, dissatisfaction from the losing party. Their view was that, even if there was a dissent, the dissent could be mentioned but with no reasons and the dissenter not being identified.

58. **P16** was a former senior partner of a law firm and now a full time arbitrator. They had experience of dissents, but noted that this was rare in ICA and more commonplace in ITA. They considered that there was clearly utility in ICA as case law shows e.g. *F-v- M*.[87] However,

[87] Ibid, n.86

they stressed that utility would depend on the integrity of the dissent, such that a different view, sincerely held, was perfectly acceptable, whereas one which was personally motivated by self-interest and obviously biased was not. They were therefore of the view that, although dissents should not be disallowed, they should only be given if there was a strong and legitimate reason for doing so.

59. **P17** was a former partner in a law firm and now a full time arbitrator specialising in maritime arbitration. Although, historically, maritime arbitrations only had a third arbitrator if (i) the two appointed did not agree or (ii) there was an oral hearing, it is now more conventional to have three arbitrators. They explained that there was a major difference for London seated maritime arbitration in that there is the availability of appeals on points of law. Thus a dissenting opinion may be written to set out a different interpretation of the law on an issue and that will therefore go before the Commercial Court on an application to appeal under Section 69 of the English Arbitration Act. The dissent will not be written for the benefit of the Courts as such (the courts rarely cite the texts of such opinions), but mainly because the dissenter wanted their opinions to be on the record. They cited as an example *The Global Santosh*[88] that went all the way to the Supreme Court where although the two courts below had sided with the dissent, the majority's view was eventually approved.

60. **P17** (continued). There is also a tradition of publishing anonymised summaries of maritime arbitration awards e.g. see the Lloyd's Maritime Law Newsletter, which means that the dissenting arbitrator has the opportunity of bringing their opinion to the attention of maritime lawyers on an anonymous basis. Their view was that the dissenting arbitrator genuinely wants the law to be right on the relevant issue. In contrast, in ICA where the seat is not London and/or there is no right of appeal on a point of law, the dissent is written for the benefit of the parties and, usually, the party who appointed the dissenter. On the other hand, awards in ITA are usually publicly available and the dissent is written for the benefit of everyone in the field including academic and future appointing parties (or their lawyers).

61. **P18** was a former partner in a law firm, now full time arbitrator, adjudicator and Dispute Adjudication Board ("DAB") member specialising in construction. They had no direct experience of a dissent in arbitration, but had experience acting for a party before a DAB

[88] 2016

where there was a dissent. Their client was the losing party and were able to use the dissent when preparing for the subsequent arbitration and negotiating with the party who had been successful. Although they considered it to be bad practice to dissent in ICA, it must be right that an arbitrator has the freedom to disagree if the reason was legitimate.

62. **P19** acts as counsel and arbitrator, but had no experience of dissents or ITA. In an ICA context, they saw no purpose at all for dissents. Their view was that it highlighted the connection between the arbitrator and the party who appointed them and also delayed deliberations and the publication of the award. They considered that an award can be suitably crafted to explain to the losing party why they have lost and, if necessary, record that it was a majority, without the need for a separate dissent.

63. **P20** formerly acted as counsel, but had been a full-time arbitrator for some time and had been appointed in over 200 international arbitrations, predominantly ICA experience but one ITA as counsel. They had experience of dissents. Their view was that, in ICA, the only utility was for the dissenting arbitrator themselves. Although it may be used as a "springboard" for an appeal or resistance to enforcement, majority awards are enforceable under the New York Convention so a dissent has no utility in that respect. However, they did accept that there may be limited circumstances where a dissent could result in a remittance of the award (again citing *F-v-M*),[89] but that this was rare. In their experience, what normally happens is the dissenting arbitrator is too close to the party who appointed them and/or culturally they see their role as an advocate.

64. **P20** (continued) Where things can go wrong is that certain arbitrators may find (or believe) that dissents result in them increasing their workload. This undermines the integrity of the system, although ICA is a relatively small world and word would get out - thankfully this is rare. They accepted that there may be legitimate reasons for a dissent. Their view was that the key difference between ICA and ITA is that the latter is typically public and involves public international law. They were aware that there is a current move towards publishing awards in ICA, which may point towards there being utility in having published awards and dissenting

[89] Ibid, n.86

opinions on issues which are common in certain specialist fields, e.g. interpretation of standard forms or clauses in insurance or construction contracts.

65. **P21** was a former head of arbitration in a law firm, but now practising as a full time arbitrator. They had experience of dissents in ICA, but considered them rare. In contrast, they were relatively frequent in ITA. Their view was that there can be utility in ICA and ITA where dissent identified serious irregularity which would have otherwise gone undetected. The key difference in ITA was that, although there was no precedential authority for awards, awards (and dissents) were nevertheless frequently used and referred to in argument and awards in later cases. Although they were aware of allegations of bias against arbitrators who dissented in favour of the losing party who (typically) had appointed them, the issue was more nuanced than that. Thus, the fact that awards and dissents are published, and the views of academics and/or practitioners are known as a result of their published work, it was understandable that states or investors would seek to nominate those whose views suited their particular case. It did not follow that all dissenting arbitrators were in breach of their duty of impartiality and independence.

66. **P22** acted as counsel and arbitrator specialising in public international law. They had direct experience of dissent in both of the cases where they had acted as co-arbitrator, one where they dissented and the other where the other party appointed arbitrator dissented. Their view was that there was utility as it increased the quality of the majority award as there would be a need for the majority award to engage with the dissent. They also highlighted that dissents are in many ways founded on fundamentally different ideologies which were legitimately held. They also believed that the losing party will be more satisfied if they can see that their arguments found favour with at least one of the arbitrators.

67. **P22** (continued). There was no doubt in their mind that arbitrators in ITA make law and that there was a *de facto* system of precedent. Public international law was fundamentally different to commercial law. They said that, initially, they thought that dissenting opinions were used for self-promotion, but had now changed their mind and believe that an honestly held, well-reasoned dissent and a similarly well-reasoned majority award was preferable to an unanimous "watered-down" award which was the product of negotiation and compromise.

68. **P23** had practiced as counsel, part-time judge and arbitrator but was now semi-retired. They had experience of ICA and ITA and direct personal experience of giving a dissenting opinion in an ICC arbitration, seated in London which resulted in the award being remitted to the tribunal by the Commercial Court under Section 68 of the English Arbitration Act. The judge found that there had been serious irregularity as a result of the majority reaching a finding on a discrete point on the basis of an argument which the losing party did not have the opportunity to address.

69. **P23** (continued) Their view was that the quality and robustness of the majority award is improved if there is the possibility of and sharing of a well-reasoned dissent. Their view was the argument against dissenting opinions or used as evidence of bias propagated by Paulsson and van den Berg in the ITA arena was weak. A dissenting opinion does not always evidence bias and the safeguard is having a tribunal of three. They also considered that the practice of publication in ITA should be carried over to ICA as there is a benefit to the wider community in terms of development of the law and sharing of knowledge.

70. **P24** was formerly a partner of a law firm and counsel, but now practising as a full time arbitrator. They had experience of dissents and ICA and ITA. They recalled one experience (as counsel) in an arbitration seated in India where it did have an effect as the other side alleged bias on the part of the dissenting arbitrator (who they had nominated) and resulted in them "dropping hands" in enforcement proceedings in India of a costs award in their favour[90]. They had also dissented personally (as presiding arbitrator) on a point of the application of the law but had elected not to write a separate opinion, but recorded the fact that the finding on that point was a majority opinion. They noted that the two co-arbitrators in that case were non-lawyers. Their view was that there was utility in ICA and referred to *F-v-M*[91] as an example of this.

71. **P24** (continued) The key difference between ITA and ICA is the public international law element. Published work (which would therefore include dissenting opinions) could in principle affect and mould customary international law. Principles like the interpretation of what constitutes fair and equitable treatment and the police powers doctrine are more

[90]Interestingly, I note that difficulties of enforcing awards in India where there are dissenting opinions has been the subject of a recent article on the subject – see Murali and Krishnani, 2020.
[91] Ibid, n.86

fundamental than those which are typically at issue in ICA. However, it is important not to forget that the number of ITA cases since its inception in total is probably less than the amount of ICA cases conducted annually.

72. **P24** (continued) They also highlighted the difference between a judge in a common law jurisdiction and an arbitrator (particularly in ICA). They quipped that the only thing stopping their grandmother from being an arbitrator was that they were dead! In contrast, a judge would typically be a senior and highly experienced lawyer, well-trained in the art of writing judgments. Judgments have a specific purpose and have a role to play in the development of the law. If an arbitrator wanted to write a paper on a point of law then they were free to do so in an academic or learned journal; a dissent in ICA would have a limited audience. They accepted that, in ITA, there were fundamentally different ideologies held by practitioners and academics which goes some way to explaining the extent of dissenting opinions. They also considered that the system of having three member tribunals was probably adequate to guard against any impropriety.

Chapter 5 – Critical analysis

73. I address the question of whether dissenting opinions have utility in international arbitration by firstly looking at the reasons given in the literature in support of the proposition that dissenting opinions are unwelcome and, where not already addressed, the reasons given by those interviewed as to why dissents have no utility. Following that, I look at the arguments put forward in favour of dissenting opinions and reasons given for them having utility. In doing so I consider the extent to which the position differs between ICA and ITA.

Reasons given against dissenting opinions and their utility

74. The reasons given against dissenting opinions in the literature were that dissents may violate the secrecy of deliberations, weaken the authority and persuasiveness of the award, harm the legitimacy of the process by highlighting the connection between the arbitrator and the party who appointed them, harden views and discourage deliberation, raise costs and time required to render the award and increase the likelihood of challenge or lead to non-enforcement.[92]

75. In terms of the question of utility, the reasons given for there being no utility by those interviewed were that they did not affect the result or enforcement[93], although more expressed a contrary view, i.e. that dissents could actually affect enforcement or lead to a challenge.[94] Other reasons given were that ICA awards are not public and have no precedential value,[95] that the utility was to the arbitrator who sought publicity or further work[96] or that an arbitrator could use a dissent to try and undermine the award.[97] Another reason was that a dissent would lead to dissatisfaction on the part of the losing party.[98]

Violation of the secrecy of deliberations

76. To be valid, the proposition that dissenting opinions breach the confidentiality of deliberations assumes that the extent of confidentiality encompasses the *fact* that there has been a dissent,

[92] Ibid, n.53, p.457
[93] **P3**, **P20**
[94] **P2**, **P12**, **P14**, **P15**, **P24**
[95] **P3**, **P4**, **P21**
[96] **P7**, **P10**, **P13**, **P20**, **P22**
[97] **P7**, **P11**
[98] **P15**

as distinct from a disclosure of what occurred in those deliberations. As dissents are permitted, either implicitly or expressly, in national laws and applicable rules,[99] it must follow that the mere fact that a dissent is made or published cannot in itself represent such a breach. As long as dissents do not reveal the substance of deliberations and are limited to the dissenter's analysis of the facts and law and/or the analysis of the majority which is included in the award, then there can be no objection on the grounds of confidentiality.[100]

77. There is a suggestion from Redfern[101] and van den Berg,[102] that the mere possibility of a dissent would inhibit deliberations. The argument is that the threat of dissent or a perception that a dissenter was an advocate of the party would result in the dissenter being excluded from deliberations. The fact the negotiation between tribunal members may, to a certain extent, go on behind "closed doors", was something alluded to by one of the interviewees.[103] However, this is not inconsistent with the principle that deliberations will take place confidentially. In the event that there was genuine exclusion of a tribunal member then the question arises as to whether a tribunal member who disclosed would have breached their duty of confidentiality. Although, on the facts, the Swedish Court of Appeal who addressed the challenge to enforcement in *CME v Czech Republic*[104] did not find the allegations proven, if they had found the other way and the majority had been found to have acted inappropriately, then suppressing such disclosure would be akin to preventing a "whistle-blower" from revealing a wrong doing. I suggest that this wouldn't be right and would be treated as justifying a tribunal member's breach of confidentiality and also be consistent with that member's duty of diligence.

Weaken the authority and persuasiveness of the award

78. This proposition is that a dissenting opinion would discredit the authority or persuasiveness of the majority award. The argument is that the dissent would promote a debate on the merits of the final decision and undermine the degree of satisfaction with the process or award.[105] The immediate question then arises as to the extent to which such dissatisfaction or lack of

[99] Ibid, n.26, n.27
[100] Ibid, n.5, p.337-339
[101] Ibid, n.4, p.239
[102] Ibid, n.55, p.929-830
[103] **P4**,
[104] Ibid, n.50
[105] Ibid, n.4, p.233

respect affects the award itself. At a micro level, in itself, a dissent does not render the majority award unenforceable. This then leads to the question as to whether, at a macro level, a dissent is harmful to the process of arbitration as a whole.

79. The suggested guidance as to how dissents should be delivered, e.g. by Rees & Rohn[106] and Arroyo[107], and Redfern's recognition of a "good" dissent,[108] would indicate that the manner, nature and content of how the dissent is delivered and expressed is relevant in the context of whether it could be harmful to the process. Further, if the quality of the dissent was such to identify a serious flaws or error in a majority award, and which was such to represent a serious irregularity undermining enforceability, this arguably strengthens the legitimacy of the process in providing the parties with a "corrected" awards. Arguably, *F-v-M*[109] is a good example of this.

80. Interestingly enough, and perhaps coincidentally in terms of the timing of the final award (29th September 2003) and the 2003 Freshfield Lecture (5th November 2003), there is also an example of a dissenting opinion in an ICC arbitration seated in London in which Alan Redfern was chair where the English Commercial Court remitted the majority award to the tribunal on the basis that the majority had erred and that such error was found to have given rise to a serious irregularity.[110] The error was said to arise from a failure to have afforded a party the opportunity to consider the approach adopted by the majority. The fact that the error was manifest was found to be evidenced by the dissenting opinion.[111] Again, it appears that a well written dissent (in that case from an English Silk) resulted in the remission of the award. This arguably strengthens the legitimacy of the arbitration process and highlights the utility of a dissenting opinion.

[106] Ibid, n.5, p.340-346
[107] Ibid, n.53, p459
[108] Ibid, n.48 *Aminoil*
[109] Ibid, n.86
[110] *Cameroon Airlines*
[111] Ibid n.110, para.113.

Harm the legitimacy of the process by highlighting the connection between the arbitrator and the party who appointed them

81. The argument here is that dissents evidence bias and/or could give rise to an allegation of bias on the part of the dissenting arbitrator and, arguably, the party nominated arbitrator with whom the presiding arbitrator agreed.[112] However, the mere fact of dissent is not synonymous with bias, particularly if the dissent represents a genuinely held belief or a view about certain principles. Even on Redfern's analysis , there is such thing as a "good" dissent, e.g. in *Animoil*.[113] Further, not all dissents are made by a party appointed arbitrator, e.g. *Tokios Tokelės.* [114]

82. The focus of the criticism of dissents featuring in the exchanges between van den Berg and Paulson on the one hand and Brower et al on the other was the appointment process itself[115] Thus it wasn't argument against dissents *per se*, just that dissents demonstrated bias and highlighted a problem with the system. However this assumes that dissents would only occur if appointments were not made unilaterally. If one looks beyond the arbitration arena to the appellate courts in common law jurisdictions, although judges may be selected in some jurisdictions by political parties, they are not actually appointed by the parties to the dispute. If they were, they would arguably be required to recuse themselves. The fact that there are split decisions in those jurisdictions ably demonstrates that dissenting opinions are not the exclusive domain of a biased tribunal member. I would suggest that the predominant reason for a dissent is more likely to be the product of a legitimate ideological belief or difference of opinion rather than something more sinister.

83. For purposes of this research, the assumption is that the tribunal consists of three members. Selection of arbitration as a means of dispute resolution is, to a certain extent, a product of the agreement of the parties. The rationale for having three tribunal members may be multifaceted and beyond the scope of this paper, however the ability for a party to have a degree of choice over who is selected is fundamental to the principle of party autonomy. Thus parties from different jurisdictions will take comfort from the fact that they have input into how the tribunal is constituted. The principle of fairness dictates that each party shall make

[112] Ibid, n.4, p.233-234
[113] Ibid, n.4, p223
[114] 2004
[115] Ibid, n.37

their selection. They may also have the ability to suggest a short list and/or put forward names to the relevant arbitral institution and/or the selected arbitrator from which the ultimate selection of chair is made.

84. The question then arises as to why there is an odd number? I would suggest that, as well as facilitating an even playing field, one of the reasons for three is the prospect that the three may not agree, either on certain issues or as a whole. Thus the whole system is premised on the basis that there may be an element of disagreement, but that, if there is, the system can nevertheless be effective as majority awards are allowed by the applicable arbitral national laws and rules, and recognised and enforceable under the ICSID and New York Convention.

Harden views and discourage deliberation

85. The basis for this proposition is that, if the majority or the minority form the view that agreement will not be reached, deliberations will break down. However, the statistics indicate that, in a high percentage of cases (77% in van den Berg's sample), there is no dissent in ITA and the evidence from the practitioners is that dissents in ICA are rare. In research conducted by Strezhnev, 80% of final awards were unanimous and there was only a dissent in 14.5% of the cases analysed.[116] Thus, in most cases, consensus is achieved.

86. A theme running through responses from practitioners is that they strive towards unanimity, but not at all costs, especially if they held a fundamentally different view on a point which was either material or meant that they could not, with a clear conscience, agree with the majority.[117] Another theme which ran through those who considered that there was utility in dissenting opinions was that it actually strengthened the majority's reasoning.[118] Conceptually, I can see how a dissenter and the majority may seek to bolster their reasons. However, for that to happen, there must have been an exchange of views. The fact there has been such an exchange would suggest that different opinions on certain issues were debated as part of the deliberations and the fact there was a dissent is evidence that the respective tribunal members were not prepared to compromise on those issues. The judgment of the

[116] Strezhnev, 2015, p.2
[117] **P1**, **P9**, **P15**
[118] **P1**, **P3**, **P6**, **P11**, **P22**, **P23**

Swedish Court of Appeal in *CME v Czech Republic* is particularly insightful regarding the nature of deliberations and what might provoke a dissent.[119]

Raise costs and time required to render the award

87. This criticism is that there is a cost and time element associated with the preparation of the dissenting opinion and the review and publication of the award.[120] However this assumes that the tribunal's or, where relevant, institution's costs are affected by the time taken to draft the dissent and/or review and publish the award. If the fees were payable based on the time spent, then it would follow that there could be additional costs. If the fees were on an *ad valorem* basis, i.e. determined by reference to the amount claimed or in dispute, there would be no difference. Similarly, the time taken to draft the dissent may result in a delay to publication of the award (assuming that the majority would wish to see and, if necessary, circulate the draft award such that the dissent and award addressed any matters arising). Thus, the question then is whether the dissent adds any value or utility? If the answer is No, then there may be merit in the argument against dissents on account of additional costs or delay. Conversely, if there is utility then the subsidiary question is whether the value of the benefits is commensurate with or justified by any additional costs associated with or time taken to produce the dissenting opinion and the award. This may be particularly apposite from the viewpoint of a losing party who may be willing to pay for the dissent on the basis that they may be the primary beneficiary (assuming that they are held liable for the costs of the arbitration).

Increase the likelihood of challenge or lead to non-enforcement.

88. It should not be forgotten that, although a dissenting opinion arises from an arbitration and is the product of a member of the tribunal, it is independent of the award and, as a matter of enforceability, does not directly affect the award's authority. Real examples and evidence of dissenting awards resulting in a challenge and non-enforcement are arguably notable because of the infrequency in which they occur.[121] Thus, ordinarily, dissents do not threaten an award's validity, recognition or enforcement but, in some limited circumstances, where the enforcing court was persuaded that there has been some irregularity as the result of a challenge citing

[119] 2003, page 47-53 for the facts and p.85-90 for the Court's findings.
[120] Ibid, n.26, p.438, n.140
[121] E.g. n.86, n.110

a dissent in support, it could.[122] The paucity of such occurrences would point towards a finding that the suggestion that a dissent would increase the likelihood of challenge or lead to non-enforcement is ill-founded.

Does not affect the result or enforcement

89. This proposition is founded on the basis that, as (and if) a dissenting opinion does not affect the result or enforcement, it has no utility.[123] Thus the corollary of the argument is that, unless a dissent affects the result or enforcement, it has no utility. Apart from the fact, admittedly in a small number of instances, that dissents have resulted in non-enforcement or revision of awards (thereby belying the truth of the proposition), responses from practitioners indicate that dissenting opinions do have other benefits and, pertinently, point towards the fact that the possibility or fact that a dissent opinion is likely to be published will result in a strengthened and more robust award.[124] Thus, to the extent the dissent (or its possibility) results in the majority altering its view and/or providing additional reasons as to why the dissent is considered to be wrong, the dissent may have a beneficial impact on the result in real terms as a part of the deliberation process.

ICA awards are not public and have no precedential value

90. If the practice in maritime arbitrations seated in London, or where there is a right of an appeal on a point of law as a result of the parties' agreement in line with Section 69 of the English Arbitration Act, are discounted, then it is true to say that ordinarily ICA awards are not public and have no precedential value. Even then, it is not the award that has precedential value, but the court judgment addressing the Section 69 application. Thus the question arises as to whether a dissenting award has utility to those who get to see them, i.e. the parties and the tribunal. The extent to which the tribunal derives benefit from the possibility or fact of a dissent has already been touched upon, i.e. it can improve the quality of the award. This can be seen as a benefit to the parties.

[122] Ibid, n.121
[123] **P24**
[124] Ibid, n.118

91. A number of practitioners highlighted the difference between a judge and an arbitrator in terms of their role and function.[125] One in particular noted the different qualifications and experience required.[126] This would therefore suggest that the quality of the product is relevant. I would include within the ambit of "the product", the award and a dissenting opinion. Although one practitioner suggested that, in arbitration, it is the result and not the reasoning that matters (in contrast to a judgment),[127] another theme running through responses from practitioners is that the losing party wants to know why they have lost and know that their arguments have been addressed.[128] In that context, the quality of a dissenting opinion may affect its utility in the same way the quality of award may affect the degree of satisfaction from the parties. Some commentators highlight the importance of reasons within an award and, specifically, the utility of a losing party knowing why they have lost.[129] This is equally applicable to a dissent and reflected in responses from some practitioners.[130] It therefore follows that the lack of publicity or precedential value of an award does not deprive a dissenting opinion of other benefits beyond precedent or wider publicity.

Utility is to the arbitrator who seeks publicity or further work and an arbitrator could use a dissent to try and undermine the award

92. There are two facets to this point. The first is arguably more specific to ITA, i.e. the suggestion that an arbitrator will be seeking to publicise their knowledge, expertise and views either generally or in relation to a specific issue. The second arguably more general, i.e. the suggestion that an arbitrator will use a dissenting opinion to please their appointer and/or future appointers as a result of expressing a contrary view to the majority. The first limb could be a subset of the second.

93. This point could have equal application to the making and publication of an award. So, an arbitrator who is seeking to secure future work may be motivated to produce a well-reasoned and logical piece of work in order to impress the reader of their ability as an arbitrator for future work. This would be a positive benefit. In contrast, if an arbitrator was motivated to

[125] **P12**, **P24**
[126] **P24**
[127] **P1**
[128] **P4**, **P11**
[129] Landau, 2009, p.190
[130] Ibid, n.128

find in favour of a party who had appointed them in order to secure future work, this would be unacceptable and represent a clear breach of a duty of impartiality. The issue is therefore not the product or dissenting opinion itself, but the motivation for the product.

94. I have already touched on the view of a number of practitioners that there may be legitimately held reasons for an arbitrator disagreeing with the majority.[131] Looking at the literature forming part of the debate as to whether dissenting opinions were desirable, there was evidently a view that dissents were to be frowned upon.[132] If that was the case, then a dissent may actually serve to alienate the dissenter as a troublemaker and have the reverse effect of what the proponents of this theory espouse. This is consistent with Strezhnev's suggestion that dissents could actually adversely affect an individual's ability to obtain your future appointments as an arbitrator.[133] This criticism therefore conflates dissent with a lack of impartiality and independence or ethical integrity. Is the possibility that a dissent may be motivated for illegitimate reasons a sufficient reason for suppressing freedom of expression or independence where those reasons are not present? I would suggest not.

95. Although there are examples of allegations of arbitrators seeking to undermine the majority award such as *CME v Czech Republic*[134] and *ConocoPhilips*[135] (where the dissent was critical of majority and there were multiple proposals to disqualify members of the tribunal), these are probably notable for the fact that they are relatively infrequent.

Dissatisfaction on the part of the losing party

96. This point is interesting as it runs counter to an argument in support of dissenting opinions, i.e. that a dissent would increase the degree of satisfaction and result in a losing party being more likely to respect an award. This would suggest that the extent to which a party is satisfied or dissatisfied is more likely to be fact dependent than influenced by whether or not there has been a dissent at all. Responses from practitioners who have practised as counsel suggest that understanding why you have lost is important.[136] Therefore, provided the reasons as to why a

[131] Paragraph 82.
[132] Ibid, n.5, p.330; n.59, n.60, n.61
[133] Ibid, n.116, p.9-10
[134] Ibid, n.50
[135] ICSID Case No. ARB/07/30
[136] Ibid, n.128

party had lost were communicated, the fact that it was the result of a majority or unanimous award may actually be of secondary importance.

97. Another matter considered to be of importance to a losing party, was to know that their arguments had been considered.[137] From this perspective, although a dissent could provide a losing party some satisfaction, there is no reason why this could not be accommodated within a unanimous award. The question of satisfaction or dissatisfaction are different views of the same coin and is therefore arguably neutral in relation to the question of utility.

Reasons given in support of dissenting opinions and why they have utility

98. The arguments in favour of allowing dissents in the literature and them having utility by the practitioners included that it was a fundamental right of any arbitrator to give a dissent, intellectual honesty should prevail over collegial solidarity, dissents can produce better awards in terms of reasoning and avoid fatal procedural irregularity, dissents promote arbitral responsibility, dissents can help build confidence in the process by showing the losing party they have been heard and a losing party was more likely to respect an award if there was a dissent and, if published, they can contribute to the development of the law.[138]

It was a fundamental right of any arbitrator to give a dissent

99. A common theme from responses from practitioners was that an arbitrator's independence should not be fettered.[139] Some writers say that the right to hold a dissent is "inarguable".[140] Viewed through this prism, it is understandable why neither national laws nor arbitral rules expressly prohibit an arbitrator from disagreeing with the majority. Therefore, the ability to dissent fulfils the purpose of enabling them to set out an explanation of the reasons for dissent and why they did not agree with the majority in circumstances where it is not possible to do so within the award itself.

[137] Ibid, n.128
[138] Ibid, n.53, p.457
[139] Ibid, n.117
[140] Goryacheva and Kisliakova, 2022, p.261

Intellectual honesty should prevail over collegial solidarity

100. This was also a recurring theme running through responses received from practitioners.[141] To a certain extent, this builds on the discussion of the previous point regarding the arbitrator's independence. The perception I have from the interviews was that practitioners would strive towards achieving consensus and unanimity. Where the effect was minimal or not material to the outcome, it can be understandable that practitioners would adopt a pragmatic approach. However, the difficulty comes when a tribunal member disagrees on an important point of principle and cannot with a clear conscience agree with the majority. In such circumstances, the ability to provide a dissenting opinion enables the dissenter to set out an explanation without undermining the majority award or impugning their integrity or intellectual honesty.

Dissents can produce better awards in terms of reasoning and avoid fatal procedural irregularity

101. This was a common thread running through many of the interviews.[142] Reasons included the fact that a dissent could serve to identify any flaws in the majority's reasons and ensure that the majority addressed all of the parties' arguments and the issues. In essence, the argument is that dissenting opinions can serve to enhance the quality of the decision-making process by making the majority more accountable for the rationale and consequence of the award. Admittedly, the requirement to produce an enforceable and recognisable award with cogent reasoning, addressing all of the submissions and issues can be established irrespective of whether there is a dissent. However, the fact that a majority's attention is drawn to specific points is more likely than not to result in those points being addressed thoroughly. As one practitioner said, no self-respecting tribunal would allow an award to be published that did not address all of the matters or issues included in a dissent.[143] Clearly, this requires the dissent and the reasons for the dissent to be known in advance such that it forms part of the deliberations.

[141] Ibid, n.117
[142] Ibid, n.118
[143] **P3**

Dissents promote arbitral responsibility

102. To a certain extent, this builds on the previous point, the proposition being that tribunals will be more conscientious if there is a prospect of a dissent, ensuring that they discharge all of their adjudicative functions.

Dissents can help build confidence in the process by showing the losing party they have been heard and losing party was more likely to respect an award if there was a dissent

103. I have already touched on this point when addressing the proposition that it had the opposite effect, i.e. that a dissent would increase dissatisfaction on the part of the losing party, suggesting that the question of satisfaction or dissatisfaction are different views of the same coin and arguably neutral in relation to the question of utility.[144] Proponents of the theory that dissents help build confidence say that a well-reasoned dissent reveals that the tribunal debated alternative arguments, facts and evidence, such that they were not overlooked, and can also evidence deliberation and avoid any suggestions that there was an absence of due process.[145] Of course, the contrary may be true, in that the dissent evidences a procedural failure and/or a failure to comply with the principles of natural justice such that there was a serious irregularity, e.g. *F-v-M*[146] or *Cameroon Airlines*.[147] However, if merited, these types of situations actually represent the successful outcome of a high-quality dissent (from the position of the losing party).

If published, dissents can contribute to the development of the law

104. With the exception of maritime arbitrations seated in London, or where there is a right of an appeal on a point of law, this cited benefit is more pertinent to ITA. Since van den Berg's papers on the subject, there is significant evidence within the ITA field that previously published awards and dissenting opinions feature in parties' arguments and subsequent awards.[148] There is also support for the proposition that there is a *de facto* system of precedent in ITA. [149] Allied to the proposition that dissents increase the quality of the majority, is the suggestion that dissents can assist counsel in building on and developing arguments

[144] Paragraph 96-97
[145] Ibid, n.118
[146] Ibid, n.86
[147] Ibid, n.110
[148] Ibid, n.82, p.262-265
[149] Ibid, n.38.

which, although may have not been successful in the past, may find favour in future. As a matter of practice it would appear that in ITA tribunals will often identity previous awards/dissents, compare the applicable facts and apply findings based on the previous cases.[150]

105. A notable feature of ITA is that it does not only concern and affect the parties to the arbitration but is said to be more akin to a form of public law adjudication.[151] Thus ITA is said to fulfil a public function in influencing the behaviour of investors and states and wider society.[152] There is a suggestion that the absence of a right of appeal on a matter of substance in ITA creates a higher level of responsibility of the tribunal than a judge in a national court and that ITA awards can and do actually influence how states and investors conduct themselves moving forward. However, Dumberry makes the point that awards do not actually represent a formal source of law for the purpose of Article 38(1) of the Statute of the International Court of Justice.[153] Practitioners also point to the fact that ITA is a comparatively recent system when compared to ICA and that tribunals are often dealing with "boilerplate" type treaties and recurring principles, e.g., what constitute fair and equitable treatment or the power of a state to police without giving rise to a claim for expropriation or compensation.[154] Awards on these subjects in turn lead to scholarly debate and help to develop an understanding of the applicable principles. It has been said, albeit in the context of the US legal system, that the freedom to announce dissent may appeal to the "intelligence of a future day".[155] By analogy, it can be readily seen how a well-reasoned dissent in an ITA on an evolving area of the law can help to develop public international law.

[150] Ibid, n.82, p.268
[151] Ibid, n.129, p.192-193
[152] Schill, 2010,
[153] Ibid, n.76 p.221-274
[154] E.g., **P24**
[155] Ibid, n.140, p.253, citing Charles Evan, former Chief Justice of the United States

Chapter 6 – Conclusion

106. The aim of this paper was to consider the competing arguments for and against dissenting opinions in international arbitration and to address the question of whether they have utility. The question was to be considered in the context of ICA and ITA. This was done through a combination of a review of the literature on the subject and interviews with twenty-four practitioners. The reasons given for and against dissenting opinions and them having utility were the subject of critical analysis.

107. A common thread running through the analysis of a number of the reasons cited against dissenting opinions is that they focus on the effect that dissenting opinions could possibly have rather than them not having utility. It does not automatically follow that, by virtue of there being a dissenting opinions these characteristics (e.g. breach of confidentiality or bias) will be present. As long as dissents do not reveal the substance of deliberations there can be no objection on the grounds of breach of confidentiality.[156] Further, such breach may be justifiable if it identifies a serious irregularity on the part of the majority.[157]

108. A dissenting opinion and the award are independent of each other. In itself, a dissenting opinion does not render the award unenforceable.[158] The product of dissent is more likely to be the product of a legitimate difference of opinion than bias.[159] To the extent there is bias, a three person tribunal affords sufficient protection and ensures that the system is effective in providing an enforceable award.[160] Although there may be a cost and delay associated with a dissent, this needs to be considered in the context of what value can be derived from dissenting opinion.[161] A dissent can result in a strengthened and more robust award.[162] Although ICA awards are not public or have precedential value, reasons for losing set out in a dissenting opinion can provide benefit to the losing party.[163]

[156] Paragraph 76
[157] Paragraph 77
[158] Paragraph 88
[159] Paragraph 82
[160] Paragraph 84
[161] Paragraph 87
[162] Paragraph 89
[163] Paragraphs 90-91

109. Although there are examples of dissenting opinions resulting in awards being set aside and remitted to the tribunal, these are notable because they are so rare.[164] Further, the fact that a dissent can lead to such a result because of a serious irregularity or breach of due process, actually provides evidence that a dissenting opinion has utility. Additionally, in such circumstances, its utility can be seen to legitimise and not undermine the arbitral process.

110. The ability to dissent enables a tribunal member to set out an explanation of the reasons for disagreement in circumstances where it is not possible to do so within the award itself. This preserves the independence of the arbitrator and their intellectually honesty.[165] It is true that, ordinarily, ICA awards are not public and have no precedential value. However, this does render dissenting opinions void of any utility – indeed, there are "*reasons for reasons*".[166] In contrast, ITA awards are public. Although they have no binding authority as such, it is evident that, in practice, both awards and dissenting opinions are referred to in submissions and subsequent awards.[167] They can therefore serve to develop the law and interpretation of investment treaties in the public international law arena. There is said to be a *de facto* system of precedent in ITA.[168]

111. The question of whether a dissent could give rise to increased dissatisfaction or satisfaction is very much fact dependent and in the eye of the beholder. However, it highlights the importance of the quality of both the award and the dissenting opinion, which is a recurring theme in relation to the question of utility. As well as facilitating an arbitrator's independence and preserving their intellectual honesty, the fact that there is the likelihood of a published dissent can serve to ensure deliberations are full, improve the quality of the award in terms of reasoning and assist in ensuring that it addresses all of the parties' submissions, facts, evidence and issues. This utility is common to ITA and ICA.

112. So, in summary, the utility of dissenting opinions can be said to be that they can:-

(i) serve to increase the quality of the award;

[164] Ibid, n.86. and n.110
[165] Paragraph 86
[166] Ibid, n129, p.187
[167] Ibid, n.38 (Commission)
[168] Ibid, n.38

(ii) preserve an arbitrator's independence and intellectual honesty;

(iii) identify fatal procedural errors; and

(iv) contribute to the development of the law

113. In terms of the distinction between ICA and ITA, the only feature which is exclusive to ITA is the final one.

Bibliography

Arbitration Act 1996 (England and Wales) **("AA96")**

Manuel Arroyo -Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal, ASA Bulletin, Association Suisse de l'Arbitrage; Kluwer Law International 2008, Volume 26 Issue 3) pp. 437 - 466.

C. Mark Baker & Lucy Greenwood, Dissent - But Only If You Really Feel You Must – Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstances, 7 Disp. Resol. INT'l 31 (2013).

Blackaby Nigel ,Constantine Partasides, et al., Redfern and Hunter on International Arbitration (6th Ed), (Oxford University Press 2015) Chapter 9

Charles N. Brower & Jawad Ahmady - From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court Volume 41, Issue 4 2018 Article 2 2017 FORDHAM INTERNATIONAL ARBITRATION & MEDIATION CONFERENCE ISSUE

Charles N Brower & Charles B Rosenberg The Death of the Two-Headed Nightingale: Why the Paulsson—van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded by ARBITRATION INTERNATIONAL, Vol. 29, No. 1 LCIA, 2013

Jeffery P. Commission, Precedent in Investment Treaty Arbitration, Journal of International Arbitration, (Kluwer Law International 2007, Volume 24 Issue 2) pp. 129 – 158

Patrick Dumberry, The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law, Journal of International Arbitration; Kluwer Law International 2016, Volume 33 Issue 3) pp. 269 - 288

Ruth Bader Ginsburg, The Role of Dissenting Opinions, (2010) Minnesota Law Review.427

Anastasia Goryacheva and Natalia Kisliakova, Nonrecognition of Dissenting Opinions in CAS as a Controversial and Unresolved Matter, in Maxi Scherer (ed), Journal of International Arbitration, (Kluwer Law International 2022, Volume 39 Issue 2) pp. 233 – 262

International Court of Arbitration ("ICC") Arbitration Rules ("ICC Rules"), in force as from 1 January 2021

ICC International Court of Arbitration Bulletin Vol. 2 No. 1 32 June 1991 Final Report on Dissenting and Separate Opinions [Making of the award] [Dissenting opinion]

ICSID Arbitration Rules (2022)

ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States ICSID, October 14, 1996

Jennifer Kirby, With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated, Journal of International Arbitration, (Kluwer Law International 2009, Volume 26 Issue 3) pp. 337 – 355

Toby Landau, Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration, in Albert Jan van den Berg (ed), 50 Years of the New York Convention: ICCA International Arbitration Conference, ICCA Congress Series, Volume 14 (Kluwer Law International; Kluwer Law International 2009) pp. 187 – 205

Ilhyung Lee Introducing International Commercial Arbitration and its Lawlessness, by way of Dissenting Opinions 4(1) Contemp., Asia J. 19 [2011]

Laurent Levy - Dissenting Opinions in International Arbitration in Switzerland - Arbitration International, Vol.5/No.1 (1989)

The London Court of International Arbitration Rules, Effective 1 October 2020 ("**LCIA Rules**")

Pedro J. Martinez-Fraga* and Harout Jack Samra A Defense of Dissents in Investment Arbitration – The University of Miami Inter-American Law Review, Summer 2012, Vol. 43, No.3 (Summer 2012, pp 445-479

Campbell McLachlan , Laurence Shore , et al. Substantive Principles (Second Edition), Oxford International Arbitration Series, (Campbell McLachlan, Laurence Shore, and Matthew Weiniger 2017; Oxford University Press 2017) pp. 47 – 91

Wendy Miles, Practical Issues for Appointment of Arbitrators, 20 J. Int'l Arb (2003)

Alexis Mourre Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration - Kluwer Arbitration Blog, October 5, 2010

Judge Richard Mosk and Tom Ginsburg, Dissenting Opinions in International Arbitration – in Liber Amicorum Bengt Broms (Finish Branch of International Law Association, Helsinki, 1999, p275

Aiswarya Murali and Vivek Krishnani, Minority Awards in India: A Low-Hanging Fruit for Judicial Interference', in Maxi Scherer (ed), Journal of International Arbitration, (Kluwer Law International 2020, Volume 37 Issue 6) pp. 731 – 750

Jan Paulsson - Moral Hazard in International Dispute Resolution, ICSID REVIEW—FOREIGN INVESTMENT LAW JOURNAL - 2010

Alan Redfern et al., Law and Practice of International Commercial Arbitration para. 4–15 (2004)

Alan Redfern - The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly Arbitration International, Vol. 20, No. 3 LCIA, 2004

Peter J Rees QC and Patrick Rohn - Dissenting Opinions: Can they Fulfil a Beneficial Role? by Arbitration International , Vol. 25, No. 3 LCIA, 2009

Guy Ritchie – Lock, Stock and Two Smoking Barrells, 1998

Stephen Schill, Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator Leiden Journal of International Law, 23 (2010), pp. 401–430 Cambridge University Press

Christoph Schreuer and others – Schreuer's Commentary on the ICSID Convention (Cambridge University Press) , 3rd Edition 2022

Stephen M. Schwebel - May the Majority Vote of an International Arbitral Tribunal be Impeached?:The 1996 Freshfields Lecture by Arbitration International, Vol. 13, No. 2 LCIA, 1997

Singapore International Arbitration Centre Arbitration Rules, 6th Edition, 1 August 2016 ("**SIAC Rules")**

Christer Söderlund - Dissenting opinions and why they should be tolerated, Senior Counsel, Morssing & Nycander, https://journal.arbitration.ru/analytics/dissienting-opinions-and-why-they-should-be-tolerated/ March 12, 2019

Jonathan Sutcliffe and Lucy Greenwood: Dissenting Opinions In Arbitration Awards: More Trouble Than They Are Worth? 24-5 Mealey's Intl. Arb. Rep. 19 (2009) SECTION: Volume 24, Issue #5

Anton Strezhnev -You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration-2015 - **https://scholar.harvard.edu/files/astrezhnev/files/dissent_draft_1.pdf**

Inan Uluc and Kristi R Sutton - Without Silence, There Is No Golden Rule; Without Dissent, There Is No Progress- Oregon Review of International Law [Vol. 20, 2018] pp219 – 274

UNCITRAL Model Law on International Commercial Arbitration (United Nations, 1994)

UNCITRAL Arbitration Rules (United Nations 2021)

Albert Jan van den Berg Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration. (eds.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman. Koninklijke Brill nv. Printed in The Netherlands. (2010)

Albert Jan van den Berg - Charles Brower's problem with 100 per cent—dissenting opinions by party-appointed arbitrators in investment arbitration - Arbitration International, 2015, 31, 381–391 doi: 10.1093/arbint/aiv028 Advance Access Publication Date: 18 June 2015 Published by Oxford University Press on behalf of the London Court of International Arbitration

Jacques Werner, Dissenting Opinions: Beyond Fears, Journal of International Arbitration, (Kluwer Law International; Kluwer Law International 1992, Volume 9 Issue 4) pp. 23 - 30

Cases

Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3 https://www.italaw.com/cases/57

Aminoil v Government of Kuwait (1982) XXI International Legal materials 976 https://jusmundi.com/en/document/decision/en-the-american-independent-oil-company-v-the-government-of-the-state-of-kuwait-final-award-wednesday-24th-march-1982 ("*Aminoil*")

Cameroon Airlines v Transnet Limited [2004] EWHC 1929 (Comm) https://www.bailii.org/ew/cases/EWHC/Comm/2004/1829.html ("*Cameroon Airlines*")

ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30, https://www.italaw.com/cases/321 ("*ConocoPhillips*")

CME v Czech Republic – Partial Award of 13 September 2001 and the Dissenting Opinion 11 September 2001 https://www.italaw.com/cases/281

Czech Republic v **CME**– Judgment of Swedish Court of Appel (SVEA) Case no T 8735-01 15 May 2003 https://jusmundi.com/en/document/decision/en-cme-czech-republic-b-v-v-the-czech-republic-challenge-of-arbitral-award-judgment-of-svea-court-of-appeal-published-at-42-ilm-919-thursday-15th-may-2003

F Ltd v M Ltd [2009] EWHC 275 (TCC) https://www.bailii.org/ew/cases/EWHC/TCC/2009/275.html *("F-v-M")*

Helman International v Egypt, Award 3 July 2008 https://jusmundi.com/en/document/decision/en-helnan-international-hotels-a-s-v-arab-republic-of-egypt-award-thursday-3rd-july-2008

International Thunderbird Gaming Corp v The United Mexico State, Separate Opinion of Thomas Wälde, DE 2005 https://www.italaw.com/cases/571 ("*Thunderbird*")

NYK Bulkship (Atlantic) NV (Respondent) v Cargill International SA (Appellant) [2016] UKSC *20* https://www.supremecourt.uk/cases/docs/uksc-2014-0143-judgment.pdf *"The Global Santosh"*

Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6 https://www.italaw.com/cases/1126

SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29 https://www.italaw.com/cases/1016

Tokios Tokelės v.Ukraine Case No. ARB/02/18 Decision on Jurisdiction 29 April 2004 + Dissenting Opinion of Prosper Weil {President] 29 April 2004 https://www.italaw.com/cases/1099 *("Tokios Tokelės")*