DISSENTING OPINIONS IN INTERNATIONAL COMMERCIAL ARBITRATIONS

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ABSTRACT

A dissenting opinion with reference to International Commercial Arbitrations elementarily denotes the expression of disagreement by an Arbitrator in relation to both the reasoning and the result of the award granted by the majority of the Tribunal. Though still at a nascent stage, the practice of delivering dissenting opinions is one which needs to be duly noted and taken into due consideration because of the incidental and collateral questions that it nurtures. Fundamentally, a dissenting opinion raises concerns related to the effect, the nature and the rectitude of such opinions. One such collateral question is the enforceability of such dissenting opinions and the repercussions that follow in the context of an arbitral award delivered by the majority. In addition to the above raised question, through this thesis the author will also address other questions such as whether the act of delivering a dissenting opinion is an indicator of the increased sense of maturity of arbitrators in international commercial arbitration? Whether the dissenting opinion possesses any precedential value to the arbitration cases arriving prospectively? and How do such opinions contribute to the development of arbitration jurisprudence. Moreover, through this thesis the author will also attempt from a comparative perspective to examine and make an incisive analysis of the governing rules of arbitration across various arbitration regimes such as ICSID, LCIA which already have a well-established arbitration jurisprudence.

CONTENTS

LIST OF ABBREVIATIONS

¶	Paragraph
Art.	Article
ICSID	The International Center for Settlement of Investment Disputes
ed.	Edition
v.	Versus
US	United States of America
UK	United Kingdom
ICJ	International Court of Justice
ICC	International Chamber of Commerce
NAI	Netherlands Arbitration Institute
LCIA	The London Court of International Arbitration
CPR	The International Institute for Conflict Prevention & Resolution
CIETAC	China International Economic and Trade Arbitration Commission
AAA	The American Arbitration Association
COFACI	Franco-German Chamber of Commerce and Industry
IBA	International Bar Association
i.e.	idest (that is)
Int'l	International
Ltd.	Limited
No.	Number
SCC	Stockholm Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Vol.	Volume

INTRODUCTION

A dissenting opinion in simple parlance is an opinion which is issued by an arbitrator who disagrees with the result and the reasoning of the majority award.[1] Notably, dissenting opinions in general arbitral practice do not form a part of the majority award[2], and their frequency is international commercial arbitration is very low.[3] In lieu of the same, the author feels that it is of pivotal importance at this juncture to understand and comprehend the distinction between a separate or concurring opinion and a dissenting opinion. A separate opinion as compared to a dissenting opinion can be understood to connote an opinion which concurs with the result of the majority award but does not concur with the reasoning of the award.[4] Alternatively, a dissenting opinion as explained above connotes a rejection of the result as well as the line of reasoning of the majority award.

Notably, there is always a probability in a tribunal composed of more than one arbitrator that all members do not reach a unanimous decision and that one of the appointed arbitrators decide to differ from the reasoning of the majority. The differences may arise on a point of law or fact or any other alleged procedural irregularity which may result in the violation of the due process right of the disputing parties.

Traditionally, civil law countries have always placed restrictions on dissenting opinions with a view of preserving complete secrecy of deliberations in a tribunal. The above restriction is highlighted by a perusal of the arbitration practice of France; where an arbitrator in domestic arbitration is not permitted to attach a dissenting opinion to the majority award.[5] In contrast,

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[1] NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, J. MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (6th ed. Oxford University Press 2015) at ¶8-69, ¶8-71.

[2] D v. A, Swiss Federal Tribunal, 11 May 1992, ASA Bulletin ¶381, ¶386.

[3] *Supra* note 1, ¶8-70.

[4] LAWRENCE W. NEWMAN, GRANT HANESSIAN, INTERNATIONAL ARBITRATION CHECKLISTS (2nd ed., Juris Publishing 2009).

[5] W. MICHAEL REISMAN, W. LAURENCE CRAIG, WILLIAM PARK & JAN PAULSSON, INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE

the practice in Switzerland allows for the issuance of dissenting opinions subject to the arbitrator complying with his general duty of diligence.[6] The general duty of diligence[7] in domestic arbitrations can be interpreted as writing opinions that do not endanger the validity and enforceability of the award.

It is argued that dissenting opinions in international arbitration proceedings are open expressions of criticism questioning the legitimacy of views expressed in the final award, that strengthen the credibility and the reasoning of the arbitral award.[8] The presumption that naturally follows from the above mentioned statement is that dissenting opinions will always lead to a better award since, whenever an arbitrator dissents the majority will exercise their cognitive capabilities to validate their conclusion in the final award. Similarly, an argument that can be forwarded in support of dissenting opinions is that they aid in the jurisprudential development of common and civil domestic arbitration law regimes.[9] Furthermore, a perusal of the evolution of dissenting opinions highlights the fact that dissenting opinions delivered by prominent judges have sometimes prompted statutory law reforms and substantially contributed to a shift in the jurisprudence of the concerned jurisdictions.[10] A diametrically opposite perspective that can also be put forth against the prevalence of such opinions is that dissenting opinions are often regarded as expressions of "*irrepressible affection*" between the arbitrators and the parties that nominated them.[11]

RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (UNIVERSITY CASEBOOK SERIES), (1st ed. Foundation Press 1997).

[6] *Id*, 955.

[7] The duty of diligence encompasses within itself the duty to not disclose details of the arbitration process to the parties.

[8] Ioan Schiau, Disagreeing on Parties' Disagreement: The Arbitral Award and The Dissenting Opinion, (Feb. 13, 2017, 10:00 AM), (*http://www.wseas.us/e-library/conferences/2011/Brasov1/LAW/LAW-21.pdf*, 2011).

[9] Hans-Patrick Schroeder; Tanja V. Pfitzner, *Recent Trends regarding Dissenting Opinions in International Commercial Arbitration*, 2 Y.B. on Int'l Arb. 133, 150 (2012).

[10] *Supra* note 9, at 134. See also, Alan Redfern, *The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20(3) Arb. Int., 223, 229 (2004).

[11] *Id*, at 142.

Noteworthy is the very fact that according to a survey carried out; which included 150 investment arbitration awards issued under the ICSID Arbitration Rules nearly all 34 dissenting opinions were "issued by arbitrators appointed by the party that lost the case in whole or in part".[12] The above mentioned statistic illustrates the underlying rationale behind the argument put forth by hardliners and traditionalists who argue against the existence of dissenting opinions in international arbitrations; the argument being that dissenting opinions "weaken the strength of the arbitral awards and adversely affect the arbitrator's impartiality principle".[13]

The prevailing cloud of confusion pertaining to the credibility of dissenting opinions can be primarily attributed to the non-existence of any detailed rules governing the same. Also, an almost nonexistent legal framework which attempts to clarify the legal status of dissenting opinions substantially contributes to the cloud of confusion. For instance, the practiced norm in Netherlands is that the "dissenting opinions are allowed in international arbitration, but they do not form part of the award".[14]Similarly, an English court categorically ruled that the majority of the arbitrators had the right to decide upon whether they deemed it appropriate to include the dissenting opinion in the arbitral award.[15] In that case the English Court of Appeal held that

> "…in general terms it would be wrong to think that awards must mention dissenting reasons and that unless the arbitration agreement or the arbitration rules were to provide expressly to the contrary, it is for the majority arbitrators to decide whether the dissenting opinion should be included in the award, the minority arbitrator having no rights in this respect".[16]

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[12] Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Mahnoush Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Riesman, (Feb. 13. 2017, 1 P.M)*, http://www.arbitration-icca.org/media/0/12970228026720/van_den_berg--dissenting_opinions.pdf, 821-843.

[13] *Supra* note 1. See also, E. GAILLARD, J. SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *(1st ed.* Kluwer Law International 1999), 766.

[14] ALBERT JAN VAN DEN BERG, YEARBOOK COMMERCIAL ARBITRATION 2012 - VOLUME XXXVII, (1st ed., Kluwer Law International,1997) ,86, ¶ 4.

[15] Cargill International vs. Sociedad Ibercia de Molturacion, London Court of Appeal, 1 Lloyd's Rep. 489 [1998].

[16] *Id.*

Furthermore, the arguments in favor of allowing dissenting opinions in international commercial arbitrations can be said to be dependent and inter-related to the issue of whether arbitral awards should be published at all.[17]

In relation to the communication of dissenting opinions to the parties it is to be noted that in Belgium, dissenting opinions are admissible, but their communication to the parties and their publication is prohibited keeping in mind the confidentiality of the deliberation proceedings.[18] However, notably the ICSID Rules, provide any arbitrator the right to attach his individual opinion to the award, thereby implying that his separate opinion will be communicated to the parties as an attachment to the award.[19] Notably, dissents in current arbitration practice are quite prevalent in intergovernmental arbitrations, even for arbitrations involving civil law countries.[20]

The author through this contribution attempts to understand the desirability of dissenting opinions in international arbitrations in the context of their utility and their effectiveness as a corrective remedy. Furthermore, the author will also attempt to highlight the usefulness and purpose (if any) of such opinions in international arbitrations simultaneously bringing forth and highlighting various institutional approaches towards such opinions. Notwithstanding the above mentioned, the author will also attempt to answer certain other incidental questions such as whether the act of delivering a dissenting opinion is an indicator of the increased sense of

[17] J.D.M. Lew, *Publication of Awards*, in The Art of Arbitration: Liber Amicorum Pieter Sanders (1982), 223, 229 (G. Schultsz and A.J. van den Berg, ed.). See also, LAURENCE CRAIG, WILLIAM PARK, AND JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, (3rd ed., Ocenea Publications, 2000), 332-35. The absence of a generalized reporting system of arbitral awards may lead arbitrators to consider decisions of domestic and international arbitrators for reference which may not specifically deal with issue pertaining to arbitration.

[18] JEAN-FRANCOIS POUDRET; SEBASTIEN BESSON; STEPHEN BERTI; ANNETTE PONTI, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION, (2nd ed. Sweet and Maxwell, 2007), 674.

[19] *Supra* note 8. Also, Article 48.4 of ICSID Rules states that "The Centre shall not publish the award without the consent of the parties".

[20] Judge Richard Mosk & Tom Ginsberg, *Dissenting Opinions in International Arbitration*, Liber Amicorum Bengt Broms, Finnish Branch of the International Law Association, Helsinki, (1999), 275.

maturity of arbitrators in international commercial arbitration? And whether dissenting opinions do actually in reality contribute towards the development of arbitral jurisprudence? *Lastly,* through this contribution the author will also make an incisive analysis on the expected outcomes of dissenting opinions and answer the question as to whether there needs to be transitional shift in the approach towards dealing with dissenting opinions?

In lieu of the above, the first chapter of the thesis will deal with the distinguishing features of dissenting opinions in international arbitrations. In ***the first chapter***, the historical treatment of dissenting opinions in civil and common law will be discussed along with various types of dissenting opinions currently prevailing in the practice of commercial arbitration. In addition to the above, the first chapter will also discuss various interpretations that can be understood when an arbitrator decides to dissent. *Lastly,* the first chapter ends with an example of a special case of dissenting opinion. Subsequently, ***the second chapter*** will bring forth the existing legal regimes governing dissenting opinions in international arbitration practice and will end by illustrating as to how dissenting opinions have evolved to be more generally accepted in current arbitral practice. ***The last chapter*** of the thesis will put forth the arguments favoring as well as arguments not favoring the practice of dissenting opinions in international arbitrations. Besides highlighting the arguments, the last chapter will also deal with the general consensus among scholars relating to dissenting opinions and will also try answering the question initially raised as to whether dissenting opinions produce better awards or not?

CHAPTER I: - DISTINGUISHING FEATURES OF DISSENTING OPINIONS IN INTERNATIONAL COMMERCIAL ARBITRATIONS

A. Historical Treatment and Current Treatment of Dissenting Opinions in Civil Law and Common Law

The origins of the concept of dissenting opinions can be attributed to Anglo-American judicial jurisprudence[21] which is strongly premised on the rule of *Stare Decisis*. The fundamental idea behind the existence of dissenting opinions in Common Law jurisdictions is "the development and adaptation of law to conditions and changing realities of life".[22] Moreover in common law legal systems, dissenting opinions enjoy a pivotal role to the development of the prevailing law as they usually provide for a source of alternate consideration of the disputed law to other courts or to various appellate bodies who in return review the decision of the lower court and attempt to establish a uniform governing law throughout the jurisdiction.[23] From a jurisdictional comparative perspective, historically there does not exist a practice of dissenting opinions in civil law[24] and the primary reason for the same can be understood in the context of the prevailing legal thought of civil law jurisdiction i.e. that the decision of the judicial body should appear as one rather than a mechanical process as often is the argument levelled against the judicial courts in common law countries.

The legality of dissenting opinions in arbitration practice can be determined by the fact that such opinions do not usually unless provided otherwise in the governing Rules form a part of the award.[25] In relation to the same, the observation of the Swiss Federal Tribunal[26] is to be noted where the tribunal has observed that the dissenting opinion unless provided for by the

[21] Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 80 N.C. L. Rev (2007). Historically, the practice of dissenting opinion can be traced back to the practice of the House of Lords where each Lord was required to declare his/her opinion separately. Currently, the practice is allowed in many domestic legal systems such as US, Canada, India, and Australia.
[22] IJAZ HUSSAIN, DISSENTING AND SEPARATE OPINIONS AT THE WORLD COURT, (1st ed. Martinus Nijhoff Publishing, 1984).
[23] Peter J Rees QC and Patrick Rohn, *Dissenting Opinions: Can they fulfil a Beneficial Role?* Arbitration International, Vol. 25, No, 3, LCIA, 330 (2009).
[24] *Id.*
[25] *Supra* note 1.
[26] *Supra* note 2. See also, *Supra* note 13.

arbitration agreement cannot be attached to the award or communicated to the parties. Further, in the same case the tribunal also remarked that a dissenting opinion by its very nature has negligible impact upon the reasons and the result of the award and therefore should not be attributed any importance.

Notably, international commercial arbitration due to its globalized approach encompasses within itself the best of both the common law as well as the civil law.[27] The current dominant trend in civil law jurisdictions is to neither discourage nor encourage dissenting opinions.[28] However, it is also to be noted that civil law jurisdictions generally disallow dissenting opinions, principally because of their emphasis on collegiality in the dispensation of justice.[29] Under the French Law, dissents between the judges are expected to be secret and confidential and are demonstrated no later than the deliberation phase. The purpose of deliberations as according to the French Law is to formalize the exchange of views between arbitrators/judges.[30] Furthermore, under the civil law systems dissenting opinions are perceived to be part of a mathematical process whereby one party emerges as a winner courtesy of garnering more votes than his adversary.[31]

However, a point of distinction which highlights the uniqueness of dissenting opinions in arbitral tribunals as compared to dissents in domestic courts is that an arbitral tribunal unlike the domestic court is a onetime composition for a particular dispute comprising of people from different nationalities and background. Whereas on comparison, in domestic courts the judges

[27] Y. DEZALAY & B. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (2nd ed., University of Chicago Pres, 1996).
[28] *Supra* note 13.
[29] Alan Redfern, *The 2003 Freshfields - Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20(3) Arb. Int., 223, 229 (2004). In Civil Law systems a court's decision should appear as a collective decision rather than a fragmented decision.
[30] JULIAN D.M. LEW & LOUKAS A. MISTELIS, ARBITRATION INSIGHTS: TWENTY YEARS OF THE ANNUAL LECTURE OF THE SCHOOL OF INTERNATIONAL ARBITRATION, SPONSORED BY FRESHFIELDS BRUCKHAUS DERINGER, (1st ed. Kluwer Law International, 2007), 385.
[31] *Id.*

share the same nationality and usually the same background so the probability of a dissenting opinion is substantially reduced.[32] Furthermore, "dissenting opinions are and will be a reality and they operate as value that reduces the pressure in arbitration where, even after drawn-out deliberations, the arbitrators are not able to reconcile their views".[33]

B. Types of Dissenting Opinions Currently Prevailing in The Practice of Commercial Arbitration

In international commercial arbitrations there exists a demarcation between practice and philosophy in relation to the legitimacy of dissenting opinions. Notably, the etymological origins of dissenting opinions between State-State arbitrations can be traced back to the case of *Alabama Claims*[34] arbitration between the US and the UK. Moreover, ICJ's Statute i.e. Article 57 is generally interpreted to entitle judges to deliver dissenting opinions in judgments, procedural orders, advisory opinions and interim proceedings.[35]

A cursory glance over the available literature relating to dissenting opinions indicates that arbitrators usually express their dissent by "simply refusing to sign the award".[36] It is also further revealed that dissenting opinions in general arbitral practice may be annexed to the award subject to the approval of other arbitrators or they may be intimated to the parties separately or else as in accordance with the applicable procedural law as provided by in the agreement entered into between the parties.[37] In either of the above mentioned approaches, the dissenting opinion does not form a part of the award itself. As duly observed by Alan Redfern

[32] *Supra* note 13.
[33] *Supra* note 19.
[34] ALAN REDFERN, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, (4th ed., Sweet & Maxwell, 2004).
[35] Article 57 states that: If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion. See also, JOHN LIDDLE SIMPSON, HAZEL FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, (Praeger 1959), 227.
[36] *Supra* note 12.
[37] *Id*.

"It is not an award; it is an minority opinion".[38] Furthermore, majority of the prevailing arbitration laws and rules allow a three-member tribunal to decide a dispute before it by majority vote.[39]

Notably, Article 32 of the ICC Rules state that:

> "Article 32: - Making of the Award
>
> 1) When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone."[40]

Furthermore, Article 29 of the UNICTRAL Model Law, states that: -

> "Article 29: - Decision-making by panel of arbitrators
>
> In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal."[41]

In practice however, arbitrators who decide to dissent are expected to write a dissent which ultimately forms a part of the final award. Notably, the motivation behind an arbitrator dissenting can be dependent upon a number of factors, including the importance of the point which is disagreed upon, the depth of the disagreement and lastly, the arbitrator's innate desire to express his or her divergent views.[42]

The dissent of an arbitrator can be inferred from the very fact that he/she refused to sign on the award delivered, however publication of a dissenting opinion merely highlights the reasoning behind the his/her refusal to sign the award. Given, the lack of an uniform law governing the

[38] *Supra* note 12, ¶8-77.
[39] Article 32 of the ICC Rules, (March. 11, 2017, 10:00AM), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_8; See also, Article 29 of UNCITRAL Rules,. (March.11, 2017, 10:00AM), https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
[40] *Supra* note 37.
[41] *Id.*
[42] Supra note 4.

procedural aspect of drafting a dissenting opinion, dissenting opinions can be extremely lengthy and could be highly critical of the award.[43] Principally, an arbitrator voting against the majority opinion in principle has three options[44], *Firstly*, to vote against the award without giving explanations. *Secondly*, to give a statement of dissent without offering a full opinion and *lastly*, to write a detailed and fully reasoned dissenting opinions.

It is also important to note at this juncture the various methods which can be used to communicate the dissenting opinion to the parties.[45] *Firstly*, including the dissenting opinion in full in the majority award itself. *Secondly*, merely including a summary of the dissent in the award. *Thirdly*, where the dissent is in the context of reasoning followed by the majority, the dissent could be by express reference to the minority opinion in connection to each point. *Fourthly*, the dissenting opinion could be annexed to the award and *lastly*, the dissenting opinion could be communicated to the parties in a separate mail.

C. Frequency of Dissenting Opinions in International Commercial Arbitrations

With a view of having a better understanding about the existence of dissenting opinions in International Commercial Arbitrations, it is imperative to comprehend and gauge the frequency of dissenting opinions. As a starting point, reference can be made to the article authored by Van den Berg which identifies 34 dissenting opinions by party-appointed arbitrators from a collection of 150 decisions.[46] Following the numbers identified above, a mathematical evaluation of the numbers presented in the article indicate that there is a 22% rate of occurrence

[43] *Supra* note 25.
[44] CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, (Cambridge University Press, 2001), 816.
[45] *Supra* note 19, 459.
[46] *Supra* note 12. In the article, Van den Berg limits his empirical analysis of the prevalence of dissenting opinions to only party-appointed arbitrators which thereby gives an overall impression to the reader that it is usually the party-appointed arbitrator who drafts dissenting opinions. Interestingly, Van den Berg acknowledges and concedes to the fact that there was a statistically significant number of dissents which were authored by arbitrators not appointed by the losing party.

of dissenting opinions in international arbitrations. In pursuance of the above figures, it is important to take into due consideration certain incidental questions. *Firstly*, is 22% a reasonably large number?[47] and *Secondly*, we need to identify a comparison parameter for the same i.e. is 22% a big number compared to what?[48]

The answer to the above raised questions can be inferred from the article authored by Van den Berg which suggests that the appropriate threshold for comparison purposes should be zero.[49] Furthermore, in addition to suggesting the threshold he also argues against various justifications for dissenting opinions and concludes that it is only appropriate for an arbitrator to issue dissenting opinions in extraordinary circumstances, for example when "something went fundamentally wrong in the arbitral process"[50] or an "arbitrator has been threatened" with physical danger.[51] The rationale behind Van den Berg's approach of dealing with dissenting opinions can quite evidently be tied to his own legal background rooted in the civil law tradition, which has always traditionally been against issuance of dissenting opinions.[52] Nevertheless, coming back to the moot point, if the proposed threshold of Van den Berg i.e. zero is taken into consideration then 22% rate of occurrence of dissenting opinions can be safely considered to be on the higher side.[53] However, the zero threshold as established by Van den Berg is not in tandem with the principles of ICSID Convention because of the very reason

[47] Christopher R. Drahozal, *Arbitration Innumeracy*, in 4 YEARBOOK ON ARB. & MEDIATION 89 (2012).
[48] *Id.*
[49] *Supra* note 12.
[50] *Id.*
[51] *Supra* note 12.
[52] *Id*, 828. Van den Berg while disagreeing with the idea of acknowledging dissenting opinions in international arbitration refers to the French Scholar and delegate to the 1899 Hague Peace Conference Chevilier Descamps, who observed that that dissenting opinions improperly create "the appearance of there being two judgments."
[53] *Supra* note 22. According to both the authors, one study conducted in ICC cases illustrates that there are dissents in less than 9% of cases and similarly, in LCIA cases in less than 3% of cases contain dissents. While these numbers are considerably lower than investment arbitration, at least according to some commentators, lower rates of dissent in international commercial arbitration are appropriate if not expected. See also, C Mark Baker and Lucy Greenwood, *Dissent-But only if you REALLY Feel You Must, Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstance*, Disp. Resol. Int'l 31, 7 (2013).

that the Convention expressly authorizes dissenting opinions.[54] But from an alternate view point the zero baseline can be well appreciated in the context of a civil law jurisdiction which either prohibits dissenting opinions or has a non-existent practice of dealing with them. In lieu of the above mentioned, it is pertinent to discuss the critique of the propositions of Van den Berg as put forth by Judge Charles Brower and Charles Rosenberg.[55] The authors in their article argue that the rate of issuing dissenting opinions among Supreme Courts in other jurisdictions are an appropriate threshold for comparison purposes.[56] Following the comparative analysis conducted by the authors, the authors duly observe that dissenting opinions in Supreme Courts range from 25%(the lowest) to 62%(the highest).[57] Against the backdrop of this baseline, the 22% rate of dissents in international arbitrations by party appointed arbitrators is evidently appropriate and quite low.[58]

While considering the rate of occurrence of dissents in international arbitrations it is noteworthy that international arbitrations frequently involve "novel legal questions"[59], "facts which are interpreted through cross-cultural and multi-national filters"[60] and "a deep ideological divide among parties and arbitrators".[61] Contextualizing the 22% rate of dissents

[54] *Article 48(4) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Regulations* (Mar. 18, 2017, 10:00 AM), https://icsid.worldbank.org/ICSID/StaticFiles/basiedoc/CRREnglish-final.pdf (reprinted Apr.2006) [hereinafter ICSID Convention].

[55] 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*, 29 Arbitration International, 1 (2013).

[56] *Id.*

[57] *Supra* note 54. Identifying a range of international tribunals that expressly permit dissenting opinions, including the Iran-United States Claims Tribunal, the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, the Inter American Court of Human Rights, and the European Court of Human Rights.

[58] Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 Santa Clara Int'l L. Rev. 223 (2013).

[59] *Id.*

[60] Supra note 57.

[61] *Id.*

against the above mentioned illustrates that party appointed arbitrators are already exercising an applaudable level of restraint in issuing dissenting opinions.

1. The US and European Domestic Practice of Dissenting Opinion

A comparative analysis between the US practice and the European practice of dealing with dissenting opinions highlights two diametrically opposite approaches adopted by the legal institutions governing both jurisdictions. It is noteworthy that in the Anglo-American legal regime, there exists a distinction between a dissent and a dissenting opinion.[62] A disagreement or dissent in the administration of justice in the Anglo-American context has always been understood to mean a direct disagreement with the majority opinion; but however it is not a necessary imperative for a dissent to give rise to a dissenting opinion in every case.[63] Another striking feature of dissenting opinions which needs to be duly taken into consideration at this juncture is that dissenting opinions have no precedential value and therefore cannot be relied upon as an authority in other subsequent cases.[64] Notwithstanding the above mentioned, examples of dissenting opinions which have affected subsequent court practices by being endorsed by the majority are plentiful. Amongst the many above referred to examples, the case of *Plessy v. Ferguson*[65] where the concept of "separate but equal" was introduced to American jurisprudence in a dissenting opinion is a famous example of the subsequent impact of dissenting opinions on future case law.[66]

In contrast, in European practice dissenting opinions are a rare phenomenon courtesy the emphasis on secrecy of deliberations. Even in rarity, the usefulness and purpose of dissenting

[62] *Supra* note 118.
[63] BRYAN A. GARNER, BLACK'S LAW DICTIONARY, (10th ed., Minn West Publishing Co, 1979).
[64] *Supra* note 72.
[65] Barton J. Bernstein, *Plessy V. Ferguson: Conservative Sociological Jurisprudence*, 48 The Journal of Negro History, 3 at 196-205 (1963).
[66] Dissenting Opinions by providing for alternate methods for approaching the disputed issue play a pivotal role in influencing future case law.

opinions is limited to supporting legal debate and indirect development of the law.[67] Notably, even though dissenting opinions are disallowed in France, Italy, Belgium and the Netherlands some eastern European countries such as Russia and Hungary allow for writing dissenting opinions in constitutional courts.[68] Moreover, with a view of maintaining confidentiality of deliberations dissenting opinions are absent in the ECJ.[69] The deliberations of the Court are conducted in closed sessions[70] and as according to the relevant statute the deliberations of the ECJ shall be secret and they shall merely state the reasons and the name of the judges.[71] Furthermore all the judges irrespective of whether they agree with the decision or not are expected to sign the final award.[72] The negative attitude towards dissenting opinions in the ECJ is courtesy the influence of the French Law which does not provide for dissenting opinions.[73]

D. Reading between the lines of Dissenting Opinions

Even though the desirability, utility and value of dissenting opinions in international arbitrations are debatable and to an extent questionable; their contribution to the development of arbitral jurisprudence should be duly noted. A well written arbitral award in practice usually adopts the exclusionary approach whereby different approaches and outcomes to the matter in dispute are systematically excluded based on the cognitive reasoning of the arbitrators. If the dissenting arbitrator's views and positions have been adequately explained in the award, then the argument of enhancing the legitimacy and confidence in the proceedings is not sufficient to justify issuing a dissenting opinion.[74] Furthermore, it is critical to assess the varied

[67] Julia Laffranque, *Dissenting Opinion and Judicial Independence*, VIII *Juridica International* 163 (2003).
[68] *Supra* note 72, 645.
[69] HENRY G. SCHERMERS, DENIS F. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION, (6th ed, Kluwer Law International, 2001).
[70] Rules of Procedure of the European Court of Justice, 2012. Article 27(1) of Rules of Procedure of European Court of Justice, 2012.
[71] Statute of the Court of Justice of the European Union 2012. Article 35 of ECJ Statute of the Court of Justice of the European Union 2012.
[72] *Supra* note 128.
[73] Supra note 125, at 17.
[74] *Supra* note 19, 336.

motivations courtesy which certain arbitrators feel the need to make dissenting opinions. The above predicament is to be undertaken keeping in mind the presence of a genuine connection between the desire of issuing a dissenting opinion and the consequent ramifications.[75] Notably, making a dissenting opinion is a right but not a duty.[76] Notwithstanding the above, in examining the actual effect that dissenting opinions have; relevant Arbitration Rules and National Arbitration Acts should be taken into account. "The relevant Lex arbitri should nonetheless be considered so as to ensure that mention or non-mention of the dissent in the award will not jeopardize its validity. Should the relevant Lex arbitri be silent on the issue […] due regard will have to be paid to the authoritative practice of the challenge court at the seat of arbitration".[77]

The biggest argument forwarded towards the lawlessness of dissenting opinions is the "aesthetic effect"[78] that it embodies within itself. The apprehension that such opinions may contribute towards establishing a foundation for challenging the validity of the award substantially attributes to the lawlessness of dissenting opinions. For instance, it may so happen that the dissenting arbitrator possesses some knowledge which when communicated to the losing party be the basis for challenge of the award, or "a basis for resisting an action for enforcement by the winning party".[79] Alternatively, the dissenting arbitrator may also be aware of a substantial *procedural* defect that may result in the attribution of a presumption of fundamental unfairness to the majority award. In contrast a dissenting opinion finds support

[75] C Mark Baker and Lucy Greenwood, *Dissent-But only if you REALLY Feel you Must, Why Dissenting Opinions in International Commercial Arbitration Should Only Appear in Exceptional Circumstance*, Disp. Resol. Int'l 31, 7 (2013).
[76] *Id.*
[77] Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal* 26 ASA Bulletin, 3, 446.
[78] Aesthetic effect can be defined as that feeling of biasness that is attached to a dissenting arbitrator if his verdict is usually in favour of the party that has appointed him.
[79] *Supra* note 12.

among arbitrators and scholars in the context that they tend to foster and generate debates about the majority award amongst the members of the tribunal.[80]

An arbitrator can resort to deliver a dissenting opinion based on varied factors. The legal background and ideology are some of the motivating factors courtesy which an arbitrator might resort to deliver a dissenting opinion. Another primary reason for issuing dissenting opinions might be that the dissenting arbitrator has given up convincing the majority arbitrators of his standing and approach towards the dispute and thereby declares his dissatisfaction to all interested parties in the form of a dissent by informing them how he would have decided the issue had he been a sole arbitrator in the dispute. However, if the parties can see from the final award that their arguments have been thoroughly considered, and if they were well informed about the reasons that led to the result, there should be no need for the issuance of a separate opinion, as its predominant purpose has been assumed by the award itself.[81]

Although party appointed arbitrators are supposed to be impartial and independent, some believe that with the availability of dissenting opinions, arbitrators may feel pressurized to support the party that appointed them and find it as a way of disclosing their support.[82] An arbitrator may dissent out of a sense of duty or loyalty to the party that appointed him/her. This sense of duty or loyalty is contradictory to the notion of independence and impartiality that every arbitrator enjoys by virtue of him being a part of an arbitral tribunal and subsequently such contradictions have negative ramifications upon the parties involved and the arbitration proceedings as a whole.[83]

[80] *Supra* note 4.
[81] *Supra* note 19, 341.
[82] *Supra* note 2, 224.
[83] Ilhyung Lee, *Introducing International Commercial Arbitration and Its Lawlessness, By Way of the Dissenting Opinion*, 19 Contemp. Asia Arb. J., 4 (2011).

The balance of presumption issue for dissenting arbitrators is also to be duly noted in the present context where it is usually presumed that an arbitrator dissenting is expressing his dissent with the sole intent of satisfying the party who appointed him/her. Other presumptions may include but are not limited to the intention of the dissenting arbitrator to disrespect and discredit the other members of the tribunal and *lastly*, dissents aiming to disclose the deliberation procedure. Such presumptions are usually negative drives in the arbitration proceedings and tend to have an adverse impact on future arbitration proceedings.

E. *Dissenting Opinions in Practice: - The case of Tokios Tokeles*

In general arbitral practice it is very rare for the chairman of an arbitral tribunal to dissent while the two party appointed arbitrators have concurred with each other. Such a unique situation was illustrated in the case of *Tokios Tokeles*[84], where Prosper Weil the presiding chairman of the arbitral tribunal issued a dissenting opinion. In short, the case involved the issue of determining nationality under the requisite ambit of Article 25 of the ICSID Convention. The uniqueness of the decision lies in the very fact that it brings forth a very unusual practice which highlights a high level of neutrality and independence within the members of the tribunal. Notably, the dissenting opinion in the above mentioned case duly illustrates the scope and extent of dissenting opinions. As Prosper Weil in the dissenting opinion has stated that

> "If I have decided to dissent, it is because of the approach taken by the tribunal on the issue of principle raised in this case for the first time in ICSID's history is in my view at odds with the object and purpose of the ICSID Convention […] my dissent does not relate to any particular aspect of this brilliantly drafted Decision, or to any particular assessments of the facts […] but to the philosophy of the decision".[85]

[84] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, http://www.italaw.com/sites/default/files/case-documents/ita0863.pdf.
[85] *Id.* Dissenting opinion of Prosper Weil in Tokios Tokeles v Ukraine.

CHAPTER II: - EXISTING LEGAL REGIMES GOVERNING DISSENTING OPINIONS IN INTERNATIONAL ARBITRATIONS

A perusal of modern arbitral legislation illustrates the fact that dissenting opinions in international commercial arbitration are not referred to and dealt expressly. Under the current prevailing regime there is no uniform international regime governing the procedural aspects of dissenting opinions.[86] For understanding the above, an example by reference which can be taken is the 1987 Swiss Act,[87] which does not allow for dissenting opinions in express terms but nonetheless has been interpreted as permitting arbitrators to give reasons for their dissent.[88] Furthermore, the Netherlands Arbitration Act 1986 also does not contain any provision allowing issuance of dissenting opinions, but the "authoritative commentary"[89] regarding the same states that "while dissenting opinions are not customary in Netherlands, they are not excluded".[90] From a comparative perspective, the act of delivering dissenting opinions is a very common practice in common law countries and it is always considered as a duty by common law arbitrators to inform the parties about their dissent.

It is a widely accepted fact that most domestic arbitration laws as well as majority institutional rules do not directly address the issue of dissenting opinions.[91] Examples of few domestic jurisdictions which expressly grant recognition to dissenting opinions are Article 37(3) of the Spanish Arbitration Act[92] and Article 24(2) of the Brazilian Arbitration Act[93]. Article 37(3) of the Spanish Arbitration Act provides that arbitrators may attach a dissenting opinion to the final arbitral award[94] and Article 24(2) of the Brazilian Arbitration Act similarly provides that a

[86] JULIAN D.M. LEW, LOUKAS A. MISTELIS, STEFAN M. KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, (Kluwer Law International, 2003), 645.
[87] Swiss Private International Act 1987.
[88] Marc Blessing, *The New International Arbitration Law in Switzerland*, 5 Journal of International Arbitration 9, 67 (1985).
[89] SANDERS PIETER & VAN DEN BERG ALBERT JAN, THE NETHERLANDS ARBITRATION ACT 1986, (Kluwer Law and Taxation Publishers, 1987),33.
[90] *Supra* note 70.
[91] Jacques Werner, *Dissenting Opinions: Beyond Fears*, 9 Journal of International Arbitration 4 (1992).
[92] CARLOS GONZÁLEZ-BUENO, THE SPANISH ARBITRATION ACT: A COMMENTARY, (1st ed, S.L Dykinson,2016).
[93] Romano, Cristina Schwansee, *The 1996 Brazilian Commercial Arbitration Law*, 5 Annual Survey of International & Comparative Law 1, (1999).
[94] *Supra* note 78.

dissenting arbitrator may state his vote separately.[95] Further, Article 53 of the Chinese Arbitration Law[96] and Article 39(1) of the Bulgarian Arbitration Law[97] also expressly provide for the opinion of the dissenting arbitrator to be recorded in writing. Article 53 of the Chinese Arbitration law states that:

> "The arbitration award shall be made in accordance with the opinion of the majority of the arbitrators. The opinion of the minority of the arbitrators may be entered in the record. If the arbitration tribunal is unable to form a majority opinion, the arbitration award shall be made in accordance with the opinion of the presiding arbitrator."[98]

In contrast, an example of a domestic legal regime which does not deal with the issue of dissenting opinions is the English Arbitration Act 1996.[99]

From an institutional perspective it is noteworthy that ICSID Arbitration Rules[100] and the Arbitration Rules of the Netherlands Arbitration Institute (NAI)[101] are the only prevailing arbitral regime that recognize the right of an arbitrator to issue dissenting opinions. In particular, ICSID Arbitration Rules i.e. Rule 47(3) which reproduces paragraph 4 of the Washington Convention postulates that:

> "any member of the tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent."[102]

Interestingly, the Arbitration Rules of the Netherlands Arbitration Institute (NAI) do not allow the opinion of the minority arbitrator to be attached in the final award. However, the dissenting arbitrator is entitled to issue his separate opinion to his co-arbitrators and to the parties. Article 43(4) of the Arbitration Rules of the Netherlands Arbitration Institute (NAI) state that:

[95] *Supra* note 79.
[96] Arbitration Law of the People's Republic of China, 1994.
[97] Law on the International Commercial Arbitration Bulgaria, 2002.
[98] *Supra* note 82.
[99] The English Arbitration Act, 1996. The Act is silent when it comes to dissenting opinions.
[100] *Supra* note 43. Article 47(3) of ICSID Rules.
[101] Netherlands Arbitration Institute Arbitration Rules, 2015. Article 43(4) of NAI Rules.
[102] *ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, 4 Int'l Tax & Bus. Law. 362 (1986); Rule 47(3). See also, Washington Convention; Article 48(4).

> "The award shall not state a minority opinion. However, a minority may express its opinion to the co-arbitrators and the parties in a separate written document. This document shall not be considered to be a part of the award."[103]

Currently, some regimes require the mandatory inclusion of dissenting opinions as part of the final award. The ICANN Rules on Uniform Domain Name Dispute Resolution Policy (UDRP), Rules of the Arbitration and Mediation Center of the Chamber of Commerce Brazil-Canada, the 2005 Rules of the Lisbon Center of Commercial Arbitration and the 2005 Rules of the Oslo ADR Institute are good examples.[104] The governing Rules of the Arbitration and Mediation Center of the Chamber of Commerce Brazil-Canada also allow for the inclusion of dissenting opinions in the final award. The Rules state that "the arbitrator who disagrees from the majority can substantiate the defeated vote, which shall be a part of the award".[105] The ICANN Rules provide that, "any dissenting opinion shall accompany the majority decision".[106]

A. Admissibility of Dissenting Opinions in International Commercial Arbitrations

It is well-accepted in international arbitral practice that if the designated institutional rules do not categorically address the admissibility of dissenting opinions such opinions are not by necessary inference prohibited nor impermissible.[107] The above mentioned inference draws support from the legislative history of German Arbitration Law which indicates that the drafters of the law decided against incorporation of a specific provision which allowed for dissenting opinions as they concluded that such a provision would be superfluous in nature because dissenting opinions were generally accepted.[108]

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[103] *Supra* note 87.
[104] *Supra* note 65, 445.
[105] Section 10.3.3 of the Rules of the Arbitration and Mediation Center of the Chamber of Commerce Brazil-Canada, 2011.
[106] Rules for Uniform Domain Name Dispute Resolution Policy, 2009. ¶15(e) of the Rules.
[107] *Id*.
[108] *Supra* note 9.

Traditionally, especially in the context of civil law jurisdictions dissenting opinions have always faced opposition in relation to their admissibility. Some of the arguments opposing admissibility of dissenting opinions can be best summed up as; *firstly*, disclosures being the fundamental tenet of dissenting opinions, such opinions automatically violate the principle of confidentiality of deliberations in the tribunal.[109] Further in conjunction with the above opposition, it has also been stated that a violation of the principle of confidentiality of deliberations may provide a sufficient reason to challenge the majority award.

Noteworthy is the observation of the *Cour de Cassation* in the same regard where the French Supreme Court has observed that it would be an undesirable result if a dissent in an otherwise perfectly legal award let to its annulment.[110] Thus, it can be safely concluded that currently the dispute in relation to dissenting opinions in international arbitrations lies in determining the virtuous nature of such opinions i.e. whether they are good or bad, necessary or unnecessary. Otherwise there is general consensus regarding the fact that dissenting opinions are and will remain a part of international commercial arbitration and are perfectly admissible in nature.[111]

Furthermore, in addition to the above admissibility or otherwise, of dissenting opinions, such opinions do not find a mention in the LCIA Rules inspite of the fact that the right to issue a dissenting opinion is a well-recognized right in England.[112] A justification for the same, which can be hypothesized, is that the drafters of the rules did not consider it important to incorporate a provision which specially allowed for dissenting opinions, as it is a well-established practice to issue dissenting opinions in England. In situations where differences between arbitrators arise, then Article 26.5 and Article 26.6of the LCIA Rules[113] are resorted to for a solution.

[109] *Id*.
[110] *Id*.
[111] *Supra* note 9.
[112] *Supra* note 12.
[113] The London Court of International Arbitration(LCIA) Arbitration Rules, 2014.

Article 26.5 specifically provides for a decision by the majority and Article 26.6 stipulates that in situations where the arbitrator refuses to sign the final arbitral award then the reason for the omitted signature is to be indicated in the award delivered by the majority.[114] Article 26.5 of the LCIA Rules states that:

> "Where there is more than one arbitrator and the Arbitral Tribunal fails to agree on any issue, the arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the presiding arbitrator shall decide that issue."[115]

In the absence of any legislated procedure to deal with dissenting opinion the LCIA practice indicates that a dissenting arbitrator can follow three different approaches.[116] *Firstly*, the dissenting arbitrator can express his dissent in the body of the final award. *Secondly*, upon the discretion of the tribunal the dissenting arbitrator may attach his dissent separately after the signature page of the final award and issue the same to the parties at the time of delivery of the majority award. *Thirdly*, the dissenting opinion is sent to the parties at the same time of the final award but it is not bound with the award itself. Notably, the first approach is usually exercised in situations where the dissenting arbitrator does not agree with a specific point within an award.

Likewise, the practice of delivering dissenting opinions in ICC arbitrations is also to be taken into due consideration keeping in mind the provisions of the ICC Rules relating to scrutiny of awards.[117] The ICC Rules neither prohibit nor allow for dissenting opinions in International Arbitration; but has developed its own method of tackling dissenting opinions. Pursuant to the stipulated Article 25(1) of the ICC Rules:

> "…the dissenting arbitrator is invited to indicate if his document constitutes a dissenting opinion which he wants to have communicated to the parties or just comments for the benefit of the Secretariat and the Court. The majority should then be invited to consider

[114] *Supra* note 22.
[115] *Supra* note 96.
[116] *Id*.
[117] *Supra* note 28.

> whether in view of the dissenting opinion, they want to change anything in the award. At the same time the arbitral tribunal shall be informed that the dissenting opinion will be communicated to the parties when notifying the signed award".[118]

In addition to the above mentioned, the ICC Rules under Article 25(1) do not allow for dissenting opinions to be part of the final award. The rationality behind the same can be understood to be derived from Article 27 and Article 37 of the ICC Rules read in conjunction with Article 6 of the internal Rules of the Court which postulates that the ICC Rules primarily are concerned with the enforceability of the award.[119]

Notwithstanding the above, the CPR Rules have an express provision incorporated in them which categorically allow for dissenting opinions.[120] Article 15.3 of the CPR Rules state that:

> "A member of the Tribunal who does not join in an award may issue a dissenting opinion. Such opinion shall not constitute part of the award."[121]

The CIETAC Arbitration Rules (1998) also allow for the attachment of dissenting opinion to the majority award.[122] The AAA[123] and the Euro-Arab Chambers of Commerce[124] also does not exclusively deal with dissenting opinions. Also, the Arbitration Institute of the Stockholm Chamber of Commerce prior to 2007 allowed for dissenting opinions.[125] In contrast, the governing rules of the Franco-German Chamber of Commerce and Industry(COFACI) expressly prohibit arbitrators from expressing their dissent.[126] In situations where the

[118] *Id*.
[119] *Supra* note 22.
[120] *Article 15.3 of The International Institute for Conflict Prevention & Resolution(CPR Rules),* (Feb. 11, 2017, 10:00AM), https://www.cpradr.org/resource-center/rules/arbitration.
[121] *Id.*
[122] J.TAO, *Amendments to CIETAC Arbitration Rules*, Rev. arb. 1998, 597.
[123] The American Arbitration Association (AAA), (Feb. 11, 2017, 10:00AM), https://www.adr.org/aaa/faces/rules/searchrules?_afrLoop=720341066419819&_afrWindowMode=0&_afrWindowId=hwc6rh6na_80#%40%3F_afrWindowId%3Dhwc6rh6na_80%26_afrLoop%3D720341066419819%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dhwc6rh6na_152.
[124] MAURO RUBINO SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE, (2nd ed. Kluwer International, 2001).
[125] *Article 32(4) of 1999 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC),* (Feb. 11, 2017, 10:00AM), http://www.sccinstitute.com/dispute-resolution/rules/. However, the same Article was deleted on account of no other major international arbitration regime providing expressly for dissenting opinions.
[126] *Supra* note 78.

institutional Rules are silent regarding issuing dissenting opinions it can be safely inferred from the Rules that the issuance of such opinions will primarily be dependent upon the law governing the arbitral proceedings or by the arbitration agreement itself. The Russian rules take into cognizance the right of an arbitrator to dissent. The Rules of the Arbitration Court of the USSR Chamber of Commerce and Industry (Para.35.22) explicitly state that:

> "… The Arbitrator disagreeing with the decision of the majority can express in writing his dissenting opinion which shall be attached to the file."[127]

A question that is poignantly raised in relation to a dissenting arbitrator is that when should an arbitrator dissent? In answer to the question raised, the appropriate response would be that an arbitrator should in all circumstances dissent only during the final phases of deliberation when it becomes clear for an arbitrator that the majority within the tribunal will decide contrary to his stand. Furthermore, "an open expression of confronting opinions on issues of facts and law is only capable of strengthening the legitimacy of the arbitral proceedings if it is made in a polite and restrained manner".[128] Thus, it is highly suggested that the admissibility of dissenting opinions in international arbitrations should be dependent upon a balance of interest test whereby the efficacy of the final arbitral award is balanced with the legitimate desire of an arbitrator to express his disagreement with a majority award.

B. Evolution of Acceptance of Dissenting Opinions

The evolution of acceptance of dissenting opinions as a general practice in ICC arbitrations is particularly interesting especially in the context of the reasons put forth by the Working Party[129] set up to deliberate upon the discretion of arbitrators to write dissenting opinions. In pursuance of the same the Working Party invited commentary, issued preliminary reports and then

[127] *Id*.
[128] *Supra* note 23, 345.
[129] *Supra* note 33.

ultimately a final report in 1988.[130] In a sum, the Working Group concluded that "it was neither practical nor desirable to attempt to suppress dissenting opinions in ICC arbitrations" and also that the ICC "should neither discourage nor encourage the giving of such opinions".[131] Moreover the report submitted by the Working Party also contained suggested methods for the handling of dissenting opinions delivered by arbitrators. The Working Party suggested that only in circumstances where the opinion was "prohibited by law"[132] or "where the validity of the award might be imperiled, either in the place of arbitration or in the place of enforcement"[133] should dissenting opinions be disallowed.

It is in pursuance of the same suggestions dissenting opinions in current practice are usually sent out accompanying the majority award in ICC Arbitrations. Notably, during the discussions for drafting the Model Law it was suggested that a provision governing dissenting opinions be incorporated but the same did not receive much support.[134] In lieu of the above it is also to be noted that the UNCITRAL Rules did not contain any provisions expressly allowing or dis-allowing dissenting opinions until the Iran-US Claims Tribunal, which categorically prompted for an incorporation of a provision specifically allowing dissenting and concurring opinions.[135]

Interestingly, the ICC Court of Arbitration has the discretion to allow an arbitral panel to attach dissenting opinions to the final award subject to the fact that the dissenting opinion should not adversely affect the enforceability and recognition of the final award.[136] It is further interesting

[130] Fourth Report on Dissenting and Separate Opinions, Working Party on Partial and Interim Awards and Dissenting Opinions, **ICC** Commission on International Arbitration, Doe. No. 420/293 Rev. 2.
[131] *Id*, ¶2.
[132] *Supra* note 19.
[133] *Id.*
[134] HOWARD M. HOLTZMANN, JOSEPH E. NEUHAUS, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY, (Kluwer Law and Taxation Publishers, 1989), 837 & 856.
[135] *Supra* note 55. Iran-US Claims Tribunal Rules; Article 32(3) states that "any arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefore be recorded."
[136] Laurent Levy, *Dissenting opinions in International Arbitration in Switzerland*, 5 ARB. INT'L 35(1989).

to note that the discretion of the ICC Court of Arbitration is primarily exercised in situations when the final award of the arbitral panel is to be enforced in a civil law jurisdiction; where usually the ICC Court prohibits the publication of dissenting opinions so as not to jeopardize the enforceability of the arbitral award in that jurisdiction.[137]

[137] *Id.* See also, J.L SIMPSON AND H. FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 226, 227(1959).

CHAPTER III: - UNDERSTANDING THE PURPOSE AND USEFULNESS OF DISSENTING OPINIONS IN INTERNATIONAL COMMERCIAL ARBITRATION

A. General Consensus of Scholars about Dissenting Opinions in Arbitral Practice

The tradition of dissent is uncommon in civil law and is a creation of common law. However, the pertinent question which needs to be deliberated upon at this juncture is whether such opinions in actuality contribute towards the development of jurisprudence of arbitral practice? The response in lieu of the question raised can be three-fold.[138] *Firstly*, the absence of the principle of s*tare decisis* in international arbitration and the non-appealable nature of almost all awards highlights the minimalistic contribution of dissenting opinions towards arbitral jurisprudence. *Secondly*, dissenting opinions by their very nature automatically raise doubts over the efficacy of the arbitral process and threaten the legitimacy and validity of an award.[139] *Lastly*, as Maitre Matthieu has observed that:

> "Certain arbitrators, so as not to lose the confidence of the company or the state which appointed them, will be tempted, if they have not put their point of view successfully in the course of the tribunal's deliberation, systematically to draw up a dissenting opinion and to insist that it be communicated to the parties."[140]

The above observation is further concretized by other scholars who duly observe along similar lines and remark that:

> "Although party-appointed arbitrators are supposed to be impartial and independent in international arbitrations, some believe that with the availability of dissent, arbitrators may feel pressure to support the party that appointed them and to disclose that support."[141]

Notably, dissenting opinions have no influence either on the rationale or on the operative part of the final award as it is complete devoid of authority.[142] In summary, according to general consensus the practice of arbitration militates against delivering dissenting opinions and the option of writing such opinions should be resorted to in exceptional circumstances.

[138] *Supra* note 12.
[139] *Supra* note 25, at 223, 231.
[140] *Supra* note 1.
[141] *Supra* note 19.
[142] *Supra* note 65, 453

Furthermore, caution should be duly exercised in delivering dissenting opinions as they should be "short, polite and restrained without imperiling the authority of the majority award."[143] The author believes that forbidding dissenting opinions fearing their impact on the admissibility and enforceability of the award delivered by the majority is not a preferable approach. Even though the author concedes to the fact that the rates of abuse of such opinions are high[144], they should be resorted to in exceptional circumstances. Such an approach would invariably lead to the elimination of abuse of such opinions and would result in dissenting opinions becoming masterpieces of arbitral jurisprudence.

B. Debating the Reasons for Challenging the Existence of Dissenting Opinions

The primary reasons challenging the existence of dissenting opinions in international arbitration can be roughly summarized as three fold.[145] *Firstly*, dissenting opinions are opined to connote a method whereby the secrecy of the arbitral decision is breached and inappropriately disclosed.[146] *Secondly*, the presumption of biasness that is always attributed to a party appointed arbitrator gets further concretized when he issues a dissenting opinion. *Lastly*, the apprehension of dissenting opinions paving the way to a challenge of the award also substantially contributes to viewing such opinions in a negative light. Arguably all the objections raised in counter of the practice of issuing dissenting opinions in international arbitration can be categorically countered by the following arguments. In response to the first argument it can be argued that if arbitration awards enjoy similar treatment to state court decisions then a corollary that can be drawn is that dissenting opinions in state courts do not

[143] *Supra* note 46.
[144] *Supra* note 12.
[145] J. Werner, *Dissenting Opinions Beyond Fears*, 9 J.Int.Arb. 4, 23.
[146] *Supra* note 25, 223, 234 and 237.

disclose the method in which the decision was arrived but only make aware that a dissenting opinion exists.

Similarly, in relation to the presumption of biasness argument it is to duly noted that in general arbitral practice a party appointed arbitrator is primarily appointed because of his shared cultural affinity with the party. It is this shared culture and approach which explains "why frequently an arbitrators dissent is in line with the position of the party which has appointed him."[147] *Lastly,* as no review of the merits is allowed in arbitral awards a dissenting opinion in such a case may highlight a gross injustice committed by the tribunal and may provide for a reason for setting aside such an award.[148]

Further support for dissenting opinions can be derived from the fact that

> "…open criticism of flaws allegedly affecting arbitral proceedings, or the public expression of differing views on a particular issue, tends to strengthen the legitimacy of the arbitral proceedings and to lead to more through reasoning of the majority."[149]

Notwithstanding the above mentioned it is also suggested that dissenting opinions impart a feeling of "cosmetic satisfaction"[150] towards the dissenting arbitrator or the parties and also tend to be useful in arbitrations where one or more of the parties is a government.[151]

The author feels that the balancing test which the ICC Rules propagate is particularly important for the present discussion. The balancing test as mentioned above attempts to maintain equilibrium between an arbitrator's duty of diligence and the efficacy of the majority award. Whenever, a dissenting opinion is submitted to the Court, the Court reviews the rationale of

[147] *Supra* note 78.
[148] For example, the dissenting opinion in the case of Klockner (ICSID Case No. ARB/81/2) provided the basis on which the subsequent Ad hoc Committee set aside the award originally given.
[149] Book review by Laurent Levy and William W. Park, *The French Law of Arbitration by Jean Robert and Thomas E. Carbonneau*, 2 ARB. INT'L 266 (1986). See also, Laurent Levy, *Dissenting opinions in International Arbitration in Switzerland*, 5 ARB. INT'L 35(1989).
[150] E. GAILLARD, J. SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *(*1st *ed.* Kluwer Law International 1999), 766.
[151] *Supra* note 118.

the award and then decides according to its discretion[152] whether or not to attach the dissenting opinion to the majority award keeping in mind that such an opinion should not impair the enforceability of the majority of the award. Also, it should not be forgotten that an arbitrator plays a role of a judge and therefore he should not be subject to limitations in relation to his right to form an opinion and to express it.[153] Thus, it follows as a necessary inference that dissenting opinions instead of being discouraged and prohibited should be constructively dealt with. The constructive approach as suggested by the author would include drafting the dissenting opinion at the time of decision of the majority whereby the arbitrators would have an opportunity to deliberate and ponder upon the result of the award.

C. Highlighting the Undesirability of Dissenting Opinions in International Arbitrations

A perusal of the available surveys about prevalence of dissenting opinions in international arbitrations brings forth a noteworthy statistic. Amongst one of the surveys conducted, it was concluded that out of 107 individual state arbitration laws only 24 domestic arbitration laws expressly allowed dissenting opinions, while the rest of the domestic arbitration laws were silent on the subject and interestingly none of them precluded dissents.[154] In pursuance of the same, the ICC Commission while considering the effectiveness of dissenting opinions has observed that such opinions clearly underscore and highlight the "aesthetic effect"[155] of arbitration whereby a link between an arbitrator and the party appointing that arbitrator is established.[156] The ICC Commission also makes an observation in the same regard that such opinions encourage a debate about the merits of the case before the Court of Arbitration. *Lastly,*

[152] *Supra* note 5.
[153] *Supra* note 78.
[154] *Supra* note 65, 437–466. These 24 countries are listed as Spain, Portugal, Norway, Romania, Poland, Lithuania, Estonia, Bulgaria, Turkey, Algeria, Israel, China, Indonesia, Brazil, Panama, Peru, Colombia, Ecuador, Venezuela, Bolivia, Guatemala, Costa Rica, El Salvador and Canada (Quebec).
[155] *Supra* note 78.
[156] ICC International Court of Arbitration, *Final Report of the Working Party on Dissenting Opinions*, 2 ICC International Court of Arbitration Bulletin,1,32 (1991).

the ICC Commission also latently observes that the discretion to write dissenting opinions may serve as an impetus for an arbitrator to not reach a unanimous decision.[157]

In lieu of the afore mentioned considerations of the ICC Commission the English case of *F Ltd v. M Ltd*[158] is to be duly considered at this juncture. This case is of importance because it is an example where a dissenting opinion may provide grounds for challenging the credibility and enforceability of an arbitral award. In the above mentioned case the dissenting arbitrator while delivering a very detailed dissenting opinion disagreed with the majority arbitrators on a number of issues which ultimately provided the claimants with an incentive to appeal against the award.[159] On appeal, the Court relying on the dissenting opinion annulled the arbitral award on grounds of serious irregularities.[160] Furthermore, in the context of dissents Justice Homes has remarked that dissents are in general practice "useless" and "undesirable".[161]

Another argument proposed by the traditionalists against dissenting opinions is that unlike in state adjudication, dissenting opinions do not contribute to the development of the law nor contribute towards the development of the jurisprudence which thereby makes the use of such opinions redundant. Furthermore, as according to the prevailing practice there exists no appeal on merits of the arbitral award[162] except for in very limited and exclusive circumstances which makes an arbitral award final and binding upon the parties.

[157] *Id*, 32.
[158] F Ltd v. M Ltd, EWHC 275 (TCC), [2009].
[159] The appeal was brought under Section 68 of the Arbitration Act 1996 based on grounds as identified and discussed in the dissenting opinion.
[160] *Supra* note 35.
[161] Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904).
[162] *Supra* note 16,374. The above authors remark that, "one may feel that the Working Party's view that 'the ICC should neither encourage nor discourage the giving of such opinions' is too weak." See also, Laurence Shore & Kenneth Juan Figueroa, *Dissents, Concurrences and a Necessary Divide Between Investment and Commercial Arbitration*, 3(6) GLOBAL ARB. REV.18 (2008).

In addition to the above, hardliners also observe that as errors of law or fact are not grounds for successfully challenging an award[163], a dissenting opinion which highlights such errors are non-effective in nature. Moreover, one latent disadvantage of dissenting opinions which is not duly acknowledged in the existing literature is their potential to increase the burden of cost of arbitration for the parties involved. Dissenting opinions will inevitably increase the required time to complete the arbitral process as each opinion requires a significant amount of time to draft, circulate and discuss.

The corrective function of dissenting opinions in international arbitrations is rightfully endorsed by Alan Redfern and Martin Hunter who concede to the fact that an arbitrator may dissent if the majority's award is flawed. [164] However, according to the authors, such an endorsement defeats the very purpose of arbitration i.e. to arrive at a determinative decision. In addition to the above stated, the authors also observe that dissenting opinions "risk bringing the entire arbitral process into disrepute and endanger the efficacy of the arbitral process."[165]

Similarly, the opponents of dissenting opinions view dissenting opinions as an "escape route" which according to them hampers the motivation of an arbitrator to pursue deliberations with other arbitrators so as to arrive at a determinative solution. Given, once the minority arbitrator realizes that he cannot prevail over the opinion of the majority he automatically uses the easiest option i.e. the option of writing a dissenting opinion. Further, dissenting opinions provide the option of a "pure and unaltered" statement of opinion which can clearly indicate to the appointing party that its position was vehemently defended.[166]

[163] *Supra* note 19. The authors duly observe that "Dissenting opinions can improve the legitimacy and performance of international arbitration, and thus offer significant benefits that offset the risks posed." See also, Richard M. Mosk, *The Debate over Dissenting and Concurring Opinions in International Arbitration,* 26 UWLA L. REv. 51, 55 (1995).
[164] *Supra* note 1.
[165] *Id*.
[166] MATTHIEU DE BOISSESON, LE DROIT FRANFAIS DE (3rd ed, Arbitrage National et Internationa, 1998), 781.

Moreover, the possibility of dissenting opinions providing legible grounds for challenging the award is also duly considered by the authors.[167] Interestingly, as observed and understood by the author of this thesis, Redfern and Hunter also subtlety mention about the "trigger effect" of dissenting opinions. The trigger effect of dissenting opinions is to be better understood in the context of the number of accompanying questions that it automatically triggers.

Dissenting opinions raise serious questions pertaining to the partiality of the party appointed arbitrator especially in scenarios where the arbitrator dissents from an award that is in favor of the opposing party. Questions such as "whether the origin of dissent is courtesy a genuine difference of opinion or motivated by less creditable considerations?" are automatically triggered whenever a dissenting opinion is delivered. Some of the other related questions which get triggered are, for example, under what circumstances should a dissenting opinion be circulated to the parties? Notwithstanding the above mentioned, in order to fully appreciate the argumentation of traditionalists and hardliners opposing dissenting opinions in international arbitrations it is important to understand the existence of an overlap (if any) between the domestic legal system and international commercial arbitrations.

1. There exists no overlap between an individual domestic legal system of law and International commercial arbitration

International commercial arbitrations are often connoted as referring to "common law of international transactions".[168] In spite of the above connotation some scholars differentiate and demarcate between international commercial arbitrations and individual state domestic legal regimes. In their opinion justifying the existence of dissenting opinions premised on the fact

[167] *Supra* note 1. Alan Redfern and Martin Hunter believe that dissenting opinions serve as a motivation for challenging the award thereby leading to years of litigation and ultimately resulting in the delay of the enforcement of the award.

[168] Thomas Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 Columbia Journal of Transnational Law, 579 (1985).

that such opinions contribute, develop and improve the jurisprudence of international commercial arbitration to the same extent that it does in individual state legal regimes in an unworthy assumption.[169] They further opine that supporters of dissenting opinions possess a mistaken belief whereby they equate an arbitral tribunal and a panel of judges on the same pedestal.

In response to the question which is quite often raised supporting dissenting opinions in arbitral practice i.e. if dissenting opinions enjoy acceptance in domestic legal system with much ease why can't the same treatment be meted out to dissenting opinions in international commercial arbitration? the answer would be that judges are not appointed by the disputing parties in domestic legal systems whereas in arbitration the arbitrators are. Thus, the necessary presumption which automatically follows due to the manner of appointment of judges/arbitrators is that unlike a judge in a court an arbitrator will always dissent if he has a bias towards the unsuccessful party.[170] As Alan Redfern duly noted in 2003 during his Freshfields lecture that of 22 available dissenting opinions submitted in ICC Arbitrations in 2001, every dissent submitted was by the arbitrator who was appointed by the unsuccessful party.[171] Furthermore, the level of biasness was statistically studied by Eduardo Silva Romero who verified that out of 31 dissenting opinions submitted to ICC arbitrations in 2003, 30 were submitted by the arbitrator nominated by the losing party.[172]

Another argument which can be hypothesized in support of the contention that there actually does not exist any overlap between individual domestic systems and international commercial arbitration is that as compared to an arbitral tribunal the authority of a judgment delivered by a judge is entirely dependent upon the reputation of the judge and also the judicial system

[169] *Supra* note 10.
[170] JAN PAULSSON, THE IDEA OF ARBITRATION, (1st ed, Oxford Publishing, 2013).
[171] *Supra* note 29.
[172] *Supra* note 169.

concerned. In contrast with the judicial courts the tribunal derives its authority from itself and only itself.[173] A tribunal is brought together only to determine a particular dispute, after which it disperses. Hence, it can be argued that a dissenting opinion is sufficient enough to overturn this fragile base on which the entire tribunal is based upon. Simply put, a dissenting opinion challenges the validity of the final arbitral award. As observed by White J in relation to dissenting opinions that,

> "the only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusion of courts of last resort."[174]

Further as has been observed by the Court of Appeal in a recent case[175] where one out of the three arbitrators delivered a dissenting opinion:

> "The difference of view between the experienced arbitrators in this case provides, of itself, ground for contending that the decision of the majority is 'at least open to serious doubt".[176]

The *raison d'etre* of dissenting opinions not contributing to the jurisprudence of international commercial arbitration can be derived from the fact that because there is no mechanism in existence which allows for an appeal on merits against an arbitral award delivered by the majority, the contribution of dissenting opinions to the jurisprudence of international arbitrations are very limited. In lieu of the above it is also opined that in absence of a rule of binding precedent in international arbitration, the principles promulgated in arbitration proceedings are merely persuasive in nature for subsequent arbitration proceedings and are not thereby mandatory.[177] Thus, the contribution of dissenting opinions to the development of

[173] *Id.*
[174] *Per* White J in Pollock v. Farmers Loan and Trust Co. 157 U.S. 429 at 608.
[175] The Northern Pioneer, Court of Appeal, Civil Division (unreported, 2002).
[176] *Id.* The dissenting opinion of Phillips MR 64. See also, *Supra* note 29.
[177] *Id.*

international arbitrations is very much different as well as limited when compared to the contribution of dissenting opinions to individual domestic state regimes.

2. Confidentiality as a related issue to Dissenting Opinions

One of the distinct characteristic features of international commercial arbitration is confidentiality and secrecy of deliberations of the arbitral tribunal. For example, as postulated under the American Arbitration Association (AAA) Rules, "…the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award".[178] In pursuance of the same, it is to be duly noted that even though the forms of deliberations may vary from tribunal to tribunal, revealing such informal discussions or deliberations possesses the potential to seriously impair the arbitral process on a whole. The above-mentioned view is awarded recognition under the ICSID mechanism which requires deliberations to be private and secret[179] as according to the drafters it helps arbitrators to exchange their views without any hindrances. Although majority of the institutional Rules and domestic arbitration regimes do not categorically provide for the principle of confidentiality of deliberations, the principle is inherently assumed to be a cornerstone of commercial arbitration.[180] Notably, the IBA Rules of Ethics for International Arbitrators contemplate that all deliberations of the arbitral tribunal are to be confidential in nature.[181]

In the context of unilateral communications between the party nominated arbitrator and the party appointing him the American Bar Association (ABA) Code of Ethics does not categorically bar such communication whereas on comparison the International Bar

[178] *Supra* note 111. Article 34 of AAA Rules
[179] *Supra* note 43. Rule 15 of the ICSID Rules.
[180] *Supra* note 150.
[181] IBA Rules of Ethics for International Arbitrators 1987. Rule 9 provides: 'The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in, or give any information for the purpose of assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators.'

Association (IBA) guidelines do not approve of unilateral communications.[182] Furthermore, according to IBA guidelines if unilateral communications were to be undertaken then the arbitrator should inform the other party or parties and the arbitrators.

The principle of confidentiality is one of the most distinguishing features of international arbitration and it is this private quality of international arbitration which strongly opposes the publication of awards and dissenting opinions.[183] The threat posed by dissenting opinions to the principle of confidentiality is that they tend to breach the confidentiality of the tribunal's deliberations[184] by disclosing internal discussions which violate the principle of secrecy of deliberations of the tribunal.[185] As the deliberations between the members of the tribunal are expected to be strictly confidential in nature and as according to general practice, the secrecy of the deliberations "is a fundamental principle which constitutes one of the mainsprings of arbitration"[186] dissenting opinions highlighting the internal discussions between the members of the tribunal are considered to constitute gross violations of the principle of confidentiality.

The principle of utmost secrecy is well established in France where the French Civil Code postulates that deliberations between arbitrators having taken place either in the form of an exchange of notes or emails of telephone conference calls must remain undisclosed to the parties.[187] Further, in France it is sometimes considered a breach of secrecy of deliberations even if it is revealed that the decision was unanimous.[188]

[182] *Id.* Article 5.3 of IBA Guidelines, 1987.
[183] Indeed, in a recent Swedish case, the Stockholm City Court invalidated an award because of publication of a preliminary decision on jurisdiction in an international arbitration reporter. See Swedish Court Imposing Involuntary Obligation of Secrecy A.I. Trade Argues, 13:12 Mealey's International Arbitration Report 9-11 (December 1998); See also Constantine Partasides, Bad News from Stockholm: Bulbank and Confidentiality AD ABSURDUM, 13:12 Mealey's International Arbitration Report 20, 22·24 (December 1998) (criticizing the decision and providing cites to cases from other jurisdictions rejecting such an extreme approach to secrecy).
[184] *Supra* note 29, 367.
[185] PIETER SANDERS, QUO VADIS ARBITRATION?: SIXTY YEARS OF ARBITRATION PRACTICE, (1st ed., Kluwer Law International, 1999), 283.
[186] *Supra* note 29, 238.
[187] *Supra* note 34.
[188] *Id.*

However, the extent to which dissenting opinions pose a threat to the principle of confidentiality is to be comprehended in the context of two different aspects.[189] *Firstly*, the ambit of the governing rule of secrecy i.e. whether the rule of confidentiality postulated in the governing law of the arbitral process applies only to deliberations or includes the voting process as well. *Secondly*, whether the content of the dissenting opinion reveals the actual content of the deliberations or merely discloses that the arbitrators have failed to agree on the interpretation of certain facts or law.

As argued by traditionalists and other hardliners opposing dissenting opinions, such opinions besides posing the threat of a potential breach of the principle of confidentiality of the internal deliberations of the tribunal, also jeopardize the authority of the arbitral award and in the process add nothing significant to the reputation of international commercial arbitration.[190] Countering the above argument against dissenting opinions, the proponents of dissenting opinions put forth the middle path as postulated by ICSID Convention.[191] The middle path as provided for under the ICSID Convention suggests that a dissenting opinion which does not reveal the intricacies of deliberations of the tribunal and is solely restricted to the evaluation of facts or applicable law does not violate the principle of confidentiality.[192]

Notwithstanding the above mentioned, the author of this thesis believes that the argument advanced that dissenting opinions breach the principle of confidentiality is baseless as nobody can prevent the dissenter from expressing his dissent to the parties. There will always be a risk of breach of secrecy associated with every deliberation of the arbitral tribunal and there is absolutely no rationale for prohibiting dissenting opinions on grounds that it leads to a breach in the principle of confidentiality.

[189] *Supra* note 22.
[190] *Supra* note 29, 223.
[191] ICSID Convention allows for both secrecy of deliberations as well as the option to publish dissenting opinions.
[192] *Supra* note 150.

D. Arguing in favor for the Desirability of Dissenting Opinions

According to proponents of dissenting opinions in international arbitrations, dissenting opinions invariably always ensures that every issue before the tribunal is duly addressed in the final award thereby protecting and upholding the integrity of the arbitral process.[193] It is also argued in favor of dissenting opinions that a well-reasoned dissent which highlights the flaws of the decision of the majority tribunal encourages the majority of the tribunal to thoroughly address the criticized issues ultimately improving the initial reasoning of the majority.[194] Thus, for the proponents of dissenting opinions such opinions improve the quality of the rationale of the arbitrators in the final award which as a consequence ensures that the majority is inclined to counter the reasoning of the minority arbitrator and justify their conclusion. Further, the value of dissenting opinions should not be underestimated especially considering the fact that the final arbitral award issued by the arbitral tribunal does not face an appellate review, except on very limited grounds.[195]

Dissenting opinions serve as clear indicators of the limits of the majority's opinion while at the same time highlighting the opinion of the minority. Also, such opinions advocate transparency in arbitral proceedings whereby the areas of disagreement are clearly highlighted in the opinion itself. Furthermore, dissenting opinions can also be viewed to be indicators of whether a particular adjudication represents a well settled principle of law or if it is only a weaker authority and narrowly confined to its own facts.[196] It can also be argued that dissenting opinions ensure the independence of an arbitrator whereby by virtue of having the right to write

[193] *Supra* note 19.
[194] *Supra* note 20.
[195] Hans Smit, *Dissenting Opinions in Arbitration*, 15(1) ICC International Court of Arbitration Bulletin 37 (2004).
[196] *Supra* note 65, 453.

a dissenting opinion, a minority arbitrator can always express himself when he/she does not agree with the reasoning of the majority.

In sum, as according to the arguments of proponents of dissenting opinions such opinions are to be preferred and promoted because of the corrective function that they perform which subconsciously forces the majority of the tribunal to strongly justify their reasoning in the award.[197] The fundamental justification on which the above statement is premised is that "vigorous debate improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side."[198]

Furthermore, viewing dissenting opinions in a positive light illustrates that they can also increase and improve the enforceability of the arbitral award. For example, when a dissenting opinion is handed over to the majority, the majority after perusal of the dissenting opinion may attempt to remedy "the defects in logic or argumentation"[199] if any in the final award. Alternatively, the presence of a dissenting opinion may help in satisfying the urge of the losing party to file an appeal to the award and thus promote the acceptance of the award.[200]

In addition to the above mentioned another argument that can be hypothesized in favor of supporting dissenting opinions in international arbitrations, is that dissenting opinions have the potential to facilitate "structural refinement of decisional methodologies"[201]. In lieu of the above, the "doctrinal paradox"[202] in the context of judicial decision making is also to be taken into consideration. The doctrine posits that complex arbitral cases which involve many issues are capable of being decided differently by the members of the same arbitral tribunal depending

[197] *Id*.
[198] W.J. Brennan, *In Defense of Dissents*, 37 Hastings L.J. 427, 430 (1986).
[199] *Supra* note 10.
[200] The losing party will be made aware by the majority tribunal that potentially all aspects working in his favour were considered yet the conclusion arrived at was not in his favour.
[201] *Supra* note 58.
[202] *Id.*

upon the approach adopted by the tribunal to the issues.[203] The different approaches that a tribunal may adopt may either be an issue based approach whereby the tribunal decides all the issues before it independently or a conclusion based approach whereby the tribunal decides the overall outcome of the dispute irrespective of whether the issues were decided differently or not.

Adopting the issue based approach as argued by proponents of dissenting opinions, promotes more clarity about the methodology adopted by the tribunal and increases transparency by "tying outcomes more closely to actual consensus on particular issues, rather than consensus about final outcomes"[204] thereby leading to an increased legitimacy of the award. The potential for introducing an issue based approach in international arbitration and the overall effect of the doctrinal paradox is directly attributable to the limited existence of dissenting opinions.[205]

E. Utilizing the option of Dissenting Opinion as an exception

Dissenting opinions currently have seemed to achieve a status of acceptance among various factions arguing in favor and various factions arguing against the prevalence of dissenting opinions. In pursuance to the acceptance referred to above, there is also a general consensus regarding the fact that the option of issuing a dissenting opinion in international arbitration is to be used "sparingly"[206] and only as a "last resort"[207]. Notably, *Alan Redfern,* who profusely argues against the practice of dissenting opinions has himself drawn a demarcation between three categories of dissent: "The good, the bad and the ugly".[208]

[203] *Supra* note 58.
[204] Adam Chilton & Dustin Tingley, *The Doctrinal Paradox and International Law,* 34 U**.** PA. J**.**INT'L L. 67, 68 (2012).
[205] *Id.*
[206] Supra note 194. The author observes that "Self-restraint should be the guide." *See also* John Alder, *Dissents in Courts of Last Resort: Tragic Choices?* 20 Oxford Journal of Legal Studies, 221 (2000).
[207] *Id.*
[208] *Supra* note 29, 223.

According to *Alan Redfern*, good dissents can be connoted as those dissents which are "short, polite and respectful to the majority and are primarily motivated by the professional conscience of the dissenting arbitrator".[209] Good dissents as classified by the author are advantageous as compared to other forms of dissent as such dissents allow the disagreeing arbitrator to express his opinion without a show of vanity or irascibility and most importantly they do not undermine the authority of the award. In view of *Redfern* bad dissents are those dissents in which the dissenting arbitrator continues arguing with the majority of the tribunal on the merits of the dispute and ultimately claims ignorance on the part of the majority.[210]

Ugly dissents as proposed by the author are those dissents in which the disagreeing arbitrator questions the entire arbitral process, for example by claiming biasness on the part of the majority.[211] It is noteworthy to note at this juncture that *Redfern*, in his article, specially has a problem with ugly dissents and not with good and bad dissents. The problem as highlighted in his article is that such dissents are neither valued nor appreciated in the context of international arbitrations as they undermine the final award and encourage the losing party to challenge the award.[212] Furthermore such dissents as argued by the author are dangerous because one of the few grounds based on which an arbitral award can be annulled or refused recognition and enforcement is the failure to adhere to the requirements of due process.

In lieu of the problem posed by ugly dissents, an example can be considered from the Swedish Court of Appeal.[213] In that case, an arbitral tribunal presiding over the dispute delivered a majority award against the Czech Republic much to the displeasure of the minority arbitrator. In response to the same the minority arbitrator delivered his dissenting opinion, in which he

[209] *Id.*
[210] *Supra* note 29, 223.
[211] *Id.*
[212] Other examples by which a dissenting arbitrator can question the entire arbitral process is by claiming that he was never properly consulted in regards of the issues before the tribunal or that proper procedures were not adhered to.
[213] The text of the Partial Award of 13 September 2001 and the Dissenting Opinion in this case, CMF v. Czech Republic is available at www.cetv-net.com/ne/articlefiles/439-cme-cv_eng.pdf.

attacked the final award on grounds of biasness and exclusion from deliberations of the tribunal. Countering the accusations of the dissenting arbitrator, the majority of the tribunal commented in their award that the minority arbitrator had failed to discharge his duty as an arbitrator and that his failure was "matched by the intemperance and inaccuracy of his dissent".[214] Following the counter arguments by the majority, the party appointed dissenting arbitrator encouraged Czech Republic to challenge the award in the Swedish Courts leading to all three arbitrators producing evidence in the Swedish Court Proceedings thereby leading to a delay in the enforcement of the award.[215]

Moreover, *Redfern* advocates resorting to dissenting opinions only under exceptional situations and further clarifies that if arbitrators feel the need to dissent they should submit only good dissents. He further summarizes his opinions as follows:

> "There may be circumstances in which an arbitrator is compelled by his or her professional conscience to dissent from the conclusions of the majority. If so, this can be done be a 'good' dissent - short, polite and restrained. To go further, and to continue to express arguments and opinions that were not accepted during the tribunal's deliberations, would seem to serve little or no purpose, except that of self-justification."[216]

Another plausible method of expressing a dissent by a frustrated arbitrator is that he may choose to resign from the tribunal if necessary.[217] Furthermore, recent trends are suggestive of the fact that dissenting opinions are expressed in the body of the final award rather than in a separate opinion.[218] Notwithstanding the recursive views of *Redfern* in his article, dissenting opinions can promote a constructive combination of the grounds of reasoning proposed by the

[214] *Id*, 625. In a Final Award dated 14 March 2003, the Czech Republic was ordered to pay US$354 million. Following the Swedish Court of Appeal's rejection of the challenge to the Partial Award, payment was made. (On the same facts, an arbitration tribunal in London had reached a different decision which not unexpectedly has caused criticism of the arbitral process: *see e.g.* Brower, Brower II and Sharpe, The Coming Crisis in the Global Adjudication System, 19(4) *Arbitration International* 424 (2003).

[215] In the event, the Swedish court dismissed the challenge to the arbitral award.

[216] *Supra* note 29**.**

[217] ***Id.***

[218] Hew Dundas, *F Ltd v M Ltd: The Implications of Dissenting Opinions on Serious Irregularity in Arbitration*, **75** Journal of Arbitration **(2009),** 454, 455; See also, *Supra* note 65, 437, 439 where different approaches for the arbitral tribunal to address dissent in (and outside of) the award have been discussed.

majority and the minority thereby leading to a better reasoned award which incorporates the reasoning of the dissenting arbitrator also in the final award.[219]

Another alternative that be suggested for a minority arbitrator is the option of compromise which can invariably also serve as an option to avoid writing dissenting opinions. However, a compromise between the arbitrators depends on different factors such as the nature of the dispute and personality of the arbitrator opting for compromise. As Professor Sanders has duly observed that "arbitrators are forced to continue their deliberations until a majority, and probably a compromise solution has been reached".[220] Furthermore, questions of realism have also influenced other would-be dissenters.[221] The impact of questions of realism can be clearly seen in some cases of the Iran-US claims Tribunal.[222] Noteworthy is the remark of Judge Howard Hotzman in the context of dissenting opinion who was of the opinion that:

> "…although believing that the damages awarded were half of what they should have been; why then do I concur in this inadequate award rather than dissenting from it? The answer is based on the realistic old saying that there are circumstances in which something is better than nothing".[223]

F. Do Dissents Produce Better Awards and Build Confidence in The Arbitral Process?

In the words of a prominent US Supreme Court Justice, dissenting opinions in judicial decision making "safeguards the integrity of the judicial decision making process by keeping the majority accountably for the rationale and consequences of its decision."[224] Furthermore, the esteemed Justice also opined that dissent "improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side."[225] In addition to the already

[219] *Supra* note 22.
[220] PIETER SANDERS, YEARBOOK COMMERCIAL ARBITRATION 1977 - VOLUME II, (1st ed. Kluwer Law International, 1977), 208.
[221] *Supra* note 29, 227.
[222] Ultrasystems Inc. v. Islamic Republic of Iran and Economic Forms Corp. (Iran-US CTR 100).
[223] Concurring opinion of Judge Howard Hotzman in Economy Forms Corp. V Islamic Republic of Iran (Case No.161), Iran-US Tribunal, https://www.biicl.org/files/3943_ina_synopsis.pdf.
[224] *Supra* note 197.
[225] *Id. See generally* L. Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 *Temp. L. Rev.* (1988), 307.

above mentioned advantages of having dissenting opinions in international arbitrations, it is also to be duly taken into consideration that the a well-reasoned dissent is a guarantee for a well- reasoned final arbitral award.[226]

The underlying rationale of the above mentioned statement that dissenting opinions act as a guarantee for better reasoned awards is premised on the idea that such opinions ensure a better quality resolution of the dispute. Therefore, it follows as a necessary inference from the above statement that a better quality resolution of the dispute does invariably lead to a better award. Further in lieu of ensuring a better quality resolution of the dispute, it is imperative wherever possible that dissenting opinions be circulated to the majority of the tribunal before the majority award is issued; a procedure which is duly followed in the present American appellate system and in the International Court of Justice.[227]

Recent research in social psychology indicates that parties involved in legal dispute resolution value the opportunity to be heard and to have their views considered at a higher pedestal than all other related virtues.[228] It can be positively argued that in arbitration or litigation the determinative factor of establishing legitimacy of the entire process is to be derived from the right to be treated fairly. The presence of a dissenting opinion in cases where it is necessary increases the legitimacy of the entire process by reassuring the losing party that alternative arguments were considered even though they were ultimately not accepted. Moreover, the presence of alternative opinions should invariably lead to an increased sense of satisfaction especially for the losing party thereby increasing the possibility that the award will be voluntarily complied with. The whole assumption that dissents enhance and build up public confidence in arbitral process is premised on the very fact that by allowing dissenting opinions,

[226] *Supra* note 19. Also, a well-reasoned dissent can insure that the majority opinion deals with difficult issues raised by the dissenting opinion.
[227] *Id.*
[228] TOM R.TYLER, WHY PEOPLE OBEY THE LAW (1st ed. Princeton University Press, 1990).

such opinions "enhance the perception of arbitration as a fair procedure".[229] Thus, it can be safely inferred that where the governing rules of the arbitral process permits dissenting opinions it is perceived to be fair by the public at large.

[229] *Supra* note 19.

CONCLUSION

The author of this thesis has in great detail dealt with the arguments forwarded for and against the prevalence of dissenting opinions in international commercial arbitration. The arguments supporting the prevalence of dissenting opinions are clearly lesser and weaker as compared to the arguments advanced against the prevalence of dissenting opinions. Inspite of the arguments forwarded by traditionalists who vehemently oppose the existence of dissenting opinions the author of this thesis believes that there should not be a blanket prohibition on dissenting opinions. The legitimate concerns of various scholars opposing the practice of dissent can be purposefully solved by legislating a code of ethics or other similar mechanisms which ensure that the option to publish a dissent is exercised by the author only in exceptional circumstances. From a positive perspective, dissenting opinions as proposed in the thesis contribute towards increasing the legitimacy of the final award courtesy their corrective function and also increase the chances of the final award being accepted by the losing party.

Alternatively, prohibiting dissenting opinions is invidious in nature as it interferes with the arbitrators right of expression. However, the necessary caveat for exercising the option of dissenting opinions must be that they should be resorted to in exceptional circumstances. The necessary question which automatically follows from the above statement is what exactly constitutes exceptional circumstances? The response to the question raised entirely lies upon the conscience of the arbitrator who wishes to dissent in writing against some manifest error either in the application of the law or interpretation of facts by the majority.

Noteworthy is the very fact that the efficacy and the integrity of arbitration militates against the availability of the option to dissent by arbitrators except for in exceptional circumstances. Moreover, such dissents should not take the form of an alternative award but should be short

and polite and drafter in a manner which does not have any adverse impact upon the final award.

It is implausible to consider that an arbitral tribunal consisting of more than one arbitrator would always reach a unanimous decision when considering a dispute. Further, dissenting opinions should be considered as an integral part of the arbitrator's right of expression and should be given the due recognition that it rightfully deserves. Thus, a dissenting arbitrator should also as a cautionary measure refrain from pursuing his/her dissent if his/her arguments have been duly considered and thoroughly explained in the final award. Provided that the dissenting arbitrator's opinion has been sufficiently dealt and considered by the majority the minority arbitrator should refrain from issuing a repetition of his arguments in the form of a separate opinion.

In relation to the initial question raised by the author that whether dissenting opinions enjoy any enforceability? the response in lieu of the same as concluded by the author is that even though dissenting opinions enjoy a level of admissibility across various domestic and arbitral regimes they do not have any enforceability as dissenting opinions are minority opinions. Furthermore, the absence of the practice of *stare decisis* in international commercial arbitration means that dissenting opinions hold no precedential value for future arbitration proceedings which thereby can be understood to mean that the contribution of dissenting opinions to arbitral jurisprudence is very limited in nature. *Lastly,* as dissenting opinions have undeniably become well accepted as part of arbitral practice, it is imperative now for domestic jurisdictions as well as other arbitral institutions to categorically deal with them and award due recognition to them.

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