

Finnish Branch of the
INTERNATIONAL LAW ASSOCIATION
Suomen osasto - avdelning i Finland ry

L i b e r A m i c o r u m

B E N G T B R O M S

**Celebrating
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16 October 1999**

The Board of the Finnish Branch
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HELSINKI 1999

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PMS Print Oy
Helsinki 1999

ISBN 951-97892-2-7

DISSENTING OPINIONS IN INTERNATIONAL ARBITRATION

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International arbitration often incorporates elements of both the common law and civil law. One of the areas in which these two legal traditions differ is in the use of separate written judicial opinions, especially those dissenting from the majority decision. We discuss the increasingly prominent role of dissents in international arbitration.¹ We submit that dissenting opinions, although not always beneficial, can enhance the arbitral process and should be authorized in international arbitration.

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1. We use the word "dissent" to include concurring opinions that offer different reasoning from the majority award. For a similar approach, see K.M. Stack, "The Practice of Dissent in the Supreme Court", 105 *Yale L.J.* (1996), 2235, 2235 n.2; see also A. Scalia, "The Dissenting Opinion", 1994 *J. Sup. Ct. Hist.* 33, 33.

Written Dissents in Different Legal Systems

In civil law jurisdictions, generally the only written opinion emanating from a multi-judge tribunal is the decision itself; typically there is no indication that any of the members of the tribunal have a different view.² This practice rests on the jurisprudential view of the law as fixed, unchanging and determinate.³ Like scientific questions, legal questions are viewed as having a single answer that can be found through application of the correct legal principles. Under this theory, courts do not "make" law, but merely find it through the exercise of legal science. Because the possibility of different reasonable answers to legal questions is not contemplated, the multi-judge court renders what appears to be a unanimous voice, and therefore separate opinions generally have not existed.

Common law lawyers and judges, particularly in the United States, view the law as evolving over time and tend to assume that dissenting opinions are appropriate and useful. Indeed, dissenting opinions in appellate courts have played a major role in American jurisprudence. But this was not always so. The important early United States Chief Justice, John Marshall, delivered virtually all opinions of the Supreme Court as unanimous judgments, even when he voted against the outcome during deliberations.⁴ Dissents did not begin to appear

2. However, some civil law jurisdictions allow dissenting opinions. In Finland, for example, judges occasionally issue dissenting opinions. See, e.g., Finnish Code of Judicial Procedure Sec. 7(1)(8) (165/1998) (providing for dissenting opinions included with judgment of district court).

3. J. Merryman, *The Civil Law Tradition* (1984). See also G. Samuel, "Comparative Law and Jurisprudence", 47 *Int'l and Comp. L.Q.* (1998), 817, 820.

4. M. Kolsky, "Note: Justice William Johnson and the History of the Supreme Court Dissent", 83 *Geo. L.J.* (1995), 2069, 2073-74. Before John Marshall, United States appellate judges and Supreme Court justices followed the British practice of announcing their opinions *seriatim* from the bench, a practice that differs from both the continental practice of unanimity and the modern American practice of separate written opinions. E.M. Gaffney, Jr., "The Importance of Dissent and the Imperative of Judicial

regularly in American Supreme Court caselaw until after Chief Justice Marshall's retirement.⁵

Some of the great opinions in American constitutional law history are dissenting opinions, the views of which eventually became adopted as law. In particular, American legal history contains a number of dissenting opinions that foretold later advances in protecting individual rights. United States Supreme Court Justice Harlan's 1896 dissent in a racial segregation case,⁶ for example, formed the intellectual underpinning for the famous case of *Brown v. Board of Education*⁷ that ended racial segregation in American schools a half-century later. Other well-known examples include several by Supreme Court Justice Oliver Wendell Holmes, Jr., who laid the basis for modern free speech law and modern economic regulation in important dissenting opinions.⁸

American law students study significant separate opinions, not only of the United States Supreme Court, but of other courts as well. One important example is California Supreme Court Justice Roger Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Company*, in which he suggested that the courts impose strict liability in tort actions for defective products.⁹ This suggestion was later adopted as law, not only in

Civility", 28 *Val. U. L. Rev.* (1994), 583, 591-92.

5. See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 583 (1837) (Story, J., dissenting). See also Kolsky, *supra* note 4.

6. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) ("Our constitution is color-blind"); see also *The Civil Rights Cases*, 109 U.S. 3, 26-62 (1883) (Harlan, J., dissenting) (arguing for constitutionality of reconstruction efforts to protect civil rights of blacks in the South).

7. 347 U.S. 483 (1954).

8. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (speech should be subject to competition in a marketplace of ideas and not subject to suppression); *Lochner v. New York*, 198 U.S. 45, 75 (Holmes, J., dissenting) (economic regulation not unconstitutional because "the 14th amendment does not enact Mr. Herbert Spencer's Social Statics.").

9. 24 Cal. 2d 453, 461 (1944).

California but also in numerous other American jurisdictions. Today, strict liability is widespread in products liability cases in many countries.¹⁰

The American concept of dissent is related to the common law view of law as evolutionary. As United States Supreme Court Chief Justice Charles Evans Hughes said, "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."¹¹

Because public international law is based in part on custom and practice, its evolving nature provides a similar justification for dissent. The Statute of the Permanent Court of International Justice recognized this possibility by providing for separate opinions.¹² The International Court of Justice also has separate and dissenting opinions, as do the International Criminal Tribunal for the former Yugoslavia and the European Court of Human Rights.¹³

Thus, dissent is not a feature peculiar to Anglo-American law but is well-established in international law as well. Indeed, the traditional civil law antipathy toward dissents has been eroding. The German Constitutional Court now has dissenting

10. The strict liability standard was adopted independently by French courts in their interpretation of Article 1641 of the Civil Code. The standard was also the subject of a European Union Directive 85/374/EC (July 25, 1985).

11. C.E. Hughes, *The Supreme Court of the United States* (1928), 68.

12. Article 57, incorporated into the Statute of the International Court of Justice ("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.").

13. For the International Court of Justice, see Rules of the Court (April 14, 1978), Art. 95(2) (judgments) and Art. 107(3) (advisory opinions); see generally I. Hussain, *Dissenting and Separate Opinions at the World Court* (1984). For the International Criminal Tribunal for the former Yugoslavia, see Rules of Procedure and Evidence, Revision 13, Rule 98 ter, subpara. (c). For the European Court, see European Convention on Human Rights (1950) Art. 51(2).

opinions.¹⁴ This reflects the notion that constitutional law evolves over time with social conditions, so that constitutional law is an especially appropriate place for an exposition of differing views of the law.

On the other hand, dissents are not universally supported, even in common law countries. The great American appeals court judge Learned Hand once criticized dissents as diminishing the power and legitimacy of the majority opinion.¹⁵ As the United States Supreme Court continues to issue a significant number of separate opinions, some jurists have called for more restraint in the number of separate opinions.¹⁶ With a multitude of separate opinions in a case, it is sometimes difficult to determine the law actually established by the case. A close vote suggests that the authority may last only so long as the composition of the court remains the same. Indeed, the California Supreme Court recently rendered a 4-3 opinion in an important case upholding a law requiring parental consent for a minor's abortion.¹⁷ A justice in the majority happened to retire shortly thereafter; a new justice formed a new majority with the dissenters in order to grant a rehearing and declare the law invalid.¹⁸ Such events may adversely affect public respect for judicial opinions.

On occasion the rhetoric in dissents spotlights divisions in

14. Act of 21 December 1970, cited in L. Levy, "Dissenting Opinions in International Arbitration in Switzerland", 5 *Arb. Int'l.* (1989) 35, at 37 n.8. See generally, D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989).

15. L. Hand, *The Bill of Rights* (1958), 72.

16. R. Bader Ginsburg, "Remarks on Writing Separately", 65 *Wash. L. Rev.* (1990), 133, 138-45 (suggesting U.S. judges exercise restraint before writing separately).

17. *American Academy of Pediatrics v. Lungren*, 51 Cal. Rptr. 2d 201 (1996) (vacated by 66 Cal. Rptr. 2d 210 (1997)).

18. *American Academy of Pediatrics v. Lungren*, 66 Cal. Rptr. 2d 210 (1997).

the court, especially when dissenters attack the majority.¹⁹ Sometimes individual dissents can create public controversy, as in a recent California case which resulted in calls for disciplinary proceedings against a judge, who, in dissent, explicitly declined to follow a binding precedent of a higher court.²⁰ Some United States Courts issue very few separate opinions, notably the Supreme Court of the State of Delaware, which is the nation's pre-eminent jurisdiction on issues of corporate law.²¹

Written Dissents In International Arbitration

International arbitration stretches across the common law and civil law worlds.²² As a result, most arbitral rules do not

19. Justice Antonin Scalia of the U.S. Supreme Court is well-known for his harsh rhetoric in separate opinions. His opinion in a controversial abortion case, for example, mocked the language of the majority. *Planned Parenthood v. Casey*, 112 S. Ct. 2796, 2882 (1992) (Scalia, J., concurring and dissenting) ("The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected life-tenured judges – leading a Volk who will be 'tested by following' and whose very 'belief in themselves' is mystically bound up in their 'understanding' of a Court that 'speaks before all others for their Constitutional ideals' – with the somewhat more modest role envisioned for these lawyers by the founders.").

20. *Morrow v. Hood Communications*, 69 Cal. Rptr. 2d 489, 490 (Ct. App., 1997) (Kline, J., dissenting) ("There are rare instances in which a judge of an inferior court can properly refuse to acquiesce in the precedent established by a court of superior jurisdiction."). See "Safeguard for the State Bench", Los Angeles Times, Sept. 10, 1998, available on www.losangeles-times.com.

21. D.A. Skeel, Jr. "The Unanimity Norm in Delaware Corporate Law", 83 *Va. L. Rev.* (1997), 127, 129 (Delaware's Supreme Court almost always issues unanimous opinions, even on deeply controversial issues).

22. Y. Dezalay & B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996) (arguing that Anglo-American law firms have recently impeded on the world of international arbitration formerly dominated by civil law lawyers).

deal specifically address separate opinions; that is, rules typically neither explicitly prohibit nor provide for minority opinions.²³ But there are some exceptions to the general silence on the issue of dissenting opinions, mostly in the context of arbitrations involving states.²⁴ For example, the United States-Mexican General Claims Commission (1923-1934) had explicit provisions for dissent,²⁵ as do the rules of the International Centre for the Settlement of Investment Disputes (ICSID).²⁶ The Iran-United States Claims Tribunal allows dissenting and concurring opinions and the members of the Tribunal have not been reluctant to write such opinions.²⁷ Indeed, Judge Bengt

23. See, e.g., Federal Act on Private International Law of 18 Dec. 1987 (Switzerland), discussed in Levy, *supra* note 14 (providing at Article 189 that the form of the award may be agreed to by the parties).

24. For a case relying on the distinction between private and public arbitration, see *NBC v. Bear Stearns*, 165 F.3d 184 (2nd. Cir. 1999) (holding that a private commercial arbitration does not constitute a "tribunal" for purposes of U.S. statute on discovery before arbitral tribunals.) For examples of dissenting opinions in intergovernmental arbitration, see, e.g., *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States of America and France*, 18 R.I.A.A. 417, 488 (dissenting opinion of P. Reuter); *Salem Case* (Egypt/USA) (8 June, 1932) 2 R.I.A.A. 1161, 1204 (dissenting opinion of F. Neilsen); *Indo-Pakistan Western Boundary Case* (19 Feb. 1968) 17 R.I.A.A. 1, 431 (dissenting opinion of A. Bebler).

25. Rules of Procedure, Sept. 4, 1924, Art. XI ¶ 4, reprinted in A.H. Feller, *The Mexican Claims Commissions* (1935), 369 ("Any member of the Commission who dissents from the award may make and sign a dissenting report setting out the grounds upon which he dissents and the award which in his opinion should have been made."). See also *Dickson Car Wheel Co. v. United Mexican States* (July, 1931) 4 R.I.A.A. 669, 682 (Neilsen, C., dissenting.)

26. Article 48(4), Convention on Settlement of Investment Disputes Between States and Nationals of Other States, 1965, 575 U.N.T.S. 159. Other examples include provisions for arbitration between members of the Organization of American States. See American Treaty on Pacific Settlement Article XLVI (April 13, 1948) ("The dissenting arbiter or arbiters shall have the right to state the grounds for their dissent.").

27. Tribunal Rules of Procedure, Art. 32 ("Any arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefor be

Broms did so recently in a Partial Award.²⁸

Rules of private international arbitration do not always provide for separate opinions. The Model Law on International Commercial Arbitration produced by the United Nations Commission on International Trade Law (UNCITRAL) declined to address the issue.²⁹ The International Chamber of Commerce (ICC) Court of Arbitration may allow a panel to attach dissenting opinions to the arbitral award, but may refuse to do so when a dissent might impair the enforceability of the award.³⁰ In particular, when the awards of a tribunal are to take effect in, and be enforced in, a civil law country, the ICC Court sometimes defers to the practice of the courts of those countries by prohibiting the publication of dissenting opinions so as not to jeopardize the award's enforceability there.³¹ Such a prohibition applied to awards that might have been enforced in Switzerland before the passage of the Swiss Federal Act on Private International Law in 1987.³²

In 1985, the ICC Commission on International Arbitration established a Working Party on Dissenting Opinions and Interim and Partial Awards. Professor (later Judge) Bengt Broms participated, along with other well-known members of the international arbitration community. In 1988, the Working

recorded.”).

28. Dissenting and Partly Concurring Opinion of Bengt Broms in *The Islamic Republic of Iran and The United States of America*, Partial Award No. 590-A15(IV)/A24-FT (28 Dec. 1998), reprinted in _ Iran-U.S. C.T.R. _, [to be published].

29. See H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989), 837 (discussing debates during drafting of Article 31 of the Model Law wherein Norwegian delegation proposed an explicit right to state reasons for dissent, while the Sudanese delegation proposed explicit prohibition of dissents).

30. Levy, *supra* note 14, at 38.

31. *Id.*, cf. J.L. Simpson and H. Fox, *International Arbitration: Law and Practice* (1959), 226-27.

32. Levy, *supra* note 14, at 38 n.9.

Party issued a Final Report on Dissenting and Separate Opinions.³³

The Working Party considered the merits and flaws of dissenting opinions in international arbitration. It addressed some criticism of dissents in international arbitration, particularly from French arbitrators who sought to change the ICC Rules to prohibit the publication of dissenting opinions.³⁴ This view was rejected by the Working Party as neither practicable nor desirable.³⁵ Ultimately, the Working Party concluded that arbitrators have a right to issue dissenting opinions, although the ICC Rules should not be changed so as to encourage dissents explicitly.

Arbitration, as all mechanisms of dispute resolution, has both private and public qualities.³⁶ The private qualities are obvious – after all, it is a dispute between two parties that prompts them to find a third party to resolve the dispute. The parties are primarily interested in fair, impartial and, sometimes, confidential dispute resolution, and courts and arbitral bodies provide this service to a greater or lesser degree.

Dispute resolution may also have a more public function. By applying a rule in a particular case and by resolving disputes peacefully, the court or arbitral body serves as an instrument of public policy and provides guidance as to the law. This is true even when there is no formal system of *stare decisis*. For example, the International Court of Justice, which has no formal system of precedent, often refers to earlier caselaw. Because each decision provides a signal to future courts, a judge who disagrees with a result may share his or her views, so as to affect decisions in the future.

While this rationale for dissents makes sense in the context of arbitration between states, it is more problematic in the

33. Reprinted in ICC Bulletin Vol. 2, No. 1, 32-36 (1991) (hereinafter "Final Report").

34. Final Report, ¶ 4.

35. Final Report, ¶ 5.

36. M. Shapiro, *Courts* (1981).

context of international commercial arbitration, which is, after all, a mainly private system of dispute resolution, although it is governed by statutes and treaties and often relies on public courts to enforce arbitration agreements and awards. The private qualities of arbitration, especially the principle of confidentiality, are usually thought to weigh against publication of awards and dissenting opinions.³⁷ Arbitration, of course, has no system of *stare decisis* or precedent. Arbitrators are not bound to consider the decisions of earlier tribunals or panels. Nor is there any formal review of the law applied in arbitral awards, so there is less need to provide a source for consideration by appellate bodies.³⁸ Indeed, errors of law are generally not a basis for vacating awards under domestic law or for failing to enforce them under the New York Convention.³⁹

As a practical matter, however, it may be helpful to arbitrators in specific cases to review past awards. For example, the Iran-United States Claims Tribunal often relies upon its past decisions. This is a natural development for an institution that has resolved nearly 4000 cases, many of which involve similar legal issues.⁴⁰ Because many of the cases involve interpretation

37. 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).

38. W.L. Craig, W.W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* (2nd ed., 1990), 332-35.

39. See, e.g., *Glennon v. Dean Witter Reynolds Inc.*, 83 F.3d 132, 136 (1996) (mere error in interpreting or applying law insufficient to set aside an arbitral award); A.J. van den Berg, *The New York Arbitration Convention of 1958: Toward a Uniform Judicial Interpretation* (1981), 246-49.

40. See generally G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (1996); and C.N. Brower and J.D. Brueschke, *The Iran-United States Claims Tribunal* (1998).

of key terms in the Algiers Accords, the Treaty establishing the Tribunal, decisions have refined the meaning of particular terms, and have developed general approaches to recurring legal problems. The Tribunal's use of its own caselaw has allowed it to develop mechanisms for treating like cases alike, an essential element in doing justice. The institutionalized character of the Tribunal and its publication of awards also enhance the rationale for reliance on past decisions. While no one would say that there is formal *requirement* to follow earlier decisions, in practice arbitrators do look to how previous panels have resolved certain issues. When previous decisions consistently treat an issue in a particular manner, the Tribunal tends to view the issue as settled.⁴¹ This makes sense, for it is undesirable if it appears that decisions are based on the specific personnel of the panel making the decision.

International commercial arbitrators are hindered by the absence of any generalized system of reporting awards, and this may lead them to consider decisions of national and international courts, which, while important, may not address issues specific to arbitration.⁴² Arguments in favor of dissenting opinions are thus related to, although not dependent on, the issue of whether arbitral awards should be published at all.⁴³ Clearly, in an arbitral mechanism established by governments to deal with their disputes, such as the Iran-United States Claims Tribunal, publication of awards is desirable.⁴⁴ Various

41. For example, the Tribunal selected nine test cases to determine if forum selection clauses calling for exclusive jurisdiction by Iranian courts deprived the Tribunal of jurisdiction under Article II, paragraph 1 of the Claims Settlement Declaration that established the Tribunal. Once these nine cases were adjudicated, subsequent practice consistently followed the test cases. See Aldrich, *supra* note 40, at 102-04.

42. J.D.M. Lew, "Publication of Awards", in: *The Art of Arbitration: Liber Amicorum Pieter Sanders* (1982), 223, 229 (J. Schultz and A.J. van den Berg, eds.).

43. See generally Lew, *id.*; see also Craig, Park and Paulsson, *supra* note 38.

44. See the Iran-U.S. Claims Tribunal Reports, published by Grotius Publications, Cambridge University Press, and Mealey's International

inter-governmental awards are published by the United Nations in Reports of International Arbitral Awards. There are also various mechanisms for the publication of nongovernmental arbitral awards, including the ICCA Yearbook, the Collection of ICC Arbitral Awards,⁴⁵ and Mealey's International Arbitration Report. General international law publications, such as International Legal Materials published by the American Society for International Law, occasionally publish arbitral awards. As more awards are published and as arbitrators rely on them, dissents should become more commonplace. Dissents are already quite common in intergovernmental arbitrations, even for arbitrations involving civil law countries.⁴⁶ Even if not published generally, dissents are typically presented to the parties in the case.

Arguments For Dissents In International Arbitration

1) Dissents can produce better awards

By pointing out problems with the reasoning of the majority, a well-reasoned dissent can help ensure that the majority opinion deals with the most difficult issues confronting it. As a prominent United States Supreme Court Justice said, dissent "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."⁴⁷ He further noted that dissent "improves the final product by forcing the prevailing side to

Arbitration Reporter. Through 1996, awards were also available in Andrews Foreign Assets Litigation Reporter.

45. S. Jarvins and Y. Derains, eds. (1974-1985); S. Jarvins, Y. Derains and J. Arnaldez, eds. (1986-1990); J. Arnaldez, Y. Derains and D. Hascher, eds. (1991-1995). See also, *Collection of Procedural Decisions in ICC Arbitration, 1993-1996*, D. Hascher, ed., (1997).

46. See, e.g., cites in notes 24 and 28, *supra*.

47. W.J. Brennan, "In Defense of Dissents", 37 *Hastings L.J.* (1986), 427, 430.

deal with the hardest questions urged by the losing side."⁴⁸ By raising the most difficult problems with the majority's reasoning, dissent can ensure that the arbitral award is well-reasoned. This reasoning ties dissent not to future policy outcomes, but to the need to ensure quality resolution of the present dispute.

To play this role of ensuring a quality award by the majority, it is important that wherever possible, dissenters circulate their opinions to the majority before the issuance of the majority award, as is done in the American appellate system and at the International Court of Justice. To this end, it would be best if dissenting opinions were issued simultaneously with the award itself, as normally done in judicial proceedings.⁴⁹ The Iran-United States Claims Tribunal has allowed dissenting opinions to be filed long after the award.⁵⁰ This detracts from the effectiveness of dissenting opinions in helping to ensure that the majority deals with the best possible arguments. Indeed, in some cases, arbitrators have complained that they first saw arguments in dissents filed long after the award and cannot defend their position against criticism of the award. When it is not possible to circulate drafts in advance of the majority award, it is basic courtesy that dissenters should at least circulate their opinions before issuance, and any code of ethics for arbitrators should include such a requirement.

48. *Id.* See generally L. Krugman Ray, "Justice Brennan and the Jurisprudence of Dissent", 61 *Temp. L. Rev.* (1988), 307.

49. This was also the conclusion of the Working Party, and it recommended that the chairman of the arbitral panel fix appropriate time limits for circulation of opinions. See Final Report ¶ 15. Dissenting opinions submitted after the majority award is filed ought not be looked at by the ICC Court of Arbitration. *Id.* ¶ 16.

50. Compare, e.g., Dissenting Opinion of the Iranian Arbitrators in Case A/18 Concerning the Jurisdiction of the Tribunal over Claims Presented by Dual Iranian-United States Nationals Against the Government of Iran in *Iran and United States, Case No. A/18*, Decision No. DEC 32-A18-FT (10 Sept. 1984), reprinted in 5 Iran-U.S. C.T.R. 275 with *Iran and United States, Case No. A/18*, Decision No. DEC 32-A18-FT (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251. The dissenting opinion in that case was filed over five months after the Decision.

2) Dissents can help build confidence in the process

Recent research in social psychology has investigated what parties value in legal procedure. One important result has shown that people value fair process; that is, they value the opportunity to be heard and to have their views considered.⁵¹ For the losing party in arbitration or litigation, the key factor in determining the legitimacy of the process is to be treated fairly. The dissenting opinion can enhance the legitimacy of the process by showing the losing party that alternative arguments were considered, even if ultimately rejected. Again, the presence of a separate opinion should force the majority to develop sounder arguments than if there were no separate opinions. The fact that alternative opinions have been expressed ought to result in greater confidence in the process from the perspective of the loser, and thus increase the possibility that the award will be complied with voluntarily without enforcement proceedings. Further, dissents can enhance the legitimacy of arbitration before the broader public, thus contributing to the popularity of arbitration as a mechanism of dispute resolution. By providing for expression of alternative views on facts and law, dissents may enhance the perception of arbitration as a fair procedure.

During the historic arbitrations conducted under the Jay Treaty between Britain and the United States in the late 18th century, arbitrators from both sides would occasionally withdraw from proceedings to prevent them from continuing.⁵² This is obviously an unsatisfactory alternative to dissent. The availability of dissents helps channel disagreement into more productive avenues, and allows the process of dispute resolution to continue despite conflicting views on particular cases.

In the Iran-United States Claims Tribunal, those who disagreed with an award would sometimes sign the award with

51. See, e.g., T. Tyler, *Why People Obey the Law* (1990).

52. S.F. Bemis, *Jay's Treaty* (1962), 439-40.

a brief declaration of disagreement.⁵³ The Members of the Tribunal have also issued separate opinions, even from the very first decision.⁵⁴ Dissent has arguably enhanced the legitimacy of the institution for private claimants and the states parties, who are provided with clear reasons for decisions in cases they lose, and an opportunity to read what dissenting Tribunal members found to be the best arguments in favor of their case.

Arguments against dissent in international arbitration

Critics of dissenting opinions have raised a number of objections.⁵⁵ In our view, none of these is sufficient to overcome the substantial benefits to be obtained from a vigorous tradition of well-reasoned dissent. Each of these objections can be addressed through the development of arbitral rules and codes of ethics that reduce the potential problems that might result from dissenting opinions.

1) Dissents risk violating the secrecy of deliberations

Some have suggested that dissents in international arbitral awards risk disclosing the secrecy of deliberations.⁵⁶ Presumab-

53. See, e.g., Statement Appended to Signature of Mr. Sani in *White Westinghouse International Company and Bank Sepah-Iran*, Award No. 7-14-3 (25 June 1982), reprinted in 1 Iran-U.S. C.T.R. 172; Note Appended to Signature of Mr. Kashani in *Economy Forms Corporation and The Government of the Islamic Republic of Iran, et al.*, Award No. 55-165-1 (14 June 1983), reprinted in 3 Iran-U.S. C.T.R. 54.

54. Dissenting Opinion of Mahmoud M. Kashani, Shafie Shafeiei and Seyyed Hossein Enayat in *Iran-United States, Case A2*, Decision No. DEC 1-A2-FT (26 Jan. 1982), reprinted in 1 Iran-U.S. C.T.R. 104.

55. See, e.g., Final Report, ¶ 5.

56. See J. Carter, "The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness", *ABA Center for Continuing Legal Education National Institute*, April 11, 1997, available on WESTLAW, JLR Data-

ly, the dissenting arbitrator also espoused during deliberations the views set out in the dissenting opinion. Some apparently believe that the dissent *by definition* violates the secrecy of deliberations by exposing disagreement and alternative views. But this view is based on a mischaracterization of the secrecy of deliberations. The key is that no one reveals the discussions themselves, so that arbitrators will be able to express their views frankly, without risk that their opinions will be disclosed involuntarily. As long as a dissenting opinion does not reveal what occurred during deliberations, it should not be objectionable.

It is therefore essential that dissenting opinions not reveal the actual content of deliberations. Separate opinion writers must be careful to limit their comments to alternative views of the facts and law, and ought not discuss the substance of deliberations themselves. Of course, if there are allegations that the deliberation process wrongfully excluded an arbitrator or that another arbitrator otherwise acted in an improper manner, then such allegations can be disclosed.⁵⁷

2) Dissents risk harming the legitimacy of the process by highlighting the connection between parties and their appointed arbitrators

Some believe that the availability of dissents will reduce the number of unanimous awards. One fear is that if dissenting opinions are explicitly contemplated by arbitral rules, there may then result a situation where there is a dissenting opinion issued by the party-appointed arbitrator for the losing side in

base.

57. An example comes from the United States-Mexican Claims Commission. In *International Fisheries Co. v. United Mexican States*, 4 R.I.A.A., 691 at 746 (Neilsen, C., dissenting), the dissenter alleged a procedural defect with regard to deliberations, namely that the Commission failed to hold a public sitting to announce its decision in violation of an explicit requirement to do so.

every arbitral award. 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. A related concern is that arbitrators will spend so much time drafting their separate opinions that the majority awards will suffer.

It should not be surprising if party-appointed arbitrators tend to view the facts and law in a light similar to their appointing parties. After all, the parties are careful to select arbitrators with views similar to theirs. But, this does not mean arbitrators will violate their duties of impartiality and independence.⁵⁸ Arbitrators should restrict their dissents to issues of fact and law, and should not use the opportunity to issue a separate opinion for improper reasons.

3) Dissents may discourage deliberation and encourage incivility

One risk associated with dissenting opinions is the possibility of incivility.⁵⁹ If arbitrators or judges are encouraged to voice disagreement with the majority, there is a risk that they will resort to intemperate rhetoric.⁶⁰ This has been an issue in

58. See R.M. Mosk, "Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-U.S. Claims Tribunal", 1 *Trans. Law.* (1988), 253.

59. See, e.g., C.A. Marvin, "Dissents in Louisiana: Civility Among Civilians", 58 *La. L. Rev.* (1998), 975, 977-80; E.M. Gaffney, Jr., *supra* note 4, at 623-46.

60. Marvin offers the example of a case in Louisiana where the dissenting judge described the majority opinion as "absolutely legally, ethically and morally wrong" and a "horrendous injustice" supported "by no stretch of logic, the law, or the imagination...." *Carter v. Jefferson*, 597 So.2d 128, 133-34 (La. App. 5th Cir.) (Bowes, J., dissenting), writ denied, 600 So. 2d 609 (1992) *quoted in* Marvin, *supra* note 59, at 984.

judicial systems as well as in arbitral settings.⁶¹

It is important for the dignity of the arbitral body that dissenting opinions should be civil and be limited to legal criticism of the majority award. One means that has been used in the United States to accomplish this goal has been the adoption of standards of professional conduct for judges. Notably, the United States Court of Appeals for the Seventh Circuit adopted such standards in 1992.⁶² While not binding, the standards do articulate norms and duties to which practitioners, including judges, must aspire. They specifically address the problem of separate opinions, saying that judges "will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly."⁶³

Some have proposed similar standards of ethics for arbitrators, and the International Bar Association has produced Rules of Ethics for International Arbitrators, but it does not cover separate opinions.⁶⁴ It would be a contribution if these rules acknowledged the growing practice of dissenting opinions by specifically addressing the threat of incivility. In doing so, they would help to prevent a deterioration in standards that might occur as dissents become more widespread.

One respected practitioner and arbitrator proposed a code of ethics for dissenters, including such provisions as the need to warn colleagues of one's intentions, to submit a draft to them, and to limit the content of the separate opinion to one's legal

61. See note 19, *supra*.

62. Gaffney, *supra* note 4, at 584 (describing the development of the standards by a committee of lawyers and judges).

63. Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 4 (1992).

64. Reprinted in 12 *Y.B. Comm. Arb.* (1997); 199-202. In the United States, there is a Code of Ethics for Arbitrators in Commercial Disputes, prepared in 1977 by a joint committee of the American Arbitration Association and the American Bar Association. See 10 *Y.B. Comm. Arb.* (1985), 131. Like the International Bar Association's Rules, it does not explicitly refer to dissenting opinions.

views about the case.⁶⁵ Indeed, an early draft of the International Bar Association's Rules of Ethics for International Arbitrators provided that a dissenting arbitrator has a right to make his dissent known, subject to relevant provisions of law.⁶⁶ It required the dissenter to avoid breaching confidentiality of deliberations. Unfortunately, this provision was omitted in the final version.⁶⁷

4) Dissents raise costs

Although not a concern voiced in the existing literature, it should be acknowledged that dissenting opinions have the potential to raise the costs of arbitration. Other things being equal, separate opinions will increase the time required to complete the arbitral process. Every separate opinion requires time to draft, circulate and discuss. More time spent by arbitrators will increase the costs to the parties. But the improvement in the quality of awards and the enhanced legitimacy of the process should be worth the additional marginal costs of dissents. Indeed, few would accept a substandard award simply because it costs less to render.

5) Dissents may inhibit the development of an actual majority

Another problem arises when there is more than one dissenting opinion in a three-member panel. This leads to the potential situation where there is no majority for the actual *dispositif*, a problem when the arbitral rules require a major-

65. Levy, *supra* note 14, at 42.

66. Draft 35/3/86 § 9, *quoted in* Levy, *id.* at 42 n.22.

67. See note 64, *supra*.

ity.⁶⁸ But the availability of dissents should have little impact on fulfilling this requirement, as a majority must be formed in every case under such rules.

Under ICC rules, the Chairperson may decide issues in the absence of a majority.⁶⁹ A similar rule exists in Swiss law.⁷⁰ The lack of a majority opinion undoubtedly increases the risk that the award will be challenged on the merits.⁷¹ As an alternative to dissents, awards sometimes state that some of the members of the panel disagreed with various parts of it, without stating the precise reasons. The ICC Court of Arbitration has sometimes insisted on a short summary before the *dispositif* indicating how many of the arbitrators agreed with the decision, and in some cases has struck such comments that appear to violate the principle of confidentiality of deliberations.⁷²

Sometimes, if an arbitrator in a separate opinion expresses disagreement with the opinion in which he has joined to form a majority, there is concern as to whether there is in fact a real majority.⁷³ Nevertheless, it appears accepted that so long as the author of the separate opinion joins in the *dispositif*, that is sufficient to form a majority. Thus, in an intergovernmental arbitration between Guinea-Bissau and Senegal, the validity of the Award was challenged before the International Court of Justice because the President of the arbitral tribunal, who voted

68. See, e.g., UNCITRAL Model Law on International Commercial Arbitration, Art. 29.

69. ICC Rules 1998, Art. 25(1). See, e.g., *Sentence Arbitral in Affaire No. 3881, 1984* reprinted in *Collection of ICC Arbitral Awards 1986-1990* (1994), 257.

70. Levy, *supra* note 14, at 39 n.12.

71. *Islamic Republic of Iran v. Cubic Defense Systems*, ICC Case No. 7365/FMS, reprinted in 13 *Mealey's International Arbitration Report* (1998), G-5.

72. F.P. Donovan, "Dissenting Opinions", 7 *ICC International Court of Arbitration Bulletin* (1996), 76, 77.

73. See S. Schwebel "May the Majority Vote of an International Arbitral Tribunal be Impeached?: the 1996 Freshfields Lecture", 13 *Arb. Int'l* (1997), 145.

in the majority, appended a declaration to the Award stating his disagreement with some of its conclusions.⁷⁴ The dissenting arbitrator referred to this declaration in challenging the very existence of the majority and argued that because the declaration emanated from the President of the tribunal himself, it cast fundamental doubts as to "the reality of the Award."⁷⁵ The International Court upheld the Award, stating that

As the practice of international tribunals shows, it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of any such differences in a declaration or separate opinion of the member concerned, which are therefore without consequence for the decision of the tribunal.⁷⁶

The practice of disagreeing with an opinion but joining the *dispositif* to form a majority has been common at the Iran-United States Claims Tribunal.⁷⁷

74. See Arbitral Award on 31 July 1989, 1991 ICJ 53.

75. Quoted in Schwebel, *supra* note 73, at 148.

76. 1991 I.C.J. 64-65. Interesting, the judge *ad hoc* appointed by Guinea-Bissau voted with the unanimous holding of the Court, against the position adopted by his appointing state. Schwebel, *id.*, at 150.

77. See Concurring Opinion of Richard M. Mosk in *Ultrasystems Incorporated and The Islamic Republic of Iran, et al.*, Partial Award No. 27-84-3 (4 Mar. 1983), reprinted in 2 Iran-U.S. C.T.R. 114 (questioning whether there can be different majorities on different issues); Concurring Opinion of Richard M. Mosk in *Ammann & Whitney and Ministry of Housing and Urban Development (Khuzestan Department of Housing and Urban Development)*, Award No. 248-198-1 (25 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 108; Concurring Opinion of Richard M. Mosk in *Blount Brothers Corporation and The Government of the Islamic Republic of Iran, et al.*, Award No. 215-52-1 (6 Mar. 1986), reprinted in 10 Iran-U.S. C.T.R. 81; Concurring Opinion of Richard M. Mosk in *Cal-Maine Foods, Inc. and The Government of the Islamic Republic of Iran, et al.*, Award No. 133-340-3 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 64; and Concurring Opinion of Richard M. Mosk in *Alan Craig and Ministry of Energy of Iran, et al.*,

6) Dissents increase the likelihood that awards will be challenged

Lastly, some argue that dissents increase the potential for challenge to an award.⁷⁸ This argument fails to consider the possibility that dissenting opinions, merely by expressing alternative views, may *reduce* potential for challenges to awards. If parties believe their views have been considered and rejected for the best possible reasons, they may be *less* likely to challenge awards. Moreover, the availability of express dissents may compel the majority to take all steps necessary to ensure the enforceability of the award. In any case, judicial avenues for challenge of arbitration awards are limited; thus, the concern about increased challenges may be overstated.

Some have suggested that an arbitrator might prepare a dissenting opinion for the purpose of facilitating the vacation or non-enforcement of an award.⁷⁹ This argument assumes that the arbitrator would violate his or her duty of impartiality and independence. Although such a result can occur on occasion, it should not be used to restrict the benefits provided by dissenting opinions in the majority of cases. Furthermore, it is highly unlikely that a dissenting opinion could provide grounds that would not be apparent for vacation or non-enforcement of an award unless it dealt with some otherwise undisclosed procedural failure. If a dissenting opinion does lead to non-enforcement of an award on legitimate grounds, then it has served a useful purpose by preventing an unjust award.

An example of a dissent leading to an enforcement dispute is the Award rendered by the Iran-United States Claims Tribu-

Award No. 71-346-3 (2 Sept. 1983), *reprinted in* 3 Iran-U.S. C.T.R. 293. *See also* Schwebel, *supra* note 73.

78. Cf. Levy, *supra* note 14.

79. For two examples of cases where arbitrators apparently sought just this result, *see* F.P. Donovan, *supra* note 72, at 76.

nal in *Avco Corporation and Iran Aircraft Industries*.⁸⁰ In that case, it was suggested that the Tribunal decided at a preliminary hearing to allow a claimant to present evidence in summary form through an accountant's report; and that the Tribunal subsequently held a hearing, and in its award rejected the accountant's report as an inadequate or improper method of presenting evidence.⁸¹ Judge Charles Brower, the only arbitrator present at both hearings, issued a separate opinion describing the situation in detail and arguing that the Tribunal's actions meant that Avco had been denied an opportunity to present its case.⁸² The Iranian party sought to enforce the Award in United States courts. The United States Court of Appeals relied heavily on Judge Brower's separate opinion in affirming the District Court's refusal to enforce the Award of the Tribunal.⁸³ Interestingly, the Tribunal subsequently found the United States liable for the non-enforcement of the award, in effect suggesting that the United States Court was incorrect.⁸⁴

The above example shows how a dissent might expose possible procedural flaws. Nevertheless, there is the possibility that in an extreme case, an arbitrator in violation of his ethical duty can seek to undermine an award for spurious reasons. Some of the problems with dissents are illustrated in a recent American case, *Fertilizantes Fosfatados Mexicanos, S.A. v. Chemi-*

80. *Avco Corporation and Iran Aircraft Industries, et al.*, Partial Award No. 377-261-3 (18 July 1988), *reprinted in* 19 Iran-U.S. C.T.R. 200.

81. *Id.*, at 211 ("[T]he Tribunal cannot grant Avco's claim solely on the basis of an affidavit and a list of invoices, even if the existence of the invoices was certified by an independent audit.").

82. Concurring and Dissenting Opinion of Judge Brower in *Avco Corporation and Iran Aircraft Industries, et al.*, Partial Award No. 377-261-3 (18 July 1988), *reprinted in* 19 Iran-U.S. C.T.R. 231, 238.

83. *Iran Aircraft Industries v. Avco Corp.* 980 F. 2d 141, 144 (2nd. Cir., 1992).

84. *The Islamic Republic of Iran and The United States of America*, Award No. 586-A27-FT (5 June 1998), *reprinted in* _ Iran-U.S. C.T.R. _, [to be published].

*cal Carriers, Inc.*⁸⁵ In that case, the court declined to set aside an award in which a dissenter issued charges of bias against the majority arbitrators. The dissenter issued several hundred pages of reasoning and attached several hundred of exhibits. The court eventually characterized the dissenter's testimony as including "long-winded and unfair broadside attacks on the majority."⁸⁶

In that case, the fear that dissents will lead to greater review of awards appears well-founded. Both the dissenting and majority arbitrators testified before the court, despite prevailing rules that majority arbitrators could not testify with regard to bias or misconduct.⁸⁷ But while the case illustrates an extreme position taken by a dissenter, it does not follow that dissents should be restricted. In fact, the *Fertilizantes* court illustrates the utility of judicial review of awards, for the Court eventually upheld the award and was critical of the arbitral dissenter.

In the early years of the Iran-United States Claims Tribunal, there was a controversy concerning the issuance of awards signed by only two arbitrators.⁸⁸ The controversy was prompted by one judge's refusal to sign two awards issued by Chamber Three, and his filing instead of a statement of "reasons for not signing," asserting *inter alia* that inadequate deliberations had taken place.⁸⁹ According to other judges, deliber-

85. 751 F. Supp. 467 (S.D.N.Y. 1990). See also J. Carter, "The Rights and Duties of the Arbitrator: Six Aspects of the Rule of Reasonableness", ABA Center for Continuing Legal Education National Institute April 11, 1997, available on WESTLAW, JLR.

86. 751 F. Supp. 467, at 469.

87. See, e.g., *Fukaya Trading, S.A. v. E. Marine*, 322 F. Supp. 278 (E.D. La. 1971) (No authority to compel arbitrators to testify about an award); see also *Linwood v. Sherry*, 178 N.Y.S. 2d 492 (1958) (Court may not examine testimony of arbitrators).

88. See S. Schwebel, *International Arbitration: Three Salient Problems* (1987), 251-81.

89. Mr. Jahangir Sani's Reasons for Not Signing the Decision made by Mr. Mangård and Mr. Mosk in Case No. 17 in *RayGo Wagner Equipment Company and Star Line Iran Company*, Award No. 20-17-3 (3 Feb. 1983),

ations had taken place, and one of those judges filed "Comments" so stating, so that if the award were challenged in court, the court would have all the facts.⁹⁰ The Tribunal and its Chambers continued to issue awards signed by only two arbitrators when the third refused to sign the award. While the dispute appeared to highlight divisions, ultimately the awards were not challenged.

Conclusion

This essay has considered arguments about dissenting opinions in international arbitration. Although the arguments against dissenting opinions raise legitimate concerns, many of these can be dealt with through codes of ethics or other such mechanisms, and need not lead to a blanket prohibition of all dissenting opinions. Dissenting opinions can improve the legitimacy and performance of international arbitration, and thus offer significant benefits that offset the risks posed. Dissenting

reprinted in 1 Iran-U.S. C.T.R. 415; Mr. Jahangir Sani's Reasons for Not Signing the Decision Made by Mr. Mangård and Mr. Mosk in Case No. 132 in *Rexnord Inc. and The Islamic Republic of Iran, et al.*, Award No. 21-132-3 (7 Apr. 1983), reprinted in 2 Iran-U.S. C.T.R. 14. In a third case he also refused to sign and filed an opinion. See The "Opinion" of Judge Jahangir Sani in *Granite State Machine Co., Inc. and The Islamic Republic of Iran, et al.*, Final Award No. 18-30-3 (14 Jan. 1983), reprinted in 1 Iran-U.S. C.T.R. 452.

90. Comments of Richard M. Mosk with respect to Mr. Jahangir Sani's Reasons for not Signing the Decision made by Mr. Mangård and Mr. Mosk in Case No. 17 in *RayGo Wagner Equipment Company and Star Line Iran Company*, Award No. 20-17-3 (3 Mar. 1983), reprinted in 1 Iran-U.S. C.T.R. 424. These Comments prompted a reply from Judge Sani, see Mr. Jahangir Sani's Reply to Mr. Mosk's "Comments" of 3 March 1983 Concerning Case No. 17 in *RayGo Wagner Equipment Company and Star Line Iran Company*, Award No. 20-17-3 (7 Apr. 1983), reprinted in 1 Iran-U.S. C.T.R. 428; Judge Mosk then issued a reply to Judge Sani's reply, see Further Comments of Richard M. Mosk in *RayGo Wagner Equipment Company and Star Line Iran Company*, Award No. 20-17-3 (13 Apr. 1983), reprinted in 1 Iran-U.S. C.T.R. 441.

opinions have played useful role in public international arbitration and now appear to be prevalent in private international arbitration as well. They are here to stay. It therefore makes sense for arbitral institutions to address them directly through the inclusion of provisions for dissenting opinions in procedural rules and codes of ethics.