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Without Silence, There Is No Golden Rule; Without Dissent, There Is No Progress

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ABSTRACT

The frequency of dissenting opinions accompanying arbitration awards in international arbitration has multiplied, particularly in international investment arbitration. Accordingly, dissenting opinions are now inevitable companions to majority awards. Notwithstanding the fact that dissenting opinions neither form part of an arbitral award nor constitute a separate award, the escalation of dissenting opinions spawns anxiety in scholars and practitioners. This trepidation ignited a crusade whereby those opposed to the practice of rendering dissent challenge the role and usefulness of these opinions. In this respect, this Article initially considers and critiques specific arguments raised by those opposed to dissenting opinions in international arbitration. Following analysis of the criticisms, this Article explores the beneficial and constructive aspects of dissenting opinions. Evident from this discussion is that dissenting opinions are not only integral to supplement an arbitrator's quasi-judicial capacity, but also encourage issuance of well-reasoned awards. Clear from the benefits of dissenting opinions in international arbitration, any departure from the present clemency espoused toward the practice will eventuate in the field's regression.

INTRODUCTION

One distinctive aspect of international arbitration is the autonomy vested within the arbitrating parties with regard to structuring arbitral procedure. By virtue of this party autonomy, the parties and arbitrators are entitled to dispense with redundant formalities and procedures of litigation and instead fashion procedures altered in accord with their particular needs and disputes.[1] This party autonomy is central to the constitution of an arbitral tribunal. The overriding principle espoused by major international arbitration conventions and national arbitration statutes is to give effect to the parties' covenant with respect to the selection of arbitrators. This principle further

[1] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 85 (Wolters Kluwer Law & Business 2d ed. 2014).

applies to contracts regarding the number of arbitrators.[2] For instance, Article 10(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law states that "the parties are free to determine the number of arbitrators."[3] In harmony with this provision, Article 1(2) of the ICSID Arbitration Rules provides that "unless such information is provided in the request, the parties shall communicate to the Secretary-General as soon as possible any provisions agreed by them regarding the number of arbitrators. . . ."[4]

Because arbitration provides parties with carte blanche to choose the desired number of arbitrators, parties may opt to submit their dispute to a sole arbitrator.[5] Despite the advantages affiliated with a sole arbitrator, the modern trend in international arbitration is to refer disputes to three-member arbitral tribunals, which are comprised of diverse cultural, economic, legal, and linguistic backgrounds. Thus, when an arbitral tribunal is composed of more than one arbitrator, the resolution of a Daedalian dispute may be preceded by the arduous task of harmonizing the tribunal members' opinions. Failure to harmonize will obviously result in tribunal divergence.

Today, perhaps as a result of the important role dissenting opinions play in the development of law within the ambit of national and

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2 *See* English Arbitration Act 1996, c. 23 § 15(1); Turkish International Arbitration Law 4686, Official Gazette No. 24453, art. 7 (enacted July 5, 2001), http://www.camera-arbitrale.it/Documenti/tial_turkey.pdf; SWISS FEDERAL CODE ON PRIVATE INTERNATIONAL LAW [CPIL] Dec. 18, 1987, art. 179; Swedish Arbitration Act of 1999 [SFS] § 12 (1999:116). As to the institutional rules, *see also* Arbitration Institute of the Stockholm Chamber of Commerce [SCC], *Arbitration Rules*, art. 16(1) (Jan. 1, 2017) [hereinafter SCC Arbitration Rules]; International Chamber of Commerce [ICC], *Arbitration Rules*, art. 12(2) (Mar. 1, 2017) [herein after ICC Arbitration Rules]; Istanbul Arbitration Centre, *Arbitration Rules*, art. 13; Hong Kong International Arbitration Centre [HKIAC], *Administered Arbitration Rules*, art. 6(1) (Nov. 1, 2013) [hereinafter HKIAC Arbitration Rules]; China International Economic and Trade Arbitration Commission [CIETAC], *Arbitration Rules*, art. 25 (May 1, 2012) [hereinafter CIETAC Arbitration Rules].

3 Model Law on International Commercial Arbitration, art. 10(1) (1985) (UNCITRAL amended 2006).

4 International Centre for Settlement of Investment Disputes [ICSID], *Arbitration Rules*, arts. 1(2), 2(1) and 37(2)(b) (1985) (ICSID amended 2006) [hereinafter ICSID Arbitration Rules].

5 BORN, *supra* note 1, at 1669. "One arbitrator is easier, in some respects, to select than a larger number of arbitrators, while he or she generally costs less and can act more quickly than multiple arbitrators. . . . Parties sometimes find these various advantages decisive and opt for a sole arbitrator; that is particularly true in smaller cases or in some industrial sectors. Thus, in roughly 40% of ICC arbitrations, the parties' arbitration agreement provides for a sole arbitrator."

international litigation, the permissibility of dissent in arbitration is well accepted.[6] Per Alan Redfern, "At present, a generally relaxed attitude toward dissenting opinions seems to be taken not only by the arbitral institutions, but also by the arbitrators themselves . . ."[7] This relaxed approach instigated an increase in arbitral dissents, particularly in investment arbitration.[8] Unsurprisingly, this escalation birthed extensive "inquir[y] [into] whether the present leniency toward dissenting opinions . . . ha[d] gone too far."[9] Hence, within the context of international arbitration, there are valid reasons to question the benefits of dissenting opinions and whether the advantages of these opinions outweigh the notable downsides.[10]

Written in the midst of this dilemma, this Article first delves into a brief history of the doctrine of dissent in litigation and international arbitration. Using examples from civil and common law cases, this Article will illustrate that the issuance of dissent and acceptance of dissenting opinions advances both domestic and international law. However, also evident from this discussion is the adversity dissenting opinions face from critics. These critics find that dissenting opinions not only threaten judgment and award authority, but also erode the prestige and power of the court and arbitral tribunal. These criticisms, however, must be taken with a grain of salt. This Article will show that, rather than encouraging the erosion of law, dissenting opinions provide a necessary function in developing law domestically and internationally.

Second, in light of the relevant contributions of dissenting opinions in domestic and international litigation, this Article delves into the costs and benefits of dissent within the context of international arbitration. This discussion initially and briefly explores the differences between litigation and arbitration and then proceeds into the disadvantages of dissent according to critics as well as the undeniable advantages of dissenting opinions in international

6 *See* R.P. Anand, *The Role of Individual and Dissenting Opinions in International Adjudication*, 14 THE INT'L & COMP. LAW Q. 788–808 (1965).

7 Alan Redfern, *The 2003 Freshfields—Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 ARB. INT'L 223, 242 (2004).

8 Albert Jan van den Berg, *Charles Brower's Problem with 100%—Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, 31 ARB. INT'L 381, 384 (2015).

9 Redfern, *supra* note 7, at 242.

10 Peter J. Rees QC & Patrick Rohn, *Dissenting Opinions: Can They Fulfill a Beneficial Role?*, 25 ARB. INT'L 329, 330–31 (2009).

arbitration. From this discussion, this Article concludes that, in light of an arbitrator's quasi-judicial role, the practice of dissenting opinion is not only necessary but also integral to both the arbitral process's dynamism and the reign of the party autonomy, and an essential constituent of arbitral tribunals' duty to render a well-reasoned, substantiated award.

I
DISSENTING OPINIONS IN LITIGATION

A. Civil Law

Numerous arbitration practitioners and scholars perceive the arrival of dissenting opinions in international arbitration as an unwelcome gift of Anglo-American common law doctrine and practices.[11] The inspiration behind dissenting opinions emanates from the practice of the English House of Lords, whereby judges gave individual speeches concerning their opinions.[12] Notably, in civil law jurisdictions, emphasis is traditionally placed upon preserving deliberation secrecy as well as collegiality in delivering justice (purportedly to nurture the public's perception of the law as a dependable and secure system).[13] Resultantly, in a select number of these jurisdictions, dissenting opinions are not favored or even allowed.[14] However, this

11 Redfern, *supra* note 7, at 225 ("Dissenting opinions have come to international commercial arbitration as a gift of the common law."). *See also* Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 U. MIAMI INTER-AM. L. REV. 445, 450–58 (2012); Albert Jan van den Berg, *Dissenting Opinions By Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 822 (Mahnoush H. Arsanjani et al. eds., 2011).

12 Van den Berg, *supra* note 11. *See also* Ruth Breeze, *Dissenting and Concurring Opinions in International Investment Arbitration: How the Arbitrators Frame Their Need to Differ*, 25 INT'L J. SEMIOTICS L. 393, 395 (2012).

13 Van den Berg, *supra* note 11; Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 3 (2010); Redfern, *supra* note 7, at 225 ("There is no tradition of dissenting opinions in the civil law. It was thought that a court's decision should appear as the decision of the court as a whole, rather than as a mathematical process by which one party emerged as the winner, having gained more votes than his or her adversary. Dissenting opinions have come to international commercial arbitration as a gift of the common law. Many rejoice at the way in which different legal procedures and traditions are mixed together to build what Sir Michael Kerr called 'the emerging common procedural pattern in international arbitration.' It is doubtful, however, whether the dissenting opinion has added much, if anything, of the value to the arbitral process.").

14 This approach, however, no longer suits reality. Today, many civil law countries grant their judges the right to issue dissenting opinions. Nonetheless, there are some civil

antagonistic approach toward dissenting opinions in civil law countries is eroding. For example, historically, German courts strictly executed the rule necessitating deliberation secrecy, and thus, divergence in opinion was never revealed.[15] Conversely, today the German Constitutional Court exercises a different approach and grants its judges freedom of choice in whether to issue dissenting opinions.[16]

B. Common Law

Publicly declaring and articulating dissenting opinions is theoretically premised upon common law tradition.[17] Under the common law system, judges construe written law and develop new law within the context of precedents, statutes, and well-recognized principles.[18] This formation of law, however, cannot be considered independent from dissenting opinions. Although future judges are not bound by dissenting opinions, law is a system subject to continual change. Dissenting opinions, by acting as persuasive authority, often affect law's advancements.[19] The influence of dissenting opinions over the advancement of law may be found in the oft-repeated words of Chief Justice Evans Hughes of the United States Supreme Court. Per Chief Justice Hughes, "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 have been betrayed."[20]

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law countries that resist allowing judges to publish dissenting opinions. These countries include France, Italy, and the Netherlands. For further information regarding dissenting opinion practice of the European Union member states, see Rosa Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States*, PE 462.470, POLICY DEP'T. C. CITIZENS' RIGHTS & CONST. AFFAIRS (Nov. 2012), http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf.

15 Kurt H. Nadelmann, *The Judicial Dissent: Publication v. Secrecy*, 8 AM. J. COMP. L. 415, 415 (1959) ("The Rule of Law as Understood in the West' was considered at a round-table held by the International Association of Legal Science in Chicago in September, 1957. In the course of the discussion, a German participant, member of the German Constitutional Court, who had referred to a decision of his court, was asked what the vote had been in the case. His answer was a reference to a rule in German law requiring judges to keep the deliberation secret.").

16 Van den Berg, *supra* note 11, at 822 n.7.

17 Breeze, *supra* note 12, at 395.

18 *Id.*

19 Anand, *supra* note 6, at 793; Breeze, *supra* note 12, at 395–96.

20 Anand, *supra* note 6, at 793.

Indeed, American jurisprudence exemplifies how dissenting opinions appeal to "the intelligence of a future day" and influences the progression of the law.[21] To illustrate, in *Plessy v. Ferguson*, Justice Harlan diverged from the majority's finding that racial segregation survived constitutional muster under the "separate but equal doctrine." In his dissent, he propounded:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows or tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[22]

Years after *Plessy*, Justice Harlan's dissent maintained its potency. It laid the intellectual foundation for the judgment furnished in *Brown v. Board of Education*,[23] where the Court ended racial segregation in schools. In addition to Justice Harlan, Supreme Court Justice Oliver Wendell Holmes, Jr., also showed unwavering support for the use of dissent to transform law. In *Abrams v. United States* and *Lochner v. New York*, Justice Holmes's dissents restructured the law on free speech, and also established the basis for modern-day economic regulations.[24]

Next, in consonance with American jurisprudence, English courts (similarly established under common law) often propound that dissenting opinions contribute to the development and acclimatization

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21 *Id.*

22 Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

23 *See generally* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

24 Richard M. Mosk & Tom Ginsburg, *Dissenting Opinions in International Arbitration*, *in* LIBER AMICORUM BENGT BROMS 259, 261 (1999); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."); Lochner v. New York, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) ("But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."). (For further information regarding Justice Holmes' dissenting opinion in the *Lochner* case, see Ellen Frankel Paul, *Freedom of Contract and the "Political Economy" of Lochner v. New York*, 1 N.Y.U. J.L. & LIBERTY 515–69 (2005)).

of law. For instance, Lord Mustill's dissent in the *Ken Ren* case[25] successfully epitomizes English favoritism for dissent. In *Ken Ren*, the contractor Coppée-Lavalin lodged requests with the High Court per Section 12(6)(a) of the Arbitration Act of 1950 to acquire an order for security for their costs in an ICC arbitration held in London.[26] The issue went up to the House of Lords. The conundrum confronting their Lordships was whether jurisdiction vested with the English court to permit such an order. The majority of Lord Justices agreed that there was a discretionary power conferred upon the court to issue an order for security for costs in the arbitration.[27] However, Lord Mustill and Lord Browne-Wilkinson deviated from the majority and furnished a dissenting opinion. In his dissent, Lord Mustill stated:

> The fact remains however that an uncorrectable miscarriage of justice is something which parties risk by agreeing to entrust their disputes to a private dispute-resolution system. . . . The parties choose arbitration for better or for worse. They relish the better features, of which there are many. When things take a turn for the worse, there are limits beyond which they cannot be allowed, consistently with their arbitration agreement, to run to the courts for help. . . .[A]n order for security for costs does not conform with the type of procedure which the parties have impliedly chosen, and that an order for security should be refused notwithstanding that on a narrower view it appears to answer the justice of the case.[28]

Reflecting the potential impact of dissenting opinions, just one year after *Ken Ren*, the English Arbitration Act of 1996 mirrored Lord Mustill's approach and confiscated from the English courts the authority to order security for costs in arbitration; the Act instead conferred this authority upon arbitrators.[29]

Recognition of dissent as a customary means of judicial expression in both common and civil law jurisdictions eventuated in integrating the practice of dissenting opinion into international adjudication. Today, the issuance of dissenting opinions is widely accepted by international courts and other bodies performing quasi-judicial roles.[30]

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25 S.A. Coppée Lavalin N.V. v. Ken-Ren Chemicals and Fertilizers [1995] 1 AC 38 (HL) (appeal taken from England).

26 *Id.*

27 Redfern, *supra* note 7, at 231.

28 S.A. Coppée Lavalin N.V. v. Ken-Ren Chemicals and Fertilizers [1995] 1 AC 65 (HL) (appeal taken from England).

29 English Arbitration Act 1996, c. 23, §§ 38–44, sch.1. Where section 38 regulates the arbitral tribunal's general powers, section 44 dictates the judiciary's power in support of arbitral proceedings.

30 Fraga & Samra, *supra* note 11, at 456.

For example, both the Permanent Court of International Justice (hereinafter PCIJ)[31] and its successor, the International Court of Justice (hereinafter ICJ), embrace dissenting opinions. Article 57 of the Statute of the ICJ provides, "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."

Unsurprisingly, similar to American and English jurisprudence, dissenting opinions furnished in the ICJ also play a pivotal role in improving and modifying international law.[32] To aid in the cultivation of international law—because the issues tackled by the ICJ are often unsettled and these proceedings are public—dissenting opinions readily find voice and influence in subsequent litigation.[33] To illustrate, disunity among the members of the PCIJ in the *Lotus* case[34] exemplified international law's deficiencies in regulating the extension of national liability to crimes perpetrated on the high seas.[35] From this disunity arose dissent that not only alleviated this deficiency, but also contributed to the development of law.[36]

In addition to the ICJ, the following international courts and tribunals endorse dissenting opinions: (1) ICSID; (2) the Iran-United States Claims Tribunal; (3) the International Tribunal for the Law of the Sea; (4) the International Criminal Court; (5) the Special Court for Sierra Leone; (6) the Special Court for Lebanon; (7) the Inter-

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31 Van den Berg, *supra* note 11, at 822 n.6 ("The final version of the Statute [of the Permanent Court of International Justice] provided: 'If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.'").

32 *See* Anand, *supra* note 6.

33 Domenico Di Pietro, *The Controversial Role of Dissenting Opinions in International Arbitral Awards*, TRANSNATIONAL NOTES (Oct. 24, 2011), http://blogs.law.nyu.edu/transnational/2011/10/the-controversial-role-of-dissenting-opinions-in-international-arbitral-awards/.

34 Anand, *supra* note 6, at 803.

35 *Id.*

36 *Id.* at 803–04 ("It also seems, to take another example at random, that Judge Lauterpacht's strong individual and dissenting opinions in the *Norwegian Loans* and *Interhandel* cases respectively, denouncing the "automatic" reservations in the declarations accepting the International Court's compulsory jurisdiction, have had a marked effect on the attitudes of governments. These two cogent pieces of reasoning not only seem to have stopped the trend of including such reservations in new declarations, but have persuaded several states (France, India, the United Kingdom, and Pakistan) to abandon them from their declarations in which they had been included.").

American Court of Human Rights; and (8) the European Court of Human Rights.[37]

Notwithstanding this apparent widespread adoption and use of dissent in both national and international jurisprudence, these opinions remain denunciated.[38] The principal argument against dissenting opinions is premised upon the need to safeguard a judgment's authority as well as the authority of the furnishing court.[39] Pursuant to this argument, because dissenting opinions manifest dissonance, not only is the judgment's authority undermined, but also the losing party is heartened to question the judgment's validity and attempt appeal, where possible. In support of this concern, Judge Learned Hand of the United States Federal Court of Appeals opined that "disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges largely depends."[40] In furtherance of Judge Hand's remarks regarding the connection of dissenting opinions and judgment authority, Manley O. Hudson (a former

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37 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 ARB. INT'L 7, 28 (2013). *See also* Fraga & Samra, *supra* note 11, at 456. Some of the articles regulating the practice of dissenting opinion in the context of the cited international courts and tribunals are as follows: ICSID Convention, Regulations, and Rules, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, art. 48(4) (Apr. 15, 2006) ("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."); ICSID Arbitration Rules, *supra* note 4, at art. 47(3) ("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."); Tribunal Rules of Procedure, IRAN-UNITED STATES CLAIMS TRIBUNAL RULES OF PROCEDURE, art. 32(3) (May 3, 1983) ("Any arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefore be recorded."); Article 65(2) of the Inter-American Court of Human Rights ("Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting."); European Convention on Human Rights, EUR. CT. H.R. & COUNCIL OF EUR., art. 45(2) (June 1, 2010) ("If a 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."); Rules of Court, EUR. CT. H.R., ch. VIII, r. 74, § 2 (Aug. 1, 2018) ("Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.").

38 *See* Anand, *supra* note 6.

39 *See* Redfern, *supra* note 7; Anand, *supra* note 6. Other arguments raised against dissenting opinions include: dissenting opinions may generate redundant ambiguity and confusion in the public, dissenting opinions may undermine the collegial relationship among judges, and dissenting opinions may considerably slow down the process of judicial deliberations and proliferate judicial expenses.

40 Anand, *supra* note 6, at 791.

member of the PCIJ) alluded to the insidious impact of dissent, stating that "disastrous consequences might follow for a high judicial institution which can command observance of its judgment and opinions only by its prestige and by the persuasion which the statement of its conclusions imparts."[41]

Based on the foregoing, skeptics argue that dissenting opinions represent a menace to the authority of judgments and to the prestige of the courts. Notwithstanding the cogency of these arguments, it is neither promising nor appropriate to perceive unanimity as an exclusive source from which the authority of judgments and the prestige of the courts derive. Discouraging dissent for the sake of unanimity will merely apportion delusional dependability and regard to both the judgments and rendering courts. Rather, a well-written and sincere dissent should take precedence because these dissents may, and often do, enhance the quality of the ultimate judgment, and accordingly give birth "not only [to] authoritarian but also [to] authoritative"[42] judgments.

In sum, far from eroding judgment, authority, and court reputation, dissenting opinions conveyed in national and international judicial proceedings "add to their vitality, comprehension, and usefulness,"[43] while simultaneously contributing to the development and innovation of dynamic national and international law. Although this conclusion appears evident, the same deduction may not come so easily when the issue comes to the role of dissenting opinions in international arbitration. Because of the evident differences in principles and priority existing between litigation and international arbitration, it is appropriate to now analyze why concern of dissenting opinions is minimal in one forum, but give rise to grave unease in another.

II
DISSENTING OPINIONS IN INTERNATIONAL ARBITRATION

To begin the discussion of dissenting opinions and their import in international arbitration, it is helpful to note initial differences between litigation and arbitration. Whereas litigation, national and international, largely appears before judges, arbitration occurs before

41 Manley O. Hudson, *The Twenty-Eighth Year of the World Court*, 44 AM. J. INT'L L. 1, 21 (1950).

42 Raffaelli, *supra* note 14, at 13.

43 Anand, *supra* note at 6, at 794.

arbitrators and is controlled by a party-made contract. Specifically, in international arbitration disputes are commonly referred to a tribunal of multiple arbitrators. Once appointed, the tribunal's implied duty (to render a unanimous award) is usually unforgiving. However, although the expectation of a unanimous award is held by the arbitrating parties, ironically, by the very nature of international arbitration and party autonomy, this expectation is often defeated. Because party autonomy allots the parties the privilege to nominate or appoint arbitrators with specific substantive, cultural, or legal experience, a tribunal comprised of multiple arbitrators is bound to disagree.

Unsurprisingly, especially in international disputes, a tribunal of multiple arbitrators results in a panel of great diversity in national, legal, cultural, and linguistic backgrounds.[44] This diversity carries with it a concomitant risk of bifurcation among the tribunal members. This divergence may result from differences of opinion regarding the outcome of the dispute (and its reasoning) or simply upon particular facets of the dispute (such as arbitral costs).[45] Thus, when a split occurs, the question changes to whether an arbitrator holding the minority opinion should fight out the differences behind closed doors and eventually acquiesce to the majority or whether the arbitrator should vocalize the reasons leading to divergence via a dissenting opinion. In response to this question, practitioners and scholars today diverge, and this discrepancy reflects the polarity that perpetually plagues the field.

To address the divergence of opinion between scholars and practitioners, in 1985 the International Chamber of Commerce Commission on International Arbitration assembled a Working Party on Dissenting Opinions on Interim and Partial Arbitral Awards (Working Party) to tackle the issue.[46] After the deliberations and the opinions garnered from invited commentary, the Working Party released its final report and concluded:

> It is neither practical nor desirable to attempt to suppress dissenting opinions in ICC arbitrations. A minority opinion was expressed to the effect that the ICC should seek to minimize the role of

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44 BORN, *supra* note 1, at 1669 (saying "permits a mix of arbitrators with diverse national, legal, and linguistic backgrounds."); *see also* BORN, *supra* note 1, at 1782–83.

45 Christoph Stippl & Veit Öhlberger, *Rendering of the Award by Multipartite Arbitral Tribunals: How to Overcome Lack of Unanimity*, 2008 AUSTRIAN ARB. Y.B. 371, 385 (2008).

46 Ilhyung Lee, *Introducing International Commercial Arbitration and Its Lawlessness, By Way of the Dissenting Opinion*, 4 CONTEMP. ASIA ARB. J. 19, 24 (2011).

> dissenting opinions, but the prevailing view was that the ICC should neither encourage nor discourage the giving of such opinions.[47]

With this conclusion, the Working Party concurrently said "something" and "nothing" on the controversial position of dissenting opinions in international arbitration. Consequently, arbitration practitioners and scholars have since weighed in on the debate.[48] On one end of the spectrum, conservatives regard dissenting opinions as a breach of the essence of international arbitration and, accordingly, severely disapprove of them, particularly in the context of commercial arbitration.[49] However, on the other end, there are pragmatists who purportedly assess the advantages and disadvantages of dissenting opinions prior to coming to a conclusion concerning their value.[50]

To tip the scales in favor of one argument or the other, it is essential to examine the legal framework regulating dissenting opinions in international arbitration and intellectualize the alleged advantages and disadvantages of dissent in international arbitration.

A. Legal Framework Regulating Dissenting Opinions in International Arbitration

International arbitration is a hybrid of common law and civil law traditions.[51] Resultantly, most national arbitration laws and institutional arbitration rules fail to provide guidance on the subject of dissenting opinions.[52] Further, in practice, arbitration agreements rarely incorporate rules on conveying dissenting opinions. This lack of regulation generates obscurity regarding issuance, publication, and communication of dissenting opinions, leaving the issue to be determined by arbitral majority, upon whom wide discretion is conferred.

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47 Di Pietro, *supra* note 33.

48 Lee, *supra* note 46.

49 Rees & Rohn, *supra* note 10, at 329–30 ("Although the admissibility of dissenting opinions seems to be now widely recognized and arbitral institutions appear to take a more relaxed attitude toward dissenting opinions, they still seem to be frowned upon by some practitioners and the prevailing view is that they should be discouraged."). As to the arbitration practitioners and scholars who oppose dissenting opinions, *see* Rees & Rohn, *supra* note 10, at 330 n.3.

50 Lee, *supra* note 46, at 25.

51 Catherine M. Amirfar, *Chapter 8: Oral Proceedings*, *in* LITIGATING INTERNATIONAL INVESTMENT ARBITRATION DISPUTES 232, 233 (2014).

52 BORN, *supra* note 1, at 3054.

However, although guidance relating to dissent is often limited, there are some national arbitration statutes and institutional arbitration rules where dissenting opinions are unambiguously addressed. For example, the following represents a list of select national arbitration statutes where rules regarding dissenting opinions are dictated:

1. Article 14A(4) of the Turkish International Arbitration Law, which permits arbitrators to specify how they voted in the arbitral award and, in practice, allows dissenting opinions to either be attached to or be dictated in the award;
2. Article 53 of the Chinese Arbitration Law, which states that the opinion of the minority arbitrator may be entered into record;
3. Article 24(2) of the Brazilian Arbitration Law provides that a dissenting arbitrator may render a separate opinion;
4. Article 39(1) of the Bulgarian Arbitration Law provides that an arbitrator who disagrees with the award shall state his/her dissenting opinion in writing;
5. Section 32(4) of the Slovakian Arbitration Act permits the "outvoted" arbitrator to attach his/her dissenting opinion to the arbitral award and provide reasons for the dissent; and last,
6. Article 37(3) of the Spanish Arbitration Act allows arbitrators to specify how they voted and, further, if any arbitrator omits his or her signature from the arbitral award, he or she is required to provide reasoning for the omission.[53]

1. English Approach

Interestingly, the English Arbitration of Act of 1996 (hereinafter the English Arbitration Act) espouses no incorporated rule regarding dissenting opinions. This silence may be perceived as an echo of the comprehensive autonomy bestowed upon the parties. Demonstrably, in the spirit of this autonomy, Section 52(1) of the English Arbitration Act permits parties to agree on the form of the award, and absent such agreement, default rules apply.[54] These default rules dictate that, in the absence of an agreement, pursuant to Section 52(3) of the English

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53 Declining to sign an arbitral award is one mechanism to show disagreement. The dissenting arbitrator may also deliver a written dissenting opinion articulating the reasons for dissent. This is sometimes delivered in the form of a dissenting or separate statement/opinion, often annexed to the arbitral award. For further details, *see* BORN, *supra* note 1, at 3053.

54 English Arbitration Act 1996, c. 23 § 52(1).

Arbitration Act, "the award shall be in writing *signed by all the arbitrators or all those assenting to the award*."[55] Summarily, if an arbitrator wishes to dissent, per the language of the Act, he or she is allowed to withhold his or her signature and therefore, although an arbitrator has the right to furnish a dissenting opinion under English law, dissents continue to be relatively rare.[56]

To illustrate how English jurisdiction treats dissenting opinions, it is helpful to examine the authoritative judgment rendered by the English Court of Appeal in *Cargill International S.A. v. Sociedad Iberica de Molturacion*.[57] Here, the Court of Appeal faced the quandary of whether a dissenting arbitrator in a GAFTA Arbitration (under the Grain and Feed Trade Association Rules) could abstain from signing the award and express his reasoning for the abstention. The court held that if applicable arbitration rules required all three arbitrators to sign the award for it to be enforceable, a dissenting arbitrator may not abstain from signature simply because the majority refused to incorporate his dissent into the award.[58] The court also opined that it would be mistaken to assume that awards must include dissent absent express rules to the contrary in the arbitration agreement or applicable arbitration rules.[59]

Thus, Lord Justice Waller, in agreement with Lord Justice Chadwick and Lord Justice Philips, concluded that a dissenting opinion does not form part of the arbitral award. In support of this holding and in consonance with *Cargill*, in 2010 Justice Tomlinson in *B v. A*[60] also opined that a dissenting opinion was not part of an arbitral award.[61]

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55 English Arbitration Act 1996, c. 23 § 52(3) (emphasis added).

56 Nigel Rawding QC & Elizabeth Snodgrass, *England & Wales: Question 36*, GLOBAL ARB. REV. (June 27, 2017), http://globalarbitrationreview.com/jurisdiction/1000187/england-&-wales.

57 Cargill International SA Antigua (Geneva Branch) v. Sociedad Iberica de Molturacion SA [1997] 1 Lloyd's Rep. 489.

58 Rees & Rohn, *supra* note 10, at 332.

59 *Id.* (citing Cargill International SA Antigua (Geneva Branch) v. Sociedad Iberica de Molturacion SA [1997] 1 Lloyd's Rep. 489).

60 B v. A [2010] EWHC (Comm) 1626 (Eng.), http://www.bailii.org/ew/cases/EWHC/Comm/2010/1626.html.

61 *Id.* at ¶ 21 ("At this point, I should say a word about the status of the Dissenting Opinion. It is not in my view formally part of the Award of the Tribunal . . . A dissenting opinion might be admissible as evidence in relation to procedural matters, as where for example it is alleged that some aspect of the procedures adopted in the arbitration worked unfairly to the disadvantage of one party. . . . So too where the proper law of the disputes

These two judgments, read in conjunction with Article 52 of the English Arbitration Act, establish that although an arbitrator's right to issue dissenting opinions is respected under English law, these opinions are principally considered commentary on the arbitral award. Importantly, this indicates that dissenting opinions may be admissible as evidence in connection with procedural matters and as a source evincing an informatory role for the respective English court when the proper law of the dispute is English law and there is an appeal on a point of law.[62]

2. Swiss Approach

The attitude adopted by English law is replicated in Switzerland. Swiss arbitration law, outlined in chapter twelve of the Federal Act on Private International Law (hereinafter PILA), does not include any rule concerning dissenting opinions. However, similar to Article 52 of the English Arbitration Act, not only does Article 189 of the PILA pay tribute to party autonomy and allow parties to agree on the form of an arbitral award, but it also recognizes the decision furnished by the majority.[63] Thus, although Swiss law does not inhibit dissent, it also does not dictate an easily read roadmap for an eager arbitrator to follow to convey his concerns regarding an arbitral award.

Relating to the status of dissenting opinions in Swiss legal practice, a certain Swiss Federal Tribunal's judgment, furnished on May 11, 1992, proves useful. Within its judgment, the Federal Tribunal held that a dissenting arbitrator may not demand his or her opinion be incorporated into the arbitral award, nor may he or she demand that the dissent be communicated to the parties unless one of the following conditions are met: first, the parties' arbitration agreement dictated otherwise; or second, in the absence of this dictation, the majority of the arbitral tribunal endorsed it.[64] Hence, in a nutshell, Swiss law gives party autonomy precedence in the context of the procedure

is English law and there is an appeal on point of law, I can see that the views of a dissenting arbitrator might well inform the decision of the court.").

62 *See* Rawding & Snodgrass, *supra* note 56.

63 Swiss Federal Code on Private International Law [CPIL] Dec. 18, 1987, art. 189 (Switz.) ("(1) The arbitral award shall be made in conformity with the procedure and form agreed by the parties; (2) In the absence of such an agreement, the award shall be made by a majority decision or, in the absence of a majority, by the presiding arbitrator alone. It shall be in writing, reasoned, dated, and signed. The signature of the presiding arbitrator is sufficient.").

64 Rees & Rohn, *supra* note 10, at 332.

behind rendering dissenting opinions. In addition, although Swiss law merits dissenting opinions as a product of due diligence, such dissents remain viewed as mere independent opinions, which hold minimal influence, are of no legal significance, and fail to contribute to the form of the arbitral award.[65]

3. Institutional Arbitration Rules

This enduring, dogged silence in national arbitration laws regarding dissenting opinions is reflected by institutional arbitration rules. Due to the limited number of rules unambiguously recognizing an arbitrator's right to issue dissent, institutional arbitration rules remain cryptic. However, hope is not lost. With the goal of attaining some clarification, the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, the Arbitration Rules of the Netherlands Arbitration Institute (hereinafter NAI), and the China International Economic and Trade Arbitration Commission (CIETAC) defy the "silence is golden" rule embraced by the majority of arbitral institutions. Article 48(4) of the ICSID Convention, Article 47(3) of the ICSID Convention Arbitration Rules, and Article 52(2) of the ICSID Additional Facility Rules expressly recognize an arbitrator's right to issue dissenting opinions.[66] All three articles indistinguishably provide that "[a]ny 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."[67] Correspondingly, Article 43(4) of the NAI Arbitration Rules states: "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."[68]

In harmony with the NAI Arbitration Rules, Article 49(5) of the CIETAC Arbitration Rules provides that "[a] written dissenting opinion shall be kept with the file and may be appended to the award.

[65] Diane Vallée-Grisel, Isabelle Fellrath & Dominique Brown-Berset, *Switzerland: Question 36*, GLOBAL ARB. REV. (June 27, 2017), http://globalarbitrationreview.com/jurisdiction/1000208/switzerland.

[66] *See generally* ICSID Convention, Regulations and Rules, art. 48(4), (2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

[67] *Id.*

[68] Netherlands Arbitration Institute [NAI], *Arbitration Rules*, art. 43(4), (Jan. 1, 2015).

. . . [S]uch dissenting opinion shall not form a part of the award."[69] Unlike the rules of the ICSID, NAI, and CIETAC, the rules of other major arbitration institutions, such as the ICC,[70] LCIA,[71] Swiss Chambers' Arbitration Institution,[72] and UNCITRAL,[73] do not express any rule on dissenting opinions. Thus, although these rules do not ban arbitrators from issuing dissenting opinions, they do not clearly hearten arbitrators to furnish them.[74]

69 CIETAC Arbitration Rules, *supra* note 2, at art. 49(5).

70 The practice of dissenting opinion in the context of international commercial arbitration was addressed by the ICC's Commission on International Arbitration via the Working Party on Dissenting Opinions. The final report issued by the Working Party embraced the possibility of dissenting opinions in ICC arbitrations. ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 576 (2009) ("The [Final] Report made a series of sensible suggestions. It did not attempt to rule out dissenting opinions and it suggested that the only circumstances in which a dissenting opinion should not be sent to the parties with the award was where such opinions were prohibited by law or where the validity of the award might be imperiled, either in the place of arbitration or—to the extent that this could be foreseen—in the country of enforcement.").

71 London Court of International Arbitration [LCIA], *Arbitration Rules*, art. 26(6), (2014) [hereinafter LCIA] ("If any arbitrator refuses or fails to sign the award, the signatures of the majority or (failing a majority) of the presiding arbitrator shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or by the presiding arbitrator"); Swiss Chambers' Arbitration Institution [SCAI], *Swiss Rules of International Arbitration*, art. 32(4) (June, 2012) [hereinafter SCAI Arbitration Rules] ("Where the arbitral tribunal is composed of more than one arbitrator and any of them fails to sign, the award shall state the reason for the absence of the signature."). Although these two articles provide a roadmap as to how to deal with an arbitrator's failure to sign the arbitral award, they do not elucidate how dissenting opinions will be tackled. In the presence of this lack of elucidation, any of these three paths may be followed in the arbitral institutions' practice: (1) incorporating dissenting reasons into the arbitral award; (2) treating the arbitral award and the dissenting opinion separate from each other and communicating them to the arbitrating parties simultaneously, but independently; consequently, (3) appending the dissenting opinion to the arbitral award, after the signature page of the arbitral award. *See* Rees & Rohn, *supra* note 10, at 335.

72 SCAI Arbitration Rules, *supra* note 71.

73 BORN, *supra* note 1, at 3054–55 ("During the drafting of the UNCITRAL Model Law, proposals were made to specifically permit dissenting opinions, but insufficient need was seen to do so. That is apparently because it was clear that dissenting opinions were permissible (absent contrary to agreement), even without express statutory authorization, but not to be encouraged."). Here, notably, the Iran-United States Claims Tribunal, operating under the UNCITRAL Model Law, expressly recognizes an arbitrator's right to dissent. According to Article 32(3) of the Iran-United States Claims Tribunal Rules of Procedure, "Any arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefore be recorded." Tribunal Rules of Procedure, *supra* note 37, at art. 32(3).

74 For example, paragraph 39 of the Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration provides that "the Model Law

Here, the arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (hereinafter SCC) warrant attention. While the 1999 version of the Arbitration Rules of the SCC expressly recognized an arbitrator's right to issue dissenting opinions,[75] the 2017 version, and its predecessors, employed a different stance. The later versions summarily detached the rule expressly recognizing an arbitrator's right to dissent from the text. To illustrate, under the current Arbitration Rules of the SCC, where there is no unanimity between the arbitrators sitting on the tribunal, Article 41(1) allows the majority to render any award or other decision.[76] In addition, Article 42(3) provides that if an arbitrator fails to sign an award, the reason behind the omitted signature shall be stated in the award either by the majority or the chairperson.[77]

These articles make clear that arbitrators may issue dissenting opinions. However, reasonable postulation speculates that the SCC preferred not to dictate a standard of practice for dissenting opinions. Rather, in typical respect for party autonomy and arbitral tribunal's authority, the SCC opted to leave the decision either to the parties' arbitration agreement or to the judgment of the respective tribunal.[78]

Evident from discussion thus far, most national arbitration statutes and institutional arbitration rules practice silence on the subject of dissenting opinions. One can reasonably conclude from this silence a desire to be neutral and preclude interference with party autonomy, avoid encroaching upon arbitrator liberty, and to maintain objectivity in the issuance of dissenting opinions. Today, notwithstanding this mainstream "silent" approach (particularly in international commercial arbitration), as well as critic repudiation of dissenting opinions, it is still well accepted that dissenting opinions are

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neither requires nor prohibits 'dissenting opinions.'" *See* Model Law on International Commercial Arbitration, *supra* note 3.

75 SCC Arbitration Rules, *supra* note 2, at art. 32(4) (1999) ("An arbitrator may attach a dissenting opinion to the Award.").

76 *Id.* at art. 41(1) ("Where the Arbitral Tribunal consists of more than one arbitrator, any award or other decision shall be made by a majority of the arbitrators or, failing a majority, by the Chairperson.").

77 *Id.* at art. 42(3) ("An award shall be signed by the arbitrators. If an arbitrator fails to sign an award, the signatures of the majority of the arbitrators or, failing a majority, of the Chairperson shall be sufficient, provided that the reason for the omission of the signature is stated in the award.").

78 *See supra* text accompanying note 68 as to the possible methods employable by an arbitral tribunal with respect to the practice of dissenting opinion in the SCC arbitration.

permissible unless the parties' arbitration agreement dictates otherwise or, in the absence of this dictation, the majority of the arbitral tribunal rejects it.

Despite the autonomy enjoyed by arbitrating parties, arbitration employs an adjudicative function under which arbitrators act with a quasi-judicial capacity.[79] Thus, an arbitrator's right to issue dissent not only is an apt concomitant of their quasi-judicial capacity but is also corollary to an arbitral tribunal's obligation to furnish a well-reasoned award.[80] There is, however, continued discourse among arbitration scholars and practitioners relating to challenges and benefits of dissenting opinions. Worthy of discussion, these alleged benefits and disadvantages are explored in the next section.

B. Advantages and Disadvantages of Dissenting Opinions in International Arbitration

Although the raison d'être of dissenting opinions was once hotly debated, today the center of controversy no longer rests upon the reality of dissenting opinions and why they exist. Rather, the debate evolved into a modern discussion and evaluation of the admissibility of these dissents and whether such admissibility is desirable.

This Article propounds that, because of the well-accepted reality of dissenting opinions in international arbitration, it is a gross waste of time and energy to debate about and dwell upon the admissibility or desirability of these opinions. Instead, critics must bury their respective hatchets and focus instead on using dissent as a beneficial tool in international arbitration. This shift in focus will optimize these opinions' benefits and minimize their disadvantages, effectively neutralizing any threat posed to international arbitration. To successfully accomplish this goal, the following section investigates the supposed disadvantages of dissenting opinions and subsequently proceeds into their benefits.

1. Disadvantages of Dissenting Opinions

Antagonists of dissenting opinions rally assorted arguments to dissuade arbitrators from rendering these opinions. From a critic's point of view, issuing dissenting opinions not only conflicts with basic principles of international arbitration but also eventuates in

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79 BORN, *supra* note 1, at 2127.
80 *See id.* at 3055.

systemic dysfunction. The following paragraphs discuss seriatim the most powerful criticisms rallied against dissenting opinions: concerns of dissenting opinions and issues of confidentiality, unease of an arbitrator's neutrality and independence, possible destruction of award authority, increased award challenge, and likelihood of cost escalation and arbitral inefficiency.

a. Confidentiality of Arbitral Deliberations and Dissenting Opinions

To begin, the first criticism raised against dissenting opinions propounds that dissent infringes upon the confidentiality of arbitral proceedings because it exposes nonunanimity of the tribunal and, further, bares the details behind deliberations. The accuracy of this argument hinges upon the following two exigent questions and their respective answers: first, how far do the radii of arbitral confidentiality and deliberation confidentiality extend?[81] Second, do dissenting opinions expose the actual content of deliberation or do they provide a mere exposé into arbitrator disagreement?[82]

The first question debates the scope of the confidentiality principle in arbitral proceedings. Broadly speaking, the principle of confidentiality is entrenched in international arbitration, especially in international commercial arbitration. This essential aspect of the arbitral process fulfills an important role in promoting arbitration as an effective dispute resolution mechanism, placing it in a catbird seat of the international dispute resolution arena.[83] Notwithstanding confidentiality's highly regarded position, there remains a substantial void in clarity relating to its scope. Nonetheless, what is absolute is

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81 Rees & Rohn, *supra* note 10, at 337 ("[D]oes it [the rule of secrecy] only include the arbitrators' discussions in the deliberation process, *i.e.* the arguments exchanged and the process by which the arbitrators shaped their view and found a decision, or does it also comprise the voting process, *i.e.* the fact of whether or not the individual arbitrator consented to the evaluation of the facts and the application of the law and, consequently, to the result of the arbitration proceedings as declared in the award?").

82 *Id.* ("[D]oes a dissenting opinion reveal the actual content of the deliberation, or does it only disclose that the arbitrators have differed about the evaluation of the facts and/or the interpretation and application of the law?").

83 BORN, *supra* note 1, at 2780 ("Many authorities and users regard confidentiality as an essential aspect of the arbitral process, which assists in the effective, efficient resolution of international disputes, and which must be given legal effect."); *but see* BORN, *supra* note 1, at 2780 ("At the same time, a substantial body of critics deny that confidentiality is a necessary or particularly beneficial feature of international arbitral proceedings, or that parties have any general legally enforceable right to confidential arbitral proceedings.").

that the confidentiality of arbitrator deliberations falls within the radius of the arbitral proceedings' confidentiality.[84]

Therefore, arbitrator deliberations are principally treated as confidential. This approach is corroborated by national laws and institutional arbitration rules.[85] Further, the confidentiality of deliberations is embraced by professional guidelines regulating the conduct of international arbitrators.[86]

Notwithstanding this universal acquiescence to deliberation confidentiality in international arbitration, what remains vague is the reach of this confidentiality, in both deliberation and dissenting opinions. This obscurity unfortunately facilitates castigation and alienation of dissenting opinions, resulting in an incomplete and incorrect interpretation of the purpose of confidentiality in international arbitration. The confidentiality of arbitral deliberations does not, and should not, apply to an arbitrator's formal statement regarding the claims submitted to the tribunal.[87] Indeed, espousing otherwise would not allow an arbitrator to do anything other than sign an award with which he or she disagrees, consequently diminishing the adjudicative function of an arbitrator.[88] In sum, application of the principle of confidentiality in this broad manner would limit an arbitrator's findings, lead to irreparable harm to the arbitral system,

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84 *See* BORN, *supra* note 1, at 2779–2831.

85 CODE DE PROCÉDURE CIVILE [C.P.C.] [Code of Civil Procedure] art. 1469 (Fr.) ("The arbitrators' deliberations are secret."); LCIA Arbitration Rules, *supra* note 71, at art. 30(2) ("The deliberations of the Arbitral Tribunal shall remain confidential to its members, save as required by any applicable law and to the extent that disclosure of an arbitrator's refusal to participate in the arbitration is required of the members of the Arbitral Tribunal under Articles 10, 12, 26, and 27."); SCAI Arbitration Rules, *supra* note 71, at art. 44(2) ("The deliberations of the arbitral tribunal are confidential."); HKIAC Arbitration Rules, *supra* note 2, at art. 42(4) ("The deliberations of the arbitral tribunal are confidential."); ICSID Arbitration Rules, *supra* note 4, at art. 15(1) ("The deliberations of the Tribunal shall take place in private and remain secret.").

86 International Bar Association, Rules of Ethics for International Arbitrators, at art. 9 (1987) ("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."); American Arbitration Association, Code of Ethics, Canon VI(B) (2004) ("The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.").

87 BORN, *supra* note 1, at 3056.

88 *Id.*

and inevitably result in an outright, de facto ban on dissenting opinions.

Next, the second question relates to the scope of dissenting opinions. Obviously, issuing dissent is a serious act and should only be pursued with caution. Thus, dissenting arbitrators must heed the content of their dissenting opinions and exercise utmost care not to reveal the actual substance of the deliberations. So long as the authors of dissenting opinions limit their comments to their own assessment of facts, analysis, and execution of applicable law (as opposed to disclosing who said what, when, and for what purpose), dissenting opinions will not breach deliberation confidentiality.[89] In sum, understood from this evaluation, dissenting opinions do not automatically equate to a breach of deliberation confidentiality.

Notwithstanding this conclusion, breach of confidentiality is but one concern related to arbitral deliberation. Next, skeptics of dissent criticize dissenting opinions for their supposed success at impeding truthful deliberation dialogue. Pursuant to Redfern:

> It would be difficult, if not impossible, for arbitrators to have a frank and open exchange of views, to advance ideas and proposals, to change their mind and then perhaps to change it back again, if what they had said and what they had not said, what they had thought and what they had not thought, was to become known to the parties—particularly in a situation in which two of three members of the tribunal are chosen by the parties themselves . . . . [A]rbitrators should be able to discuss freely and openly the case that they have to decide. Yet it is difficult for arbitrators to do this if there is a risk, real or imaginary, that one of their number will break the confidence of their discussions, whether by communication with his or her appointing party, or by means of a dissenting opinion.[90]

89 Mosk & Ginsburg, *supra* note 24, at 274 ("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 actual content of deliberations."); *see also* Rees & Rohn, *supra* note 10, at 337–38.

90 Redfern, *supra* note 7, at 239; *see also* van den Berg, *supra* note 11, at 829–30 ("A party-appointed arbitrator who believes that he or she should support (or even improve) the case advanced by the party that appointed him or her is not likely to engage in meaningful dialogue about the case with his or her colleagues. . . . [I]n turn, will soon discover that there is a quasi-advocate among the members of the tribunal. The result may be either that the presiding arbitrator and the other party-appointed arbitrator will no longer take the advocate-arbitrator seriously or that the other party-appointed arbitrator will do the same relative to his or her co-arbitrators. In both cases, the deliberative process

Gleaned from Redfern's statement is the worry that the threat of dissent renders other tribunal members incapable of soundly deliberating facts and issues. However, this anxiety is foolish and should neither result in inhibition nor prevent arbitrators from frank and open exchange. This supposed inability to hold dialogue truthfully should not act as a scapegoat and oppress dissent. Regardless of whether dissenting opinions are permitted, the risk of breaching confidentiality by any tribunal member will forever hang over arbitral deliberations (not solely ones with dissenting arbitrators).[91] Therefore, the simple chance that a member will issue a dissenting opinion should not act as condition precedent to frank and open discourse among tribunal members.

Notwithstanding these perils, the Arbitration Rules of the ICSID seek to balance the risks with the advantages of dissenting opinions. The ICSID Arbitration Rules explicitly provide for the confidentiality of deliberations, while simultaneously recognizing the right to dissent.[92] Thus, not only do these rules defy the cynicism of dissenting opinions but they also demonstrate that dissenting opinions and deliberation confidentiality may exist symbiotically so long as dissenting arbitrators exercise utmost care and due diligence.[93]

In sum, unless dissenting arbitrators disclose or comment upon statements purportedly made throughout deliberations or anterior drafts of awards, or reveal the actual substance of the deliberations, there exist no "alternative facts" upon which to found an equation correlating dissenting opinions with breach in confidentiality.

b. Relationship Between Parties and Party-Appointed Arbitrators

The next major contention rallied against dissenting opinions relates to arbitrator neutrality and independence. Here, critics of

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breaks down. Moreover, arbitrators cannot freely exchange views with the prospect that a dissenting opinion inspired by party-partisanship may be forthcoming.").

91 Rees & Rohn, *supra* note 10, at 338.

92 ICSID Arbitration Rules, *supra* note 4, at art. 15(1) ("the deliberations of the Tribunal shall take place in private and remain secret"); ICSID Arbitration Rules, art. 47(3) ("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.").

93 BORN, *supra* note 1, at 3057 ("The fact that arbitrators are permitted to issue dissenting or separate opinions does not mean that they should—or even are entitled to—issue *any* dissenting opinion or separate opinion that they choose. . . . Moreover, not unlike the making of arbitral awards, the making of a dissenting opinion is a serious act, that implicates the arbitrator's personal duties of impartiality, confidentiality, collegiality and diligence.").

dissenting opinions argue that absent some extenuating circumstances, dissents are the fruit of sectarianism exercised by party-nominated arbitrators. Hence, these opinions are tainted by a preexisting connection between parties and their designated arbitrators. Consequently, doubt is automatically cast upon the legitimacy of the award-making process and the arbitral award.

Leading arbitration scholar, practitioner, and holder of the Michael R. Klein Distinguished Scholar Chair, Jan Paulsson, voiced the first major concern of arbitrator impartiality in his inaugural lecture at Miami University in April 2010.[94] In his lecture, Paulsson advocated a major reform in the fabric of international commercial arbitration. In a nutshell, he criticized arbitrator impartiality within the context of the established practice of unilateral appointments and propounded the idea to "forbid, or at least rigorously polic[e]"[95] the practice of unilateral appointments to preserve the impartial arbitration concept.[96]

To substantiate his claim of arbitrator favoritism, Paulsson relied upon statistics exhibiting that dissenting opinions are almost always issued in favor of the aggrieved party who appointed the dissenting arbitrator. On this point, he particularly stated:

> We must confront an uncomfortable fact. Two recent studies of international commercial arbitrations have revealed that dissenting opinions were almost invariably (in more than 95% of the cases) written by the arbitrator nominated by the losing party. This troubling record is duplicated in the newer field of treaty-based arbitrations brought by foreign investors against states.[97]

Evident from this data, Paulsson illustrated the lack of good faith on behalf of arbitrators as a direct result of unilateral party appointment. Accordingly, he proposed a deviation from the status quo of unilateral appointment, in favor of either choosing an arbitrator from a preexisting list or arbitrator appointment by a neutral body or joint agreement of the parties for the purpose of enhancing legitimacy in international arbitration.[98]

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94 Professor Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law (Apr. 29, 2010), http://www.arbitration-icca.org/media/0/12773749999020/ paulsson_moral_hazard.pdf.

95 *Id.* at 8.

96 *See id.*

97 *Id.* at 8–9 (citing Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 ARB. INT'L 223–242 (2004)).

98 *Id.* at 11–12.

Perhaps inspired by Paulsson's discomfort for current unilateral party appointment, Albert Jan van den Berg, a prominent arbitration scholar and practitioner, similarly "question[ed] the neutrality of party-appointed arbitrators based upon his finding that nearly all of the publicly available dissenting opinions in investment arbitrations were issued by the arbitrator appointed by the party that lost the case."[99] Consequently, van den Berg cast a shadow over arbitrator independence and neutrality and admonished party-appointed arbitrators to act more in accord with the principle *nemine dissentiente* for the sake of a better operating and credible investment arbitration system.[100]

Prompting van den Berg to recommend avoiding dissenting opinions were findings from a self-conducted survey of dissenting opinions in 150 publicly reported arbitral awards and decisions rendered in investment arbitration.[101] The outcome of the survey showed that there were 34 cases where a party-appointed arbitrator issued a dissenting opinion. Of great concern was the fact that in nearly all 34 dissenting opinions the arbitrator dissented in favor of the aggrieved appointing party. This raised significant disquiet and sparked controversy, not only about arbitrator impartiality but also about the practice of dissenting opinion and its raison d'être in international investment arbitration.[102] It should not go unnoticed that the same concern and controversy would likely apply in international commercial arbitration.[103]

In this snow globe that is international arbitration, where dissenting opinions flurry, the pertinent question turns to whether dissenting

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99 Brower & Rosenberg, *supra* note 37, at 27.

100 Van den Berg, *supra* note 11, at 834.

101 *See id.* at 821–43.

102 *Id.* at 824 ("The 150 decisions show that the presiding arbitrator rarely dissents. . . . The 150 decisions also show that a party-appointed arbitrator issued a dissenting opinion in 34 cases (that is, in approximately 22 percent of the 150 cases under analysis). . . . The astonishing fact is that nearly all of those 34 dissenting opinions were issued by the arbitrator appointed by the party that lost the case in whole or in part. A nearly 100 percent score of dissenting opinions in favor of the party that appointed the dissenting arbitrator is statistically significant. . . . That nearly 100 percent of the dissents favor the party that appointed the dissenter raises concerns about neutrality.").

103 Redfern, *supra* note 7, at 234 ("The ICC in Paris publishes annual statistics which show, amongst other things, the number of awards that it sends out each year which are accompanied by, or include dissenting opinions. In 2001, there were 24 dissenting opinions. In 22 of these, where it was possible to identify the dissenting arbitrator, the dissent was made in favour of the party that had appointed him or her."); *see also* van den Berg, *supra* note 11, at 832–33.

opinions result from an honest difference of opinion between arbitrators or if they are something more sinister and reflect either pressures placed upon arbitrators by the appointing party or a desire to cater to the appointing party's interests.

Commentators diverge in their conclusions to this question. Unsurprisingly, how this question is answered reflects how arbitration scholars and practitioners polarize. On one end of the spectrum, commentators argue that the prevalence of dissenting opinions issued by arbitrators in favor of the appointing party signals obvious bias, inferring that party-appointed arbitrators have a propensity to dissent simply to display a posture in favor of their appointing party. This finding debases the legitimacy of the arbitral process.[104] On the other end of the spectrum, some commentators argue (and this Article concurs) that dissenting opinions by party-appointed arbitrators are "the reflection of their shared outlook with the party who appointed them . . ."[105] and they do not detract from the legitimacy of the arbitral process; on the contrary, they play a critical role toward enhancing it.[106]

Unsurprisingly, one of the most prominent advocates of the former view is van den Berg. To substantiate his argument, van den Berg relies upon the conclusions of his survey correlating party-appointed arbitrators with dissent authorship.[107] From van den Berg's perspective, party-appointed arbitrators use dissenting opinions as a mere means to showcase cloaked support in favor of the appointing party. Van den Berg argues that not only does this superficial support

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104 Redfern, *supra* note 7, at 234 (citing De Boisséson, Le Droit Français de l'Arbitrage National et International 802 (1998) ("[C]ertain 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.")). *See also* Mosk & Ginsburg, *supra* note 24, at 275 ("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.").

105 Brower & Rosenberg, *supra* note 37, at 32 (citing Jacques Werner, *Dissenting Opinions: Beyond Fears*, 9 J. INT'L ARB. 23, 25 (1992)).

106 *Id.* at 27 ("[D]issenting opinions play a critical role in fostering the legitimacy of international arbitration, particularly investment arbitration."); Fraga & Samra, *supra* note 11, at 464 ("Indeed, taking a more deliberate view, some commentators have observed, and we agree, that dissenting opinions can play a 'critical role in fostering the legitimacy of international arbitration, particularly investment arbitration.'").

107 *See supra* text accompanying notes 97–98.

conflict with arbitrator neutrality but it also infects arbitral decision-making, effectively soiling the award-making process. In particular, van den Berg states:

> That nearly 100 percent of the dissents favor the party that appointed the dissenter raises concerns about neutrality. While treaty law and arbitration rules allow dissents, they also require that an arbitrator be impartial and independent . . . . Few exceptions for party-appointed arbitrator exist . . . . [I]t is also an implied duty that they ensure that the tribunal consider the arguments of the party that appointed them. *This duty does not, however, mean that the party-appointed arbitrator may act as an advocate for the party that appointed him or her. The nearly 100 percent score is difficult to reconcile with the neutrality requirement. . . . [I]t is hard to see how dissenting opinions enhance the quality of arbitral decision-making given that almost 100 percent of the dissents are issued by party-appointed arbitrators and almost 100 percent of them favor the party that appointed the dissenter*.[108]

From van den Berg's point of view, due to the prevalence of dissenting opinions furnished by an arbitrator in favor of the appointing party, party-appointed arbitrators act as the party's musketeers. At the conclusion of van den Berg's work, he suggests that those arbitrators prone to deviate from the majority adhere to the principle *nemine dissentiente* and acquiesce to the majority for a better and more authoritative investment arbitration system.[109]

In his argument, van den Berg failed to properly recapitulate unilateral appointments. Simply because dissenting arbitrators, more likely than not, are appointed by the losing party does not, and should not, conclusively bespeak ethical failure on behalf of arbitrators.[110] Helpful to remember is that each arbitrating party obviously desires an outcome favorable to his or her interests. By the very nature of unilateral appointments, each party is allowed to enhance its chance of success by selecting arbitrators who initially assist the appointing party. Hence, it is not idiosyncratic that "co-arbitrators, selected by each party independently, would have views about legal, commercial and cultural issues that made the co-arbitrators more likely to be

108 Van den Berg, *supra* note 11, at 825 (emphasis added).

109 *Id.* at 834.

110 In the same vein, *see* Paulsson, *supra* note 94, at 9 ("The fact that dissenting arbitrators are nearly always those who have been appointed by the party aggrieved by the majority decision does not in and of itself point to a failure of ethics."); Stippl & Öhlberger, *supra* note 45, at 390 ("Furthermore, to dissent in favor of the nominating party does not *per se* mean that the respective arbitrator is violating his duties of impartiality and independence.").

responsive to his or her nominating party."[111] This, however, does not necessarily vindicate an arbitrator's breach of the duty of impartiality. Unavoidably and on occasion, an arbitrator lacking integrity may employ a partisan stance and issue dissent to guard one party's interests and contaminate the arbitral process. Thus, although we would naturally like to believe that all arbitrators are honorable in discharging their duties, they are human and possess human frailties. Obviously, this possible scenario cannot be ignored in a discussion of dissent and arbitrator impartiality.

At this juncture, it is beneficial to explore the nexus between unilateral appointments, dissenting opinions, and a lack of arbitrator neutrality and independence. Akin to a doctor and patient, to effectively treat an illness, the illness must be properly diagnosed. To better manage the illness causing systematic dysfunction in arbitration, we must find the root of the disease. Here, in line with van den Berg's work,[112] this Article argues that the root of dysfunction, relating to arbitrator neutrality and independence, rests upon the method of arbitrator appointment.[113] Unfortunately, where van den Berg erred in his solution was his premise to rid the arbitral system of dissenting opinions: "Until that moment [the moment all arbitrators act independent and impartial] has come, investment arbitration would function better and be more credible if party-appointed arbitrators observe the principle: *nemine dissentiente*."[114]

Lamentably, this recommendation can neither extinguish the apprehension concerning arbitrator neutrality and independence nor can it effectively preclude a dishonorable party-appointed arbitrator

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111 BORN, *supra* note 1, at 3061; Melanie van Leeuwen, *Pride and Prejudice in the Debate on Arbitrator Independence*, *in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 1, 14 (2013) ("Anyone with considerable experience as counsel in international arbitration can confirm that preference on the part of clients. It is common practice that prior to the appointment of an arbitrator, a fair amount of due diligence is conducted by the appointing party and its counsel into the potential arbitrator(s), his or her professional experience, his or her academic writings and the previously issued arbitral awards that that arbitrator has rendered in other cases. When given the opportunity, it is only natural that a party will appoint an arbitrator, who—based on the outcome of such investigation—is deemed likely to view the issues in dispute in a manner that is positive for the case that it will be putting forward.").

112 Van den Berg, *supra* note 11, at 834 ("The root of the problem is the appointment method. Unilateral appointments may create arbitrators who may be dependent in some way on the parties that appointed them.").

113 *See* Paulsson, *supra* note 94; van den Berg, *supra* note 11.

114 Van den Berg, *supra* note 11, at 834.

from serving the interests of the appointing party. Thus, van den Berg's argument that the arbitral system will strengthen if dissenting opinions are forsaken simply does not hold water. Because dissenting opinions are not the root cause of the disease in arbitral dysfunction, ridding the system of a tool with which an arbitrator may express his or her reasons of dissent will only result in further sullying the system. Because disposal of dissenting opinions is far from the best tactic, our attention must recalibrate toward a greater focus on "improving" unilateral appointment. With this minimal compromise, the elixir of arbitrator rehabilitation is found.

Noted earlier, although prevalence is low, some arbitrators who lack integrity may support an appointing party by transgressing ethical codes and exploiting dissenting opinions. This misuse of dissenting opinions is an inevitable side effect of unilateral appointments and clearly poses "a moral hazard"[115] to international arbitration. According to Paulsson, "The unilaterally nominated arbitrator is the product of realism, doubtless indispensable in a complex world of intercommunal transactions, as a way of making arbitration acceptable—though in a manner which immediately dilutes its purity."[116] Clearly, Paulsson perceives the practice of unilateral appointments as jeopardizing the veracity and integrity of the arbitral process.[117] Thus, he proposed two alternative methods of appointment: first, arbitrator appointments may be made by joint agreement of the parties or by a neutral body; second, arbitrator appointment may be made from a preexisting list of arbitrators.[118]

Regretfully, Paulsson's proposals opened a Pandora's box, not only for the practice of unilateral appointments and arbitrator neutrality, but also for dissenting opinions. In response to Paulsson, Messrs. Brower and Rosenberg take exception to his assumption that party-appointed arbitrators are inherently unreliable and exercise tendencies contravening their personal duties of impartiality and

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115 *See* Paulsson, *supra* note 94. To see how Paulsson presents the hazard that the party-appointed arbitrator poses, see Paulsson, *supra* note 94, at 6 ("Many persons serving as arbitrator seem to have no compunction about quietly assisting 'their' party; they apparently view the modern international consensus that all arbitrators owe a duty to maintain an equal distance to both sides as little more than pretty words, as though sophisticates in reality conduct themselves in accordance with a different sub rosa operational code.").

116 *Id.* at 9.

117 *Id.* at 8.

118 *Id.* at 11.

independence.[119] In response to Paulsson's negative view of unilateral appointment,[120] Messrs. Brower and Rosenberg argue that it is a party's right to designate their arbitrator. Specifically, they propound that "[i]t is beyond debate, however, that at the time Paulsson expressed his views such right had in fact existed for decades, even centuries, and that this right has been one of the most attractive aspects of arbitration as an alternative to domestic litigation."[121]

Pursuant to Messrs. Brower and Rosenberg, a party's right to appoint an arbitrator is a basic arbitration principle, entrenched from distillation of centuries of practical experience.[122]

Undeniably, the practice of unilateral appointments not only manifests party autonomy but also acts as a primary incentive for parties to pursue arbitration rather than litigation. Unilateral appointment allows parties to participate in the constitution of the arbitral tribunal, giving parties a sense of propinquity with the arbitral process.[123] With each party holding the reins of arbitrator

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119 Brower & Rosenberg, *supra* note 37, at 8. Charles Brower is an eminent arbitration practitioner, who served as Judge of the Iran-United States Claims Tribunal as well as Judge Ad Hoc of the Inter-American Court of Human Rights. Brower is a Member of 20 Essex Street Chambers and a Professional Lecturer at George Washington University School of Law. Charles Rosenberg is a renowned arbitration practitioner at White & Case. Together, Brower and Rosenberg criticize the stance of Paulsson and van den Berg in their respective opposition to issuing dissenting opinions in arbitration.

120 Paulsson, *supra* note 94, at 8 ("The best way to avoid such incidents is clearly to forbid, or at least rigorously police, the practice of unilateral appointments. This would involve a significant change in prevailing practices, because the fact is that arbitrations routinely begin with each side naming an arbitrator. References are occasionally made to 'the fundamental right' to name one's arbitrator. But there is no such right. Moreover, if it existed, it would certainly not be fundamental.").

121 Brower & Rosenberg, *supra* note 37, at 9–11.

122 English Arbitration Act 1996, § 16; Turkish International Arbitration Law, art. 7 (Turk.); Model Law on International Commercial Arbitration art. 11 (UNCITRAL amended 2006); ICSID Arbitration Rules, *supra* note 4, at art. 37; ICC Arbitration Rules, *supra* note 2, at art. 12; SCC Arbitration Rules, *supra* note 2, at art. 17; Istanbul Arbitration Centre, *Arbitration Rules*, art. 14; *see also* Brower & Rosenberg, *supra* note 37, at 9–11.

123 Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, KLUWER ARB. BLOG (Oct. 5, 2010), http://arbitrationblog.kluwerarbitration.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/ ("[U]nilateral appointments serve a broader purpose: by appointing an arbitrator, the parties—rightly or wrongly—get a sense of proximity with the process. Unilateral appointments give the parties the impression that they control the arbitration, and that is an important difference between arbitration and court litigation."); BORN, *supra* note 1, at 1807 ("More fundamentally . . . that parties agree to arbitrate precisely in order to retain, insofar as possible, control over

appointment, they are able to nominate an altruistic arbitrator, favorable to their case. However, evidently, this direct contact between arbitrator and appointing party casts doubt upon arbitrator impartiality, independence, and by extension, the legitimacy of international arbitration. It is thus not infrequent to hear contentions that "co-arbitrators tend to exhibit sympathies for the parties that nominated them."[124]

The sympathy expressed by appointed arbitrators toward "their party" should not ignite skepticism. Rather, it should be regarded as a byproduct of the comprehensive autonomy bestowed upon parties. This autonomy accords parties carte blanche to nominate their arbitrators and, accordingly, facilitates each party's access to a desired outlook, knowledge, understanding, and expertise germane to the dispute. Hence, co-arbitrators are naturally more likely than not to express sympathy for the appointing party.

Of course, there are instances where parties nominate an arbitrator who has a predilection to disregard his or her duty of impartiality and independence and easily step into the position of advocate. Today, however, there is "widespread awareness, amongst the users of arbitration, that hired guns do them more harm" than good.[125] Moreover, the majority of arbitrators perceive bias to be a wolf in sheep's clothing. In the long run, bias in one case undermines his or her integrity in a tribunal and will result in negative future repercussions.[126] As to the minority of arbitrators not cautious about

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the resolution of 'their' dispute and a substantial measure of participation in constitution of the tribunal that will decide the dispute.").

124 BORN, *supra* note 1, at 1807 (citing Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrator*, 33 Columbia FDI Perspectives 1, 2 (2010) ("In my judgment, all arbitrators sitting in investment disputes should be appointed by a neutral institution; bilateral investment treaties should be amended to achieve this. International investment arbitration would thus set a potent example for general emulation in international arbitration.")). *See* Paulsson, *supra* note 94; *see* van den Berg, *supra* note 11.

125 Mourre, *supra* note 123.

126 Brower & Rosenberg, *supra* note 37, at 15; REDFERN & HUNTER, *supra* note 70, at 266–67 ("Experienced practitioners recognize that the deliberate appointment of a partisan arbitrator is counterproductive, because the remaining arbitrators will very soon perceive what is happening and the influence of the partisan arbitrator during the tribunal's deliberations will be diminished. It is a far better policy to appoint a person who may, by reason of culture or background, be broadly in sympathy with the case theory to be put forward (e.g., someone who is known to favour a strict literal interpretation of contracts rather than look to the true intention of the parties), but who will be strictly impartial when it comes to assessing the facts and evaluating the arguments on fact and law."); Mourre, *supra* note 123 ("[P]arties want to appoint arbitrators who will be listened [to] and respected within the tribunal. And parties know that the standing and reputation of

the risks affiliated with apparent bias, when circumstances induce justifiable doubts as to that arbitrator's impartiality or independence, there are mechanisms available to arbitral institutions and parties to eliminate that arbitrator. For example, upon the respective institution's initiative, at the written request of all other members of the arbitral tribunal, or upon a written challenge by any party, a biased arbitrator may be removed from appointment.[127]

Although the practice of unilateral appointments has shortcomings, the problems germane to arbitrator impartiality and independence do not per se emanate from the practice of unilateral appointments, nor are the problems exacerbated by dissenting opinions. On the contrary, the combination of party-appointed arbitrators and the issuance of dissenting opinions legitimizes the system, as it gives the arbitrator a chance to express different views and explain the reasoning behind the departure from the majority.[128]

Although unilateral appointments clearly affect an arbitrator's behavior, even more likely to influence said behavior are the dynamics evinced by the arbitral market. Arbitrators sitting on tribunals may espouse different behavioral patterns contingent upon their status in the market.[129] To illustrate, close-knit arbitral communities commonly incorporate "elite" arbitrators who are repetitively nominated to serve on arbitral tribunals. By virtue of their

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experienced international arbitrators depend from their capacity to exercise independent judgment when deliberating with their colleagues. As a consequence, party-appointed arbitrators tend to be selected more for their reputation of impartiality and integrity than for their supposed willingness to support their appointing party's thesis."); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 90 (2010) ("[T]he arbitrators' valuable professional reputation could be a key incentive for them to remain impartial. Impartiality critically affects not only their future selection as arbitrators but also other spheres of their professional careers, whether as private counsel or as academics. In order to promote their reputation, arbitrators may choose to increase accuracy and to counter any real perceived biases rather than to cater to any particular interests. This tendency rings especially true for repeat arbitrators in the arbitration market, whose most valuable trait may be their reputation as credible and independent decision makers.").

127 LCIA Arbitration Rules, *supra* note 71, at art. 10; ICC Arbitration Rules, *supra* note 2, at art. 14; Istanbul Arbitration Centre, *Arbitration Rules*, art. 16; ICSID Arbitration Rules, *supra* note 4, at art. 57; Model Law on International Commercial Arbitration art. 12 (UNCITRAL amended 2006); English Arbitration Act of 1996, § 24(1)(a); Swiss Federal Code on Private International Law [CPIL] Dec. 18, 1987, art. 180(1); Turkish International Arbitration Law, art. 7(c) (Turk.).

128 Brower & Rosenberg, *supra* note 37, at 44.

129 Kapeliuk, *supra* note 126, at 68.

secure status, these experienced arbitrators are more prone to exercise different behavioral patterns than novices.[130] Where seasoned members may prioritize collegiality of the arbitral tribunal and thus tend to compromise and acquiesce to the majority, the newer members may feel it necessary to accentuate their uniqueness.[131] On this point, Daphna Kapeliuk particularly states:

> The larger the pool of newcomers, the harder it is for these newcomers to be selected. Once these newcomers are appointed, market pressure may lead them to behave strategically by accentuating their uniqueness. In order to attract the attention of prospective disputing parties, they may try to stand out from the other members of the tribunal by rendering dissenting opinions.[132]

In other words, the dynamics of the arbitral market may prove of greater influence over an arbitrator's integrity and use of dissent than unilateral appointment. Notable here, relating to the arbitral market, is the existence of a rivalry between elite arbitrators and newcomers. In the shadow of this rivalry, newcomers, hoping to make names for themselves, may depart from the duties of impartiality and independence and use dissenting opinions, not only as a valve to relieve themselves of the arbitral market's pressure but also as an instrument to invoke the attention of prospective disputing parties to secure future arbitrator nominations. Unsurprisingly, this behavior is a shortcoming of unilateral appointment.

Although unilateral appointment may cause novices to participate in this unsavory behavior, the cure is not a complete desertion of the practice of unilateral appointments. Rather, a solution may rest in the adoption of a blind method to nominate arbitrators. Here, the International Institute for Conflict Prevention and Resolution (CPR) Rules for Administered Arbitration of International Disputes of 2014 espouse such a method termed "the screened selection of party-designated arbitrators."[133] Not only does this process preserve party

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130 *Id.*

131 This is not to say that elite arbitrators never issue dissenting opinions. In fact, there are numerous well-known arbitrators who, without concern for their prospective appointment, issue dissenting opinions. Here, important to compare, are the differing motives among arbitrators when they issue dissenting opinions and how surrounding circumstances (such as the dynamics of the arbitral market) control these motives.

132 Kapeliuk, *supra* note 126, at 68.

133 International Institute for Conflict Prevention & Resolution [CPR], 2014 CPR Rules for Administered Arbitration of International Disputes, rule 5(4), (2014). The screened selection process for party-designated arbitrators (also called "a blind method of nominating arbitrators") is dictated under Rule 5(4), which provides, "If the parties have

inclusion in arbitrator appointment[134] but it also insulates arbitrators from the internal dynamics of the arbitral market by cutting off the direct link between arbitrators and appointing parties.[135] In other words, the screened selection process warrants objectivity and eliminates the risk of arbitrator favoritism while conserving a party's ability to influence the constitution of the arbitral tribunal.

The drawback of this process is that it deprives the appointing parties of the chance to interview the prospective arbitrator prior to making an appointment and, accordingly, creates dependency solely upon publicly available information and personal recommendations. However, this drawback can be resolved if the administrating arbitral institution conducts interviews on behalf of appointing parties and in accord with their demands.

In sum, it is neither fair nor accurate to paint unilateral appointments and dissenting opinions as the roots of all complication relating to arbitrator neutrality and independence. In fact, limiting or eradicating unilateral appointments and/or dissenting opinions would resultantly shatter any legitimacy of international arbitration and hinder its future development and attractiveness. Thus, for unilateral appointments to be free of criticism, a nice compromise lies in the screened selection process. Further, relating to dissenting opinions, per Laurent Levy, "[I]t is preferable to eliminate or penalize abuses rather than the means, otherwise useful, which are used to commit them."[136] Hence, useful here would be the development of a code of ethics for dissenting arbitrators to follow. Such a code would remove

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agreed on a Tribunal consisting of three arbitrators, two of whom are to be designated by the parties without knowing which party designated each of them. . . .(d) Neither CPR nor the parties shall advise or otherwise provide any information or indication to any arbitrator candidate or appointed arbitrator as to which party selected either of the party-designated arbitrators. No party or anyone acting on its behalf shall have any ex parte communications relating to the case with any arbitrator candidate or appointed arbitrator . . ."

134 Ben Giaretta, *Blind Appointment of Arbitrators: The Way Forward?* (Feb. 21, 2017), https://www.ashurst.com/en/news-and-insights/legal-updates/blind-appointment-of-arbitrators-the-way-forward/.

135 *Recent Study Supports CPR's Screened Selection Process for Arbitrators*, INT'L INSTITUTION FOR CONFLICT PREVENTION & RESOLUTION (Dec. 15, 2016), https://www.cpradr.org/news-publications/press-releases/2016-12-15-recent-study-supports-cpr-s-screened-selection-process-for-arbitrators.

136 Stippl & Öhlberger, *supra* note 45, at 391 (citing Laurent Levy, *Dissenting Opinions in International Arbitration in Switzerland*, 5 ARB. INT'L 35, 39 (1989)).

any doubt cast upon the practice of dissenting opinion by the luminaries in the field.[137]

c. Debilitation of the Majority Opinion

The third major principle employed to discredit dissenting opinions is the criticism that dissent negatively affects an award's authority. Proponents of this critique view dissenting opinions as eclipsing an arbitral award's legitimacy and power. Alan Redfern particularly argues that "dissenting opinions may endanger the efficacy of the process"[138] and that "the dissenting arbitrator risks bringing the arbitral process itself into disrepute."[139]

Undeniably, dissenting opinions do harbor the risk of igniting debate on the merits of a final decision and may pollute the legitimacy and power of an award. However, also undeniable, is that dissenting opinions are not part of the arbitral award itself. Rather, they are "merely an independent opinion which remains foreign to the award and which neither affects the ruling nor the reasons."[140] Accordingly, dissenting opinions, devoid of authority, do not principally menace the legitimacy and power of the award.

Evident from Paulsson's and van den Berg's distaste for dissenting opinions as a means by which minority arbitrators may damage award validity, there exists no rational correlation between dissenting opinions and award legitimacy. Rather, legitimacy and power of the rendered award rests in the parties' arbitration agreement and agreed-upon rules and framework.[141] Absent actual deficiencies in the arbitral award or award-making process, a dissenting opinion does not detract from the award's legitimacy and power.[142] Instead, the real debilitating impact of a dissenting opinion is commensurate with deficiencies in the award, upon which the dissenting arbitrator casts light.

Notably, how an arbitrator chooses to render dissent is of great import. When disagreement transpires, human nature reflects that

137 Van den Berg, *supra* note 11, at 832; *see* Mosk & Ginsburg, *supra* note 24.

138 REDFERN & HUNTER, *supra* note 70, at 577.

139 Redfern, *supra* note 7, at 241; *see also* van den Berg, *supra* note 11, at 828.

140 Rees & Rohn, *supra* note 10, at 339.

141 Patricia Jimenez Kwast, *Prohibitions on Dissenting Opinions in International Arbitration*, *in* WHAT'S WRONG WITH INTERNATIONAL LAW? 128, 135 (2015).

142 *Id.* ("If a dissenting opinion has any weakening effect on the authority of an award, it is because the dissent points to actual flaws in the award. The dissent does not create them, it merely points them out.").

different people express disagreement in diverse ways. These expressions of disagreement range from well-mannered chivalry to those evincing *non compos mentis*. Similarly, if an arbitrator departs from the majority, there are various tools available to the arbitrator to formulate his or her dissent.[143] Thus, how a dissent is formulated may have solemn influence over the legitimacy and power of the award.

Therefore, to preserve the status of arbitration as a desirable venue to resolve disputes, dissenting opinions should be succinct and polite with no exhibition "of conceit or petulance."[144] Additionally, the dissent should be limited solely to the issues leading to the deviation and should not morph into an attack upon the other tribunal members or scathe the manner in which the arbitral process transpired.[145]

To illustrate the import of professionalism when issuing dissenting opinions, it is helpful to examine a "what not to do" example. In this regard, Professor Georges Abi-Saab's dissent, concerning the decision on jurisdiction and merits in the *ConocoPhillips Petrozuata B.V.* case is demonstrative.[146] The professor accused the majority of legitimizing "a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality."[147] Further, he claimed that the decision made by the majority constituted "a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication."[148]

This dissent is a prime example of "what not to do." An opinion formatted with such evident hostility does not benefit the arbitral system. Rather, it "risks bringing the arbitral process itself into disrepute."[149]

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143 *See* Redfern, *supra* note 7.

144 *Id.* at 228 ("The advantage of these 'good' dissents is that they permit an arbitrator to express disagreement, without what may be seen as a show of conceit, or petulance. And without imperiling the authority of the award.").

145 *Id.* at 229.

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

147 Dissenting Opinion of Professor Georges Abi-Saab, ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/30 at 24, ¶ 67 (Mar. 10, 2014), https://www.italaw.com/ cases/321.

148 *Id.*; *see also* BORN, *supra* note 1, at 3058 n.287.

149 Redfern, *supra* note 7, at 241.

Consequently, the legitimacy and power of an arbitral award should not be contingent upon whether a dissenting opinion exists. In principal, the dissenting opinion solely exposes flaws harbored in the award. Accordingly, if an arbitral award is premised upon a solid foundation, the dissenting opinion can neither taint nor weaken the legitimacy and power of the award. Thus, what should be credited in an award is not unanimity, as unanimity may easily be fabricated. Rather, of import is the quality of the legal argument on which the award is founded and rendered. Hence, whether an award is rendered by majority or unanimity is irrelevant and the method by which an award earns legitimacy should not cloud the vision of the parties, nor should it negatively affect the perspective of the public.

d. Likelihood of Award Obstruction

As previously stated, dissenting opinions are independent from arbitral awards and therefore do not influence the final ruling, dictate the reasons upon which the award is premised, or undermine the award's legitimacy and power. However, skeptics in this branch of criticism propound that dissenting opinions create an environment where challenges to an award spread like wildfire.[150] In line with this critique, a dissenting opinion may provide the losing party with an instrument to orchestrate a challenge aimed at either award vacation or impeding award enforcement.[151]

Although dissenting opinions may facilitate legal challenges, this concern is largely unfounded, as dissenting opinions are bereft of authority.[152] In principal, "a dissenting opinion criticizing ordinary issues of fact and law should not actually imperil the authority of the award and its ability to be recognized and enforced under the New York Convention."[153] Simply put, dissenting opinions may be regarded as an outcome of the modern departure from conducting de novo review due to arbitration-friendly policies.

Again, at the risk of redundancy, dissents pose no menace to the validity or recognition and enforcement of an award.[154] However,

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150 Van den Berg, *supra* note 11, at 828 ("Dissents may impair enforcement and incentivize a dissatisfied party to move to annul the award.").

151 Rees & Rohn, *supra* note 10, at 339 ("[I]t is suggested that it [a dissenting opinion] may set the scene for an action to set aside the award or for objections to be raised at the stage of recognition and enforcement.").

152 *Id.*

153 *Id.*

154 *Id.*

where a dissenting opinion exposes serious flaws subject to judicial review under germane applicable law, or which constitute a ground according to which the enforcement and recognition of the award can be inhibited, it may be possible for the dissenting arbitrator to jeopardize the award's validity and enforcement.[155] In other words, the impact of dissenting opinions upon both the breadth of scrutiny exercised by a competent authority and an award's enforcement and recognition is directly commensurate with the severity of flaws in the award exposed by the dissenting arbitrator.

To illustrate: in 2009, the English High Court encountered such an award.[156] Here, the arbitral tribunal awarded £1,856,597.90 to the claimant and £1,101,871 to the defendant.[157] However, companion to the award was a comprehensive dissenting opinion issued by one of the three tribunal members. This dissenting opinion became the backbone of an appeal lodged by the claimant. In its appeal, the claimant requested the remission of the award on the basis of "serious irregularity" under Section 68(2) of the English Arbitration Act of 1996. Under English arbitration law, it is well established that the success of the challenges premised upon Section 68 are contingent upon the satisfaction of the highly designated threshold.[158] Further, it

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155 *Id.*

156 *See* F Ltd v. M Ltd [2009] EWHC (TCC) 275 (Eng.); *see also* Mosk & Ginsburg, *supra* note 24, at 280–81 (for another example where a dissenting opinion exposed serious flaws in the award and led to nonenforcement of an award on legitimate basis).

157 Francesca Richmond, *English Court Sets Aside an Award on the Basis of Serious Irregularity, but Confirms the Doctrine Has Limited Scope*, KLUWER ARB. BLOG (Mar. 23, 2009), http://kluwerarbitrationblog.com/2009/03/23/english-court-sets-aside-an-award-on-the-basis-of-serious-irregularity-but-confirms-the-doctrine-has-limited-scope/?print=pdf.

158 *See id.*; Jonathan Sutcliffe & Lucy Greenwood, *Dissenting Opinions in Arbitration Awards: More Trouble Than They Are Worth?*, 24 MEALEY'S INT'L ARB. REP. 19 (2009), https://static1.squarespace.com/static/57fe4d37c534a5c932910b78/t/5873aa5f59cc682e767a47d6/1483975263807/Dissenting+Opinions+in+Arbitration+Awards+More+Trouble+Than+They+Are+Worth.pdf; Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and others (Appellants) [2005] UKHL 43 at ¶ 28 (Eng.), http://www.bailii.org/uk/cases/UKHL/2005/43.html ("The policy in favour of party autonomy does not permit derogation from the provisions of section 68. A number of preliminary observations about section 68 are pertinent. First, unlike the position under the old law, intervention under section 68 is only permissible *after* an award has been made. Secondly, the requirement is a serious irregularity. It is a new concept in English arbitration law. Plainly a high threshold must be satisfied. Thirdly, it must be established that the irregularity caused or will cause substantial injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges.").

is required to show that any serious irregularity induced substantial injustice to the party raising serious irregularity allegations.[159]

The claimant, using the dissenting opinion, succeeded in showing that the majority opinion caused substantial injustice emanating from serious irregularity and thus satisfied the high threshold set by Section 68 of the Arbitration Act of 1996. Here, the dissenting opinion shed light upon grave error behind the majority's award computation. In his judgment, Justice Coulson examined the dissenting opinion and concluded that "an important point . . . decided by the majority without reference to the parties [is] . . . a factor to which the court attach[es] weight in dealing with an application under section 68."[160] At the cessation, according to Justice Coulson, "there was no pleaded basis for the tribunal's finding that a certain sum should be offset against the amount awarded to the claimant,"[161] and accordingly, there was a serious risk of a substantial injustice. Thus, Justice Coulson concluded "for the issue of the deduction only, namely the £973,344, to be remitted to the Arbitral Tribunal. . . ."[162]

Clearly, the dissenting opinion, which Justice Coulson referenced numerous times in his judgment, exposed the tribunal's error and helped avert a serious risk of substantial injustice. Evidenced from this case is the desirable and constructive role dissenting opinions play in the arbitral system.[163] Notwithstanding this role, these opinions may also facilitate legal challenges. Thus, how a dissent is crafted is of utmost significance. Reflected by the success of this

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159 *See* Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and others (Appellants) [2005] UKHL 43 at ¶ 28 (Eng.), http://www.bailii.org/uk/cases/UKHL/ 2005/43.html.

160 F Ltd v. M Ltd [2009] EWHC (TCC) 275 [16], (Eng.).

161 Sutcliffe & Greenwood, *supra* note 158.

162 F Ltd v. M Ltd [2009] EWHC (TCC) 275 [61], (Eng.).

163 To supplement, contrary to the argument that dissenting opinions inhibit enforcement and recognition of arbitral awards, dissenting opinions may actually *remove* the obstacles of award enforcement and recognition. In this respect, *see* Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA BULL. 437, 451 (2008) ("In a more recent case, the Supreme Court referred to a dissenting opinion to demonstrate that, contrary to the challenger's allegations, a given witness statement had not been overlooked by the arbitral tribunal. Though the witness statement was not mentioned in the reasoning of the award, this could not justify the assumption that it had been ignored by the tribunal, the Court held. *Moreover, the fact that the dissenting arbitrator mentioned the relevant witness statement in his dissenting opinion corroborated the view that the statement had not been overlooked, since a dissenting opinion should not contain any arguments which the dissenter did not previously bring into the deliberations with the other arbitrators*.") (emphasis added).

dissent, dissenting opinions must not be written for sole award obstruction, but rather drafted to disclose serious flaws and explain the reasoning behind the arbitrator's conclusions.

Consequently, dissenting opinions evince two sides of the same coin. Where one side allows dissatisfied parties to challenge the validity or enforcement of the arbitral award, the other side may also provide invaluable insight into an award's inadequate legal reasoning. From this analysis, it is safe to say that the question of "whether dissenting opinions . . . jeopard[ize] the finality of the awards is, to a large extent, a moot issue."[164] Because dissenting opinions do not form a part of the award, they do not influence its outcome; although they *may* be taken into consideration by the reviewing court, they are usually merely regarded as the dissenting arbitrator's commentary on the arbitral award.[165]

e. Prolonging Arbitral Proceedings and Escalating Costs

The last major criticism against dissenting opinions revolves around the prolongation of arbitral proceedings and, relatedly, arbitral cost inflation.[166] Here, some commentators attend to the economics of dissenting opinions and contend that the preparation, circulation, and consideration of these opinions demand additional time, eventuating in the prolongation and cost escalation of arbitral proceedings.'

Regardless of whether an award is unanimous or accompanied by dissent, every written opinion requires time to draft, circulate, and

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164 Brower & Rosenberg, *supra* note 37, at 40 (citing Jacques Werner, *Dissenting Opinions: Beyond Fears*, 9 J. INT'L ARB. 23, 25–26).

165 EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD GAILLARD GOLDMAN ON INT'L COMMERCIAL ARB. 769 (1999) ("In action to set aside or resist enforcement of the award, a dissenting opinion, regardless of whether or not it was permitted by the arbitration rules or by the law of the seat, has no authority except as an element of fact. Thus, *if the dissenting arbitrator states that a procedural breach was committed—for example, that a document was sent by one party to the arbitral tribunal but was not communicated to the other party—that is simply a fact which a court may take into consideration as evidence, but to which it is not obliged to attribute special importance. Both the dissenting arbitrator's assessment of the facts of the case and the legal reasoning used have no particular authority*. In this respect, the minority opinion will not affect the outcome of an action against the award made by the majority, especially where, as is usually the case, no review of the merits can take place in the context of that action.") (emphasis added).

166 Mosk & Ginsburg, *supra* note 24, at 277 (acknowledging that dissenting opinions "have the potential to raise the costs of arbitration."); Stippl & Öhlberger, *supra* note 45, at 390 ("Dissenting opinions will increase the time required to complete the proceedings and thus, may raise costs."); Brower & Rosenberg, *supra* note 37, at 43 n.259.

deliberate. Hence, it is unfair to paint the practice of dissenting opinion as a hindrance. Although it would be irresponsible to argue that there are zero costs associated with dissent, what is equally imprudent is to slate dissenting opinions and cost escalation as shackled companions. In support of this statement, in the words of one commentator, "[O]ther than in the rare and exceptional case where a dissenting arbitrator out-pens the majority, dissenting opinions have historically been concise."[167] In this respect, the extra time and costs attributed to dissenting opinions appear to be negligible.[168]

Therefore, rather than focus on the costs and time presumed to increase with the presence of a dissenting opinion, greater attention should be paid to the potential benefits harvested from these opinions. These benefits should not be sacrificed under the weak heading of additional time and cost. Instead, "the improvement in the quality of awards and the enhanced legitimacy of the process should be worth the additional marginal costs of dissents."[169] This point leads us to our next discussion: the advantages of dissenting opinions in international arbitration.

2. Advantages of Dissenting Opinions

Made evident under the previous section, although some critics portray the practice of rendering dissent as a rose garden filled with thorns (where thorns are in the majority), this section reflects the reality that roses are far more plentiful. The following section discusses seriatim three powerful advantages in favor of dissenting opinions: first, the usefulness of dissent in developing distinct solutions to arbitral issues and contributing to the development of law; second, assurance that awards are rendered with due diligence and care; and third, enhanced confidence in both the arbitral system and the award-making process. Through this discussion, this Article argues that dissenting opinions are not only integral to the arbitral process but are also integral to satisfy the dynamism of the law.

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167 Brower & Rosenberg, *supra* note 37, at 43.

168 *Id.* at 44.

169 Mosk & Ginsburg, *supra* note 24, at 277.

a. Dissenting Opinions, Law's Enhancement, and the Concept of Stare Decisis

Regrettably, when discussing dissenting opinions in the context of improving the law, much agnosticism exists. For instance, pursuant to Redfern, dissenting opinions in international commercial arbitration "do not serve to advance the development of law."[170] In consonance with Redfern, per van den Berg, "[t]he argument that dissenting opinions contribute to the development of law"[171] is unfounded:

> With one curious exception, in none of the investment cases did the arbitrators refer to a dissent in a previous investment case. Although it cannot be supported empirically, one reason for such a lack of reference may be that tribunals know that dissents in investment arbitrations almost always emanate from the arbitrator appointed by the party that lost the case in whole or in part. In other words, regrettably, dissenting opinion by party-appointed arbitrators in investment arbitrations have become suspicious.[172]

Additionally, van den Berg opines that "a party-appointed arbitrator does not have the expectation that his or her dissent will contribute to the development of investment law because . . . those dissents are virtually never relied upon in subsequent investment cases."[173] Clearly, taking these statements as a whole suggests that van den Berg correlates the role of dissenting opinions in law's development with the quantum of references made by subsequent investment tribunals to these opinions issued in previous investment cases. From these references, he concludes that dissenting opinions do not fulfill a constructive role in law's improvement.

Notably, when van den Berg reached this conclusion, there was supposedly[174] "*one* curious exception [*Helnan International v. Arab Republic of Egypt*,"[175] where the arbitral tribunal referred to a

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170 Redfern, *supra* note 7, at 240.

171 Van den Berg, *supra* note 11, at 826.

172 *Id.* at 826–27.

173 *Id.* at 831.

174 Brower & Rosenberg, *supra* note 37, at 36 ("As a preliminary matter, we note that van den Berg is mistaken in his claim that '[w]ith one curious exception [*Helnan International v. Egypt*], in none of the investment cases [he surveyed] did the arbitrators refer to a dissent in a previous investment case.' He overlooks the ICSID tribunal's unanimous decision in *Tza Yap Shum v. Republic of Peru*. . . . Van den Berg also overlooks the ICSID tribunal's jurisdictional Award in *Aguas del Tunari S.A. v. Republic of Bolivia*. . . .").

175 Van den Berg, *supra* note 11, at 826.

dissenting opinion issued in a previous investment case. However, "[i]n recent years there have been instances in which arbitral tribunals have favorably referred to dissenting opinions in other arbitrations for certain points of substance."[176] Hence, from a modern perspective, van den Berg's statements pertaining to dissenting opinions and these opinions' role in the development of law may be avowed obsolete.

To illustrate van den Berg's outdated argument, today there are numerous ICSID cases noting the increasing impact of dissenting opinions in investment arbitration. One example, where the ICSID tribunal expressly cited a dissenting opinion, is *Señor Tza Yap Shum v. Republic of Peru*.[177] In its decision on jurisdiction and competence, the tribunal expressly agreed with the treaty interpretation adopted by Professor Weiler in his 2006 separate opinion rendered in *Berschader v. Russia Federation*.[178] In addition, in its final award dated July 7, 2011, the *Tza Yap Shum* tribunal cited and approved the partial dissenting opinion rendered by Robert Volterra regarding the "fair and equitable treatment" requirement in *Eastern Sugar B.V. v. Czech Republic*.[179]

In yet another ICSID case, in *Aguas del Tunari, S.A. v. Republic of Bolivia*, the tribunal corroborated its stance by referencing a dissenting opinion.[180] In *Aguas del Tunari*, to bolster its decision regarding the respondent's objections to jurisdiction, the tribunal embraced the reasoning of the Dissenting Declaration of Antonio Crivellaro in *SGS v. Republic of the Philippines*[181] issued approximately two years earlier.[182] Faced with Bolivia's objections

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176 Kwast, *supra* note 141, at 132.

177 Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6 (Award Date July 7, 2011).

178 Brower & Rosenberg, *supra* note 37, at 36. Regarding the separate opinion rendered by Professor Todd Weiler, *see* Vladimir Berschader and Moïse Berschader v. Russian Federation, Separate Opinion of Professor Todd Weiler, SCC Case No. 080/2004 (Apr. 7, 2006). The part of Professor Weiler's separate opinion to which the *Tza Yap Shum* tribunal referred is as follows: "While my colleagues concentrate much of their analysis on identifying the intent of the drafters of the Treaty as of the date of its execution, I focus on the treaty terms themselves as the best evidence of ascertaining such intent . . ."

179 Señor Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6, ¶70 n. 11 (Award Date July 7, 2011) (citing Eastern Sugar B.V. v. Czech Republic, The Partial Dissenting Opinion of Robert Volterra, SCC Case No. 088/2004 (Apr. 12, 2007)).

180 Aguas Del Tunari, S.A. v. Republic of Bol., Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3 (Oct. 21, 2005).

181 SGS Société Générale de Surveillance S.A. v. Republic of the Phil. Declaration (Dissenting Opinion of Antonio Crivellaro), ICSID Case No. ARB/02/6 (Jan. 29, 2004).

182 Brower & Rosenberg, *supra* note 37, at 36.

concerning the concession agreement and its preclusive effect over the tribunal's jurisdiction, the tribunal identified the differences distinguishing *Aguas del Tunari* from *SGS*:[183] "Despite these differences, the Tribunal also recognizes that its reasoning differs from that of the SGS tribunal. The Tribunal observes that its view is closer to that of paragraph 11 of the dissenting Declaration of Arbitrator Antonio Crivellaro in *Société Générale de Surveillance v. Republic of Philippines*."[184]

Next, other recent awards evidence the tribunal's use of previously rendered dissenting opinions. In one such award, rendered in *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela*,[185] the tribunal expressly concurred with paragraph 17 of the dissenting opinion of Sir Franklin Berman issued ten years earlier in *Industria Nacional de Alimentos v. Peru*.[186] While assessing matters critical to establishing jurisdiction, the tribunal expressly referred to Sir Franklin Berman's dissenting opinion and stated:

> The Tribunal also concurs with the following statement by Sir Franklin Berman in the *Industria Nacional de Alimentos et al v. Peru* case: "[I]f particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved?"[187]

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183 Aguas del Tunari, ICSID Case No. ARB/02/3, at n.99.

184 *Id.* As to paragraph 11 of the Dissenting Declaration of Arbitrator Antonio Crivellaro, *see SGS Société Générale de Surveillance S.A*, ICSID Case No. ARB/02/6, at 4, ¶ 11 ("Consequently, SGS's claim seemed to me fully admissible before our Tribunal, without first being processed before the domestic courts as to *quantum* matters. If our jurisdiction derives from (also) Article X(2), as unanimously admitted, I see no reason why our Tribunal could not deal with and decide on the merits of the payment claim, including *quantum*, after proper examination of either party's future arguments and defences.").

185 Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB/12/20 (Award Date Apr. 26, 2017).

186 Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. Republic of Peru, Dissenting Opinion of Sir Franklin Berman in Decision on Annulment, ICSID Case No. ARB/03/4 (Sept. 5, 2007).

187 Blue Bank Int'l & Trust (Barbados) Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB/12/20 at 14, ¶ 72 (Award Date Apr. 26, 2017) (citing Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. Republic of Peru, Dissenting Opinion of Sir Franklin Berman in Decision on Annulment, ICSID Case No. ARB/03/4 at 10, ¶ 17 (Sept. 5, 2007)).

Another recent ICSID case where the tribunal referred to a dissenting opinion was *İçkale İnşaat Limited Şirketi v. Türkmenistan* of 2016.[188] The *İçkale İnşaat* tribunal briefly alluded to the dissenting opinion of Professor Georges Abi-Saab in *Abaclat v. Argentine Republic* and *Daimler v. Argentine Republic*,[189] while distinguishing the *Kiliç İnşaat v. Turkmenistan* case where Professor Abi-Saab's dissenting opinion constituted the backbone of the majority decision.[190] Here, although the *İçkale İnşaat* tribunal did not embrace the approach espoused by Professor Abi-Saab's dissenting opinion, it discussed its merit while determining whether it would adopt a similar approach to the *Kiliç İnşaat* majority, which found the domestic litigation requirement to be a condition precedent to the State parties' endorsement to arbitration.[191]

Important to note here is the obvious respect the tribunal paid in the *Kiliç İnşaat v. Turkmenistan* case[192] to the dissenting opinion of Professor Abi-Saab in *Abaclat v. Argentine Republic*,[193] issued less than two years earlier. In its discussion on jurisdiction and admissibility, the *Kiliç İnşaat* tribunal referred to the dissenting opinion of Professor Abi-Saab in the *Abaclat* case and stated:

> Article 26 of the ICSID Convention explicitly recognizes that a Contracting state may impose conditions on its consent to arbitration under the ICSID Convention, in a manner that determines the conditions in which jurisdiction may be said to exist and be capable of being exercised . . . . This point was made with considerable force in the dissenting opinion of Professor Georges Abi-Saab in the *Abaclat* case, where he stated that the "legal recharacterization" of the majority was "conceptually wrong": "*It adopts an extremely narrow, in fact partial, concept of jurisdiction, limiting it to the ambit within which jurisdiction is exercised. But, as explained above . . . jurisdiction is first and foremost a power, the legal power to exercise the judicial or arbitral function. Any limits to this power, whether inherent or consensual, i.e. stipulated in the jurisdictional title (consent within certain limits, or subject to*

188 İçkale İnşaat Limited Şirketi v. Turkm., ICSID Case No. ARB/10/24 (Award Date Mar. 8, 2016).

189 *Id.* at ¶ 243.

190 *Id.*

191 *Id.*

192 Kiliç Inşaat İthalat İhracat Sanayi ve Ticaret Anomim Şirketi v. Turkm., ICSID Case No. ARB/10/1 (Award Date July 2, 2013).

193 Abaclat v. Arg. Republic, Dissenting Opinion of Professor Georges Abi-Saab, ICSID Case No. ARB/07/5 (Oct. 28, 2011).

> *reservations or conditions relating to the powers of the organ) are jurisdictional by essence*."[194]

By referencing earlier dissenting opinions, these cited awards illustrate the increasing acknowledgment and use of dissenting opinions and herald the possible contributions of such opinions toward the development of law. Hence, the next logical question is whether and how dissenting opinions contribute to the development of law.[195]

In parallel with all aspects of dissenting opinions, the answer is not straightforward, and varies based upon which forum the practice of dissenting opinion is discussed. Regarding international commercial arbitration, dissenting opinions may not present a constructive influence due to a highly regarded and strictly applied confidentiality principle. Because the confidentiality principle impedes publication of awards and dissenting opinions, the impacts generated by the awards and dissenting opinions are limited to the particular dispute and the specific parties.[196]

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194 Kiliç Inşaat İthalat İhracat Sanayi ve Ticaret Anomim Şirketi v. Turkm., ICSID Case No. ARB/10/1 at 70–71, ¶ 6.3.4 (Award Date July 2, 2013) (citing Abaclat v. Arg. Republic, Dissenting Opinion of Professor Georges Abi-Saab, ICSID Case No. ARB/07/5 ¶ 126 (Oct. 28, 2011) (emphasis added)). For other citations where the tribunals referenced dissenting opinions issued in earlier cases, *see* Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, at 93 n.155 (Award Date Mar. 24, 2016); SGS Société Générale de Surveillance S.A. v. Republic of Para., Decision on Jurisdiction, ICSID Case No. ARB/07/29, at 57, ¶ 181 (Feb. 12, 2010) (citing SGS Société Générale de Surveillance S.A. v. Republic of the Phil. Declaration (Dissenting Opinion of Antonio Crivellaro), ICSID Case No. ARB/02/6, at n.176, at 2, ¶ 4), (Jan. 29, 2004)).

195 Van den Berg, *supra* note 8, at 388 ("The Nightingale article [The Death of Two-Headed Nightingale *by* Charles N. Brower & Charles B. Rosenberg] heralds the four separate opinions as 'a validation of the potential contributions that can be made by such opinions.' Note the qualifier 'potential.' The Nightingale article does not inform us what the contributions of those four dissents could have been.").

196 Alan Redfern, *Dangerous Dissents*, 71 ARB. 200, 210 (2005) ("It is true, as stated earlier in this article, that a dissenting opinion may point the way to a change in the law. As was said in somewhat poetic terms, it may constitute 'an appeal to the brooding spirit of the law, to the intelligence of a future day.' But for this to happen, the dissent would need to be on some point of legal principle; and in addition, the dissent would need to be published as part of an award that was itself made public."); *see also* Mosk & Ginsburg, *supra* note 24, at 267–68 (In this article, the authors embraced a favorable approach to the issuance of dissenting opinions and postulated that such opinions have a potential to affect decisions in the future. They, however, also added: "While this rationale for dissents makes sense in the context of arbitration between states, it is more problematic in the 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 agreement and awards. The private qualities of

On the other hand, within the ambit of investment arbitration, every decision made by an investment treaty tribunal has a ripple effect that transcends the particular dispute and involved players.[197] The key factor generating this effect in investment arbitration is the transparency-oriented policy, which, unlike in international commercial arbitration, does not prevent publication of decisions and opinions. Thus, not only does this available knowledge create a perfect environment for valuable and substantive ideas to spread, but it also gives rise to "the *de facto* system of precedent"[198] and further aids in its evolution.[199]

Indisputably, arbitrators are not bound by precedent. However, as shown by the ICSID cases, ICSID tribunals frequently refer to and cite former arbitral awards and dissenting opinions.[200] In this context,

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arbitration, especially the principle of confidentiality, are usually thought to weigh against publication of awards and dissenting opinions.").

197 Laurence Shore & Kenneth Juan Figueroa, *Dissents, Concurrences and a Necessary Divide Between Investment and Commercial Arbitration*, GLOBAL ARB. REV. (Dec. 1, 2008), http://globalarbitrationreview.com/article/1027691/dissents-concurrences-and-a-necessary-divide-between-investment-and-commercial-arbitration.

198 *Id.* (emphasis added). Regarding stare decisis in international arbitration, *see* Mosk & Ginsburg, *supra* note 24, at 268 ("Arbitration, of course, has no system of *stare decisis* or precedent. Arbitrators are not bound to consider the decisions of earlier tribunals or panels."); W. Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV., 1895, 1908 (2010) ("ICSID was not consciously designed to create a body of investment law precedent. There is no doctrine of stare decisis in investment or any other kind of arbitration. Yet despite the formally nonbinding nature of past awards, ICSID tribunals frequently cite to engage with awards issued by investment or other international tribunals. In analysis of ICSID awards issued between 1990 and 2006, Jeffery Commissions found that tribunals cited to awards rendered by other ICSID panels nearly 80 percent of the time."); Breeze, *supra* note 12, at 407 ("Although ICSID, like other arbitration fora, was not designed to create a body of precedent, and there is no doctrine of stare decisis in arbitral theory, it has been noted that ICSID decisions frequently cite to and engage with previous ICSID awards, and the awards generated by other arbitration tribunals.").

199 For further information regarding the direct affiliation between arbitral precedent and award publication, *see* Weidemaier, *supra* note 198, at 1895–958.

200 *See* sources cited *supra* note 198. Notwithstanding the highly regarded privacy and absolute lack of transparency, commercial arbitral tribunals also pay regard to the awards of earlier tribunals. In this regard, *see* BORN, *supra* note 1, at 3823–24 ("A review of reported awards indicates fairly strongly that it is inaccurate to conclude that arbitral precedents are confined to sports, domain name and investment arbitrations (although it is correct that arbitral awards in these fields also have precedential authority). Rather, arbitral tribunals in a range of other settings have expressly noted that they are influenced by prior awards. For example, in one ICC award, the tribunal concluded that a prior award did not formally have *res judicata* effect, but that parts of the previous award represented an 'authoritative ruling' on 'certain matters that may be relevant' in the subsequent arbitration. In another ICC arbitration, the tribunal similarly concluded that, although a

dissenting opinions are deemed persuasive authority and, accordingly, are significant and authoritative players contributing to law's continued development.

For dissenting opinions to have such influence over legal development, they must address shortcomings found in an award and propound views that palliate the side effects of these deficiencies. Further, considering that every award rendered by an arbitral tribunal establishes a possible referable framework for future proceedings, exposés made by dissenting opinions become more valuable and contributive. In this respect, several arbitrators made particular reference in their dissenting opinions to future repercussions resulting from the rendered award's result and the persuasive authority set by it.[201] For example, in his dissenting opinion, Sir Franklin Berman stated, "Because, however, I take a sterner view than they do of the manifold shortcomings of the Tribunal's Award, I should explain why I do so, in the interests of the ICSID system as a whole, and as a pointer for future Tribunals."[202]

Like Berman, Arbitrator Keith Highet also issued a dissenting opinion where he noted the award's shortcomings and strove to alleviate the mistake made by the tribunal. Specifically, he stated:

> I consider it important to append this opinion of my dissenting views, not to denigrate or undermine the reasoning and logic of the Award, but only to point out the key differences between my views and those of the majority. The precedential significance of this Award for future proceedings under the North American Free Trade Agreement (NAFTA) cannot be underestimated. In addition, the Award will be an important guidance to future potential NAFTA claimants. It is for this purpose that as complete an understanding as possible be expressed of the legal issues involved.[203]

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prior award did not have formal *res judicata* effect (because the prior dispute involved different parties and different contracts), the prior award would be considered persuasive. . . .").

201 Breeze, *supra* note 12, at 406.

202 Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. Republic of Peru, Dissenting Opinion of Sir Franklin Berman in Decision on Annulment, ICSID Case No. ARB/03/4 at ¶ 1 (Sept. 5, 2007).

203 Waste Management, Inc. v. United Mex. States, Dissenting Opinion of Keith Highet, ICSID Case No. ARB(AF)/98/2, at 241 (May 8, 2000); *see also* Marvin Roy Feldman Karpa v. United Mex. States, Dissenting Opinion of Jorge Covarrubias Bravo, ICSID Case No. ARB(AF)/99/1, at 16 (Dec. 3, 2002) ("If the approach taken in this award were to prevail, it would suffice for any investor from a NAFTA State to show that another State party to the same Treaty has made only one mistake or miscalculation in the

Undeniably, in investment treaty arbitration, tribunals often proceed using the following steps: first, identify prior related decisions; second, compare the applicable facts coloring the prior holdings, and; third, apply those findings to the present case.[204] In this environment, dissenting opinions fulfill a fundamental role by enlightening prospective tribunals to the deficiencies of preceding awards and encourage these tribunals to establish their awards based upon a firm legal foundation. By performing this role, these awards abate the relative wrongs inflicted by prior tribunals and thus contribute to the positive enhancement and evolution of law.[205]

Unsurprisingly, it is not uncommon that the minority views memorialized in dissenting opinions are not always met with open arms by subsequent tribunals.[206] Further, most dissents never mature into majority opinions. This fact, however, does not mean that these dissents avoid the circulation of ideas amongst tribunals. Noted

administration of a tax, favoring a single national investor—*whose circumstances are apparently similar*—to claim and obtain a benefit from that State, to the detriment of its public finance.").

204 Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1031–32 (2007) ("[I]nvestment treaty arbitration tribunals tend to: (1) identify prior relevant decisions; (2) compare aggregate costs of departure from prior decisions with the aggregate consequences of following prior decisions, taking into account whether the policies underlying those prior decisions remain relevant under contemporary conditions; (3) decide which prior decisions to follow or depart from; and (4) articulate reasons for their decision."); Saipem S.p.A. v. People's Republic of Bangl., Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07, at 20, ¶ 67 (2007) ("The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.").

205 For example, the dissenting opinion issued by Professor Georges Abi-Saab in *Abaclat v. Arg. Republic* was expressly embraced by the majority award rendered in *Kiliç İnşaat v. Turkm*.

206 William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 435–36 (1986) ("A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated, and perhaps, in time, superseded. This supersession may take only three years, as it did when the [Supreme] Court overruled *Gobitis* in *Barnette*; it may take twenty years, as it did when the [Supreme] Court overruled *Hammer v. Dagenhart* in *Darby*; it may take sixty years as it did when we overruled *Plessy* in *Brown*. *The time periods in which dissents ripen into majority opinions depend on societal developments and the foresight of individual justices, and thus vary*.") (emphasis added).

earlier, in "the *de facto* system of precedent," there are more investment arbitration cases where tribunals cite to and engage with awards and former dissenting opinions. Further, because dissenting arbitrators specifically refer to the rendered award's shortcomings and potential repercussions stemming from the award, dissenting opinions, even if not referenced in a majority opinion, maintain a role in advancing law's development.

Viewed through this prism, dissenting opinions instigate a fresh approach and birth distinct solutions.[207] Hence, dissenting opinions, by injecting different views, approaches, and methods of analysis into the award-making process, not only prevent static and stale law from becoming the norm in arbitration but also through dynamism rejuvenate majority opinions and provide a fluid foundation compatible with constant change.[208]

b. Improving Award Quality

By identifying flaws in the majority's reasoning, dissenting opinions ensure that the majority diligently exercises due care and attention to all party arguments and issues.[209] In consonance with this statement, albeit from a judicial perspective, Justice Brennan of the United States Supreme Court stated that "dissent . . . safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."[210]

Importantly, observing the possibility that a rendered dissent may influence the actions of the majority toward being more attentive and thorough does not presume that the majority would act otherwise in the absence of dissenting opinions. Regardless of whether dissent is drafted or not, every arbitral tribunal must adhere to the duty to render an enforceable and recognizable award established upon cogent reasoning, addressing all arguments and subtle issues. Unfortunately,

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207 Brower & Rosenberg, *supra* note 37, at 37 (citing Hans Smit, *Dissenting Opinions in Arbitration*, 15 ICC INT'L CT. ARB. BULL. 37, 38 (2004)).

208 Shore & Figueroa, *supra* note 197 ("[I]f there is an emerging 'common law of investment protection, with a substantially shared understanding of its general tenets,' one would expect to see concurrences and dissents influencing these general tenets. And their influence would not be limited to the establishment of the content of legal standards, but extend to the application of such standards both to recurring fact patterns and to evidentiary records that may contain subtle but significant differences.").

209 Mosk & Ginsburg, *supra* note 24, at 270.

210 Brennan, *supra* note 206, at 430.

although this duty is critical to the arbitral system's functioning, a tribunal does not always dictate a perfectly analyzed award. However, tribunals faced with the "threat" of a dissenting opinion likely to emphasize the majority's erred reasoning may practice greater caution and proceed with the utmost due diligence during the entire award-making process.[211] Moreover, should the minority arbitrator's arguments not be sufficiently addressed by the majority, nor properly explained in the award, the issuance of a dissenting opinion may prompt the majority to further deliberate the concerns and arguments of the minority arbitrator.[212]

In addition to ensuring the majority's due diligence, the prospects of a possible dissent compel the majority to set forth a more eclectic and thorough reasoning. Because the dissenting arbitrator criticizes the majority's analysis, perhaps weakening the award's authority, the majority will naturally want to refute the dissent's assertions and deliver a comprehensive opinion that not only justifies the desertion of other outcomes but also stimulates the award's enforceability. Further, if the majority's reasoning fails to incorporate all the deliberated information, the dissenting opinion may fill these holes and realize a pivotal role in the competent court's decision to enforce the award.

Reflecting this precise scenario is a decision rendered by the Swiss Federal Tribunal in *X. Society*, *Y. Society v. Company*.[213] Here, the appellants challenged an award rendered by the arbitral tribunal[214] situated in Zurich on the grounds of infringement of the right to be heard.[215] Specifically, the appellants claimed that the majority intentionally overlooked a witness statement. The Federal Tribunal dismissed the claim on the basis of lack of reference to certain evidence and stated that nothing in the rendered award inferred that the arbitral tribunal overlooked the evidence.[216] To substantiate the dismissal of the appellants' claim, the court referred to Dr. Pagenberg's dissenting opinion, where he mentioned the allegedly disregarded witness statement. Due to this obvious reference, albeit in

211 Rees & Rohn, *supra* note 10, at 335.

212 *Id.* at 336.

213 X. Society, Y. Society v. Company, 1st Civil Chamber of the Federal Supreme Court of Switzerland, 4P.74/2006, 24(4) ASA Bulletin 761–78 (2006).

214 The arbitral tribunal was composed of Dr. Laurent Lévy (Chair), Robert S. Rifkin, and Dr. Jochen Pagenberg.

215 *X. Society*, *Y Society*, *supra* note 213, at 765.

216 *Id.* at 769.

the dissent, the court deduced that the tribunal did deliberate the witness statement prior to issuing the award.[217] Here, because the dissenting opinion clearly filled the holes and palliated the shortcomings of the award, it illustrated the quality and comprehensiveness of the arbitral deliberations and facilitated award enforcement.

Notably, to fulfill this role of ensuring and enhancing award quality, dissenting opinions must be circulated among the majority prior to finalizing and issuing the final award. Issuance of dissent after the award is finalized detracts from the efficacy of these opinions and proves unhelpful in assisting the majority tackle all the best possible arguments.[218] The reasoning behind this point is clear because a late dissent will not be shared with the majority prior to award conclusion and thus will not provide the majority with the opportunity to rebut criticisms. Similarly, the majority will not be able to adjust the award in accord with the analysis and conclusions adopted by the dissenting arbitrator.[219] Therefore, ideally all tribunal members should have an opportunity to analyze the dissent before finalizing an award and memorializing their reasoning.

In sum, a well-reasoned dissenting opinion opens the door to vigorous debate and "improves the final product by forcing the prevailing side to deal with the hardest questions urged by the losing side."[220] However, for this essential role to effectuate change, it is imperative that dissenting arbitrators circulate their opinions prior to award finalization and issuance. In the words of Messrs. Mosk and Ginsburg, "[W]hen 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. . . ."[221]

c. Increasing Confidence in the Arbitral Process

Unsurprisingly, one principle factor of a functional and effective dispute resolution system is a party's right to be heard.[222] This right

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217 *Id.*

218 Mosk & Ginsburg, *supra* note 24, at 271.

219 *Id.* ("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.").

220 Brennan, *supra* note 206, at 430.

221 Mosk & Ginsburg, *supra* note 24, at 271.

222 *See id.* at 272; Stippl & Öhlberger, *supra* note 45, at 387.

demands that arbitral tribunals examine and address all issues germane to the dispute.[223] This duty is contravened when "inadvertently or by misunderstanding, the arbitral tribunal does not take into account some statements of facts, arguments, evidence and offers of evidence submitted by one of the parties and important to the decision to be issued."[224] In this regard, dissenting opinions may fulfill a lodestar role by casting light upon a tribunal's failure to appropriately tackle pertinent questions and arguments.

A well-reasoned dissent not only reveals to the aggrieved party that the tribunal debated alternative arguments raised in favor of said party, but further proves that the tribunal did not overlook relevant statements of facts and evidence. By fulfilling this role, dissenting opinions evoke greater confidence in the arbitral proceedings[225] and bolster award enforcement.[226]

Along with quelling grievances of dissatisfied parties by evidencing deliberation into all arguments, dissenting opinions further "prevent a 'run-away jury' and avoid a miscarriage of justice 'in the arbitral system as well as in the State court system.'"[227] Thus, dissenting opinions, through this "whistle blower" role, illustrates the award's deliberation quality, which in turn augments the perception of arbitration as a legitimate and fair system.

By virtue of the addressed functions, dissenting opinions play a pivotal role in amplifying confidence in the arbitral system and concomitantly increase the likelihood of voluntary compliance with an award.

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223 Susan Field, *Swiss Federal Court Annuls Arbitration Award due to Violation of the Right to be Heard*, KLUWER ARB. BLOG (Oct. 7, 2013), http://arbitrationblog.kluwerarbitration.com/2013/10/07/swiss-federal-court-annuls-arbitration-award-due-to-violation-of-the-right-to-be-heard/.

224 Tribunal federal [TPF] [Federal Tribunal] Apr. 17, 2013, 4A_669/2101, X. Limited v. Y. Limited, http://www.swissarbitrationdecisions.com/sites/default/files/17%20avril%202013%204A%20669%202012.pdf.

225 Mosk & Ginsburg, *supra* note 24, at 272.

226 This fact is illustrated in the judgment rendered by the Swiss Federal Tribunal in the *X. Society* case. Here, the court faced an arbitral award challenged on the basis of a violation of the right to be heard by the appellants. Thus, the court looked to the dissenting opinion to decide whether the arbitral tribunal overlooked the witness statement submitted by the appellants. From the language of the dissenting arbitrator, the court deduced that the witness statement was properly deliberated by the arbitrators prior to the issuance of the award and, consequently, dismissed the challenge. For further information regarding the case, *see supra* note 213 and accompanying text.

227 Brower & Rosenberg, *supra* note 37, at 41 (citing James H. Carter, *Rights & Obligations of the Arbitrator*, 52 DISP. RESOL. J. 56, 64 (1997)).

CONCLUSION

From the perspective of Redfern and Hunter, dissenting opinions conflict with the very purpose of the arbitral system: to reach a conclusive decision.[228] Consequently, per Redfern and Hunter, irrelevant is the wayward arbitrator; only a conclusive award will honor the parties' contract and should therefore be respected.[229] Further, these scholars find dissenting opinions to threaten the efficacy of the arbitral process through menacing the validity and enforceability of the award.[230] Per this view, a dissenting minority arbitrator should nonetheless acquiesce to the majority's reasoning and resulting award simply for the sake of preserving the award's conclusiveness and authority.

In harmony with Redfern and Hunter, other commentators discourage the practice of dissent. These commentators opine that issuing dissenting opinions threatens the functionality and integrity of the arbitral system. Specifically, these critics argue that dissenting opinions violate the secrecy of deliberations, endanger the legitimacy of the arbitral process by accentuating the connection between parties and their appointed arbitrators, debilitate the majority opinion's legitimacy, obstruct award enforcement and recognition, and prolong arbitral proceedings and escalate costs.

Although these arguments raise legitimate concerns, also undeniable is that dissenting opinions, for better or for worse, are "here to stay."[231] Therefore, trying to suppress or prohibit dissent will not neutralize the alleged threats posed by these opinions. On the contrary, any such attempt will frustrate the beneficial role fulfilled by dissenting opinions[232] and will boomerang upon the arbitral system by impeding further improvement and tainting its perceived legitimacy.

Resultantly, the focus must shift from suppressing dissents toward guiding dissenting arbitrators to successfully express coherent and helpful opinions. In this respect, what could provide critics of dissent with peace of mind is an integration of ethical codes and internationally approved guidelines into the arbitral system. Such

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228 REDFERN & HUNTER, *supra* note 70, at 577.

229 *Id.*

230 *Id.*

231 Mosk & Ginsburg, *supra* note 24, at 284.

232 For the advantages of the practice of dissenting opinion, *see supra* Part B(2).

suggested codes and guidelines, by regulating the practice of issuing dissenting opinions, will assuage the fears entertained by critics via expressly defining and dictating principles, such as due regard for deliberation secrecy, prohibiting attacks upon the majority's reasoning (or the manner in which arbitration proceeds), disallowing a dissent to be drafted like a vacatur application, and requiring circulation of the dissent prior to award issuance.

In conclusion, important to remember is arbitration's heterogeneous nature. It is this blend of different rules and principles that so successfully addresses disputes between parties with diverse cultural, economic, legal, and linguistic backgrounds. Because of this diversity, opinions range among tribunal members and often result in different ideas. In this respect, the practice of dissent should not carry stigma, nor should it be deemed a piñata to be beaten when there is frustration with the independence and neutrality of arbitrators.[233] Instead, dissenting opinions must be viewed in the context of an arbitrator's quasi-judicial role and be regarded as a reflection of freedom of expression, corollary to a tribunal's obligation to furnish a well-reasoned, substantiated award.

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233 *See* van den Berg, *supra* note 11.