

Dangerous Dissents

By ALAN REDFERN *

In the play that Shakespeare called “The Tragedy of Julius Caesar”, there is the well-known funeral oration by Mark Antony. He wishes to rouse the population against Brutus, Cassius and the other conspirators who have assassinated his friend, Caesar. But Mark Antony has to be careful. His own life was only spared because Brutus insisted upon it. He starts by saying:

“Friends, Romans, countrymen,
“I come to bury Caesar, not to praise him.
The evil that men do lives after them.
The good is oft interred with their bones.
So let it be with Caesar.”

But then he begins to strike. The accusation against Caesar was that he was too ambitious. Mark Antony questions this:

* Member of the English bar, of One Essex Court, Temple. Arbitrator and former senior litigation partner at Freshfields.

“When the poor cried, Caesar wept –
Ambition should be made of sterner stuff”.

And what of the accusation that Caesar wished to become king?
Mark Antony says that three times he offered him the crown :

“Which he did thrice refuse. Was this ambition?
Yet Brutus says he was ambitious,
And Brutus is an honourable man.”

I come here tonight, in considerably happier circumstances, to talk about dissenting opinions. I believe they have little part to play in commercial arbitration. But I would not wish it to be thought that I have come to bury dissent. Indeed, there are circumstances in which I would praise it very highly.

We pride ourselves in living in a free country. We have no fear of arbitrary imprisonment – of being arrested on the *diktat* of a Government minister, imprisoned without charge, held without trial. We value liberty too much. And yet, just over 60 years ago, many people living in this country were arrested in the name of national security and imprisoned

without trial. One of them Mr. Liversidge, brought a case before the English courts, which finished in the House of Lords.¹

It was a time, in 1940, when England faced the very real threat of a German invasion. The relevant Minister, the Home Secretary, was given the power to arrest persons living in this country if he had reasonable grounds to believe that they were persons of hostile origin or associations. Despite assurances to the contrary, the Ministerial power appears to have been exercised fairly indiscriminately. One person amongst the many arrested was a young law student at Cambridge, whose family had fled from Nazi Germany in the 1930s. The trouble was that Cambridge was in a sensitive part of the country – near the airfields and the coast. In his book², this law student describes how he and many others of German origin – including his Roman law supervisor – were arrested. He was interned for six months without trial. He was then released and joined the Royal Air Force as a pilot. Later he became a successful barrister, a judge of the Court of Appeal and a distinguished arbitrator. He was, of course, the late Sir Michael Kerr.

¹ The case is Liversidge v. Anderson (1941) 3 AER 338. Mr. Liversidge was arrested in May 1940 and released in early January 1942: for a full account of the case, see Lord Bingham's lecture, cited at footnote 5.

² Sir Michael Kerr became an outstanding Judge of the English Court of Appeal and amongst other distinctions, President of the LCIA (and of Queen Mary College): see Kerr, "As far as I remember" (Hart Publishing) 2002. For an account of the family's move to England, see the children's book for adults by Sir Michael's sister, Judith Kerr, entitled "When Hitler Stole Pink Rabbit", Harper Collins Publishers Ltd (1971).

But let us go back to Mr Liversidge. The Home Secretary had ordered his arrest and imprisonment on the basis that he had “reasonable grounds to believe” that Mr Liversidge was a person of hostile associations. The questions at issue for the judges was a simple one. Could the Court investigate whether or not the Minister had reasonable grounds for his belief? Or was it sufficient if the Minister himself thought that he had?

The case, as I said, went all the way to our supreme court, the House of Lords. The majority of their lordships deferred to the Government. They did not believe that the relevant defence regulation allowed them to review the Minister’s decision. Only one judge – Lord Atkin - dissented. But his speech is remembered when all the rest have long been forgotten. Lord Atkin said³:

“In this country, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges are

³ Liversidge v. Anderson (*op. cit.*) at p. 244.

no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified by law. In this case, I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister.”

Lord Atkin went on to say that he knew of only one authority which might justify the majority's view of the law. It came from Lewis Carroll. “When I use a word”, Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean, neither more nor less”. “The question is” said Alice “whether you can make words mean so many different things”. “The question is” said Humpty Dumpty “who is to be the master – that's all”.⁴

⁴ Ibid at p.245.

As might be imagined, this dissenting speech was not well received by Lord Atkin's fellow judges⁵. It was left to another eminent Law Lord to say, years later, that the time had come to acknowledge openly that the majority of the House of Lords were "expediently and, at that time perhaps excusably, wrong and the dissenting speech of Lord Atkin was right".⁶

Another celebrated case, in which the judgment of a dissenting judge was vindicated by the judges themselves was Candler v. Crane Christmas.⁷ Mr Candler, who had invested money in a company on the basis of accounts that had been negligently prepared, lost his investment and sued the accountants. The majority of the Court of Appeal held that, in the absence of a contractual or fiduciary relationship, the accountants owed no duty of care to that investor. Lord Denning, dissenting, disagreed. He said:

"In my opinion, accountants owe a duty of care not only to their own clients, but also to all those whom they know will rely on their

⁵ In a lecture at the Reform Club, October 1997, entitled "Mr. Perlzweig, Mr. Liversidge and Lord Atkin", Lord Bingham related that, in an unprecedented move, the Lord Chancellor asked Lord Atkin to take out the reference to Humpty Dumpty. Lord Atkin refused and, after delivery of his speech, he was cold-shouldered by his colleagues: see Bingham, "The business of Judging" (Oxford University Press) 2000, at p.216.

⁶ Lord Diplock in Inland Revenue Commissioners v. Rossminster (1980) AC 952.

⁷ Candler v. Crane Christmas & Co (1951) 1 AER 426.

accounts in the transactions for which those accounts are prepared.”⁸

Twelve years later, in Hedley Byrne⁹, the House of Lords held unanimously that as a matter of law, the making of a statement upon which reliance is placed *could* give rise to a duty of care, even if there was no contractual or fiduciary relationship. Lord Hudson expressly referred to the judgment of Lord Denning in Candler v. Crane Christmas saying that he agreed with it “so far as it dealt with the facts of that case”¹⁰ and that he was therefore of the opinion that Lord Denning’s judgment “is to be preferred to that of the majority...”. Lord Devlin too said¹¹ that he was prepared to adopt Lord Denning’s statement “as to the circumstances in which he says a duty to use care in making a statement exists.”

Most arbitrators and arbitration practitioners will remember the Ken Ren case.¹² The issue that confronted the House of Lords was whether or not to make an order for security for costs in an ICC arbitration. Their Lordships agreed that the English Court had the power

⁸ Ibid at p.436.

⁹ Hedley Byrne & Co. Ltd v. Heller & Partners Ltd (1963) 2 AER 575.

¹⁰ Ibid at p. 597.

¹¹ Ibid at p. 611.

¹² Coppée Levalin NV v. Ken-Ren Chemicals and Fertilisers Ltd (1995) 1 A.C. 38. (For a vigorous criticism of this decision, see Paulsson “The Unwelcome Atavism of Ken Ren: the House of Lords shows its Meddle” 12 ASA Bulletin (314, 1994) p.439.)

to make such an order; but the exercise of that power was discretionary. It was argued that in exercising its discretion the court should refuse to make the order sought, because the issue would be much better dealt with in the arbitration itself. The House of Lords decided that the power to order costs should be exercised by the court. But Lord Mustill, in a dissenting judgment with which Lord Browne-Wilkinson agreed, said that in his judgment an order for security for costs did not conform with the type of procedure that the parties had chosen. Accordingly the application should be refused, “notwithstanding that on a narrower view it appears to answer the justice of the case”.¹³ It is perhaps significant that only a year later, when the English Arbitration Act 1996 was enacted, the power to order security for costs in an arbitration was taken away from the English Court and vested in the arbitrators themselves.¹⁴

Finally, there are dissenting judgments which provoke a wry smile, as the dissenting judge self evidently lets off steam. In an article in the Columbia Law Review¹⁵, Judge Fuld referred to a judge in the Appellate Court who said:

“In essence, what these four judges have done
here is to blindly announce a....rule which not

¹³ Ibid at p.65.

¹⁴ English Arbitration Act, 1996, sections 38 and 44.

¹⁵ Fuld, “The Voices of Dissent”, Columbia Law Review, Vol. 62, No.6 at p.923.

only finds no support in history, precedent, experience, custom, practice, logic, reason, common sense or natural justice, but is in utter defiance of each and all of these standards.”¹⁶

Judge Fuld comments:

“I do not know the reactions of this dissenter’s colleagues, for I never spoke to them, but I am fairly confident that they did not pat him on the back and say “well done, old fellow.”¹⁷

Later in the same article, Judge Fuld referred to another US Judge, in a case in which the claimant had sued a railway company for injuries allegedly caused through its negligence. The jury had given a verdict in favour of the claimant but on appeal, the High Court reversed the judgment and dismissed the complaint. One judge dissented and said:

“The majority opinion sweeps over the evidence in this case like an express train shooting across a trestle, ignoring signals, semaphores and swinging lanterns.... Because

¹⁶ Fuld, *op. cit.* at p.924.
¹⁷ Ibid.

of his experience with the train, the plaintiff will undoubtedly never park an automobile in the vicinity of a railroad track again, but from his experience with this lawsuit, he will undoubtedly also feel that he should remain far away from the courts because, from his point of view, a collision with Court-inspired law can be as devastating as a collision with a railroad locomotive.”¹⁸

As Judge Fuld observes, it is not necessary for the dissenter to use a sledge hammer to drive home the point that the majority do not know what they are talking about. A rapier will do just as well, as with the English jurist who is reported to have said: “I am dissenting for the reasons so ably expressed in the majority opinion”.¹⁹

So, it may be said, if the dissenting opinions of judges may be of value, even if only as a way of letting off steam, what is wrong with dissenting opinions in commercial arbitration – and particularly in international commercial arbitration?

¹⁸ Fuld, *op. cit.* at p.925.

¹⁹ Ibid. The same, possibly apocryphal dissent, is mentioned in Alder “Dissents in Courts of Last Resort: Tragic Choices?”, Oxford Journal of Legal Studies, Vol. 20, Issue 2, p.221 to 246 - a scholarly review and analysis of judicial dissent.

My answer is that three things are wrong – but they all owe their origins to the fundamental difference between proceedings in the established courts of law and proceedings before an arbitral tribunal. Holdsworth, in his *History of English Law*, wrote²⁰:

“The practice of arbitration therefore, comes, so to speak, naturally to primitive bodies of law; and after courts have been established by the state and a recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle it with less formality and expense than is involved in a recourse to the courts.”

In a similar vein, a distinguished French lawyer has written of arbitration as an “apparently rudimentary method of settling disputes, since it consists of submitting them to ordinary individuals whose only qualification is that of being chosen by the parties.” He added that, traditionally, countries of the civil law were hostile to arbitration as being “too primitive” a form of justice.²¹

²⁰ Holdsworth, *History of English Law* (1964), Vol. XIV, p.187.

²¹ Fouchard, *L'Arbitrage Commercial International* (1965) pp. 1, 30 and 31 (my translation).

It is not difficult to visualise the rudimentary nature of the arbitral process in its early history. Two traders, in dispute over the price or quality of goods delivered, would turn to a third whom they trusted for his decision. Or two merchants, arguing over damaged merchandise, would settle their dispute by accepting the judgment of a fellow merchant which would be given quickly and without any formalities. If you were looking for an aphorism you might be tempted to say:

“If you want justice, go to the King’s courts (although the process is likely to be long and formalistic). If you simply want a decision on a commercial dispute, go to arbitration.”

It is important to maintain this distinction between recourse to the courts and recourse to arbitration.

A distinguished commercial judge once said, in a talk to a group of arbitrators:

“By all means give your decision, because you will almost certainly be right. But do not give your reasons, because you will almost certainly be wrong!”

Nowadays, of course, arbitrators have no choice. They have to give their reasons. Some rules of arbitration, such as these of the ICC, insist that the arbitrators' award must state the reasons on which it is based. Other rules, such as these of the LCIA – and indeed, these contained in the UNCITRAL Model Law – stipulate that the arbitral tribunal must state the reasons upon which its award is based, unless the parties agree otherwise.²²

In international commercial arbitration, it is practically unknown for the parties to agree otherwise. At the end of the arbitration, after the exchange of pleadings and documents and submissions, the arbitrators are required to give their decision in the form of a written award which sets out the reasons on which it is based. The expectation is that this award will be unanimous. If not, a majority decision – and sometimes the decision of the presiding arbitrator alone – will generally suffice. An arbitrator who disagrees with the award will normally be expected to sign it. At the same time, he or she will generally be free to write a dissenting opinion, which may run to many pages – indeed, as it may be as long as the award itself – and it may be highly critical of the award. There is no

²² There is no express requirement for a written award in the ICC Rules of Arbitration, but it is clear that this is required – for instance, from the provisions for signature of the Award; and, under Article 25(2) of the Rules, the Award must state the reasons on which it is based. The LCIA Arbitration Rules, in Article 26, expressly require an Award to be made in writing and to state the reasons on which it is based, unless the parties agree in writing to dispense with reasons. The UNCITRAL Arbitration Rules contain, in Article 32, a similar rule to that of the LCIA, as does the Model Law.

restraint on this – except perhaps good taste and a sense of collegiate responsibility.

Do such dissenting opinions serve any useful purpose, particularly in the context of an international commercial arbitration? Or should they in fact be strongly discouraged, as being at best unhelpful and at worst evidence of bias, which does not fit well with a very real and necessary concern for independence and impartiality on the part of an arbitral tribunal.

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 may 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".²³ It is doubtful however, whether the dissenting opinion has added much, if anything, of value to the arbitral process.

²³ Kerr, "Concord and Conflict in International Arbitration" (1997) 13 *Arbitration International* No.2 at p.121.

In a previous talk on this subject, I suggested – borrowing from the “Spaghetti Western” which starred Clint Eastwood – that dissenting opinions in international commercial arbitration could be classified in three distinct groups: “the good, the bad and the ugly”. Later, in carrying out research for my task, I found that an American judge had come to a somewhat similar conclusion. He said: “Dissents, like homicide, fall into three categories: excusable, justifiable and reprehensible.”²⁴

The “good” or “excusable” dissent is one that is short, polite and above all restrained, so that the dissenter says: “It is with regret that I must dissent from the views of my learned colleagues” - followed perhaps by a few short, sharp sentences. Or there may be a partial dissent (or dissents) woven neatly into the fabric of the judgment or award, so that it is said (for example) that Arbitrator “A” disagrees with his or her colleagues on this issue or set of issues and Arbitrator “B” disagrees on some other issue or issues but nevertheless all the members of the tribunal find themselves able to agree upon the final decision. In the process, one or all of the members of the tribunal may have had to moderate his or her views, in deference to the other members of the tribunal - but this is the essence of a collegiate decision.

²⁴ Fuld *op. cit.* at p. 928.

There may even be an almost total dissent, in which the arbitrator makes clear his or her disagreement with much of the reasoning of his or her colleagues, but is nevertheless prepared to concur in their conclusion as a matter of realism and good sense. For example, in the Iran/US Claims Tribunal, in the case of Ultrasystems Inc.v. The Islamic Republic of Iran²⁵, Judge Mosk said:

“I concur in the Tribunal’s Partial Award. I do so in order to form a majority, so that an award can be rendered.”

(He also added a footnote: “As Professor Pieter Sanders has written, “arbitrators are forced to continue their deliberations until a majority, and probably a compromise solution, has been reached”.²⁶)

Again in the Iran/US Claims Tribunal, in the case of Economy Forms Corp.v. The Islamic Republic of Iran²⁷, Judge Howard Holtzman considered that the damages awarded were only half of what they should have been. He said:

²⁵ 2 Iran-US CTR 100.

²⁶ Sanders “Commentary on UNCITRAL Arbitration Rules” Yearbook Commercial Arbitration, 1977, 172 at p.208.

²⁷ For a discussion of these and other cases, including the important decision of the International Court of Justice in the “Case Concerning the Arbitral Award of 31 July 1989” see Schwebel, “The Majority Vote of an International Arbitral Tribunal”. (The American Review of International Arbitration), Vol. 2, No.4 1991 at p.402.

“Why then do I concur in this inadequate award, rather than dissenting from it? The answer is based on the realistic old saying that there are circumstances in which “something is better than nothing.”

The advantage of these “good” dissents is that they permit an arbitrator to express his or her views, without what may be seen as a show of conceit – or petulance – and without imperilling the authority of the award.

As an example of what might be called a “bad” dissent – although the arbitrator concerned no doubt thought that it was at least “justifiable” – we might consider what happened when a Finnish judge, Judge Bengt Broms, entered a dissenting opinion in a case before the US/Iran Claims Tribunal. In a very unusual move, the United States government sought his removal as an arbitrator. The United States claimed that there were justifiable doubts as to his independence and impartiality, based on his alleged breach of the secrecy of the Tribunal’s deliberations by his concurring and dissenting opinion of 19 December 2000.

Sir Robert Jennings Q.C., a former Judge of the International Court of Justice, was appointed to consider this request for the removal of an arbitrator. In his decision²⁸, Sir Robert referred to his initial puzzlement at “some of the seeming contradictions”²⁹ in Judge Broms’ opinion and then said:

“And there are other touches that seem to an outside observer to be a strange way of expressing a separate opinion. Eventually, however one realises after many readings – something that has probably been tolerably obvious all along to the insiders – that it seems a strange and unusual opinion for the reason that it is a continuation in the form of an Opinion of Judge Brom’s stance and arguments made by him during the deliberations. He has been unable to resist the temptation to continue arguing with his colleagues, or at any rate with the ‘smallest possible majority’ of them who were not able to accept these views of his. Once

²⁸ Decision of 7 May 2001 (hereinafter “Decision”). A summary of this Decision was published in (2001) 16(5) Mealey’s Int. Arb. Rep. (May 2001). The full text is available for purchase from Mealey’s electronic database.

²⁹ Decision at p.5.

that fact is realised then one has, from reading his Opinion, a quite vivid picture of what took place in the deliberation and how it eventually emerged.”³⁰

Sir Robert went on to say:

“A rule of the confidentiality of the deliberations must, if it is to be effective, apply generally to the deliberation stage of a tribunal’s proceedings and cannot realistically be confined to what is said in a formal meeting of all the members in the deliberation room. The form or forms the deliberation takes varies greatly from one tribunal to another. Anybody who has had experience of courts and tribunals knows perfectly well that much of the deliberation work, even in courts like the ICJ which have formal rules governing the deliberation, is done less formally. In particular the task of drafting is better done in small

³⁰ Decision at p.4.

groups rather than by the whole court attempting to draft round the table. Revelations of such informal discussion, and of suggestions made, could be very damaging and seriously threaten the whole deliberation process.”

After concluding that this breach of confidentiality had been correctly dealt with by the President of the tribunal, Sir Robert said:

“My only concern, as the Appointing Authority, is what is the effect of the terms of Judge Brom’s ‘concurring and dissenting Opinion’ on the question of his impartiality and his independence. A Judge may be strictly and correctly impartial and independent though massively indiscreet and forgetful of the rules.”³¹

On this issue, Sir Robert said:

“This Opinion of the Judge suggests a man who not only has very strong views but who also

³¹ Decision at p.7.

does not find it easy to let go of them and for whom opposition, especially successful opposition, probably only signals a need to restate his own point of view. He was not alone in his views of course. It is clear – indeed altogether too clear, as we have seen above – from Judge Brom’s revelations of the deliberations that there had been, during the deliberation and probably even earlier, a sharp difference of opinion between Iran and the United States about what may be called the practicalities resulting, or not resulting depending upon the point of view, from what at first sight looks like a simple task of interpreting a few plain words.”³²

Sir Robert concluded that it was not possible to infer from one single opinion that the United States’ suspicions of partiality were justified; but he warned that if it was to happen again, things might be very different.³³

³² Decision at p.9.

³³ Decision at p.11.

Those who, like myself, knew Sir Robert Jennings – and indeed had the privilege of being taught by him – will know that this was a very serious rebuke from a usually mild mannered lawyer. And if this is only a “bad” - or even “justifiable” - dissent, what then is one that is “ugly” or “reprehensible”?

Such dissents, I would suggest, are these in which the dissenting arbitrator does not merely disagree with his or her colleagues on issues of fact or law, or on their reasoning, but instead takes the opportunity of issuing a dissenting opinion to attack the way in which the arbitration itself was conducted. The dissenting arbitrator complains, unrestrainedly and in print, that his or her views were ignored, that he or she was never properly consulted, that the majority arbitrators were ignorant of the law and biased from the outset – and so forth. In short, the dissenting arbitrator complains that the proper procedures were not followed and that the majority arbitrators have failed to behave as they should have behaved.

This is what seems to have happened in a case which came before the Swedish Court of Appeal. In CMF v. The Czech Republic³⁴, the Czech government tried to set aside an award made by a majority

³⁴ The text of the Partial Award on Liability of 13 September 2001 and the dissenting Opinion in this case, CMF v. The Czech Republic is available at http://www.cetv-net.com/ne/articlefiles/439-cme-cv_eng.pdf.

decision. One of the grounds was that the arbitrator nominated by the government had, as he alleged in his dissenting opinion, been excluded from the deliberations of the arbitral tribunal. The Court upheld the award and in doing so had some useful things to say about the process of deliberation by which a tribunal reached its decision. In particular, whilst the principle of equality amongst the arbitrators should be upheld, one arbitrator should not be allowed to prolong the deliberations by demanding continuing discussion, in an attempt to persuade the others to adopt his point of view.

Does it matter, if an arbitrator enters a long dissent, with a complaint against his or her arbitrators? Or, has as been suggested, is it part of the price that has to be paid for the freedom that each party to an arbitration has to select his or her arbitrator?

In my view, it does matter; and it matters for three reasons as I mentioned earlier.

First, the authority of a judgment rests not only on the reputation of the judges concerned but also on the reputation of the judicial system of which they form part – including the appellate courts. This judicial system should be strong enough to tolerate dissent – and even

occasionally perhaps to profit by it. Even so, not all courts permit dissent. The European Court of Justice is a notable example of a court in which the secrecy of the deliberations is maintained and no dissent is allowed. This rule is defended on the grounds that it builds up the authority of the Court.³⁵ As an American judge said, more than a hundred years ago,

“the only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusion of courts of last resort.”³⁶

Since in most cases there is no appeal from the award of an international arbitral tribunal, that tribunal is in effect a court of last resort. Even the famous U.S. judge Oliver Wendell Holmes, who was often described as “the great dissenter”, said that he thought it “useless and undesirable, as a rule, to express dissent”.³⁷

³⁵ See, for instance, the comment by Alder “Dissents in Courts of Last Resort: Tragic Choices?” Oxford Journal of Legal Studies, Vol. 20, Issue 2, pp. 221 to 246: “dissents are not permitted in the European Court of Justice, the deliberations of which are subject to a strong requirement of secrecy and all must sign the opinion of the court. This has been defended on the ground of the need to build up the court’s authority by “presenting a united front and as a defence against political pressure”. Alder suggests that such a role is “anti-democratic” (*loc. cit.* at footnote 19).

³⁶ Per White J. in Pollock v. Farmers Loan and Trust Co. 157 US 429 at 608 (1895).

³⁷ In Northern Securities Company v. United States 193 US 197 at 400 (1904).

By contrast with the courts of law, the authority of an arbitral tribunal rests on that tribunal alone; and it is a tribunal, it must be remembered, which is brought together only to determine a particular dispute, which may never have met before and which may never meet again. This is a fragile base on which to build a decision on a claim that may be worth millions of dollars. A dissenting opinion may be sufficient to over-turn this fragile base and with it, an award which, for better or for worse, the parties have undertaken to honour. In other words, a dissenting opinion may lay an award open to attack. Indeed in a recent case³⁸ relating to an arbitration award made by three English arbitrators, one of whom gave a dissenting opinion, the Court of Appeal said:

“The difference of view between the experienced arbitrators in this case provides, of itself, ground for contending that the decision of the majority is “at least open to serious doubt.”³⁹

³⁸ “The Northern Pioneer” (2002), Court of Appeal, Civil Division.

³⁹ Per Phillips M-R at para. 64. Under English Law, parties may waive their right of appeal on a point of law either expressly or by implication (under rules such as those of the ICC or the LCIA which contain such a waiver). If the parties have kept open the right of appeal, the applicant must still apply to the English court for leave to appeal, which will not be given unless it appears that the Tribunal’s decision on the point of law is “obviously wrong” or if the question is one of general public importance and the decision is “at least open to serious doubt”. English Arbitration Act, 1996, ss.69(1) and 82(1).

The second reason is a more sensitive one. Judges are appointed by the state. They do not depend in any way on the parties who appear before them. In an international commercial arbitration, by contrast, two of the three members of the tribunal will usually have been appointed (or nominated) by the parties; and it is those parties who will pay the fees and expenses of the arbitrators. Does this create a degree of dependence?

It should not do so. The members of the arbitral tribunal, including the party-nominated members, are not the advocates or representatives of the parties. The modern insistence is upon the independence and impartiality of arbitrators. They are appointed to exercise a judicial function and they should do so, impartially and independently. Yet when a dissenting arbitrator disagrees with the majority, and does so in terms which are likely to find favour with the party which appointed him or her, does not that cause some concern? Does the dissent arise from a genuine difference of opinion or is it influenced by other, less creditable considerations?

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. There is perhaps nothing strange about this; in selecting an arbitrator, the parties will naturally look for someone likely to be sympathetic to their point of view.⁴⁰ But it would have been comforting if one or two of the dissenting opinions had gone against the appointing party!⁴¹

For Maître Boisséson, to accept the principle of a dissenting opinion is to diminish the independent role of the arbitrator. “In effect”, he says,

“Certain arbitrators, so as not to lose the confidence of the company of 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

⁴⁰ As stated by Judge Richard Mosk and Tom Ginsberg in “Dissenting Opinions in International Arbitration”, *Liber Amicorum Bengt Broms*, Finnish Branch of the International Law Association, Helsinki 1999 at p. 275: “It should not be surprising if party appointed arbitrators tend to view the facts and law in a light similar to their appointing parties. After all, the parties are careful to select arbitrators with views similar to theirs. But this does not mean that arbitrators will violate their duties of impartiality and independence.”

⁴¹ In fairness, it should of course be said that the two dissenting arbitrators whose identity was not clear from the Award may not have dissented in favour of their appointing party.

and to insist that it be communicated to the parties.”⁴²

A similar point is made by Judge Richard Mosk and Mr. Tom Ginsburg. They say:

“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.”⁴³

The third point goes to the relationship between the people who sit as members of the arbitral tribunal. They may come from different professions: lawyers, accountants, engineers – or whatever the exigencies of the case demands. In an international arbitration, they will generally come from different legal backgrounds, with different languages and perhaps different cultures. Yet for the purpose of the arbitration, and of arriving at a decision they must try to work together, honestly and impartially.

⁴² de Boissésou, “Le Droit Français de l’Arbitrage National et International”, 1998 at p.802 (my translation).

⁴³ “Dissenting Opinions in International Arbitration”, at p.275, in “Liber Amicorum Bengt Broms”, cited in footnote 40.

As the case proceeds, each arbitrator will no doubt begin to form his or her own view as to how the various issues that have arisen ought to be determined; but this should not be a solitary process. The tribunal consists of three arbitrators. There must obviously be some exchange of views, some dialogue between them, if they are to try to arrive at a unanimous decision. In this situation, no man – or woman – is an island. It would seem to be a matter of plain commonsense that there has to be an interchange of views between the arbitrators, however it takes place, until – like a jigsaw puzzle – the pieces of the award are put together.

In French law, such an interchange of views is formalised as a “deliberation”. The Civil Code which governs French internal (or domestic) arbitrations requires the arbitrators to fix the date at which their deliberations will start (*la mise en délibéré*). After that, no further submissions by the parties are allowed. Under French law too – as in other civil law countries – the deliberations of the arbitrators are “secret”. The emphasis is significant – the deliberations are not merely confidential, but “secret”.

For Professor Bredin, the distinguished French Academician and author, the rule that there must be a “deliberation” before there is any

award by the tribunal, is a rule of international public order⁴⁴; for Maître Boissésou, the rule that such a “deliberation” should be, and should remain, secret is a “fundamental principle, which constitutes one of the mainsprings of arbitration, as it does of all judicial decisions”.⁴⁵

In adopting this approach, these distinguished French lawyers have the support of the rules of the International Centre for the Settlement of Investment Dispute (ICSID) which stipulates, in Rule 15, that:

- (1) The deliberations of the Tribunal shall take place in private and remain secret.

- (2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

It will not have escaped notice that, in the Swedish Court of Appeal mentioned previously, the secrecy of the arbitrators’ deliberations was not maintained. Indeed, it could not have been when the arbitrators themselves were called upon to testify in court as to the meetings and

⁴⁴ Professor J.D. Bredin, “Le Secret du Délibéré Arbitral” in *Etudes Offertes à Pierre Bellet (LITEC)*.

⁴⁵ de Boissésou, “Le Droit Français de l’Arbitrage National et International (1990) p.296. See also the comment in Robert “L’Arbitrage: Droit Interne, Droit International Privé (5^{ème} Edition, Dalloz) at para. 360: “Although it is practised according to a certain number of foreign laws, notably anglo-saxon, the dissenting opinion is prohibited in French domestic law since it violates the secrecy of the tribunal’s deliberation ...” (my translation).

discussions that were held, as they moved towards the writing of their award.

This highlights one of the problems caused by the dissenting opinion. Once an arbitrator has expressed such an opinion, the secrecy of the tribunal's deliberations has been breached and the curtain has been lifted, if only to give a brief but tantalising glimpse of dissension within the tribunal.

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 the three members of the tribunal are chosen by the parties themselves.

This in essence is the justification for keeping secret the deliberations of the tribunal. But does this secrecy need to be maintained once the award has been issued? I would suggest that it should be; but can it be, if dissenting opinions are permitted? Experience suggests that such

opinions may well reveal what went on in the private deliberations of the Tribunal.

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

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.

In an article that is generally favourable to the expression of dissenting opinions in international arbitration, the authors suggest that such opinions may affect decisions in the future, but they add:

“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 agreements and awards. The private qualities of arbitration, especially the principle of confidentiality, are usually thought to weigh against publication of awards and dissenting opinions. Arbitration, of course, has no system of *stare decisis* or precedent. Arbitrators are not bound to consider the decisions of earlier tribunals or panels. Nor is there any formal review of the law applied in arbitral awards, so there is less need to provide a source for consideration by appellate bodies. Indeed, errors of law are generally not a basis for vacating awards under domestic law or for

failing to enforce them under the New York Convention”.⁴⁶

The authors conclude that:

“Arguments in favour of dissenting opinions are thus related to, although not dependent on, the issue of whether arbitral awards should be published at all.”⁴⁷

What, in summary, is the case against dissenting opinions in international commercial arbitration? It is, first, that they may inhibit that open discussion between arbitrators which ought to take place secretly and within the confines of the arbitral tribunal. Secondly, that they may cast doubts on the validity or authority of the award made by the majority. Thirdly, that they do not serve to advance the development of the law, since there is no doctrine of precedence in arbitrations and, in general no appeal against the award of an arbitral tribunal and no open publication of that tribunal’s award.

⁴⁶ “Dissenting Opinions in International Arbitration” op cit at footnote 40, at p. 267 and 268 (references omitted).

⁴⁷ Ibid, at p.269.

It may be that the communication of dissenting opinions by the ICC – and by other institutions, such as the LCIA – not only encourages arbitrators to enter a dissenting opinion but also gives an air of respectability – or even authority – to that opinion. If so, this is unfortunate.

Why do arbitrators dissent? Some, no doubt, do so out of a sense of duty or loyalty to their appointing party, which weighs more heavily than their duty to be and to remain independent and impartial. Others, having seen the majority opinion move away from the view that they themselves have formed, will be “unable to resist the temptation to continue arguing” with their colleagues. By expressing a detailed dissenting opinion, they are in effect saying to anyone who is interested: “this is how I would have decided the dispute, if I had been the sole arbitrator”.

But, of course, a dissenting arbitrator is *not* the sole arbitrator. By putting forward a detailed dissent which continues the argument and leads to a different conclusion or worse, by putting forward a detailed dissent which attacks the majority arbitrators and the way in which the arbitration was conducted, the dissenting arbitrator risks bringing the arbitral process itself

into disrepute. It is difficult enough, as has already been said, for a disparate group of arbitrators, brought together perhaps for the first time and often of different nationalities and backgrounds, to reach a unanimous decision on matters on which the parties themselves and their experienced advisers have been unable to agree. It does not help if, for whatever reason, one of the members of the tribunal decides to rock the boat.

At present, a generally relaxed attitude towards dissenting opinions seems to be taken not only by the arbitral institutions, but also by arbitrators themselves. It is perhaps time for a change. It would be too much to demand conformity from all arbitrators, but the time has perhaps come to enquire whether the present leniency towards dissenting opinions, however offensive they may be, has gone too far.

Alan Redfern

London, 16 March 2005