



2 of 2 DOCUMENTS

Copyright 2009 LexisNexis, Division of Reed Elsevier Inc.  
Copyright in individual articles as noted therein.  
Mealey's International Arbitration Report

Online ISSN: 2159-161X  
Print ISSN: 1089-2397

May 2009

*24-5 Mealey's Intl. Arb. Rep. 19 (2009)*

**SECTION:** Volume 24, Issue #5

**HEADLINE:** Dissenting Opinions In Arbitration Awards: More Trouble Than They Are Worth?

**BODY:**

By Jonathan Sutcliffe and Lucy Greenwood

Parties choose international arbitration for a variety of reasons. One of the most compelling reasons for choosing arbitration is the ability to obtain a final, binding and enforceable award, which is not subject to a prolonged appeal process. Parties who choose international arbitration are generally sophisticated commercial parties who, naturally, want their disputes resolved fairly and justly, but above all, they want their dispute resolved. The overriding purpose of arbitration therefore, is to determine, and thereby put an end to, the dispute. Dissenting opinions,<sup>1</sup> whilst tolerated in international commercial arbitration, do not sit comfortably in its fabric. Further, as the recent English case of *F Ltd v M Ltd*<sup>2</sup> shows, given a certain combination of circumstances, they may risk the security of the arbitral award.

Arbitral Practice On Dissenting Opinions

In civil law systems, although dissenting opinions may be permitted, there is typically no tradition of dissenting opinions.<sup>3</sup> In Switzerland there is no express rule forbidding dissenting opinions in arbitrations, although they are apparently rare,<sup>4</sup> which seems to reflect the general approach in civil law jurisdictions.<sup>5</sup> However, under Belgian law, deliberations of arbitrators are strictly confidential and for this reason, dissenting opinions (in proceedings subject to the Belgian Arbitration Act) cannot be included in the award.<sup>6</sup>

In the common law, dissenting opinions are a tradition and have occasionally shaped the course of case law. In England, dissenting opinions play an important role in the development of jurisprudence.<sup>7</sup> The situation in the United States is very similar, with dissenting opinions often foretelling subsequent changes in the law.<sup>8</sup>

In a survey of 107 national arbitration laws, twenty-four expressly permitted dissenting opinions,<sup>9</sup> the remainder were silent on the subject. There is no reference to dissenting opinions either in the Model Law or in the UNCITRAL Arbitration Rules. The ICC, LCIA and WIPO permit dissenting opinions despite the rules being silent on the point. The

earlier version of the Stockholm Chamber of Commerce Arbitration Institute Rules expressly provided for dissenting opinions, but the current rules, adopted in 2007, removed all mention of a dissenting opinion. The Netherlands Arbitration Institute allows the dissenter to write separately, but does not allow the document to form part of the award. ICSID expressly provides for any member of the tribunal to attach a dissent to the award.<sup>10</sup> The Iran-US Claims Tribunal allows dissents.<sup>11</sup>

The ICC Court's practice is to look at dissenting opinions at the same time as it scrutinizes awards and it will send the dissenting opinion to the parties at the same time as the award. However, the ICC Report on Dissenting Opinions in 1991 noted that, in exceptional circumstances in which communication of the dissenting opinion is prohibited by law, or where the validity of the award might be imperiled either in the country in which the arbitration took place or in any country in which recognition or enforcement of the award is likely to be sought, then the opinion will not be communicated to the parties.<sup>12</sup> The dissenting opinion does not form part of an ICC award.<sup>13</sup>

Generally, therefore, dissenting opinions are tolerated in international arbitration<sup>14</sup> but mainly ignored,<sup>15</sup> perhaps because the parties are more interested in knowing the final decision of the tribunal than being informed of the tribunal's disagreements that preceded it. Dissenting opinions are expressed separately from the award, either attached as a lengthy postscript or enclosed with the award. As there is unlikely to be express provision in the procedure for the treatment of dissenting opinions, the tribunal will determine how the matter is dealt with.<sup>16</sup> The dissenting opinion is not considered to be part of the award and, generally, has no effect on the validity or enforceability of the award. However, the recent English case of *F Ltd v M Ltd*<sup>17</sup> showed that, given a certain combination of circumstances, a dissenting opinion could highlight an issue which may render the award unsafe.

#### The Decision In *F Ltd v M Ltd*

The Claimant in *F Ltd v M Ltd* would no doubt argue that, in his case at least, the existence of the dissenting opinion meant that the interests of justice were served. In this case, the arbitrators awarded ?1,856,597 to the Claimant and ?1,101,871 to the Defendant (which meant that the Claimant netted ?754,726 together with 40% of its costs). A detailed dissenting opinion was delivered to the parties along with the award because one of the tribunal members disagreed with the views of the majority on a number of points.

The English Arbitration Act 1996 contains a provision which allows challenges to arbitration awards to be made to the English court on grounds of "serious irregularity" (section 6818). The Claimant in *F Ltd v M Ltd* challenged the arbitration award on this ground and sought to have the award remitted to the tribunal. The Claimant based its argument, in large part, on matters raised in the dissenting opinion.

Section 68 was intended "as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."<sup>19</sup> The English courts have respected this approach and have consistently held that there is a very high threshold that must be satisfied before an application under section 68 will succeed. Counsel in *F Ltd v M Ltd* were unable to identify any authority in which a section 68 application was made against the background of a dissenting opinion from an arbitrator, so the decision in *F Ltd v M Ltd* provides useful guidance on the treatment of dissenting opinions in relation to challenges to arbitration awards.

The Court agreed to uphold an element of the challenge on the basis of certain issues identified by the dissenting opinion, one of which was that there was no pleaded basis for the tribunal's finding that a certain sum should be offset against the amount awarded to the Claimant. The Court decided to remit the issue of the deduction of this sum from the sums otherwise due to the Claimant to the arbitral tribunal for reconsideration.

One of the allegations in *F Ltd v M Ltd* was that the tribunal had decided a point against the Claimant without having heard the parties on the issue. The judge hearing the challenge, Coulson J, confirmed that, in this situation, a serious irregularity could be established.<sup>20</sup>

Coulson J stated that, in his view:

? The existence of a dissenting opinion which refers to a pleaded or argued issue was irrelevant;

? If the dissenting opinion referred to an argument that had been debated and rejected by the tribunal, whether or not the parties had raised the argument, it would be unlikely that a substantial injustice had occurred;

? If the dissenting opinion asserted that an important point had been decided without reference to the parties that would be a factor that a court would take into account in considering a section 68 application (although it was unlikely that, without more, it would prove determinative).

Coulson J held that the tribunal had mistakenly made a deduction from the damages it awarded to the Claimant. The dissenting opinion, which was quoted by Coulson J, had identified the tribunal's error. Coulson J agreed with the dissenting arbitrator and held "the majority failed to understand the accounting exercise . . . and confused a sum due from the client with a sum due from the claimant." Accordingly, he considered that there was a serious risk of substantial injustice if the issue of the deduction was not reconsidered. He also remitted the costs award to the tribunal because it had been based on the (incorrect) net amount awarded to the Claimant.

#### More Trouble Than They Are Worth?

Clearly, therefore, the dissenting opinion in *F Ltd v M Ltd* was of assistance to the Claimant in ensuring that justice was done. However, the combination of circumstances, which culminated in the decision in *F Ltd v M Ltd*, is rare. It is not the intention of this article to rehearse in detail the arguments for and against dissenting opinions, as this is a much-debated topic. However, it is useful, given the impact that the dissenting opinion had in *F Ltd v M Ltd*, to briefly consider whether dissenting opinions do add value to the arbitration process.

It is often argued that an arbitrator has a fundamental right to give a dissenting opinion.<sup>21</sup> However, there is also some confusion between the arbitrator's fundamental right to hold that dissenting opinion (which is inarguable) and the alleged right to publish that dissenting opinion. An argument in favour of dissenting opinions is that dissents can produce better awards. Certainly in common law jurisdictions and, possibly, in public international arbitrations, it could be asserted that dissent "safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."<sup>22</sup> However, it is not the fact of a written dissent that ensures quality resolution of the dispute, but the disagreement with the majority view that will cause the majority to work harder to justify its decision. The dissenter is not there to enliven the process.<sup>23</sup> It is not suggested that an arbitrator should not be permitted to disagree in deliberations, nor that such disagreement would not add to the rigor of the decision-making process. It is simply that the value of communicating the dissent to the parties in a private international commercial arbitration is questionable.

Another argument in favour of dissenting opinions is that the losing party has a record that its voice was heard (but ignored) by the majority, and thus, the losing party can have confidence in the justice of the arbitration process. Yet the existence of a dissenting opinion can hinder rather than enhance confidence in the arbitration process. Consider the difference between a reasoned arbitration award which reflects in detail on the opposing positions taken in the pleadings and at the hearing, which demonstrates the consideration given to those different positions and which ultimately decides (on specified grounds) to opt for one position over another. The losing party in that arbitration can have confidence in the arbitral process. Now consider the position in which a dissenting opinion harangues the majority, is clearly partisan or petulant. Such an opinion is only going to harm the confidence the losing party had in the process.

An area of concern is the strong connection between party appointed arbitrators and dissenting opinions. These may be used to appease the losing appointing party and to line up the possibility of another appointment. Whilst this is a cynical viewpoint, the number of arbitrations in which dissenters have gone against the party appointing them is apparently "statistically negligible."<sup>24</sup> There is also a feeling that such partisan dissents are "naturally suspect,"<sup>25</sup>

particularly if they are obviously used to propel a challenge to the award. Clearly, this was not the case in *F Ltd v M Ltd*, but the existence of dissents will increase the likelihood that awards will be challenged.<sup>26</sup> Generally, however, awards can only be challenged on very limited grounds and, if the example of the English High Court in *F Ltd v M Ltd* is followed, courts will be careful to preserve the autonomy of the arbitral process.

Accordingly, in commercial arbitrations therefore, the value of dissenting opinions is arguably limited to the rare combination of circumstances which arose in the facts of *F Ltd v M Ltd*. This combination of circumstances resulted in the exposure of an irregularity which caused substantial injustice to the party. This possibility was noted by the ICC Report on Dissenting Opinions, which stated "In general, awards may be challenged only for lack of jurisdiction or lack of due process. However, in the cases in which these questions are raised in a dissenting opinion, it may be thought proper- indeed desirable- that the parties should in fact be made aware of the contents of the dissenting opinion. The Working Party is sure that the ICC would not wish to adopt a policy which could have the effect of deliberately suppressing from the parties any genuine cause for concern on jurisdiction questions, or on the requirements of procedural due process."<sup>27</sup>

In public international law, a dissenting opinion may have more value. With ICSID cases being published and, increasingly, relied on to show how other tribunals have approached certain issues (whilst all parties accepting that the tribunal is not bound by those decisions), then dissenting opinions can provide a useful analysis of an arbitrator's approach to the issues. It can add to the body of opinion which may help counsel in preparing to present a case and the tribunal in deliberating over their decision.

#### Concluding Remarks

Clearly it is impossible to put the genie back into the bottle, as indeed the ICC Working Party on Dissenting Opinions thought in 1986, when it said that it was "neither practical nor desirable to attempt to suppress dissenting opinions in ICC arbitrations"<sup>28</sup> and it has been said that dissenting opinions in arbitrations are a "fact of life" <sup>29</sup> and are "here to stay."<sup>30</sup> Further, the extreme diversity of legal (and non-legal) backgrounds of international arbitrators invites a diverse approach to dissenting opinions. However, arbitrators need to remember that their function is to determine the dispute. In private international commercial arbitration, arbitrators are not law-makers, even if many may have been judges in a former life. They are not advocates for the party that appointed them. They are decision makers, paid to decide a dispute in accordance with the rules of law chosen by the parties. Save in the rare combination of circumstances, thankfully recognized as such by the English High Court in *F Ltd v M Ltd*, dissenting opinions may do more harm than good and should be approached with caution by arbitrators and parties alike.

#### Endnotes

1. In international arbitration, an arbitrator whose views did not prevail during the tribunal's deliberations may generally let his or her views be known in a separate opinion which is either "dissenting," when he or she disagrees with the decision reached by the majority of the tribunal or "concurring," when he or she disagrees with the reasoning applied (but agrees with the decision reached). This article focuses on dissenting opinions.

2. [2009] EWHC 275 (TCC).

3. Laurent Levy: "Dissenting Opinions in International Arbitration in Switzerland" (1989) 5 *Arbitration International* 35.

4. Laurent Levy, op cit, "The admissibility or exclusion of dissenting opinions, both in the practice of arbitration and in the applicable rules of law, are rare enough in Switzerland that it is impossible to conclude that one or the other prevails."

5. Fouchard, Gaillard and Goldman on International Commercial Arbitration (1999) paragraph 1398 states that the

"dominant trend" in civil law jurisdictions is that dissenting opinions, whilst not encouraged, will not be considered unlawful.

6. "Dissenting Opinions in Arbitral Awards" Leendert Creyf, Catherine Erkelens, 12.07.07  
www.twobirds.com/English/News/Articles/Pages/Dissenting\_opinions\_arbitral\_awards.aspx.

7. As Alan Redfern noted in his 2003 Freshfields lecture - "Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly" all English law students will be familiar with Lord Denning's dissent in *Candler v Crane Christmas [1951] 1 All ER 426* which was subsequently cited with approval in the seminal case of *Hedley Bryne & Co v Heller & Partners [1963] 2 All ER 575*, Arbitration International Vol. 20 No.3 (2004).

8. Richard Mosk and Tom Ginsburg "Dissenting Opinions in International Arbitration" Mealey's International Arbitration Report Vol 15#4 (April 2000).

9. See Manuel Arroyo "Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal" ASA Bulletin Vol 26 No 3 (2008). These twenty-four countries are listed as Spain, Portugal, Norway, Romania, Poland, Lithuania, Estonia, Bulgaria, Turkey, Algeria, Israel, China, Indonesia, Brazil, Panama, Peru, Colombia, Ecuador, Venezuela Bolivia, Guatemala, Costa Rica, El Salvador and Canada (Quebec).

10. ICSID Arbitration Rules, Rule 47.

11. Iran-US Claims Tribunal Rules of Procedure Article 32 "Any arbitrator may request that his dissenting vote or his dissenting vote and the reasons therefore be recorded."

12. "Final Report on Dissenting and Separate Opinions of the Working Party of the ICC Commission on International Arbitration" ICC International Court of Arbitration Bulletin (1991) Vol 2 No 1 32 paragraph 29.

13. In relation to the ICC Dispute Board Rules, a dissenting Dispute Board Member is required to give reasons for a dissent and "They thereby seek to discourage frivolous dissent but more importantly they seek to provide the Parties with the full range of opinions of all Members of the Board. If the Dispute continues and is ultimately referred to final settlement before an arbitral tribunal or a court, both the majority determination and the dissenting opinion may be useful evidence." Christopher Koch, "ICC's New Dispute Board Rules" ICC International Court of Arbitration Bulletin (2004) Vol 15, No 2 page 30.

14. For a very useful discussion of the position under numerous arbitral rules and arbitration laws, see Manuel Arroyo op cit.

15. Fouchard, Gaillard and Goldman on International Commercial Arbitration (1999) paragraph 1401 "although it would be unfortunate for dissenting opinions to become common practice one should not, on the other hand, overstate their importance."

16. "[A]rbitral practice is too diverse and uncertain to support a presumption of the parties' intention in this respect, and the arbitration rules are mostly silent on this point, so that it is usually left to the arbitral tribunal to decide, as it does with regard to other important questions concerning proceedings" Comparative Law of International Arbitration (2nd Edition, 2007), Jean-Francois Poudret, Sebastian Besson, page 676.

17. [2009] EWHC 275 (TCC).

18. "A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. . . .

Serious irregularity means an irregularity of one or more of the following kinds which the court considers has

caused or will cause substantial injustice to the applicant -

- (a) failure by the tribunal to comply with section 33 (general duty of the tribunal)
- (b) the tribunal exceeding its powers . . .
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it . . ."

19. See the Departmental Advisory Committee Report on the Arbitration Bill, cited by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2006] 1 AC 221.

20. He cited the decision in *London Underground Limited v Citylink Telecommunications Limited* [2007] EWHC 1749 (TCC) in which Ramsay J stated "it will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity."

21. See Manuel Arroyo *op cit*, footnote 130.

22. William J. Brennan, Jr., *In Defense of Dissents* 37 *HASTINGS L.J.* (1986) 427, 430.

23. As Alan Redfern noted in his 2003 Freshfields lecture, *op cit*, life would indeed be dull without dissent, but there can be active debate in tribunal deliberations without arbitrators resorting to dissenting opinions so that they create an audience for their views. Further, it is likely that the audience will not really be listening, as it will be far too pre-occupied in turning to the end of the award to see whether its team has prevailed.

24. Manuel Arroyo *op cit* footnote 6; Yves Derains "The Deliberations of the Arbitral Tribunal" ASA Special Series No 29, 2007.

25. Hans Smit "Dissenting Opinions in Arbitration" ICC International Court of Arbitration Bulletin (2004) Vol 15 No 1.

26. In the article by Richard Mosk and Tom Ginsburg, *op cit*, in which the authors are generally in support of dissenting opinions, the authors state "it is highly unlikely that a dissenting opinion could provide grounds that would not be apparent for vacation or non-enforcement of an award unless it dealt with some otherwise undisclosed procedural failure" which is, essentially, the situation that arose in *F Ltd v M Ltd*.

27. ICC International Court of Arbitration Bulletin (1991) Vol 2 No 1 Paragraph 21.

28. CC International Court of Arbitration Bulletin (1991) Vol 2 No 1, Paragraph 2.

29. Donovan, cited by Manuel Arroyo, *op cit*, Francis Patrick Donovan, *Dissenting Opinions* 7 ICC International Court of Arbitration Bulletin (1996) 76.

30. Richard Mosk and Tom Ginsburg, *op cit*.

#### **EDITOR-NOTE:**

[Editor's Note: [Editor's Note: Jonathan Sutcliffe is a Partner in the London office and Lucy Greenwood is a Foreign Legal Consultant in the Houston office of Fulbright & Jaworski LLP. Both are members of the firm's international arbitration practice group. Copyright 2009 by Jonathan Sutcliffe and Lucy Greenwood.]

View today's headlines and listen to the latest podcast at [www.lexisnexis.com/legalnews](http://www.lexisnexis.com/legalnews) Do you have news to share?  
Interested in writing a commentary article? Email the Mealey News Desk at [Mealeys@LexisNexis.com](mailto:Mealeys@LexisNexis.com)

**LOAD-DATE:** May 27, 2009