CHAPTER 4

Comments on the Use of Dissenting Opinions

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The author describes the different types of dissenting opinions and the different approaches towards the issuing of dissenting opinions in different jurisdictions, with a particular emphasis on Sweden, Italy, Austria and Germany. Subsequently, the author analyses the differences between deliberations of state court judges and deliberations by arbitral tribunals. On this basis, characteristic features of arbitrators' deliberations are identified. Lastly, the author sets out parameters that may serve as guidelines for expressions of arbitrator's dissent.

§4.01 INTRODUCTION

It will happen in the practice of every arbitrator that a co-arbitrator is not very happy with a part of the reasoning, or not satisfied with the outcome of the proceedings. Usually, this will lead to further discussions among the arbitrators who will use their best efforts to achieve unanimity. The president bears much of the responsibility for achieving this goal. First and foremost, however, the arbitral tribunal must deliver justice rather than unanimity, and there may be situations where the majority of the tribunal, even with the best of intentions, will be unable to follow the views of the minority. In such cases, it is not uncommon for the minority arbitrator to issue a dissenting opinion. This may help to unblock protracted deliberations and is an accepted practice in domestic as well as international cases.

The purpose of this chapter is to consider the use of dissenting opinions in domestic and international cases. To this end, the author will set out the different types of dissent (section II) and different approaches towards dissent in different jurisdictions (section III). Subsequently, the author will undertake a comparative analysis of

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deliberations by state court judges and arbitral tribunals (section IV). In section V, four characteristic features of arbitrators' deliberations will be identified, namely collegiality, confidentiality, the *intuitu personae* character of the work of arbitrators, as well as the principle of independence and impartiality. Lastly, section VI contains a list of parameters that may serve as guidelines for the drafting of dissenting opinions by arbitrators.

§4.02 DIFFERENT TYPES OF DISSENTING OPINIONS IN THE PRACTICE OF ARBITRAL TRIBUNALS

An arbitrator can express his or her dissent (or a lack of consent) in different forms, which may be indicative of the vehemence of the dissent.[1] The rather common form is to insert the dissenting opinion into the body of the award's reasoning, where the issues that give rise to the dissent are discussed. This may make the award less readable but it will usually be the most appropriate form. As a variation of this type that is perhaps less useful, the arbitral tribunal may merely state in the award that one of its members dissented, without identifying the dissenter and without giving any reasons.

Another, louder but still rather common form of non-agreement is to create a separate document that is attached to the award, with a reference to the attached dissent beneath the signature of the dissenting arbitrator. The loudest (but perhaps least convincing) form of dissent is where the dissenter refuses to sign the award altogether. In this case, the applicable *lex arbitri* usually provides that the two remaining arbitrators may make the award alone.[2]

Even where an arbitrator does not express any dissenting opinion at all, this does not imply that he or she is in full agreement with every comma in the award, or even with the outcome of the proceedings. If an arbitrator fails to sway his or her fellow arbitrators, the arbitrator may have to concede that another opinion is possible and accept that the majority view takes precedence.[3] The opinion of a panel of three arbitrators should never be mistaken for the personal opinion of any of its members, nor even for the opinion of the president of the tribunal. It lies within the nature of collegial decision-making that the outcome of the arbitration cannot be imputed to any of the members of the tribunal individually.

1. Regarding the different types of dissent, *see* in particular Ugo Draetta, *Cooperation Among Arbitrators in International Arbitration*, Indian Journal of Arbitration Law 2015, p. 107 (pp. 139ff.).
2. For example, section 31 Swedish Arbitration Act; Article 823(7) Italian civil procedure code; § 606(1) Austrian civil procedure code; § 1054(1) German civil procedure code.
3. Antonias Dimolitsa, *Are Genuine Dissenting Opinions of Any Real Use?* Essays in Honour of John Beechey 2015, p. 137 (p. 139).

§4.03 DIFFERENT APPROACHES TOWARDS DISSENTING OPINIONS IN DIFFERENT JURISDICTIONS

The Swedish Arbitration Act of 1999 is silent on the question of whether an arbitrator may issue a dissenting opinion.[4] It is nevertheless acknowledged that arbitrators are allowed (but not obliged) to disclose a dissenting opinion, provided that they respect the confidentiality of the deliberations.[5] Article 32(4) of the 1999 edition of the Stockholm Chamber of Commerce (SCC) Rules expressly stated that '[a]n arbitrator may attach a dissenting opinion to the Award'. That provision was deleted in the subsequent 2007 edition of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules).[6] The current 2017 edition of the SCC Rules does not deal with dissent either. Dissenting opinions nevertheless continue to be allowed in arbitrations under the SCC Rules. If a dissent is expressed, it is common to make a note next to the signature of the dissenter which refers to an annex of the award that contains the dissent.[7] Hence, if anything can be concluded from the deletion of Article 32(4) of the 1999 edition of the SCC Rules, it is only that arbitrators are not encouraged to issue dissenting opinions.

In Italy, the legal framework is very similar. Dissenting opinions are allowed.[8] In arbitrations under the Rules of the Milan Chamber, the dissent, which is 'not infrequent', is attached to the award, but still not considered part of the award, and not endorsed by the institution. Furthermore, the institution does not communicate the dissenting opinion if the dissenter reveals information about the internal deliberation process.[9]

Austrian authors have shown more reluctance in accepting dissents, pointing out in particular that there is no 'obligation' on the part of the majority to include the dissent in the body of the award. It has also been noted in Austria that dissenting opinions may be frequent in common law jurisdictions, before both courts and arbitral tribunals, but that this practice has not established itself in continental European jurisdictions.[10] In the practice of the Vienna International Arbitral Center (VIAC), the dissent is sent to the parties as a separate document together with the award, provided

4. According to a survey conducted in 2008, 24 out of 107 national arbitration laws dealt with the issue by expressly allowing dissenting opinions: *see* Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, ASA Bulletin 2008, p. 437 (pp. 440ff.).
5. Kristoffer Löf, Aron Skogman and Sara Johnsson, in Magnusson, Ragnwaldh and Wallin (eds.), *International Arbitration in Sweden: A Practitioners' Guide*, 2nd ed., 2021, p. 313; Robin Oldenstam, Kristoffer Löf, Alexander Förster et al., *Mannheimer Swartling's Concise Guide to Arbitration in Sweden*, 2nd ed., 2019, p. 80.
6. Article 36 SCC Rules 2007.
7. Kristoffer Löf, Aron Skogman and Sara Johnsson, in Magnusson, Ragnwaldh and Wallin (eds.), *International Arbitration in Sweden: A Practitioners' Guide*, 2nd ed., 2021, p. 313.
8. Massimo Benedettelli, *International Arbitration in Italy*, 2020, p. 370.
9. Antonia Crivellaro, in Ugo Draetta and Riccardo Luzzato (eds.), *The Chamber of Arbitration of Milan Rules*, 2012, pp. 518-519.
10. Christian Hausmaninger in Hans W. Fasching and Andreas Konecny, *Kommentar zu den Zivilprozessgesetzen*, vol. IV/2, 3rd ed., 2016, § 606 ZPO, ¶¶ 75-76; Eliane Fischer and Günther Horvath, in Czernich, Deixler-Hübner and Schauer, *Handbuch Schiedsrecht*, 2018, ¶ 15.10.

that this entails no prejudice to the confidentiality of the deliberation process or the enforceability of the award.[11]

The aversion to dissenting opinions, if one can call it that, seems to be even more widely held in Germany. This is illustrated by the mere titles of academic articles, where authors speak about a betrayal of secrets ('*Geheimnisverrat*')[12] and a nuisance ('*Ärgernis*').[13] It is suggested in Germany that a dissenting opinion may only be expressed: (a) with the consent of the parties, or (b) with the consent of the majority of the tribunal, or (c) with the consent both of the parties and of the majority.[14] According to one view, permission of the majority of the tribunal is needed even if the dissent does not violate the secrecy of the deliberations.[15]

In the wake of this approach, the Frankfurt Court of Appeal recently observed, *obiter*, that an arbitrator is not allowed to express his or her dissent in German domestic arbitration proceedings on the ground that this violates the secrecy of deliberations. Furthermore, according to the Frankfurt Court of Appeal, the secrecy of deliberations, which protects the independence and impartiality of the members of the tribunal, pertains to (procedural) *ordre public* and cannot be waived, either by the parties or by the arbitrators.[16]

Eminent authors have already come forward in support of the Frankfurt Court of Appeal.[17] They emphasise in particular that arbitrators' deliberations deserve the same protections as those of judges[18] and that the dissenting opinion, if published, inevitably violates the secrecy of the arbitrators' deliberations, as it discloses how an arbitrator has cast his or her vote.[19] In this context, one must know that (with the prominent exception of the German Constitutional Court)[20] German state court judges never issue

11. Wulf Gordian Hauser, in VIAC (ed.), *Handbook Rules of Arbitration and Mediation*, 2019, Article 36, ¶¶ 13-15.
12. Axel Bartels, *Geheimnisverrat des Dissenters im schiedsrichterlichen Verfahren?* SchiedsVZ 2014, p. 133; Axel Bartels, however, holds the view that dissenting opinions are allowed in principle.
13. Anke Sessler and Christine Ruß, *Dissenting Opinions – Aufhebungsgrund oder bloßes Ärgernis?* SchiedsVZ 2020, p. 210; as for the relative infrequency of dissenting opinions in Germany, *see* a survey published by Mirjam Escher, *Die Dissenting Opinion im deutschen Handelsschiedsverfahren – Fear of the Unknown*, SchiedsVZ 2018, p. 219.
14. A comprehensive overview of the various positions is offered by Heiner Nedden and Johanna Büstgens, *Die Beratung des Schiedsgerichts – Konfliktpotential und Lösungswege*, SchiedsVZ 2015, p. 169 (p. 178) with further references, as well as by Axel Bartels, *Geheimnisverrat des Dissenters im schiedsrichterlichen Verfahren?* SchiedsVZ 2014, p. 133 (p. 133).
15. Peter Schlosser in Stein and Jonas (eds.), Kommentar zur Zivilprozessordnung, 23rd ed., 2014, § 1054 ZPO, ¶¶ 20.
16. OLG Frankfurt 16 January 2020, 26 Sch. 14/18, published on the website www.rv.hessenrecht.hessen.de/bshe/search, rv.Hessenrecht.hessen.de, last accessed on 1 April 2021.
17. Rolf A. Schütze, *Beratungsgeheimnis v. Dissenting Opinion*, RIW 11/2020, p. 1; Anke Sessler and Christine Ruß, *Dissenting Opinion – Aufhebungsgrund oder bloßes Ärgernis?* SchiedsVZ 2020, p. 210. The German Supreme Court rejected an appeal against the decision of the Frankfurt Court of Appeal, but expressly declined to comment on the *obiter*: BGH 26.11.2020, I ZB 11/20, margin no. 41, published on the website of the BGH under https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/, last accessed on 21 June 2021.
18. Rolf A. Schütze, *Beratungsgeheimnis v. Dissenting Opinion*, RIW 11/2020, p. 1.
19. Anke Sessler and Christine Ruß, *Dissenting Opinion – Aufhebungsgrund oder bloßes Ärgernis?* SchiedsVZ 2020, p. 200 (p. 203).
20. § 30(2) Act on the German Constitutional Court ('Bundesverfassungsgerichtsgesetz').

dissenting opinions, considering that a state court judge must keep the history of the deliberations and the voting confidential pursuant to § 43 of the German Act on Judges.[21] This comports with the legal tradition in many continental European jurisdictions.[22]

If the reasoning of the Frankfurt Court of Appeal is accepted, it applies also to international arbitrations because the 'monistic' German arbitration law does not distinguish between domestic and international arbitrations.[23] It is therefore an urgent matter for German and non-German arbitrators alike to consider whether the *obiter* comment expressed by the Frankfurt Court of Appeal should be adhered to. In this context, it is appropriate to consider, as an initial matter, the differences between the deliberations of state court judges and those of arbitral tribunals.

§4.04 DELIBERATIONS OF STATE COURT JUDGES VERSUS DELIBERATIONS BY ARBITRAL TRIBUNALS

At present, but with the prominent exceptions of supranational or international courts such as the European Court of Justice (ECJ), the European Court of Human Rights (ECHR) or the International Criminal Court, state court judges are almost always of the same nationality. In many cases, they have the same or a very similar legal education and very similar legal careers. When they have been sitting together on the same appellate court panel over the course of many years, they will even know the legal thinking of their colleagues on the panel.

The situation of arbitrators is very different. In international arbitrations, the members of the arbitral tribunal usually do not share the same nationality, and they come from very diverse legal and professional backgrounds.[24] Sometimes, they are not even professional lawyers. Arbitrators may have different perceptions not only of the law and how it should be applied but also of the way business relations should be conducted or how society as a whole should be organised.[25] In most cases, they do not share one and the same native language and are formed by different civilisations. More often than not, they do not know each other from prior appointments and cannot rely on any pre-existing experience with each other.[26] While this diversity is one of the assets of the system, it comes with the challenge that different personalities must find common ground. It is natural that there will be a greater potential for disagreement. For

21. § 43 Act on Judges ('Richtergesetz'): 'Der Richter hat über den Hergang bei der Beratung und Abstimmung auch nach Beendigung seines Dienstverhältnisses zu schweigen.'
22. As for a comparative analysis between the practice of dissenting opinions in common and civil law traditions, *see* Lord Mance, *In a Manner of Speaking: How Do Common, Civil and European Law Compare?* RabelsZ 78 (2014), p. 231.
23. However, different rules apply in regard to the enforcement of domestic and foreign awards according to § 1060 and § 1061 German civil procedure code.
24. *See* Audley William Sheppard and Daphne Kapeliuk-Klinger, *Dissents in International Arbitration*, in Cole (ed.), *The Roles of Psychology in International Arbitration*, 2017, p. 313 (p. 329).
25. Yves Derains, *La pratique du délibéré arbitral*, in Liber Amicorum in honour of Robert Briner, 2005, p. 221 (p. 230).
26. *See* Bernhard Berger, *Rights and Obligations of Arbitrators in Deliberations*, ASA Bulletin 2013, p. 244 (p. 245).

these reasons alone, arbitrators' deliberations will necessarily take a different form and can have a wider outreach than those of state court judges.

Arbitrators' deliberations must also be more extensive because state court judges are usually bound by a procedural code that dictates almost every procedural step. By contrast, arbitral tribunals have broad discretion to design the procedure that will then be best suited for the needs of the particular case. To achieve this goal, it will be necessary to consult with the parties, and importantly, to have ample discussions among the members of the tribunal not only about the substance of the case but also about procedure.[27] The deliberative process of the arbitral tribunal continues throughout the whole arbitration from the drafting of the first 'welcome' letter up to the signing of the final award.

If we consider these differences, then it does not really seem helpful to equate arbitrators' deliberations with those of state court judges. It seems much less appropriate to apply the prohibition on dissenting opinions by judges, which exists in many continental European jurisdictions, in relation to arbitrators. It would seem that the better approach is to consider the characteristic features of the deliberative process within arbitral tribunals and to assess whether and to which extent those features are compatible with the delivery of a dissenting opinion.

§4.05 CHARACTERISTIC FEATURES OF ARBITRATORS' DELIBERATIONS

As stated, the arbitral tribunal's deliberations are an ongoing process which covers the arbitral process from the start up to the signing of the final award. They can take place orally or in writing, and they may be conducted by telephone or videoconference.[28] Even sole arbitrators go through a deliberative process before they decide, but they do so in complete solitude, which perhaps makes their task even more difficult.[29]

In the course of deliberations, the arbitrators may use written notes, chronologies, memoranda and other documents they have drafted as by-products while studying the case. The secretary of the arbitral tribunal, if any, is allowed to provide assistance, e.g., by locating specific documents, but there are different views as to whether the secretary should be allowed to remain in the room while the arbitrators are discussing and voting.[30]

While discussing the case with a plurality of arbitrator colleagues, every arbitrator must be able to freely share his or her thoughts. This includes, for example, a right

27. Yves Derains, *La pratique du délibéré arbitral*, in Liber Amicorum in honour of Robert Briner, 2005, p. 221 (p. 222); Heiner Nedden and Johanna Büstgens, *Die Beratung des Schiedsgerichts – Konfliktpotential und Lösungswege*, SchiedsVZ 2015, p. 169 (pp. 169ff.).
28. Bernhard Berger, *Rights and Obligations of Arbitrators in Deliberations*, ASA Bulletin 2013, p. 244 (p. 250).
29. Yves Derains, *La pratique du délibéré arbitral*, in Liber Amicorum in honour of Robert Briner, 2005, p. 221 (p. 232).
30. Bernhard Berger, *Rights and Obligations of Arbitrators in Deliberations*, ASA Bulletin 2013, p. 244 (p. 256). According to the LCIA Notes for Arbitrators, ¶ 71, the arbitral tribunal should inform the parties of its intention to allow the tribunal secretary to attend the deliberations.

to communicate first impressions after a hearing, or to perform a comprehensive (written or oral) analysis of any factual and legal issue, as well as a right to correct one's own opinion. All of this would be impossible without the protections offered by the secrecy of deliberations. Legal writers have rightly pointed out that the secrecy of arbitrators' deliberations is designed to protect the arbitrators,[31] but not exclusively. The secrecy of deliberations should also ensure that no party becomes aware of the contents of the arbitrators' discussions. If those contents were leaked, they might give one side an undue advantage and violate the equality of the parties.[32] The secrecy of deliberations is therefore not only a duty that binds the arbitrators in their internal relations but also a duty owed by the arbitrators to the parties. This is reflected in Article 9 of the International Bar Association (IBA) Rules of Ethics for International Arbitrators (1987), which states that the tribunal's deliberations remain confidential in perpetuity unless the parties release the arbitrators from this obligation. Furthermore, according to this rule, an arbitrator should not disclose any information about the deliberations for the purpose of giving assistance in proceedings to review the award unless, exceptionally, the arbitrator considers it his or her duty to disclose material misconduct or fraud on the part of the fellow arbitrators. The secrecy of deliberations is thus a widely acknowledged characteristic feature of the deliberative process of arbitrators.

However, arbitrators' deliberations must be distinguished from the reasoning of the award, which is the outcome of the process. The situation is similar to that of a team of three architects who are commissioned to jointly design a bridge, for example. While they will have ample discussions among themselves about the design of the bridge and exchange their statics calculations, the product of their work will be the one plan for the one bridge that must be submitted to the principal.

If an arbitrator accepts a mandate to serve on a tribunal, it is implied that he or she is agreeing to work with the co-arbitrators that have already been appointed or will be appointed in accordance with the appointment process agreed by the parties. According to this principle, which one may call the collegiality-principle, the arbitrator agrees in advance to form one opinion with the other members of the arbitral tribunal on all relevant issues of fact and of law. In this vein, the arbitrators not only have a right but also have a duty to participate in the deliberations.[33] Importantly, they must also listen to one another. The Code of Ethics of Arbitrators of the Milan Chamber of Arbitration (which is binding on every arbitrator who accepts a mandate in arbitrations administered by the Milan Chamber) makes this duty of collegiality and cooperation clear when it states in Article 11(3) that arbitrators shall promptly participate in the deliberations.

31. Anke Sessler and Christine Ruß, *Dissenting Opinion – Aufhebungsgrund oder bloßes Ärgernis?* SchiedsVZ 2020, p. 200 (p. 203); *see also* Christian Hausmaninger in Fasching and Konecny, *Kommentar zu den Zivilprozessgesetzen*, vol. IV/2, 3rd ed., 2016, § 604 ZPO, ¶ 41.
32. Bernhard Berger, *Rights and Obligations of Arbitrators in Deliberations*, ASA Bulletin 2013, p. 244 (p. 258).
33. *Supra* n. 32 (p. 252).

While the three architects mentioned above may or may not delegate their work, depending on their contract with the principal or the applicable statutory law, the work of the arbitrators is always *intuitu personae* in nature and must not be delegated to anybody, not even the president of the tribunal.[34] The parties have selected the individual members of the tribunal, or they have been appointed by the institution, because of their specific knowledge and understanding, which they must apply throughout the whole deliberative process.

The *intuitu personae* character of the deliberative process comes with another characteristic feature of the work of arbitrators, namely their independence and impartiality. This also includes a position of independence and impartiality in relation to the other members of the arbitral tribunal, as is illustrated by IBA Guidelines on Conflict of Interest which refer to relationships between an arbitrator and another arbitrator on the orange list of conflicts. A conflict subject to disclosure will be present if two arbitrators are lawyers in the same law firm, the same barristers' chambers, if an arbitrator has been a partner of, or otherwise affiliated with another arbitrator within the past three years, or even if a lawyer in the arbitrator's firm is an arbitrator in another dispute involving the same party or parties, or affiliates thereof.[35] All these circumstances may prevent an arbitrator from forming his or her opinion freely and without *undue*[36] influence by other arbitrators.

More importantly still, an arbitrator cannot be compelled to sign the award. Neither the president nor the majority of the tribunal has any coercive power over the minority. This is spelled out in Article 11(3) of the Code of Ethics of Arbitrators of the Milan Chamber of Arbitration which states that the arbitrator shall remain 'free' to refuse his or her signature where the decision was taken by majority vote. This also allows an arbitrator to remain independent and impartial in the deliberative process. The ability to issue a dissenting opinion is only one part of this independence and impartiality.

§4.06 PARAMETERS FOR AN ARBITRATOR'S DISSENTING OPINION

Having considered the characteristic features of arbitrators' deliberations (collegiality, confidentiality, *intuitu personae* character as well as independence and impartiality), it should now be possible to define parameters which may serve as guidelines for expressions of an arbitrator's dissent.

34. *Supra* n. 32 (p. 255).
35. Guideline 3.3, 'Relationships between an arbitrator and another arbitrator or counsel'.
36. Naturally, an arbitrator is allowed to persuade the other arbitrators through his or her arguments.

[A] The Dissent Must Be Limited to the Reasoning of the Award, Without Disclosing the Contents of Prior Deliberations

Legal writers in Germany rightly emphasise that the dissent must be limited to the reasoning of the award and thus refer to issues that are dealt with in the reasoning.[37] It must not reveal the positions taken by the fellow arbitrators during the deliberation process or in prior drafts of the award.[38] Hence, the minority may state the reasons why it is declining to follow the majority. However, the minority is not allowed to disclose the reasons for which the majority refused to follow the minority unless these reasons are already set out in the award.[39]

Provided that the relevant issues are reflected in the reasoning, the dissent may refer not only to legal issues but also to the facts of the case.[40] Furthermore, not only the award but also procedural orders may be subject to dissent, provided that the dissent is limited to the reasoning of the procedural order. The parameters set out for dissent in respect of awards apply *mutatis mutandis* to procedural orders.

If a certain issue was submitted by (one of) the parties, but found to be irrelevant by the majority, then the dissenting arbitrator may also refer to it in the dissent. In this case, while the dissent does not refer to the reasoning, it identifies an issue that, in the dissenter's view, should be contained in the reasoning. However, in such a situation, the dissenter must have drawn the attention of his or her colleagues to the specific issue while the deliberations were ongoing (*see* the following point).

There can be no suggestion that dissenting opinions should only be issued if the dissenter fears a breach of public policy or other potentially serious defects. A statement of dissent does not imply, by any means, that the award will have to be set aside. It is completely within the discretion of the dissenting arbitrator to decide whether the issue at stake is such that it warrants a dissent. The dissenter is the master of his or her diverging view.[41] At the end of the day, the dissenting opinion is worth what it is worth, no more and no less.

The dissenter must also know that a dissent is not necessary merely to demonstrate that he or she would have decided otherwise because it lies within the nature of collegial decision-making, as stated,[42] that the decision cannot be imputed to any member individually.

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37. Axel Bartels, *Geheimnisverrat des Dissenters im schiedsrichterlichen Verfahren?* SchiedsVZ 2014, p. 133 (p. 135 and p. 137).
38. Ugo Draetta, *Cooperation Among Arbitrators in International Arbitration*, Indian Journal of Arbitration Law, 2016, p. 107 (p. 141).
39. Heiner Nedden and Johanna Büstgens, *Die Beratung des Schiedsgerichts – Konfliktpotential und Lösungswege*, SchiedsVZ 2015, p. 169 (p. 178).
40. Antonias Dimolitsa, *Are Genuine Dissenting Opinions of Any Real Use?* Essays in Honour of John Beechey 2015, p. 137; even though dissent on legal issues will be more frequent, there seems to be no reason why dissent should be limited to issues of law, which is submitted by Manuel Arroyo, *Dealing with Dissenting Opinion in the Award: Some Options for the Tribunal*, ASA Bulletin 2008, p. 437 (p. 456).
41. Manuel Arroyo, *Dealing with Dissenting Opinion in the Award: Some Options for the Tribunal*, ASA Bulletin 2008, p. 437 (p. 452).
42. *See supra*, section II.

In exceptional circumstances, a dissenting opinion may also be necessary and allowed where the collegial principle of deliberations or the parties' right to be heard was breached.[43] This would constitute circumstances of material misconduct or fraud within the meaning of Article 9 of the IBA Rules of Ethics for International Arbitrators (1987). However, if an arbitrator refers to such issues only in a dissenting opinion, the parties may ask why he or she did not raise red flags earlier.

There should be no concern that, by issuing a dissenting opinion, the dissenter might disclose how the arbitrators cast their votes[44] because it may already be noted in the award that the award was made by a majority. This information is not a breach of confidentiality because an arbitrator is also entitled to refuse to sign the award.[45] Furthermore, there should be no concern that the publication of dissenting opinions undermines the independence and impartiality of arbitrators. The independence and impartiality of arbitrators are already protected by the provisions dealing with arbitrators' challenges, which allow a removal only under rather limited circumstances.[46]

[B] A Dissenting Opinion Should Not Contain any Arguments Which the Dissenter Did Not Previously Bring into the Deliberations with the Other Arbitrators

This rule[47] follows from the principle of collegial decision-making. If the issue referred to in the dissent is new, the dissenting arbitrator has failed in his or her duty to actively participate in the deliberations.

[C] The Dissent Should Not Be Made in Order to Assist One Side in Actions to Challenge the Award in Setting Aside or Enforcement Proceedings

The dissent should not be instrumental in creating the basis for setting aside proceedings, or facilitating the possible refusal by a national court to enforce the award.[48] If that was the goal of the dissent, then the dissenter has breached his or her duty of independence and impartiality. Be this as it may, experienced state courts will be able to sense whether the dissent was driven by illicit motives and will attach no weight to it if this was the case.

43. Antonias Dimolitsa, *Are Genuine Dissenting Opinions of Any Real Use?* Essays in Honour of John Beechey 2015, p. 139.
44. This concern is emphasised by Anke Sessler and Christine Ruß, *Dissenting Opinion – Aufhebungsgrund oder bloßes Ärgernis?* SchiedsVZ 2020, p. 200 (p. 204).
45. As the Austrian Supreme Court stated in its decision OGH 13 April 2011, 3 Ob 154/10h, the signature of two arbitrators is sufficient to form a valid award not only in cases where the third arbitrator is prevented from signing due to reasons of incapacity (illness) but also where he or she is simply unwilling to sign.
46. For example, section 8 Swedish Arbitration Act; Article 19(1) SCC Rules (2017).
47. Also expressed by Manuel Arroyo, *Dealing with Dissenting Opinion in the Award: Some Options for the Tribunal*, ASA Bulletin 2008, p. 437 (p. 456).
48. Ugo Draetta, *Cooperation Among Arbitrators in International Arbitration*, Indian Law Journal 2016, p. 107 (p. 141).

[D] The Dissenter Must Express Himself or Herself in Impartial and Tactful Terms

The dissenting arbitrator remains subject to a duty of independence and impartiality vis-à-vis the parties. The dissent does not exempt the dissenting arbitrator from this duty. [49] Therefore, the dissenter must express himself or herself in impartial and tactful terms, not only vis-à-vis his or her co-arbitrators but also vis-à-vis the parties. Anecdotal evidence seen by the author suggests that, when there have been respectful deliberations, any dissent will also be respectful.

[E] The Majority Must Be Given an Opportunity to Learn about the Dissent Before It Is Communicated to the Parties

The dissenting opinion can be issued without the approval of the parties. This is so because the dissent must refer to the reasoning of the award, and the reasoning is not subject to the parties' agreement.[50] Furthermore, on the basis of his or her independence vis-à-vis the co-arbitrators, the dissenting arbitrator does not require the consent of the other members of the tribunal and, of course, the dissenter is not allowed to disclose anything about their deliberations.[51]

However, the dissenter must give the other arbitrators an opportunity to learn of the dissent. He or she is not allowed to take the other members of the tribunal by surprise. This would be a breach of the requirement of collegial decision-making.[52] Thus, the other members of the tribunal must have an opportunity to disclose in the reasoning of the award why they did not follow the view of the dissenter.[53] They must also be given an opportunity to raise flags where, in their opinion, the dissenter would breach the secrecy of the deliberations. To achieve this goal, it is within the power of the president (or the secretariat of the institution, as the case may be) to fix an appropriate deadline for submission of the dissent.[54]

It is improper for the dissenter to notify the parties directly of the dissenting opinion, as this would be an ex parte communication.[55] Only under very exceptional circumstances (which will hopefully never arise), where the majority (or the arbitral

49. Ugo Draetta, *Cooperation Among Arbitrators in International Arbitration*, Indian Law Journal 2016, p. 107 (p. 141).
50. Axel Bartels, *Geheimnisverrat des Dissenters im schiedsrichterlichen Verfahren?* SchiedsVZ 2014, p. 133 (p. 135).
51. In this sense Ugo Draetta, *Cooperation Among Arbitrators in International Arbitration*, Indian Law Journal 2016, p. 107 (p. 140); Axel Bartels, *Geheimnisverrat des Dissenters im schiedsrichterlichen Verfahren?* SchiedsVZ 2014, p. 133 (p. 135).
52. Manuel Arroyo, *Dealing with Dissenting Opinion in the Award: Some Options for the Tribunal*, ASA Bulletin 2008, p. 437 (p. 456).
53. Harm Peter Westermann, *Das dissenting vote im Schiedsgerichtverfahren*, SchiedsVZ 2009, p. 102 (p. 108).
54. Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, ASA Bulletin 2008, p. 437 (pp. 461f).
55. Ugo Draetta, *Cooperation Among Arbitrators in International Arbitration*, Indian Law Journal 2016, p. 107 (p. 141).

institution) unreasonably declines to communicate the dissent to the parties, may the dissenter write to the parties directly, assuming the full risk of being seen as lacking impartiality and breaching the confidentiality of the deliberations.

[F] The Dissent Is or Is Not Part of the Award

It is commonly stated that the dissent does not form part of the award.[56] However, this depends on the circumstances in which it was made. If the dissenting opinion is inserted into the body of the award, it naturally forms part of the award and it will be impossible to submit the award to state courts without the accompanying dissent.

If the dissenting opinion is contained in a separate document, one must assess whether the award contains a reference such that the separate document is incorporated. If there is only a reference beneath the signature of the dissenter stating that the arbitrator in question is signing 'by reference to the attached consent', or the like, this will *not* be the case, because in that case, only the dissenter refers to the attachment and the dissent is not covered by the signatures of all three arbitrators.

Depending on the question of whether or not the dissent forms part of the award, it must be subject to scrutiny by the arbitral institution if such scrutiny is prescribed. Furthermore, a dissent that is not part of the award does not have to be submitted to the court where enforcement is sought, as has been recognised by the enforcement courts in Austria.[57]

§4.07 CONCLUSION

In the opinion of the author, we have nothing to fear from the practice of civilised dissent. This is also more in line with modern societies that have learned to live with a plurality of opinions, even where it is difficult at times to do so. As was beautifully stated by Lord Mance,[58] we should not accept a system that resembles the rood screen in mediaeval cathedrals, which stood between the ordinary faithful and the high priests who administered their religion. Arbitration is becoming more open and accessible in many respects, with the possibility of civilised dissent being only one aspect of this.

56. Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, ASA Bulletin 2008, p. 437 (p. 453); Ugo Draetta, *Cooperation Among Arbitrators in International Arbitration*, Indian Law Journal 2016, p. 107 (p. 141); *see also* OGH 13 April 2011, 3 Ob 154/10h.
57. OGH 26 April 2006, 3 Ob 211/05h and 13 April 2011, 3 Ob 154/10h; *see also* the comments on OGH 13 April 2011, 3 Ob 154/10 by Veit Öhlberger, ecolex 2011, p. 1016.
58. Lord Mance, *In a Manner of Speaking: How Do Common, Civil and European Law Compare*, RabelsZ 78 (2014), p. 231 (p. 250).