

Disagreeing on Parties' Disagreement: The Arbitral Award and the Dissenting Opinion

Dr. IOAN SCHIAU

Faculty of Law

Transilvania University of Brasov

16, Moldovei Street – 500205 Brasov

Romania

schiau@schiau-prescure.ro; www.schiau-prescure.ro

Abstract: Whenever an arbitral tribunal is composed of more than one arbitrator, the solving of a difficult and complex litigation may be preceded by the burdensome task of harmonizing the opinions of the members of the arbitral tribunal. Each time the arbitrators fail to do so, the arbitral award will be accompanied by a dissenting opinion. This paper addresses the issue of the legal fate of such a dissenting opinion (in terms of usefulness, effects and procedural aspects), as provided for in various arbitration regulations, focusing on a comparison between solutions adopted by prominent arbitration institutions and the rules applied by the Court of International Commercial Arbitration of the Romanian Chamber of Commerce and Industry and aiming to outline the necessity of better tailored rules.

Key-Words: Arbitration Rules, Arbitration Award, Majority Award, Dissenting Opinion, Effects, Procedure.

1. Introduction

Arbitration is becoming, more and more, the preferred way to solve complex business litigations, involving international interests, multiparty attendance and/or various procedural or substantial law issues.

Most arbitration rules adopted by permanent arbitration institutions provide for arbitral tribunals composed of one or three members, the sole arbitrator option being often reserved for cases where the parties did not previously agree upon the number of arbitrators or where the amount in dispute and/or the complexity of the subject matter do not warrant the appointment of three arbitrators. [1]

Every now and then, the parties' disagreement regarding the construction, validity, execution or termination of their contractual relationship, resulting in a litigation submitted to arbitration, is transferred to the arbitrators, which (a) may reach the same conclusion, but on a

different ground or (b) may reach different or dissenting conclusions, not being able to agree upon a unitary solution of the legal and factual problems and issues they are confronted with.

Sometimes, the arbitrators founding themselves in disagreement with the majority arbitrators simply decide not to sign the award they are dissenting with; more commonly, they will express their disagreement in a separate or dissenting opinion that is conveyed to the other arbitrators.

A “*separate*” or “*concurring*” opinion is the expression of an agreement with the result of the arbitration and of a disagreement with the grounds or key elements of the reasoning that have been used by the arbitral tribunal to reach such a decision; a “*dissenting*” opinion is expressing the disagreement of an arbitrator regarding both the reasoning and the result of an arbitration. [2]

The mere production of arbitral dissenting opinions raises significant questions related to the rectitude, the nature and the effects of such opinions. Answering these issues is important in order to determine the relation between the arbitral award and the dissenting opinion and, consequently, to assess the legal force of an arbitral award delivered by majority. More, some technical or procedural issues are also to be considered whenever a dissenting opinion is delivered by a member of the arbitral tribunal.

2. The Worth of Dissenting Opinions.

The ultimate goal of the arbitration procedure is to deliver an award solving the dispute of the parties, dispute that arise out of parties' different ways of construction or interpretation of factual or juridical issues raised by their contractual links.

The moral strength of such an award is based not only on the reputation of the arbitrators or on the arbitration court but, also, on the unanimous chorus of the arbitrators' "voices", conveying the message that the solution offered to the dispute is the only valid interpretation of the facts and legal arguments submitted by the parties.

Whenever a dissenting opinion is expressed, the parties are entitled to question the validity of one of the solutions, provided either by the majority award or by the dissenting arbitrator. By that, not only the moral force of the arbitral award is diminished but even its legal force is questioned, since the parties are naturally inclined more often to challenge a majority award than a unanimous award.

Therefore, a legitimate question arises: how comes that the arbitrators, called upon to indicate the right pass to overcome the parties' disagreement are allowed to fall themselves in the traps of their own disagreement?

It is argued that, following the state courts example, dissenting opinions are accepted in arbitration proceedings as an

expression of the open criticism and diversity of views that are strengthening the legitimacy and the reasoning of the arbitral award. [3] They are useful because they will lead to a better award since, whenever a dissenting opinion is expressed, the majority will exercise their best endeavors to thoroughly validate their decision as opposing the dissenting solution.

On the other part, dissenting opinions are, often, regarded as an expression of an irrepressible "affection" between the arbitrators and the parties that nominated them; even if the effect of a dissenting opinion is only a limited one, not affecting the validity of the award, dissenting opinions are a way to make obvious to the nominating party that its interests were appropriately watched over. In that regard, a survey of 150 investment arbitrations carried out under the ICSID Arbitration Rules shows that nearly all 34 dissenting opinions were issued by arbitrators appointed by the party that lost the case in whole or in part. [4]

From that perspective, dissenting opinions are weakening the strength of the arbitral awards and are adversely affecting the arbitrators' impartiality principle.

3. The Effects of Dissenting Opinions.

A dissenting opinion is not, by the mere fact of being expressed, invalidating the arbitral award. Most of the arbitration rules or state procedural norms are establishing that an arbitral award should be pronounced by way of majority voting, by that accepting that an award may be validly made even if one of the arbitrators is opposing the result of arbitration. [5] Some arbitration rules go even further; according to the ICC Rules and the Swiss Rules, if such a majority will not be reached, the matter will be decided by the chairman or the presiding arbitrator alone. [6]

That means that dissenting opinions, as long as they do not impede the formation of a majority decision, do not adversely affect the validity of the arbitration process or of

the arbitral award. As a matter of fact, they are not even considered as being part of the award but, normally, they are made available to the parties. [7]

There is a largely accepted standard that the parties to arbitration should be notified about an arbitral award being adopted by a majority and not unanimously; nonetheless, by doing so, the arbitral tribunal should also accept that such dissenting opinions may be used by the parties as a ground for challenging and setting aside the majority award.

4. Procedural Issues.

While the dissent between the arbitrators is admitted as a matter of practice, few legislations or arbitration rules are expressly allowing for dissenting opinions. ICC Rules, UNCITRAL Rules and the Swiss Rules do not specifically provide for the possibility of an arbitrator to express a dissenting opinion. Nevertheless, they admit that the award may not be signed by all the arbitrators, specifically requesting for such an absence to be explained in the award.

On the other hand, the ICSID Rules of Procedure for Arbitral Proceedings (the ICSID Rules) are expressly allowing for dissenting opinions, stating in Article 48, Paragraph 4 that any member of the arbitral tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

According to Article 39, Paragraph 1 of the Bulgarian Law on International Commercial Arbitration [8], an arbitrator who disagrees with the award shall state his/her dissenting opinion in writing.

Since no detailed rules are provided as to grant the dissenting opinions an accomplished or sufficient legal status, various questions subsist regarding the appropriate moment of the drafting of the dissenting opinion, the recording of the dissenting opinion, the need to communicate the dissenting opinion to the parties and so on.

For instance, the Supreme Court of Netherlands decided that the dissenting opinion of an arbitrator that did not sign the award is not part of the award; more, a dissenting opinion dating from a later date than the award has no legal relevance. [9]

An English court decided that it is the right of the majority arbitrators to accept or not the recording or the mentioning of the dissenting opinion in the arbitral award. [10] In Netherlands, the dissenting opinions are allowed only in international arbitration, but they do not form part of the award, although they may be attached to the award. [11]

In international arbitration, the arbitration courts have not yet taken a clear position regarding the communication of the dissenting opinion. As a matter of practice, the dissenting opinion may be attached to the award, if the majority arbitrators agree; otherwise, it may be separately delivered to the parties.

In Belgium, dissenting opinions are admissible, but their communication to the parties and their publication are prohibited, in order to preserve the confidentiality of the deliberation proceedings. [12]

The ICSID Rules provide for any arbitrator the right to attach his individual opinion to the award, by that implying that the separate opinion will be communicated to the parties as an attachment to the award.

5. The Romanian Legislation and Practice.

5.1. Relevant Provisions.

According to Article 345 of the Romanian Civil Procedure Code (RCPC), the arbitral tribunal may be composed of one, two or more arbitrators that will decide by a majority of votes.

When the arbitral tribunal is composed of an even number of arbitrators and they fail to reach a decision, due to their dissenting opinions, a third arbitrator, acting as chairperson, will be appointed; the chairperson may adopt one of the opinions of the dissenting arbitrators or may deliver

another solution, after hearing the parties and the arbitrators (Article 360³ of RCPC).

Article 360² of RCPC and Article 76 of the Bucharest Rules establishes that, when the arbitral tribunal is composed of an odd (uneven) number of members, the arbitrator that has expressed another view than the majority of the arbitral tribunal will draft and will sign a separate opinion, explaining the reasoning of such an opinion.

More, if a separate opinion is expressed, the dispositive part of the award will mention that fact.

The arbitral award will be signed by all arbitrators, excepting the case when a separate opinion has been expressed; in that case, the majority will sign the draft and the dissenting arbitrator will sign only the dissenting opinion. [13]

5.2. Legal Issues.

Apparently, RCPC and the Bucharest Rules do not make a distinction between “concurring” opinions and “dissenting” opinions. They are reunited under the larger concept of “separate” or “different” opinion and, consequently, their procedural treatment is unique.

5.2.1. A Peculiar Situation: An Arbitral Tribunal Consisting in an Even Number of Arbitrators.

In such a situation the delivery of a dissenting opinion will call for the nomination of a chairperson in two situations: (a) when the arbitral tribunal is composed of only two arbitrators or (b) the arbitral tribunal is composed of four, six or more arbitrators and the majority cannot be obtained due to the fact that more than one arbitrator is dissenting (actually, exactly half of the arbitrators; e.g.: when there are four arbitrators and only one is dissenting, the other three will form a majority).

The appointed chairperson will have a casting vote and in its position may embrace any of the opinions expressed; he may also amend one of the solutions expressed and may give an entire new solution, after proceeding, actually, to listen not only the parties but, also, the dissenting arbitrators.

Delivery of a brand new solution to the arbitration means that the chairperson is, actually, in disagreement with both dissenting solutions issued by the initially appointed arbitrators; therefore, whenever he/she decides to deliver another result to the arbitration, the chairperson appointed under the terms of Article 360³ of RCPC is reassessing the merits of the case which may call even for new evidence or further submissions by the parties.

5.2.2. The Dissenting Opinion – Separate, but Attached to the Award.

From a structural point of view, the concurring opinion, accepting the result of arbitration and identifying itself with the award, may be considered part of the award, since is not aiming to challenge or to change in any way the result of the arbitration.

On the contrary, the dissenting opinion has a total different meaning; contesting the result of the arbitration, it cannot be perceived as being a part of the award itself, but an opposite solution to the arbitration outcome. [14]

RCPC and the Bucharest Rules ask that the separate opinion be mentioned in the dispositive part of the award. It also require for all the arbitrators to sign the award, excepting the case when a separate opinion has been expressed (Article 361 letter “g” of RCPC). Consequently, a strict construction of the above mentioned provisions allows, in such a situation, the conclusion that the arbitral award will be validly rendered if signed only by the majority arbitrators, while the dissenting arbitrator will only sign the separate opinion.

As a matter of practice, the mentioning in the dispositive part of the arbitral award of the separate opinion is made by reference and does not comprise the whole text of the opinion; all the arbitrators will sign the award, but under the signature of the dissenting arbitrator there will be a mention stating that he expressed a separate opinion.

The logical outcome of that “mentioning” requirement is that the separate opinion has to be attached to the award and, consequently, communicated to

the parties together with the arbitral award. Otherwise, the mentioning of the separate opinion within the award's dispositive part is meaningless.

From the requirement of mentioning in the award of the separate opinion another conclusion is arising: the dissenting/separate opinion should be contemporaneous to the arbitral award. Any opinion which has been expressed after the signing of the award and it is not mentioned in the dispositive part of the award is not a dissenting opinion and will not be communicated to the parties.

To conclude with a general remark, although it is mentioned in the dispositive of the award and it is communicated to the parties together with the award, the separate or dissenting opinion is not a part of the award.

5.2.3. Scrutiny of the Awards by the Courts.

Following a request filed by one of the parties, an arbitral award may be set aside by the state courts, for a number of reasons.

When the majority award has been communicated accompanied by a dissenting opinion, the challenging party may feel inclined to take over the arguments stated by the dissenting arbitrator and to use them as instruments of criticism of the challenged award.

The court that is called to decide upon a set aside request has to consider only the majority award rendered by the arbitral tribunal; while the separate opinion is not part of the award, the court may, nevertheless, set aside the award based upon the reasoning expressed in the dissenting opinion.

Such a probability is, anyhow, atypical for most of the grounds that are scrutinized by the Romanian courts when assessing a set aside request; such grounds are, mostly, procedural issues to be observed by the arbitral tribunal and it is highly unusual for an arbitration to proceed by infringing its own procedural rules.

Therefore, the dissenting opinion should not be regarded by the set aside court as a base of the annulment of the award; if the

award is infringing the requisites of Article 364 of RCPC, the content of the award and the record of the proceedings should be the foundation of any annulment of the arbitral award.

6. Conclusions

So far, dissenting opinions in international arbitration are accepted but not very much appreciated. The confidential nature of arbitration, resulting in a restricted circulation of the arbitral awards is, anyhow, depriving the dissenting opinions of their beneficial effect in terms of improving the arbitral jurisprudence or the law.

Although a Working Party was established by the International Chamber of Commerce in order to consider the dissenting opinions, its Final Report, approved in 1988, did not offer a decisive stand; without excluding the dissenting opinions, the report recommended to restrain their field to situations that do not adversely afflict the validity of the award or do not offer arguments to the losing party for a set aside procedure.

In the Romanian arbitration jurisprudence, the incidence of dissenting opinion is quite insignificant; out of more than 400 cases registered by the Bucharest Court of International Commercial Arbitration in 2010, only two separate opinions were delivered by dissenting arbitrators.

Nevertheless, more precise rules regarding the delivery, recording, communication and effects of separate opinions, as well as determining the difference between a concurring opinion and a dissenting opinion are required.

References:

[1] International Chamber of Commerce - International Court of Arbitration, *Rules of Arbitration*, Article 8, Paragraph 1 (hereinafter referred to as "ICC Rules"); *Swiss Rules of International Arbitration*, Article 6, Paragraph 1, (hereinafter referred to as "Swiss Rules"); *UNCITRAL*

Arbitration Rules, Article 7, Paragraph 1; Romanian Chamber of Commerce and Industry – Court of International Commercial Arbitration, *Procedural Rules*, Article 17, Paragraph 1 (hereinafter referred to as the “Bucharest Rules”).

[2] N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration, Fifth Edition*, Oxford University Press, 2009, pp. 574-576

[3] E. Gaillard, J. Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, 1999, Kluwer Law International, p. 766.

[4] A. J. van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Mahnouch Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*

[5] See *ICC Rules*, Article 25, Paragraph 1, *Swiss Rules*, Article 31, Paragraph 1, *UNCITRAL Rules*, Article 35, Paragraph 1, *Bucharest Rules* as well as the *French Civil Procedure Code*. and the *Romanian Civile Procedure Code*.

[6] See *ICC Rules*, Article 25, Paragraph 1 and the *Swiss Rules*, Article 31, Paragraph 1

[7] J.D.M. Lew, L. A. Mistelis, S. Kroll, *Comparative International Commercial Arbitration*, 2003, Wolters Kluwer, p. 641

[8] In effect from 01.03.2008.

[9] A.J.M. Hoogveld, M. van Leuween, *Dissenting Opinions and Non-Compliance: Grounds for Setting Aside an Award?*, ILO Newsletter, available at www.internationallawoffice.com/newsletter

[10] *Cargill International vs. Sociedad Ibercia de Molturacion* [1998], 1 Lloyd’s Rep. 489, London Court of Appeal.

[11] P. Sanders, A. van den Berg, *Yearbook of Commercial Arbitration*, 1997, p. 86, Paragraph 4.

[12] J.F. Poudret, S. Besson, S. Berti, A. Ponti, *Comparative Law of International Arbitration*, Sweet and Maxwell, 2007, p. 674

[13] Bucharest Rules, Articles 76-79

[14] N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration, Fifth Edition*, Oxford University Press, 2009, pp. 575; see also, Decision of Supreme Court, December 5, 2008, *Netherlands Court Reports [NJ 2009, 6]* delivered in *Bursa Buyuksehir Belediyesi v. Guris Insaat VE Muhendislik AS*, discussed in A.J.M. Hoogveld, M. van Leuween, *Dissenting Opinions and Non-Compliance: Grounds for Setting Aside an Award?*