

ARIAS-US 2020 Virtual Fall Conference
“Exploring Dissenting Opinions by Arbitrators”

Panel:

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For those of you who wish to prepare for this breakout session or to explore this topic more extensively, we have provided the following references which we believe may be of interest.

1) Ethical considerations in writing a dissent

ARIAS Code of Conduct

Canon II

FAIRNESS: Arbitrators shall conduct the dispute resolution process in a fair manner and shall serve only in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.

Comment 3. Party appointed arbitrators should not offer a commitment to dissent or to work for a compromise in the event of a disagreement with the majority’s proposed award.

Canon IV

DISCLOSURE: Candidates for appointment as arbitrators should disclose any interest or relationship likely to affect their judgment. Any doubt should be resolved in favor of disclosure.

Comment 2. A candidate for appointment as arbitrator shall also disclose:

- a. Relevant positions taken in published works or in expert testimony . . .

Canon VI

CONFIDENTIALITY: Arbitrators should be faithful to the relationship of trust and confidentiality inherent in their position.

Comment 3. . . . An arbitrator shall not disclose contents of the deliberations of the arbitrators or other communications among or between the arbitrators.

Notwithstanding the previous sentence, an arbitrator may put such deliberations or

communications on the record in the proceedings (whether as a dissent or in a communication to all parties and panel members) to the extent (but only to the extent) reasonably necessary to expose serious wrongdoing on the part of one or more of the panel members, including actions that are contemplated by Section 10 (a) of the Federal Arbitration Act.

2) Dissenting opinions on the merits do not appear to influence courts reviewing a final award

a) No apparent impact

Benihana, Inc. v. Benihana of Tokyo, LLC, Case No. 15 Civ 7428 (S.D.N.Y. 2016). Court declined to vacate a 32 page majority award even though it found the 12 page dissent on the merits more persuasive.

General Re Life Corporation v. Lincoln National Life Insurance Company, 273 F. Supp. 3d 307 (D. Conn. 2017), *aff'd* 903 F.3d 544 (2d Cir. 2018) (See District Court opinion fn. 2 re: dissent on the merits) (panel did not exceed its powers in issuing clarification of final award in violation of *functus officio* doctrine).

Vantage Deepwater Co. v. Petrobras America Inc., Civ. Action No: 4:18-cv-02246 (S.D.Tex. 2019) Arbitrator's dissent on merits and on conclusory statement of failure to provide due process were not sufficient standing alone to vacate award. Court stated that it was not aware of any case where a dissenting opinion was sufficient to overturn a majority award. "And the issuance of a dissent in and of itself does not make vacatur arguments more meritorious."

b) Some possible impact

Gas Aggregation Services, Inc. v. Howard and Avista Energy, LLC, 319 F.3d 1060 (8th Cir. 2003) Affirming District Court vacating a portion of arbitration award on basis of manifest disregard of the law and quoting the applicable law from the dissent.

3) Dissenting opinions on process generally do not appear to influence courts reviewing a final award

a) No apparent impact

Antietam Industries, Inc. et al v Morgan Keegan & Co., Inc., Case No. 6:12-cv-1250-Orl-36 (D. Fla. 2013) FINRA arbitrator's failure to disclose a dissent in a prior unrelated arbitration was not sufficient to support vacatur under 10(a)(2) (evident partiality) or 10(a)(3) ("any other misbehavior by which the rights of any party have been prejudiced.") Court noted that it was not aware of any cases in which 10(a)(2) violations related to failure to disclose things other than relationships with parties, arbitrators, etc. Failure to disclose a pre-disposition on a point of law was not a basis to invoke 10(a)(2).

American National Insurance Company v. Everest Reinsurance Company, 180 F. Supp. 2d 884 (S.D. Tex. 2002) (dissent issued 3 days after final award questioned whether a meaningful deliberative process occurred).

Century Indemnity Company v. AXA Belgium, No. 11 Civ. 7263, 2012 WL 4354816 (S.D.N.Y. Sept. 24, 2012) (confirming award notwithstanding dissent regarding failure to hear evidence; denying motions to seal arbitration documents).

National Indemnity Co. v. IRB Brazil Resseguros SA, 164 F. Supp. 3d 457 (S.D.N.Y. 2016), *aff'd* 675 F. App'x 89 (2d Cir. 2017). (dissent on several issues including evident partiality; dissent appears to have had ex parte input from counsel)

b) Perhaps some impact

Star Ins. Co. v National Union Fire Ins. Co. of Pittsburg, PA, 656 Fed Appx. 240 (6th Cir 2016) (vacating arbitration award on ex parte communication issue raised in dissent; court cites to dissent).

4) Are reinsurance arbitrators' dissenting opinions publicly available?

a) Although the question of whether arbitral awards (including dissents) should be sealed when seeking to confirm or vacate such an award is beyond the scope of this presentation, some courts are refusing to seal the awards. See e.g., *TIG Insurance Co. v. National Union Fire Insurance Co. of Pittsburgh, P.A.*, No. 19 Civ. 10238 (PAE), 2019 U.S. Dist. LEXIS 205120 (S.D.N.Y. Nov. 25, 2019) (citing 7 New York cases).

b) Cases with dissents available on Pacer

National Indemnity Co. v. IRB Brazil Resseguros SA, 164 F. Supp. 3d 457 (S.D.N.Y. 2016), *aff'd* 675 F. App'x 89 (2d Cir. 2017)

Century Indemnity Company v. AXA Belgium, No. 11 Civ. 7263, 2012 WL 4354816 (S.D.N.Y. Sept. 24, 2012)

Harper Ins. Ltd. v. Century Indemnity Co., 819 F. Supp. 2d 270 (S.D.N.Y. 2011)

5) Is it useful/a best practice to circulate a dissenting opinion among the panel members before the award issued?

a) The US Supreme Court circulates draft dissenting opinions prior to issuance of its opinions. See Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minnesota L. Rev. 1 (2010).

6) For a study of published dissenting opinions in investment arbitrations, see Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*