

Charles Brower's problem with 100 per cent—dissenting opinions by party-appointed arbitrators in investment arbitration[†]

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ABSTRACT

This contribution is a *réplique* to Charles Brower and Charles Rosenberg's article 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded', which appeared in *Arbitration International* in 2013, to the extent that it discussed dissenting opinions (the 'Nightingale Article'). The Nightingale Article is a reaction to a study published in 2009 in which it was reported that 100 per cent of the separate opinions issued in investment arbitrations by party-appointed arbitrators have been rendered by the arbitrator appointed by the losing party. In this *réplique*, a number of the arguments advanced in the Nightingale Article are rebutted: 'dissenting opinions are a significant feature of international dispute settlement'; '[t]his figure alone [22 per cent of the decisions and awards have a dissenting opinion by a party-appointed arbitrator] serves to minimize any concerns regarding dissenting opinions in investment arbitration'; 'concerns about neutrality are unwarranted'; 'offers a unique tool to produce a better award'; 'the development of investment law'; and 'the authority of the award'. It is concluded that none of them provide a satisfactory answer to the fact that 100 per cent of the separate opinions of party-appointed investment arbitrators have been issued by the arbitrator appointed by the party that has lost the case.

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1. INTRODUCTION

In 2009, I wrote an article entitled 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration'.¹ In the contribution, I discussed a survey that I had conducted of dissenting opinions in some 150 published awards and decisions in investment arbitration. The survey focused on arbitral tribunals composed of three arbitrators, two of whom were appointed by the claimant and the respondent, respectively, which is the most common method of appointing arbitrators in investment arbitration. The focus was on party-appointed arbitrators, as dissenting opinions by presiding arbitrators were (and are) rare. The outcome of the survey was stunning: nearly 100 per cent of the dissents were in favour of the party that appointed the dissenter in the investment arbitration. In other words, no arbitrator appointed by the prevailing party issued a dissenting opinion. I observed in the 2009 Article that this finding raised concerns about neutrality. Further, almost no award or decision referred to a dissenting opinion in an earlier case, a fact that contradicts the argument that dissenting opinions contribute to the development of investment law. If the test is that an investment-treaty arbitrator should dissent where he or she discerns a principled basis to do so, few of the dissenting opinions seemed to be warranted. I expressed concern about the fact that a dissenting opinion may weaken the authority of the award and that it may inhibit the deliberative process. My argument was directed towards the fact that the percentage of dissenting opinions in commercial arbitration is much less than in investment arbitration and the percentage was decreasing in the former, but increasing in the latter. It seemed to me that the practice of dissents in investment arbitration may have reached the point where a party-appointed arbitrator is now expected to dissent if the party that appointed him or her has lost the case (the so-called 'mandatory dissent'). My view was that the current method of unilaterally appointing arbitrators may create arbitrators who are dependent in some way on the parties that appointed them. I agreed with Jan Paulsson that the solution might be to replace the method of party-appointed arbitrators with a list-procedure,² but also noted that it is probably still a long way off. I concluded with a call for a moratorium on dissenting opinions by party-appointed arbitrators in investment arbitration: 'Until that moment has come, investment arbitration would function better and be more credible if party-appointed arbitrators observe the principle: *nemine dissentiente*.'

To be clear, I do not suggest doing away with the possibility of expressing dissent in investment arbitration. Rather, I propose a temporary stay in dissenting practice by party-appointed arbitrators in investment arbitration until such time as the

1 Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush H Arsanjani, Jacob Katz Cogan, Robert D Sloane and Siegfried Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W Michael Reisman* (Martinus Nijhoff, The Netherlands, 2011) 821–43 <<http://www.hvdb.com/wp-content/uploads/2011-AJvdB-Dissenting-Opinions-in-Investment-Arbitration.pdf>> accessed 5 September 2014. I completed the manuscript in July 2009; the Festschrift was published in March 2011. Hereafter referred to as the '2009 Article'.

2 Jan Paulsson, 'Are Unilateral Appointments Defensible?' (*Kluwer Arbitration Blog*, 2 April 2009) <<http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible/#more-537>> accessed 5 September 2014; see also Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (2010) 25 ICSID Rev-FILJ 339.

international arbitration community has been able to address the concerns expressed in my 2009 Article and below.

I have known Charles Brower for more than 30 years. Our friendship goes back to when he became a Judge on the Iran-United States Claims Tribunal in The Hague. It is in that particular setting that he developed the skill of writing dissenting opinions. No wonder, then, that Charles Brower reacted to my contribution. He did so in an article entitled 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded'.³ The choice by Charles Brower to refer to the Two-Headed Nightingale is historically interesting, not in the least as it also involved a certain Brower.⁴ However, that is not the object of this contribution. The abstract of the Nightingale Article reads:

Two of the most well-regarded and distinguished members of our profession – Professors Jan Paulsson and Albert Jan van den Berg – recently authored articles that seemed to presume that party-appointed arbitrators are untrustworthy and will violate their mandate to be and to remain independent and impartial. Their articles attacking party appointments and dissenting opinions, respectively, assume a lack of good faith on the part of party-appointed arbitrators. This article critiques certain shortcomings in their theses and further clarifies the importance of party-appointed arbitrators and dissenting opinions in international arbitration. As the well-established right of the parties to choose the arbitrators and the ability of a member of a tribunal to express disagreeing views in a dissenting opinion are significant elements of perceived legitimacy, this article explains that restricting them, as proposed by Paulsson and van den Berg, positively would impede the further development of the field.

This contribution serves as a *réplique* to Charles Brower's reaction to the extent that it concerns dissenting opinions. I leave it to my separated twin Jan Paulsson to deal with his views on the party-appointed arbitrators.

The Nightingale Article is remarkable, in particular, because it knocks down a straw man, addressing propositions different from those that I had put forward. The most noteworthy aspect of it is that Charles Brower is unable to give a convincing explanation for the fact that 100 per cent of the separate opinions issued in investment arbitrations by party-appointed arbitrators have been rendered by the arbitrator appointed by the losing party. Actually, the Nightingale Article is silent on this astonishing fact.

3 Charles N Brower and Charles B Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded' (2013) 29 *Arb Intl* 7, 7–44 (hereafter referred to as the 'Nightingale Article').

4 The 'Two-Headed Nightingale' is one of the stage names of the conjoined twins Millie and Christine McKoy born in 1851 who reportedly were slaves belonging to a blacksmith. They were exhibited by a certain showman named Brower (no known family ties) at the North Carolina State Fair in 1853. Brower was later conned by a Texan adventurer. After their slave status ended in 1863 following the Emancipation Declaration, they had a successful career with the Barnum Circus. They died of tuberculosis in 1912. They are also known as 'The Eighth Wonder of the World.' See <http://en.wikipedia.org/wiki/Millie_and_Christine_McKoy> accessed 5 September 2014; see also <http://phreeque.tripod.com/mckoy_sisters.html> accessed 5 September 2014.

It is for these reasons that I feel compelled to review a number of the arguments advanced in the Nightingale Article.

2. 'DISSENTING OPINIONS ARE A SIGNIFICANT FEATURE OF INTERNATIONAL DISPUTE SETTLEMENT'

It is argued in the Nightingale Article that '[d]issenting opinions are a significant feature of international dispute settlement'.⁵ It suggests that this feature is 'demonstrated by the fact that a large number of international courts, tribunals, and institutions permit international adjudicators, both permanent and party-appointed, to dissent'.⁶ I do not disagree that these courts, tribunals, and institutions 'permit' adjudicators to dissent. Most of these instances, however, cannot be compared with investment arbitration because in many cases the judges are not appointed by the parties to the case. Thus, International Court of Justice judges cannot be compared with party-appointed investment arbitrators. More importantly, it is not the concept of a dissenting opinion that I examined in my 2009 Article. Rather, I examined the use of the faculty of issuing a dissenting opinion by a party-appointed adjudicator, even if it is legally permitted.⁷

3. 'THIS FIGURE ALONE SERVES TO MINIMIZE ANY CONCERNS REGARDING DISSENTING OPINIONS IN INVESTMENT ARBITRATION'

It is also argued in the Nightingale Article that '[t]his figure alone serves to minimize any concerns regarding dissenting opinions in investment arbitration'.⁸ My survey of approximately 150 awards and decisions showed that in 34 cases the party-appointed arbitrator of the party that had lost the case had issued a separate opinion. That is, 22 per cent of the surveyed investment cases. In the Nightingale Article, this figure is presented differently: '78% of the approximately 150 cases reviewed by van den Berg produced *no* dissenting opinions whatsoever'. This manner of presenting overlooks the fact that 22 per cent compares badly with commercial arbitration, where the percentage is around 8 per cent.⁹ It also overlooks the increase of the percentage in investment arbitration, as compared with a decrease in commercial arbitration. The trend in investment arbitration is particularly worrying as it seems to lead to 'mandatory dissents'.

4. 'CONCERNS ABOUT NEUTRALITY ARE UNWARRANTED'

In the Nightingale Article it is stated:

A number of the dissents in van den Berg's survey, although 'issued by the arbitrator appointed by the party that lost the case in whole or in part,' are benign or actually disfavour the party that appointed the dissenter.¹⁰

5 Brower and Rosenberg (n 3) 27.

6 *ibid.*

7 One can disagree with the qualifier 'significant' for international dispute settlement in general.

8 Brower and Rosenberg (n 3) 27.

9 van den Berg (n 1) 48.

10 Brower and Rosenberg (n 3) 27–31.

This observation in and of itself misses the crucial question: why is it that all dissents are issued by the arbitrator appointed by the party that has lost the case? Why are there no examples of cases in which the arbitrator appointed by the winning party issued the dissent?

Reviewing the separate opinions mentioned in support of the above statement in the Nightingale Article, it is arguable whether any disfavour the party that appointed the arbitrator in question. Furthermore, reviewing them, another question arises: why are these separate opinions issued at all? It is my understanding that dissenting opinions are used if the dissenter discerns a principled basis to so.

With some difficulty, the first example given in the Nightingale Article might qualify as a benign dissent. In *AMT v Zaire*,¹¹ the majority found liability on the basis of general principles of law and most favoured treatment, while the dissenter believed that it was to be based on destruction of property by the other party's forces. The result was the same.

More disquieting is the separate statement in *RosInvestCo v Russia*:¹²

In other words, I would not want our common conclusion that Article 8 does not confer jurisdiction in this case to be taken in any way as an expression of opinion on how that article or other similar treaty clauses relates to other claims that might be brought forward in other cases based on an allegation of expropriation.¹³

Why would an arbitrator say this separately? Is the arbitrator concerned about his (appointment in) future cases? Why make a statement about the future at all? Is it not his duty to decide only the case before him? If his colleagues were of the same opinion about future cases, it would have been a joint statement. Apparently, his colleagues were not willing to discuss the future in the award, for which reason the separate statement must be presumed a dissenting opinion.

The Nightingale Article states that I 'lum[p] together in [my] survey dissenting opinions on incidental issues, such as interest and costs'. Here my question applies even more forcefully: why dissent? If dissent is intended for principled matters, these separate statements should not have been issued. Being an arbitrator on an arbitral tribunal requires team play. The end result is a decision in a dispute between the parties before the tribunal. An arbitrator cannot always have it their way and if in the end their colleagues are not convinced by their arguments, they should align with the majority. Why is it necessary to state separately, as in *Wena v Egypt*,¹⁴ that one concurs with the tribunal's entire award and is persuaded that compound interest should be awarded, but that compounding should not be quarterly?

11 *American Manufacturing & Trading Inc v Republic of Zaire*, ICSID Case No ARB/93/1, Award (10 February 1997).

12 *RosInvestCo UK Ltd v The Russian Federation*, SCC, Award on Jurisdiction (1 October 2007).

13 *ibid* para 123.

14 *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award (8 December 2000).

In *Salini v Jordan*,¹⁵ the majority had decided to allocate the costs equally between the parties. The separate opinion states:

I am not wholly convinced that the considerations set out in paragraph 103 of the Award on the merits fully warrant the conclusion set out in paragraph 104. In my view, a more equitable solution would have been to allow some limited weight to 'the loser pays' principle by apportioning the costs and expenses of the Tribunal for the merits stage of the proceedings in the proportion of one-third to the Respondent and two-thirds to the Claimants, with each Party bearing its own costs for the merits phase.¹⁶

Thus, the separate opinion, issued by the arbitrator appointed by the Respondent, favoured an award of costs in which the Claimant would bear 66 per cent of the costs of the merits phase of the arbitration, rather than the 50 per cent as determined by the majority. I do not comprehend how that opinion can be characterized as a concurring opinion, as it is done in the Nightingale Article. It is clearly dissenting. Moreover, the arbitrator was dissenting on what may be described contextually as 'peanuts'.

The Nightingale Article then states that I should have compared the 22 per cent rate of dissent with the rates of dissent experienced in national judicial systems, such as the United States Supreme Court and the Canadian Supreme Court.¹⁷ I am afraid that the essence of my 2009 Article was missed. My concern is about arbitrators appointed by parties who invariably express dissent in favour of the party that appointed them. Judges on the United States or Canadian Supreme Court are not appointed by the parties in a given case.

Finally, the Nightingale Article argues that:

dissenting opinions by party-appointed arbitrators ought to be properly viewed as 'the reflection of their shared outlook with the party who appointed them, rather than dependency or fear to alienate such party'.¹⁸

The 'shared outlook' may be an explanation for a number of dissenting opinions, but is it an explanation for the 100 per cent score? From that perspective, the expression 'shared outlook' becomes a doubtful euphemism.

5. 'OFFERS AN UNIQUE TOOL TO PRODUCE A BETTER AWARD'

The Nightingale Article's response to my arguments regarding the potential to inhibit the deliberative process is the recommendation to have 'competent counsel' who will advise clients not to appoint an 'advocate-arbitrator'. The recommendation is well-intentioned; in practice, unfortunately, such competence is less universal than one would hope.

15 *Salini Costruttori SpA and Italstrade SpA v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Award (31 January 2006).

16 *ibid.* Declaration 38.

17 Brower and Rosenberg (n 3) 30–31.

18 *ibid.* 31, quoting Jacques Werner, 'Dissenting Opinions: Beyond Fears' (1992) 9(4) *J Intl Arb* 23, 25.

The same goes for the alleged positive effect of a (potential) dissenting opinion on the majority opinion. In the words of the Nightingale Article, a dissenting opinion operates 'as a valve that reduces the pressure in an arbitration' and 'offers an unique tool to produce a better arbitral award'.¹⁹ I am afraid that in practice the opposite is often true. In fact, the (threat of a) dissenting opinion may create distrust and tension inside a tribunal. The quality of an award should, in any event, meet high standards and should not remotely depend upon a dissenting opinion. Put differently, a dissenting opinion must not form a part of the toolbox of arbitrators doing their job.

The Nightingale Article states that 'a prospective dissenting opinion . . . of course always should be circulated in draft form to the other tribunal members in advance of a final decision'.²⁰ This is another example of well-intentioned advice, which, unfortunately, seems to ignore what happens in practice. There are cases in which, although the dissenter has made his or her views fully known, it takes months before the dissenter circulates a written draft. It is not uncommon that, after the majority has taken into account the draft dissenting opinion in the majority opinion, it is surprised to receive upon issuance of the award a revised and entirely different dissenting opinion. The revised text of the dissenting opinion makes it look as if the majority has not taken into account the dissenting opinion. It also happens that the majority believes that there is unanimity. The award is issued and signed by all three arbitrators, stating that it is issued unanimously. A huge surprise for two of the arbitrators comes a few weeks later, when they receive from their colleague a dissenting opinion to the award.²¹

6. 'THE DEVELOPMENT OF INVESTMENT LAW'

In my 2009 Article, I wrote that: '[t]he argument that dissenting opinions contribute to the development of the law is also contradicted by the 150 reported investment arbitration awards'.²² In none of the investment cases did the arbitrators refer to a dissent in a previous investment case, save for one curious exception.²³ I stand corrected by the authors of the Nightingale Article: they have found a footnote in another award that referred to a dissenting opinion. For a perfectionist, like I am, that is a serious matter.²⁴

19 *ibid* 32–35.

20 *ibid* 33–34.

21 *Siemens v Argentina*, ICSID Case No ARB/02/8, Award (17 January 2007) ('the Tribunal unanimously decides'). The 'Separate Opinion' of 31 January 2007 expresses a dissent on the appointment of a damages expert and on costs.

22 van den Berg (n 1) 826.

23 The sole exception that I could find was *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No 05/19, Decision on Award (3 July 2008) para 125.

24 Brower and Rosenberg (n 3) 34–38; *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) fn 99. The footnote in question states: 'The Tribunal emphasizes that the facts of the SGS case are distinct from the present proceeding'. After having set out the differences, the Tribunal notes: 'Despite these differences, the Tribunal also recognizes that its reasoning differs from that of the SGS tribunal. The Tribunal observes that its view is closer to that of paragraph 11 of the dissenting Declaration of Arbitrator Antonio Crivellaro in *Société Générale de Surveillance v Republic of the Philippines*'.

The Nightingale Article mentions two other references to previously issued dissenting opinions in investment awards. Although the Nightingale Article states that I have 'overlooked' these awards, they were issued after the date on which I had concluded my research (ie 31 December 2008).²⁵ The first is another endorsement of the other view in the SGS cases.²⁶ The second is a reference by the *Tza Yap Shum* tribunal²⁷ to Todd Weiler's separate opinion in *Berschader v The Russian Federation*.²⁸ In that opinion, Weiler expresses the view that he prefers to focus on the treaty terms themselves rather than analysing the intent of the drafters. To me, that seems an elementary application of the general rule of treaty interpretation offered by Article 31 and the subsidiary means of interpretation offered by Article 32 of the Vienna Convention of 1969, which would not require any reference to a prior award or other authority, let alone a reference to a separate opinion.

The Nightingale Article heralds the four separate opinions as 'a validation of the potential contributions that can be made by such opinions'.²⁹ Note the qualifier 'potential'. The Nightingale Article does not inform us what the contributions of those four dissents could have been. Again, the Great Dissenters at the United States Supreme Court, this time in cases involving racial discrimination and the Fourth Amendment's protection against unreasonable search, constitute the foundation of the argument of the authors of the Nightingale Article that the fact that the Dissenters have not been cited in subsequent Supreme Court decisions is a 'telling indictment of the theory, implicit in van den Berg's approach, that a dissent not cited in a subsequent case has no influence on the development of international investment law'.³⁰ With all due respect, this is really a stretch.

The results of the search for references to dissenting opinions in investment awards and decisions being meagre, the Nightingale Article redirects the attention to a discussion of dissenting opinions in law review articles, continuing legal education programs, and in a myriad of professional fora. According to the Nightingale Article:

[b]y this means, a dissent can give rise to intellectual debate within the relevant community, which in turn may contribute to the evolution of the law in the direction to which that dissent had pointed.³¹

The authors do not clarify how such debate has an influence on decisions and awards in investment arbitration. The Nightingale Article refers in support of its view

25 Brower and Rosenberg (n 3) 35.

26 *SGS Société Générale de Surveillance SA v Republic of the Paraguay*, ICSID Case No ARB/07/29, Award (12 February 2012) para 181.

27 *Tza Yap Shum v Republic of Peru*, ICSID Case No ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009) paras 177–88.

28 *Vladimir Berschader and Moise Berschader v The Russian Federation*, SCC Case No 080/2004, Separate Opinion of Professor Todd Weiler (7 April 2006).

29 Brower and Rosenberg (n 3) 6.

30 *ibid* 37.

31 *ibid* 38.

to the dissenting opinion by the late Thomas Wälde in *Thunderbird v Mexico*.³² It is unfortunate that the authors take that case as an example not only because *de mortuis nihil nisi bonum* but also because I am unable to respond as I was the presiding arbitrator in that case and I adhere to the principle that one should not discuss cases in which one was involved as an arbitrator.³³

7. 'THE AUTHORITY OF THE AWARD'

In my 2009 Article, I had stated that dissenting opinions may also weaken the authority of the award, may impair enforcement and may incentivize a dissatisfied party to move to annul the award. I gave two examples: *Klöckner v Cameroon* and *CME v The Czech Republic*.³⁴ Dismissing these two examples as 'bad apples',³⁵ the authors of the Nightingale Article attempt to argue the opposite by advancing three propositions.³⁶

The first proposition is unnecessary: 'A dissent may properly prevent enforcement of an unjust award'.³⁷ By the term 'unjust award', the authors of the Nightingale Article mean 'arbitral awards based on manifest violations of the parties' procedural rights'. I had said the same thing in my 2009 Article by stating that it is one of the few reasons justifying a dissent.³⁸ However, very serious violations of due process are usually apparent and need not be evidenced again by a dissenting opinion for the purposes of refusal of enforcement. Moreover, is the remedy against an 'unjust award' not an annulment action before the ad hoc Committee at ICSID or in the case of an investment arbitration on the basis of the UNCITRAL Rules, a setting aside action before the national court at the place of arbitration?

The second proposition is remarkable: 'A dissent may help insulate an award from challenge'.³⁹ The support for this proposition consists of references to authors who merely speculate about the effects of dissenting opinions in general (not limited to investment arbitration). There is no support in actual investment arbitration cases. As mentioned above, case law in investment arbitration is to the contrary. As that apparently does not suit the authors' second proposition, they dismiss them as 'bad apples'.

The third proposition is equally remarkable and actually counter-intuitive: 'The absence of a dissent may weaken the authority of an award and delay enforcement'.⁴⁰ It is again unfortunate that the authors of the Nightingale Article take as example only cases in which I was an arbitrator, and therefore I am unable to respond.

32 *International Thunderbird Gaming Corp v The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (1 December 2005).

33 It is for this reason that I abstain from using the dissenting opinion in the *Renta4 SVSA et al v The Russian Federation* case as an example in this *réplique* addressed to Charles Brower as he was the dissenter in that case. See van den Berg (n 1) 834–35.

34 van den Berg (n 1) 828–29.

35 Brower and Rosenberg (n 3) 40–41.

36 *ibid* 38–43.

37 *ibid* 40.

38 van den Berg (n 1) 831.

39 Brower and Rosenberg (n 3) 40–41.

40 *ibid* 41–42.

Apart from these cases, the proposition of the authors of the Nightingale Article is in essence that if an arbitrator has sat on a tribunal that has decided on a certain issue, and if the same issue comes up in a subsequent case but is decided differently, he or she should issue a dissenting opinion. If the arbitrator would not dissent in the second case, the authors argue, the award in the second case would have a weakened authority.

There is something strange with this proposition. What should the arbitrator do in the second case if he or she did not dissent in the first case although he or she was in the minority on the issue in that first case? Publish a dissenting opinion in the first case, effectively issuing a retroactive dissent? That seems (too) late. Or publish a concurring opinion in the second case, letting the world know that he or she disagrees with the decision on the issue in the first case? Such a concurring opinion in the second case might be a violation of the arbitrator's duty of confidentiality regarding the first case. Moreover, even if an issue is the same in two cases, the manner in which it was presented in terms of argument, factual evidence and expert opinion may have been different.

More in general, how does one know what the views of an arbitrator were in a case? In my opinion, it is a misconception to state that 'arbitrator X has view Y' by referring to a unanimous arbitral award of a tribunal of three. The view expressed in the award is a view of the tribunal, not necessarily of arbitrator X. The misconception finds its origin in the unrestricted use of dissenting opinions as apparently advocated by the authors of the Nightingale Article. Actually, they seem to advocate the practice of mandatory dissent: as soon as an arbitrator disagrees with the majority, he or she should issue a dissenting opinion.

8. CONCLUSION: THE DEBATE ABOUT DISSENTING OPINIONS

My 2009 Article was limited to dissenting opinions:

- i. in *investment* arbitration; and
- ii. by arbitrators *appointed by a party*.

Based on a survey of awards and decisions in investment arbitration, I expressed concern about the *use* of dissenting opinions, and for that reason I advocated a moratorium on their use by party-appointed arbitrators in investment arbitration.

The limited scope of my proposal has escaped a number of commentators, including apparently the authors of the Nightingale Article. They also believe that my 'observance of the principle *nemine dissentiente* is a minority view within the arbitration community'.⁴¹ To that end, they refer to the report in Global Arbitration Review (GAR) of a debate held in London on 22 November 2011 between Peter Rees and Alan Redfern on the proposition: 'This House considers Dissenting Opinions in international arbitration to be unwelcome.' Relying on the GAR article, the authors state that 78 per cent of the audience disagreed with the proposition. It is interesting

to hear what actually happened at that debate from Alan Redfern himself, who wrote to me afterwards:

The debate on Tuesday evening, on the motion that 'This House considers Dissenting Opinions in international arbitration to be unwelcome', drew a large audience at the Chartered Institute of Arbitrators, but it was an entirely English audience, comprised mostly of arbitrators (including surveyors and engineers) whose experience was confined to domestic disputes.

Peter Rees QC, my opponent for the evening, cleverly turned the event into a debate about free speech: Tiananmen Square and all that, with a brilliant slide showing photographs of dictators – Hitler, Mussolini, Stalin, Gaddafi and Redfern, with extracts from writings in which they had expressed authoritative views, including Redfern – 'dissent is dangerous'.

Taken out of context like this, of course, there was only one result: 9 votes for the motion, 40 against. As I said to John Rushton, our Chairman for the evening: 'If that was a motion to suppress all dissent, I'd have voted against it myself!'⁴²

The Nightingale Article is brilliantly written. Yet, there is an elephant in the room. It does not give an explanation for the fact that 100 per cent of the separate opinions of party-appointed investment arbitrators have been issued by the arbitrator appointed by the party that has lost the case. This is Charles Brower's problem with 100 per cent.