



THE
AMERICAN
REVIEW OF
INTERNATIONAL
ARBITRATION



2006/Vol. 17 No. 4

Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration on Secretaries to International Arbitral Tribunals

International arbitral tribunals in large and complex disputes commonly appoint secretaries to assist them. The International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association have investigated and analyzed the appointment and the role of secretaries in international arbitrations.

To survey this trend of the appointment of arbitral secretaries, the Committees inquired of major international arbitral institutions and of individual international arbitrators. The Committees assessed whether and to what extent parties to arbitration participate in the appointment process and examined the efficacy of the secretary's appointment. The Joint Committee Report highlights the value of secretaries and the importance of transparency and party autonomy.

Readers are encouraged to share with us their experiences and ideas relating to secretaries in international arbitrations.

- Julie Bédard and Jill Teitel*

*Julie Bédard is a former member of the Committee on Arbitration and is a senior associate in the litigation and international arbitration group at Skadden, Arps, Slate, Meagher & Flom LLP and is based in its New York City office (JulieBedard@skadden.com). Jill Teitel is a member of the Arbitration Committee and the International Commercial Disputes Committee and is a senior associate in the litigation and arbitration department at Solomon Pearl Blum Heymann & Stich, LLP, also based in New York (jteitel@solpearl.com).

NEW YORK CITY BAR ASSOCIATION

**Joint Report of the International Commercial Disputes Committee and the
Committee on Arbitration on**

Secretaries to International Arbitral Tribunals

I.	INTRODUCTION	1
II.	EXISTING RULES AND PRACTICE	2
	A. Institutional Rules and Guidelines	2
	B. Survey of Arbitrators' Practices	10
III.	COMMITTEES' ASSESSMENT AND RECOMMENDATIONS	13
	A. <i>Intuitu Personae</i> Nature of the Arbitral Function	13
	B. Appropriate Use of a Secretary	15
	C. Professional Background of the Secretary	15
	D. The Parties' Consent and Participation	16
	E. Assessing Secretarial Costs	18
IV.	CONCLUSION	20

I. INTRODUCTION

It is common practice for international arbitration tribunals to appoint secretaries – in most instances, with the consent of all parties – in order to facilitate the smooth and expeditious functioning of large and complex arbitrations. Based on inquiries to international arbitral institutions, arbitrators and counsel, the type and degree of assistance from arbitral secretaries appear to vary as do the level of expertise and experience of the arbitral secretary. The arbitrators, who must review voluminous submissions, are often well served by an arbitral secretary, whose primary purpose is intended to provide help in organizing the proceedings.

In this report, the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association address uses (and abuses) of tribunal-appointed secretaries in international arbitration.¹ We examine the responsibilities of arbitral secretaries, which range from performing clerical tasks (such as organizing files and handling correspondence) to serving as a law clerk, whose duties may include legal research, document review, analysis of the parties' submissions and drafting awards. Those instances where arbitral secretaries may be involved in the deliberations of the tribunal and the drafting of awards give rise to particular debate. Given the *intuitu personae* ("in person") nature of the arbitral function, the international arbitration community continues to lack consensus on the proper role of arbitral secretaries. One especially contentious issue concerns whether the use of a secretary (particularly one who is active and involved in substantive factual and legal issues) may undermine the parties' right to select their arbitrators.

Our Committees believe that two fundamental principles should guide the use of arbitral secretaries, namely efficiency and consent. Arbitral tribunals and the parties may benefit from the assistance of a secretary – but transparency and consent of the process is critical. Part I of this Report provides an overview of the institutional rules concerning the appointment of a secretary. It also describes current arbitral practice concerning secretaries based upon the results of a survey our Committees have submitted to the International Chamber of Commerce ("ICC"), the International Center for Dispute Resolution ("ICDR"), the American Arbitration Association

¹ It is the understanding of both Committees that, currently, secretaries are rarely used in domestic arbitrations. Accordingly, this Report focuses on international arbitration.

("AAA"), the International Center for Settlement of Investment Disputes ("ICSID"), and the London Court of International Arbitration ("LCIA"). Additionally, we discuss the divergent outcome of interviews conducted with prominent international arbitrators and practitioners concerning the appointment and use of secretaries.

Part III offers the Committees' assessment and recommendations. It analyzes issues surrounding (a) the personal nature of the arbitral function; (b) why an arbitral tribunal may benefit from the assistance of a secretary; (c) the professional background of the secretary; (d) the parties' consent and control over the appointment of a secretary; (e) the application of the principles of independence and impartiality to the arbitral secretary; and (f) the assessment of the fees of the secretary. We conclude that a secretary can perform a useful and desirable function in international arbitration, provided that the tribunal discloses, and the parties consent to, both the appointment of and functions to be performed by the secretary. This Report provides a checklist of issues for the tribunal and the parties to consider in connection with the appointment of a secretary, including the tribunal's authority to make the appointment, the qualifications, independence and impartiality, scope of duties and compensation of the secretary. We suggest that arbitral tribunals seeking to appoint a secretary review with the parties the checklist of issues annexed to this report as Appendix A.

II. EXISTING RULES AND PRACTICE

A. Institutional Rules and Guidelines

Rules and regulations of arbitral institutions rarely contain specific provisions regarding the appointment or role of a secretary.² However, several institutions have developed policies and procedures, concerning the role of arbitral secretaries.

International Chamber of Commerce

The Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") are silent concerning the appointment of a secretary to an arbitral tribunal. However, in

² By contrast, the Swiss Rules of International Arbitration specifically provide for the appointment of a secretary by the arbitral tribunal, after consultation with the parties (Article 15.5).

1995, recognizing that many tribunals require the assistance of a secretary, the Secretariat of the ICC published a Note setting forth the ICC Court's policies and procedures on the subject (the "Note").³ The ICC provides this Note to parties and arbitrators at the outset of the arbitral proceedings.

The ICC Note states that the tribunal may appoint a secretary, but only upon the consent of all parties, and only after informing the parties of the identity of the secretary and the duties the secretary will perform.

The Note instructs that:

The duties of the administrative secretary must be strictly limited to *administrative tasks*. . . . Such person must not influence in any manner whatsoever the decisions of the Arbitral Tribunal.

In particular, the administrative secretary must not assume the functions of an arbitrator, notably by becoming involved in the decision-making process of the Tribunal or expressing opinions or conclusions with respect to the issues in dispute.⁴

The ICC apparently has constituted a working committee to review and, if appropriate, revise the Note.⁵ A revised Note has not yet been published.

Some commentators have criticized the ICC for taking a position at odds with party autonomy by proscribing secretaries for tasks that exceed administrative duties. A well-known Swiss arbitrator, Professor Pierre Lalive, harshly criticized the Note: "nothing, absolutely nothing justifies the Note from the Secretariat of the ICC Court on the administrative secretaries

³ 6 ICC Int'l Court of Arb. Bull. 77 (1995).

⁴ The Arbitration Center of Mexico ("CAM") has reproduced, almost verbatim, the ICC's Note for distribution to its arbitrators. See *Note from the Secretariat of the Arbitration Center of Mexico*. By contrast, some delegates at the third Biennial Colloquium on Arbitration and ADR organized by the Centre for International Legal Studies in Salzburg supported the use of secretaries by arbitral tribunals in substantive roles, such as reviewing case law, although on a limited basis. See Emilia Onyema, *The Role of the International Arbitral Tribunal Secretary*, 9 *Vindobona J. of Int'l Com. L. & Arb.* 99, 106 (2005).

⁵ Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 *Arb. Int'l* 147, 151 (2002).

when the parties and the arbitrators decide to use them."⁶

Although the ICC Note "strictly" limits the role of a secretary to administrative tasks, it does not define such duties other than to state what tasks the arbitral secretary is not permitted to perform, *i.e.*, that the secretary should not be involved in the decision-making progress. This proscription, however, is subject to differing interpretations. At what point does organization end and participation in substantive decision-making begin? Factual summaries may be considered organizational in nature, but may also have a potential to influence the decision-making process of the tribunal. Also, it would appear that if the secretary were to draft any portion of the award other than the procedural section, the secretary would exceed the permissible duties of an administrative assistant, as conceived by the ICC Secretariat. However, it is arguable that the secretary does not influence the arbitrators' decision if he or she drafts the award in accordance with the specific instructions of the tribunal.

A former Secretary General of the ICC Court has noted that, in practice, it is difficult for the ICC Court to verify whether arbitrator(s) abide by the limitations laid down in the Note. He reported that "[i]n at least one case, the [ICC] Court required a tribunal to replace a secretary when the person originally appointed was a well-known arbitrator and arbitration authority in his own right."⁷ The ICC does not keep statistics on the appointment of secretaries.

American Arbitration Association and International Center for Dispute Resolution

Neither the International Dispute Resolution Procedures of the ICDR (under the auspices of the AAA) nor the AAA's Commercial Arbitration Rules contain provisions concerning the appointment of a secretary to an arbitral tribunal.

The AAA's Code of Ethics for Arbitrators in Commercial Disputes provides some guidance on the topic. Canon V, which advises an arbitrator to "make decisions in a just,

⁶ Pierre Lalive, *Inquiétantes dérives de l'arbitrage CCI (sur un récent "Oukase" du Secrétariat de la Cour d'Arbitrage CCI)*, ASA Bulletin 4, 634-640 (1995). Eric Schwartz, then Secretary General of the ICC Court, has responded to this and other criticisms. (See Eric Schwartz, *On the Subject of Administrative Secretaries*, ASA Bulletin 1 (1996), 32-34). Professor Pierre Lalive restated his position in a subsequent article. See Pierre Lalive, *Un post-scriptum et quelques citations*, ASA Bulletin 1, 35-43 (1996).

⁷ See Schwartz, *supra* note 6, at 86.

independent and deliberate manner," provides in section C that "[a]n arbitrator should not delegate the duty to decide to any other person."⁸

However, Canon VI, while instructing an arbitrator to "be faithful to the relationship of trust and confidentiality inherent in that office," provides in section B that:

An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.⁹

The AAA Code of Ethics does not require arbitrators to obtain consent of the parties prior to engaging a secretary. The arbitrator simply must "inform" the parties. By allowing the arbitrator to "obtain help . . . in connection with reaching his or her decision," the AAA Code of Ethics can be interpreted to permit precisely what the ICC Note prohibits, namely, involvement by the secretary in the decision-making process.

Like the ICC, the ICDR does not keep statistics on the appointment of secretaries. As a matter of policy, in practice, it favors maximum involvement of the parties.

United Nations Commission on International Trade Law

The Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") also do not address the subject of the appointment of secretaries to an arbitral tribunal. However, the 1996 "Notes on Organizing Arbitral Proceedings" do provide some guidance ("UNCITRAL Notes"). Articles 26 and 27 of the UNCITRAL Notes state:

26. Administrative services might be secured by engaging a secretary of the Arbitral Tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the Arbitral Tribunal

27. To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the Arbitral Tribunal

⁸ *AAA Code of Ethics for Arbitrators in Commercial Disputes Canon V* (1998), available at <http://www.adr.org/sp.asp?id=21958>.

⁹ *Id.*

(e.g. collecting case law or published commentaries on legal issues defined by the Arbitral Tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the Arbitral Tribunal.¹⁰

Further, Article 82 of the UNCITRAL Notes, "Arrangements for a record of the hearings," describes a procedure which allows tribunals "to leave to [the secretary, if one has been appointed], the preparation of a summary record."¹¹

While both the ICC Note and the AAA Code of Ethics provide that the duty to decide the dispute may never be delegated to a secretary, they diverge on the permissible duties that may be delegated to the secretary. The UNCITRAL Notes reflect no position on the duties and responsibilities of the secretary, but do suggest that the proper focus of analysis is the parties' informed consent.

International Centre for Settlement of Investment Disputes

In ICSID arbitrations, the Secretary-General will appoint a secretary to the arbitral tribunal who will serve as a staff member of the Secretariat. Under Regulation 25, the ICSID Secretary must:

- (a) represent the Secretary-General and may perform all functions assigned to the Secretary General by these Regulations or the Rules with regard to individual proceedings or assigned to the Secretary by the Convention, and delegated by the Secretary General to the Secretary;
- (b) be the channel through which the parties may request particular services from the Centre;
- (c) keep summary minutes of hearings, unless the parties agree with the

¹⁰ See UNCITRAL *Notes on Organizing Arbitral Proceedings* ¶¶ 26-27 (1996), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

¹¹ *Id.* ¶ 82.

Commission, Tribunal or Committee on another manner of keeping the record of the hearings; and

(d) perform other functions with respect to the proceeding at the request of the President of the Commission, Tribunal or Committee, or at the direction of the Secretary-General.¹²

Although ICSID secretaries represent the Secretary-General and generally act as a liaison between the arbitral institution and the parties, they also may "perform other functions with respect to the proceeding at the request of the . . . Tribunal. . . ." In theory, this allows the arbitral tribunal considerable latitude to delegate any number of tasks to the secretary. In practice, however, we are unaware of ICSID staff members performing duties beyond case management and the drafting of the section of the award setting out the procedural history of the case.

In addition to the staff member of the Secretariat assigned to the case, ICSID tribunals regularly appoint secretaries to assist them directly. The ICSID Rules are silent on the scope of such assistants' duties, thus leaving unaddressed the questions discussed in this Report.

London Court of International Arbitration

Secretaries are regularly appointed in complex commercial cases held under the auspices of the LCIA. When a tribunal advises the LCIA that it wishes to appoint a secretary, the LCIA administrative body seeks the parties' approval for such appointment. The LCIA requires that the secretary complete a statement of independence similar to that completed by LCIA arbitrators. The secretary must also agree to an hourly rate for his or her services.

The LCIA rules do not formally prescribe the secretaries' duties and responsibilities. However, the LCIA typically provides the following instructions to secretaries prior to their appointment:

The Secretary to the Tribunal is concerned with the internal, day-to-day workings of the Tribunal, whilst the institution is concerned with the external relationship

¹² See ICSID Convention, Regulations & Rules, *Administrative and Financial Regulation 25* (2005), available at <http://www.worldbank.org/icsid/basicdoc/partC-chap05.htm#r25>. See Antonio R. Parra, *The Role of the ICSID Secretariat in the Administration of Arbitration Proceedings under the ICSID Convention*, Foreign Investment L. J. 85 (1998).

between the Tribunal and the parties. The duties of the Secretary should, therefore, neither conflict with those provided by the LCIA Secretariat, nor, of course, constitute any delegation of the Tribunal's authority.

Below is a sample statement regarding the role of the secretary to be submitted to the parties at the outset of the arbitration, which was prepared by a senior LCIA arbitrator wishing to remain anonymous:

The primary function of a Secretary (legal assistant) is to assist the members of the Tribunal by providing both administrative support (not duplicative of the LCIA) and research capabilities. Examples of the former might include remaining aware of and managing the correspondence, submissions and evidence produced by the parties in order to be able to assist the Tribunal as may be required ("document handling"). An example of the latter would be directing the members of the Tribunal to submissions or items of evidence that they consider relevant to their discussions, or identifying in the record all evidence on a certain point, as well as researching, at the express request of the Tribunal, points of law. The work of a Tribunal and its members can be rendered more efficient by a legal assistant.

Of course, a Secretary to the Tribunal is not an arbitrator. He or she does not participate in the Tribunal's deliberations or decision-making. It is perhaps worth noting, in addition, that the functions and tasks of a Secretary are not those of the Secretariat of the arbitral institution (the LCIA in the present case). On the contrary, by becoming familiar with the procedure and substance of a particular dispute, a secretary complements, not duplicates, the support available to Tribunal members and parties from either the LCIA or from the arbitrators' own professional office staffs (if any). All of which, as mentioned, with a view to rendering the arbitral process more efficient and enabling the arbitrators to concentrate on issues going to the conduct of the arbitration and the merits of the parties' dispute.

World Trade Organization

The World Trade Organization ("WTO") has a dispute settlement mechanism in place for countries to resolve trade disputes that cedes considerable control over the proceedings to on-staff attorneys, commonly referred to as *legal officers*.¹³ The dispute resolution arm of the WTO follows principles and rules set forth in the Uruguay Round Agreement. The dispute

¹³ The dispute settlement rules for the WTO can be found on their website at: www.wto.org.

resolution panel is comprised of experts from different countries who are appointed by the states-parties to the dispute (usually drawn from the Permanent Mission Staff in Geneva) or by the WTO Director-General, if the parties cannot mutually agree on the members of the panel.

According to a discussion held in an on-line forum of Transnational Dispute Management,¹⁴ WTO legal officers have broad responsibilities and play a significant role in framing and deciding substantive and procedural issues facing a WTO panel. For example, a legal officer usually has the following responsibilities: (a) to choose the panelists if the parties are not be able to reach agreement by themselves; (b) to prepare a summary of factual and legal issues to be addressed by the parties, which summary normally is discussed at the panel's first internal meeting; (c) to survey relevant case law for the panel members; (d) to prepare a set of questions from the panel to the parties' experts or the parties themselves; (e) to draft the award and participate in internal meetings between the panel members; and (f) to participate in the hearings (without directly addressing questions to the parties).

The Use of Arbitral Secretaries in Switzerland

In Switzerland, the use of arbitral secretaries follows a well-established tradition, both in domestic and international arbitration.

The 1969 Swiss Intercantonal Arbitration Convention, which governs domestic arbitrations, specifically provides that the arbitral tribunal may designate a secretary with the consent of the parties (Article 15(1)). It further provides that the grounds to challenge arbitrators also apply to secretaries.¹⁵

The recently modified Swiss Rules of International Arbitration, adopted by six

¹⁴ www.transnational-dispute-management.com is a well-known web site in the field of international commercial arbitration.

¹⁵ See Article 15 (2).

Swiss chambers of commerce and industry providing arbitration services provides for the appointment of a secretary by the arbitral tribunal after consultation with the parties.¹⁶ While the arbitrators have the power to appoint a secretary over a party's objection, in practice, tribunals usually do not appoint secretaries without the parties' consent. The Swiss Rules of International Arbitration further require that a secretary be impartial and independent.

Neither the Swiss Inter cantonal Arbitration Convention nor the Swiss Rules of International Arbitration prescribe the duties of a secretary. However, it is generally recognized that the duties of a secretary must be limited to administrative and/or clerical tasks and that a secretary may not exercise any influence on the decisions of the arbitral tribunal.¹⁷ In practice, arbitral secretaries attend to correspondence with the parties as well as the scheduling of meetings between parties and arbitrators or among the members of the tribunal. They may also organize the evidentiary record, perform legal research, take part in the deliberations of the tribunal, and contribute to the drafting of procedural orders and arbitral awards.¹⁸

B. Survey of Arbitrators' Practices

In an attempt to understand more fully the use of secretaries by arbitral tribunals, we conducted interviews with twenty-two prominent international arbitrators and practitioners in North America, Latin America, Europe, and Asia.

Several patterns emerging from the survey are summarized below. The numbers in brackets indicate the number of interviewed arbitrators who affirmed the attendant proposition. Arbitrators who did not affirm particular statements either denied those statements or did not comment on them.

- The chair of the tribunal, who often has the primary responsibility for managing the procedural aspects of the arbitration and drafting the award, usually

¹⁶ See Article 15 (5).

¹⁷ See Pierre Lalive, Jean-Francois Poudret & Claude Reymond, *Le droit de l'arbitrage interne et international en Suisse*, at 95-96 (1989); Tobias Zuberbuehler, Christoph Mueller & Philipp Habegger (Eds), *Swiss Rules of International Arbitration – Commentary*, N. 19-23 ad Article 15 (2005).

¹⁸ See Lalive, Poudret & Reymond, *supra* note 19, at 96.

takes the initiative in raising the issue of the appointment of a secretary [13]. In large and complex arbitrations, this step usually occurs at the beginning of the proceedings, often prior to the scheduling conference [9].

- Swiss arbitrators tend to appoint secretaries more often than do arbitrators of other nationalities [2]. As a general rule, American arbitrators see less of a need for secretaries than their European counterparts [3].
- The chair of the tribunal, usually requests the consent of the parties prior to the appointment of the secretary [12]. However, some arbitrators have disclosed the fact that secretaries are often appointed without party consent [2]. One interviewee mentioned having appointed a secretary over the objection of the parties, while another stated that party participation in the decision to appoint a secretary is usually minimal. [2]
- The identity of the secretary is most often disclosed [18], and the chair of the tribunal often provides the résumé of the prospective secretary to the parties [3]. Some arbitrators, however, prefer to appoint the secretary unilaterally and do not provide the parties with the prospective secretary's résumé [5].
- The chair of the tribunal, in the absence of pre-established rules from the relevant arbitral institution, raises with the parties the issue of the compensation of the secretary [11]. Typically, parties pay secretaries a modest hourly wage, in addition to the arbitrators' fees [8]. If the parties refuse to pay the secretaries' fee, Arbitrators will sometimes deduct such compensation from their own fees [3]. The secretary carries out duties that the chair would otherwise undertake at a higher hourly rate [2].
- Some chairs discuss the duties and responsibilities of the secretary with the parties [2]. Most of the time the parties are not aware of the precise scope of the secretaries' duties and responsibilities [6].
- The secretary works mainly with the chair of the Tribunal, who defines the

duties and responsibilities of the secretary [13].

- The duties of the secretaries are primarily of an administrative nature and include the organization of the documents in the file, the drafting of letters regarding scheduling and procedural matters, and the preparation and minutes of hearings [14]. The duties of secretaries may be more significant in *ad hoc* arbitrations [2].

- It is common for secretaries to draft certain portions of awards, which the chair considers to be "descriptive" or "non-substantive," namely, the procedural history of the arbitration, the description of the parties, and sometimes also the summary of the parties' contentions [11]. Some arbitrators, however, refuse to assign any drafting responsibilities to the secretary [2].

- In some cases, secretaries observe and take notes during the deliberations [7]. However, it is not uncommon for arbitrators to exclude secretaries from the deliberations entirely [3].

- In some cases, secretaries prepare a first draft of the award in its entirety. The chair and the co-arbitrators then review and revise the draft award [3].

- Some chairs regularly use a junior associate or research assistant to perform the tasks normally associated with a secretary (as discussed above), without disclosing this matter to the parties [2].

- Some of the arbitrators raised the concern that allowing arbitrators to appoint secretaries enables them to accept more appointments, which may create a concentration of arbitral appointments in the hands of fewer arbitrators [2].

Members of our Committees have had both positive and negative experiences with the use of secretaries. One member, in his capacity as party representative, voiced concerns regarding *ex parte* communications between one of the parties and the secretary. Several members of our Committees, in their capacity as arbitrators, expressed the view that the appointment of secretaries is useful and efficient; however, one member responded that the

arbitral process does not benefit from the appointment of secretaries.

III. COMMITTEES' ASSESSMENT AND RECOMMENDATIONS

A. *Intuitu Personae* Nature of the Arbitral Function

The role of the arbitrator is characterized by its *intuitu personae* nature. The appointment of a secretary may be reconciled with this fundamental principle as long as the arbitral tribunal exercises both close supervision and has ultimate authority over the decision making process.

Arguably the most important difference between arbitration and litigation is that the parties (or the arbitral institution the parties have selected) choose the individual(s) who will adjudicate the dispute. Simply stated, parties rely on the notion that their chosen arbitrator(s) will personally review and rule on their claims.¹⁹ The role of a secretary potentially challenges this assumption. It can reasonably be inferred that the greater a secretary's involvement in the non-administrative tasks of the tribunal, the more likely it is that he or she may affect the decision-making process of the tribunal.²⁰ However, as Alan Redfern and Martin Hunter wrote, "[t]he task [of the secretary] is to assist the Arbitral Tribunal, not to usurp its function."²¹

The Iran-United States Claims Tribunal offers a "notorious example of controversy" regarding the use of secretaries in arbitration.²² Iran's counsel challenged Tribunal Chairman Mr. Gaetano Arangio-Ruiz for his "alleged failure to perform his arbitral functions."²³ It was argued that due to the Chairman's limited presence at the tribunal proceedings, he could not possibly have adequately studied the record and instead must have unduly relied on a

¹⁹ See, e.g., Eric Schwartz, *The Rights and Duties of ICC Arbitrators*, ICC Int'l Ct. of Arb. Bull. (Special Supplement, The Status of the Arbitrator), at 86 (referring to a "broad international consensus that the arbitrator's mandate is a personal one and is not to be delegated to another person").

²⁰ One commentator noted that "a young lawyer's instinct to express an opinion on a legal issue may require no particular incentive." Partasides, *supra* note 5 at 150. See also, Thomas Clay, *Le Secrétaire Arbitral*, 4 *Revue de l'arbitrage* 931, at 932 and 948 (2005).

²¹ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 225 (4th ed. 2004).

²² Partasides, *supra* note 5, at 149.

²³ *Id.*

condensed record prepared by his legal assistant.²⁴ Counsel for Iran pointed out that this circumstance "would defeat the parties' choice of an arbitrator on the basis of his personal qualifications."²⁵ The Claims Tribunal Appointing Authority ultimately rejected the challenge, but this case illustrates the problems that may arise following the appointment of an arbitral secretary.

A French case offers an example of challenge to an award based on the involvement of a secretary. In Campagnie Honeywell Bull S.A. v. Computación Bull de Venezuela,²⁶ the losing party sought to set aside the award based on an alleged breach of due process and lack of equal treatment purportedly caused by the presence of the secretary at an oral hearing and his alleged interference at those proceedings. The *Cour d'Appel* of Paris dismissed the application and held that the arbitral tribunal was entitled to appoint a secretary and that the party seeking to challenge the award had failed to establish how the secretary had interfered in the proceedings.

These cases above show that it is possible that when arbitrators delegate substantive legal responsibilities to an arbitral secretary their decision making may be unduly influenced by the secretary. Even if that is not in fact the case, parties may feel that their dispute is not being accorded due attention by the chosen arbitrators as a result of a secretary's substantial participation.²⁷ As such, in hindsight, parties may reconsider their choice to arbitrate their dispute by their chosen arbitrators. Indeed, inappropriate use of a secretary may occasion challenges to arbitrators, as illustrated by the challenge of one of the members of the Iran-United States Claims Tribunal, or by making an application to set aside the award, as illustrated by the French case above. On the other hand, parties and arbitral institutions select arbitrators for their

²⁴ *See id.*

²⁵ *See id.* (quoting 27 *Iran-United States Claims Tribunal Reports* 291-336 (1992)).

²⁶ Decision of the *Cour d'Appel* of Paris, June 21, 1990, 1 *Revue de l'arbitrage* 96, at 100 (1991). *See also Fouchard, Gaillard, Goldman on International Commercial Arbitration* 1250 (1999).

²⁷ We have been aware of a case where the secretary communicated about the merits of a case with each of the parties separately and without the arbitrator being present. Such communications should not be permitted since they constitute *ex parte* communications (which the arbitrators themselves generally should not have). In general, direct communication between the secretary and the parties are not supported by our Committees, however, telephone conferences concerning the scheduling of arbitral conferences and briefing schedules may be acceptable.

experience and good judgment. One would expect those arbitrators to exercise that same good judgment in their appointment and supervision of a secretary. Furthermore, many of the concerns that arise in connection with the appointment of a secretary can be addressed through appropriate disclosure and party consent.

B. Appropriate Use of a Secretary

An arbitral tribunal may wish to appoint a secretary, taking into consideration: (1) the number of parties involved; (2) the number of claims and counterclaims alleged; (3) the estimated number of submissions, witness statements, and expert reports; and (4) the volume of documentary evidence.

Arbitrators, sometimes, without seeking official appointment of a secretary, use a research assistant or colleague from their law firm or law school to assist with the arbitration on a periodic basis. For some arbitrators (consider, for example, the retired law professor who works from home), the use of an assistant may be necessary to handle certain administrative tasks. For other arbitrators, such as an attorney at a law firm, support services available within the firm may suffice, thus avoiding the need for a secretary, at least for ministerial tasks. Although the formal appointment of a secretary may not be necessary (in the case of a small case with only ministerial tasks assigned), arbitrators should fully disclose to parties their use of such assistance when they enlist the help of a research assistant or a junior associate and disclose the nature of the secretarial tasks to the parties, as described below.

C. Professional Background of the Secretary

An arbitrator should appoint a secretary whom he or she believes is qualified for the position: suitably trained, free from conflicts of interest, and with the ability to act with the same independence and impartiality as members of the arbitral tribunal.

Depending on the nature of the tasks delegated to the secretary, an arbitrator must also assess the level of skills required of the secretary and ascertain whether the secretary is free from conflicts, holding the secretary to the same standards that the arbitrator holds himself or herself. If the secretary is responsible solely for clerical tasks, then someone with secretarial

training alone is sufficient. However, more substantive duties, such as performing legal research and drafting awards, require the skills of a lawyer. The arbitral tribunal should determine which duties the secretary will perform and, on the basis of these duties, assess whether an administrative assistant or attorney will be needed to serve as secretary.

Some arbitrators appoint relatively inexperienced attorneys as their secretary. By contrast, other arbitrators seek a seasoned attorney with significant experience in the practice of international arbitration. In the latter case, the secretary brings substantial expertise to the arbitration proceedings, leading the ICC Court in one reported instance to require an arbitral tribunal "to replace a secretary when the person originally appointed was a well-known arbitrator and arbitration authority in his own right."²⁸ The ICC Court was concerned that the secretary would be acting as a "fourth arbitrator" whose involvement would not be "strictly limited to administrative tasks."²⁹ Thus, while the appointment of an experienced attorney or arbitrator may be acceptable under certain institutional rules, the arbitral tribunal should consider whether the experience of a proposed secretary is commensurate to the risk of actual or perceived improper influence over the tribunal.

D. The Parties' Consent and Participation

After selecting the secretary, the arbitral tribunal or the arbitral institution should propose the secretary to the parties. One commentator has suggested preparing and disclosing to the parties the following Terms of Appointment of the secretary setting forth the duties and responsibilities of the secretary:

The general terms of appointment would include a clear description of the tasks the Tribunal secretary would be expected to perform with a provision encompassing all relevant administrative duties, her remuneration or how it would be calculated and when payable. The same principles in calculating the arbitrators' fees may be applied. The secretary's fees may therefore be a lump sum, a certain agreed amount per hour or per day. The amount payable for other expenses, for example transportation costs, should equally be agreed. A clause

²⁸ See Partasides, *supra* note 5, at 149 (alteration in original) (citing Schwartz, *The Rights and Duties of ICC Arbitrators*, at 86).

²⁹ *Id.*

regarding confidentiality issues must be included in the terms of appointment.³⁰

A difficult issue concerns whether the final decision to appoint a secretary and to define his or her responsibilities should be entirely within the discretion of the arbitral tribunal. Clearly, the appointment of a secretary should not turn into a lengthy side proceeding in which one of the parties challenges the tribunal's choice of secretary. On the other hand, the parties should not be prevented from voicing their concerns regarding the choice of the secretary or the scope of the secretary's duties and responsibilities. Ultimately, the integrity of the arbitral process is better safeguarded by preserving the parties' right to participate in the appointment of the secretary, including the determination of the secretary's duties. The parties can refer to the list of possible duties set forth in Appendix A.

Arbitrators may also wish to preserve party anonymity in seeking the parties' consent to the appointment of a secretary due to the possibility of arbitrator prejudice against a party who objected to his or her appointment of a secretary. Thus, for example, the chair of the tribunal could invite the parties to give a joint response, thereby allowing one party to object to the appointment of a secretary without any apprehension about voicing such opposition. In certain cases, parties have been invited to communicate their response to the arbitral institution instead of directly contacting the arbitral tribunal in order to avoid prejudice to the objecting party.

Following the secretary's appointment, and with a view toward ensuring full disclosure, it would be good practice for the secretary to record and identify the tasks and time spent discharging these duties to the tribunal and to the arbitral institution. If that practice is followed, the arbitrators should pay careful attention to keeping accurate time records showing the secretary's time spent on the particular matter. The arbitrators could then disseminate the time records to the parties if he or she so desires, which would contribute to the transparency of the arbitration.

³⁰ Onyema, *supra* note 3, at 103-04.

E. Assessing Secretarial Costs

Given that parties already have to pay the fees of the arbitrators and of any arbitral institution used, to the extent that the use of secretaries further increases the costs of arbitration, this may impact on the desirability of having secretaries. In other words, if secretaries become a permanent fixture of large international arbitrations, the concern arises that the parties will be asked to provide separate compensation for the secretary, in addition to the fees of the arbitrator and of the institution.

In ICC arbitrations, the general rule is that the arbitral tribunal bears the responsibility of paying the secretary's fees.³¹ Many arbitrators follow this rule in ICC arbitrations and pay the secretary from the arbitrators' fees (which are calculated by reference to the amount in dispute). Certain arbitrators, however, prefer to obtain the parties' consent to handle the fees of the secretary as a tribunal "expense." As a result, the tribunal does not absorb the costs of the secretary.³²

The ICC recently reiterated its commitment to reducing the cost of the dispute resolution process with its creation of the ICC Task Force on Reducing Time and Costs in Arbitration which resulted in the recent report of the ICC Commission on Arbitration on Techniques for Controlling Time and Costs in Arbitration (August 2007). The dedication of the ICC to reducing costs in arbitration could have the effect of encouraging secretarial appointments. The ICC encourages parties to an arbitration to "[c]onsider whether or not an administrative secretary to the arbitral tribunal would assist in reducing time and costs." (Article 27). The report refers the parties to the Note of the Secretariat of the ICC International Court of Arbitration on the Appointment of Administrative Secretaries by arbitral tribunals, discussed in Part I of this Report for guidance concerning the duties of the secretary, the secretary's independence, the tribunal's responsibility for the secretary's work, and the basis for the payment of the secretary.

Under the Swiss Rules of International Arbitration and the LCIA Rules, the

³¹ See *Note From the Secretariat of the ICC Court*, at 77.

³² See Yves Derains & Eric A. Schwartz, *A Guide to the New ICC Rules of Arbitration* at 335 (1998).

secretary's fees are to be paid in addition to the fees of the arbitral tribunal, similar to the other expenses of the arbitrators.³³

At a seminar on *International Business Litigation and Arbitration* held at the Practising Law Institute in New York City on March 27 and 28, 2006, discussion regarding the appointment of secretaries focused in part on the issue of the secretary's fees. A representative of the LCIA stressed that there should be no duplication of work as amongst the secretary, the tribunal and the institution, which would lead to payment for the same service twice. It was further noted that appointment as a secretary is an opportunity for the chosen individual and that accordingly, secretaries perhaps should not charge for their services. Another view expressed was that the secretary's fees should be deducted from the fees of the arbitrators.

Our Committees have concluded that the greater portion of secretarial fees is not duplicative of arbitrator fees and that secretarial fees should reduce rather than increase overall parties' costs. Work performed by the secretary at a lower rate than most arbitrators' fees is work that otherwise presumably would need to be performed by the arbitrators.³⁴ When arbitrators' fees are calculated based on an hourly rate, appointing a secretary should reduce the costs of arbitration by reducing the time arbitrators spend on clerical and any other matters delegated to the secretary. Thus, even allowing for the necessary overlap created by the arbitrators' supervision of the secretary, what might appear to be an additional expense may in fact reduce the overall arbitration costs.

³³ See Article 38 (c) of the Swiss Rules of International Arbitration; Article 28 of the LCIA Rules. See also Zuberbuehler, Mueller & Habegger, *supra* note 17, at N. 23 ad Article 15 (2005).

³⁴ See Partasides, *supra* note 7, at 161.

IV. CONCLUSION

The proper use of secretaries in complex international arbitrations increases the efficiency of arbitration and thereby benefits both arbitrators and parties. The secretary, by assuming administrative and in some instances more substantive duties, can reduce the workload of the arbitral tribunal allowing it to focus on the substantive issues in the case. There is a concern that secretaries permitted substantial involvement may exercise undue influence over the arbitral tribunal and affect the disposition. This concern is best addressed by disclosure, transparency and informed consent of the parties.

APPENDIX A

CHECKLIST OF ISSUES PROSPECTIVE APPOINTMENT OF A SECRETARY

Tribunal Authority to Appoint Secretary

- Arbitration agreement
- Arbitration rules
- Arbitration law at place of arbitration

Qualifications

- Legal
- Administrative
- Experience as a secretary

Independence and Impartiality

- Conflicts of interest
- Ability to act with the same independence and impartiality as the arbitrator(s)

Administrative/Clerical Duties

- Coordinating and updating the arbitral tribunal's diary
- Coordinating correspondence and the parties' submissions among the arbitrators
- Coordinating and handling accounting and financial matters related to the arbitration, including opening and managing a bank account for the tribunal (in *ad hoc* arbitrations)
- Keeping time during the hearings
- Arranging meetings and conference calls between the parties and/or the arbitrators
- Preparing minutes of meetings and conference calls
- Reserving meeting and hearing rooms
- Arranging visas, hotel reservations, flights and other transportation for members of the tribunal
- Coordinating transcription services
- Coordinating interpretation services
- Coordinating the signature, issuance and filing of the award

Duties With Respect to the Conduct of Arbitration

- Drafting letters regarding procedural and administrative matters
- Attending case management meetings
- Drafting procedural orders
- Attending procedural and evidentiary hearings

Duties With Respect to Substance of Parties' Submissions and Arbitral Award

- Preparing summaries of the parties' submissions
- Reviewing translations and provide interpretation assistance
- Reviewing legal authorities submitted by parties or conducting such other research as tribunal deems appropriate
- Attending or participating in conferences or deliberations with the arbitrators
- Drafting interim or final awards, in whole or in part, including:
 - procedural history
 - description of the parties
 - facts
 - summary of parties' submissions
 - analysis
 - disposition

Compensation

*Committee on International
Commercial Disputes*

Robert H. Smit, Chair
Janet M. Whittaker, Secretary

Gerald Aksen *	Richard N. Papper
Jeffrey A. Barist	John V. H. Pierce
Mark D. Beckett	Dr. Dietmar W. Prager
Professor George A. Bermann *	Steven H. Reisberg
Lorraine M. Brennan	James M. Rhodes *
William J. T. Brown	Rafael Ribeiro
James H. Carter *	Jeffrey A. Rosenthal
Tai-Heng Cheng	Arthur W. Rovine *
Robert B. Davidson *	Claudia T. Salomon
Sheldon H. Elsen *	Ank A. Santens
Louis Epstein	Lauri W. Sawyer
Helena Tavares Erickson	Kathleen M. Scanlon
Barry H. Garfinkel *	Josefa Sicard-Mirabal
Karl Geercken	Professor Linda J. Silberman
Steven A. Hammond	Felix Sotomayor
Louis B. Kimmelman	Edna R. Sussman
Judge John G. Koeltl *	Jill H. Teitel *
Torsten M. Kracht	Professor Louise Ellen Teitz
David Lindsey	Misha Vanyo
Luis Martinez	Maria R. Vicien-Milburn
Carroll E. Neesemann	Vincent J. Vitkowsky
Timothy G. Nelson*	Henry S. Weisburg
Lawrence W. Newman *	Joseph P. Zammit
Joseph L. Noga	David Zaslowsky *

Committee on Arbitration

Nancy Nelson, Chair
David Wenger, Secretary

Jacob Aschkenasy
Pieter H.F. Bekker
Ethan A. Brecher
Tai-Heng Cheng
Elizabeth R. Clancy *
Louise E. Dembeck
Joseph H. Einstein *
Erin Gleason Alvarez
Marc Joel Goldstein
Grant Aram Hanessian

William L. Kandel *
Dana MacGrath
Christopher M. Mason *
Richard L. Mattiaccio *
Charles J. Moxley
Sandra K. Partridge
James M. Rhodes *
David E. Robbins
Kathleen A. Roberts
Jill H. Teitel *