Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard and Gordon E Kaiser

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Publisher's Note

Global Arbitration Review is delighted to publish this new volume, *The Guide to Challenging and Enforcing Arbitration Awards*.

For those unfamiliar with Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and a series of more in-depth books and reviews, and also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial journal of international arbitration, sometimes we spot gaps in the literature earlier than other publishers. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters has increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Contents

Editor's Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – i.e., efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in approximately 160 countries. When enforcement against a sovereign state is at issue, the ICSID Convention of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 161.

Awards used to be honoured

A decade ago, international corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily - of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2018, *Global Arbitration Review*'s daily news reports contained literally hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement.

A sprinkling of last year's headlines on the subject are illustrative:

- 'Well known' arbitrator sees award set aside in London
- Gazprom challenges gas pricing award in Sweden
- ICC award set aside in Paris in Russia–Ukrainian dispute
- Yukos bankruptcy denied recognition in the Netherlands
- Award against Zimbabwe upheld after eight years
- Malaysia to challenge multibillion-dollar 1MBD settlement
- Uzbekistan escapes Swiss enforcement bid
- India wins leave to challenge award on home turf

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially

since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, last summer I raised the possibility of doing a book on the subject with David Samuels (*Global Arbitration Review*'s publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said in a report 35 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide is structured to include, in Part I, coverage of general matters that will always need to be considered by parties, wherever situated, when faced with the need to enforce or to challenge an award. In this first edition, the 13 chapters in Part I deal with subjects that include (1) initial strategic considerations in relation to prospective proceedings, (2) how best to achieve an enforceable award, (3) challenges generally, (4) a variety of specific types of challenges, (5) enforcement generally, (6) the enforcement of interim measures, (7) how to prevent asset stripping, (8) grounds to refuse enforcement, and (9) the special case of ICSID awards.

Part II of the book is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This first edition includes reports on 29 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 35 questions. All relate to essential, practical information on the local approach and requirements relating to challenging or seeking to enforce awards in each jurisdiction. Obviously, the answers to a common set of questions will provide readers

with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

Through this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors, colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach with chapters on China, Saudi Arabia, Turkey and Venezuela.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this first edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

April 2019

London

Part I

Issues relating to Challenging and Enforcing Arbitration Awards

7

Awards: Challenges based on misuse of tribunal secretaries

Chloe Carswell and Lucy Winnington-Ingram[1]

In a method of dispute resolution that is always based on a consent agreement between the parties,[2] and where the persons empowered to determine the dispute are typically party-appointed, the role of the tribunal secretary in the arbitral process can be problematic. Procedural ambiguity and a perceived lack of transparency have given rise to challenges both to arbitrators and to arbitration awards. For many, these threaten to undermine the legitimacy of international arbitration and engender concerns around the enforceability of awards.

The 'fourth arbitrator'

In 2002, the *Journal of International Arbitration* published Constantine Partasides' seminal article 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration'.[3] Describing the unease developing around the use, or misuse, of tribunal secretaries almost two decades ago, Mr Partasides noted that:

> *[a] concern is growing in the world of arbitration at what is perceived to be the excessive role of some of these assistants, known commonly as secretaries to tribunals. The term the 'fourth arbitrator' alludes to this concern, rather than to a state of affairs that is presently believed to exist. For, whether justified or not, such a concern can only damage the legitimacy of the arbitral process and deserves to be addressed.*[4]

1 Chloe Carswell is a partner and Lucy Winnington-Ingram is an associate at Reed Smith LLP.

2 C Schreuer, 'Consent to Arbitration', in P Muchlinski, et al (editors), *The Oxford Handbook of International Investment Law* (2008), p. 1.

3 C Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration', 2002(18) *Journal of International Arbitration*, p. 147.

4 id., pp. 147 and 148.

Since the publication of this article, the role and functions of tribunal secretaries in international arbitration have come under increasing scrutiny, with a number of well-known challenges to awards and arbitrators, and increasing academic commentary on the subject. In response to the international arbitration community's mounting concerns, arbitral institutions have also taken steps to codify the precise framework for the use of tribunal secretaries.

Challenges to arbitration awards

Compagnie Honeywell Bull SA v. Computacion Bull de Venezuela CA

One of the first known challenges to an award based (in part) on the actions of a tribunal secretary is recorded in the 1990 Paris Court of Appeal Decision in *Compagnie Honeywell Bull SA v. Computacion Bull de Venezuela CA*,[5] well before the concept of the 'fourth arbitrator' was first described by Mr Partasides.

In an appeal to set aside an International Chamber of Commerce (ICC) award, the appellant, Honeywell, alleged that the tribunal secretary had 'interfered' during the two-day hearing on the dispute.[6] In dismissing this element of the complaint, the Paris Court of Appeal noted that the tribunal was permitted to appoint a tribunal secretary and Honeywell had 'not explained how he would have interfered in the proceedings in circumstances which would be more prejudicial to Bull than to its opponent'.[7]

Sonatrach v. Statoil

In the ICC arbitration between Statoil and the Algerian state oil company (Sonatrach), the scope of the tribunal secretary's role was expressly agreed by the parties. The question of whether the tribunal secretary had exceeded that scope was one of the grounds of Sonatrach's subsequent challenge of the award under Section 68 of the Arbitration Act 1996 (AA 1996).[8]

Sonatrach sought to set aside the award, *inter alia*, on the ground that the tribunal improperly delegated its authority to the tribunal secretary, and impermissibly allowed her to participate in its deliberations. In its application, Sonatrach alleged that the tribunal secretary had exceeded her agreed remit by producing three notes for the tribunal on substantive matters.[9] It was asserted that this fell outside the agreed scope of the tribunal secretary's role, which had been set out in a letter to the parties (and thereafter confirmed by the parties) as follows:

> *The status of the Administrative Secretary will only consist in assisting the Tribunal and its Chairman in the administrative tasks for the proceedings, the organization of the hearings and the preparation of documents that may be useful for the decision. In no way the Administrative Secretary will have the right to participate in the decision.*[10]

5 *Compagnie Honeywell Bull S.A. v. Computacion Bull de Venezuela C.A.*, Paris Court of Appeal [PCA], 21 June 1990, 1991(1) Rev. Arb. 96 (unofficial translation).

6 id., p. 100.

7 ibid.

8 *Sonatrach v. Statoil* [2014] EWHC 875 (Comm).

9 id., 48.

10 id., 47.

The tribunal refused to produce the three notes to Sonatrach on the basis that to do so would violate the secrecy of the tribunal's deliberations.[11] This reasoning gave rise to the allegation by Sonatrach that the tribunal secretary must accordingly have participated in the tribunal's deliberations, thus exceeding her agreed remit.[12]

Mr Justice Flaux held that there was no inconsistency between the chairman's reference to the secrecy of deliberations and the tribunal secretary not exceeding the agreed remit: the tribunal had not said that the tribunal secretary participated in the tribunal's deliberations, only that the notes formed part of those deliberations.[13] Flaux J accordingly dismissed this ground of challenge, noting that it was 'a very serious allegation which is completely without merit and which should never have been made'.[14]

The Yukos set-aside proceedings

A more fully articulated, and better known, challenge to an arbitral award based on the involvement of a tribunal secretary is Russia's application to the District Court of The Hague[15] to set aside the tribunal's awards in the *Yukos* proceedings.[16]

Russia sought to set aside the awards, *inter alia*, on the ground that the arbitrators did not personally fulfil their mandate but instead delegated their adjudicative function[17] to an 'assistant to the Tribunal',[18] Mr Valasek, and that the tribunal was irregularly composed.[19]

Acknowledging that the position of a tribunal secretary should be distinguished from that of an assistant, and noting that, unlike a tribunal secretary, the powers of a tribunal assistant are not anchored in Dutch legislation, Russia's formulation of the role of an arbitral assistant was one that was of lesser substance than that of a tribunal secretary.[20] At the same time, Russia argued that the job description of a tribunal secretary, as defined by international practice, was in any event only one of support of the tribunal in the carrying out of administrative tasks relating to the organisation of the arbitration.[21]

Russia emphasised the strictly personal mandate of an arbitrator and asserted that Mr Valasek's hours, being between 40 per cent and 70 per cent greater than those of any member of the tribunal,[22] evidenced an improper and unauthorised delegation of this mandate to Mr Valasek, whose hours could only be explained on the basis that he had participated in substantive work and deliberations.[23] This was particularly the case in

11 id., 48.
12 id., 49.
13 ibid.
14 id., 46.
15 *Yukos Universal Limited (Isle of Man) v. Russia*, UNCITRAL, PCA Case No. AA 227, Writ of Summons, 28 January 2015 [Yukos Set-Aside Petition].
16 *Hulley Enterprises Limited (Cyprus) v. Russia*, UNCITRAL, PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. Russia*, UNCITRAL, PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. Russia*, UNCITRAL, PCA Case No. AA 228.
17 Yukos Set-Aside Petition, Section V.
18 id., para. 469.
19 id., Section VI.
20 id., para. 485.
21 id., para. 473.
22 id., para. 469.
23 id., para. 499.

circumstances where the Permanent Court of Arbitration had been entrusted with the administration of the proceedings[24] and Mr Valasek had been brought in at the request of the chairman, ostensibly to provide him with personal assistance 'in the conduct of the case'.[25] In this regard, Russia also complained that the tribunal did not obtain the permission of the parties to the appointment of Mr Valasek,[26] with the same being presented to the parties as a *fait accompli*.[27]

Using the same reasoning as *Sonatrach*, Russia argued that the improper role of Mr Valasek was confirmed by the tribunal's refusal to disclose further details regarding his hours on the basis that to do so could prejudice the 'confidentiality of the Tribunal's deliberations'.[28] As further 'proof of the tribunal's impermissible delegation' of its mandate,[29] Russia submitted a report from a linguistics expert who, having conducted an analysis of the writing styles of the arbitrators and Mr Valasek, concluded that it was 'extremely likely' that Mr Valasek wrote 79 per cent of the preliminary objections section of the awards, 65 per cent of the liability section and 71 per cent of the damages section.[30]

The District Court of The Hague ultimately set aside the awards on alternative grounds and did not address Russia's complaints regarding Mr Valasek's involvement in the proceedings.[31]

P v. Q

Reliance by a party on the time records of a tribunal secretary to support an allegation of an improper delegation of duty is not limited to the challenge of arbitration awards. The role of tribunal secretaries has most recently been put under the spotlight by the claimant's application in *P v. Q* to remove the co-arbitrators appointed to a London Court of International Arbitration (LCIA) tribunal.[32] The application was grounded on allegations of improper delegation of the adjudicative function to the tribunal secretary in relation to three procedural decisions made between 2015 and 2016.

The trigger for the application was an email from the chairman intended for the tribunal secretary, but mistakenly sent to a paralegal at the claimant's lawyers. By reference to correspondence received from the claimant on the preceding day, the chairman asked 'Your reaction to this latest from [Claimant]?'[33]

24 ibid.

25 id., para. 488.

26 id., para. 490.

27 id., para. 487.

28 id., para. 500.

29 A Ross, 'Valasek wrote Yukos awards, says linguistics expert', October 2015, https://globalarbitrationreview.com/article/1034846/valasek-wrote-yukos-awards-says-linguistics-expert (last accessed 15 January 2019).

30 ibid.

31 District Court of The Hague, 20 April 2016, ECLI:NL:RBDHA:2016:4230.

32 *P v. Q and Ors* [2017] EWHC 194 (Comm).

33 id., 10.

Following a failed application to the LCIA Court[34] to have all three members of the tribunal removed on five grounds, three of which[35] related expressly to the improper delegation of tasks to the tribunal secretary and the alleged failure of the tribunal to discharge their decision-making duties,[36] the claimant brought an application under Section 24 of AA 1996 to remove the co-arbitrators.[37] A witness statement submitted in support of this application noted that the improper delegation of its decision-making duties by the tribunal had 'cause[d] prejudice which cannot be un-done'.[38]

In addition to the chairman's email, the claimant relied on the time records of the tribunal secretary, the chairman and the co-arbitrators, stating that the significant amount of time recorded by the tribunal secretary in relation to the three procedural decisions indicated an improper delegation of functions to him, and that the comparatively shorter amount of time spent by the co-arbitrators indicated that they had failed to fulfil their obligations.[39]

In dismissing the application, Mr Justice Popplewell articulated an important distinction between acts amounting to a failure to properly conduct proceedings under the LCIA Rules[40] and Notes for Arbitrators,[41] which are relatively permissive regarding the role of the tribunal secretary[42] and best practice in international arbitration, which should allay any hints of a 'fourth arbitrator'.[43]

As regards the proper conduct of proceedings under the LCIA Rules, Popplewell J noted that the 'yardstick' for the purposes of Section 24 of AA 1996 is that the 'use of a tribunal secretary must not involve any member of the tribunal abrogating or impairing his non-delegable and personal decision-making function'.[44] The touchstone of this function is the exercise of independent judgement.[45] The receipt and even the consideration of the opinions of others, including those of a tribunal secretary, does not automatically preclude

34 The London Court of International Arbitration[LCIA] dismissed all three grounds of complaint relating to the tribunal secretary, but the chairman's appointment was revoked on the unrelated ground that certain circumstances existed giving rise to justifiable doubts as to his impartiality (*P v. Q and Ors* [2017] EWHC 194 (Comm), 19 and 20).

35 id., 14: '(1) Ground 1: the Tribunal improperly delegated its role to the Secretary by systematically entrusting the Secretary with a number of tasks beyond what was permissible under the LCIA Rules and the LCIA Policy on the use of arbitral secretaries; (2) Ground 2: the Chairman breached his mandate as an arbitrator and his duty not to delegate by seeking the views of a person who was neither a party to the arbitration nor a member of the tribunal on substantial procedural issues (i.e., the Secretary); (3) Ground 3: the other members of the Tribunal equally breached their mandate as arbitrators and their duty not to delegate by not sufficiently participating in the arbitration proceedings and the decision-making process.'

36 id., 17.

37 *P v. Q and Ors* [2017] EWHC 194 (Comm).

38 id., 23.

39 ibid.

40 id., 50: 'The LCIA Rules provide at Article 14.2 that unless otherwise agreed by the parties under Article 14.1, the Tribunal shall have the widest discretion to discharge its duties permitted by the applicable law.'

41 The LCIA arbitration was conducted pursuant to the LCIA's Notes for Arbitrators dated 29 June 2015, as subsequently amended in October 2017.

42 *P v. Q and Ors* [2017] EWHC 194 (Comm), 50 to 55.

43 id., 68.

44 id., 65.

45 ibid.

an arbitrator from reaching an independent decision based on their own reasoning and due diligence.[46]

As to the nature of the tasks undertaken by the tribunal secretary, Popplewell J emphasised the wide discretion afforded to the tribunal to discharge its duties under the LCIA Rules, noting that in agreeing to the appointment of the secretary, the parties did not seek to limit his permitted involvement in the process or otherwise place any constraints upon the tasks and functions that he might perform.[47]

In relation to the latter, and by reference to the 'considerable and understandable anxiety in the international arbitration community that the use of tribunal secretaries risks them becoming, in effect, "fourth arbitrators"', Popplewell J stated that to ensure that the adjudicatory function of arbitration is undertaken by tribunal members alone, best practice dictates that the tribunal 'avoid involving a tribunal secretary in anything which could be characterised as expressing a view on the substance of that which the tribunal is called upon to decide'. Anything else could give rise to a 'real danger of inappropriate influence over the decision-making process by the tribunal',[48] tantamount to an abrogation of the personal decision-making function, which is non-delegable.

Application to excuse Mr Gaetano Arangio-Ruiz

Another early allegation of misuse of a tribunal secretary also comes from an arbitrator challenge. In August 1991, Iran submitted an application to excuse the incumbent chairman of Chamber Three of the Iran–United States Claims Tribunal, Mr Gaetano Arangio-Ruiz, from his office for an alleged failure to perform his arbitral functions.[49] The application under Article 13(2) of the Iran–United States Claims Tribunal Rules of Procedure was prompted by a dissent from Chamber Three's Iranian arbitrator,[50] which revealed that Mr Arangio-Ruiz had been present at the tribunal for 'no more than 40 working days' in the preceding 12 months.[51]

In drawing attention to Mr Arangio-Ruiz's lack of physical presence at the tribunal, Iran noted:

> *It is also more than obvious that a judicial function cannot be properly conducted by a legal assistant's telecommunicating a condensed or selective version of the parties' pleadings and evidence to the arbitrator living abroad. Under such circumstances, the arbitrator would, in reality, be the legal assistant, and a situation of this kind would defeat the parties' choice of an arbitrator on the basis of his personal qualifications. What may appear to a legal assistant as relevant or material in his study of the case, might not necessarily strike the arbitrator in the same matter, and vice versa.*[52]

46 id., 67.
47 id., 50.
48 id., 68.
49 J Adlam and E Lauterpacht (editors), Iran-US Claims Tribunal Reports (Vol. 27, 1991), pp. 293 to 297.
50 id., pp. 297 to 305.
51 id., p. 304.
52 id., p. 294.

In this vein, Iran also argued that Mr Arangio-Ruiz's questions had been formulated by his legal assistant, and that he had failed to properly engage with the cases before him.[53]

In a subsequent letter dated September 1991,[54] Iran put its case more squarely: in the absence of agreement, an arbitrator's powers of adjudication cannot be delegated to anybody else. To do so would violate a key tenet of international arbitration; that is, a party has the right to choose the individual or individuals to whom it ascribes powers of adjudication. Further, in the context of disputes brought before the Iran–United States Claims Tribunal, in which the arbitrators' power of adjudication has been delegated to them by the state parties to the Algiers Declarations, this would offend the settled principle *delegata potestas non potest delegari* (no delegated powers can be further delegated).[55]

Determining the application, the appointing authority of the Iran–United States Claims Tribunal noted that the test under Article 13(2) of the Iran–United States Claims Tribunal Rules of Procedure would be met where an arbitrator 'consciously neglects his arbitral duties in such a way that his overall conduct falls clearly below the standard of what may be reasonable [*sic*] expected from an arbitrator'.[56]

Against that standard, and in response to allegations relating to the misuse of the tribunal secretary, the appointing authority determined that:

- Mr Arangio-Ruiz had formed his decisions on the basis of the complete original documents that had been sent to him and had not relied solely on abstracts of pleadings and submissions selected and prepared by his assistant;[57] and
- there was insufficient evidence to support the allegation that Mr Arangio-Ruiz had failed to study properly the cases he had to adjudicate or that his work was done by his assistants.[58]

The key issues

An analysis of these cases reveals a number of central themes.

The first is bound up with a central feature of arbitration, that is, a party's right to select its arbitrator – identified by 39 per cent of respondents to the 2018 Queen Mary Arbitration Survey as among the three most valuable characteristics of international arbitration.[59] Arbitrator selection is typically an involved process with decisions based on numerous factors, including an arbitrator's experience, expertise, previous decisions, language capabilities and reputation. The acceptance of an appointment by an arbitrator creates an 'arbitrator's contract',[60] which 'gives rise to reciprocal rights and obligations on

53 id., p. 295: 'It has become apparent that he does not even bother to formulate the questions himself. The questions are passed to him by his legal assistant in the back seat.'

54 id., pp. 312 to 317.

55 id., p. 325.

56 id., p. 332.

57 id., pp. 322 and 333.

58 id., p. 334.

59 Queen Mary University of London – School of International Arbitration, '2018 International Arbitration Survey: The Evolution of International Arbitration', 2018, www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (last accessed 21 January 2019), p. 7.

60 G Born, *International Commercial Arbitration* (2nd ed., 2014), p. 1981.

the part of both the arbitrator(s) and the parties'[61] and 'obligates the arbitrator to resolve the parties' dispute'.[62] It follows that an arbitrator's mandate is strictly personal (*intuiti personae*). No one else can properly determine the dispute.

The second, and a corollary of the personal mandate, concerns the proper role of a tribunal secretary in the arbitral process. It is common ground that the adjudicative function, the essence of the arbitrator's mandate, is non-delegable. The question is what tasks and responsibilities can be safely delegated to a tribunal secretary for reasons of procedural efficiency before their role risks trespassing on that of the arbitrators.

On this latter point, there appears to be some divergence of opinion, and it is in an effort to combat this that arbitral institutions have taken steps to codify the precise framework for the use of tribunal secretaries.

International arbitration rules and guidelines

The development of non-binding notes and guidelines

The '2016 UNCITRAL Notes on Organizing Arbitral Proceedings', intended for general and universal use across arbitral institutions,[63] briefly detail the use of tribunal secretaries in international arbitration.[64] Acknowledging that the '[f]unctions and tasks performed by secretaries are broad in range',[65] the Notes only confirm that, save in certain specialised forms of arbitration, 'it is recognized that secretaries are not involved and do not participate in the decision-making of the arbitral tribunal'.[66]

The 'Young ICCA Guide on Arbitral Secretaries',[67] the product of two surveys conducted in 2012 and 2013[68] and arguably the most authoritative and detailed study on the use of tribunal secretaries in international arbitration, sets out non-binding guidelines for the appointment and use of arbitral secretaries. While this study concluded that 'with appropriate direction and supervision' by the arbitral tribunal, an arbitral secretary's role 'may legitimately go beyond the purely administrative',[69] support from the survey's participants for arbitral secretaries performing specific tasks decreased as the proposed duties moved away from the purely administrative and towards tasks involving analysis and decision-making.[70] For example, actual participation in the tribunal's deliberations was opposed by 83.5 per cent of respondents,[71] and only 31.9 per cent of respondents considered that a tribunal secretary should draft the legal reasoning portions of the award.[72]

61 ibid.

62 ibid.

63 '2016 UNCITRAL Notes on Organizing Arbitral Proceedings', p. 1.

64 id., paras. 35 to 38.

65 id., paras. 36.

66 ibid.

67 International Council for Commercial Arbitration [ICCA], 'The ICCA Reports No. 1: Young ICCA Guide on Arbitral Secretaries', 2014, https://www.arbitration-icca.org/media/3/14235574857310/aa_arbitral_sec_guide_composite_10_feb_2015.pdf (last accessed 21 January 2019).

68 id., p. vii.

69 ibid.

70 id., p. 3.

71 id., Art. 3(2)(i) Commentary.

72 id., Art. 3(2)(j) Commentary.

Setting out a non-exhaustive list of 10 tasks that 'may' be undertaken by the tribunal secretary, to include: '[u]ndertaking administrative matters',[73] '[c]ommunicating with the arbitral institution and parties',[74] '[d]rafting procedural orders and similar documents',[75] 'research',[76] '[r]eviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence',[77] '[a]ttending the arbitral tribunal's deliberations'[78] and '[d]rafting appropriate parts of the award',[79] the study ultimately concluded that:

> *it should be left to the discretion of the tribunal to determine what duties and responsibilities can appropriately be entrusted to the arbitral secretary, taking into account the circumstances of the case and the arbitral secretary's level of experience and expertise.*[80]

For some, the proper supervision and direction of tasks by a conscientious tribunal[81] may be sufficient to militate against any impairment of the tribunal's non-delegable decision-making function. However, the recent challenges to arbitration awards show that the wide margin of discretion afforded to tribunals pursuant to these general guidelines may not go far enough to protect against procedural ambiguity or a perceived lack of transparency.

Arbitral institution rules

The majority of the major international arbitration institutions' rules[82] provide that a tribunal secretary can only be appointed following consultation with,[83] or by agreement of,[84] the parties. Pursuant to the same rules, tribunal secretaries are typically subject to the same or similar requirements of impartiality and independence as the members of the tribunal.[85] Further, of these institutions, all but the Singapore International Arbitration

73 id., Art. 3(2)(a).

74 id., Art. 3(2)(b).

75 id., Art. 3(2)(g).

76 id., Art. 3(2)(e) and (f).

77 id., Art. 3(2)(h).

78 id., Art. 3(2)(i).

79 id., Art. 3(2)(j).

80 id., Art. 3(1) Commentary.

81 Born, p. 2000; S Maynard, 'Laying the fourth arbitrator to rest: re-evaluating the regulation of arbitral secretaries', 34(2) *Journal of International Arbitration* 173, p. 182.

82 For example, the rules of the Hong Kong International Arbitration Centre [HKIAC], the Singapore International Arbitration Centre [SIAC], the Stockholm Chamber of Commerce [SCC], the LCIA, the International Chamber of Commerce [ICC], the Swiss Chambers' Arbitration Institution [SCAI] and the International Centre for the Settlement of Investment Disputes [ICSID].

83 2014 HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, Guideline 2.1; 2014 SCAI Guidelines for Arbitrators, Guideline A1.

84 2017 LCIA Notes for Arbitrators, paras. 74 and 75; 2015 SIAC Practice Note for Administered Cases – On the Appointment of Administrative Secretaries, para. 3; 2017 SCC Arbitration Rules, Article 24(1); 2019 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, para. 182.

85 SCC Arbitration Rules, Art. 24(3); HKIAC Guidelines on the Use of a Secretary, Guideline 2.2; ICC Note on the Conduct of the Arbitration, para. 181; LCIA Notes for Arbitrators, paras. 78, 81; SCAI Guidelines for Arbitrators, Guideline A1.

Centre (which remains silent on the tasks that may be undertaken by a tribunal secretary)[86] have taken steps to define and regulate the scope of the tribunal secretary's role.

In October 2017, the LCIA adopted changes to its Notes for Arbitrators[87] to 'clarify the tribunal secretary role, and strengthen the existing elements of the LCIA's approach to tribunal secretaries'.[88] The list of tasks that the tribunal 'may wish to propose' includes administrative tasks, attendance at hearings, meetings and deliberations, and substantive tasks such as summarising submissions, reviewing authorities and preparing first drafts of procedural orders and awards.[89] Notably, it mandates that any tasks proposed by a tribunal to be performed by the tribunal secretary must be expressly agreed to by the parties. Commenting on these changes, the LCIA noted:

> *The fundamental theme underlying all of these changes is communication and consent, ensuring that parties are given the opportunity to have their say. By requiring consent in relation to individual aspects of the tribunal secretary role, arbitrators are better able to see which elements (if any) the parties have concerns about, and respond accordingly. Once parties are made fully aware of the pertinent aspects of the tribunal secretary's role, the risk of challenges or other issues arising is greatly reduced.*[90]

This concern with consent to each aspect of the tribunal secretary's role is similarly reflected in the January 2017 Stockholm Chamber of Commerce (SCC) Rules, which provide that the tribunal shall consult the parties regarding the tasks of the secretary.[91]

Unlike the LCIA Notes and SCC Rules, most institutional rules do not require the consent of the parties to the individual aspects of the tribunal secretary's role in each case. The ICC Rules, which are silent as to tribunal secretaries, are supplemented by the January 2019 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the 2017 ICC Rules of Arbitration. The ICC Note sets out a non-exhaustive list of 'organisational and administrative' tasks that may be undertaken by a tribunal secretary, which include: 'transmitting documents and communications', 'organising hearings and meetings', 'conducting legal or similar research', 'proof-reading and checking' procedural orders and awards, and 'attending hearings, meetings and deliberations; taking notes or minutes or keeping time'.[92] At the same time, the ICC Note seeks to constrain the role of the secretary stating:

> *Under no circumstances may the arbitral tribunal delegate its decision-making functions to an Administrative Secretary. Nor shall the arbitral tribunal rely on an Administrative Secretary to perform on its behalf any of the essential duties of an arbitrator.*[93]

86 SIAC Practice Note On the Appointment of Administrative Secretaries.

87 LCIA, 'LCIA implements changes to tribunal secretary processes', 27 October 2017, www.lcia.org/News/lcia-implements-changes-to-tribunal-secretary-processes.aspx (last accessed 28 January 2019).

88 ibid.

89 LCIA Notes for Arbitrators, para. 71.

90 'LCIA implements changes to tribunal secretary processes' – see footnote 87.

91 SCC Arbitration Rules, Art. 24(2).

92 id., para. 185.

93 id., para. 184.

The list of 'organisational and administrative tasks' under the ICC Note is broadly replicated in the 2014 the Hong Kong International Arbitration Centre (HKIAC) Guidelines on the Use of a Secretary to the Arbitral Tribunal under the same heading.[94] Notably, however, the HKIAC Guidelines enumerate further tasks that may be performed '[u]nless the parties agree or the arbitral tribunal directs otherwise'.[95] These tasks appear to be accepted as being in addition to and, accordingly, more substantial than 'organisational and administrative' tasks. Contrary to their classification under the ICC Note,[96] under the HKIAC Guidelines, both research[97] and attendance at the tribunal's deliberations[98] fall under this latter category, as does the preparation of 'summaries from case law and publications as well as producing memoranda summarising the parties' respective submissions and evidence'.[99]

Both the HKIAC Guidelines and the ICC Note include a reiteration of the tribunal's personal and non-delegable duty to review the complete case file and materials,[100] since this is critical to the exercise of independent judgement by the arbitrator in reaching their ultimate decision.

The arbitral institution rules and guidelines detailed above each include an express prohibition against the delegation of the tribunal's decision-making function.[101] This prohibition appears to transcend any agreement by the parties to the contrary. By contrast, certain other institutions appear reluctant to override the parties' wishes. For example, the Swiss Chambers' Arbitration Institution Guidelines for Arbitrators governing the use of administrative secretaries, which are silent on this point,[102] have been interpreted by the Swiss Supreme Court as permitting the exercise of the judicial function by the administrative secretary, provided there is a corresponding agreement by all parties.[103] Such permitted delegation was also reported in *AES v. Hungary*,[104] in which an International Centre for the Settlement of Investment Disputes (ICSID) tribunal, with the agreement of the parties, delegated the decision-making function on a discrete issue to the tribunal secretary.[105]

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94 2014 HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, Guideline 3.3.

95 id., Guideline 3.4.

96 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, para. 185.

97 2014 HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, Guideline 3.4(a) and (b).

98 id., Guideline 3.4(e).

99 id., Guideline 3.4(c).

100 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, para. 184; 2014 HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, Guideline 3.6.

101 LCIA Notes for Arbitrators, para. 68; SCC Arbitration Rules, Art. 24(2); ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, para. 184; HKIAC Guidelines on the Use of a Secretary, Guideline 3.2.

102 SCAI Guidelines for Arbitrators.

103 4A_709/2014 of 21 May 2015: 'Without a corresponding agreement by the parties, the arbitral secretary must however refrain from exercising any judicial function, which remains to be the privilege of the arbitrators.' See: Tribunal fédéral, Ière Cour de droit civil, 4A_709/2014, Arrêt du 21 mai 2015, *A. SA contre B. Sàrl*, Mmes les Juges Kiss, présidente, Hohl et Niquille. Greffier: M Carruzzo, 33(4) ASA Bull. 879.

104 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 3.29.

105 ibid. Specifically, it was agreed that any disagreement between the parties on the redactions proposed by the respondent would be submitted to the secretary for a decision.

It is undisputed that consent and party autonomy are central tenets of international arbitration that facilitate the flexibility of the arbitral process. However, the codified prohibition against any delegation by the tribunal of its core function may act as an important safeguard. The danger inherent in the absence of the same lies in the relationship between the parties and the tribunal. The nature of this relationship could foreseeably give rise to a situation in which a party feels unable to refuse a request by the tribunal to delegate some aspect of its role, including in respect of adjudication.

The exceptional position under ICSID

The position under ICSID is unique. Among the 'Special Features of ICSID' enumerated on the ICSID website, it is stated that '[a] dedicated ICSID case team is assigned to each case and provides full legal and administrative support throughout the process'.[106] This includes the appointment of a tribunal secretary from among ICSID's staff (i.e., the ICSID Secretariat) by the secretary general.[107] The secretary is further said to act as the representative of the secretary general while serving in that capacity.[108] The secretary's tasks include serving as the channel of communication between the parties and the centre, keeping summary minutes of hearings and the performance of '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'.[109]

While the authors are not aware of any challenges to ICSID awards or arbitrators on the ground of misuse of tribunal secretaries, the additional opinion of Professor Dalhuisen appended to the decision on annulment in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*[110] offers an unprecedented and scathing indictment of the role of the ICSID Secretariat in that particular case:

> *Before ending the discussion, I should like to deal with the role of the ICSID Secretariat in this matter which has led to multiple complications and has delayed the final decision by many months.*[111]

Professor Dalhuisen's criticism of the secretariat's actions in the instant annulment proceedings focused on:

- the secretariat's desire to prepare the recitals in the award, which 'delayed the final result considerably';[112] and
- the view taken by the secretariat that it could intervene to streamline the text of the award agreed by the *ad hoc* committee and in particular the approach by senior

106 ICSID, 'Special Features of ICSID', https://icsid.worldbank.org/en/Pages/about/Special-20Features-20of-20ICSID.aspx (last accessed 21 January 2019).

107 2006 ICSID Administrative and Financial Regulations, Reg. 25.

108 id., Reg. 25(a).

109 id., Reg. 25(d).

110 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Argentina's Annulment Request – Additional Opinion of Professor J H Dalhuisen, 10 August 2010.

111 id., para. 1.

112 id., paras. 4 and 5.

secretariat members to individual members of the *ad hoc* committee with a view to amending the text, which gave rise to 'fundamental issues of propriety, independence, open and direct communication between Committee Members, and confidentiality'.[113]

Levelling more general and wide-ranging criticisms at the secretariat, Professor Dalhuisen cautioned against the secretariat's apparent desire 'to obtain for itself a greater role in the conduct of ICSID cases'.[114] In particular, he noted that:

- the drafting of any part of the tribunal's or *ad hoc* committee's decisions or reasoning by the secretariat is 'wholly inappropriate' and cannot be legitimised by subsequent approval by the tribunal;[115]
- the use of the secretariat as an intermediary for communications between the chairman and the other members of the tribunal or committee risks breaching Arbitration Rule 15, which mandates that the deliberations of the *ad hoc* committee or tribunal are both secret and private;[116]
- the secretariat is not entitled to intervene in the proceedings in any way save if asked to do so by the committee or tribunal (which should never affect the substance of the case);[117] and
- the secretariat should not assume the mantle of promoting a *jurisprudence constante* across ICSID awards.[118]

Related to the central issue of the right and obligation to exercise the decision-making function, Professor Dalhuisen stated that: 'Submissions by the Secretariat, whatever the intention, are here legally irrelevant and no more than unsolicited opinion. Not being subject to examination by the parties, they cannot carry any weight.'[119]

While the grounds for annulment under the ICSID Convention are limited, it is easy to see how allegations of this nature against an ICSID tribunal secretary by a party to the arbitration could give rise to an application for annulment, for example, on the ground that the delegation to, or the assumption by, the ICSID Secretariat (including the tribunal secretary) of the tribunal's mandate amounted to a serious departure from a fundamental rule of procedure.[120]

Mitigating the risks

The recent challenges to both awards and arbitrators based on the alleged misuse of tribunal secretaries suggests that the 'fourth arbitrator' is no longer a spectre. For many, and as forewarned by Mr Partasides, it now describes the 'state of affairs that is presently believed to exist'.[121] Further, and despite efforts to codify the extent of the tribunal secretary's role

113 id., para. 9.
114 id., para. 2.
115 id., para. 7.
116 id., paras. 10 to 12.
117 id., para. 15.
118 id., paras. 16 and 17.
119 id., para. 19.
120 2006 ICSID Convention, Art. 52(1)(d).
121 Partasides, p. 148 (see footnote 3).

by some institutions, many argue that there remains a manifest lack of consistency across the various institutional rules and guidelines.

At the other end of the spectrum, some commentators have opined on what they conceive to be illegitimate challenges based on the alleged misuse of tribunal secretaries. In this regard, during the 2017 Spring Arbitration Symposium, Professor Janet Walker is reported to have said that attacks on the use of tribunal secretaries do not come on their own, but tend to occur in one of two situations: when 'the party cannot allow the award to stand under any circumstances and finds the use that was made of a tribunal assistant as a convenient means of attacking the award' and when 'the tribunal's conduct of the matter caused general dissatisfaction to one or both parties'.[122]

It is evident that concerns from those on both sides of the debate give rise to questions of transparency and legitimacy. On the one hand, the delegation of the personal adjudicative function to a tribunal secretary, lacking any mandate to determine the dispute, threatens to undermine the integrity of the arbitral process. On the other, a successful party to the arbitration may face an opportunistic challenge to the award, which exploits any procedural ambiguity around the use of a tribunal secretary. In either case, there is a real danger of jeopardising what is still regarded as the most valuable characteristic of international arbitration: the enforceability of awards.[123]

The surest protection is early and proactive engagement with the tribunal on the scope of the tribunal secretary's role.

For arbitrations not conducted under the auspices of institutions such as the LCIA or SCC, where the scope of the tribunal secretary's role is subject to party consent, the parties remain at liberty to seek to agree the exact role and functions of the tribunal secretary with each other and the tribunal. The benefits of this are at least threefold:

- The parties will have defined the role of the tribunal secretary in accordance with their own subjective criteria. It is the parties who will determine which tasks can be safely undertaken by the secretary without diluting the arbitrators' mandate and who will accordingly have given the secretary a mandate of his or her own.
- By defining the four corners of the tribunal secretary's role, a party will be better equipped to point to circumstances demonstrating that the tribunal secretary has overstepped his or her mandate.
- In the same vein, it will be more difficult for a party to mount an opportunistic (and potentially unmeritorious) challenge on the basis of the involvement of the tribunal secretary where the tribunal secretary's role was agreed by the parties and transparent throughout the proceedings.

122 D Ganev, 'Problematics of tribunal secretaries', 16 August 2017, https://www.cdr-news.com/categories/arbitration-and-adr/7522-problematics-of-tribunal-secretaries (last accessed 21 January 2019).

123 2018 International Arbitration Survey: 'The Evolution of International Arbitration', p. 7.

Appendix 1

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