CHALLENGING AND ENFORCING ARBITRATION AWARDS GUIDE

THIRD EDITION

General Editor
J William Rowley KC

Editor
Benjamin Siino

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Publisher's Note

Global Arbitration Review is delighted to publish this new edition of the *Challenging and Enforcing Arbitration Awards Guide*.

For those new to 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, alongside more in-depth books and reviews. We also organise conferences and build workflow tools that help you to research arbitrators and enable you to read original arbitration awards. And we have an online 'academy' for those who are newer to international arbitration. Visit us at www.globalarbitrationreview.com to learn more.

As the unofficial 'official journal' of international arbitration, sometimes we are the first to spot gaps in the literature. This guide is a fine example. As J William Rowley KC observes in his excellent preface, it became obvious recently that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and a reference work focusing on this phase was overdue.

The *Challenging and Enforcing Arbitration Awards Guide* fills that gap. 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 construction, energy, evidence, intellectual property, M&A, mining disputes and telecommunications in the same unique, practical way. We also have books on advocacy in international arbitration, the assessment of damages, and investment treaty protection and enforcement.

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

David Samuels
London
April 2023

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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 – in other words, 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 169 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 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 158.

Awards used to be honoured

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

In the year before the first edition of this guide, Global Arbitration Review's daily news reports contained hundreds of headlines that suggested 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. Indeed, in the first three months of 2023, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Nigeria seeks to overturn US$11 billion award;
- Russia fails to quash jurisdictional awards in Crimea cases;
- Swiss court upholds multibillion-dollar Yukos award;
- Swedish courts annul intra-EU treaty awards;
- Indian court annuls billion-dollar award for 'fraud';
- Malaysia challenges mega-award in French court;
- GE pays out after losing corruption challenge in legacy case;
- Ukrainian bank's billion-dollar award against Russia reinstated;
- Burford wins enforcement against Kyrgyzstan;
- India loses Dutch appeal over treaty award;
- ECJ dismisses London award in oil spill saga;
- 'Fifteen years is long enough': US court enforces Conoco award;
- Pakistan fails to stay Tethyan award in US; and
- India fails to upend latest award in protracted oil and gas dispute.

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, the importance of the subject (without effective enforcement, there really is no effective resolution), and my anecdote-based perception of increasing concerns, led me to raise 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 Gordon Kaiser and the late Emmanuel Gaillard agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in April 2021. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

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 some 40 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

The guide is structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this third edition, the 15 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and admissibility of new evidence.

Part II of the guide 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 edition includes reports on 29 national

jurisdictions. The author, or authors, of each chapter have been asked to address the same 58 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. 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.

With 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 *Challenging and Enforcing Arbitration Awards Guide* 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 those colleagues who were some of the internationally recognised leaders in the field. My fellow editors and I have felt 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 of 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 even further.

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 edition of the 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 KC
London
April 2023

CHAPTER 7

Awards: Challenges Based on Misuse of Tribunal Secretaries

Chloe J 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 about 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]

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1 Chloe J Carswell is a partner and Lucy Winnington-Ingram is a senior 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 ibid., 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 UK 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

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 ibid., p. 100.

7 id.

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

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]

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]

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 grounds 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]

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9 ibid., 48.
10 ibid., 47.
11 ibid., 48.
12 ibid., 49.
13 id.
14 ibid., 46.
15 *Yukos Universal Limited (Isle of Man) v. Russia*, United Nations Commission on International Trade Law (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, op. cit. note 15, Section V.
18 ibid., para. 469.
19 ibid., Section VI.

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 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 regarding the appointment of Mr Valasek,[26] which had been presented to the parties as a *fait accompli*.[27]

Using the same reasoning as in *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 in 2016 and did not address Russia's complaints regarding Mr Valasek's involvement in the proceedings.[31] However, on 18 February 2020, the Court of Appeal in The Hague overturned the 2016 District Court decision and, in doing so, addressed all

20 ibid., para. 485.
21 ibid., para. 473.
22 ibid., para. 469.
23 ibid., para. 499.
24 id.
25 ibid., para. 488.
26 ibid., para. 490.
27 ibid., para. 487.
28 ibid., 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 21 February 2023).
30 id.
31 District Court of The Hague, 20 April 2016, ECLI:NL:RBDHA:2016:4230.

set-aside grounds advanced by Russia, including in relation to Mr Valasek. As to the allegation that the tribunal had violated its mandate, the Court of Appeal concluded that, absent contrary agreement between the parties, a tribunal has a procedural right to use an assistant or secretary for the drafting of an arbitral award as it sees fit.[32] The submission of draft texts of the award by Mr Valasek did not justify the conclusion that the tribunal had violated its mandate; 'what matters in the end is that the arbitrators have decided to assume responsibility for the draft version of Valasek . . . The Russian Federation does not argue that the Tribunal has accepted these drafts without a second thought'.[33] The Court of Appeal further held that Russia had failed to establish that the tribunal had not been properly constituted.[34] Notwithstanding these findings, the Court of Appeal noted that the tribunal had failed to fully inform the parties on the nature and extent of Mr Valasek's work but that this did not amount to a major procedural violation.[35]

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 was put under the spotlight in *P v. Q* by the claimant's application to remove the co-arbitrators appointed to a London Court of International Arbitration (LCIA) tribunal.[36] The application was grounded on allegations of improper delegation of the adjudicative function to the tribunal secretary in relation to three procedural decisions made in 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]?'[37]

32 Judgment of the Court of Appeal of The Hague dated 18 February 2020 (unofficial translation), para. 6.6.14.1.

33 ibid., para. 6.6.10.

34 ibid., para. 6.6.13: 'It has not been established that the Tribunal was composed in violation of the applicable rules. The circumstance that Valasek has written parts of the arbitral awards cannot lead to the conclusion that the Tribunal was composed in violation of statutory rules or rules agreed between the parties.'

35 ibid., para. 6.6.14.2.

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

37 ibid., 10.

Following a failed application to the LCIA[38] to have all three members of the tribunal removed on five grounds, three of which[39] 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,[40] the claimant brought an application under Section 24 of AA 1996 to remove the co-arbitrators.[41] 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 [*sic*]'.[42]

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.[43]

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[44] and Notes for Arbitrators,[45] which are relatively permissive regarding the role of the tribunal secretary[46] and best practice in international arbitration, which should allay any hints of a 'fourth arbitrator'.[47]

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

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38 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 that gave rise to justifiable doubts as to his impartiality (see also *P v. Q and Ors*, op. cit. note 36, 19 and 20).

39 *P v. Q and Ors*, op. cit. note 36, 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.'

40 ibid., 17.

41 id.

42 ibid., 23.

43 id.

44 ibid., 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.'

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

46 *P v. Q and Ors*, op. cit. note 36, 50–55.

47 ibid., 68.

his non-delegable and personal decision-making function'.[48] The touchstone of this function is the exercise of independent judgement.[49] The receipt and even the consideration of the opinions of others, including those of a tribunal secretary, does not automatically preclude an arbitrator from reaching an independent decision based on their own reasoning and due diligence.[50]

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 on the tasks and functions that he might perform.[51]

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 should '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',[52] tantamount to an abrogation of the personal decision-making function, which is non-delegable.[53]

Application to excuse Mr Gaetano Arangio-Ruiz

Another early allegation of misuse of a tribunal secretary 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.[54] The application under Article 13(2) of the Iran–United States Claims Tribunal Rules of Procedure

48 ibid., 65.

49 id.

50 ibid., 67.

51 ibid., 50.

52 ibid., 68.

53 In a similarly framed challenge in 2017, the claimant in the International Centre for Settlement of Investment Disputes (ICSID) case of *Supervision v. Costa Rica* challenged the entire tribunal on the basis that, during the pendency of the arbitration, a former secretary of the tribunal had joined the law firm that represented Costa Rica in the proceedings. It is reported that the chairman sought an external recommendation regarding the disqualification proposal before rejecting the challenge (the decision remains unpublished) (*IA Reporter*, 'In new award, arbitrators disagree whether claims should be mixed due to overlap with local cases; dissenter critiques party-appointments, and challenge arises when tribunal secretary joins respondent's law firm' (1 February 2017)).

54 J Adlam and E Lauterpacht (editors), *Iran-U.S. Claims Tribunal Reports* (Vol. 27, 1991), pp. 293–97.

was prompted by a dissent from Chamber Three's Iranian arbitrator,[55] which revealed that Mr Arangio-Ruiz had been present at the tribunal for 'no more than 40 working days' in the preceding 12 months.[56]

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.*[57]

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.[58]

In a subsequent letter, dated September 1991,[59] Iran put its case more squarely: in the absence of agreement, an arbitrator's powers of adjudication cannot be delegated to anybody else, and that 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).[60]

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'.[61]

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;[62] and

55 ibid., pp. 297–305.

56 ibid., p. 304.

57 ibid., p. 294.

58 ibid., 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.'

59 ibid., pp. 312–17.

60 ibid., p. 325.

61 ibid., p. 332.

62 ibid., pp. 322 and 333.

- 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.[63]

Key issues

An analysis of the above-mentioned cases reveals a number of central themes.

The first is bound up with a central feature of arbitration, that is, a party's ability to select its arbitrator – identified by 39 per cent of respondents to the 2018 Queen Mary Arbitration Survey[64] as one of the three most valuable characteristics of international arbitration. Arbitrator selection is typically an involved process with decisions based on numerous factors, including the experience, expertise, previous decisions, language capabilities and reputation of an arbitrator. The acceptance of an appointment by an arbitrator creates an 'arbitrator's contract',[65] which 'gives rise to reciprocal rights and obligations on the part of both the arbitrator(s) and the parties'[66] and 'obligates the arbitrator to resolve the parties' dispute'.[67] 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

Development of non-binding notes and guidelines

The 2016 'UNCITRAL Notes on Organizing Arbitral Proceedings', intended for general and universal use across arbitral institutions,[68] briefly detail the use of tribunal secretaries in international arbitration.[69] Acknowledging that the '[f]unctions and tasks performed

63 ibid., p. 334.

64 Queen Mary University of London – School of International Arbitration, '2018 International Arbitration Survey: The Evolution of International Arbitration', p. 7 www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (last accessed 21 February 2023).

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

66 id.

67 id.

68 'UNCITRAL Notes on Organizing Arbitral Proceedings (2016)', p. 1 at [1], at https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings (last accessed 21 February 2023).

69 ibid., paras. 35–38.

by secretaries are broad in range',[70] the Notes only confirm that, save in certain specialist forms of arbitration, 'it is recognized that secretaries are not involved and do not participate in the decision-making of the arbitral tribunal'.[71]

The *Young ICCA Guide on Arbitral Secretaries*,[72] the product of two surveys conducted in 2012 and 2013[73] 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. Although 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',[74] 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.[75] For example, actual participation in the tribunal's deliberations was opposed by 83.5 per cent of respondents,[76] and only 31.9 per cent of respondents considered that a tribunal secretary should draft the legal reasoning portions of the award.[77]

Setting out a non-exhaustive list of 10 tasks that 'may' be undertaken by the tribunal secretary – to include undertaking administrative matters,[78] communicating with the arbitral institution and parties,[79] drafting procedural orders and similar documents,[80] research,[81] reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarising the parties' submissions and evidence,[82] attending the arbitral tribunal's deliberations[83] and drafting appropriate parts of the award[84] – 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.*[85]

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70 ibid., para. 36.

71 id.

72 International Council for Commercial Arbitration, *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 February 2023).

73 ibid., p. vii.

74 id.

75 ibid., p. 3.

76 ibid., Art. 3(2)(i) Commentary.

77 ibid., Art. 3(2)(j) Commentary.

78 ibid., Art. 3(2)(a).

79 ibid., Art. 3(2)(b).

80 ibid., Art. 3(2)(g).

81 ibid., Art. 3(2)(e) and (f).

82 ibid., Art. 3(2)(h).

83 ibid., Art. 3(2)(i).

84 ibid., Art. 3(2)(j).

85 ibid., Art. 3(1) Commentary.

In Dr Ole Jensen's 2019 monograph on the subject of tribunal secretaries (the first of its kind), the 'Traffic Light Scale of Permissible Tribunal Secretary Tasks' was proposed as a tool to assist stakeholders in determining how tribunal secretaries may be employed.[86] This Scale classifies all tasks that an arbitrator may potentially delegate to a tribunal secretary, or for which an arbitrator may receive support from a tribunal secretary, under three categories: the Green List (tasks that may be carried out by undisclosed tribunal secretaries or other informal support);[87] the Orange List (tasks that may be carried out by tribunal secretaries who have been formally appointed);[88] and the Red List (tasks that may be carried out only by an appointed tribunal secretary with specific consent from the parties).[89] In keeping with stakeholder concerns, the Red List covers tasks that directly pertain to or constitute eminently personal parts of the arbitral mandate.

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86 Appendix E, 'Traffic Light Scale of Permissible Tribunal Secretary Tasks' in J Ole Jensen, *Tribunal Secretaries in International Arbitration* (Oxford International Arbitration Series, 2019) pp. 411–14.

87 ibid., para. 5.133: 'The Green List consists of tasks which do not impact the originality of the arbitrator's decision, either because they pertain to his non-essential duties or because they are not fit to influence him in any way. As the parties do not have any expectation of personal fulfilment in regard to these non-essential tasks, obtaining the parties' consent is not necessary for delegation and support. Yet, as most of these tasks may entail that the secretary becomes privy to confidential information, the arbitrator must ensure that the secretary is included in his sphere of confidence or otherwise under a sufficient confidentiality obligation. If that safeguard is in place, Green List tasks may be carried out by undisclosed secretaries or any other type of informal third-party support, such as office secretaries, personal assistants, IT departments, etc.'

88 ibid., para. 5.134: 'The Orange List consists of tasks which can have a bearing on the originality of the award, meaning that they can influence the arbitrators' eminently personal mandate to some degree. To perform these tasks, a tribunal secretary must be formally appointed. The tasks on the Orange List are all tasks that a tribunal secretary "commonly" carries out and that the parties may therefore be deemed to expect under their general consent to the secretary's appointment (Verkehrssitte). What is considered "usual" will be determined in the following section, but differs in some institutional contexts that have been described earlier. If the parties do not want the tribunal secretary to carry out any of the tasks on the Orange List they must indicate this in the TS ToA [Tribunal Secretary Terms of Appointment]. The Orange List serves as an indication of what parties must legitimately expect when they consent to the appointment of a secretary, thus lifting the veil of "obscurity" currently engulfing tribunal secretaries. At the same time, the formal appointment ensures that the secretary possesses the requisite impartiality and independence, which is necessary when handling tasks that can influence the arbitral tribunal's decision. In addition, the Orange List ensures that parties have formally consented to the participation of a secretary so that they are not surprised or dissatisfied when they get in contact with him throughout the proceedings.'

89 ibid., para. 5.135: 'Lastly, the Red List covers tasks that directly pertain to or constitute eminently personal parts of the arbitral mandate. They can have a substantial influence on what decision the arbitral tribunal reaches and how it substantiates that decision. The probability that the tribunal secretary becomes a *de facto* arbitrator if he carries out

For some, the proper supervision and direction of tasks by a conscientious tribunal[90] may be sufficient to militate against any impairment of the tribunal's non-delegable decision-making function. However, recent challenges to arbitration awards show that the wide margin of discretion afforded to tribunals (including by reference 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 arbitral institutions' rules[91] provide that a tribunal secretary can be appointed only following consultation with,[92] or by agreement of,[93] the parties. Pursuant to these rules, tribunal secretaries are typically subject to the same or similar requirements of impartiality and independence as the members of the tribunal.[94] Further, of these institutions, all but the Singapore International Arbitration Centre (which remains silent on the tasks that may be undertaken by a tribunal secretary)[95] have taken steps to define and regulate the scope of the tribunal secretary's role.

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a number of the tasks on the Red List is considerable. Yet, as there are no limits to party autonomy in this regard, parties may validly agree to charge secretaries with the tasks contained in the Red List. This makes the entire Red List "waivable", provided the parties have given their informed and specific consent to the particular tasks. In addition, to these tasks, all tasks on the Orange and Green Lists may be carried out, unless the parties have specifically agreed to the contrary.'

90 Born, op.cit., note 65, 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.

91 For example, the rules of the Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC), Stockholm Chamber of Commerce (SCC), LCIA, International Chamber of Commerce (ICC), Swiss Chambers' Arbitration Institution (SCAI) and ICSID.

92 HKIAC, 'Guidelines on the Use of a Secretary to the Arbitral Tribunal' (2014), Guideline 2.1; SCAI, 'Guidelines for Arbitrators' (2021), Guideline A1.

93 'LCIA Notes for Arbitrators' (2017), paras. 74 and 75; SIAC, 'Practice Note for Administered Cases – On the Appointment of Administrative Secretaries' (2015), para. 3; 'SCC Arbitration Rules 2017', Art. 24(1).

94 SCC Arbitration Rules 2017, Art. 24(3); HKIAC, 'Guidelines on the Use of a Secretary to the Arbitral Tribunal' (2014), Guideline 2.2; 'LCIA Notes for Arbitrators' (2017), paras. 78 and 81; SCAI, 'Guidelines for Arbitrators' (2014), Guideline A1.

95 SIAC, 'Practice Note for Administered Cases – On the Appointment of Administrative Secretaries' (2015).

In October 2017, the LCIA adopted changes to its Notes for Arbitrators[96] to 'clarify the tribunal secretary role, and strengthen the existing elements of the LCIA's approach to tribunal secretaries'.[97] This was followed by the adoption of the 2020 LCIA Arbitration Rules. Article 14A of the Rules sets out a clear framework for the use of tribunal secretaries, expressly precluding any delegation of the decision-making function of the tribunal.[98] The Rules further mandate that any tasks to be performed by the tribunal secretary must be expressly agreed to by the parties.[99] The tribunal secretary is also subject to a continuing duty to disclose any circumstances that 'are likely to give rise in the mind of any party to any justifiable doubts as to [their] impartiality or independence'.[100]

This concern regarding consent to each aspect of the tribunal secretary's role is similarly reflected in the Stockholm Chamber of Commerce (SCC) Arbitration Rules of January 2017, which provide that the tribunal shall consult the parties regarding the tasks of the secretary.[101]

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 2021 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' (ICC Note) under the 2021 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', 'attending hearings,

96 LCIA, News release, 'LCIA implements changes to tribunal secretary processes' (26 October 2017), www.lcia.org/News/lcia-implements-changes-to-tribunal-secretary-processes.aspx (last accessed 21 February 2023).

97 id. 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 ('LCIA Notes for Arbitrators' (2017), para. 71).

98 See LCIA Arbitration Rules (October 2020) (LCIA Rules 2020), Art. 14.8: 'Under no circumstances may an Arbitral Tribunal delegate its decision-making function to a tribunal secretary. All tasks carried out by a tribunal secretary shall be carried out on behalf of, and under the supervision of, the Arbitral Tribunal.'

99 See LCIA Rules 2020, Arts. 14.10(i) and 14.11.

100 ibid., Art. 14.14.

101 SCC Arbitration Rules 2017, Art. 24(2).

meetings and deliberations; taking notes or minutes or keeping time', and 'proof-reading and checking . . . procedural orders and awards'.[102] 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 or rely on an administrative secretary to perform on its behalf any of the essential duties of an arbitrator. Likewise, the tasks entrusted to an administrative secretary, such as the preparation of written notes or memoranda, will not release the arbitral tribunal from its duty to personally review the file and/or draft itself any arbitral tribunal's decision.*[103]

The list of organisational and administrative tasks under the ICC Note is broadly replicated in the 2014 Hong Kong International Arbitration Centre (HKIAC) 'Guidelines on the Use of a Secretary to the Arbitral Tribunal' (HKIAC Guidelines) under the same heading.[104] Notably, however, the HKIAC Guidelines enumerate further tasks that may be performed '[u]nless the parties agree or the arbitral tribunal directs otherwise'.[105] 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,[106] under the HKIAC Guidelines, both research[107] and attendance at the tribunal's deliberations[108] 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'.[109]

Both the HKIAC Guidelines and the ICC Note include a reiteration of the personal and non-delegable duty of members of the tribunal to review the complete case file and materials,[110] since this is critical to the exercise of independent judgement by the arbitrator in reaching his or her ultimate decision.

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102 ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' (1 January 2021), para. 224.

103 ibid., para. 223.

104 HKIAC, 'Guidelines on the Use of a Secretary to the Arbitral Tribunal' (2014), Guideline 3.3.

105 ibid., Guideline 3.4.

106 ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' (1 January 2021), para. 224.

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

108 ibid., Guideline 3.4(e).

109 ibid., Guideline 3.4(c).

110 ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' (1 January 2021), para. 223; HKIAC, 'Guidelines on the Use of a Secretary to the Arbitral Tribunal' (2014), Guideline 3.6.

The arbitral institution rules and guidelines detailed above each include an express prohibition against delegation of the tribunal's decision-making function.[111] 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,[112] 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.[113] Such permitted delegation was also reported in *AES v. Hungary*,[114] 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.[115]

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.

Exceptional position under ICSID

The position under ICSID is unique. In the overview about ICSID on its website, it is stated: 'A dedicated ICSID case team is assigned to each case and provides full legal and administrative support throughout the process.'[116] This includes the appointment of a tribunal secretary from ICSID's staff (i.e., the ICSID Secretariat) by the secretary general.[117] The secretary is further said to act as the representative of the secretary general

111 'LCIA Notes for Arbitrators' (2017), para. 68; SCC Arbitration Rules 2017, Art. 24(2); ICC, 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration' (1 January 2021), para. 223; HKIAC, 'Guidelines on the Use of a Secretary to the Arbitral Tribunal' (2014), Guideline 3.2.

112 SCAI, 'Guidelines for Arbitrators' (2014).

113 Swiss Federal Tribunal, First Civil Law Court, *A. SA v. B. Sàrl*, 4A_709/2014, Judgment of 21 May 2015, Federal Judges Mmes Kiss (presiding), Hohl and Niquille. Clerk of the Court: Mr Carruzzo, 33(4) *ASA Bull.* 879. ('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.')

114 *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.

115 id. 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.

116 'About ICSID', https://icsid.worldbank.org/About/ICSID (last accessed 21 February 2023).

117 ICSID Convention, Regulations and Rules, 'Administrative and Financial Regulations' (2006 Version), Reg. 25.

while serving in that capacity.[118] 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'.[119] Notably, the tribunal secretary's participation in the deliberations of the tribunal was explicitly excluded under the 2006 Version of the ICSID Rules[120] but is now permitted under the 2022 Rules.[121]

Although 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*[122] 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.*[123]

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';[124] 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 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'.[125]

118 ibid., Reg. 25(a).

119 ibid., Reg. 25(d).

120 ICSID Rules of Procedure for Arbitration Proceedings (April 2006), Rule 15.

121 ICSID Arbitration Rules (2022), Rule 34(3).

122 *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.

123 ibid., para. 1.

124 ibid., paras. 4 and 5.

125 ibid., para. 9.

Levelling more general and wide-ranging criticisms at the Secretariat, Professor Dalhuisen cautioned against the apparent desire 'to obtain for itself a greater role in the conduct of ICSID cases'.[126] 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;[127]
- 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;[128]
- the Secretariat is not entitled to intervene in the proceedings in any way, unless asked to do so by the committee or tribunal (which should never affect the substance of the case);[129] and
- the Secretariat should not assume the mantle of promoting a *jurisprudence constante* across ICSID awards.[130]

Regarding the central issue of the right and obligation to exercise the decision-making function, Professor Dalhuisen stated: '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.'[131]

Although the grounds for annulment are limited under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 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.[132]

Mitigating the risks

Recent challenges to both awards and arbitrators based on the alleged misuse of tribunal secretaries suggest 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'.[133] Further, and despite efforts to codify the extent of the tribunal secretary's role by some institutions, many argue that there remains a manifest lack of consistency across the various institutional rules and guidelines.

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126 ibid., para. 2.
127 ibid., para. 7.
128 ibid., paras. 10–12.
129 ibid., para. 15.
130 ibid., paras. 16 and 17.
131 ibid., para. 19.
132 Convention on the Settlemennt of Investment Disputes between States and Nationals of Other States (2006), Art. 52(1)(d).
133 Partasides, op. cit. note 3, p. 148.

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 CDR Spring Arbitration Symposium in 2017, 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'.[134]

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, delegation of the personal adjudicative function to a tribunal secretary, who lacks 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.[135]

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 the 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 their 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 their mandate; and
- 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 if the tribunal secretary's role was agreed by the parties and transparent throughout the proceedings.

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134 Commercial Dispute Resolution News, 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 February 2023).

135 '2018 International Arbitration Survey: The Evolution of International Arbitration', op. cit. note 64, p. 7.

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