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## Chapter III: The Award and the Courts, Efficient Drafting of the Arbitral Award: Traditional Ways Revisited – Lesson Learned from the Past?

Felix Dasser; Emmanuel O. Igbokwe

### I Introduction

The rendering of an enforceable arbitral award (1)) is considered the '*raison d'être*' of international arbitration. Yet the very process of drafting the arbitral award remains somewhat obscure and very much a matter of personal predilections and practical possibilities. This is perhaps not surprising when one considers that both parties and international arbitrators often hail from different jurisdictions with diverse approaches to the judicial decision-making process. Thus, the drafting of an arbitral award will inevitably be influenced by a multitude of factors. These include the legal or factual complexity of the dispute, the composition of the arbitral tribunal (one arbitrator or a panel of three arbitrators), the background of the arbitrator(s), personal styles and preferences of the arbitrators, the needs of the parties to the arbitration etc. It is therefore little wonder that arbitrators enjoy a great deal of discretion when it comes to the drafting of the arbitral award. This notwithstanding, it is recognized that there are certain basic standards and considerations that should be generally taken into due consideration.

Against this background, this article revisits the process of drafting an arbitral award, both from historical and contemporary perspectives. While scholarly discourse and commentary on this topic have hitherto mainly focused on the formal requirements and minimum contents of an arbitral award, this article will lay emphasis on the actual process of "wielding the pen". It will first examine the legal framework as regards the drafting process. Thereafter, we will lay out the most important issues to be taken into consideration before and during the drafting of the award. Finally, the article will present an in-depth re-evaluation of the role of arbitral secretaries in the drafting process.

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Drawing on historical considerations and the reality in contemporary arbitration practice, this article will propose certain methods based on lessons from the past, which will help in demystifying the drafting process, with a view to enhancing the quality of arbitral awards in international arbitration.

### II Legal Framework

#### A Arbitration Laws

##### 1 National Laws

Typically, the first reaction of lawyers in the quest for answers on a particular issue is to inquire what the law says. However, a close look at national arbitration laws has revealed that seeking for answers on how to draft arbitral awards in these laws is a futile exercise. As far as we are aware of, the usual arbitration laws, including the Swiss Private International Law Act (Swiss PILA), the Austrian Arbitration Law, the 1996 English Arbitration Act are silent on the issue. (2)) Therefore, it seems that national arbitration laws do not provide any guidance on the drafting of arbitral awards.

##### 2 UNCITRAL Model Law

Similar to national arbitration laws, the UNCITRAL Model Law (3)) does not contain any specific provisions as regards the drafting of arbitration awards either. According to Article 31(1) UNCITRAL Model Law, "[t]he award shall be made in writing and shall be signed by the arbitrator or arbitrators". Article 31(2) UNCITRAL Model Law further states that "[t]he award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given [...]". Other than these provisions – which actually say nothing about the drafting process – the UNCITRAL Model Law is silent on the issue.

#### B Arbitration Rules

As our search for guidance on how to draft arbitral awards in national laws has not yielded any fruits, we now turn our attention to the most prominent arbitration rules.

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##### 1 UNCITRAL Arbitration Rules

According to Article 34(2) UNCITRAL Arbitration Rules, (4)) "[a]ll award shall be made in

writing and shall be final and binding on the parties.” Article 34(3) states that the “arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.” Other than these provisions, the UNCITRAL Arbitration Rules do not provide any guidance on how the arbitral award is to be drafted.

## 2 ICC Rules

Article 32(2) 2017 Arbitration Rules of the International Court of Arbitration (ICC Rules) states that “[t]he award shall state the reasons upon which it is based”. However, the ICC Rules do not contain further instructions on how to draft the award.

## 3 Other Arbitration Rules

A close look at the other major institutional arbitration rules has also revealed that these rules are silent on how arbitral awards should be drafted. These rules mostly restrict themselves to stating that the arbitral awards shall be in writing and the arbitral tribunal shall state the reasons upon which the award is based. (5)) Beyond this, they do not explicitly provide any guidance for the arbitrators on how the arbitral award should be drawn up. Given this lack of guidance in national laws and practically all arbitration rules, the drafter of the award is compelled to look elsewhere for inspiration.

# III Sources of Inspiration and Guidance

## A Case Law

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The natural instinct of a lawyer is to seek for answers in case law if the applicable laws and rules do not provide any solutions. However, seeking for guidance in arbitration case law on how to draft the arbitral award has proved ● fruitless. Having said this, there have been a few cases in which courts dealt with the topic of award drafting. However, the issue in those cases was not the drafting of the award *per se* but instead the role of arbitral secretaries in the drafting process, (6)) which we shall address at V.B *infra*. Therefore, as far as the actual drafting of the award is concerned, case law is of no help either.

## B Arbitration Doctrine

In addition to the lack of case law on the process of drafting an arbitral award, commentary and academic discourse on the actual process of drafting the arbitral award is also surprisingly sparse. This seemingly lack of attention in the award drafting process prompted Humphrey Lloyd to remark back in 1994 that “[c]uriously, very little has apparently been written about how awards should be drawn up.” (7)) As mentioned above, most of the literature on arbitral awards tend to focus on the formal contents and structure of the award but not so much on how the drafting process in itself should be conducted. (8)) Therefore, it seems that not so much has changed since Humphrey Lloyd’s observation in 1994.

## C Guides and Toolkits

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Given the *lacuna* in national arbitration laws and arbitration rules, as well as the apparent lack of attention in arbitration doctrine on how to draft the arbitral award, attempts have been made at devising practical guides, based on purported “best practice”, which would assist arbitrators in drafting the arbitral award. (9)) All these documents, some of which we will address in more detail ● below, are neither binding nor do they purport to represent a generally accepted approach with regard to the drafting of arbitral awards. (10)) Nonetheless, they provide useful guidelines on how arbitral awards ought to be drafted.

In addition to the above, the IBA Arb40 Subcommittee recently issued a document with the title “Toolkit for Award Writing”, which was released on September 21, 2016. (11)) The IBA Toolkit for Award Drafting contains valuable recommendations; *inter alia*, advice on how to conform to time limits, tips with regard to the length of the award, (12)) comments on the role of arbitral secretaries in the drafting of the arbitral award (13)) as well as a general checklist on award drafting. (14)) However, according to the drafters, the aim of the IBA Toolkit for Award Drafting is not to set uniform standards of award writing, but simply to provide practical guidance, especially for those who are in the early stages of their practice as an arbitrator. (15)) Unlike some other documents by international organizations, the toolkit is nudging rather than preaching. It does not seek to put people on the right or wrong side of a moral fence.

# IV Important Considerations when Drafting the Award

## A Addressees of the Award

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It is vital for the drafters of an arbitral award to always reflect on the question of whom the award is being drafted for. Of course, the award is primarily meant for the parties to the arbitration. (16)) This is not the end of the story, though. There are other possible addressees whose interests should also be taken into account. (17)) Therefore, other than the parties to the arbitration (1), the arbitration institution (2), State courts (3) and the wider public (4) may also ● be considered addressees of the arbitration award. We shall address each of these in the following.

## 1 The Parties

### a) The Winning Party

It is often said that the winning party will only be interested in the dispositive part of the arbitral award. (18) This is because it is this part that sets out the result of the arbitration in simple terms so that a court where the enforcement of the award is sought would have little difficulty in giving effect to the decision of the arbitral tribunal. (19)

However, while the winning party seldom reads every word of the award, it is generally still interested in the reasoning behind the findings of the arbitral tribunal. (20) This is because, regardless of the fact that it has prevailed in the arbitration, the winning party may still wish to know exactly if and to what extent the reasoning of the arbitral tribunal may affect its business in the future. For instance, the reasoning of the tribunal could be the basis for a party to reconsider its General Terms and Conditions or it could serve as a basis for re-examining the structure of the contract that formed the basis of the dispute.

The winning party may also want to take a very close look at the reasoning of the arbitral tribunal in order to identify any procedural grounds the opposing party may seize upon in an attempt to thwart or stall the enforcement of the award. (21) A careful perusal of the reasoning of the arbitral tribunal can therefore help in developing a strategy in anticipation of a challenge of the award. Thus, despite the fact that the operating part often represents the most important section for the winning party, the drafter must resist any temptation to give short shrift to the other parts of the arbitral award, especially the reasoning.

### b) The Losing Party

Similar to the winning party, the losing party will also most likely first consult the operating part of the award. However, the losing party will be more interested in the reason for the decision in order to understand why it has been unsuccessful (22) and, maybe more importantly, how it can best attack the award in court or otherwise. Given the substantial amounts of money often involved in international arbitration disputes, losing parties, either because of share-holders' ● pressure or in order to stave off or at least temporarily prevent the enforcement of a potentially ruinous award, sometimes also launch baseless appeals, often under the guise of due process violation. Therefore, the drafter of the award must keep in mind that the losing party is most likely to conduct a microscopic examination of the award to see if it can find grounds on which to launch such an attack. (23)

Although such frivolous appeals are not entirely preventable (it is the party's right to appeal), they can be minimized if the drafter ensured that the award does not contain any hints at disdain for the losing party's factual representations, its legal arguments or the conduct of its witnesses during the hearings. The goal is to avoid creating the impression that the losing party is being criticized unfairly or that its behavior in the proceedings is to blame for the decision of the arbitral tribunal on the merits. (24)

Moreover, as parties in international arbitrations often hail from different jurisdictions with different cultural sensitivities, the drafter of the arbitral award will also want to make sure that these sensitivities are taken into account. Accordingly, the drafter should abstain from using language that may be viewed as inflammatory or insensitive in a different cultural context. (25) At any event, it is important for the drafter to exercise decorum towards the losing party in the elucidation of the grounds upon which a decision was reached.

It is also our view that observing these factors discussed above, and expressing appreciation of the losing party's arguments and positions, however flawed they may be, could play an important psychological role on whether or not that party will accept defeat and comply with an unfavorable award. (26) For balsam is as good for the soul as it is for the skin. As Claude Reymond excellently put it:

"[T]he most important aspect is, perhaps, the explanatory role of the award, which goes much further than the indication of the factual and legal reasons for the award. The losing party needs to know why it has lost, based on relevant facts or law. To the extent feasible, this explanation should avoid giving such party the impression that it lost because of its own fault or, much less, that of its counsel. An objective explanation will increase the chances of the award being accepted." (27)

Then again, not all losing parties are willing to listen. Sometimes it is clear from the outset that all labor will be lost.

## 2 The Arbitration Institution, If Any

A well-known practice of the International Chamber of Commerce (the ICC) is that the ICC Court scrutinizes and approves the draft of the arbitral awards before the award is dispatched to the parties. (28) Some arbitration institutions have also adopted such a practice. (29) The purposes of the scrutiny are twofold: first, to identify possible formal defects, and second, to draw the arbitral tribunal's attention to points of substance. Ultimately, the goal of the scrutiny is to assist the arbitral tribunal to render an award that

is not only of the sufficient quality, but also one with which the parties will most likely voluntarily comply.

Now the distinction between form and substance is important. This is because, while the arbitral tribunal is required to incorporate into its award any modifications of forms, it has the discretion to decide whether to take into account any substantive matters to which the ICC Secretariat draws its attention. (30) Accordingly, the drafter of the award must bear in mind that, where applicable, the arbitration institution will always take a close look at the award to ensure, for example, that core procedural information, the names of the parties to the arbitration and their counsel, their addresses etc. are correctly recorded. Incomplete or false representation of such mundane issues can indeed result in arbitral award being sent back to the arbitral tribunal for corrections. The inevitable delay that may result can easily be avoided if meticulous care is applied in the drafting process. Besides, it does not do a lot of good to the reputation of an arbitrator if his or her award is constantly being referred back for corrections that could have been easily avoided. Arbitration institutions also strive to protect their own reputation and would strive to ensure that awards rendered under their auspices do not contain grave errors. As far as the ICC is concerned, this might sometimes require a more thorough reasoning than is usually required for the parties, given the Court's limited familiarity with the case. Often, suggestions by the ICC Court for the arbitrators to further elaborate on a point provides little benefit to the parties to the arbitration and only leads to further delays of mostly already too long proceedings.

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### 3 State Courts?

Another important consideration for drafters of arbitral awards is that a party might challenge the arbitral award before a State court, either at the seat of arbitration or at the place where enforcement or recognition is being sought. As a result, arbitrators also bear a responsibility to preserve the reputation of arbitration by ensuring that the award they render will withstand scrutiny before a State court. (31) Indeed, concern for the reputation of arbitration is also one of the reasons why, as discussed above, (32) the ICC Court scrutinizes arbitral awards in an attempt to eliminate, subject to the agreement of the arbitral tribunal, any grave substantive errors that might jeopardize the enforcement to the award.

Moreover, the drafter of the arbitral award must not lose sight of the fact that, where applicable, some institutional rules require that the arbitral tribunal apply its best effort to ensure that the award is enforceable at law. (33) This reason alone suffices for the drafter to always contemplate that, to the extent this is permissible, a State court might have the opportunity to scrutinize the arbitral award, and to anticipate such a scrutiny accordingly. (34) The quality of the award could play a role in preventing State court intervention.

Conversely, arbitrators normally do not need to tailor their award to idiosyncratic requirements of a specific State where enforcement might be sought, as such State might either not exist at all – if no enforcement is necessary – or may, as is usually the case, not be predictable for the arbitrators with certainty.

### 4 The Wider Public?

The drafter of the arbitral award should also be mindful of the fact that the award may attract a readership broader than just the parties to the arbitration, State courts and the arbitration institution. Such a broad readership can particularly be expected in investment and some sports arbitration cases. In these instances, the function of the arbitral award transcends the simple resolution of the dispute between the parties. Thus, exactitude and cohesiveness ● in the reasoning of the arbitral tribunal are imperative prerequisites of which the drafter must not lose sight.

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Having said this, it must be acknowledged that the interests of third parties might be considered less significant in the context of international commercial arbitration. This is not only because such awards are rarely published, but also due to the fact that, in some jurisdictions, international commercial arbitrations and awards rendered under their auspices are considered “inherently” confidential. (35) Therefore, it may be argued that the drafters of arbitral award in international commercial arbitrations may be less inclined to endeavor that the award is also suitable for a readership outside of the parties to the arbitration.

Nonetheless, we are of the view that, to the extent possible, the drafter of the award should always strive to render a well-reasoned decision. As already mentioned, the understanding behind this approach is that arbitral awards can no longer be construed as having the sole purpose of settling the dispute between the parties. Indeed, a well-reasoned arbitral award gives the impression that justice has been served and thus enhances the image of arbitration. (36)

## B Timing and Structure

### 1 The Issue of Time Limits for the Delivering of the Award

## a) Arbitration Rules

The general impression today is that it is taking longer and longer for arbitral tribunals to deliver their awards. Indeed, the Queen Mary Survey 2018 lists “lack of speed” as one of the worst characteristics of international arbitration. (37))

International arbitration has evolved: the increasing complex nature of the disputes in international arbitration and the ever-increasing huge amounts of money involved lead parties to often seek for services of renowned arbitrators to adjudicate their disputes. Inevitably, these arbitrators often have loads of cases they simultaneously work on and are therefore very busy. It is, therefore, not surprising that certain arbitration institutions have taken measures aimed at tackling the issue of delays. For instance, Article 31(1) ICC Rules states in part that the “*time limit within which the arbitral tribunal must render its final award is six months.*” The ICC Court may extend this time limit “*pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.*” (38))

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Some institutional arbitration rules contain similar provisions, (39)) while most others are mostly silent on the matter. (40)) Where applicable, provisions such as Article 31 ICC Rules are intended to put pressure on the tribunal to deliver the arbitral award on time. That said, the reality in arbitral practice is that very few awards are ever rendered within six months of the signing of the Terms of Reference. Therefore, the six-month rule is rather the rare exception instead of the rule. (41)) Indeed, Article 31 ICC Rules exemplifies the shortcomings of the idea of setting time limits: if the time limits are obviously too short, their prolongation risks degenerating into a mere bureaucratic formality and the limits are no longer taken seriously.

Other than the institutional rules, the parties themselves may determine a time limit for the delivering of the arbitral award, although such party established time limits are rare in practice. Such a determination carries substantial risks. For example, if, as is often the case, the time limit set by the parties was overly optimistic, and if the parties have agreed that an extension will only be granted subject to prior agreement of both parties, the arbitration process as such may easily be jeopardized by an obstructive party or unforeseen circumstances. (42))

In any event, the possibility of time limit, either pursuant to the applicable arbitration rule or as established by the parties, inevitably increases the pressure on the tribunal to deliver their awards on time. There could also be financial penalties for arbitrators in cases of excessive delays. (43)) All this militates for the approach that the drafting process should commence as soon as possible, as we will address in the following.

## b) Start Early and Finish Early?

Even in cases where there is no deadline or time limits, starting the drafting process as early as possible should be preferred. In addition to the need to comply with any deadline, commencing with the drafting process as early as possible enhances accuracy and efficiency. In cases where the tribunal is composed of more than one arbitrator, the process of drawing up the arbitral award should start during the deliberation of the arbitrators. Most arbitral ● tribunals commence such deliberations before or shortly after the evidentiary hearing on the merits. (44)) Some even contend that it is good practice to commence with the drafting of the award well in advance of the hearing by setting out the introductory parts, e.g., names of the parties, and arbitrators, procedural history, and, to the extent available, the relevant facts. (45))

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The benefits of commencing with the drafting of the award at the earliest possible time are manifold. First, the fleeting nature of human recollection should not be underestimated: starting the drafting process not too long after the hearings ensures that the facts of the case, the issues discussed at the hearing and the decisive witness evidence (if any) will likely still be fresh on the mind of the drafter. Second, not spending too much time between the hearing and commencement of the drafting would reduce the risk of the frustration many arbitrators often experience if they had to re-identify the pertinent evidence, re-acquaint themselves with the facts of the case and re-familiarize themselves with the issues and the parties' arguments. (46)) Finally, although most experienced arbitrators are accustomed to delivering quality work under time pressure, commencing early with the drafting process will contribute in eliminating the small and avoidable mistakes that often inevitably creep into arbitral awards due to time pressure. Such mistakes could lead to the award being sent back to the arbitrator for corrections after having been scrutinized by the arbitration institution. In view of the above, it is preferable that, to the extent possible, the drafter should not procrastinate when it comes to the commencement of drafting of the award. (47)) Delaying the drafting of the award and hence the rendering the award on time is a violation of an arbitrator's professional duties. (48))

Having said all this, the ability to start with the deliberation shortly after the hearing obviously depends on how well the arbitrators are prepared beforehand. At any event, conscientious arbitrators will want the drafting process to be commenced as early as possible, and they would also strive to deliver the arbitral award within a reasonable time. The old saying “justice delayed is justice denied” also applies to arbitration. (49))

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## 2 Outline Concise Procedural History

The main purpose of the procedural history section is to demonstrate that the arbitration was properly commenced, that the arbitral tribunal was properly constituted and that the proceedings were conducted in accordance with the due process and equal treatment requirements. (50))

However, one often comes across a procedural history that runs for pages upon pages, with minute details of every insignificant event that occurred in the course of the arbitration. It is our view that the procedural history should be as concise as possible. This can be achieved if the drafter of the award concentrated on the most important procedural issues. For instance, although it is advisable to commence with the drafting as early as possible, with constant update of the procedural history, such continuous additions tend to cluster the arbitral award with insignificant procedural minutiae and hence add to the volume of the award. Insignificant procedural details, *e.g.*, the fourth extension of a deadline for filing by three days, must not necessarily be included in the award. Of course, a losing party may seize upon any omission of a procedural matter to launch an attack against the award. Yet, challenges cannot be eliminated simply by including every procedural detail in the award, given that parties bent of obstructing the arbitration process or challenging an unfavorable award will always find a reason to do so.

At any event, it is helpful to maintain a log file which includes all basic data related to the case, the parties and their counsel. The information contained therein can be very useful during deliberations if procedural issues arise. However, it is not helpful to simply copy and paste all that information into the procedural part of the award as this inevitably and unnecessarily increases the volume of the award. (51))

## 3 Define Appropriate Structure | Issues before Commencing with the Drafting

A structure that clearly lines out the thinking process of the drafter is important. The formal and substantive parts of the award are normally clearly discernible. Typically, jurisdictional issues are addressed before the issues on the substance of the dispute, and any preliminary matters are dealt with prior to progressing with the main issues. (52))

A typical, albeit not necessary, structure of an award is as follows: (i) Summary of Essential Data; (ii) Prayers for Relief; (iii) Chronology of the Arbitration Proceedings; (iv) Facts of the Case; (v) Claims and Counterclaims; (vi) Operating Part of the Award, and (vii) remaining Formalities, in particular the signatures. (53))

The above general comments should not prevent the drafter from taking into account the nature of the dispute and from tailoring the award in such a manner as to satisfy the peculiarities of the case at hand, including the expectations of the parties and of the arbitral institution, if any.

## 4 Use Definitions | Abbreviations

It is helpful to use clear definitions and abbreviations. For example, before commencing with the drafting, a list of, for instance, the contract(s) that formed the basis of the dispute, the names of the parties' involved, important events that occurred during the contractual relationship or after the initiation of the arbitration proceedings may be drawn up and given discernible abbreviations. The same approach can be applied with regard to specific concepts or topics that have very long names and are constantly mentioned throughout the award. Establishing such a list of definitions and abbreviations will prevent the long names from being constantly written in full in the body of the award, and will typically contribute in making the award somewhat shorter and easier to read.

Abbreviations should, however, be easy to remember. If the reader needs to consult the list of abbreviations at every other paragraph, as sometimes happens, the concept loses its purpose.

## C The Length of the Award

There is presently a sense that arbitral awards are increasingly becoming too voluminous. There is no golden rule when it comes to the question as to what the appropriate length of an arbitral award should be, nor would it be feasible to devise such a rule. This is because the length of the award will inevitably depend on the peculiarities of the case at hand. These peculiarities include, for instance, the will of the parties to the arbitration, the complexity of the dispute, the volume of briefs submitted by the parties, etc. However, it is our view that the increasing number of pages of arbitral awards is a major scourge of international arbitration.

While it is difficult to empirically confirm the perception for all types of international arbitration, particularly given that awards rendered in the context of international commercial arbitration are not always published, we took a look at final awards rendered in investment arbitrations from 1988 to 2017, in an attempt to determine whether this

perception reflects reality.

### 1 The Situation Twenty Years Ago

A few decades ago, arbitral awards rendered in arbitrations seated in Switzerland were similar to court judgments with regard to length and structure. For instance, the facts were usually presented in a very concise manner and the procedural history was usually drafted summarily. This meant that the awards were often short, concise and straight to the point. The succinctness of awards rendered a few decades ago was by no means restricted to Switzerland.

It is difficult to come about reliable data with regard to the length of arbitral awards twenty years ago, particularly given that awards rendered under the auspices of international commercial arbitration institutions, let alone in *ad-hoc* proceedings, are mostly not published nor readily available. However, our review of final awards rendered from 1988 to 1999 in investment arbitration (mostly ICSID cases) published in the International Arbitration Database ([arbitration.org](http://arbitration.org)) reveals that the median length of those awards was approximately 45 pages (see chart 1 below). While one cannot assert that this finding also reflects the situation in international commercial arbitration, it still serves as indication as to what the situation may have been twenty years ago with regard to the length of awards in international commercial arbitration.

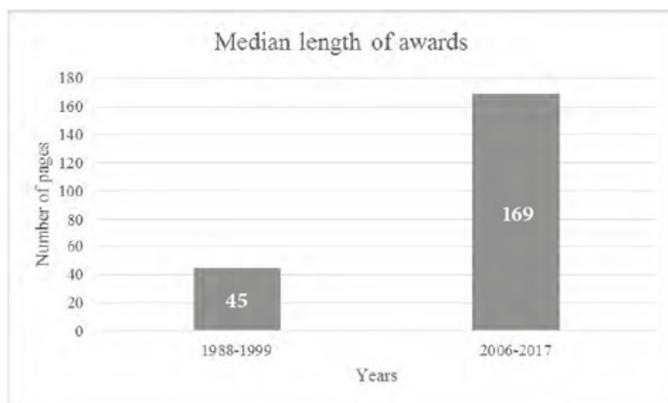


Chart 1: A comparison of the length of final awards in investment arbitrations, 1988–1999 and 2006–2017. Data source: [arbitration.org](http://arbitration.org)

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### 2 The Situation Today

In comparison, we also reviewed investment arbitration awards (again mostly ICSID cases) rendered from 2006 to 2017 (the awards are available in the same database, [arbitration.org](http://arbitration.org)) and discovered that the median number of pages was approximately 169 (see chart 1 above). This is an increase of almost four times the length of the awards rendered from 1988 to 1999.

We demonstrate this steady increase in the number of pages of arbitral awards rendered from 1988 to 2017 in chart 2 below. The sample is not perfectly uniform, but the tendency is obvious. Today, an award may be expected to exceed 200 pages. Is this a desirable development? Where does it end?

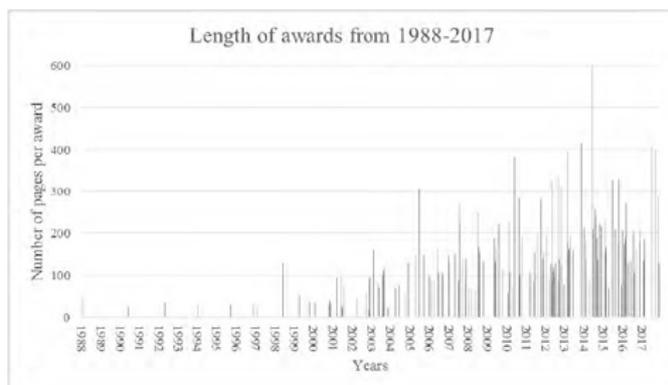


Chart 2: An illustration of the increase in the number of pages of awards in investment arbitration from 1988 to 2017. Data source: [arbitration.org](http://arbitration.org)

### 3 Whither Hence?

What are the reasons for this exponential increase in the number of pages? Must we now resign ourselves to the inevitability that in a not too distant future – i.e. assuming the current trend is not checked – awards of a thousand pages will become the norm? Is it time

for us to take a step back and draw some lessons from the way in which arbitral awards of yesteryears were drafted?

There are several reasons for the increase in the number of pages of arbitral awards. First, the increasing complexity of the disputes requires more pages. Second, the modern tools (computers and software programs, etc.) make the proliferation of long awards much easier. Third, the procedural history section is often unnecessarily very detailed. Fourth, lack of focus on the part of the drafters leads to copy and paste routines in which the parties' arguments and ● positions are repeated in detail over pages. Fifth, there has been an increase in the costs of arbitration and hence costs decisions are today much more detailed. Finally, it seems to us that most drafters of nowadays simply do not take the time to write a concise award. There might also be a vicious circle in motion: The longer awards become (and are expected to become), the higher the probability that busy arbitrators will delegate at least part of the drafting to secretaries, who will err on the side of caution, often choosing to incorporate too much rather than not enough history, facts, and party arguments into the award.

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Now, notwithstanding the increasing complexity of the disputes, we concur with Michele Patocchi and Robert Briner when they opine that the goal of the drafter(s) of an arbitral award should be to present the parties with an award that reads and looks like a “self-contained piece of writing”. (54)) The drafter would have achieved this goal if both the parties to the arbitration and any third party (e.g., State courts, shareholders and insurers) can read the award and quickly understand what the dispute was all about and why the arbitral tribunal decided in a particular fashion. (55)) To this end, the use of short and concise sentences is to be preferred; the award should be well structured, including paragraphs and subsections. (56)) Furthermore, the parties' arguments and positions must not simply be repeated verbatim, but ought instead to be presented as a succinct summary. (57)) It is also very useful to avoid repetition. Adhering to these recommendations would assist in keeping the number of pages of the award in check. (58)) Hardly anybody peruses through 400 or 500 pages of an arbitral award. So why write them?

Producing such enormous awards will inevitably increase the duration and costs of arbitration and deliver more salvo to those who are already scorning at the “overjudicialization” of international arbitration. Arbitration can ill afford to continue further down this path, certainly not at a time when the death knell of investment treaty arbitration is already being sounded in some quarters, while mediation is snapping at the heels of commercial arbitration. Consequently, while the award must be as complete as possible, addressing all the essential issues, the overall aim of the drafter(s) should be clarity and succinctness (59)) for “*brevity is the soul of wit, and tediousness the limbs and outward flourishes [...]*”. (60)) The goal should be high quality, not great quantity.

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● It also seems that there is a certain degree of insecurity amongst arbitrators of today. As a result, they are more risk averse and therefore tend to include every minute detail in the award for fear of their award being challenged on grounds of due process violation (right to be heard, etc.). However, we think that this insecurity is unwarranted, given that arbitral awards are rarely set aside. As far as arbitrations seated in Switzerland are concerned, there is only a 7 % chance of an award being set aside. (61)) Of course, we do not want to turn the clock back to the 1990s, nor could we. Arbitral awards are bound to remain more voluminous than in the distant past, but maybe they could be shorter than in the recent past.

## V The Drafters – Who Writes the Award?

### A The Arbitrators

The principle of party autonomy, an important part of which is the ability for the parties to choose their decision makers, is one of the cornerstones of international arbitration. By exercising this right, parties select and place their trust in specific, purpose-identified individuals, chosen because of who they are and their reputation and expertise with regard to specific legal questions or certain subject matters. In choosing an arbitrator to adjudicate a dispute, parties expect that he or she will personally perform the task of reaching a decision. Accordingly, the arbitrator's mandate is understood as being *intuitu personae*, i.e. the mandate is specific to the individual. (62))

However, for present purposes the question is whether the actual act of drafting the arbitral award is to be considered one of the core decision-making duties of the arbitral tribunal, to the extent that only the arbitrators themselves should carry out this task. This leads us to the discussions below as to who should potentially draft the arbitral award.

#### 1 The Chairperson

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● If an arbitral tribunal is composed of a single arbitrator, the question as to whose responsibility it is to draw up the award does not necessarily arise. This ● issue only becomes relevant in cases where the arbitral tribunal is composed of three or more arbitrators. In such instances, even though there appears to be no rules explicitly requiring the chairperson to draft the arbitral award, it is often the case in arbitral practice that the co-arbitrators will expect the chairperson to be in charge of producing a draft, after at

least a first thorough round of deliberations. (63) Therefore, the duty of drafting the award often falls on the chairperson as a rule of thumb. (64)

## 2 The Co-arbitrators

Nonetheless, often the co-arbitrators can and ought to contribute chapters. Such an approach may, for instance, be called for in cases in which one of the members of the tribunal is an expert on the applicable law or certain aspects of the subject matter of the dispute. (65) Depending on the dynamics in the composition of the arbitral tribunal, the drafting may also be evenly split between the arbitrators, with the chairperson being in charge of fitting together the different parts. In such cases, the drafting of the arbitral award will inevitably be a collective effort.

Such a “division of labor” makes sense because, ultimately, the burden of rendering the award is a collective responsibility of the arbitral tribunal. However, it is important for the chairperson to at all times retain oversight and to not completely delegate the drafting process to the co-arbitrators. This is because the drafter of the award often controls the result, and the chairperson would not want to find him- or herself in a position where he or she only discovers at the very end of the proceedings that the award does not properly reflect the collective decision of the arbitrators or the majority, as the case may be. (66)

## B The Arbitral Secretary?

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Any discussion on the drafting of arbitral awards must nowadays necessarily include an examination of the role, if any, of arbitral secretaries (67) ● in this process. The role of arbitral secretaries was recently thrust into the limelight in connection with the *Yukos* arbitration. (68) In that case, the Russian Federation successfully (69) requested the District Court of The Hague to set aside a USD 50 billion award against it rendered under the aegis of the Permanent Court of Arbitration (PCA). Russia argued, *inter alia*, that the arbitral tribunal did not fulfil its personal mandate given that the arbitral secretary, Mr. Martin Valasek, had allegedly drafted large parts of the award and thereby acted as a “fourth arbitrator.” An appeal launched by the former majority holders in *Yukos Universal Ltd.* against the decision of the Hague District Court is still pending before the Hague Court of Appeal. (70) Even though the Hague District Court did not set aside the *Yukos* award on the ground of the alleged substantial involvement of the arbitral secretary, this case demonstrates the dangers that lurk if there is no clarity on the role of the arbitral secretary. (71) In view of the historic size of the award, it is no surprise that the *Yukos* saga has resuscitated the debate on the role of arbitral secretaries in the drafting of the award.

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Indeed, this “grey area” (72) has been a subject of intense debate and controversy within the arbitration community for quite some time. (73) While ● we are under no illusions about the very controversial nature and the difficulty of the subject, we will in the following nonetheless attempt to re-evaluate the role of arbitral secretaries in the process of drafting the award, both from practical and historical perspectives.

Bearing in mind that parties specifically choose arbitrators based on their individual characteristics, it could be argued that, in accordance with the *intuitu personae* principle, the arbitrator must perform the act of drafting the arbitral award personally. (74)

However, as we shall see below, it seems that not only does such a narrow understanding of the *intuitu personae* principle lack historical background in most jurisdictions, but the idea that arbitrators should personally draft their awards never really gained a foothold in international arbitration practice, despite decades of insistence by some. One wonders whether the time has come for us to take a step back and draw on lessons learned from the past and how they can, if implemented prudently, still be helpful today and in the future.

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## 1 The Arbitral Secretary Twenty Years Ago – Common Law / Civil Law Divide?

The fact that arbitrators may rely on secretaries for support in the arbitral proceedings is not novel. This has been an integral part of arbitration in some jurisdictions for decades, e.g., Switzerland, where arbitration has strong foundations. (75) Indeed, Article 15 of the Swiss Concordat of 27 March 1969 on Arbitration, which was replaced by the Swiss Private International Law Act of 18 December 1987 (Swiss PILA), (76) explicitly empowered arbitrators to appoint an arbitral secretary, subject to the consent of the parties. (77)

Hence, a few decades ago the role of arbitral secretaries was understood to be similar to that of law clerks, to whom the State court judge routinely delegated the production of the first draft of a judgement – a practice by no means restricted to civil law jurisdictions. (78) Accordingly, some earlier commentators considered it normal practice that “*the drafting of the reasoning [of the award] can be left to the Secretary, with the drafting to be done in accordance with possible instructions by the majority of the arbitrators*”. (79) Therefore, “[t]he (usual) redaction of the award by the secretary requires his attendance at the deliberation.” (80)

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In contrast, some common law commentators were “*firmly opposed to any draft being written by anyone other than a member of the tribunal*”, (81) arguing that it is “*not*

acceptable to allow the draft to be prepared by the secretary of the tribunal". (82))

The diverging views on the duty of arbitral secretaries was not to restricted international arbitration conducted under the auspices of the ICC. Recognizing the importance of the institution of arbitral secretaries as well as the controversy surrounding their roles in arbitration proceedings, the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings (83)) addressed the matter as follows:

"Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal." (84))

It was at the height of these debates that the ICC Secretariat on 1 October 1995 issued a Note, which sought to codify the appointment and role of arbitral secretaries in ICC arbitrations. (85)) The sub-section titled "Duties" reads as follows:

"The duties of the administrative secretary must be strictly limited to *administrative tasks*. The choice of this person is important. Such person must not influence in any manner whatsoever the decisions of the arbitral tribunal. In particular, the administrative secretary *must not assume the functions of an arbitrator, notably by becoming involved in the decision-making process* of the tribunal or expressing opinions or conclusions with respect to the issues in dispute." (86))

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This attempt by the ICC Secretariat to restrict the role of arbitral secretaries to strictly administrative support was not greeted with enthusiasm in some quarters. (87)) However, notwithstanding the 1995 ICC Note, which, assuming one considers the drafting of the arbitral award as part of the "decision-making process", appeared to exclude arbitral secretaries from the circle of the drafters, some argued that such an exclusion was irreconcilable with the realities on the ground. (88))

## 2 The Arbitral Secretary Today – The Principle

On October 30, 2017, the ICC once more updated its Note on the Appointment, Duties and Remuneration of Arbitral Secretaries. (89)) This Note replaced previous versions, and made some improvements by providing clearer directions on the procedure to be followed when engaging an arbitral secretary as well as the scope of such a role. Following the approach of the 1995 ICC Notes, the 2017 ICC Notes states "[u]nder no circumstances may the arbitral tribunal delegate decision-making functions to an Administrative Secretary. Nor should the arbitral tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator." (90))

With respect to the arbitral secretaries' role regarding drafting the award or procedural orders, the 2017 ICC Notes makes reference to general proofreading, checking citations, dates and cross-references and correcting typographical, grammatical or calculation errors. (91)) Indeed, the Notes states that arbitrators have a duty to personally draft any decision of the arbitral tribunal. (92)) The 2017 ICC Notes thus shows that the ICC's restrictive position on the role of the arbitral secretaries in the drafting of the award has not necessarily evolved since the 1995 Notes was issued. If anything, by providing that arbitrators are under the duty to personally write any decision of the arbitral tribunal, the question may arise whether the widely accepted practice of having the arbitral secretary draft the procedural and summary sections of the award is even permissible under the 2017 ICC Notes. (93))

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Some arbitration institutions have also adopted a conservative approach similar that of the ICC. For instance, the Stockholm Chamber of Commerce's 2017 (94)) Arbitrators Guidelines states "[s]ubject to any agreement of the parties to the contrary, the administrative secretary's duties shall be limited to organizational, clerical and administrative functions. The arbitral tribunal may not delegate any decision-making functions to the administrative secretary." (95)) Others institutions are tacit on the matter. For example, in its 2015 Practice Note, (96)) the SIAC only provides that administrative secretaries may not be appointed without the consent of the parties, but does not contain any provision as regards the duties of the arbitral secretaries. (97)) The same applies to the Swiss Rules: Although Article 15(5) Swiss Rules provides that the arbitral tribunal may, after consulting with the parties, appoint a secretary, both the Swiss Rules and the Swiss Chambers' Guidelines for Arbitrators (98)) are silent on the role of arbitral secretaries. (99)) It would appear that those institutional rules that are silent on the duties of the arbitral secretaries leave it to the arbitral tribunals to themselves decide on the extent to which the arbitral secretary may be involved in the drafting process. Consequently, it seems that the only message one can derive from the above discussions is that there is a general

acknowledgement that arbitral tribunals may rely on the assistance of arbitral secretaries in the course of the arbitration; but beyond this general principle, the consensus breaks down.

### 3 The Prevalence of a Pragmatic Approach in Contemporary Arbitration Practice?

#### a) Arbitral Secretaries May Draft Part(s) of the Award

Notwithstanding the restrictive view of the ICC and some arbitration institutions, practical considerations seem to dictate that a more nuanced approach is called for. Accordingly, several efforts have been made at establishing a widely acceptable approach when it comes to the role of arbitral secretaries in the drafting of arbitral awards. Most recent amongst these is the ● Young ICCA Task Force, (100) upon whose survey a guide on arbitral secretaries was published in 2014. (101) Article 3 of the Young ICCA Guide reads in part:

“(1) With appropriate direction and supervision by the arbitral tribunal an arbitral secretary's role may legitimately go beyond the purely administrative. (2) On this basis, the arbitral secretary's tasks may involve all or some of the following [...] (e) Researching questions of law; (f) Researching discrete questions relating to factual evidence and witness testimony; (g) Drafting procedural orders and similar documents; (h) Reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence; (i) Attending the arbitral tribunal's deliberations; and (j) Drafting appropriate parts of the award.”

Article 3(2)(j) Young ICCA Guide, according to which the arbitral secretary may draft appropriate parts of the award, was based on the fact that a majority of the respondents (63.5 %) were in support of the arbitral secretary drafting some sections of the award. Of course, to allow an arbitral secretary to draft “appropriate” parts begs the questions as to what “appropriate” means. Nobody would suggest that a secretary draft an inappropriate part of the award. Hence, the question of what parts are appropriate for the secretary to draft remains very much a matter of subjective view. In particular, respondents approved of the arbitral secretary drafting the “Procedural Background”, “Factual Background”, and the “Position of the Parties”. (102) However, the Young ICCA Guide also points out that the majority of participants in the survey opposed to the arbitral secretaries drafting the entirety of the award. (103)

Other organizations also seem to be gravitating towards a less rigid approach to the question whether arbitral secretaries may draft some parts of the award. For instance, although the 1996 UNCITRAL Notes did not expatiate on the role of arbitral secretaries in the drafting of the award, the 2016 UNCITRAL Notes (104) recognizes that arbitral secretaries may prepare drafts of ● procedural decisions. (105) The LCIA Notes for Arbitrators (106) also provides that arbitral secretaries could be tasked with substantive tasks, such as summarizing submissions, reviewing authorities, and preparing drafts of awards, or sections of awards, and procedural orders. (107) A similar approach was adopted by the Australian Centre for International Commercial Arbitration (ACICA) Guidelines (108) on the use of tribunal secretaries, according to which the tribunal secretary may, unless parties otherwise agree, “prepare drafts of procedural orders and non-substantive parts of awards”. (109) The same applies to the HKIAC Guidelines on the use of arbitral secretaries, (110) which provides that the arbitral secretaries may be tasked with “preparing drafts of non-substantive letters for the arbitral tribunal and non-substantive parts of the tribunal's orders, decisions and awards (such as procedural histories and chronologies of events)”. (111) A recent report by the HKIAC asserts that the use of arbitral secretaries based on the HKIAC has been viewed very positively. (112) These institutional arbitration rules have provided a certain degree of legitimacy for the use of arbitral secretaries.

Furthermore, it appears that the views in arbitration doctrine as regards the role of arbitral secretaries has significantly evolved in the past twenty years. Indeed, most commentators now opine that holding on to the dogmatism of *intuitu personae* and the myth of arbitrators personally drafting every single word of every award they render could undermine the legitimacy of arbitration, as this no longer reflects the reality in arbitral practice. (113)

#### b) Determining the Limits of the Arbitral Secretaries in the Drafting of Arbitral Awards

It is said that intellectual control is exhibited in the act of writing. (114) Accordingly, some view the intellectual exercise of writing an arbitral award as part of the decision-making function of arbitrators, given that the arbitral award ought to be the product of the arbitrators' personal commitment and intellect. (115) It is generally admitted, therefore, that arbitrators should not readily delegate said intellectual control to arbitral secretaries. (116) According to the Swiss Federal Court, an award rendered in violation of this “unwritten rule” may be annulled pursuant to Article 190(2)(a) Swiss PILA. (117) However, the crucial question is whether delegating the preparation of drafts of parts or the entire arbitral award to arbitral secretaries necessarily amounts to relinquishing intellectual control over the decision-making process.

While some commentators argue that allowing arbitral secretaries to draft parts of the

award – even the substantive parts – does not amount to surrendering the intellectual control over the decision-making process, as long as the arbitral tribunals closely supervise the activity of the secretary, (118)) others seem more skeptical of such practice. (119)) Indeed, one should not expect a consensus to emerge any time soon; neither is the attainment of such a consensus a goal worth pursuing. Too diverse are the players and the disputes in international arbitration for unanimity on this very controversial topic to be a desirable, let alone realistic goal. Therefore, the fact remains that (at least for now) defining the scope of the involvement of arbitral secretaries in the drafting of the arbitral award remains as the discretion of the arbitral tribunal, taking ● into account the peculiarities of each individual case as well as the capabilities of the secretary. (120))

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Nonetheless, it is of immense importance to distinguish between responsible and irresponsible delegation. Indeed, there is a difference between usurpation of decision-making function and assistance in the decision-making process. (121)) In this sense, relying on the assistance of arbitral secretaries in the drafting of the award does not *per se* violate the *intuitu personae* principle, provided the secretary performs this task under the close supervision and guidance of the arbitral tribunal, with the tribunal retaining the intellectual control over the decision-making process. (122)) Yet one must concede that it is nigh impossible to gauge the extent to which each individual arbitrator relies on arbitral secretaries for the drafting of the award and to what extent the requisite supervision is performed. However, do we now need to set up an “investigate body”, whose job it would be to forensically examine arbitral awards in order to figure out whether the arbitrators themselves drafted the award and/or if the award reflects the intellectual deliberations of the arbitrators? Moreover, should we really hold arbitrators to a higher standard than, say, American and Swiss Supreme Court judges?

Faced with this quagmire, it seems that the only viable solution is to return to the principle of self-policing. Accordingly, just as was the case twenty or thirty years ago, it should be assumed that a majority of arbitrators are conscientious of their core duties and would hence desist from improperly delegating their decision-making function to arbitral secretaries. (123)) This assumption should find its basis on one of the fundamental principles upon which international arbitration was built: trust. (124)) It is undeniable that the functioning of arbitration as an institution depends in so many aspects on the trust in the integrity of arbitrators. Yet somewhat surprisingly, it appears that lack of trust in the arbitrators to behave responsibly is one of the driving factors behind the skepticism towards the use of arbitral secretaries. (125))

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Nevertheless, in order for international arbitration to remain functional and to retain its position as the preferred dispute settlement mechanism in international commercial affairs, the major players (parties, counsel and arbitration institutions) must trust that a vast majority of arbitrators do not (and would not) improperly (i.e. absent any form of oversight) delegate their decision-making function to arbitral secretaries. Therefore, “[t]he system should not be fashioned by fear of the irresponsible, for they can undermine any safeguard. Rather, it should be designed with the majority in mind: those who are concerned to fulfil their mandate responsibly.” (126))

Remarkably though, despite the alleged widespread apprehension and distrust of arbitrators, it appears that this perceived fear has not yet manifested itself in arbitration practice. On the contrary, it seems that users (and indeed counsel who regularly assist them in the selection of arbitrators) do not seem to worry about the fact that arbitrators (especially the chairpersons) often rely on arbitral secretaries for the drafting of their awards. Indeed, it has been observed that parties consistently appoint and re-appoint the high-profile arbitrators who are known to be very busy and therefore are said to rely heavily on arbitral secretaries on several levels, including, in particular, the drafting of their awards. (127))

#### c) Support of a Pragmatic Approach by Case Law?

As mentioned above, courts have rarely had to deal with the question of the role of arbitral secretaries in the drafting of the award. As far as we are aware of, the Italian Supreme Court on 7 June 1989 handed down one of the earliest decisions in which the role of arbitral secretaries in the drafting of the award was at issue. (128)) In that case, the arbitrators, who were not trained lawyers, considered themselves incapable of rendering the decision and drafting the award. As a result, they delegated the task of drawing up the award to a lawyer, who had been appointed as an expert. The Italian Supreme Court held that the arbitrators had violated the principle of *intuitu personae* by delegating their decision-making duty to a third party: ●

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“Due to the arbitrators’ professed incapacity to decide issues other than technical construction problems, it amounted to delegating a third person to formulate the final decision, which the arbitrators were not able to conceive and which they could not critically examine once it had been drafted. Hence, the arbitrators totally abdicated their jurisdictional powers.” (129))

The findings of the Italian Supreme Court can hardly be contested, given that the tribunal seemed to have effectively abdicated its decision-making duties. (130)) However, such apparently clear-cut cases are rather seldom in practice. Much more difficult are cases in

which the tribunal has not clearly delegated the decision-making function to the arbitral secretary but simply relied on the secretary for support during the decision-making process.

The Swiss Federal Supreme Court (the Swiss Federal Court) recently had the opportunity to weigh in in the debate on the role of arbitral secretaries. (131)) In the instant case, the sole arbitrator had appointed an expert and a secretary for assistance. The respondent in the arbitration challenged the award, arguing, *inter alia*, that the award was rendered in violation of Article 190(2)(a) Swiss PILA (which deals with proper constitution of the tribunal) because the participation of the expert meant that the arbitral tribunal comprised of two arbitrators, even though the arbitration agreement provided for a sole arbitrator. The respondent further argued that the appointment of the secretary was in violation of the arbitration agreement, which did not explicitly provide for such an appointment. Although the role of the arbitral secretary was not at the center of that dispute, the following general remark by the Court is worthy of note:

“The tasks of the legal secretary are comparable to those of a clerk in state proceedings: organization of exchanges of briefs, preparation of hearings, keeping minutes, drawing-up of statements of costs, etc. They do not exclude some assistance in drafting the award, under the control and in accordance with the instructions of the arbitral tribunal or, if it is not unanimous, of the majority arbitrators, which implies that the secretary attends the hearings and deliberations of the arbitral tribunal. On the other hand, unless otherwise agreed by the parties, the secretary is prohibited from performing judicial functions, which must remain the prerogative of the arbitrators only.” (132))

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For present purposes, the opinion of the Swiss Federal Court, according to which it is not excluded that the arbitral secretary may provide “*une certaine assistance dans la rédaction de la sentence*”, is arguably open to interpretation. Yet it appears that this statement aligns with the view that arbitral secretaries may prepare drafts of the award, provided they do so under the close supervision of and in accordance with the instructions of the arbitral tribunal. (133)) In fact, given that the Swiss Federal Court judges – as at most Swiss courts – routinely delegate substantial drafting work to court clerks and that this tradition essentially remains undisputed in Switzerland, it is difficult to imagine that the Court would hold arbitrators to a higher standard.

Similar to the Swiss Federal Court, the High Court of Justice of England and Wales recently addressed the role of arbitral secretaries. In that case, the claimant alleged that the arbitral tribunal had improperly delegated the decision-making process to the arbitral secretaries, prompting a challenge pursuant to s 24 1996 English Arbitration Act. Popplewell J held that “[c]are must be taken to ensure that the decision-making is indeed that of the tribunal alone” (134)) and that the “safest way to ensure that that is the case is for the secretary not to be tasked with anything which involved expressing a view on the substantive merits of an application or an issue.” (135)) Just like in the case before the Swiss Federal Court, the role of the arbitral secretary in the drafting of the award was not the main issue in this dispute. Yet Popplewell J said the following:

“Best practice is therefore to 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. If the secretary’s role is circumscribed in this way, the parties can have confidence that there is no risk of inappropriate influence on the personal and non-delegable decision-making function of the tribunal [...]. However, a failure to follow best practice is not synonymous with failing properly to conduct proceedings within the meaning of s. 24(1)(d) of the Act. Soliciting or receiving any views of any kind from a tribunal secretary on the substance of decisions does not of itself demonstrate a failure to discharge the arbitrator’s personal duty to perform the decision-making function and responsibility himself. That is especially so where, as in this case, the relevant arbitrator is an experienced judge who is used to reaching independent decisions which are not inappropriately influenced by suggestions made by junior legal assistants.” (136))

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This opinion does not appear to have completely shut the door on the possibility that arbitral tribunals may delegate the preparation of drafts of the award to arbitral secretaries. Instead, the main message in Popplewell J’s opinion seems to have focused on emphasizing the imperativeness of the arbitral tribunal retaining intellectual control over the process and preserving its decision-making function. (137))

Consequently, these court decisions seem to reveal that courts in both civil and common law jurisdictions now view the issue rather pragmatically. Indeed, these decisions appear to acknowledge that arbitral tribunals may delegate the drafting of at least some parts of their decisions to arbitral secretaries. The prerequisite, however, is that such a delegation can only be deemed appropriate if the arbitrators themselves performed the decision-making function, and provided the drawing up of the award took place under the close supervision of the tribunal.

#### 4 Bottom Line: Transparency Helps

Isolated cases of inappropriateness, such as was alleged in the Yukos saga, clearly demonstrate the dangers that lurk when participants in international arbitration take for

granted the role of arbitral secretaries. Arbitration has evolved. It must be therefore recognized that given the increasing complexity of the cases in international arbitration and the volume of the briefs submitted by counsel, the idea of a lone arbitrator sitting in a dimly lit room somewhere and churning out hundreds of pages of flawless arbitral awards is rather a myth and must now be consigned to history. Indeed, arbitrators often require the assistance of arbitral secretaries for the drafting of the award. And parties cannot reasonably expect otherwise if, as increasingly usual, they dump hundreds or even thousands of pages of submissions with hundreds of exhibits on the arbitrator who had probably been selected for his or her extensive experience and know-how and not for his or her spare time.

Having said this, we consider it helpful if the process is transparent. A clear communication to the parties to arbitration about the participation of an arbitral secretary as well as the scope of such a participation would significantly reduce the chances of the losing party challenging the award on the grounds of ● improper constitution. (138)) Indeed, if parties were aware of the involvement and the role of the secretary from the onset of the procedure but did not immediately object, they might have waived their right to set aside the award on such a ground. (139)) More importantly perhaps, any controversy stemming from lack of transparency, perceived or real, as regards the role of the arbitral secretary would likely affect the progress of the arbitration procedure and/or hinder the enforcement of the arbitral award, thereby jeopardizing the outcome of the process, the facilitation of which the institution of the arbitral secretaries was originally designed. Finally, a transparent approach may contribute in preventing negative headlines – the likes of which we have seen in connection with the *Yukos* case – that could further damage the reputation of arbitration.

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### C Increasing Calls for Soft Law Instruments on the Role of Arbitral Secretaries

The controversy surrounding the role of arbitral secretaries in the drafting of the awards has unsurprisingly led some to calls for a soft law standard on the role of arbitral secretaries in the drafting of the award. Not only were such calls already made several years ago, (140)) but the latest Queen Mary Survey also found that a large majority of participants surveyed were in favor of a regulation of arbitral secretaries. (141)) It is, in particular, argued that the development of a uniform standard would “*strengthen the perceived legitimacy of the arbitration process and resulting award by minimising the likelihood that the secretary would exceed his or her position as an assistant to the tribunal and impermissibly become a decision-making ‘fourth arbitrator’.*” (142))

The calls for soft law in this area should indeed not come as a surprise to anyone who has been paying attention to the developments in international arbitration. Indeed, it is becoming increasingly fashionable to call for soft law regulations whenever a difficult issue arises. (143)) However, putting aside the fact that there may already exist sufficient instruments (Guidelines, Rules etc.) ● dealing with a myriad of issues, and that arbitration in general does not necessarily need more of such instruments, (144)) would a soft law “standard” provide a viable solution with regard to the role of arbitral secretaries in the drafting of arbitral awards? Further, who should determine what such a “standard” should be?

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Take for instance the following suggestions by Michael Polkinghorne and Charles B. Rosenberg:

“Draft procedural orders and non-substantive portions of awards

Standard: The secretary may prepare draft procedural orders and non-substantive portions of awards if: (i) the tribunal provides detailed guidance to the secretary in advance of drafting; and (ii) the draft is scrutinized by the tribunal before finalizing [...].” (145))

“Draft substantive portions of awards

Standard: The secretary may not prepare draft substantive portions of awards.” (146))

As we have shown above, it is obvious that these suggestions do not reflect an approach acceptable across several jurisdictions. Furthermore, these suggestions are based, *inter alia*, on the Young ICCA Survey and Young ICCA Guide of 2013. (147)) Let us take a closer look at the Young ICCA Guide: According to the Young ICCA Survey 2013, 31.9 % of the participants or almost one out of three were in favor of arbitral secretaries producing a first draft of the “Legal Reasoning” section of the award, suggesting a rather broad support for an extensive role of secretaries. (148)) Yet another survey conducted in 2015 reached a very different conclusion on a similar question. According to that survey, only 13 % of participants or just about one out of eight said they were in favor of arbitral secretaries “*preparing drafts of substantive parts of awards*”, (149)) which, in our view, includes legal reasoning. In another survey conducted in 2012 by Professor Thomas Schultz and Robert Kovacs, (150)) participants were asked whether they mind an arbitrator who delegates part of the work to his or her ● staff, for instance, the writing of the award: “*Two-thirds of participants (65 % exactly) responded no, they did not mind an arbitrator who delegates part of the work.*” (151)) What now should be the basis for a “best practices” or at least “acceptable practice” guideline? Our message is simple: survey results must necessarily be taken with a large pinch of salt.

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Therefore, instead of calling for soft instruments, we suggest that the focus should be on transparency. The divergence in arbitral practice should not prompt calls for uniformity; it should be celebrated, so long as the role of arbitral secretaries in the drafting of the arbitral award is handled in a transparent manner. (152) Finally, given the historical differences in the approach to the role of arbitral secretaries and the diversity of arbitration practice, which allows arbitral secretaries to play different roles, depending on the applicable institutional rules, it is inevitable that an alleged uniform standard – whatever that may be – would not satisfy all players in the game of international arbitration. Neither should it be expected that such a standard would be broadly adhered to in arbitration practice. One size does not fit all. Global standards choke competition, and lack of competition chokes improvement through innovation.

## VI Conclusions

The act of drafting of the arbitral awards in international arbitration remains an area in which the discretion of the arbitral tribunal still reigns supreme. This is particularly so because neither national arbitration laws, the UNCITRAL Model Law nor institutional arbitration rules contain any provisions on how the arbitral awards should be drafted. In addition, case law and arbitration doctrine do not provide sufficient guidance for the drafter(s). Despite this lack of guidance, this article has addressed some issues that may be taken into consideration when drafting an arbitral award. We have also identified and addressed some areas where there might be room for improvement.

Although the parties are the main addressees of the award, the drafter must not ignore the possibility that the award may attract a readership outside the parties to the arbitration (especially in investment cases). It is not helpful to treat the drafting of the award as a last-minute job. Instead, care must be taken to ensure that the award is drafted in a timely, structured and concise manner. In most cases, this approach will contribute in improving the overall quality of the award and will help in keeping the volume of the award in check.

While it is the responsibility of the arbitral tribunal to render the decision and ensure that the award is drafted appropriately, it seems that the idea that arbitrators must personally write all parts of their awards is slowly but steadily losing support. The prevailing view today seems to be that arbitral secretaries may draft the procedural and factual sections of the award. However, there remains a considerable degree of hesitation in some quarters when it comes to arbitral secretaries also producing drafts of the substantive parts of the award. This reluctance is purportedly based on the distrust of arbitrators. However, it seems to us that the anxiety of widespread irresponsibility on the part of the arbitrators is unjustified. Sure enough, there are going to be isolated cases in which an arbitrator acts irresponsibly, but this does not, in our view, justify tarring the responsible arbitrators who are in the majority with the same brush. Moreover, it seems that users of international arbitration do not demonstrate this alleged distrust of arbitrators to act responsibly. It is, therefore, our view that the pragmatic approach adopted by the Swiss Federal Supreme Court and the High Court of Justice of England and Wales with regard to the role of the arbitral secretary in the drafting of the award should be our lodestar going forward. Nevertheless, in order for arbitrators (and indeed arbitration as an institution) to retain the trust of States and the users, the involvement and the role of an arbitral secretary should be treated in a transparent manner. Finally, in view of the diversity in international arbitration practice, and bearing in mind the current state of the debate, we do not believe that a “soft law” regulation of the role of arbitral secretaries is a viable solution.

Arbitration is not a gentleman's pursuit anymore (if it ever was). It is a service industry. It is about reaching a proper result, delivered efficiently and at a reasonable cost. Perfection is not the goal. We have proposed some ideas worth considering. In practice, drafting will remain a somewhat messy business and there is nothing fundamentally wrong about this. As rules of thumb, though, 200+ page awards are to be avoided as is drafting an award many months after the last submission or hearing when the impressions from the hearing have faded long ago, or delegating the drafting to an arbitral secretary without retaining full intellectual and factual control over the result.

Drafting is an art. Some artistic freedom is in order. There were different approaches twenty years ago. There should be room for different approaches also in the future.

## References

- 1)) For avoidance of confusion, the term “arbitral award” as used in this article refers to a decision by which the arbitral tribunal either decides not to admit the claims, upholds the claims totally or partially, or dismisses the claims in total or in part.
- 2)) See Humphrey Lloyd, *Writing Awards – A Common Lawyer's Perspective*, ICC Bull. 38, 38 (1994).
- 3)) UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (hereinafter: UNCITRAL Model Law).

- 4)) UNCITRAL Arbitration Rules, as revised in 2010 (hereinafter: UNCITRAL Rules).
- 5)) See, e.g., Article 36(1) Arbitration Rules of the Vienna International Arbitration Centre (VIAC Rules); Article 42(1) Arbitration Rules of the Stockholm Chamber of Commerce (SCC Rules); Article 32(3) Arbitration Rules of the Swiss Chambers' Arbitration Institution (Swiss Rules); Article 26.2 of the Arbitration Rules of the London Court of International Arbitration (LCIA Rules); Article 32.4 Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules); Articles 35.2 and 35.4 2018 administered Arbitration Rules of the Hong Kong International Arbitration Centre (HKIAC Rules).
- 6)) See, e.g., *Sacheri v. Robotto*, Corte di Cassazione [Supreme Court], 2765, 7 June 1989, Y.B. Com. Arb. XVI (1991), 156–157; decision of the Swiss Federal Supreme Court 4A\_709/2014 of 21 May 2015; *P v Q* [2017] EWHC 194 (Comm) of February 9, 2017.
- 7)) Lloyd, *Writing Awards*, *supra*note 2, at 38.
- 8)) See, e.g., Jean-françois Poudret & Sébastien Besson, *Comparative Law of International Arbitration* paras. 744 *et seqq.* (2nd ed. 2007); Bernardo M. Cremades, *The Arbitral Award*, in *The Leading Arbitrators' Guide to International Arbitration* 813 *et seqq.* (Newman & Hill eds., 3rd ed 2014).
- 9)) See, e.g., Humphrey Lloyd *et al.*, *Drafting Awards in ICC Arbitrations*, ICC 16 Bull., 19 *et seqq.* (2005); Chartered Institute of Arbitrators, *Drafting Arbitral Awards Parts I–III*, available at <<http://www.ciarb.org/guidelines-and-ethics/guidelines/arbitration-guidelines>>, last accessed 17 September 2018; UNCITRAL Notes on the Organizing of Arbitral Proceedings (2016), available at <[https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing\\_arbitral\\_proceedings](https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings)> last accessed 11 September 2018 (hereinafter: 2016 UNCITRAL Notes); ICC Notes to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, available at <<https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>> last accessed 11 September 2018 (hereinafter: ICC Notes 2017).
- 10)) See, e.g., Lloyd *et al.*, *supra*note 9, at 19, stating that the article “represents only the views of its authors. It is not an official statement by the ICC Commission on Arbitration [...]. Nor is it, of course, approved by the ICC International Court of Arbitration.”
- 11)) IBA Arb40 Subcommittee Toolkit for Award Writing, available at <<https://www.ibanet.org/Search/Search.aspx?query=toolkit>> last accessed 19 September 2018 (hereinafter: IBA Toolkit for Award Drafting).
- 12)) *Id.*, at 21 and 44 *et seq.*
- 13)) *Id.*, at 30–31.
- 14)) *Id.*, at 49 *et seq.*
- 15)) *Id.*, at 8–9.
- 16)) Marcel Fontaine, *Drafting the Award – A Perspective from a Civil Law Jurist*, 5 ICC Bull., 30, 31 (1994); Claude Reymond, *The President of the Tribunal*, 9 ICSID Rev. – FILJ 1, 16 (1994).
- 17)) Lloyd, *supra*note 2, at 39–41; Elliott Geisinger, *President's Message*, 32 ASA Bull. 683–686 (2014).
- 18)) Reymond, *supra*note 16, at 16: “The winning party, which already knows what is in it from reading the operative part, will not look too closely at the substance of the awards.”; Lloyd, *supra*note 2, at 40; Geisinger, *supra*note 17, at 683.
- 19)) Lloyd *et al.*, *supra*note 9, at 35.
- 20)) See Fontaine, *supra*note 16, at 33–34; Lloyd, *supra*note 2, at 40; Geisinger, *supra*note 17, at 683–684.
- 21)) See also Geisinger, *supra*note 17, at 683.
- 22)) Fontaine, *supra*note 16, at 34.
- 23)) Reymond, *supra*note 16, at 16.
- 24)) Geisinger, *supra*note 17, at 685; Paolo Michele Patocchi & Robert Briner, *The Role of the President of the Arbitral Tribunal*, in *The Leading Arbitrators' Guide to International Arbitration* 304 (Newman & Hill eds., 3rd ed. 2014).
- 25)) See also Reymond, *supra*note 16, at 16; Geisinger, *supra*note 17, at 684.
- 26)) See also Geisinger, *supra*note 17, at 684.
- 27)) Reymond, *supra*note 16, at 16.
- 28)) Article 34 ICC Rules reads: “Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.”
- 29)) See, e.g., Article 32.3 SIAC Rules 2016: “The Registrar may, as soon as practicable, suggest modifications as to the form of the Award and, without affecting the Tribunal's liberty to decide the dispute, draw the Tribunal's attention to points of substance. No Award shall be made by the Tribunal until it has been approved by the Registrar as to its form.”
- 30)) Yves Derains & Eric A. Schwarz, *A Guide to the ICC Rules of Arbitration* 314 (2nd ed. 2005).
- 31)) Lloyd, *supra*note 2, at 40 *et seq.*; Geisinger, *supra*note 17, at 684.
- 32)) See IV.A.2. *supra*.

- 33)) See, e.g., Article 42 ICC Rules: “In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.”; Article 32.2 LCIA Rules: “For all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat.”
- 34)) See Fontaine, *supranote 16*, at 31.
- 35)) See Constantine Partasides & Simon Maynard, *Raising the Curtain on English Arbitration*, 33 *Arb. Intl.* 197 (2017).
- 36)) Fontaine, *supranote 16*, at 33, with further references.
- 37)) Queen Mary Survey on International Arbitration, at 9, accessible under <<http://www.arbitration.qmul.ac.uk/research/2018/#>> last accessed 4 September 2018.
- 38)) Article 31(2) ICC Rules.
- 39)) For instance, Article 43 SCC Rules 2017: “The final award shall be made no later than six months from the date the case was referred to the Arbitral Tribunal pursuant to Article 22. The Board may extend this time limit upon a reasoned request from the Arbitral Tribunal or if otherwise deemed necessary.”
- 40)) For example, the LCIA Rules, the VIAC Rules and the SIAC Rules.
- 41)) Derains & Schwarz, *supranote 30*, at 304.
- 42)) For an instructive example, see Swiss Federal Supreme Court 4A\_490/2013 of 28 January 2014, published as a leading decision under BGE 140 (2014) III 75: The arbitrator delivered the award one day after the lapse of a time limit agreed with the parties, rendering the award void for lack of jurisdiction pursuant to Article 190(2) (b) Swiss PILA.
- 43)) See, e.g., ICC Notes 2017, *supranote 9*, at 14, para. 94.
- 44)) Jacob Grierson & Annet van Hooff, *Arbitrating Under the 2012 ICC Rules: An Introductory User's Guide* 211 (Kluwer Law International 2012).
- 45)) See Lloyd *et al.*, *supranote 9*, at 25; Albert van den Berg, *Organizing an International Arbitration: Practice Pointers, in The Leading Arbitrators' Guide to International Arbitration*, 418 (Newman & Hill eds., 3rd ed. 2014).
- 46)) Nicolas Ulmer, Six Modest Proposals Before You Get to the Award, *in Inside The Black Box: How Arbitral Tribunals Operate and Reach Their Decisions* 119 (ASA Special Series No. 42. Juris 2014, Berger & Schneider eds.).
- 47)) See also IBA Toolkit for Award Drafting, *supranote 11*, at 22.
- 48)) See Pierre Lalive, *Irresponsibility in International Commercial Arbitration*, 7 *Asia Pacific Law Review* 161, 167 (1999).
- 49)) See also Matthias Scherer, *Drafting the Award, in Inside The Black Box: How Arbitral Tribunals Operate and Reach Their Decisions* 30 (ASA Special Series No. 42. Juris 2014, Berger & Schneider eds.); Zachary Douglas, *The Secretary to the Arbitral Tribunal, in Inside The Black Box: How Arbitral Tribunals Operate and Reach Their Decisions* 89 (ASA Special Series No. 42. Juris 2014, Berger & Schneider eds.).
- 50)) See also IBA Toolkit for Drafting Arbitral Awards, *supranote 11*, at 34.
- 51)) See also Patocchi & Briner, *supranote 24*, at 304.
- 52)) Cf. IBA Toolkit for Award Drafting, *supranote 11*, at 45.
- 53)) See also Pierre-Yves Tschanz, *The Award: How to Structure it, How Detailed? Order and Reasons, Adding Insult to Injury?, in The Resolution of the Dispute – From the Hearing to the Award* 32–33 (29 ASA Special Series, Wirth ed., 2007).
- 54)) Patocchi & Briner, *supranote 24*, at 304.
- 55)) Lloyd *et al.*, *supranote 9*, at 29.
- 56)) On the structure of the award, see IV.B.3 *supra*.
- 57)) See also Patocchi & Briner, *supranote 24*, at 303–304.
- 58)) For further tips on this, see IBA Toolkit for Award Drafting, *supranote 11*, at 43 *et seq.*
- 59)) See Lloyd *et al.*, *supranote 9*, at 27.
- 60)) William Shakespeare, *Hamlet*, Act II, Scene II.
- 61)) Felix Dasser & Piotr Wójtowicz, *Challenges of Swiss Arbitral Awards. Updated Statistical Data as of 2017*, 36 *ASA Bull.* 276, 284 (2018).
- 62)) Swiss Federal Supreme Court 4A\_709/2014 of 21 May 2015 cons. 3.2.2. See also Eric A. Schwartz, The Rights and Duties of ICC Arbitrators, *ICC Bull. Special Supplement* 67, 86 (December 1995); Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 *Arb. Intl.* 147 (2002); Pierre Tercier, *The Role of the Secretary to the Arbitral Tribunal, in The Leading Arbitrators' Guide to International Arbitration* 537 (Newman & Hill eds., 3rd ed. 2014).
- 63)) See Reymond, *supranote 16*, at 15; Patocchi & Briner, *supranote 24*, at 303; Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *International Arbitration – Law and Practice in Switzerland* para. 7.153 (2015).
- 64)) See also Fontaine, *supranote 16*, at 35; Laurent Lévy, *The Chairman's Role in the Arbitral Tribunals Dynamics, in Players' Interaction in International Arbitration*, *ICC institute of World Business Law* 78 (Hanotiau & Mourre eds., 2012).
- 65)) Fontaine, *supranote 16*, at 36.
- 66)) Lloyd, *supranote 2*, at 39.

- 67)) Arbitral secretaries are also often referred to as “administrative secretaries”. This article will use the phrase “arbitral secretaries” to reflect the fact that the tasks of “arbitral secretaries” may go beyond pure administrative tasks.
- 68)) *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, interim award of 30 November 2009, available at <<https://pcacases.com/web/sendAttach/423>> last accessed 2 October 2018; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, Final Award of 18 July 2018, PCA Case No. AA 228, available at <<https://pcacases.com/web/sendAttach/422>> last accessed 2 October 2018. This case was one of the three Yukos the same arbitral tribunal heard in parallel and the three final award were almost identical.
- 69)) The District Court of The Hague in a decision of 20 April 2016 set the arbitral awards aside. An unofficial translation of this decision is available at <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230>> last accessed 2 October 2018.
- 70)) See GAR Report 19 June 2018, available at <<https://globalarbitrationreview.com/article/1170724/yukos-appeal-gets-under-way-in-the-hague>> last accessed 2 October 2018.
- 71)) See Alison Ross, *Valasek wrote Yukos awards, says linguistic experts*, GAR News 20 October 2015, available at <<https://globalarbitrationreview.com/article/1034846/valasek-wrote-yukos-awards-says-linguistics-expe...>>: “It is more than 95 percent certain that the assistant to the tribunal in the Yukos arbitrations wrote parts of the awards that include reasoning on substantive issues, says an expert in forensic linguistics relied on by Russia in its attempt to get the award set aside.”
- 72)) See Michael Polkinghorne, *Different Strokes for Different Folks? The Role of the Tribunal Secretary*, Kluwer Arbitration Blog, 17 May 2014, available at <<http://arbitrationblog.kluwerarbitration.com/2014/05/17/different-strokes-for-different-folks-the-ro...>> last accessed 17 September 2018.
- 73)) For a selected bibliography on the subject, see, e.g., Ottoarndt Glossner, *Schweizerisches Schiedsgericht*, NJW 504 (1981); Pierre Lalive, *Der Sekretär von Schiedsgerichten: Der gute Menschenverstand setzt sich durch*, 7 ASA Bull. 5–8 (1989); Thomas Rüede & Reimer Hadenfeldt, *Schweizerisches Schiedsgericht Nach Konkordat und IPRG* 194 (2nd ed. 1993); Pierre Lalive, *Inquiétantes dérives de l'arbitrage CCI*, 13 ASA Bull., 634 (1995); Eric A. Schwartz, *The Rights and Duties of ICC Arbitrators*, ICC Bull. Special Supplement 86 et seq. (December 1995); Eric A. Schwartz, *On the Subject of “Administrative Secretaries”: A Reply by Mr. Eric Schwartz, Secretary General of the ICC Court*, 14 ASA Bull., 32 (1996); Partasides, *supranote 62, passim*; Arthur W. Rovine, *Cost Concerns in the Drafting of Arbitral Awards*, in *Contemporary Issues in International Arbitration and Mediation*, The Fordham Paper, 139–145 (Rovine ed., 2009); Emilia Onyeama, *The Role of the International Arbitral Tribunal Secretary*, 9 VJ 99 (2009); Alexis Martinez, *The International Chamber of Commerce's Note on the Appointment, Duties and Remuneration of Administrative Secretaries dated 1 August 2012*, 15 Intl. Arb. Law Rev. 51 (2012); Constantine Partasides et al., *Arbitral Secretaries, in International arbitration: the coming of a new age?* 17 icca congress 2012 327–368 (van den Berg ed., 2013); Michael Polkinghorne & Charles B. Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, 8 Dispute Resolution International 107–126 (2014); Tercier, *supranote 62*; Michael Feit & Chloé Terrapon Chassot, *The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultants under the Swiss lex arbitri: Case Note of DFC 4A\_709/2014 dated 21 May 2015*, 33 ASA Bull. 897 (2015); James Menz & Anya George, *How Much Assistance is Permissible? A Note on the Swiss Supreme Court's Decision on Arbitral Secretaries*, 33 J. of Intl. Arb., 311 (2016); Marco Stacher, *Berater und Sekretär von Schiedsgerichten – BGer 4A\_709/2009, Urteil vom 21. Mai 2015 i.S. A v. B., Z.Z.Z. 2018, 22*; Simon Maynard, *Laying the fourth arbitrator to rest: re-evaluating the regulation of arbitral secretaries*, 34 Arb. Int. 173 (2018).
- 74)) See Fontaine, *supranote 16*, at 30: “The drafting of a final award is the main responsibility of the arbitrator or arbitrators.”; Lloyd, *supranote 2*, at 39.
- 75)) Lalive, *Der Sekretär von Schiedsgerichten*, *supranote 73*, at 5; Rüede & Hadenfeldt, *supranote 73*, at 194.
- 76)) Chapter 12 Swiss PILA, which governs international arbitrations seated in Switzerland, does not contain a similar provision. However, although Chapter 12 Swiss SPILA does not contain a similar provision, the prevailing view in Switzerland is that Article 365(1) Swiss Code of Civil Procedure (Swiss CCP), according to which the “arbitral tribunal may appoint a secretary”, also applies in international arbitrations seated in Switzerland (Swiss Federal Supreme Court 4A\_709/2014 of 21 May 2015 cons. 3.2.2, with further references).
- 77)) Keep in mind that this requirement of parties' prior consent is not retained in Article 365(1) Swiss CCP. Therefore, arbitral tribunals decide on their own to appoint a secretary, unless the parties decide otherwise.

- 78))** The practice of relying on court clerks for the drafting of legal opinions is widely practiced by State courts in the U.S., including the U.S. Supreme Court. For an analysis of this practice and how it may or may not influence the decision-making process, see Nadine J. Wichern, *A Court of Clerks, Not of Men: Serving Justice in the Media Age*, 49 DePaul L. Rev. 621, 663 (1999) *et seq.*; Rick A. Swanson & Stephen L. Wasby, *Good Steward: Law Clerk Influence in High Courts*, 29 Just. Sys. J. 24, 44 *et seq.* (2008).
- 79))** RÜede & Hadenfeldt, *supranote 73*, at 302.
- 80))** *Id.*, at 194. For a very liberal view on the role of arbitral secretaries, see Ottoarndt Glossner, *Sociological Aspects of International Commercial Arbitration*, in *The Art of Arbitration – Liber Amicorum Pieter Sanders* 149 (London, Schultsz & van den Berg eds., 1982): “A secretary with legal background and institutional backing by law [...] is considered virtually equal to an arbitrator as he has the right to be present while the arbitrators deliberate, he takes part in the voting session, he even prepares the interim decisions and the award.”
- 81))** Lloyd, *supranote 2*, at 39.
- 82))** *Id.*
- 83))** UNCITRAL Notes on Organizing Arbitral Proceedings (1996), available at <[https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing\\_arbitral\\_proceedings](https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings)> last accessed 2 October 2018.
- 84))** *Id.*, para 27.
- 85))** ICC Secretariat, “Note Concerning The Appointment of Administrative Secretaries By the Arbitral Tribunal” of 1 October 1995, as reproduced in 6 ICC Bull., at 77 (hereinafter: 1995 ICC Note).
- 86))** *Id.*, at 78 (emphasis added).
- 87))** See Lalive, *Inquiétantes dérives de l'arbitrage CCI*, *supranote 73*, *passim*; Partasides, *supranote 62*, at fn. 46.
- 88))** Cf. Douglas, *supranote 49*, at 89; Tercier, *supranote 62*, at 543.
- 89))** ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, available at <<https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/>> last accessed 11 September 2018 (hereafter: 2017 ICC Notes).
- 90))** *Id.*, para 151.
- 91))** *Id.*, para. 150.
- 92))** *Id.*, para. 153.
- 93))** See also Kaufmann-Kohler & Rigozzi, *supranote 63*, at para. 7.155.
- 94))** SCC Arbitrator's Guidelines, January 2017, available at <<https://sccinstitute.com/about-the-scc/digital-library/arbitrators-guidelines/>> last accessed 11 September 2018.
- 95))** *Id.*, at 7.
- 96))** Singapore International Arbitration Centre – Practice Note PN – 01/15 (2 February 2015), Administered Cases, On the Appointment of Administrative Secretaries, available at <<http://www.siac.org.sg/our-rules/practice-notes/practice-note-for-administered-cases-on-the-appointm...>> last accessed 11 September 2018.
- 97))** *Id.*, para. 4.
- 98))** Guidelines for Arbitrators, Swiss Chambers' Arbitration Institution, 1 August 2014, available at <<https://www.swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws>> last accessed 11 September 2018 (hereinafter: Swiss Chambers' Guidelines).
- 99))** *Id.*, at A.
- 100))** Young ICCA Task Force on the Appointment and Use of Arbitral Secretaries (Young ICCA).
- 101))** Young ICCA Guide on Arbitral Secretaries – The ICCA Reports No. 1, available at <[https://www.arbitration-icca.org/publications/Young\\_ICCA\\_Guide\\_on\\_Arbitral\\_Secretaries.html](https://www.arbitration-icca.org/publications/Young_ICCA_Guide_on_Arbitral_Secretaries.html)> last accessed 11 September 2018 (hereinafter: Young ICCA Guide).
- 102))** *Id.*, at 15.
- 103))** *Id.*
- 104))** UNCITRAL Notes on the Organizing of Arbitral Proceedings (2016), available at <[https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing\\_arbitral\\_proceedings](https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings)> last accessed 11 September 2018 (hereinafter: 2016 UNCITRAL Notes).
- 105))** *Id.*, para. 36.
- 106))** LCIA Notes for Arbitrators, available at <<http://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx#8.2Proposingtheuseofatribunalsecret...>> last accessed 11 September 2018.
- 107))** *Id.*, para. 71(c).
- 108))** ACICA Guideline on the Use of Tribunal Secretaries, available at <<https://acica.org.au/wp-content/uploads/2017/01/ACICA-Tribunal-Secretary-Guideline.pdf>> last accessed 2 October 2018.
- 109))** *Id.*, at 11(c).
- 110))** HKIAC Guidelines on the Use of a Secretary to the Tribunal of 1 June 2014, available at <<http://www.hkiac.org/images/stories/arbitration/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%...>> last accessed 30 September 2018.
- 111))** *Id.*, para. 3.4(f).

- 112)) Report on Use of HKIAC Tribunal Secretary Service (5 September 2018), available at <<http://hkiac.org/news/report-use-hkiac-tribunal-secretary-service>> last accessed 12 September 2018.
- 113)) See, e.g., Constantine Partasides, *Secretaries to Arbitral Tribunal*, in *Players' Interaction in International Arbitration*, ICC Institute of World Business Law 78 (Hanotiau & Mourre eds., 2012); Lévy, *supranote 64*, at 79–80; Michael E. Schneider, *President's Message: A Taxonomy of Arbitrators and the New Species of arbiter compositus*, 31 ASA Bull. 327, 327 (2013); Tercier, *supranote 62*, at 542 et seqq.; Kaufmann-Kohler & Rigozzi, *supranote 63*, at para. 7.156; Stacher, *supranote 73*, at 27; Maynard, *supranote 73*, at 182–183.
- 114)) Partasides, *supranote 62*, at 158; Douglas, *supranote 49*, at 89.
- 115)) Swiss Federal Supreme Court 4A\_709/2014 of 21 May 2015 cons. 3.2.2.; Patocchi & Briner, *supranote 24*, at 303; Polkinghorne & Rosenberg, *supranote 73*, at 126.
- 116)) Swiss Federal Supreme Court 4A\_709/2014 of 21 May 2015 cons. 3.2.2.; P. v. Q. [2017] EWHC 194 (Comm), para. 70. See also Pierre Tercier, *supranote 62* at 539.
- 117)) Swiss Federal Supreme Court 4A\_709/2014 of 21 May 2015 cons. 3.2.2.
- 118)) Lévy, *supranote 64*, at 79: “[A]rbitrators – the president included – may not delegate their deliberation, that is to say, the forming of their decisions. Concretely, arbitrators should in general not commission a third person to draft texts pertaining to the essence of a decision without first having made that decision and, thus, giving directions as to the end result and, usually, the reasons that intimately support that result. But this is the sole limit on delegation.” See also Tercier, *supranote 62*, at 547.
- 119)) Lloyd, *supranote 2*, at 39; Polkinghorne & Rosenberg, *supranote 73*, at 126: “Unlike the procedural orders and non-substantive portions of the awards, the secretary may not draft substantive portions of the award. The substantive portion of an award goes to the heart of the arbitration and hence its drafting is an essential duty of the arbitrators.”
- 120)) See Partasides, *supranote 73*, at 157; Young ICCA Guide, *Article 3 Commentary*, *supranote 101*, at 11–12.
- 121)) Cf. also Partasides, *supranote 62*, at 156.
- 122)) See Gary Born, *International Commercial Arbitration* 2000 (2nd ed. 2014); Kaufmann-Kohler & Rigozzi, *supranote 63*, at para. 7.156.
- 123)) See Partasides, *supranote 62*, at 156.
- 124)) The Brazilian Delegate at the Hague Conference of 1907 highlighted the importance of trust in international arbitration when he famously stated: “*The arbitration institution is based on trust, the judicial institution on obedience*”, quoted in Pierre Lalive, *Problèmes relatif à l'arbitrage international commercial*, Collected Courses of the Hague Academy = Recueil des cours 120 (Martinus Nijhoff, 1967), at 578. Translation by the authors. Original in French: “*L'institution arbitrale vit de la confiance, l'institution judiciaire de l'obéissance.*”
- 125)) Popplewell J in P. v. Q. [2017] EWHC 194 (Comm), para. 68: “[...] there is considerable and understandable anxiety in the international arbitration community that the use of tribunal secretaries risks them becoming, in effect, ‘fourth arbitrators.’” See also Partasides, *supranote 62*, at 148: “Scare stories abound of assistants to tribunals usurping decision-makers' function.”; Tercier, *supranote 62*, at 554: “The root of the problem stems from a lack of trust toward arbitrators and their commitment to properly fulfill their duties.”; Roger Enock & Alexandra Melia, *Ad Hoc Arbitrations*, in *Arbitration in England*, With Chapters on Scotland 102 (Lew, Bör et al., 2013): “[...] there is a fear that an administrative secretary can end up being a ‘shadow arbitrator’, doing analysis that the tribunal should do and having too much influence on procedural decisions.”
- 126)) Partasides, *supranote 62*, at 157.
- 127)) See Douglas, *supranote 49*, at 89; Lévy, *supranote 64*, at 77; Tercier, *supranote 62*, at 554.
- 128)) *Sacheri v. Robotto*, Corte di Cassazione [Supreme Court], 2765, 7 June 1989, Y.B. Com. Arb. XVI (1991), 156–157.
- 129)) *Id.*, at 157.
- 130)) See also Julian D.M. Lew, Loukas A. Mistelis et al. *Comparative International Commercial Arbitration* 235, 638 (2003).
- 131)) Swiss Federal Supreme Court 4A\_709/2014 of 21 May 2015 cons. 3.2.2.
- 132)) *Id.*, cons. 3.2.2. Translation by the authors. Original in French: “*Les tâches du secrétaire juridique sont comparables à celles d'un greffier en procédure étatique: organisation des échanges d'écritures, préparation des audiences, tenue du procès-verbal, établissement des décomptes de frais, etc. Elles n'excluent pas une certaine assistance dans la rédaction de la sentence, sous le contrôle et conformément aux directives du tribunal arbitral ou, s'il n'est pas unanime, des arbitres majoritaires, ce qui suppose que le secrétaire assiste aux audiences et aux délibérations du tribunal arbitral. Il lui est, en revanche, interdit, sauf convention contraire des parties, d'exercer des fonctions de nature judiciaire, lesquelles doivent demeurer l'apanage des seuls arbitres.*”
- 133)) See also Feit & Terrapon Chassot, *supranote 73*, at 917; James Menz & Anya George, *supranote 73*, at 322; Stacher, *supranote 73*, at 36.

- 134))** *P v Q* [2017] EWHC 194 (Comm), para. 68. But cf. Tracey Timlin, *The Swiss Supreme Court on the Use of Arbitral Secretaries and Consultants in the Arbitral Process*, 8 Y.B. Arb. & Mediation 268, 288 (2016): “[I]n its decision to allow secretaries to draft arbitral awards, the Court may have paved the way for arbitrators to flout party autonomy and freedom of contract.”
- 135))** *Id.*, para. 68–69.
- 136))** *P v Q* [2017] EWHC 194 (Comm), para. 68.
- 137))** See also Peter Hirst, *When Does a Tribunal Secretary Overstep the Mark?*, Kluwer Arbitration Blog, April 18 2017, available at <<http://arbitrationblog.kluwerarbitration.com/2017/04/18/when-does-a-tribunal-secretary-overstep-the-...>> last accessed 30 September 2018.
- 138))** See also Kaufmann-Kohler & Rigozzi, *supra*note 63, at para. 7.156.
- 139))** See, e.g., JAMS Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations, available at <<https://www.jamsadr.com/files/Uploads/Documents/JAMS-International-Guidelines-for-Use-of-Clerks-and-...>> last accessed 2 October 2018: “The arbitrator’s disclosure regarding the use of a Clerk or Secretary will state the types of tasks assigned to the Clerk or Secretary, e.g., research and/or drafting.”
- 140))** See, e.g., Polkinghorne & Rosenberg, *supra*note 73.
- 141))** Queen Mary Survey 2018, *supra*note 37, at 35.
- 142))** Polkinghorne & Rosenberg, *supra*note 73, at 128.
- 143))** Toby Landau & Romesh Weeramantry, *A Pause for Thought, in International Arbitration: The Coming of a New Age?*, 496 *et seqq.*, at 496 (van den Berg (ed.), ICCA Congress Series, Vol. 17, 2013); Felix Dasser, *Soft Law in International Commercial Arbitration – A Critical Approach*, in this Yearbook, 111 *et seqq.*
- 144))** See Michael Schneider, *President’s Message. The sense and non-sense of “para-regulatory texts” in international arbitration*, 28 ASA Bull. 201 (2010); Landau & Weeramantry, *supra*note 143 at 496; David Arias, *Soft Law in International Arbitration: Positive Effects and Legitimation of the IBA as a Rule-Maker*, 6 IJAL 30 (2018).
- 145))** Polkinghorne & Rosenberg, *supra*note 73, at 125.
- 146))** *Id.*, at 126.
- 147))** *Id.*, at 125 *et seq.*
- 148))** Young ICCA Guide, *supra*note 101, at 15.
- 149))** 2015 International Arbitration Survey, available under <<http://www.arbitration.qmul.ac.uk/research/2015/>> last accessed 25 September 2015 (hereinafter Queen Mary Survey 2015), 43.
- 150))** Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? – Fifteen Years after Dezalay and Garth*, 28 Arb. Intl. 161, 170 (2012).
- 151))** *Id.*
- 152))** See Maynard, *supra*note 73, at 183. Cf. also Lévy, *supra*note 64, at 80.

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