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# SECRETARIES ALWAYS GET A BAD REP: IDENTIFYING THE CONTROVERSY SURROUNDING ADMINISTRATIVE SECRETARIES, CURRENT GUIDELINES, AND RECOMMENDATIONS

Courtney J. Restemayer\*

## I. THE PLAIN LANGUAGE APPROACH AND CURRENT APPROACH TO THE ROLE OF ADMINISTRATIVE SECRETARIES TO INTERNATIONAL ARBITRATION TRIBUNALS

Through various modern forms of entertainment, print, and comedy the stereotype of “the secretary” often involves a hard-nosed, secretly beautiful, will-sleep-with-the-boss woman who simply carries out the commands of those above her in automated, non-opinionated fashion. Under a similar set of duties, Black’s Law Dictionary defines “secretary” as “An administrative assistant ... in charge of official correspondence, minutes of board meetings, and records of stock ownership and transfer.”<sup>1</sup> Mechanical, tedious, but fundamentally important to the success of the business is the work of the enigmatic secretary. International arbitration tribunals, similar to most businesses, are subject to paperwork, documentation, and organization, to name a few of the tasks involved in the mechanical structure. The ability to effectively and efficiently carry out these tasks makes alternative dispute resolution desirable to clients, arbitrators, and institutions. But, as in any modern office plot, what if the secretary went outside her stereotypical role, authorized or not? Does her involvement create a violation of the sanctity not of her bosses affairs, but of the fundamental nature of arbitrations? The role of the administrative secretary to international arbitration tribunals remains ambiguous, varied, and often secretive to clients, creating wide controversy in the field today<sup>2</sup> comparable to a wife’s suspicion of her husband’s secretary.

### A. Administration – Theoretical Role of “Secretaries”

It is important to remember, though arbitration is an alternative means of adjudication, it also is a profit making enterprise. Typical to most business enterprises, the theoretical role of tribunal secretaries is to assist the arbitral tribunal and facilitate complex or large arbitrations in purely an administrative function<sup>3</sup>. This function, however, is not the source of critic’s “wife

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<sup>1</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>2</sup> See U.N. COMMISSION ON TRADE LAW (“UNCITRAL”) YEARBOOK, VOL. XXVII (1996), pt. 2 (“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”).

<sup>3</sup> See ICC NOTE ¶ 3 (limits secretary function to administrative tasks); see also UNCITRAL Notes ¶ 24-27 (lists the types of administrative services that are allowed to aid the tribunal: providing meeting rooms and coordinating secretarial services); NCCCP, ARGENTINA, ART. 749 (tribunal secretary must attend all meetings and hearings between arbitrators and parties and/or their lawyers); see also A. Redfern and M. Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (3<sup>rd</sup> ed., Sweet and Maxwell, 1999), at ¶ 4-101 (“it is an established practice in large and complex international commercial arbitrations for the arbitral tribunal to appoint and administrative secretary or registrar to take charge of all administrative arrangements (which) would otherwise fall to be made by the arbitral tribunal and to act as a link between the parties an the arbitral tribunal.”).

anxiety.” Some assume secretaries can perform professional services that parallel clerical tasks comparable to those of law clerks<sup>4</sup>: legal research, brief and memorandum composition, and basic document review.<sup>5</sup> These roles have raised certain documented debate, but all sides agree the scope of professional tasks must be limited.<sup>6</sup> Several such instances, for example, involve analysis not only of jurisdictional law, but also of party submissions.<sup>7</sup> This practice, still, is more rare than the current movement or perhaps current *discovery*, that secretaries are now sitting in on deliberations<sup>8</sup> and drafting the awards for the tribunal.<sup>9</sup> One arbitrator in attendance at the most recent Global Arbitration Review (GAR) conference in London stated, “if the role of the facts and the party arguments are drafted incorrectly, it leads to confusion, misunderstanding, and misstating the arbitral award.”<sup>10</sup> With such importance resting on the pen of the secretary, why has this practice evolved and thrived? The prominence grew, simply, through necessity to the future of arbitration.

Two fundamental principles in alternative dispute resolution, and more specifically arbitration, are the cost efficiency and speed of this form of adjudication as opposed to trial.<sup>11</sup> The basic idea is that the risks or issues surrounding administrative secretaries in arbitrations are vastly overshadowed by the benefits: (1) organization of procedure, (2) keeping records, (3) expediting deliberations, etc. Often business choose arbitration because they do not want to strain their relationships with adversarial trials as well as for speed and lower costs.<sup>12</sup> Arbitrations are currently getting more and more expensive as new rules or exceptions are implemented through jurisdictional laws or party contracts. While the average costs of arbitration does not surpass costs of trial, some large-scale arbitrations threaten while others overcome the economic division. Arbitral practitioners and arbitral institutes need more than the old reputation of arbitration proceedings as “quick and cheap” and needs to implement cost effective methods to its procedure to continue its prevalence in modern business and law<sup>13</sup>: enter the impregnable secretary.

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<sup>4</sup> See generally Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT’L ARB. 575, 576 (2006).

<sup>5</sup> UNICTRAL NOTE ¶ 27.

<sup>6</sup> See E. Schwartz, *The Rights and Duties of ICC Arbitrators*’ in *The Status of the Arbitrator*, ICC Bull. Special Suppl. 67, 86 (P. Fouchard ed., 1995) (professional tasks are often implemented but under the direction and limitation of the tribunal); see ENGLISH ARBITRATION ACT § 24(1) (1996) (allows secretaries to draft facts but prohibits extension to procedural orders or parts of the award); ICC NOTE ¶ 3 (“administrative secretary must not assume the functions of an arbitrator...by becoming involved in the decision-making process...or expressing opinions or conclusions.”).

<sup>7</sup> See generally Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT’L ARB. 575, 576 (2006).

<sup>8</sup> See, e.g., *A Guide to the NAI Arbitration Rules* 224 (Bommel van der Bend, Marnix Leijten and Marc Ynzonides eds., Kluwer Law International 2009); see also H J Snijders, *Nederlands Arbitragerecht*, Kluwer 2007, p 274.

<sup>9</sup> See Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB INT’L 147, 152 (2002).

<sup>10</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>11</sup> THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* (5<sup>th</sup> ed. 2009).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

## 1. *Organization and Procedure*

“Time is of the essence” and “time is money” are the simple, yet appropriate, reasoning establishing speed as one of the fundamental principles of arbitration. Scheduling often becomes a balancing act between promoting party equality and time pressures: dates need to be set, paperwork filed for proceedings and arbitrators, and venues booked. Arbitration institutions often take care of these elements,<sup>14</sup> but ad hoc arbitration lacks the formalities.<sup>15</sup>

## 2. *Records*

Records in arbitration proceedings may take many different forms. First, if the call to arbitration is not through submission – the process where parties willing agree to submit a current dispute to arbitration – the contract containing the arbitral clause becomes the first document to obtain. Appointed or employed secretaries will find the scope, the choice of law, the jurisdiction, and other party bargained matters within that clause.<sup>16</sup>

Second, even if the scope is broad or ambiguous, parties may mutually chose at the start to submit only certain issues to arbitration. The “issues” therefore, need to be documented and implemented to create barriers of consideration. Making note of these key elements helps eliminate challenges to the award de facto.<sup>17</sup> Under this same premise, where secretaries are permitted to employ “professional tasks”<sup>18</sup> they will obtain relevant subject-matter and jurisdictional law.<sup>19</sup> In light of recent technological advances, secretaries familiar and proficient in IT skills greatly aid the tribunal with preparation.<sup>20</sup>

Third, a record of the parties’ stances or arguments is essential for arbitrators when rendering a decision. Without documentation of facts or arguments, the reasoning for an award is weakened by calls of arbitrator partiality or corruption<sup>21</sup>. While courts often find this argument without merit<sup>22</sup>, challenges slow down the arbitral process for clients. Recently, Netherlands Supreme Court ruled that, absent previous party provisions, a record is not mandatory and tribunal secretary notes are not subject to disclosure:

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<sup>14</sup> UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS, UNCITRAL YEARBOOK XXVII (1996) Art. 4 ¶ 26 (“Some arbitral institutions routinely assign such persons to cases administered by them”).

<sup>15</sup> *Id.* (“In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.”).

<sup>16</sup> THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* (5<sup>th</sup> ed. 2009).

<sup>17</sup> *Id.*

<sup>18</sup> UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS, UNCITRAL YEARBOOK XXVII, ART. 4 (1996).

<sup>19</sup> *Id.*

<sup>20</sup> ARB. HK P GUIDE 8.18 § 8-81, 82 (“In heavy document cases, this is particularly useful because the secretary can provide considerable assistance with regard to the collation of the documents and save the time of the tribunal in finding documents at any stage of the proceedings... In recent times where cases are prepared with a high technological content, the secretary usually has better IT skills than the tribunal and this again provides useful assistance to the tribunal.”).

<sup>21</sup> THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* (5<sup>th</sup> ed. 2009).

<sup>22</sup> See Eelco Meerdink, *Supreme Court Rules Arbitral Tribunal Not Required to Disclose Hearing Notes*, 15 NO. 1 IBA ARB. NEWS 131 *reviewing*, *Knowsley SK Ltd. v. AGJ Van Wassenauer van Catwijck*, Amsterdam Court of Appeal (Dec. 2 2008), LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39.

In addition to party autonomy, another policy argument can be raised against the disclosure of the informal notes of the tribunal's secretary, namely the imprecise and potentially inaccurate nature of the notes. Contrary to a formal report prepared by the arbitrators, informal notes taken by a secretary do not necessarily reflect an accurate and complete account of the hearing. Indeed, such notes may very well contain a biased description or an incomplete account of the debate because they were not prepared for the purpose of providing a faithful report. If (informal) notes of a tribunal's secretary had to be disclosed upon the request of a party, arbitrators would have to make sure that these notes contain a correct account of the hearing (and nothing more).<sup>23</sup>

In cases where arbitrators did not take notes, or their notes are lacking, they can rely on the notes of tribunal secretaries in a limited capacity to fill gaps; consequently, this practice promotes the accuracy of arbitral awards.

Lastly, whether or not the secretary herself drafts the arbitral award, both the secretary's personal notes and the award become a record compiled primarily by institutions for their personal record keeping:

Irrespective of the issue of party autonomy, the issue arises whether the preparation of a transcript or minutes--and their communication to the parties--should be encouraged. We think it should. At a minimum, a basic report giving a factual account of the main substantive arguments and procedural discussions and decisions should be made for each arbitration hearing.<sup>24</sup>

Therefore, allowing a secretary access to relevant documents and keep records promotes time and cost efficiency and allows Institutions to keep detailed business records.

### ***3. Expediting Deliberations***

Some arbitral institutions outline the time frame for arbitrations in their governing standards or rules.<sup>25</sup> This is one way the arbitral community maintains the speed of its adjudication. Deliberations, however, with or without this constraint can take long periods of time meanwhile businesses stall operation in expectancy of the award. Similar to the role of easing the compilation of a record collected during proceedings, secretaries may also aid the deliberation phase of arbitration through drafting the award. Oftentimes, this also saves the parties money because the hourly rate of a tribunal secretary is lower than the arbitrator.<sup>26</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> See Eelco Meerdink, *Supreme Court Rules Arbitral Tribunal Not Required to Disclose Hearing Notes*, 15 NO. 1 IBA ARB. NEWS 131 *reviewing*, Knowsley SK Ltd. v. AGJ Van Wassenae van Catwijck, Amsterdam Court of Appeal (Dec. 2 2008), LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39.

<sup>25</sup> See generally ICC NOTE, ART. 24 ("The time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or of the parties of the Terms of Reference, or, in the case of application of Article 18(3), the date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the Court.").

<sup>26</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

#### 4. *Issue with Duplicity*

While the scope of the secretary authority is the forefront of critic concerns, critics also maintain that requiring or authorizing secretaries in arbitral proceedings does not always keep costs lower. In fact, one critic at the recent GAR conference stated he believed secretaries were duplicitous and just cost clients more money when parties request secretarial services: many arbitrators have what he called “back-up” in their office or chambers that deal with the administrative elements of the proceedings.<sup>27</sup> Therefore, when parties acquiesce to secretary involvement, they are paying for the same services arbitrators are already using but less formally. Further, the Secretary-General in ICSID arbitrations often will assign a secretary to arbitral proceedings<sup>28</sup>; additionally, often tribunals will add secretaries to assist them directly.<sup>29</sup>

#### B. **Appointment and Procedure**

Cinematically, it is not until after the secretary is hired that the wife wishes she had taken part in the hiring process. While no overarching policy guides the appointment of tribunal secretaries, and its subsequent procedure, many commentators believe consent<sup>30</sup> to be the cornerstone for use in the future; a premise, wary wives would adamantly support.

#### 1. *Institutional Rules*

Institutions run the gambit of restricting secretary use to a more laissez faire method. This section summarizes the major Arbitral Institution’s regulations on tribunal secretaries in current use.

#### a. *AAA*

Current American Arbitration Association Commercial Arbitration Rules are silent on tribunal secretaries. Instead, the only direction this Institution provides comes from the Code of Ethics for Arbitrators in Commercial Disputes: Canon V and Canon VI.<sup>31</sup> Appointment is left to the discretion of arbitrators, subject to informing parties but not requiring consent<sup>32</sup>; still, the requirement to inform the parties remains unenforceable without a definition of who qualifies as a

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<sup>27</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>28</sup> See ICSID ADMINISTRATIVE AND FINANCIAL REGULATIONS, REG. 25 (2005), available at <http://www.worldbank.org/icsid/basicdoc/partC-chap05.htm#r25>; see also, Antonio R. Parra, *The Role of the ICSID Secretariat in the Administration of Arbitration Proceedings under the ICSID Convention*, 13 FOREIGN INVESTMENT L.J. 85 (1998).

<sup>29</sup> *Id.*

<sup>30</sup> See Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT’L ARB. 575, 576 (2006).

<sup>31</sup> AAA CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, CANONS V, VI (2004), available at <http://www.adr.org/sp.asp?32124>.

<sup>32</sup> AAA Code of Ethics for Arbitrators in Commercial Disputes, Canon VI § B (2004), available at <http://www.adr.org/sp.asp?32124>.

“secretary”. Canon IV suggests that any help in connection with reaching a decision could arguably be considered the “secretary” definition:

The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision. An arbitrator may obtain help from an associate, a research assistant or other persons in connection with reaching his or her decision if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon.<sup>33</sup>

The Code of Ethics, however, lacks any other information defining “secretary” which lends itself to creating a loophole to disclosure. Because “back-up” falling within Canon IV, Section B is bound to the same “oath” of “Canon VI: An Arbitrator Should Be Faithful To The Relationship Of Trust And Confidentiality Inherent In That Office”<sup>34</sup> any loopholes could cause serious distrust in the confidentiality of disclosed information. Similarly, Canon V, Sections B and C, “An arbitrator should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision...An arbitrator should not delegate the duty to decide to any other person”<sup>35</sup> seem to contradict Canon VI<sup>36</sup> and result in lack of enforcement or effectiveness.

#### ***b. United Nations Commission on International Trade Law***

The United Nations Commission on the International Trade Law published its current, nonbinding guides to secretary roles in its 1996 Notes on Organizing Arbitral Proceedings (“UNICTRAL Notes”)<sup>37</sup>:

Finalized by UNCITRAL in 1996, the Notes are designed to assist arbitration practitioners by providing an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings, including deciding on a set of arbitration rules, the language and place of an arbitration and questions relating to confidentiality, as well as other matters such as conduct of hearings and the taking of evidence and possible requirements for the filing or delivering of an award. The text may be used in both ad hoc and institutional arbitrations.<sup>38</sup>

Section 4 (Articles 24-27)<sup>39</sup> addressing “administrative services that may be needed for the arbitral tribunal to carry out its functions” lays out four guiding provisions for assistance. Essentially, it attempts to establish the limited role as purely organizational – but it’s not that

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<sup>33</sup> *Id.*

<sup>34</sup> AAA, *supra* note 32, Canon VI.

<sup>35</sup> AA, *supra* note 32, Canon V §§ (B), (C).

<sup>36</sup> AAA, *supra* note 32, Canons V, VI.

<sup>37</sup> UNICTRAL Notes (1996), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1996Notes\\_proceedings.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

simple.<sup>40</sup> The UNCITRAL Note's lack of definitions lends to a more controversial usage, termed "professional assistance", meaning legal research.<sup>41</sup> Critics worry by controlling the secondary knowledge of the arbitrator, the secretary can effectively sway the award with principal driven agenda. Those favoring the professional assistance approach argue this knit picking is highly unnecessary and slows down the progress of adapting arbitration practices to changing global needs.<sup>42</sup> In other forms of adjudication this process is a cornerstone of legal practice: judicial clerks and staff supplying judges with case decisions, briefs, and memorandums.<sup>43</sup> Beyond actually finding these resources, secretaries often summarize materials. Like Canon VI's broadening of Canon V in the AAA Code of Ethics, Section 17, Articles 82 and 83 broaden the provisions under Section 4: Article 82 allows arbitrators to appoint a secretary to prepare the record of hearings without party consent<sup>44</sup> and Article 83 expands to transcripts taken of hearing recordings.<sup>45</sup> Proponents argue the experience young lawyers gain from fulfilling the role of arbitral secretary, comparable to a judicial clerk, is necessary to developing the arbitrational skills of future generations.<sup>46</sup>

### *c. ICSID's Regulation 25*

The Secretary-General appoints the secretary in ICSID arbitrations, who, then, must adhere to these guidelines laid out in Regulation 25 of the ICSID Administrative and Financial Regulations:

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

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<sup>40</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 579 (2006).

<sup>41</sup> See Partasides *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration* (2002) 18(2) ARB. INT'L 147, 149 (asserts that the secretary's function vary from purely administrative to decision-making depending on the arbitrator); see also, UNCITRAL Notes on Organizing Arbitral Proceedings ¶ 26-17 (1996), available at <http://www.uncitral.org/pdf/English/texts/arbitration/arb-notes/arb-notes-e.pdf>.

<sup>42</sup> See C.H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2001) (asserts secretaries are usually legal staff).

<sup>43</sup> THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* (5<sup>th</sup> ed. 2009).

<sup>44</sup> AAA Rules, Art. 82.

<sup>45</sup> AAA Rules, Art. 83.

<sup>46</sup> C.H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* 1210 n. 18 (Cambridge UP, 2001) (tribunal secretaries are usually part of legal staff).



- (d) perform other functions with respect to the proceedings at the request of the President of the Commission, Tribunals or Committee, or at the direction of the Secretary-General.<sup>47</sup>

At first glance, this Regulation intends to address several ambiguities in the role of the secretary. It lists the duties, how a secretary is appointed, who appoints, and her approachability with parties. Part (d) still remains troubling: “other functions” and “respect to the proceedings” erase the formal enumerated role of the secretary and once again opens the function to interpretation where the end justifies the means.

## II. CURRENT LEGISLATION ATTEMPTING TO REGULATE LOOPHOLES AND AMBIGUITIES

### A. ICC Court of Arbitration

#### 1. *Past Loose Guidelines*

Though the ICC’s Rules of Arbitration lack direction on tribunal secretaries, in 1995, their appointment became subject to the Note from the Secretariat of the ICC Court Concerning the Appointment of Administrative Secretaries by Arbitral Tribunals (hereafter the “Note”):

The ICC provides this Note to parties and arbitrators at the outset of arbitral proceedings. The Note states that the tribunal may appoint a secretary, but only upon the consent of all parties, and only after informing the parties of the secretary’s identity and the duties he or she will perform.<sup>48</sup>

Further, the Note limits those duties to administrative tasks in order to avoid any influence on the deliberation. The Notes critics argue it challenges party autonomy by allowing the arbitrator this outside power and through limiting the role of the secretary, which they believe should be left to the parties to decide.<sup>49</sup>

One major flaw in the ICC’s attempt to regulate arbitral secretaries is the Note only outlines specific instances where the secretary cannot act<sup>50</sup>; yet, stating prohibitions and limitations rather than defining power and role perpetuate the current ambiguities. The limitations themselves contain vague language including “decision-making process”<sup>51</sup>, inviting interpretation

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<sup>47</sup> See ICSID Administrative and Financial Regulations, Reg. 25 (2005), available at <http://www.worldbank.org/icsid/basicdoc/partC-chap05.htm#r25>; see also, Antonio R. Parra, *The Role of the ICSID Secretariat in the Administration of Arbitration Proceedings under the ICSID Convention*, 13 FOREIGN INVESTMENT L.J. 85 (1998).

<sup>48</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT’L ARB. 575, 577 (2006).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> ICC NOTE.

of what actions occur before the decision-making process begins, which overlap, and does that mean the secretaries duties are at an end or can it overlap without being involved in the opinion aspect of the process?

It is clear, however, that the ICC recognized the need for some regulation to guide future arbitrations. Their first attempt, while ultimately failing to address the continuing concerns of the ADR community, shows that these issues are not on the backburner but don't have a ready solution without more regulation: critics believe the ICC is taking away party autonomy.<sup>52</sup> Currently, the ICC is devising an actual set of guidelines concerning secretaries.<sup>53</sup>

## 2. *Devising New Guidelines*

In 2012, the ICC printed a revamped set of rules, taking effect January 1<sup>st</sup>. While the rumored new guidelines containing suggested clauses for tribunal secretaries has yet to be published the new rules included this provision in Article 15, Section 1:

The proceedings before the Arbitral Tribunal shall be governed by these Rules, and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.<sup>54</sup>

The composition of the court changes slightly from “tribunal secretary” to a Secretariat, an ICC employee whom the Secretary-General appoints case-by-case. Article 2, Sections 2-5 outlines the standards for procedure:

2. The Court shall not appoint Vice-Chairmen or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or, pursuant to any other procedure agreed upon by the parties, subject to confirmation.
3. When the Chairman, a Vice-Chairman or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.
4. Such person must refrain from participating in the discussions or in the decisions of the Court concerning the proceedings and must be absent from the courtroom whenever the matter is considered.
5. Such person will not receive any material documentation or information pertaining to such proceedings.<sup>55</sup>

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<sup>52</sup> See Pierre Lalive, *Un Post-Scriptum et Quelques Citations*, ASA Bull. 1, 35-43 (1996).

<sup>53</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL Arbitration REVIEW, 21 Dec 2011, available at [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary); see also, Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147, 152 (2002).

<sup>54</sup> ICC RULES, ART. 15(1) (2012).

<sup>55</sup> ICC RULES, ART. 2 (2012).

### III. WHERE SUSPICIONS ARISE AND INEVITABLY SUCCUMB TO THE TYRANNICAL INTERPRETATION OF LAWYERS

#### A. In One Corner - Confidentiality

Confidentiality, the ability for parties not to air their dirty laundry, is another fundamental principal in arbitration. One of the few countries to implement new laws regulating confidentially, Peru's statute stipulates:

Unless otherwise agreed, all participants in the arbitration (arbitrators, secretaries, arbitration institution, witnesses, experts, the party representatives and legal counsel) are to keep the arbitration proceedings and the award confidential...That said, the confidential nature of the notes taken by the secretary does not necessarily follow from the confidentiality of deliberations in chambers.<sup>56</sup>

While certain players are necessary to the process, the tribunal secretary might not qualify. In fact, arbitrators cannot disclose any part of the arbitration. If secretaries are used, does the confidentiality protection vanish? What if the role of the secretary is to keep a record of the proceedings or attend and transcribe deliberations? These questions push for more limited access for secretaries in order to preserve confidentiality. Still, which is more desirable, limiting access or allowing someone who was "never in the room" to have such a fundamental impact on the outcome?

#### B. In the Other Corner – Party Autonomy and the Level of Direct Communication with Arbitrators

##### 1. *Husband's Hiring Secretaries without Wives' Input: Arbitrators Preempting Party Autonomy*

Parties have the right to select at least one arbitrator<sup>57</sup>, given certain guidelines. This right to select arbitrators, however, is directly undermined when those arbitrators either do not disclose their employment of "back-ups"<sup>58</sup> or even under transparency the arbitrators or regulating institution chooses the secretaries<sup>59</sup>. Given the unstable and unbound nature of secretaries' involvement in the final awards, this calls into question the true freedom of whose opinion guides

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<sup>56</sup> Legislative Decree No. 1071 (published in El Peruano, the official gazette, June 28, 2008).

<sup>57</sup> THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5<sup>th</sup> ed. 2009).

<sup>58</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>59</sup> ICSID NOTE.

the procedures.<sup>60</sup> Party autonomy is at odds with any attempt to regulate secretary usage without consent of the parties or their overriding authority.<sup>61</sup>

## 2. *Secretary “Miscellaneous Services” Raises Brows*

Duplicity or uninformed appointment occurs regularly in arbitral proceedings<sup>62</sup>, acting as the default where formal rules allow or are silent. Current efforts attempt to move away from the current default and secret nature of using or appointing secretaries to having all peoples involved in the arbitral proceedings assume a secretary will be used.<sup>63</sup> Parties then have the option of addressing the use and terms of the secretary involvement at the front-tend of the proceedings. Then, the unnecessary costs become more prominent when using a secretary hinges on the explanation of her necessity.

### C. **Drafting the Office Boundaries**

#### 1. *Delegations*

Normally, arbitral duties should not be delegated.<sup>64</sup> In the Note from the Secretariat of the ICC Court Concerning Appointment of Administrative Secretaries by Arbitral Tribunals, which provides that the work of any secretary (somewhat analogous to the clerk of an American judge) "must be strictly limited to administrative tasks" and that the secretary "must not influence in any manner whatsoever the decisions of the Arbitral Tribunal."<sup>65</sup>

#### 2. *“4<sup>th</sup> Arbitrator” Perception*

The crux of the controversy surrounding the secretary rests on how much influence the position wields. Often deemed the “4<sup>th</sup> Arbitrator”<sup>66</sup>, many worry through compiling resources, handling sole documentation of proceedings, and sometimes drafting the award, the power the

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<sup>60</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT’L ARB. 575, 578 (2006).

<sup>61</sup> See Pierre Lalive, *Un Post-Scriptum et Quelques Citations*, ASA Bull. 1, 35-43 (1996).

<sup>62</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>63</sup> See National Code of Civil and Commercial Procedure Law, Art. 749, Book IV (1981).

<sup>64</sup> See AAA/ABA CODE OF ETHICS, SUPRA NOTE 16, CANON V(C).

<sup>65</sup> ICC INT’L CT. ARB. BULL. AT 77, 78 (Nov. 1995).

<sup>66</sup> See Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT’L 147, 152 (2002).

secretary holds includes the ability to decide the award herself because her notes are not always subject to disclosure.<sup>67</sup>

*a. Mechanistic v. Substantive Reasoning*

The mechanistic role of the tribunal secretary ideal encompasses the same administrative roles akin to the traditional secretary: filing, scheduling, documenting<sup>68</sup>. But it never is that simple. Even drawing the distinction between mechanistic and substantive reasoning<sup>69</sup> is blurred. For instance, if the secretary is documenting the minutes or record of the proceedings unmonitored, or perhaps untrained in a court reporter capacity, how hidden is her opinion, her agenda, her perceptions of the parties? While it is not impossible to provide impartial documentation, these reports are not subject to authoritative review for veracity.<sup>70</sup> Even unintentional opinions could flood the documents arbitrators will review before giving the award. One arbitrator in attendance at the GAR conference, commented that the facts and arguments that surface during proceedings are indispensable to identifying the reasoning behind an award<sup>71</sup>. If the record truly is this imperative to the outcome, these common, and often background, practices warrant structure and guidance.

Even more poignant is the practice of allowing secretaries to draft the arbitral awards. One arbitrator who admitted to regularly endorsing awards written by secretaries defends the practice as “reflecting a conversation”<sup>72</sup> rather than an invitation for secretaries to give opinion:

In CIETAC practice, where there are three arbitrators, the presiding arbitrator will take a principal role in driving the issues through the hearing. During or following the hearing, he or she will preside over an internal meeting among the arbitrators and will discuss the open issues involved. Where the arbitrators can reach an opinion, such opinion will be noted by the secretary in charge of the case who attends the hearing and the arbitrator's meeting throughout the process. In most cases, the presiding arbitrator is under a general duty to prepare the draft Award recording the opinion of the case, with the assistance of the handling secretary of CIETAC secretariat.<sup>73</sup>

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<sup>67</sup> *Knowsley SK Ltd v. AGJ Van Wassenae van Catwijk*, Amsterdam Court of Appeal (Dec. 2 2008), LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39 (Nor. Courts ruled that the tribunal secretary's notes are protected, if parties have not otherwise stipulated. In cases where Arbitrators do not publish reasons for the award or take discoverable notes themselves, it is reasonable to wonder how heavily Arbitrators relied on this potentially opinion heavy secretary notes.).

<sup>68</sup> See ICC NOTE ¶ 3.

<sup>69</sup> See Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147, 149 (2002) (secretarial duties range from administrative to decision making).

<sup>70</sup> *Id.*

<sup>71</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>72</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>73</sup> Jerry Yulin Zheng, ARB. CHN P GUIDE 11(5)(d), 11-102 (2004).

His position was one of transparency that secretaries are used throughout the proceedings and deliberations with no extra charge to the parties. He views the role of arbitral secretaries as a trade usage, necessary to maintain the current efficiency of arbitral proceedings.<sup>74</sup>

The general benefits of secretary involvement in the substantive reasoning portion of arbitration proceedings go beyond diminishing costs and time and can include well-crafted awards with little jeopardy of challenge. Secretaries can spend more time on researching and drafting than arbitrators for the same fee to parties.<sup>75</sup> Also, rhetorical skills should be a determining factor in appointing secretaries. This skill could prove indispensable if compared to dismal, ambiguous, or incorrectly drafted awards produced by arbitrators.

#### **D. Payment: It's More Than Petty Cash**

The final issue strays from the normal controversial issue path of proceedings and highlights the clear lack of guidance concerning the practice of using secretaries: who pays for this?<sup>76</sup>

##### **1. Lower Rate Than Arbitrators**

The popular conception is that the billing rate for arbitrators is vastly higher than the hourly rate of secretaries who are qualified to do the more nominal tasks.<sup>77</sup> Under this theory, even when the parties are not aware a secretary is involved, billing for secretary services is appropriate because it saves the parties money:

Many arbitrators find it useful to appoint a secretary to the tribunal who will carry out administrative functions on behalf of the tribunal and render assistance to the tribunal before, during and after the hearing. In heavy document cases, this is particularly useful because the secretary can provide considerable assistance with regard to the collation of the documents and save the time of the tribunal in finding documents at any stage of the proceedings. Time spent by the secretary will be at a lower charging rate than that of the tribunal.<sup>78</sup>

##### **2. Ad Hoc v. Institutions**

The distinction between ad hoc and institutional run proceedings also affects who pays the secretaries. However, there is no common billing procedure among institutions: some keep

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<sup>74</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>75</sup> *Id.*

<sup>76</sup> See generally Matthew Gearing, ARB CHN P GUIDE 9(11)(B), 9-71(2003); see also Neil Kaplan, ARB. CHN P GUIDE 8(18), 8-84 (2003) citing ICC International Court of Arbitration Bulletin, Vol. 6(2) (note from the secretariat of the ICC Court concerning the appointment of administrative secretaries by arbitral tribunals).

<sup>77</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>78</sup> Neil Kaplan and Andrew Aglion, ARB. CHN P GUIDE 8(18), 8-81 (2003).

secretaries on their payroll as part of their service<sup>79</sup>; others appoint outside secretaries or allow arbitrators to appoint outside secretaries<sup>80</sup>, and parties are often billed for any services rendered. Ad Hoc Arbitrations often lend themselves to more negotiated secretary fees because payment procedures are not wrapped up in Institution Standards.<sup>81</sup>

### 3. *Inequality of Bargaining Power*

Secretaries can create bias through more than simply drafting awards or recording proceedings with their opinions. When arbitrators are given the discretion to appoint their own secretaries, which is usually the case, they sometimes hire within their own firms or organizations.<sup>82</sup> In instances where the arbitrator who appoints the secretary was a party-chosen arbitrator<sup>83</sup> the equality of proceedings shift significantly. Still, some situations create inequality for both parties by allowing the arbitrators to empirically add costs from unbargained fee or wage amounts without consent<sup>84</sup> or even disclosure.

## IV. THE ANSWER KEY TO THE FOLLY OF AMBIGUITIES: RECOMMENDATIONS

While it is undisputed arbitral institutions are attempting to address the problems apparent the arbitral secretary relationship, the attempts thus far are failing because of the hesitancy to regulate this practice. In order to maintain their competitive appeal, new regulations or provisions set either vague limitations or include a savings-clause to protect their appeal. Basically, no one wants to look like the jealous wife. In order to actually fix the issues, broad regulations are unacceptable. Instead, the following is a list of proposed regulations and guidelines to achieve the most optimal balance of party autonomy and fixed, predictable treatment of arbitral secretaries:

### A. Statistics

One possible cause of creating the multitude of positions regarding secretaries lies in the undocumented statistics. Most institutions do not keep statistics on the appointment of secretaries, if party consent was given, who appointed the secretary, how the secretary was paid, if the award challenged, etc.<sup>85</sup> Without clear proof favoring any one opinion of how the secretary should function, the debate will not likely die after guidelines are implemented. Before Institutions do implement regulations, data needs to be gathered from on going arbitrations.

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<sup>79</sup> See ICSID RULES.

<sup>80</sup> See ICC RULES, ART. 11(1).

<sup>81</sup> See Emilia Onyema, *The Role of the International Arbitral Tribunal Secretary*, 9 VILANOVA J. INT'L COM. L. & ARB. 99, 101-102 (2005).

<sup>82</sup> Kyriaki Karadelis, *The Role of the Tribunal Secretary*, GLOBAL ARBITRATION REVIEW (Dec. 21 2011), [www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/](http://www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/).

<sup>83</sup> THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (5<sup>th</sup> ed. 2009).

<sup>84</sup> UNCITRAL NOTE.

<sup>85</sup> Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, 17 AM. REV. INT'L ARB. 575, 578-79 (2006).

## **B. Selection: Let the Wife Run the Hiring Process**

Similar to the procedure of choosing arbitrators, the selection of the secretary or secretaries should mirror party preferences and bargains. If only one secretary is needed, the rules governing arbitrator neutrality also apply. Arbitrators should retain the right to recommend secretaries with full disclosure of their relationship to better enable parties to make an informed decision.

## **C. Appointment and Scope of Duties**

Secretaries should not be the default assumption in arbitral proceedings. Instead, arbitrators must (1) notify all parties of the need/desire for secretarial aid, (2) allow for party designation of the secretaries, (3) have party consent before any appointment, (4) notify parties of costs, and (5) allow parties to dictate the level of involvement. This last provision, (5), eliminates the differing interpretations of what is clerical and what is analytical: parties establish a case-by-case designation of secretarial power. Commentators are divided on whether any actions beyond administrative actions are appropriate<sup>86</sup> but under the scope of party autonomy this argument vanishes. If leaving this decision to the parties seems an error or misguided given party lack of concern or experience perhaps institutes should produce generic templates, similar to the current practice of arbitral clauses, as a basis subject to mutual party modification<sup>87</sup>.

## **V. WIFE V. SECRETARY**

### **A. Conclusion Immersed in Suspicious Minds**

Ultimately, until the arbitration community produces a strong consensus on the tribunal secretary's defined role, full disclosure and candor should guide current proceedings. When friends and family solicit cautions and warnings not to trust her husband's secretary (Jean Harlow) in *Wife v. Secretary, Linda* (Myrna Loy) challenges the unconditional trust of her marriage to Van (Clark Gable)<sup>88</sup>. Similarly, no matter how tight an Institution might think it's guidelines to the scope of tribunal secretaries or how much contracting parties believe it rests on party autonomy, once trust is called into question it is hard to mend. This mistrust of arbitration proceedings could have a detrimental affect on this form of dispute resolution. Consequently, arbitrators should learn from Gable's mistake and always be forthright with the use and role of their secretaries in order to maintain the sanctity of arbitration.

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<sup>86</sup> Third Biennial Colloquium on Arbitration and ADR organized by the Centre for Legal Studies in Salzburg (June 2004).

<sup>87</sup> THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE* (5th ed. 2009).

<sup>88</sup> *WIFE V. SECRETARY* (Metro-Goldwyn-Mayer 1936).