

INTERNATIONAL COUNCIL FOR  
COMMERCIAL ARBITRATION

YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES

THE ICCA REPORTS NO. 1

ICCA is pleased to present the ICCA Reports series in the hope that these occasional papers, prepared by ICCA interest groups and project groups, will stimulate discussion and debate.

INTERNATIONAL COUNCIL FOR  
COMMERCIAL ARBITRATION

## YOUNG ICCA GUIDE ON ARBITRAL SECRETARIES

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# Foreword

*Guillermo Aguilar-Alvarez*

I have reviewed the *Young ICCA Guide on Arbitral Secretaries* with admiration. The Guide reflects the careful effort of young practitioners to codify existing best practices. Supported by two surveys conducted by the Young ICCA Task Force in 2012 and 2013, the Guide and its Commentary also neatly display areas of consensus and controversy.

As it should, the Guide focuses on transparency, party consent and cost efficiency. There is no controversy that a properly appointed, supervised and diligent arbitral secretary will contribute to keeping the arbitral proceedings organized and on schedule. It is also true that cost savings achieved through appropriate use of an independent arbitral secretary are beneficial to the parties.

Unsurprisingly, the major area of disagreement lies in the nature of the tasks properly assigned to arbitral secretaries. Largely based on the results of surveys performed in 2012 and 2013, Article 3 of the Guide provides that “with appropriate direction and supervision” by the arbitrators, the role of an administrative secretary “may legitimately go beyond the purely administrative”. Paragraph 2 of Article 3 then proceeds to list the kinds of activities that an arbitral secretary may perform. The list travels the spectrum, from purely “administrative matters” to “drafting appropriate parts of the award”. Predictably, the most controverted duties are factual research<sup>1</sup> (Article 3(2)(f)); “reviewing the parties’ submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties’ submissions and evidence”<sup>2</sup> (Article 3(2)(h)); and “drafting appropriate parts of the award” (Article 3(2)(j)). The Commentary, however, immediately provides useful clarification: the arbitrator should not rely solely on the secretary’s factual research (Commentary to Article 3(2)(f)) and the tribunal should of course not relinquish review of the parties’ pleadings and evidence (Commentary to Article 3(2)(h)). As to awards, although the Guide does not expressly embrace restraint, caution militates in favor of interpreting the Commentary to Article 3(2)(j) to limit the secretary’s role to preparing a first draft of the award’s procedural/factual background and description of the parties’ positions. So applied, the Guide’s Commentary may contribute to realizing the benefits of meaningful administrative support without compromising the integrity of the arbitral function.

As with other examples of *soft law*, a debate will no doubt emerge as to the vitality of the *Young ICCA Guide on Arbitral Secretaries* where the arbitration is governed by institutional rules and practice. Publication of the Guide should nonetheless be applauded for one additional important reason. Young ICCA’s association with this project underscores the need to recognize the importance of secretarial appointments as an invaluable training tool. Like judicial clerkships, secretarial appointments provide young lawyers with a unique opportunity to discern where advocacy meets persuasion.

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1. Supported by less than half of the respondents in the 2013 Survey.  
2. Supported by less than half of the respondents in both 2012 and 2013.





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# Young ICCA Guide on Arbitral Secretaries

## 1. Introduction to the Project

The reasons for the use of arbitral secretaries are numerous and often interconnected. As international arbitration has grown in popularity as a dispute resolution mechanism, cases have generally grown more complex and the amounts in dispute have increased. Arbitrators commonly report significant numbers of procedural applications (e.g., interim injunctions, disputed document production requests and third party applications), which in turn lead to more procedural arguments between counsel, more procedural and interim decisions and ultimately more nuanced procedures. Additionally, counsel teams have grown and parties' submissions are more voluminous. To handle these developments, parties commonly turn to highly sought-after arbitrators with the experience to handle the added procedural and substantive complexities, leading to more demanding schedules that take those arbitrators away from their offices for long periods. Lastly, arbitrators have reacted to the increased complexity and adversarial nature of modern arbitration by producing more detailed awards that address every potential issue to defend against potential challenges. These added complexities and voluminous filings have led many arbitral tribunals to employ assistance in the form of arbitral secretaries.

Traditionally thought of as occupying an administrative role, it has become increasingly common for arbitral secretaries to take on many tasks beyond the purely administrative in order to assist the tribunal in the overall management of the arbitration.

When used properly, arbitral secretaries can support arbitral tribunals in performing their mandate with greater efficiency and effectiveness. However, when used improperly (e.g., without the consent or knowledge of the parties, or the appropriate supervision of the arbitral tribunal), the use of arbitral secretaries can undermine the legitimacy of the arbitral process. Ensuring that arbitral secretaries are used properly is an important step in encouraging the effective use of arbitral secretaries and protecting the integrity of the arbitral process.

Given the potential benefits in efficiency and cost savings that an arbitral secretary can bring to the arbitral process, the Young ICCA Task Force on the Appointment and Use of Arbitral Secretaries (the “**Task Force**”) was formed to examine the use of arbitral secretaries and advance a more transparent and robust approach to the role of secretaries in arbitration.

The Task Force has used, as a starting point, the work done in preparation for the 2012 ICCA Congress in Singapore, where a panel composed of Constantine Partasides, Niuscha Bassiri and Ulrike Gantenberg presented four questions relating to the use of arbitral secretaries: (1) Whether arbitral secretaries should be used? (2) What should be the role of an arbitral secretary? (3) Who should act as an arbitral secretary? and (4) How should arbitral secretaries be remunerated? The panel developed a survey in advance of the

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Congress (the “**2012 Survey**”),<sup>1</sup> which was sent to a cross-section of international arbitration practitioners, users and providers:

- (a) In relation to the first question, the results of the 2012 Survey<sup>2</sup> indicated an overwhelming 95.0% approval of the use of arbitral secretaries.
- (b) In relation to the second question, the 2012 Survey identified specific tasks ranging from the administrative (e.g., organizing meetings and hearings with the parties) to the non-administrative (e.g., drafting all or part of the award), and asked the participants to choose those tasks they felt were appropriate for the arbitral secretary to perform. The respondents predictably indicated support for the utilization of the arbitral secretary to perform numerous administrative tasks such as: organizing meetings and hearings with the parties (88.2%); handling correspondence and evidence (79.6%); and reminding parties of meetings and deadlines (74.2%). However, the results showed a decrease in support as the proposed duties moved away from the purely administrative and towards tasks involving analysis and decision-making – e.g., performing legal research for the arbitral tribunal (68.8%); drafting procedural orders (60.2%); communicating with the parties on behalf of the arbitral tribunal (57.0%); communicating with the institution (54.8%); drafting parts of the award (45.2%); and analyzing the parties’ submissions (38.7%).
- (c) In relation to the third question, unsurprisingly, the junior lawyer received the most support as having the ideal profile of an arbitral secretary (89.8%). The office secretary or personal assistant received the least support, with only one vote. The trainee lawyer, experienced lawyer and young arbitrator all received almost the same number of votes (approximately 26.0% each). In the converse question, as to what profile the arbitral secretary should *not* have, the survey participants were overwhelmingly against the office secretary or personal assistant (81.1%). The paralegal (48.9%) and law student/trainee lawyer (43.3%) also were less favored by the participants. Consistent with the responses to the positive question, the junior lawyer received the least votes for what profile the arbitral secretary should *not* have (4.0%).
- (d) In relation to the fourth question, the majority of responses favored the parties paying the costs of the arbitral secretary (62.1%), with fewer votes received for the chairperson/sole arbitrator (22.1%) or the tribunal as a whole (30.5%).
- (e) Finally, the 2012 Survey concluded by asking the participants if the arbitral process would benefit from greater regulation of the role and function of arbitral

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1. Annex B, pp. 55-68.

2. The 2012 and 2013 Surveys permitted participants to provide more than one answer for several questions. As such, the percentages as reported do not necessarily add up to 100% because they are based on the number of votes per category. Throughout the 2012 and 2013 Surveys, participants were permitted to skip questions. In this document, “participants” refers to all persons participating in one or other of the Surveys, while “respondent/s” refers to a participant or participants who responded to a particular question.

secretaries. The majority (57.4%) favored regulation and, when asked what form that regulation should take (on the assumption that the arbitral process would in fact benefit from greater regulation of arbitral secretaries), an overwhelming majority of responses received (78.5%) were in favor of guidelines of best practice as opposed to, for example, some form of binding appendices to arbitral institutional rules (13.8%).

Following the 2012 ICCA Congress and interest in the topic evident in the arbitral community, ICCA invited Young ICCA to take this project forward and ultimately develop guidelines for the appointment and use of arbitral secretaries.

An additional survey was then developed to supplement the 2012 Survey on a number of key issues (e.g., appropriate duties of an arbitral secretary, challenge procedures and remuneration) in order to develop a better understanding of the current views on the use of arbitral secretaries. Approximately 100 international arbitration practitioners, academics, representatives of arbitral institutions and users took part in this second survey (the “**2013 Survey**”).<sup>3</sup> What follows is a brief summary of the results of the 2013 Survey.

- (a) An overwhelming majority of respondents (75.0%) believed that an arbitral secretary should be admitted to practice law in at least one jurisdiction, but a majority rejected the requirement of a minimum level of Post-Qualification Experience (“PQE”) (57.1%). Of those in favor of a minimum level of PQE, 26.2% favored one year, 38.1% favored two years and 21.4% favored three years. The majority of respondents in the 2013 Survey indicated that there should be no maximum level of PQE (93.4%).
- (b) Over 94.0% of respondents agreed that the arbitral tribunal should propose the appointment of the arbitral secretary, and the tribunal should appoint the secretary (81.3%). Despite placing the onus on the tribunal, the respondents overwhelmingly agreed (76.9%) that the parties should be required to consent to the appointment of an arbitral secretary. The respondents also indicated their support for requiring the arbitral secretary to submit a statement of independence and impartiality (83.5%).
- (c) The 2013 Survey asked specific questions related to the tasks an arbitral secretary should be allowed to perform. The administrative tasks received overwhelming support. However, the numbers began to drastically change as the tasks envisaged became more substantive. For example, the respondents voted 95.6% in favor of the arbitral secretary organizing meetings and hearings. However, when asked whether the arbitral secretary should participate in the tribunal’s deliberation, 83.5% of respondents voted against.
- (d) Lastly, the 2013 Survey addressed the issue of costs and remuneration of arbitral secretaries. In general, contrary to the results of the 2012 Survey, the majority of

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3. Annex C, pp. 69-86.

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respondents favored the tribunal bearing the cost of an arbitral secretary (60.5%). The majority also indicated a preference for the arbitral secretary to be paid at an hourly rate (64%), instead of as a lump sum (36%). Although no majority was found for any single option, if an arbitral secretary was being paid at an hourly rate, the range of remuneration supported by a majority of respondents (50.2%) was between US\$ 125 and US\$ 225 per hour.

The two Surveys have been reviewed and analyzed at length by the Task Force. Together with the Task Force's research into modern practice on this issue, these Surveys have informed the content of this Guide, which is intended to better represent the international arbitration community's current views on arbitral secretaries and how they can best be utilized by arbitral tribunals in a more transparent and efficient manner.

The members of the Task Force were selected to provide the project with a range of experience, but the key criterion in the selection of representatives was significant experience either serving as arbitral secretary or assisting arbitral tribunals from within an arbitral institution. Collectively, the Task Force has served as arbitral secretary on over 90 arbitrations, *ad hoc* cases under the UNCITRAL Rules as well as institutional cases under the rules of numerous institutions, including the American Arbitration Association International Center for Dispute Resolution ("AAA-ICDR"), the Belgian Centre for Arbitration and Mediation ("CEPANI"), the Cairo Regional Centre for International Commercial Arbitration ("CRCICA"), the Dubai International Arbitration Centre ("DIAC"), the International Chamber of Commerce ("ICC"), the International Centre for the Settlement of Investment Disputes ("ICSID"), the London Court of International Arbitration ("LCIA"), the Stockholm Chamber of Commerce ("SCC"), the Singapore International Arbitration Centre ("SIAC"), and the Permanent Court of Arbitration ("PCA"). The Task Force represents both the civil and common law traditions as well as a diverse geographical professional background with members currently or formerly practicing in North America, Europe and the Asia-Pacific region. Additionally, members represent both law firm and institutional organizations with significant academic backgrounds in the field of international arbitration. The members of the Task Force are: Niuscha Bassiri, *Hanotiau & van den Berg, Partner*; Christopher Bloch, *Michael Hwang Chambers, Associate*; Leilah Bruton, *Freshfields Bruckhaus Deringer LLP, Senior Associate*; Joshua Fellenbaum, *Debevoise & Plimpton LLP, Associate*; Ulrike Gantenberg, *Heuking Kühn Lüer Wojtek, Partner*; L Andrew S. Riccio, *Assouline & Berlowe, P.A., Associate*; and Garth Schofield, *Permanent Court of Arbitration, Legal Counsel*. All members of the Task Force participated in their personal capacity, and the views expressed herein do not necessarily represent the views of the institutions and law firms with which they are affiliated.

## 2. Best Practices for the Appointment and Use of Arbitral Secretaries

### **Article 1. General Principles on the Appointment and Use of Arbitral Secretaries**

- (1) An arbitral secretary should be appointed to support an arbitral tribunal where it considers that such appointment will assist it in resolving the dispute effectively and efficiently.
- (2) An arbitral secretary should only be appointed with the knowledge and consent of the parties.
- (3) An arbitral tribunal should notify the parties of its intention to appoint an arbitral secretary at its earliest convenience.
- (4) It shall be the responsibility of each arbitrator not to delegate any part of his or her personal mandate to any other person, including an arbitral secretary.
- (5) It shall be the responsibility of the arbitral tribunal to appropriately select and supervise the arbitral secretary.
- (6) Where an arbitration is proceeding under institutional arbitration rules, any rules and policies of the institution relating to arbitral secretaries shall apply.

#### *Article 1 Commentary*

##### *Article 1(1):*

The use of an arbitral secretary has the potential not only to add value to the arbitral process by saving costs and reducing time, but also to improve the quality of the arbitral tribunal's work by assisting the tribunal in better understanding the factual and legal basis of the dispute. It is clear from the responses collected in the 2012 Survey that there is overwhelming support (95.0%) for the use of arbitral secretaries generally. The decision to appoint an arbitral secretary should be taken by the arbitral tribunal, where it considers it necessary for the effective and efficient resolution of the dispute in question.

##### *Article 1(2):*

Concerns have been raised in various fora (e.g., at the 2012 ICCA Congress in Singapore) that some arbitrators are habitually assisted by arbitral secretaries without any formal appointment process, or, in some circumstances, without identifying these assistants to the parties. To promote transparency and protect the legitimacy of the international arbitration process, this practice should be avoided.

In the 2012 Survey, an overwhelming majority of respondents were also in favor of party consent (72.4%) with a minority of respondents qualifying the consent requirement depending on whether: the chosen rules required consent (13.3%); the arbitral secretary would attend the hearings and/or meetings (6.1%); or the arbitral secretary would contact the parties directly (2.0%). In response to a differently worded version of the question, a majority of respondents in the 2013 Survey agreed that an arbitral tribunal should not be allowed to use an arbitral secretary in the absence of a formal appointment and knowledge

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of the parties (74.7%) and that the consent of the parties should be obtained before an arbitral secretary is appointed (76.9%), regardless of his or her duties and responsibilities. Finally, respondents to the 2013 Survey also supported (75.8%) the requirement that the parties' consent to the particular candidate being proposed as arbitral secretary be given before he or she is appointed.

### *Article 1(3):*

In the majority of instances, where no appointment process exists (see commentary on Article 1(6), below), an arbitral tribunal should inform the parties of its intention to appoint an arbitral secretary at its earliest convenience so as to allow the parties the opportunity to submit any potential objections without undue delay to the arbitral process.

An arbitral tribunal should aim to conclude the appointment of an arbitral secretary by the end of the initial procedural meeting (or if no formal meeting is conducted, before the issuance of the first procedural order). In the instance of ICC arbitrations, the appointment of an arbitral secretary should ideally be settled before, and the terms of such appointment should be included in, the Terms of Reference. If the need for an arbitral secretary only becomes apparent at a later stage in the arbitral process, then his or her appointment should be notified to the parties and, assuming no objection is made, concluded at the arbitral tribunal's earliest convenience.

### *Article 1(4):*

The most common reason for objecting to the use of arbitral secretaries is that the mandate of the arbitrator is *intuitu personae* ("according to the person") and that any use of arbitral secretaries that goes beyond the purely administrative risks derogating from the arbitrator's personal responsibility. Indeed, of those respondents who opposed the use of arbitral secretaries in the 2012 Survey, 80.0% gave as the principal reason for their objection the potential for the "[d]erogation from an arbitrator's responsibilities", when given the choice between this option and "costs". Any arbitrator who appoints an arbitral secretary must, therefore, do so appropriately and with great care not to delegate any part of his or her decision-making in a way that would dilute the arbitrator's mandate. The issue of which tasks may be appropriately delegated to an arbitral secretary is addressed in more detail at Article 3.

### *Article 1(5):*

Although there may be a risk of a "dilution in mandate" when appointing an arbitral secretary, the Task Force considers the fact that 95.0% of 2012 Survey respondents supported the use of arbitral secretaries as showing that there is significant acceptance within the arbitration community that this risk is outweighed by the benefits inherent in the use of arbitral secretaries. In order to minimize that risk, however, arbitral tribunals must ensure that they maintain tight control over the tasks entrusted to the arbitral secretary and provide close oversight of the arbitral secretary's responsibilities. While 55.2% of 2012 Survey respondents indicated that the arbitral secretary is controlled by the chairperson, the remaining 44.8% indicated that the entire arbitral tribunal is in control



of the arbitral secretary. The Task Force believes that, while it is common practice for the arbitral secretary to be selected from the chairperson's law firm or organization, the benefits associated with the use of an arbitral secretary would be furthered if he or she was controlled by, and tasked with supporting, the arbitral tribunal as a whole.

*Article 1(6):*

It is not typical for arbitral institutions to have a formal appointment process for arbitral secretaries and, accordingly, in the vast majority of international arbitrations the appointment of a secretary remains a matter for the arbitral tribunal. The Task Force notes that the Netherlands Arbitration Institute ("NAI") provides for a formal process of appointment of an arbitral secretary by request of the arbitral tribunal to perform certain activities under the responsibility of the arbitrators. The Task Force also notes that, in the context of Investor-State arbitration, ICSID appoints their legal counsel to perform the function of the arbitral secretary, a matter that is envisaged in its Rules and Regulations, and the PCA provides their legal counsel to perform the function of the arbitral secretary, sometimes working alongside an external secretary or assistant appointed by the arbitral tribunal. Although this Guide is intended to apply to any situation where an arbitral secretary is appointed, deference should be given to the rules, procedures, and policies adopted by the relevant arbitral institutions, and this Guide could accordingly be used where any gaps may exist.

**Article 2. Appointment of Arbitral Secretaries**

- (1) The arbitral tribunal may suggest to the parties that an arbitral secretary be appointed. The selection of an appropriate candidate shall be made at the discretion of the tribunal taking into account all of the circumstances of the case.
- (2) The arbitral tribunal shall propose a candidate for appointment as arbitral secretary and shall provide the parties with the candidate's *curriculum vitae* including all relevant educational and employment history, and experience serving as arbitral secretary. The arbitral tribunal shall also disclose the nationality of any candidate for appointment.
- (3) The arbitral tribunal shall confirm to the parties that the proposed candidate for arbitral secretary is independent, impartial and free of any conflicts of interest. The arbitral tribunal shall notify the parties if the circumstances of the arbitral secretary's independence and impartiality change, or if a conflict of interest arises during the course of the arbitration.
- (4) The parties shall be given an opportunity to object to the appointment of the arbitral secretary. Any such objection shall be accompanied by reasons justifying said objection.
- (5) The arbitral tribunal shall rule on the objection unless the administering institution has developed its own procedures in this regard.
- (6) Assuming no objection is made, or the arbitral tribunal rules against the objection, the final appointment of the arbitral secretary may be made by the arbitral tribunal.

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- (7) The parties shall accord the same immunity to the arbitral secretary as that accorded to the arbitral tribunal.
- (8) The arbitral secretary shall be bound by the same duties of confidentiality and privacy as the arbitral tribunal.

### *Article 2 Commentary*

#### *Article 2(1):*

The arbitral tribunal is in the best position to: (i) determine whether a given case is suitable for the appointment of an arbitral secretary; and (ii) consider potential candidates and nominate a candidate for appointment. Given the wide range of cases submitted to international arbitration, the facts and circumstances of each case may call for the appointment of an arbitral secretary with an appropriate set of skills or practical experience. In selecting a candidate, the tribunal should evaluate the intricacies and issues of each case against the particular candidate's experience and credentials.

In the 2012 Survey, 89.8% of respondents favored the appointment of junior lawyers as arbitral secretaries, while 26.5% favored experienced lawyers and 25.5% favored young arbitrators.

However, there is clear support not to set a cap on an arbitral secretary's level of PQE. The 2013 Survey revealed a preference for arbitral secretaries who have been admitted to practice in at least one jurisdiction (75.8%), but respondents rejected the idea of either a minimum or a maximum level of PQE (57.1% / 93.4%). Thus, the international arbitration community favors a pool of potential candidates that is not limited to young lawyers but will depend instead on all the circumstances of the case.

While trainee lawyers are generally suitable to take on the responsibilities of an arbitral secretary, the arbitral tribunal must consider the experience of each candidate as well as the role envisaged for the secretary in the case in question. As a practical consideration, the nature and length of training contracts may pose difficulties with the use of trainees as arbitral secretaries, but, similar to the rotation of judicial clerks in the United States, it is possible for an arbitral secretary to be replaced with another qualified and suitable candidate during the course of an arbitration, provided that an appropriate hand-off is arranged and additional costs not incurred. The use of law students, paralegals and personal assistants as tribunal secretaries or assistants poses additional difficulties and arbitrators must ensure that the tasks assigned to an arbitral secretary are commensurate with the individual's level of experience. In the 2012 Survey, 81.1% of respondents considered office secretaries or personal assistants to be inappropriate candidates for the role of arbitral secretary, while paralegals (48.9%) and law students/trainee lawyers (43.3%) were also considered to be inappropriate candidates by a sizable number of respondents.

*Article 2(2):*

It is imperative that the parties are provided with sufficient information to make an informed decision as to the appropriateness of a particular candidate. Requiring the arbitral tribunal to submit the candidate's *curriculum vitae* for review before his or her appointment should address any concerns the parties may otherwise have regarding potential conflicts. The 2013 Survey respondents indicated significant support (73.4%) for the circulation of each candidate's *curriculum vitae*. In the 2012 Survey, the majority of respondents stated that the arbitral secretary should be required to provide the parties with the same information as the arbitrators (52.6%). Therefore, if the applicable rules or administering institutions require specific and/or additional disclosures to be made by the arbitrators, the same disclosure requirements should be met by the arbitral secretary.

*Article 2(3):*

Although it has not been the historical practice to require an arbitral tribunal to confirm that an arbitral secretary is independent, impartial and free of any conflicts of interest, given the duties and responsibilities of an arbitral secretary in modern international arbitration, it is important to ensure their independence and impartiality throughout the course of an arbitration. It is also in the interest of the international arbitration community as a whole to remove the source of any tensions between parties and tribunals and to put standards in place to govern the potential objections of parties to the appointment of arbitral secretaries. Although only 55.1% of respondents to the 2012 Survey indicated that they would support a requirement for the arbitral secretary to file a statement of independence and impartiality, that figure was 83.5% in the 2013 Survey. The Task Force believes that the arbitral secretary's independence and impartiality should be the responsibility of the arbitral tribunal, which is why it proposes that it shall be for the arbitral tribunal to confirm that the arbitral secretary is independent, impartial and free of any conflicts of interest.

Moreover, the arbitral secretary should be bound by the same conflicts of interest rules as the arbitral tribunal. As the most widely utilized and accepted set of standards governing disclosures and challenges to the independence and impartiality of arbitrators, the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") will likely be the most relevant in this regard. In fact, a majority of respondents in the 2012 Survey (54.2%) believed that the IBA Guidelines should apply to arbitral secretaries.

*Article 2(4):*

Following receipt of a candidate's background information and statement of independence and impartiality, each party should be provided with the opportunity to raise objections to the candidate's proposed appointment as arbitral secretary. This principle was overwhelmingly supported by the 2013 Survey respondents (91.2%). Any objection should be made in good faith and by reference either to a particular individual and on the basis of specific grounds (e.g., lack of independence or profile of the candidate) or in

relation to the appointment of an arbitral secretary generally (e.g., on the grounds of costs).

*Article 2(5):*

On the basis that, in many instances other than the NAI, ICSID and PCA examples (as discussed in the Commentary to Article 1(6) above), the arbitral tribunal nominates the candidate and that such selection is based on the tribunal's knowledge of the circumstances of each case, it is the Task Force's view that, in general, the arbitral tribunal is the most appropriate body to rule on any objection made by the parties (especially given that not all arbitrations involve arbitral institutions).

In coming to a decision, the arbitral tribunal should be guided by the applicable conflict of interest rules. If a party's objection is based on a genuine conflict of interest, the arbitral tribunal should either proceed without an arbitral secretary or nominate a new candidate for appointment. If the parties have objected to the appointment of an arbitral secretary on general grounds (e.g., associated costs), the tribunal must consider the circumstances of the case (e.g., its factual and legal complexity) to determine whether the appointment of an arbitral secretary is necessary for the effective and efficient resolution of the dispute notwithstanding the specific objection of the party or parties.

*Article 2(6):*

If one or both parties raise an objection that is unsuccessful, the arbitral tribunal may proceed to the formal appointment of the candidate. Likewise, if neither party raises an objection to the particular candidate or to the appointment of an arbitral secretary generally, the arbitral tribunal shall proceed to the formal appointment of the candidate.

*Article 2(7):*

Given that the arbitral tribunal is responsible for overseeing and managing the work of the arbitral secretary, in the 2012 Survey respondents indicated that the arbitral secretary could not be liable for his or her wrongdoing (65.6%). Of those respondents, 55.4% considered that the arbitral tribunal as a whole should assume such liability. However, in the opinion of the Task Force, such an exclusion of liability should not necessarily extend to any intentional wrongdoing committed by an arbitral secretary in the course of executing his or her duties. Although this was not addressed in either the 2012 or 2013 Surveys, this position is reflected in the UNCITRAL Rules, which provide, at Article 16, for the exclusion of liability of "any person appointed by the arbitral tribunal". Undoubtedly, an arbitral secretary falls within the category of those "appointed by the arbitral tribunal".

*Article 2(8):*

Although the extension of the arbitral tribunal's duty of confidentiality to the arbitral secretary was not directly addressed in either of the two Surveys, the Task Force believes that this is an important addition. The Queen Mary & White & Case 2010 International Arbitration Survey: Choices in International Arbitration confirms that 62% of respondents

stated that confidentiality was “very important” and 50% stated that corporate users “consider that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules adopted or the arbitration agreement”.

Based on the importance of confidentiality to users, the Task Force considers that the parties to an international arbitration should be provided with the assurance that the arbitral secretary will be bound by the same rules of confidentiality and privacy that are expected and required of the arbitrators themselves.

### **Article 3. Role of the Arbitral Secretary**

- (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:
  - (a) Undertaking administrative matters as necessary in the absence of an institution;
  - (b) Communicating with the arbitral institution and parties;
  - (c) Organizing meetings and hearings with the parties;
  - (d) Handling and organizing correspondence, submissions and evidence on behalf of the arbitral tribunal;
  - (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 Commentary*

##### *Article 3(1):*

In practice, many arbitrators responsibly make full use of arbitral secretaries, beyond the purely administrative sphere, to help them in the discharge of their functions. Indeed, to ensure that the maximum benefit is derived from the appointment of an arbitral secretary, the responsibilities entrusted to the arbitral secretary *must* go beyond the purely administrative. To limit the arbitral secretary’s role in supporting the arbitral tribunal to administrative matters only would largely eliminate the gains in efficiency sought through the appointment of a secretary. In order to minimize the risk of diluting the arbitrators’ personal mandate, however, tribunals must closely instruct and supervise the arbitral secretary. Ultimately, it should be left to the discretion of the tribunal to determine what duties and responsibilities can appropriately be entrusted to the arbitral secretary, taking into account the circumstances of the case and the arbitral secretary’s level of experience

and expertise. If an arbitrator exercises poor judgment in determining what tasks to assign to the arbitral secretary, it reflects badly on the institution of arbitral secretaries.

*Article 3(2):*

This article sets out those tasks that may reasonably be undertaken by the arbitral secretary (subject to the caveats set out in relation to Article 3(1) above). This is not an exhaustive list and should be seen as a default list of responsibilities that is subject always to the preferences of the parties. If the parties so desire, they may discuss with the arbitrator the scope of tasks and duties to be undertaken by the arbitral secretary at or prior to the time of his or her appointment.

Interestingly, the results of the 2012 and 2013 Surveys differed in relation to the issue of which duties can be appropriately entrusted to an arbitral secretary. Participants in the second (more comprehensive) Survey generally indicated stronger support for each category of responsibilities than the previous Survey. The results of both Surveys are discussed below.

*Article 3(2)(a):*

It appears to be uncontroversial, especially in the absence of an institution's administrative assistance, for an arbitral secretary to be responsible for handling a number of administrative matters. These might include the coordination of funds, preparation of the arbitral tribunal's statements of fees and expenses, tax matters (i.e., VAT) related to the fees of the tribunal and the distribution of submissions, orders and awards to the parties.

*Article 3(2)(b):*

The majority of the Survey participants agreed that an arbitral secretary's tasks could legitimately include communications with the arbitral institution. In the 2012 Survey, 54.8% of respondents agreed that an arbitral secretary could communicate and liaise with an arbitral institution, with 73.6% of respondents in the 2013 Survey concurring. Additionally, in the 2012 Survey 57.0% of respondents agreed that the arbitral secretary should be allowed to liaise with the parties (58.2% in the 2013 Survey).

Moreover, by acting as a point of contact for the parties, an arbitral secretary can help to expedite the resolution of purely procedural or administrative issues without having to involve the arbitral tribunal who may not be as readily available or responsive due to caseload and travel schedules. However, as a matter of best practice and to alleviate any potential concerns the parties may have, an arbitral secretary should inform the arbitral tribunal and the opposing party of any communications in which they have not participated and the content of such communications.

Additionally, it is important to note that any communications from the arbitral secretary that are made on behalf of the arbitral tribunal should clearly indicate that they are made on its behalf and should comply with the same rules that are applicable to communications between the parties and the arbitral tribunal, in particular any rules on *ex parte* communications.

*Article 3(2)(c):*

The responsibility for coordinating and organizing meetings and hearings received the highest number of positive responses with 88.2% of respondents in 2012 deeming such tasks to be suitable for delegation to the arbitral secretary (95.6% concurred in the 2013 Survey).

*Article 3(2)(d):*

Given the voluminous submissions and evidence prepared by the parties in modern international arbitration, the arbitral secretary can provide significant value to the arbitral tribunal by handling and organizing the correspondence, submissions and evidence transmitted, whether electronically or physically. Ensuring that the arbitral tribunal has access to any document that is required at any given time is an integral part of the arbitral secretary's job and helps to keep the arbitral tribunal fully informed of the issues at hand when questions arise, whether they be before a hearing, in the hearing room or during deliberations. Participants in the 2013 Survey indicated that this is an appropriate duty to be entrusted to the arbitral secretary, with 80.2% of respondents in support.

*Article 3(2)(e):*

The arbitral tribunal should be permitted to rely on an arbitral secretary to check legal authorities submitted by the parties in support of their positions and research further areas of law relevant to the arbitral tribunal's analysis. The use of arbitral secretaries to conduct legal research and check referenced legal authorities for the arbitral tribunal received support from 68.8% of respondents in the 2012 Survey and 85.7% of respondents in the 2013 Survey. The Task Force considers that the cost-saving advantage of having an arbitral secretary conducting potentially time-consuming legal research is desirable for all those involved in the arbitral process.

*Article 3(2)(f):*

It is clear that arbitrators should review all key documents relied on by the parties but, nonetheless, the assistance of an arbitral secretary to review the entire evidential record in order to research discrete questions relating to the factual evidence and witness testimony that have been identified by the arbitral tribunal can add value and efficiency to the process.

Although the 2013 Survey revealed that just about half of the respondents (47.3%) supported an arbitral secretary being utilized to identify key documents and pieces of evidence, the Task Force believes that the realities of the process and the sheer number of documents produced mean that an arbitral tribunal can benefit from the assistance of an arbitral secretary. In this regard, the Task Force is in no way suggesting that an arbitrator should rely solely on the work of an arbitral secretary.

*Article 3(2)(g):*

Drafting procedural orders or similar documents, such as Terms of Reference in the context of an ICC arbitration, can be a time-consuming process and one in which an arbitral tribunal may benefit from the assistance of an arbitral secretary.

As procedural orders are typically short documents recording in most part the procedural background to the issues at stake, these can be legitimately and appropriately entrusted to an arbitral secretary to draft, subject to subsequent review and approval by the arbitral tribunal. In the 2012 Survey 60.2% of respondents indicated their approval (71.4% of respondents in the 2013 Survey).

*Article 3(2)(h):*

The utilization of an arbitral secretary to summarize the factual circumstances of a dispute and review the parties' legal and evidentiary submissions can result in a better and more effective arbitral process, if done appropriately: 38.7% of respondents in the 2012 Survey supported the utilization of the arbitral secretary in this regard and in the 2013 Survey the level of support was 49.5%.

Given the complexities of factual disputes and legal arguments and the volume of submissions and evidence in modern international arbitrations, arbitral secretaries can play a useful role in assisting the arbitral tribunal in becoming better informed as to the substance of the case by helping to marshal the arguments and evidence presented by the parties during the course of the proceedings. In a large number of legal fora, legal assistants or judicial clerks similarly assist judges in discharging their responsibilities without being considered an illegitimate derogation of the decision-making function.

Those who oppose the use of arbitral secretaries in such manner argue that the review of the parties' submissions or documentary evidence is an important step for an arbitrator in evaluating the case and assessing the strengths and weaknesses of the parties' respective positions. The Task Force does not advocate that the arbitral tribunal should not also review the parties' submissions and evidence itself. However, the Task Force also considers, as do the nearly 50% of the 2013 Survey respondents, that for some arbitrators it is a considerable benefit to be assisted in their review by factual chronologies, summaries and/or memoranda prepared by the arbitral secretary from his or her review of the file.

*Article 3(2)(i):*

Utilizing an arbitral secretary during the course of the arbitral tribunal's deliberations to record the analysis of the members of the tribunal and the numerous decisions made should free the arbitrators to discuss and debate without having to record the entire discussion themselves.

Additionally, and closely related to the duties provided in Articles 3(2)(d) to 3(2)(h), an arbitral secretary's attendance should facilitate the tribunal's deliberations given the arbitral secretary's command of the factual record and documentary evidence. Indeed, arbitrators should be able to use the arbitral secretary as a resource when considering specific questions concerning the factual background of the case, which inevitably arise



during the course of the deliberations. However, while the arbitral secretary may be present during the deliberations, care should be taken by the tribunal not to allow the arbitral secretary to *participate* in the deliberations. This distinction is supported by the results of the 2013 Survey: while 72.5% of respondents supported the arbitral secretary's *attendance* at the arbitral tribunal's deliberations, 83.5% of respondents opposed their actual *participation* in such deliberations.

*Article 3(2)(j):*

The drafting of awards can be a time-consuming process for a sought-after arbitrator with a demanding schedule of commitments. To assist, an arbitral secretary may legitimately be used to prepare first drafts of certain sections of the award.

While it is clear that there is little support for an arbitral secretary being tasked with drafting the entirety of the award (67.0% of respondents in the 2013 Survey opposed this), there is substantial support for involving the arbitral secretary in drafting some sections of the award (63.5% of respondents in the 2013 Survey). More precisely, according to the results of the 2013 Survey, respondents who considered that an arbitral secretary should draft some part or parts of the award were comfortable with an arbitral secretary preparing a first draft for review by the arbitral tribunal of the following sections of the award: "Procedural Background" (84.9%); "Factual Background" (69.4%); and "Parties' Positions" (65.3%). More controversial remain the "Legal Reasoning" section (31.9%) and presumably the final analysis and operative portions of the award.

**Article 4. Costs**

- (1) As a general principle, the use of an arbitral secretary should reduce rather than increase the overall costs of the arbitration.
- (2) The remuneration of the arbitral secretary should be reasonable and proportionate to the circumstances of the case and should be transparent from the commencement of the arbitration.
- (3) Unless otherwise determined by the arbitration institution or agreed upon by the parties, the remuneration and reasonable expenses of the arbitral secretary should be paid: (i) out of the arbitral tribunal's fees where the arbitral tribunal is paid on the basis of the amount in dispute; or (ii) by the parties where the arbitral tribunal is paid on an hourly basis.

*Article 4 Commentary*

*Article 4(1):*

As the results of the 2012 Survey make clear, one of the key reasons for using an arbitral secretary is the potential for cost savings to the parties: 58.8% of the respondents indicated that cost savings is one of the principal reasons for appointing an arbitral secretary; 57.7% of respondents indicated that time savings is a principal reason – this is obviously directly

related to costs in those cases where the arbitrators are remunerated on an hourly basis. Therefore, the Task Force considers that the guiding principle in relation to costs should be that the use of an arbitral secretary should reduce rather than increase the overall costs of the arbitration.

*Article 4(2):*

Since the arbitral secretary's work consists in assisting the arbitral tribunal, his or her value is best appreciated by the arbitrators who will benefit from the work. Accordingly, the arbitral secretary's remuneration should be proposed by the arbitral tribunal, based on an hourly rate or lump sum (as appropriate). The arbitral tribunal's proposal should take into account the qualifications of the arbitral secretary, the circumstances of the case with regard to the amount in dispute and projected length of the arbitration as well as the complexity of the issues in dispute.

Regular disclosure of the tasks carried out by the arbitral secretary to the parties will ensure transparency in terms of the nature of work carried out by the arbitral secretary and any ensuing cost savings. The Task Force considers that this is supported by the 2013 Survey results, where 54.7% of respondents indicated that the parties should bear the costs of the arbitral secretary where the arbitral tribunal is remunerated on an hourly basis (as they should ultimately see a reduction in costs through the appointment). As with the bills of arbitrators, however, the arbitral tribunal should take care to ensure that any description of the arbitral secretary's work does not inadvertently disclose the tribunal's decision-making process.

In the 2013 Survey a majority of respondents indicated a preference for the arbitral secretary to be remunerated on the basis of an hourly rate (64.0%), as opposed to on a lump sum basis (36.0%). In practice, the choice will depend on the rules, regulations and policies of the arbitration institutions involved, if any, and the preferences of the arbitral tribunal and parties.

In any event, in order to allow the parties to make a reasoned decision on the appointment of an arbitral secretary generally and a particular candidate specifically, the proposed fee schedule should be provided to the parties at the time the candidate is proposed.

*Article 4(3):*

Where the arbitral tribunal is remunerated on the basis of the amount in dispute, the costs and expenses associated with the arbitral secretary should be borne by the arbitral tribunal rather than the parties. This default rule was supported by 65.1% of respondents in the 2013 Survey. Moreover, when the arbitral tribunal bears the costs and expenses of the arbitral secretary, the arbitral tribunal as a whole, rather than the chairperson alone, should bear the costs. The 2013 Survey respondents overwhelmingly rejected any proposal that the chairperson be solely responsible for the costs and expenses of the arbitral secretary (74.4%).

Where the arbitral tribunal is remunerated on an hourly basis, the costs and expenses associated with the arbitral secretary should properly be borne by the parties due to the

inherent time and cost savings associated with the use of an arbitral secretary. As opposed to the situation of a flat fee paid in relation to the amount in dispute, where the parties must pay the arbitral tribunal for their time, the efficiency of having many routine tasks performed at a lower rate by an arbitral secretary will generally lead to cost savings. The 2013 Survey respondents supported this approach at a rate of 54.7%, with 45.3% preferring the arbitral tribunal to bear the expenses in the hourly rate scenario.

Where the arbitral secretary is paid an hourly rate, the 2013 Survey respondents indicated that an appropriate range would span from US\$ 125 to US\$ 225 per hour (50.1%). The Task Force suggests that the hourly rate should be based on the specific arbitral secretary's qualifications and the relative complexity of the case.

(A complete list of remuneration ranges and Survey results can be found at Appendix C.)

The Task Force notes that in the 2013 Survey a majority (53.5%) of respondents stated that arbitral secretaries who are to be remunerated on a lump sum basis should have the amount tied to the amount in dispute. While only 36% of respondents favored the arbitral secretary being paid a lump sum rather than an hourly rate, this may be a procedure to be investigated by those arbitration institutions that currently remunerate arbitrators on the basis of the amount in dispute.

### 3. Model Plug-in Regarding the Appointment and Use of Arbitral Secretaries

For ease of reference, the model plug-in regarding the appointment and use of the arbitral secretary provided below is for insertion into an arbitral tribunal's procedural order, terms of reference or other similar direction by the arbitral tribunal to record the appointment of the arbitral secretary. The Task Force notes that this model plug-in is intended for use in situations where the arbitral secretary will be remunerated on an hourly basis by the parties, rather than on a lump sum basis.

The tribunal has communicated to the parties its intention to appoint [name] as arbitral secretary. [Name] is [an associate in [name of presiding arbitrator's firm]] who has confirmed to the tribunal his/her independence and impartiality in this matter. [Name]'s biographical details can be found [in the attached CV], which has previously been provided to the parties. In the absence of any objection from the parties, the tribunal hereby proceeds to appoint [name] as arbitral secretary to the tribunal.

The arbitral secretary will undertake to facilitate the arbitral process and complete such tasks as are placed under his/her purview or specifically assigned to him/her by the arbitral tribunal or the chairperson of the arbitral tribunal.

The arbitral secretary will be paid [by the parties/by the institution/by the arbitral tribunal] an hourly fee of EUR/USD [amount] for his/her work performed in connection with the proceedings. He/she will further be reimbursed for his/her travel and other reasonable expenses [within the limits prescribed by the rules, regulations and policies of the relevant arbitration institution].

The arbitral secretary shall be bound by the same duties of confidentiality and privacy as the arbitral tribunal and shall be accorded the same immunities as the arbitral tribunal.

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# ANNEX A

## Arbitral Secretaries

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### I. INTRODUCTION

There are few aspects of the practice of international arbitration that better deserve the unwelcome moniker of “hypocrisy” than the approach to the use of secretaries to arbitral tribunals.

Much is often said about how the use of the arbitral secretary to play more than a purely administrative role would amount to a grave derogation of responsibility by the arbitrator. However, in practice, many arbitrators responsibly make fuller use of arbitral secretaries, beyond the purely administrative, to help them in the discharge of their functions; sometimes officially, sometimes not.

In recent years the open use and ready acceptance of arbitral secretaries has grown. This is evidenced by the express accommodation of the use of arbitral secretaries in the more recent iterations of the major arbitral rules.

By way of example, the UNCITRAL Arbitration Rules of 2010 now explicitly accommodate assistance being provided to the arbitral tribunal. As the *travaux préparatoires* confirm, these rules were intended to apply to arbitral secretaries.

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Thus, Art. 5 of the Rules, entitled “Representation and Assistance”, refers to “each party” having the facility to be represented or “assisted” by persons chosen by it. It is understood and accepted that, in this context, the reference to “assistance” is intended to accommodate assistance sought by the arbitral tribunal of a secretary.

In the same way, Art. 16, entitled “Exclusion of Liability”, extends not only to arbitrators and appointing authorities, but also to “any person appointed by the Arbitral Tribunal”, which again would appear to be intended to accommodate arbitral secretaries.

Finally, Art. 40, entitled “Definition of Cost” explicitly includes within such definition the “reasonable costs of expert advice and of other assistance required by the Arbitral Tribunal”.

This express contemplation of the appointment of arbitral secretaries in the UNCITRAL Arbitration Rules is a welcome development. But it is only the first step in addressing the legitimacy gap that remains with respect to the role performed by, and cost of, an arbitral secretary.

With regard to UNCITRAL, this issue was last considered in its 1996 Notes on Organizing Arbitral Proceedings,<sup>1</sup> which state the problem but do not provide an answer, 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.”* (Emphasis added).<sup>2</sup>

The extract set out above raises the question as to where the dividing line between the appropriate and the inappropriate should lie. However, that question remains to be answered by UNCITRAL, or by other institutional guidance.

The ICC’s recently revised Note on the Appointment, Duties and Remuneration of Administrative Secretaries is a (prominent) case in point.<sup>3</sup> Whilst the Note does

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1. UNCITRAL, Notes on Organizing Arbitral Proceedings (1996), available at <[www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf)>.

2. *Ibid.*, para. 27.

3. ICC, “Note on the Appointment, Duties and Remuneration of Administrative Secretaries” (2012), available at <[www.iccwbo.org/products-and-services/arbitration-and-adr/flash-news/introduction-of-revised-Note-on-the-Appointment,-Duties-and-Remuneration-of-Administrative-Secretaries/](http://www.iccwbo.org/products-and-services/arbitration-and-adr/flash-news/introduction-of-revised-Note-on-the-Appointment,-Duties-and-Remuneration-of-Administrative-Secretaries/)>.

## ANNEX A: ARBITRAL SECRETARIES

acknowledge that administrative secretaries “can provide a useful service to the parties and Arbitral Tribunals” and sets out a list of organizational and administrative tasks that an administrative secretary may perform (including, for example, organizing hearings and meetings, as well as proofreading and cite-checking awards), it does not grapple with the reality of today’s use of arbitral secretaries, which frequently goes beyond the purely administrative.

Indeed, there appears to remain a general reluctance to recognize the fact that many responsible arbitrators are habitually delegating activities that go beyond the purely administrative to diligent secretaries without it impacting on the full and proper discharge by the arbitrators of their decision-making functions. As a consequence of this, many arbitrators feel compelled to be less than fully transparent about such delegation.

Accordingly, we believe that this subject is worthy of further exploration. To do so, we identified the following four questions, the pros and cons of which are considered in the next section, together with the results of a survey that we conducted between October and December 2011 on this issue:

- (a) *Whether* there is a place for the use of secretaries in the arbitral process, whatever their role;
- (b) *What* the duties of an arbitral secretary should be and whether they should go beyond the purely administrative;
- (c) *Who* should be allowed to act as arbitral secretary; and
- (d) *How* the arbitral secretary should be compensated.

The survey, at Appendix B to this paper, set out a number of key questions relating to the use of arbitral secretaries, and was open to over 200 members of the arbitration community (divided evenly between institutional representations, arbitrators, counsel, lawyers who work as secretaries and commercial users of the arbitral process), in order to provide us with anonymous views on a number of important issues relating to the use of arbitral secretaries.

We conclude this paper by considering whether users of the arbitral process will be assisted by a Statement of Best Practice on the use of arbitral secretaries.

## II. ARBITRAL SECRETARIES: PROS AND CONS

The four questions set out above provided the underlying basis for the survey conducted on the issue of arbitral secretaries, and formed the crux of the debate presented during the session on arbitral secretaries at the ICCA Congress in Singapore, with Niuscha Bassiri and Ulrike Gantenberg taking up opposing positions on each question.

1. *Whether There Is a Place for Arbitral Secretaries in the Arbitral Process, Whatever Their Role*

The first topic of the debate is a simple one: whether arbitral secretaries should be used at all.

There are a number of obvious arguments in support of the proposition that arbitral secretaries should be used. The appointment of an arbitral secretary makes particular sense in complex cases where the arbitral secretary can bring increased efficiency to the arbitral process. Such cases are likely to involve voluminous submissions as well as considerable documentary evidence. In these circumstances, the arbitral tribunal (and the parties) will benefit from assistance in ensuring that the submissions and documents, as well as the procedural conduct of the case itself (e.g., in relation to communications with the parties and the arbitral institution), are properly and efficiently managed, leaving the arbitral tribunal with more time to handle the substantive matters at issue.

In these situations where it is likely that the tribunal will need some assistance, it is in the parties' interests that there be greater transparency surrounding which specific person is providing the assistance to the arbitral tribunal, what assistance they are providing and how they are remunerated for the same.

That said, there are some risks in using an arbitral secretary. Whilst a number of such risks are best discussed in the section below regarding the duties of an arbitral secretary, there are certainly some points worth noting here to counter the proposition that arbitral secretaries *should* be used in the arbitral process.

It is a fundamental principle of the arbitral process that the mandate of the arbitrator and the arbitral tribunal is *intuitu personae*. Indeed, those survey respondents who did not approve of the use of arbitral secretaries at all considered that the principal reason not to appoint an arbitral secretary is because such appointment derogates from the arbitrator's personal responsibility. An arbitrator may not assign his or her personal mandate to another person and is at greater risk of doing so when he or she involves an arbitral secretary in the arbitral process.

In this respect, it would be naive to assume that an arbitral secretary will not have a degree of influence, however indirect, over the arbitrator and the arbitral tribunal. Even if the arbitral secretary is "merely" tasked with basic matters such as summarizing the factual background and the parties' submissions or with identifying key documents for the arbitral tribunal to review, the arbitral secretary will inevitably exert some level of influence over the arbitral tribunal (through, for example, his or her choice of key documents to bring to the attention of the arbitral tribunal). This may be of particular concern to the parties who have chosen their arbitrators with much care and diligence but who have had no say in the appointment of the arbitral secretary who, nevertheless, may have an impact, however small, on the arbitral tribunal and the exercise of its mandate.<sup>4</sup>

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4. Indeed, it is normally the case that the arbitral secretary would be appointed and/or selected by the president of the arbitral tribunal.

## ANNEX A: ARBITRAL SECRETARIES

Notwithstanding these risks, the results of the survey suggest that there is little need to question the use of arbitral secretaries in the arbitral process. Indeed, 95 percent of the survey respondents agreed with the use of arbitral secretaries. Therefore, it appears safe to conclude that even though there may be a risk of a “dilution in mandate” when appointing an arbitral secretary, most would appear to accept that these risks are outweighed by the benefits inherent in the use of an arbitral secretary. For most, these benefits seem to relate to a perceived increase in efficiency where arbitral secretaries are used. Indeed, for those survey respondents who approved of the use of an arbitral secretary in the arbitral process, the principal reason for appointing an arbitral secretary was to support the arbitral tribunal, and, in particular to support the president of the arbitral tribunal. Additional factors include savings in terms of in time and cost.<sup>5</sup>

Accordingly, the use of arbitral secretaries in the arbitral process appears to be well-supported by the arbitral community. The natural next question relates to the duties that such an arbitral secretary should undertake as part of the role, and how such duties might be limited to allay any residual concerns in this respect.

### 2. *What the Duties of an Arbitral Secretary Should Be and Whether They Should Go Beyond the Purely Administrative*

Astute readers will have noted already that the present article refers to the “arbitral” secretary rather than the “administrative” secretary. This reflects the fact that for most arbitral tribunals, the secretary’s tasks do go beyond the purely administrative.<sup>6</sup> However, the question, and debate, in this section asks whether the tasks of the arbitral secretary *should* go beyond the administrative, and if so, how far.

The arguments against the arbitral secretary carrying out tasks which go beyond the administrative echo the arguments rehearsed above regarding the use of arbitral secretaries at all. Rejectionists will argue that the mandate of the arbitrator is a personal one and, so the argument goes, an arbitral secretary should not be charged in any way with reviewing parties’ submissions or documentary evidence, or the generality of the case. Rather, the arbitrators should carry out all such substantive tasks (however minor) as part of their personal mandate to resolve the parties’ dispute. In this respect, summarizing the facts of a case, reviewing documents and exhibits, and summarizing or distilling the parties’

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5. In answer to question number 3 of the survey, “what is the principal purpose of appointing a secretary”, 58.8 percent agreed that the purpose included saving cost, and 57.7 percent agreed that the purpose included saving time.

6. The ICC’s revised Note specifies that “Under 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.” And further, that “A request by an Arbitral Tribunal to an Administrative Secretary to prepare written notes or memoranda shall in no circumstances release the Arbitral Tribunal from its duty personally to review the file and/or to draft any decision of the Arbitral Tribunal.” Accordingly, the revised Note recognizes that the duties of the arbitral secretary may extend beyond the purely administrative, but, if so, such duties must not extend so far as to affect or encroach on the arbitrators’ personal mandate.

submissions should be done by the arbitrator and the arbitral tribunal as an important step in evaluating the case, assessing the strengths and weaknesses of the parties' respective positions, and ultimately coming to a final decision.

Such a rejection of the arbitral secretary performing anything more than a purely administrative role would apply *a fortiori* to the drafting of any part of an award. After all, is not the "act of writing" the arbitrator's ultimate means of intellectual control?

But such rejectionism invites the following response. Assistants to judicial decision-makers are called upon in a large number of different fora to assist judges with the discharge of their responsibilities, without such assistance being considered an illegitimate derogation of the decision-making function. In this comparative context, why should there be anything inappropriate in an arbitrator making use of the services of a young lawyer to assist him or her to become better informed as to the substance of a case by helping in the digest of the arguments and evidence presented by the parties during the course of the proceedings? Indeed, it is not immediately apparent why such assistance cannot efficiently extend to producing first drafts of substantive correspondence or procedural orders, under the close supervision of the arbitrators. On the question of the drafting of awards (a practice that is long-standing in other fora, including notably the role played by clerks to justices in drafting judicial opinions for US courts), it is surely for the individual arbitrator to determine whether he or she can delegate part or all of the drafting function to an arbitral secretary without jeopardizing decision-making control. On this sensitive subject, dogmatism is unhelpful. For some, the act of drafting is indeed the ultimate safeguard of intellectual control. For others, the same level of control can be achieved in other ways. Ultimately, this surely must be a question for the arbitrator's judgment. And if your arbitrator gets such a significant decision wrong, then the problem is not with the institution of secretaries, it is with the choice of arbitrator.

On these issues, the survey responses were particularly interesting. Participants approved of the arbitral secretary carrying out tasks that went beyond the purely administrative. However, unlike the previous question as to the involvement of arbitral secretaries at all, the answers from respondents were varied as to the non-administrative duties the arbitral secretary should carry out. Participants were asked, on the one hand, what the tasks of an arbitral secretary were in practice and, on the other hand, what the tasks of an arbitral secretary should be. As to the current practice, the top six tasks carried out by arbitral secretaries were organizing meetings and hearings with the parties, handling correspondence and evidence, performing legal research, drafting procedural orders, reminding the parties of meetings and deadlines, and communicating with the arbitral institution.<sup>7</sup> As to the tasks that an arbitral secretary should carry out (in an ideal world) the same top six tasks were identified. Other tasks of the arbitral secretary which

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7. In answer to question number 16 of the survey, "what are the tasks of a secretary in practice", 90.3 percent of respondents said organizing meetings and hearings with the parties, 86 percent said handling correspondence and evidence; 80.6 percent said performing legal research; 77.4 percent said drafting procedural orders; 74.2 percent said reminding the parties of meetings and deadlines; and 71 percent said communicating with the arbitral institution.

found some support from survey participants included communicating with the parties on behalf of the arbitral tribunal, drafting part of the award and analyzing the parties' submissions.

Unsurprisingly, the tasks which the survey participants ranked as least appropriate for an arbitral secretary to perform were drafting the entire (as opposed to part of) the award and taking part in the decision-making process of the arbitral tribunal.<sup>8</sup> Interestingly, however, as regards the tasks that arbitral secretaries actually carry out in current practice, survey participants suggested that drafting the entire arbitral award and participating in the decision-making process of the arbitral tribunal may indeed comprise the real-life activities of some arbitral secretaries in some arbitral proceedings.<sup>9</sup>

Ultimately, whilst an arbitral secretary should not participate in the decision-making process, there appears to be a growing consensus that the tasks of an arbitral secretary may appropriately go beyond the purely administrative. The extent to which such tasks should go beyond the purely administrative is, however, a matter which depends on the particular arbitral tribunal in question. As an additional matter, the extent of an arbitral secretary's tasks may also depend on the type of person appointed as an arbitral secretary. It is this question to which we now turn.

### 3. *Who Should Act as an Arbitral Secretary?*

It is generally the case that a junior lawyer, usually from the law firm of the president of the arbitral tribunal, acts as arbitral secretary to the tribunal. As a junior lawyer, the arbitral secretary is a qualified lawyer and is therefore capable (or ought to be capable) of carrying out some of the more substantive tasks that could be expected of an arbitral secretary, including for example reviewing parties' submissions and evidence submitted, as well as drafting administrative or organizational procedural orders. An additional factor is that, as a junior lawyer, he or she is unlikely to carry out tasks which encroach on the mandate of the arbitrators. A junior lawyer is also likely to seek and require guidance from the arbitral tribunal, which in turn gives the arbitral tribunal or president of the arbitral tribunal the opportunity to more readily steer, supervise and control the tasks carried out by the arbitral secretary.

Conversely, the risk in appointing a more experienced lawyer as arbitral secretary, is that an experienced lawyer may well be more inclined to undertake tasks which encroach on the arbitrators' personal mandate, such as drafting an entire award or contributing to the decision-making process of the arbitral tribunal. Accordingly, the risks identified above regarding the involvement of an arbitral secretary may be reduced by restricting the

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8. In answer to question number 17 of the survey, "what should the tasks of a secretary be", 7.5 percent of respondents said drafting the entire award; and 5.4 percent said taking part in the decision-making process of the arbitral tribunal.

9. In answer to question number 16 of the survey, "what are the tasks of a secretary in practice", 26.9 percent of respondents said drafting the entire award; and 17.2 percent said taking part in the decision-making process of the arbitral tribunal.

type of person who may act as an arbitral secretary to junior lawyers. It is certainly the case that a person who is an experienced lawyer and an arbitral authority in his or her own right ought not to be able to act as an arbitral secretary.<sup>10</sup>

However, the definition of a “junior” lawyer may be subject to some debate, particularly where any specification is given in terms of number of years of practice, years since qualification, or number of arbitration proceedings.

Having said that, one might consider that five years of post-qualification experience should be taken as a threshold beyond which lawyers should not act as arbitral secretaries. After five years of practice a lawyer may no longer be properly described as a “junior lawyer”. Though the experience may not necessarily have been in the field of international arbitration, presumably after five years of practice, a lawyer has some of the skills which the parties would have identified in their choice of arbitrator. As such the arbitral secretary of more than five years practical experience may be more willing and able to encroach on the arbitrators’ mandate, whether intentionally or not.

That said, at the other end of the spectrum, the arbitral secretary generally should not be a law student or paralegal. As the arbitral secretary is required to assist the arbitral tribunal in managing the case, reviewing the parties’ submissions or documentary evidence, a certain level of qualification and understanding of the arbitral process is necessarily required. Moreover, there is a risk that a law student or paralegal may not be able to see the case from beginning to end (given the nature and length of training contracts and the like) and if the purpose of the appointment of an arbitral secretary is to optimize the efficiency of the arbitral proceedings then this purpose is diminished with a changeover, perhaps more than once, of arbitral secretaries during the course of the proceedings. As to the question of a personal assistant assuming the role of the arbitral secretary, another comparison with judges’ clerks is apt in light of the fact that the position of a judge’s clerk is typically given to a qualified lawyer who has developed the necessary legal and analytical skills. The same skills are needed in arbitral proceedings and, therefore, arbitral secretaries should have a certain level of legal qualification.

It could be said that an arbitral secretary ought to have the “goldilocks” level of qualification and experience. Not too experienced, but with just enough experience, and not too qualified, but with just enough qualification. Ultimately, the choice of the arbitral secretary will be determined by the sole arbitrator or president of the arbitral tribunal. However, in considering a suitable candidate, the arbitral tribunal must be aware that as arbitral secretaries become the norm in arbitral proceedings, the parties will come to expect a certain level of service offered by the arbitral secretary which, in turn, requires a certain level of experience. Equally, the parties are likely to be wary of attempts by an arbitral tribunal to appoint someone as an arbitral secretary who quite obviously exceeds

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10. As happened in one ICC proceeding. It is understood that the person proposed to be appointed as an arbitral secretary was an experienced lawyer and an arbitral authority in their own right. In that instance the ICC prevented the person from acting as an arbitral secretary.



the definition of the term “junior lawyer”. As with many other aspects of good practice, transparency is key.

Survey participants agreed with most of the statements set out above, namely that the best candidate to take on an arbitral secretary role is a junior lawyer, and the least favoured candidate being the office secretary or personal assistant.<sup>11</sup> The experienced lawyer and the trainee lawyer were equally unfavoured by survey participants but were favoured more than law students or paralegals.<sup>12</sup>

The real question in the coming years, as arbitral secretaries become the norm in arbitral proceedings, is how much say the parties will have in the appointment of an arbitral secretary and, in particular, whether they will be able to insist on a particular person acting (or not) as arbitral secretary. The parties’ say in the arbitral secretary’s appointment will be particularly relevant if arbitral secretaries are to be remunerated separately in addition to the fees paid to the arbitral tribunal. Thus, it is to the question of remuneration that we now turn.

#### 4. *How Should the Arbitral Secretary Be Remunerated?*

As stated at the outset, one of the key purposes of the appointment of an arbitral secretary is to optimize the efficiency of the arbitral proceedings. Survey participants supported the notion that the appointment of an arbitral secretary is a way of making arbitral proceedings more cost-effective.<sup>13</sup> In terms of cost-effectiveness, the question is whether the arbitral secretary ought to be remunerated separately from (and in addition to) the arbitral tribunal, or whether the remuneration of the arbitral secretary should be included within the fees paid to the arbitral tribunal.

In relation to whether the arbitral secretary should be remunerated separately from the arbitral tribunal, some have questioned whether this would amount to a form of compensation for duplicate work. Given that it is the arbitral tribunal’s mandate to resolve the parties’ dispute by, inter alia, drafting and issuing procedural orders, reviewing the parties’ submissions and reviewing documentary evidence, remuneration of the arbitral secretary may result in a duplicate payment if the same tasks are carried out by the arbitral tribunal and the arbitral secretary.

However, as was stated above, in complex cases, the arbitral tribunal will often benefit from assistance in managing the material generated in a case. In this respect, the use of

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11. In answer to question number 6 of the survey, “what profile should a secretary have (beside linguistic skills)”, 89.8 percent of respondents said he or she should be a junior lawyer; and 1 percent of respondents said that he or she should be an office secretary.

12. In answer to question number 6 of the survey, “what profile should a secretary have (beside linguistic skills)”, 26.5 percent of respondents said he or she should be an experienced lawyer; 26.5 percent of respondents said he or she should be a trainee lawyer; 9.2 percent said he or she should be a law student; and 6.1 percent said he or she should be a paralegal.

13. In question 22 of the survey 70.5 percent answered “yes” to the question “Do you think that appointing a secretary is a way to make arbitration proceedings more cost-effective?”

an arbitral secretary can benefit the arbitral tribunal and the parties alike, particularly given that by managing the case, the arbitral secretary will relieve the arbitral tribunal of a number of tasks that it would otherwise have to perform, such as drafting organizational or non-controversial procedural orders and directions. By managing these tasks, the arbitral secretary's involvement allows the arbitral tribunal to focus more closely on the substantive issues in dispute.

Moreover, where the arbitral secretary is able to complete tasks such as drafting administrative and organizational procedural orders and directions, reviewing submissions and managing documentary evidence, this will reduce the amount of time that would otherwise be spent by the arbitrators performing those same tasks. Accordingly, the appointment of an arbitral secretary may lower the overall fees of the arbitral tribunal, particularly where the arbitrators are remunerated on an hourly basis. In any case, it should also be noted here that the fees of the arbitral tribunal, and the arbitral secretary, are dwarfed by the fees of the parties' counsel in most, if not all, arbitral proceedings.<sup>14</sup> Accordingly, additional payment to an arbitral secretary, which would usually be accompanied by lower overall fees for the arbitral tribunal, ought not to cause alarm.

Whilst a majority of survey participants agreed that the parties ought to bear the costs of the arbitral secretary, there is some debate as to whether as a result thereof the parties ought to have some role in controlling the costs of the arbitral secretary.<sup>15</sup> It may be the case that if the arbitral secretary is to be remunerated separately in addition to the fees of the arbitral tribunal, the parties may wish to see "time sheets" for the arbitral secretary.

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14. See for example International Chamber of Commerce Commission on Arbitration, "Techniques for Controlling Time and Cost in Arbitration" Introduction (page number not provided) (2007):

Administrative expenses of ICC:	2 %
Arbitrators' fees and expenses:	16 %
Costs borne by the parties to present their cases:	82 %

(including, as the case may be, lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration other than those set forth below)

15. In answer to question 23 of the survey, "who should bear the costs of the secretary in an arbitration", 62.1 percent of respondents agreed it should be the parties who bear the costs of the arbitral secretary, whereas 30.5 percent and 22.1 percent thought it should be the arbitral tribunal and president of the arbitral tribunal respectively. It is noted here that the ICC's revised note on arbitral secretaries explicitly states that any remuneration for the arbitral secretary must come from the fees of the arbitral tribunal:

"Any remuneration payable to the Administrative Secretary shall be paid by the Arbitral Tribunal out of the total funds available for the fees of all arbitrators, such that the fees of the Administrative Secretary will not increase the total costs of the arbitration.

In no circumstances should the Arbitral Tribunal seek from the parties any form of compensation for the Administrative Secretary's activity. Direct arrangements between the Arbitral Tribunal and the parties on the Administrative Secretary's fees are prohibited. Since the fees of the Arbitral Tribunal are established on an ad valorem basis, any compensation to be paid to the Administrative Secretary is deemed to be included in the Arbitral Tribunal's fees."

## ANNEX A: ARBITRAL SECRETARIES

This may also have the effect of ensuring that the arbitral tribunal does not allow the arbitral secretary to encroach inappropriately on the arbitrator's work. Separate remuneration of the arbitral secretary may therefore help to reduce some of the risks identified above.

In terms of defining and determining the remuneration of the arbitral secretary, and whether or not this is done by the arbitral tribunal or the parties or both together, most survey participants agreed that the arbitral secretary ought to be remunerated on an hourly rate plus expenses basis.<sup>16</sup> As to remuneration generally however, this is certainly one area within the subject of arbitral secretaries which would benefit from greater exploration and consideration. Survey responses were mixed in terms of defining the costs of an arbitral secretary and who might bear those costs. It became evident from the survey responses received that if parties are required to accept the use of an arbitral secretary, the transparency of the process of appointment of the arbitral secretary, as well as the work of the arbitral secretary may well have to increase.

In light of the results of the survey and the discussion during the ICCA Congress in Singapore, it would appear that there is an "in principle" acceptance that an arbitral secretary may be appointed to assist the arbitral tribunal and to contribute to the overall cost-effectiveness and efficiency of the arbitral process. However, given certain mixed results in the survey, particularly with regard to the tasks that an arbitral secretary may carry out, the qualifications and experience required of an arbitral secretary, and remuneration of an arbitral secretary, we conclude by considering whether users of the arbitral process would be assisted by a Statement of Best Practice on the use of arbitral secretaries.

### III. A STATEMENT OF BEST PRACTICE

It appears that a common usage on the issue of arbitral secretaries is slowly evolving in modern arbitral practice.<sup>17</sup> The final question, therefore, is whether to let the natural evolution continue, or whether modern practice would benefit from greater guidance in the form of guidelines or a Statement of Best Practice.

The arguments against the creation of such guidelines or a Statement of Best Practice are likely to have at their heart a concern that the field of international arbitration is already subject to an uncontrolled proliferation of rules and regulations (a form of

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16. In answer to question 25 of the survey "how should the remuneration of the secretary be defined", 55.1 percent of respondents agreed that it should be an hourly rate plus expenses, with the remaining options ranked as follows: hourly rate: 17.9 percent; lump sum plus expenses: 16.7 percent; and lump sum: 10.3 percent.

17. See, for example, T. SCHULTZ and R. KOVACS, "The Rise of a Third Generation of Arbitrators?" 28 *Arb Int* (2012) p. 161, at p. 170. The authors conducted an extensive survey of lawyers and arbitrators engaged in international arbitration. In response to the question whether the participants mind an arbitrator who delegates part of his work to his/her staff, 65 percent responded no.

“legislatitis” or “judicialization” of the arbitral process)<sup>18</sup> and that the creation of additional guidelines, which are not strictly essential, such as those relating to the use of arbitral secretaries, should be avoided. Further guidelines will deprive the arbitral tribunal of its flexibility and discretion, values which are at the heart of the arbitral process, thus making it less attractive to its users and potential users. They will also reduce the scope of independent thinking of the participants in the process and replace it by what the producers of the guidelines believe the participants should think or do.<sup>19</sup>

The very absence of precise rules on arbitral procedure has, so the argument goes, allowed the tribunal to tailor the procedure of each particular dispute to its specific facts and peculiarities, without needing to shoehorn it into a procedural “straight-jacket of rules.”<sup>20</sup>

Accordingly, issues relating to the use of arbitral secretaries should be left entirely to the arbitrator’s discretion in individual cases. At best, guidelines would constrain that discretion in a way that would encumber the process. At worst, they may provide participants in the process desirous to create mischief with a further opportunity to do so.

In the face of such protests, the arguments in favour would run as follows: whilst we laud the beauty of discretion and flexibility in theory, in practice participants in the arbitral process need guidance.<sup>21</sup> Such participants include arbitrators concerned to know what is, and what is not, appropriate for them to delegate; junior lawyers, who might be called upon to assist as secretaries and need some basis for judging what is and is not appropriate; and clients, who will likely pay for the services of an arbitral secretary and who are entitled to know within what limits the services they are paying for should remain.

When the question as to whether the arbitral process would benefit from greater regulation of the role and function of arbitral secretaries was put to our survey respondents, a solid majority of 57.4 percent (based on 94 responses) was in favour. When asked what form the arbitral secretary regulation should take, an overwhelming majority (51 of 65 responses) was in favour of guidelines of best practice as opposed to, for example, some form of binding appendices to arbitral institutional rules.

In our view, and in light of the strong support highlighted above, we recommend that a Statement of Best Practice be developed and have prepared an outline of possible

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18. W.W. PARK, “The Procedural Soft Law of International Arbitration: Non-Governmental Instruments” in L.A. MISTELIS and J.D. LEW, *Pervasive Problems in International Arbitration* (2006) p. 142, at p. 146. See also the speech given by Toby LANDAU at this Conference, on the topic of the relationship between international arbitration and the regulator(s): the need for ethical codes, guidelines and best practices for arbitration counsel, arbitrators, arbitral secretaries and arbitral institutions (this volume, pp. 496-528).

19. M.E. SCHNEIDER, “The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and Other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into ‘Best Practices’” in L. LEVY and Y. DERAIS, eds., *Liber Amicorum en l’honneur de Serge Lazareff* (2011) p. 564.

20. See W.W. PARK, *op. cit.*, fn. 18, p. 148.

21. See W.W. PARK, “The 2002 Freshfields Lecture – Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion” 19 *Arb Int* (2003) p. 279.

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guidelines to be included in such a Statement (together with the slides presented at the ICCA Singapore Congress, at Appendix C). The outline is divided into three sections (appointment, role and cost), as follows:

(a) Appointment:

- (i) To record the principle that arbitral secretaries should only be appointed with the consent of all of the parties to the arbitration;
- (ii) To identify in general terms the appropriate profile for an arbitral secretary;
- (iii) To propose that, upon appointment, arbitral secretaries should complete declarations of independence and impartiality; and
- (iv) To propose that, in agreeing to the appointment of an arbitral secretary, the parties should agree to accord the same immunity to the arbitral secretary that the arbitral tribunal benefits from;

(b) Role, setting out a list of what an arbitral secretary can legitimately do, including:

- (i) Reviewing the parties' submissions and evidence, and drafting memos summarizing such submissions and evidence for and under the direction of the arbitral tribunal;
- (ii) Researching questions of law for and under the direction of the arbitral tribunal;
- (iii) Researching discrete questions relating to the factual evidence and the witness testimony for and under the direction of the arbitral tribunal;
- (iv) Drafting procedural orders under the direction and supervision of the arbitral tribunal; and
- (v) Drafting appropriate parts of the award under the direction and supervision of the arbitral tribunal;

(c) Role, setting out a list of what an arbitral secretary should not do, including the following:

- (i) Advocating views to members of the tribunal on the outcome of the issues in dispute;
- (ii) Participating actively in the arbitral tribunal's deliberations; and
- (iii) Drafting substantive (rather than descriptive) sections of the procedural orders or the award(s) without express direction from the arbitral tribunal as to the outcome and the grounds for the outcome;

(d) Cost:

- (i) One of the primary justifications for the use of arbitral secretaries is that they will make the arbitral process more cost-effective for the parties. As a result, and as a general principle, the use of an arbitral secretary should reduce – rather than increase – the overall cost of the arbitration for the parties; and

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(ii) As a second general principle, the guidelines should recognize that, where an arbitration is proceeding under institutional arbitration rules, any rules (and policies of the institution) relating to the appointment of arbitral secretaries will govern remuneration.

In our view, the Statement of Best Practice should be designed to be used in conjunction with institutional, *ad hoc* or other rules applicable to any particular arbitration. It should also not be intended as anything other than non-binding guidance.

Our recommendation is that the above guidelines be used as a starting point for the creation of a Statement of Best Practice, and we now invite Young ICCA to take this project forward.

## Appendix A

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## Appendix C

Slides

# **The Use of Arbitral Secretaries Under the New UNCITRAL Arbitration Rules and Otherwise: Opportunities and Pitfalls**

**Constantine Partasides**, Freshfields Bruckhaus Deringer LLP

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# The Fourth Arbitrator?

## The new UNCITRAL Arbitration Rules 2010

- **Article 5 (“Representation and Assistance”)** talks of “each party” having the facility to be represented “or assisted” by persons it chooses
- **Article 16 (“Exclusion of Liability”)** extends to “any person appointed by the Arbitral Tribunal”
- **Article 40 (“Definition of Cost”)** includes “reasonable costs of expert advice and of other assistance required by the Arbitral Tribunal”

## UNCITRAL Notes on Organising Arbitral Proceedings

*“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.”*

Paragraph 27

## Four Questions

- Q1: **Whether** arbitral secretaries should be used?
- Q2: **What** should be the role of an arbitral secretary?
- Q3: **Who** should act as an arbitral secretary?
- Q4: **How** should arbitral secretaries be remunerated?

## Whether arbitral secretaries should be used?

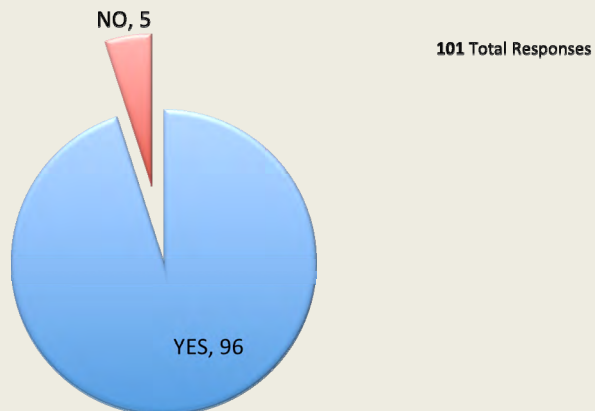
### Yes

- Arbitral secretaries *should* be used because...
  - They **increase efficiency** in terms of organisation and preparatory assistance to the arbitral tribunal
  - They **allow the arbitral tribunal to cope** with voluminous submissions
  - They **improve the quality** of the work done by the arbitral tribunal
  - They can act as **a central means of communication** between parties and the arbitral tribunal
  - It should be a concern for the arbitral community that **young arbitrators learn best practices**

## No

- Arbitral secretaries *should not* be used because...
  - Their use encourages delegation of the arbitrators' mandate
  - Their use encourages the species of “ghost-writers”
  - Their use adds to the costs of arbitration

### Survey results: Overwhelming approval of the use/appointment of arbitral secretaries?



# What should be the role of arbitral secretaries?

Should the role go beyond purely administrative tasks?

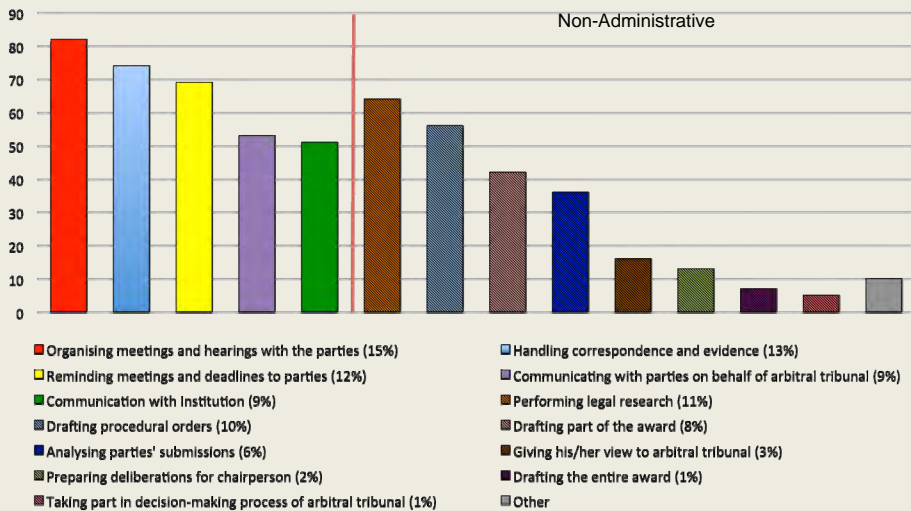
## No

- The role of arbitral secretaries *should not go* beyond purely administrative tasks because ...
  - The review of the case/submissions/evidence is mandated to the arbitrators only
  - Drafting parts of the award, incl. summarising facts and distilling parties' arguments is important for the process of reaching a final decision
  - Writing is the ultimate means of intellectual control
  - From a point of principle and tradition, arbitral secretaries were only allowed to carry out administrative tasks, hence the name "administrative secretary"

# Yes

- The role of arbitral secretaries *should* go beyond purely administrative tasks because...
  - This would optimise functionality of arbitral tribunals
  - This would help efficiency of arbitral tribunals to digest voluminous materials submitted by parties to the extent that tasks of the arbitral secretary are properly controlled by arbitral tribunals
  - Akin to judges clerks and Referendariat: proper and adequate control by the judge

**Survey Results:** What should the tasks of an arbitral secretary be?



93 Total Responses  
 578 Total Selections  
 239 Total Selections for Non-Administrative Tasks (shaded columns)

**Roughly 41% Of The Selections Are For Non-administrative Tasks**

# Who should act as an arbitral secretary?

Ideally, should it be a junior lawyer?

## Yes

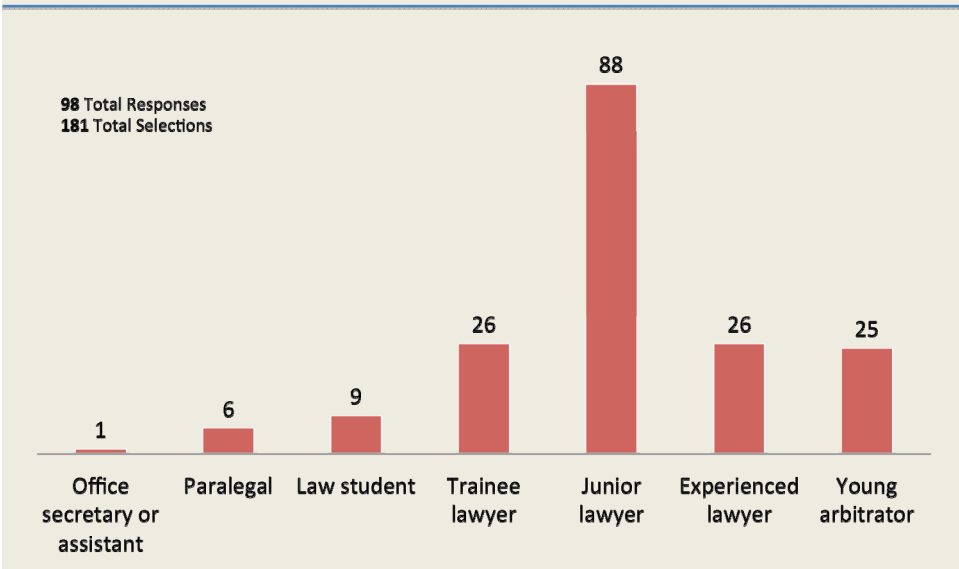
- An arbitral secretary *should* ideally be a junior lawyer because ...
  - A junior lawyer from the chair's/sole arbitrator's practice would have sufficient experience for the tasks to be carried out by an arbitral secretary
  - A senior lawyer may succumb more easily to the temptation to exceed the arbitral secretary's mandate



## No

- An arbitral secretary does not necessarily need to be a junior lawyer because ...
  - The efficient assistance to the arbitral tribunal requires an arbitral secretary with experience
  - The parties should not be burdened with “training” costs of junior lawyers who train themselves on the parties’ case

### What profile should an arbitral secretary have (besides linguistic skills)?



## How should arbitral secretaries be remunerated?

Should arbitral secretaries only be appointed to reduce the costs of the arbitration?

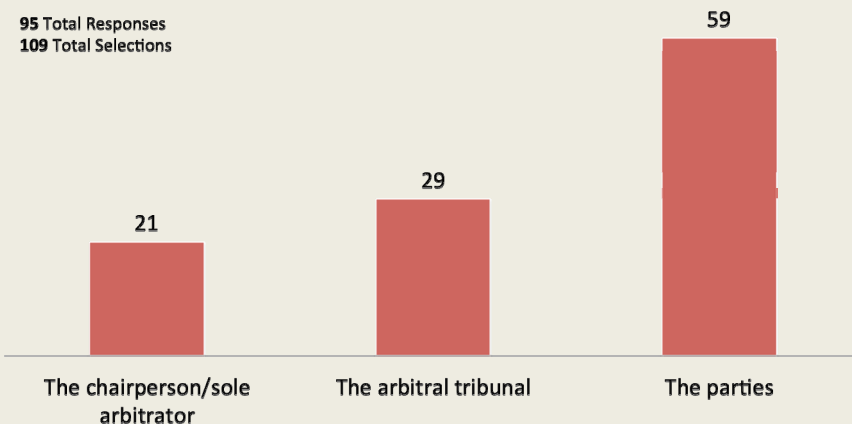
### Yes

- Arbitral secretaries *should* only be appointed to reduce the costs of the arbitration because otherwise ...
  - There would be compensation for duplicate work
  - Additional costs would be incurred for the parties
  - Parties usually do not have a choice but to accept an arbitral secretary's fees

## No

- Arbitral secretaries *should not* only be appointed to reduce the costs of the arbitration because ...
  - The use of arbitral secretaries has benefits for parties and the arbitral tribunal alike, which justify extra fees for the arbitral secretary
  - The use of arbitral secretaries will overall lower the fees of the arbitral tribunal
  - The hourly rate of an arbitral secretary is a fraction of the arbitrator's hourly rate
  - The fees for arbitral secretaries can be charged as disbursements / expenses of the arbitral tribunal

## Who should bear the costs of the arbitral secretary in an arbitration?



## Do we need a Statement of Best Practice

- **The arguments against:**

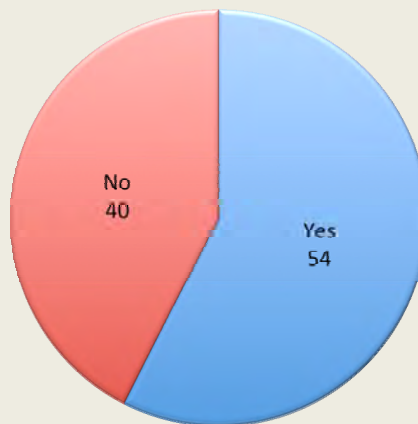
Yet another unnecessary proliferation of rules?

- **The arguments in favour:**

Guidance is needed by arbitrators, arbitral secretaries and the parties who often pay for secretaries?

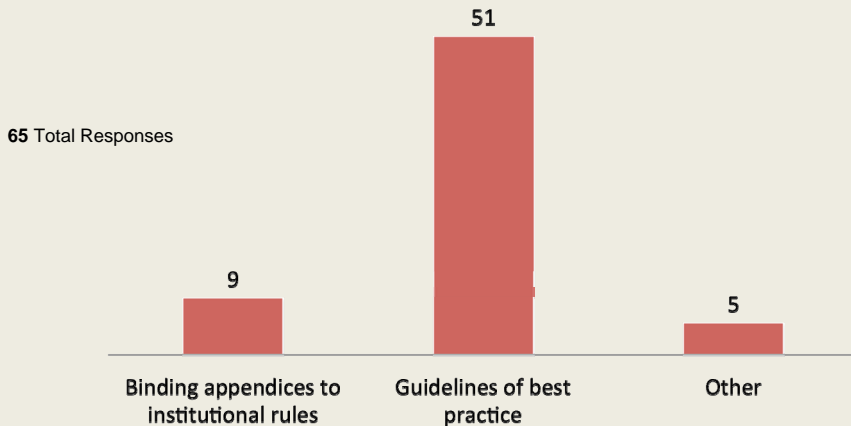
## Will the arbitral process benefit from greater regulation of the role and function of arbitral secretaries?

- **94** Total Responses
- **42.6%** do not believe the arbitral process benefits from greater regulation of the arbitral secretary.



## Survey Results: strong support for the development of guidance

What form should arbitral secretary regulation take?



## Outline Guidelines on the use of Arbitral Secretaries (Extracts)

### Appointment of a Secretary

1. [To record the principle that Arbitral Secretaries should only be appointed with the consent of all of the parties to the arbitration.]
2. [To identify in general terms the appropriate profile for an Arbitral Secretary.]
3. [To propose that, on appointment, Arbitral Secretaries should complete declarations of independence and impartiality.]
4. [To propose that, in agreeing to the appointment of an Arbitral Secretary, the parties should agree to accord the same immunity to the Arbitral Secretary that the arbitral tribunal benefits from (e.g. to the fullest extent that is allowed under the applicable law, save for intentional wrongdoing).]

## Outline Guidelines on the use of Arbitral Secretaries (Extracts)

### Use of a Secretary

1. [To set out a list of what an Arbitral Secretary can legitimately do, to include:
  - (A) reviewing the parties' submissions and evidence, and drafting memos summarising such submissions and evidence for, and under the direction of, the arbitral tribunal;
  - (B) researching questions of law for, and under the direction of, the arbitral tribunal;
  - (C) researching discrete questions relating to the factual evidence and the witness testimony for, and under the direction of, the arbitral tribunal;
  - (D) drafting procedural orders, under the direction and supervision of the arbitral tribunal;
  - (E) drafting appropriate parts of the award(s), under the direction and supervision of the arbitral tribunal.]

## Outline Guidelines on the use of Arbitral Secretaries (Extracts)

### Use of a Secretary (cont.)

2. [To consider setting out a list of what an Arbitral Secretary should not do, including the following:
  - (A) advocating views to members of the arbitral tribunal on the outcome of the issues in dispute;
  - (B) participating actively in the arbitral tribunal's deliberations;
  - (C) drafting substantive (rather than descriptive) sections of the procedural orders or the award(s) without express direction from the arbitral tribunal as to the outcome and the grounds for the outcome.]

## Outline Guidelines on the use of Arbitral Secretaries (Extracts)

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### **Costs of a Secretary**

1. [One of the primary justifications for the use of Arbitral Secretaries is that they will make the arbitral process more cost-effective for the parties. As a result, and as a general principle, the use of an Arbitral Secretary should reduce – rather than increase – the overall cost of the arbitration for the parties.]
2. [As a second general principle, the guidelines should recognise that, where an arbitration is proceeding under institutional arbitration rules, any rules (and policies of the institution) relating to the appointment of Arbitral Secretaries will govern remuneration.]

## Conclusion

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### **Our Recommendation:**

To proceed with the creation of such guidelines/Statement of Best Practice

### **Our Invitation:**

Young ICCA to take this forward









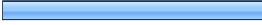


# ANNEX B

## 2012 Survey Results



1. I have been/have had experience as						
	1 - 5 years	6- 10 years	11 - 15 years	16 - 20 years	20+ years	Rating Count
An arbitrator	33.9% (21)	25.8% (16)	21.0% (13)	6.5% (4)	16.1% (10)	62
A secretary	57.1% (28)	24.5% (12)	16.3% (8)	0.0% (0)	2.0% (1)	49
An institution	27.8% (5)	33.3% (6)	11.1% (2)	5.6% (1)	22.2% (4)	18
A counselor	30.6% (22)	25.0% (18)	22.2% (16)	11.1% (8)	16.7% (12)	72
A party user	42.9% (3)	14.3% (1)	28.6% (2)	14.3% (1)	0.0% (0)	7
<b>answered question</b>						<b>103</b>
<b>skipped question</b>						<b>3</b>

2. Do you approve of the use/appointment of secretaries?			
		Response Percent	Response Count
Yes		95.0%	96
No		5.0%	5
Why? (please explain)			64
<b>answered question</b>			<b>101</b>
<b>skipped question</b>			<b>5</b>

**3. If yes to previous question, what is the principal purpose of appointing a secretary?**




		Response Percent	Response Count
To support the chairperson/arbitral tribunal		94.8%	92
To teach a secretary how to become an arbitrator		21.6%	21
To provide a junior associate with first-hand experience of arbitration		21.6%	21
To save time		57.7%	56
To reduce costs		58.8%	57
Different purpose (please specify)		4.1%	4
<b>answered question</b>			<b>97</b>
<b>skipped question</b>			<b>9</b>

**4. If no, what is the principal reason for avoiding the appointment of a secretary?**




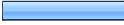
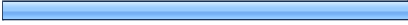


		Response Percent	Response Count
Derogation from an arbitrator's responsibilities		80.0%	12
Costs		20.0%	3
Different reason (please specify)			3
<b>answered question</b>			<b>15</b>
<b>skipped question</b>			<b>91</b>

ANNEX B: 2012 SURVEY RESULTS








**5. Where to find a potential secretary?**

		Response Percent	Response Count
Within the employees from the law firm of the chairperson/sole arbitrator		69.4%	68
On a list provided by an institution		14.3%	14
Anywhere		29.6%	29
<b>answered question</b>			<b>98</b>
<b>skipped question</b>			<b>8</b>







**6. What profile should a secretary have (besides linguistic skills)?**

		Response Percent	Response Count
Office secretary or assistant		1.0%	1
Paralegal		6.1%	6
Law student		9.2%	9
Trainee lawyer		26.5%	26
<b>Junior lawyer</b>		<b>89.8%</b>	<b>88</b>
Experienced lawyer		26.5%	26
Young arbitrator		25.5%	25
<b>answered question</b>			<b>98</b>
<b>skipped question</b>			<b>8</b>

### 7. What profile should a secretary not have?

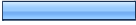

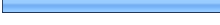
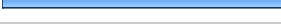
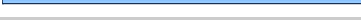


		Response Percent	Response Count
Office secretary or assistant		81.1%	73
Paralegal		48.9%	44
Law Student Trainee lawyer		43.3%	39
Junior lawyer		4.4%	4
Experienced lawyer		33.3%	30
Young arbitrator		21.1%	19
Other (please specify)		7.8%	7
		<b>answered question</b>	<b>90</b>
		<b>skipped question</b>	<b>16</b>

### 8. Do parties have to consent to the appointment of a secretary?








		Response Percent	Response Count
Yes, always		72.4%	71
No		3.1%	3
Only if they are to be contacted by this person		2.0%	2
Only if this person attends hearings or meetings		6.1%	6
Only if the chosen rules require it		13.3%	13
In other cases (please specify)		3.1%	3
		<b>answered question</b>	<b>98</b>
		<b>skipped question</b>	<b>8</b>

ANNEX B: 2012 SURVEY RESULTS

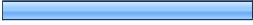

9. What information should be disclosed about the secretary?			
		Response Percent	Response Count
Name		95.9%	93
Nationality		77.3%	75
Position		91.8%	89
Professional experience		70.1%	68
Other (please specify)		24.7%	24
answered question			97
skipped question			9

10. What should be negotiated with the parties?			
		Response Percent	Response Count
The choice of the person		28.9%	28
The prerequisites for the choice		13.4%	13
Terms of appointment		48.5%	47
Tasks and duties of the secretary		61.9%	60
Remuneration and expenses		79.4%	77
Liability		12.4%	12
Other (please specify)		9.3%	9
answered question			97
skipped question			9

**11. Should the assistance of an associate/paralegal who is not formally appointed as secretary be disclosed to the parties?**



		Response Percent	Response Count
Yes, in all cases		37.2%	35
No, never		3.2%	3
If the chosen person does not work in the arbitrator's law firm		17.0%	16
If the person directly contacts the parties		14.9%	14
If the person attends the hearings		9.6%	9
If the person's work refers to organisational or administrative matters		1.1%	1
It is the arbitrator's choice		17.0%	16
<b>answered question</b>			<b>94</b>
<b>skipped question</b>			<b>12</b>



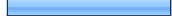

**12. Should the secretary have to file a statement of independence like the arbitrator?**

		Response Percent	Response Count
Yes		55.1%	54
No		44.9%	44
<b>answered question</b>			<b>98</b>
<b>skipped question</b>			<b>8</b>











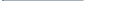



ANNEX B: 2012 SURVEY RESULTS

<b>13. Should the IBA Guidelines on Conflict of Interest also apply to secretaries?</b>			
		<b>Response Percent</b>	<b>Response Count</b>
Yes		54.2%	52
No		45.8%	44
<b>answered question</b>			<b>96</b>
<b>skipped question</b>			<b>10</b>

<b>14. Do secretaries have to disclose the same information as arbitrators?</b>			
		<b>Response Percent</b>	<b>Response Count</b>
Yes		52.6%	50
No		47.4%	45
<b>answered question</b>			<b>95</b>
<b>skipped question</b>			<b>11</b>















<b>15. If yes, who should decide the matter?</b>			
		<b>Response Percent</b>	<b>Response Count</b>
The chairperson		15.6%	10
<b>The arbitral tribunal</b>		<b>46.9%</b>	<b>30</b>
The institution		35.9%	23
State court at the seat of the arbitration		1.6%	1
<b>answered question</b>			<b>64</b>
<b>skipped question</b>			<b>42</b>

**16. What are the tasks of a secretary in practice?**



		<b>Response Percent</b>	<b>Response Count</b>
Handling correspondence and evidence		86.0%	80
<b>Organising meetings and hearings with the parties</b>		<b>90.3%</b>	<b>84</b>
Reminding meetings and deadlines to the parties		74.2%	69
Performing legal research		80.6%	75
Drafting procedural orders		77.4%	72
Analysing parties' submissions		62.4%	58
Drafting part of the award		69.9%	65
Drafting the entire award		26.9%	25
Communicating with the parties on behalf of the arbitral tribunal		69.9%	65
Communication with the institution		71.0%	66
Giving his/her view on the matter to the arbitral tribunal		25.8%	24
Participating in the deliberations for the chairperson		16.1%	15
Taking part in the decision-making process of the arbitral tribunal		17.2%	16
Other (please specify)		10.8%	10
		<b>answered question</b>	<b>93</b>
		<b>skipped question</b>	<b>13</b>





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17. What should the tasks of a secretary be?			Response Percent	Response Count
Handling correspondence and evidence		79.6%	74	
<b>Organising meetings and audiences with the parties</b>		88.2%	82	
Reminding meetings and deadlines to the parties		74.2%	69	
Performing legal research		68.8%	64	
Drafting procedural orders		60.2%	56	
Analysing parties' submissions		38.7%	36	
Drafting part of the award		45.2%	42	
Drafting the entire award		7.5%	7	
Communicating with the parties on behalf of the arbitral tribunal		57.0%	53	
Communication with the institution		54.8%	51	
Giving his/her view on the matter to the arbitral tribunal		17.2%	16	
Preparing the deliberations for the chairperson		14.0%	13	
Taking part in the decision-making process of the arbitral tribunal		5.4%	5	
Other (please specify)		10.8%	10	
			<b>answered question</b>	<b>93</b>
			<b>skipped question</b>	<b>13</b>




**18. Who controls the secretary?**

		Response Percent	Response Count
<b>The chairperson/sole arbitrator</b>		55.2%	53
The arbitral tribunal		44.8%	43
The institution		0.0%	0
Nobody		0.0%	0
<b>answered question</b>			<b>96</b>
<b>skipped question</b>			<b>10</b>

**19. Can a secretary be liable for his/her wrongdoing?**



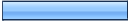
		Response Percent	Response Count
Yes		34.4%	32
<b>No</b>		65.6%	61
<b>answered question</b>			<b>93</b>
<b>skipped question</b>			<b>13</b>

**20. If no, who should assume liability?**








		Response Percent	Response Count
The arbitrator who appointed the secretary		23.1%	15
The chairperson/sole arbitrator		21.5%	14
<b>The arbitral tribunal as a whole</b>		55.4%	36
<b>answered question</b>			<b>65</b>
<b>skipped question</b>			<b>41</b>

ANNEX B: 2012 SURVEY RESULTS




**21. What happens if the secretary exceeds his/her tasks?**

		Response Percent	Response Count
The arbitrator who assigned him/her can be revoked		22.5%	18
<b>The award can be challenged</b>		50.0%	40
Other (please specify)		27.5%	22
<b>answered question</b>			<b>80</b>
<b>skipped question</b>			<b>26</b>





**22. Do you think that appointing a secretary is a way to make arbitration proceedings more cost-effective?**

		Response Percent	Response Count
Yes		70.5%	67
Only in sole arbitrator procedures		2.1%	2
Only in three arbitrators procedures		1.1%	1
Only in institutional arbitration		1.1%	1
Only in ad hoc arbitration		3.2%	3
Only in small cases		0.0%	0
Only in large cases		13.7%	13
No		8.4%	8
<b>answered question</b>			<b>95</b>
<b>skipped question</b>			<b>11</b>





**23. Who should bear the costs of the secretary in an arbitration?**

		Response Percent	Response Count
The chairperson/sole arbitrator		22.1%	21
The arbitral tribunal		30.5%	29
<b>The parties</b>		<b>62.1%</b>	<b>59</b>
<b>answered question</b>			<b>95</b>
<b>skipped question</b>			<b>11</b>



**24. Who defines the costs of the secretary?**



		Response Percent	Response Count
The arbitrator		16.1%	15
<b>The arbitral tribunal</b>		<b>54.8%</b>	<b>51</b>
The parties		41.9%	39
The institution, if any		23.7%	22
<b>answered question</b>			<b>93</b>
<b>skipped question</b>			<b>13</b>

**25. How should the remuneration of the secretary be defined?**

		Response Percent	Response Count
Hourly rate		17.9%	14
Lump sum		10.3%	8
<b>Hourly rate plus expenses</b>		<b>55.1%</b>	<b>43</b>
Lump sum plus expenses		16.7%	13
Other (please specify)			14
<b>answered question</b>			<b>78</b>
<b>skipped question</b>			<b>28</b>






ANNEX B: 2012 SURVEY RESULTS

26. Is there a need to change today's practice with regard to secretaries?			
		Response Percent	Response Count
Yes		58.9%	53
No		41.1%	37
If yes, please explain			47
answered question			90
skipped question			16

27. Will the arbitral process benefit from greater regulation of the role and function of secretaries?			
		Response Percent	Response Count
Yes		57.4%	54
No		42.6%	40
answered question			94
skipped question			12

28. If yes, what form should that regulation take?			
		Response Percent	Response Count
Binding appendices to institutional rules		13.8%	9
Guidelines of best practice		78.5%	51
Other (please specify)		7.7%	5
answered question			65
skipped question			41

**29. If yes, what should these rules especially include?**

		Response Percent	Response Count
Duties and tasks of the secretary		64.5%	40
Minimum qualifications		3.2%	2
Interdictions		0.0%	0
Independence		6.5%	4
Costs		6.5%	4
Other (please specify)		19.4%	12
<b>answered question</b>			<b>62</b>
<b>skipped question</b>			<b>44</b>

**30. Additional remarks:**

	Response Count
	13
<b>answered question</b>	<b>13</b>
<b>skipped question</b>	<b>93</b>



# ANNEX C

## 2013 Survey Results





1. I am a(n):			
		Response Percent	Response Count
Arbitrator		80.8%	80
Counsel		69.7%	69
Institution		3.0%	3
Party (User of International Arbitration)		2.0%	2
Please Provide Any Additional Comments			4
<b>answered question</b>			<b>99</b>
<b>skipped question</b>			<b>1</b>

2. Should an arbitral secretary be admitted to practice law in at least one jurisdiction?			
		Response Percent	Response Count
Yes		75.8%	69
No		24.2%	22
Please Comment			19
<b>answered question</b>			<b>91</b>
<b>skipped question</b>			<b>9</b>



**3. Should an arbitral secretary have a minimum level of Post-Qualification Experience (“PQE”) ?**

		Response Percent	Response Count
Yes		42.9%	39
No		57.1%	52
	Please Comment		18
<b>answered question</b>			<b>91</b>
<b>skipped question</b>			<b>9</b>

**4. If yes to Question 3, how many years?**





		Response Percent	Response Count
1		26.2%	11
2		38.1%	16
3		21.4%	9
Other (please specify)		14.3%	6
<b>answered question</b>			<b>42</b>
<b>skipped question</b>			<b>58</b>


**5. Should an arbitral secretary have a maximum level of PQE?**

		Response Percent	Response Count
Yes		6.6%	6
No		93.4%	85
	Please Comment		15
<b>answered question</b>			<b>91</b>
<b>skipped question</b>			<b>9</b>






ANNEX C: 2013 SURVEY RESULTS



6. If yes to Question 5, how many years?			
		Response Percent	Response Count
4		14.3%	1
5		28.6%	2
6		0.0%	0
7		28.6%	2
Other (please specify)		28.6%	2
answered question			7
skipped question			93

7. Who should suggest the appointment of an Arbitral Secretary?			
		Response Percent	Response Count
Arbitral Tribunal		94.5%	86
Arbitral Institution		13.2%	12
Parties		15.4%	14
Please Comment			13
answered question			91
skipped question			9

**8. Who should appoint the Arbitral Secretary?**



		Response Percent	Response Count
Arbitral Tribunal		81.3%	74
Arbitral Institution		15.4%	14
Parties		3.3%	3
	Please Comment		17
<b>answered question</b>			<b>91</b>
<b>skipped question</b>			<b>9</b>

**9. If the Parties are not responsible for suggesting or appointing the Arbitral Secretary, should the Parties be given an opportunity to object to any particular Arbitral Secretary nominated or appointed?**



		Response Percent	Response Count
Yes		91.2%	83
No		8.8%	8
	Please Comment		12
<b>answered question</b>			<b>91</b>
<b>skipped question</b>			<b>9</b>

ANNEX C: 2013 SURVEY RESULTS



**10. Should the Parties be required to consent to the appointment of an Arbitral Secretary in general?**

		Response Percent	Response Count
Yes		76.9%	70
No		23.1%	21
	Please Comment		11
	answered question		91
	skipped question		9



**11. Should the Parties be required to consent to the appointment of a particular Arbitral Secretary?**

		Response Percent	Response Count
Yes		75.8%	69
No		24.2%	22
	Please Comment		14
	answered question		91
	skipped question		9



**12. If the Parties do not consent to the appointment of an Arbitral Secretary on confidentiality grounds, should an Arbitral Secretary still be appointed if the Arbitral Tribunal so desires?**

		Response Percent	Response Count
Yes		26.4%	24
No		73.6%	67
	Please Comment		20
	answered question		91
	skipped question		9



**13. If the Parties do not consent to the appointment of an Arbitral Secretary on conflict of interest grounds, should an Arbitral Secretary still be appointed if the Arbitral Tribunal so desires?**

		Response Percent	Response Count
Yes		18.7%	17
No		81.3%	74
	Please Comment		12
	answered question		91
	skipped question		9



**14. Should the Arbitral Secretary be required to submit a curriculum vitae?**

		Response Percent	Response Count
Yes		73.6%	67
No		26.4%	24
	Please Comment		9
	answered question		91
	skipped question		9



**15. Should the Arbitral Secretary be required to submit a statement of independence and impartiality?**

		Response Percent	Response Count
Yes		83.5%	76
No		16.5%	15
	Please Comment		7
<b>answered question</b>			<b>91</b>
<b>skipped question</b>			<b>9</b>

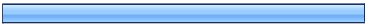

**16. Should an Arbitral Tribunal be able to use an Arbitral Secretary, but not formally appoint him or her, and not tell the parties of the involvement of the Arbitral Secretary?**

		Response Percent	Response Count
Yes		25.3%	23
No		74.7%	68
	Please Comment		22
<b>answered question</b>			<b>91</b>
<b>skipped question</b>			<b>9</b>



**17. Should the Arbitral Secretary organise meetings and hearings?**

		Response Percent	Response Count
Yes		95.6%	87
No		4.4%	4
	Please Comment		9
<b>answered question</b>			<b>91</b>
<b>skipped question</b>			<b>9</b>



**18. Should the Arbitral Secretary handle and organise correspondence and evidence?**

		Response Percent	Response Count
Yes		80.2%	73
No		19.8%	18
	Please Comment		14
	answered question		91
	skipped question		9

**19. Should the Arbitral Secretary perform legal research?**



		Response Percent	Response Count
Yes		85.7%	78
No		14.3%	13
	Please Comment		19
	answered question		91
	skipped question		9

**20. Should the Arbitral Secretary review and summarise the parties' submissions for the Arbitral Tribunal?**



		Response Percent	Response Count
Yes		49.5%	45
No		50.5%	46
	Please Comment		23
	answered question		91
	skipped question		9

ANNEX C: 2013 SURVEY RESULTS



**21. Should the Arbitral Secretary identify key documents / pieces of evidence?**

		Response Percent	Response Count
Yes		47.3%	43
No		52.7%	48
Please Comment			16
answered question			91
skipped question			9



**22. Should the Arbitral Secretary draft Procedural Orders or similar documents?**

		Response Percent	Response Count
Yes		71.4%	65
No		28.6%	26
Please Comment			23
answered question			91
skipped question			9

**23. Should the Arbitral Secretary be responsible for liaising with the Arbitral Institution?**

		Response Percent	Response Count
Yes		73.6%	67
No		26.4%	24
Please Comment			15
answered question			91
skipped question			9



**24. Should the Arbitral Secretary be responsible for liaising with the parties?**

		Response Percent	Response Count
Yes		58.2%	53
No		41.8%	38

Please Comment 26

answered question	91
skipped question	9



**25. Should the Arbitral Secretary attend the Arbitral Tribunal's deliberations?**

		Response Percent	Response Count
Yes		72.5%	66
No		27.5%	25

Please Comment 18

answered question	91
skipped question	9

**26. Should the Arbitral Secretary participate in the Arbitral Tribunal's deliberations?**

		Response Percent	Response Count
Yes		16.5%	15
No		83.5%	76



Please Comment 19

answered question	91
skipped question	9





ANNEX C: 2013 SURVEY RESULTS



**27. Should the Arbitral Secretary prepare the first draft of an Arbitral Award?**

		Response Percent	Response Count
Yes		33.0%	30
No		67.0%	61
	Please Comment		18
answered question			91
skipped question			9



**28. If 'No' to Question No. 27, should the Arbitral Secretary draft any parts of an Arbitral Award?**

		Response Percent	Response Count
Yes		63.5%	40
No		36.5%	23
	Please Comment		29
answered question			63
skipped question			37



**29. If 'Yes' to Question No. 27, should the Arbitral Secretary draft the 'Procedural Background' part of an Arbitral Award?**

		Response Percent	Response Count
Yes		84.9%	62
No		15.1%	11
	Please Comment		11
answered question			73
skipped question			27



**30. If 'Yes' to Question No. 27 above, should the Arbitral Secretary draft the 'Factual Background' part of an Arbitral Award?**

		Response Percent	Response Count
Yes		69.4%	50
No		30.6%	22
Please Comment			15
answered question			72
skipped question			28

**31. If 'Yes' to Question No. 27 above, should the Arbitral Secretary draft the 'Parties' Positions' part of an Arbitral Award?**



		Response Percent	Response Count
Yes		65.3%	47
No		34.7%	25
Please Comment			10
answered question			72
skipped question			28

**32. If 'Yes' to Question No. 27 above, should the Arbitral Secretary draft the 'Legal Reasoning' part of an Arbitral Award?**



		Response Percent	Response Count
Yes		31.9%	22
No		68.1%	47
Please Comment			14
answered question			69
skipped question			31

ANNEX C: 2013 SURVEY RESULTS



**33. In general, who should bear the costs of an Arbitral Secretary?**

		Response Percent	Response Count
Parties		39.5%	34
Arbitral Tribunal		60.5%	52
Please Comment			22
answered question			86
skipped question			14



**34. Who should bear the costs of an Arbitral Secretary if the Arbitral Tribunal is remunerated on an hourly basis?**

		Response Percent	Response Count
Parties		54.7%	47
Arbitral Tribunal		45.3%	39
Please Comment			13
answered question			86
skipped question			14


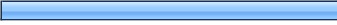
**35. Who should bear the costs of an Arbitral Secretary if the Arbitral Tribunal is remunerated on a lump sum basis?**

		Response Percent	Response Count
Parties		34.9%	30
Arbitral Tribunal		65.1%	56
Please Comment			10
answered question			86
skipped question			14



**36. If the Arbitral Tribunal bears the costs of an Arbitral Secretary, should the costs come out of the Arbitrators' fees?**

		Response Percent	Response Count
Yes		86.0%	74
No		14.0%	12
	Please Comment		11
		<b>answered question</b>	<b>86</b>
		<b>skipped question</b>	<b>14</b>

**37. If the costs of the Arbitral Secretary should come out of the Arbitrators' fees, should it only be the Chair's fees?**





		Response Percent	Response Count
Yes		25.6%	22
No		74.4%	64
	Please Comment		13
		<b>answered question</b>	<b>86</b>
		<b>skipped question</b>	<b>14</b>

**38. Should the Arbitral Secretary be paid a lump sum or an hourly rate?**










		Response Percent	Response Count
Hourly Rate		64.0%	55
Lump Sum		36.0%	31
	Please Comment		19
		<b>answered question</b>	<b>86</b>
		<b>skipped question</b>	<b>14</b>

ANNEX C: 2013 SURVEY RESULTS



**39. If an hourly rate, who should set the Arbitral Secretary's hourly rate?**

		Response Percent	Response Count
Arbitral Tribunal		59.2%	42
Arbitral Secretary		2.8%	2
Arbitral Institution		18.3%	13
Parties		19.7%	14
	Please Comment		24
<b>answered question</b>			<b>71</b>
<b>skipped question</b>			<b>29</b>

**40. If an hourly rate is selected, what is an appropriate hourly rate (in US Dollars)?**

		Response Percent	Response Count
Less than \$100		11.6%	10
\$100-125		8.1%	7
\$126-150		14.0%	12
\$151-175		7.0%	6
\$176-200		14.0%	12
<b>\$201-225</b>		<b>15.1%</b>	<b>13</b>
\$226-250		11.6%	10
\$251-275		0.0%	0
\$276-300		8.1%	7
More than \$300		10.5%	9
	Other (please specify)		25
<b>answered question</b>			<b>86</b>
<b>skipped question</b>			<b>14</b>



**41. If an hourly rate, should there be a limit on the maximum number of hours for which an Arbitral Secretary is paid?**

		Response Percent	Response Count
Yes		52.3%	45
No		47.7%	41

Please Comment 9

answered question	86
skipped question	14

**42. If a lump sum, should it be tied to the amount in dispute?**




		Response Percent	Response Count
Yes		53.5%	46
No		46.5%	40

Please Comment 9



answered question	86
skipped question	14

ANNEX C: 2013 SURVEY RESULTS

**43. If a lump sum, who should determine the amount of the Arbitral Secretary's lump sum?**

		Response Percent	Response Count	
Parties		17.4%	15	
<b>Arbitral Tribunal</b>		<b>57.0%</b>	<b>49</b>	
Arbitral Institution		25.6%	22	
Arbitral Secretary		0.0%	0	
	Please Comment		20	
			<b>answered question</b>	<b>86</b>
			<b>skipped question</b>	<b>14</b>

**44. If the Parties do not consent to the appointment of an Arbitral Secretary on costs grounds, should an Arbitral Secretary still be appointed if the Arbitral Tribunal is willing to pay for the Arbitral Secretary themselves?**

		Response Percent	Response Count	
Yes		<b>76.7%</b>	<b>66</b>	
No		23.3%	20	
	Please Comment		13	
			<b>answered question</b>	<b>86</b>
			<b>skipped question</b>	<b>14</b>





## ANNEX D

### Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries (Without Commentary)

#### **Article 1. General Principles on the Appointment and Use of Arbitral Secretaries**

- (1) An arbitral secretary should be appointed to support an arbitral tribunal where it considers that such appointment will assist it in resolving the dispute effectively and efficiently.
- (2) An arbitral secretary should only be appointed with the knowledge and consent of the parties.
- (3) An arbitral tribunal should notify the parties of its intention to appoint an arbitral secretary at its earliest convenience.
- (4) It shall be the responsibility of each arbitrator not to delegate any part of his or her personal mandate to any other person, including an arbitral secretary.
- (5) It shall be the responsibility of the arbitral tribunal to appropriately select and supervise the arbitral secretary.
- (6) Where an arbitration is proceeding under institutional arbitration rules, any rules and policies of the institution relating to arbitral secretaries shall apply.

#### **Article 2. Appointment of Arbitral Secretaries**

- (1) The arbitral tribunal may suggest to the parties that an arbitral secretary be appointed. The selection of an appropriate candidate shall be made at the discretion of the tribunal taking into account all of the circumstances of the case.
- (2) The arbitral tribunal shall propose a candidate for appointment as arbitral secretary and shall provide the parties with the candidate's *curriculum vitae* including all relevant educational and employment history, and experience serving as arbitral secretary. The arbitral tribunal shall also disclose the nationality of any candidate for appointment.
- (3) The arbitral tribunal shall confirm to the parties that the proposed candidate for arbitral secretary is independent, impartial and free of any conflicts of interest. The arbitral tribunal shall notify the parties if the arbitral secretary's independence and impartiality change, or a conflict of interest arises during the course of the arbitration.
- (4) The parties shall be given an opportunity to object to the appointment of the arbitral secretary. Any such objection shall be accompanied by reasons justifying said objection.
- (5) The arbitral tribunal shall rule on the objection unless the administering institution has developed its own procedures in this regard.
- (6) Assuming no objection is made, or the arbitral tribunal rules against the objection, the final appointment of the arbitral secretary may be made by the arbitral tribunal.

- (7) The parties shall accord the same immunity to the arbitral secretary as that accorded to the arbitral tribunal.
- (8) The arbitral secretary shall be bound by the same duties of confidentiality and privacy as the arbitral tribunal.

**Article 3. Role of the Arbitral Secretary**

- (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:
  - (a) Undertaking administrative matters as necessary in the absence of an institution;
  - (b) Communicating with the arbitral institution and parties;
  - (c) Organizing meetings and hearings with the parties;
  - (d) Handling and organizing correspondence, submissions and evidence on behalf of the arbitral tribunal;
  - (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 4. Costs**

- (1) As a general principle, the use of an arbitral secretary should reduce rather than increase the overall costs of the arbitration.
- (2) The remuneration of the arbitral secretary should be reasonable and proportionate to the circumstances of the case and should be transparent from the commencement of the arbitration.
- (3) Unless otherwise determined by the arbitration institution or agreed upon by the parties, the remuneration and reasonable expenses of the arbitral secretary should be paid: (i) out of the arbitral tribunal's fees where the arbitral tribunal is paid on the basis of the amount in dispute; or (ii) by the parties where the arbitral tribunal is paid on an hourly basis.



