Volume 33, No. 4, 2015

ASA Bulletin

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Association Suisse de l'Arbitrage
Schweiz. Vereinigung für Schiedsgerichtsbarkeit
Associazione Svizzera per l'Arbitrato
Swiss Arbitration Association

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Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by Turpin Distribution
Pegasus Drive
Stratton Business Park, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISSN 1010-9153
© 2015, Association Suisse de l'Arbitrage
(in co-operation with Kluwer Law International, The Netherlands)

This journal should be cited as ASA Bull. 4/2015

The ASA Bulletin is published four times per year.
Subscription prices for 2016 [Volume 34, Numbers 1 through 4] including postage and handling: Print subscription prices: EUR 320/USD 425/GBP 235
Online subscription prices: EUR 296/USD 396/GBP 217

This journal is also available online at www.kluwerlawonline.com.
Sample copies and other information are available at www.wklawbusiness.com.

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The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultants under the Swiss *lex arbitri*:

Case Note on DFC 4A_709/2014 dated 21 May 2015*

MICHAEL FEIT[1], CHLOÉ TERRAPON CHASSOT[2]

1. Introduction

Debates on the use of arbitral secretaries are not a new phenomenon.[3] But it seems fair to say that with the recent issuance of notes on the use of arbitral secretaries by several arbitral institutions, discussions have intensified in the last couple of years.

While nowadays international arbitration practitioners, users and providers appear to overwhelmingly approve the use of arbitral secretaries,[4] they disagree to some extent about the tasks that may be properly assigned to the arbitral secretary. There is a general consensus that arbitral secretaries may handle administrative tasks,[5] but there are different views as to whether an arbitral secretary may perform substantive legal work, such as performing legal research, drafting procedural orders, analysing the parties' submissions, and drafting parts of or even the entire first draft of the award.[6] Some voice

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* ASA Bull. 4/2015, p. 879.

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3 Cf. Pierre LALIVE, Inquiétantes dérives de l'arbitrage CCI, ASA Bulletin 1995, p. 634-40; Pierre LALIVE, Secrétaire de tribunaux arbitraux: le bons sens l'emporte, ASA Bulletin, 1989, p. 1-4.

4 Cf. Young ICCA Guide on Arbitral Secretaries, The ICCA Reports No. 1, 2014, Annex B – 2012 Survey Results, according to which 95% of the respondents answered the question "Do you approve of the use/appointment of secretaries?" with yes.

5 Cf. Michael POLKINGHORNE/Charles B. ROSENBERG, The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard, Dispute Resolution International, Vol. 8 No. 2, October 2014, p. 109; Katia CONTOS, London: Secretary perspectives, Global Arbitration Review, 12 October 2015; Kyriaki KARADELIS, The role of the tribunal secretary, Global Arbitration Review, 21 December 2011.

6 Cf. Young ICCA Guide on Arbitral Secretaries, The ICCA Reports No. 1, 2014, Annex B – 2012 Survey Results, p. 63.

concerns that arbitral secretaries who perform substantive legal work may eventually act as the "fourth arbitrator", a term often used when describing the improper influence an arbitral secretary may have on the decision making process.[7] Others however observe some degree of hypocrisy in this debate and refer to the benefits of having an arbitral secretary whose tasks go beyond the purely administrative ones.[8]

The discussion has been fuelled by the Russian Federation's filing in January 2015 of three writs that seek to have the awards annulled in the arbitrations commenced by former shareholders of Yukos Oil Company. The Russian Federation argued, amongst others, that "*the assistant to the arbitrators, who the tribunal had previously stated would be responsible only for administrative tasks, in fact billed the parties for more hours than did any of the arbitrators*", and that "*the tribunal must therefore have impermissibly delegated to the assistant certain of the arbitrators' personal responsibilities, including analyzing the evidence and applicable law, participating in deliberations, and preparing the arbitral awards*".[9]

It is against this international background that the Swiss Federal Supreme Court rendered in May 2015 a decision dealing with the proper use of the arbitral secretary and the arbitrator consultant. It does therefore not come as a surprise that the decision quickly gained the attention of the international arbitration community.[10]

2. Summary of the Decision

The summary focuses on the sections that concern the use of arbitral secretaries and arbitrator consultants. This article does not address other

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7 Cf. Michael POLKINGHORNE/Charles B. ROSENBERG, The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard, Dispute Resolution International, Vol. 8 No. 2, October 2014, p. 107; Kyriaki KARADELIS, The role of the tribunal secretary, Global Arbitration Review, 21 December 2011; Constantine PARTASIDES, The Fourth Arbitrator?, The Role of Secretaries to Tribunals in International Arbitration, Arbitration International, 18(2), 2002, p. 147.

8 Cf. Constantin PARTASIDES/Niuscha BASSIRI/Ulrike GANTENBERG/Leighla BRUTON/ Andrew RICCIO, Arbitral Secretaries, International Arbitration: The Coming of a New Age?, ICCA Congress Series, 2013, p. 327.

9 Press release by the Ministry of Finance of the Russian Federation dated 6 February 2015, http://old.minfin.ru/en/news/index.php?id_4=24358. For the discussion triggered by the argument raised by the Russian Federation cf., e.g., Katia CONTOS, London: Secretary perspectives, Global Arbitration Review, 12 October 2015.

10 Cf. Kyriaki KARADELIS, Swiss court okays tribunal assistants, Global Arbitration Review, 4 August 2015.

issues dealt with by the Swiss Federal Supreme Court, such as the allegation that the sole arbitrator had violated the principle of *ne eat iudex ultra petita partium* and the right to be heard.

2.1 Facts

In November 2012 a company from Luxembourg as the principal and a Swiss company as the general contractor entered into a general contractor agreement for the renovation of a property in Switzerland (the "**Contract**"). The Contract contained an arbitration clause. The clause provided for *ad hoc* arbitration and designated a person referred to in the decision as D. as the sole arbitrator, who was to decide any dispute between the parties *ex aequo et bono*. In the decision, the arbitration clause is quoted as follows:[11]

> *"Tous les différends qui pourraient survenir au sujet du présent contrat, y compris concernant l'interprétation ou l'application du présent contrat, seront exclusivement réglés par un arbitre unique. Les parties désignent D.___ en tant qu'unique arbitre, qui décidera selon le principe ex aequo et bono, et déclarent qu'ils (sic) reconnaîtront son jugement comme final et obligatoire, sans possibilité de recours à un autre arbitre ou à un tribunal."*

D. was the chairman of the board of directors of a company with whom the principal had concluded a contract on architectural services concerning the same project a year before it entered into the agreement with the general contractor.

A dispute arose and the principal initiated arbitration proceedings by submitting a request for arbitration to the sole arbitrator on 9 April 2014.

The general contractor challenged the sole arbitrator around mid-May 2014 before the competent court in Geneva acting as the *juge d'appui* and submitted a request to the sole arbitrator to resign. Both the sole arbitrator and the court dismissed the request and the challenge respectively. The court did so on the basis that the general contractor knew which role the prospective sole arbitrator would play in the execution of the project and was aware of his ties to the parties and that he was an architect with no legal knowledge. The court also considered that the challenge was belated.

Around mid-May 2014, the general contractor also asked the sole arbitrator to disclose whether he was assisted in his work by lawyers. The sole arbitrator confirmed on 21 May 2014 that he was assisted by an

[11] DFC 4A_709/2014, facts A.a.

independent and experienced legal counsel whose remuneration he would personally and entirely assume.

The hearing took place on 31 October 2014. The arbitrator was assisted by two lawyers, namely F. and E., whom the Swiss Federal Supreme Court described as a secretary and counsel respectively.

The award was rendered on 14 November 2014. The arbitrator ordered the general contractor to pay the principal an amount of CHF 2,459,324.08 plus interests, as well as CHF 70,000.00 for legal costs and CHF 70,000.00 for arbitration costs.

In the award, the sole arbitrator addressed the fact that he had retained assistance by F. and E. and emphasised that he had decided the case by himself without being influenced by either of the two lawyers. More precisely, he wrote:[12]

> *"Compte tenu de l'attitude ouvertement hostile à son égard adoptée par A.___ SA, le Tribunal arbitral a choisi de se faire assister par MMes E.___ et F.___ de l'Etude G.___ à Genève, à ses frais et aux seules fins de tenir le procès-verbal d'audience, de conseiller le Tribunal arbitral lors de l'audience au sujet des innombrables objections soulevées notamment par A.___ SA et d'assister le Tribunal arbitral dans la rédaction de la sentence. Ces deux hommes de loi ont tenu le procès-verbal et ont conseillé le Tribunal arbitral afin que les règles élémentaires de procédure arbitrale, avec lesquelles le non-juriste arbitre unique n'était pas nécessairement entièrement familier, soient respectées. Ce faisant, MMes E.___ et F.___ n'ont agi qu'à la demande du Tribunal arbitral, dans le cadre de l'art. 365 CPC, sans participer à la prise de décision ou à l'issue de la sentence que le Tribunal arbitral assume seul, sans influence ni conseil."*

The general contractor subsequently filed a motion to set aside the award before the Swiss Federal Supreme Court alleging the irregular composition of the arbitral tribunal (Article 190(2)(a) of the Swiss Private International Law Statute ("**PILS**")), the violation of the principle *ne eat iudex ultra petita partium* (Article 190(2)(c) PILS), the violation of the right to be heard (Article 190(2)(d) PILS) and the violation of public policy (190(2)(e) PILS).

[12] DFC 4A_709/2014, consid. 3.3.

2.2 Legal Reasoning

The general contractor argued that the award was made in violation of Article 190(2)(a) PILS because it was allegedly rendered by two arbitrators, namely the architect D. and the lawyer E. On top of it, they were assisted by the secretary F., even though the arbitration clause provided for one arbitrator only and did not foresee the possibility to appoint an arbitral secretary.

The Swiss Federal Supreme Court first explained that Article 190(2)(a) PILS covers two complaints, namely (i) the violation of the contractual or statutory provisions concerning the appointment of the arbitrator, and (ii) the violation of the provisions concerning the arbitrator's impartiality and independence. As the Swiss Federal Supreme Court stated, the irregular composition of the arbitral tribunal encompasses the scenario under which the arbitral tribunal was constituted in violation of the agreement by the parties, such as the failure to comply with the agreement on the number of arbitrators.[13] The Swiss Federal Supreme Court however reminded the parties that they cannot invoke Article 190(2)(a) PILS for the purpose of having the decision of the *juge d'appui* on the challenge against the sole arbitrator indirectly reviewed.[14]

The Swiss Federal Supreme Court then turned to the principles applicable to the arbitrator's task. The contract between the parties and the arbitrator is concluded *intuitu personae*, which means that the arbitrator has to perform his duties personally, and must thus not delegate his task to a third party, not even to a colleague working in the same law firm. At the decision-making stage, the arbitrator has to know the file, deliberate the case and participate in the formation of the arbitral tribunal's will. To that end, the president needs to be in control of the case and the co-arbitrators need to contribute to the decision-making process. Any award rendered in violation of this unwritten rule can be set aside on the basis of Article 190(2)(a) PILS.

The Swiss Federal Supreme Court noted however that the prohibition to delegate the arbitrator's task does not necessarily exclude the possibility to retain assistance, such as by the arbitral secretary or the consultant.

Concerning the appointment of the arbitral secretary, the Swiss Federal Supreme Court stated that it is generally accepted that also in an international arbitration the arbitral tribunal can appoint an arbitral secretary, even though Chapter 12 of the PILS (which governs international arbitration), unlike the more recently enacted Article 365 (1) of the Swiss Civil Procedure Code

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[13] The Swiss Federal Supreme Court referred to its decision DFC 139 III 511, consid. 4.

[14] The Swiss Federal Supreme Court referred to its decision DFC 138 III 270, consid. 2.

("**CPC**") (which governs domestic arbitration), does not expressly mention this possibility. The Swiss Federal Supreme Court noted that while the draft of the Swiss Federal Council provided for the consent of the parties for the appointment, that requirement was dropped following the proposal of the Council of States in favour of the organisational autonomy of the arbitral tribunal and in order to avoid delays. The parties can however exclude the possibility of the appointment of an arbitral secretary either in the arbitration agreement or in a later agreement.

As regards the arbitral secretary's duties, the Swiss Federal Supreme Court explained that they are similar to the court clerk's duties in state court proceedings, such as organising the exchange of submissions, preparing the hearings, taking minutes of the hearings, preparing accounts of the costs and related work. It is not excluded that the arbitral secretary provides a certain assistance in the drafting of the award under the control of and in accordance with the directions of the arbitral tribunal (or, if the decision is not unanimous, with the majority of the arbitral tribunal), which requires that the arbitral secretary assists at the hearings and the deliberations of the arbitral tribunal. Without a corresponding agreement by the parties, the arbitral secretary must however refrain from exercising any judicial function, which remains to be the privilege of the arbitrators.

The Swiss Federal Supreme Court noted that the arbitral tribunal can also retain assistance from other sources, as long as it adheres to the principles formulated above for the use of the arbitral secretary. The Swiss Federal Supreme Court then specifically dealt with the consultant. It explained that in technically or commercially complex arbitrations, arbitral tribunals often rely on external consultants, who assist the arbitral tribunal in dealing with non-legal issues that require specific expertise. The Swiss Federal Supreme Court noted that retaining such a consultant has obvious advantages but also bears some risks. It further stated that it is acknowledged that if the parties have not agreed on the procedural rules, the arbitral tribunal has the right based on Article 182(2) PILS to appoint a consultant on its own motion, without having to obtain the parties' prior approval.

The Swiss Federal Supreme Court then applied these general principles to the case at hand:

(a) The Swiss Federal Supreme Court rejected the allegation that the arbitral tribunal was composed of two arbitrators and concluded that D. acted as the sole arbitrator who benefitted from advice provided by the lawyer E. on procedural issues and from the service provided by F. as an arbitral secretary. That procedural

organisation did not violate the arbitration clause contained in the Contract.

(b) The Swiss Federal Supreme Court raised the question as to whether the general contractor's conduct was consistent with the principle of good faith because it waited until the hearing on 31 October 2014 to object to the external assistance retained by the arbitral tribunal even though the arbitral tribunal had already informed the parties about that fact on 21 May 2014 and thus about five months earlier.

(c) Concerning the arbitral secretary, the Swiss Federal Supreme Court briefly stated that this function did not call for any particular comments.

(d) The Swiss Federal Supreme Court noted that the role of E. was more unusual. It wrote that the role of E. could be compared to that of a consultant with the peculiarity that in the present case, the consultant was not retained because of his technical expertise (which was not necessary because the sole arbitrator himself was an architect) but because of the knowledge he possessed in the field of arbitral proceedings. Since the parties had not themselves agreed on the procedural rules, the arbitral tribunal was entitled to appoint at his own discretion the persons who would assist him in the arbitration proceedings. The Federal Supreme Court noted in this context that the arbitral tribunal bore the costs for the support it retained.

(e) The Swiss Federal Supreme Court continued that the general contractor did not invoke any grounds for the challenge of the arbitral secretary or the consultant and had not made any such attempts in the past.

(f) Finally, the Swiss Federal Supreme Court concluded its analysis by stating that nothing in the files indicated that either of the two auxiliaries retained by the arbitral tribunal had overstepped their powers and had acted as a *de facto* arbitrator.

The Swiss Federal Supreme Court thus denied that the arbitral tribunal was irregularly composed. It also dismissed all other claims raised by the general contractor.

3. Comment

3.1 Institutional Notes on the Proper Use of the Arbitral Secretary

Apparently following some instances of "*abuse*" and to shed some light on this "*enormously grey area*",[15] some arbitration institutions have issued in recent years (or amended already existing) notes or similar guidelines on the proper use of arbitral secretaries. To name some, the Secretariat of the ICC International Court of Arbitration issued in 2012 a revised "*Note on the Appointment, Duties, and Remuneration of Administrative Secretaries*" (the "**ICC Note**"), JAMS published "*Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations*" (the "**JAMS Guidelines**"), the Arbitration Institute of the Finland Chamber of Commerce published in 2013 a quite detailed "*Note on the Use of a Secretary*" (the "**FAI Note**"), the Hong Kong International Arbitration Centre issued in 2014 encompassing "*Guidelines on the Use of a Secretary to the Arbitral Tribunal*" that can be adopted by the parties (the "**HKIAC Guidelines**"), in February 2015 the Singapore International Arbitration Centre issued a "*Practice Note for Administered Cases – On the Appointment of Administrative Secretaries*" (the "**SIAC Practice Note**"), and in June 2015 the London Court of International Arbitration issued the LCIA Notes for Arbitrators, which also deal with the use of arbitral secretaries (the "**LCIA Notes for Arbitrators**").[16]

Broadly speaking, these notes typically deal with (i) the appointment of the arbitral secretary, (ii) the tasks that may be assigned to the arbitral secretary, and (iii) the remuneration of the arbitral secretary.

In short, (i) some notes provide that the appointment requires the parties' (express or tacit) consent, whereas other notes only require prior consultation,[17]

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[15] Kyriaki KARADELIS, The role of the tribunal secretary, Global Arbitration Review, 21 December 2011, quoting a speaker at the GAR Live at the Waldorf Hilton Hotel in London on 30 November 2011, concerning the issuance by the ICC Court of Arbitration of guidelines on the use of secretaries.

[16] Already before the London Court of International Arbitration had uploaded on its website under the header "*Frequently Asked Questions*" a short text under the title "*What is the LCIA's position on the appointment of Secretaries to Tribunals?*". Cf. also Michael POLKINGHORNE/Charles B. ROSENBERG, The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard, Dispute Resolution International, Vol. 8 No. 2, October 2014 for an encompassing overview of existing notes.

[17] Article 1(4) of the ICC Note: "*The Arbitral Tribunal shall make clear to the parties that they may object to such proposal and an Administrative Secretary shall not be appointed if a party has raised an objection.*" First bullet point of the JAMS Guidelines: "*The Tribunal's*

(ii) the notes generally tend to take a rather strict position on the work that may be delegated to the arbitral secretary,[18] and (iii) some notes provide that the

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use of Clerks or Secretaries must be approved by the parties after disclosure." Article 3 of the SIAC Practice Note states: "*No administrative secretary may be appointed without the consent of all parties to the arbitration*." Article 8, para. 68 of the LCIA Notes for Arbitrators: "*Subject to the express written agreement of the parties, an Arbitral Tribunal may, if it considers it appropriate in a particular case, appoint a tribunal secretary to assist it with the internal management of the case*." Under the HKIAC Guidelines, the arbitral tribunal only needs to consult with the parties, but does not need their consent. Article 2.1 provides: "*An arbitral tribunal may, after consulting with the parties, appoint or remove a secretary at any stage of the arbitration*." And Article 2.4: "*After receiving and considering the parties' comments pursuant to paragraph 2.3, the arbitral tribunal may appoint the proposed secretary*." A similar position is taken in the FCC Note. Article 2.3 of the FCC Note reads: "*Before appointing a secretary, the arbitral tribunal shall consult with the parties. If any party objects to the use of a secretary, the arbitral tribunal may proceed with the appointment only where the tribunal is convinced that this will benefit all parties by saving time and costs*." Also Article 15(5) of the Swiss Rules of International Arbitration only require prior consultation of the parties.

[18] Article 2(6) of the ICC Note: "*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.*" Article 3.4(f) of the HKIAC Guidelines provides: "*Unless the parties agree or the arbitral tribunal directs otherwise, a tribunal secretary may provide the following assistance to the arbitral tribunal, provided that the arbitral tribunal ensures that the secretary does not perform any decision-making function or otherwise influence the arbitral tribunal's decisions in any manner: (f) preparing drafts of non-substantive letters for the arbitral tribunal and non-substantive parts of the tribunal's orders, decisions and awards (such as procedural histories and chronologies of events)*." Article 3.4(ii) of the FCC Note reads: "*In addition, a secretary may provide limited assistance to the arbitral tribunal in its decision-making process, as long as the arbitral tribunal ensures that the secretary does not assume any decision-making function of the tribunal, or otherwise influence the tribunal's decisions in any manner. Such assistance may include, but is not limited to, the following tasks: (ii) collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications as well as producing memoranda summarising the parties' respective submissions and the evidence supporting those submissions, provided that the arbitral tribunal refrains from relying solely on a secretary's work to the exclusion of its own review of the file and legal authorities.*" Article 2 of the SIAC Practice Note: "*In appropriate cases, administrative secretaries may be appointed to assist the arbitral tribunal in administrative matters.*" According to a blog comment by Jonathan CHOO, "*[t]his no doubt implies that duties or tasks performed by administrative secretaries must be limited to administrative work and separate from any decision-making role which can only be performed by arbitral tribunals*" (http://singaporeinternationalarbitration.com/2015/02/23/siac-introduction-of-practice-note-on-the-appointment-of-administrative-secretaries/). Article 8, para. 71 of the LCIA Notes for Arbitrators: "*Tribunal secretaries should, therefore, confine their activities to such matters as organising papers for the Arbitral Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, reserving hearing rooms, and sending correspondence on behalf of the*

arbitral tribunal must not request the parties to pay for the arbitral secretary's work (but may ask the parties to pay for the arbitral secretaries' reasonable disbursements),[19] whereas others foresee that possibility.[20]

In 2014, the International Council for Commercial Arbitration published the Young ICCA Guide on Arbitral Secretaries (the "**ICCA Guide**"). The basis of the ICCA Guide form two surveys conducted in 2012 and 2013. In a nutshell, the ICCA Guide provides that (i) an arbitral secretary should only be appointed with the knowledge and consent of the parties,[21] (ii) with appropriate direction and supervision by the arbitral tribunal, the arbitral secretary's work may legitimately go beyond the purely administrative,[22] and (iii) the remuneration should be paid out of the arbitral tribunal's fees where the arbitral tribunal is paid on the basis of the amount in dispute; or by the parties where the arbitral tribunal is paid on an hourly basis.[23]

3.2 The Position of the Swiss Federal Supreme Court on the Use of the Arbitral Secretary

3.2.1. Appointment

On the basis of an *ad hoc* arbitration agreement whose procedural rules were not determined by the parties, the Swiss Federal Supreme Court explained that under the Swiss *lex arbitri* the appointment of an arbitral secretary does not require the parties' consent. It noted however that the parties could jointly exclude the possibility to appoint an arbitral secretary, be

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Arbitral Tribunal." The JAMS Guidelines appear to be more flexible. Bullet point 3 of the JAMS Guidelines states: "*The arbitrator's disclosure regarding the use of a Clerk or Secretary will state the types of tasks assigned to the Clerk or Secretary, e.g., research and/or drafting. At no time can a Clerk or Secretary engage in deliberations or decision-making on behalf of an arbitrator or tribunal.*" According to bullet point 1, such use must be approved by the parties.

19 Cf. Article 3 of the ICC Notes; Article 4.1 of the FCC Note.

20 Cf. Bullet point 4 of the JAMS Guidelines; Article 8, para. 72 of the LCIA Notes for Arbitrators (considering an hourly rate of GBP 50 to 150 as reasonable). The SIAC Practice Note foresees the possibility of an agreement between the arbitral tribunal and the parties if the amount in dispute is SGD 15 million or above (cf. Articles 5 and 6).

21 Cf. Article 1(2) of the ICCA Guide.

22 In particular, the ICCA Guide lists the "[*d*]*rafting procedural orders and similar documents*", "[*r*]*eviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence*", "[*a*]*ttending the arbitral tribunal's deliberations*", "[*d*]*rafting appropriate parts of the award*". Cf. Article 3(1) in conjunction with Article 3(2)(g) to (j).

23 Cf. Article 4(3) of the ICCA Guide.

it in the arbitration agreement or at a later stage. When making that statement, the Swiss Federal Supreme Court referred to Tarkan GÖKSU's textbook. In his textbook, GÖKSU continues however that if the parties jointly declare that they do not consent to the appointment of an arbitral secretary, the arbitral tribunal may still retain an arbitral secretary, but it must not pass on any costs of the arbitral secretary to the parties.[24] Whether an arbitral tribunal may indeed retain an arbitral secretary if the parties excluded that possibility in their arbitration agreement or at a later stage is disputed in legal writing.[25] In the present case, the Swiss Federal Supreme Court was not confronted with that scenario since there was no joint opposition of the parties to the appointment of the arbitral secretary. Against this background, we submit that the statement by the Swiss Federal Supreme Court is not specific enough to be construed as having ruled on the question as to whether the arbitral tribunal may retain an arbitral secretary on its own motion against the will of the parties (provided that the arbitral tribunal bears the costs of the arbitral secretary). In our reading, that particular question has not been addressed by the Swiss Federal Supreme Court.

In contrast to the ICC Note, the JAMS Guidelines, the SIAC Practice Note and the LCIA Notes for Arbitrators, the Swiss *lex arbitri* does therefore not provide that the arbitral tribunal must mandatorily retain the parties' consent when appointing an arbitral secretary.

In the present case, the arbitral tribunal did not disclose that it retained the serviceof ancillaries on its own motion, but did so swiftly following a party's inquiry. The Swiss Federal Supreme Court did not criticize that approach. Quite on the contrary, it only found harsh words for the general contractor for having waited for about five months to object to the external assistance retained by the arbitral tribunal. The decision thus suggests that there is also no requirement under the Swiss *lex arbitri* for the arbitral tribunal to consult with the parties prior to the appointment of an arbitral secretary. However, in order to maintain the parties' right to challenge the arbitral secretary for lack of independence or impartiality,[26] we submit that

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24 Tarkan GÖKSU, Schiedsgerichtsbarkeit, Zurich 2014, para. 880.

25 Contra: ZK-Stefan GRUNDMANN, 2nd ed., Zurich 2013, Article 365 CPC para. 4; BK-Christopher BOOG/Sonja STARK-TRABER, Bern 2014, Article 365 CPC para. 12; BSK-Philipp HABEGGER, 2nd ed., Basel 2013, Article 365 CPC para. 1b. Cf. also Ivo SCHWANDER/Marco STACHER, DIKE Komm-ZPO, Article 365 CPC para. 2, who argue that the appointment of an arbitral secretary in domestic arbitration requires at least implicit consent by the parties.

26 Cf. Tarkan GÖKSU, Schiedsgerichtsbarkeit, Zurich 2014, para. 883; Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 1009; BSK-Philipp HABEGGER, 2nd ed., Basel 2013, Article 365 CPC para. 8.

the arbitral tribunal should disclose the appointment in due course. In the present case, the challenge of the ancillaries was however not an issue since the general contractor did not, as expressly noted by the Swiss Federal Supreme Court, allege at any point in time that the arbitral secretary or the consultant lacked independence or impartiality.

3.2.2. Duties

When providing examples for the tasks that can be duly assigned to the arbitral secretary, the Swiss Federal Supreme Court first mentioned administrative work (organising the exchange of submissions, preparing the hearings, taking minutes of the hearings, preparing accounts of the costs and related work). It added however that the arbitral secretary can also provide certain assistance in the drafting of the award provided that this is done under the control of and in accordance with the directions of the arbitral tribunal. According to the Swiss Federal Supreme Court, the attendance of the arbitral secretary at the hearings and the deliberations is not only permissible, it is even a requirement if the arbitral secretary is expected to assist in the drafting process. The Swiss Federal Supreme Court emphasised however that the arbitral secretary must not perform any decision making functions. Taking decisions is the prerogative of the arbitral tribunal.

The Swiss Federal Supreme Court thus permits "certain assistance in the drafting of the award", which is obviously a rather vague description of the work that can be assigned to the arbitral secretary. Should "certain assistance" be read to mean that the tasks that can be assigned are limited to preparatory work such as collecting relevant case law? Or does "certain assistance" encompass the preparation of the first draft of parts or even the entirety of the award? If read in conjunction with the Swiss Federal Supreme Court's statement that this type of work requires the arbitral secretary's attendance at the hearing and the deliberations, we submit that the Swiss Federal Supreme Court' decision should be construed to mean that the arbitral secretary can be asked to prepare a first draft of the award. Presumably this holds even true for the more sensitive sections of the award such as the legal reasoning, since it would make little sense to require the arbitral secretary's attendance at the hearing and the deliberations if his or her tasks were restricted to non-substantive sections such as the procedural history. Our reading of the decision finds further support in the doctrine referred to by the Swiss Federal Supreme Court in the relevant passage. The Swiss Federal Supreme Court primarily relies on GÖKSU. That author states that the arbitral secretary can also be asked to draft the award according to the directions given by the arbitral tribunal, which requires the arbitral secretaries' attendance at the deliberations and

regularly at the hearings.[27] The Swiss Federal Supreme Court also refers to Gabrielle KAUFMANN-KOHLER and Antonio RIGOZZI, who explain in their textbook that it is permissible for the arbitral secretary to provide certain assistance in the drafting of the award, a task that only consists in reproducing the content of the decision.[28] Neither of these authors suggests that the draft prepared by the arbitral secretary should be limited to specific sections. On the contrary, drafting the procedural history can hardly be characterised as reproducing the content of the arbitral tribunal's decision. As the Swiss Federal Supreme Court however underlines, such work must be performed under the control of and in accordance with the directions of the arbitral tribunal.[29]

In our reading, the decision thus describes the scope of work that can be delegated to the arbitral secretary more broadly than most, if not all of the discussed notes. The ICC Note, the LCIA Notes for Arbitrators and the SIAC Practice Note seem to suggest that an arbitral secretary must not draft any portion of the award. Other notes such as the HKIAC Guidelines allow the preparation of drafts, but limited to non-substantive sections such as the procedural history and chronologies of events. This is also the position taken by the ICCA Guide, which provides that the arbitral secretary may, with appropriate direction and supervision by the arbitral tribunal, draft appropriate parts of the award. It follows from the commentary on the ICCA Guide that the procedural background, the factual background and the parties' positions are regarded as appropriate, whereas it is more controversial whether the arbitral secretary can also prepare a first draft of the legal reasoning, the final analysis and the operative portions of the award.

3.2.3. Remuneration

In the case at hand, the arbitral tribunal paid its ancillaries from its own fees. There was thus no reason for the Swiss Federal Supreme Court to

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27 Tarkan GÖKSU, Schiedsgerichtsbarkeit, Zurich 2014, para. 879.

28 Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI, Arbitrage international, 2nd ed., Bern 2010, para. 678.

29 Cf. also Decision of the Swiss Federal Supreme Court dated 19 June 2008 2C_807/2008 consid. 3.4. This decision dealt with the question of whether the work of the arbitral secretariat in the Claims Resolution Tribunal for Dormant Accounts in Switzerland was exempted from VAT. When analysing the work performed by the arbitral secretariat, the Swiss Federal Supreme Court noted that the tasks assigned to the arbitral secretariat were in all aspects comparable to the work performed by court clerks, whose workload included significant tasks concerning the drafting of decisions. The Swiss Federal Supreme Court continued to note that the arbitral secretariat in the case at hand was responsible for resolving legal questions, reviewing evidentiary materials and the preparation and drafting of procedural orders and final awards.

address the question under which circumstances an arbitral tribunal can charge the parties for the service provided by the arbitral secretary and the consultant. The decision provides thus no guidance on this issue.

Swiss legal writing generally takes the view that the fees of the arbitral secretary form part of the expenses of the arbitral tribunal and are charged separately to the fees of the arbitral tribunal.[30]

The notes issued by the arbitral institutions deal differently with the remuneration of the arbitral secretary.

According to Article 3 of the ICC Note "the engagement of an Administrative Secretary should not pose any additional financial burden on the parties", and thus, "[a]ny 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". The ICC Note strictly prohibits any deviating agreement between the arbitral tribunal and the parties: "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".

Article 5 of the SIAC Practice Note makes a distinction based on the amount in dispute. If the amount in dispute is under SGD 15 million, the parties are not to bear any fees for the use of an administrative secretary, save for the reasonable expenses of the secretary. Above that threshold, the arbitral tribunal may agree with the parties that both the fees and reasonable expenses of the administrative secretary shall be borne by the parties, whereas the fees are capped at SGD 250 per hour.

The LCIA Notes for Arbitrators states that an hourly rate in the range of GBP 50 to 150 per hour would generally be considered reasonable, on the basis that the secretary's work will save the arbitral tribunal time and underlines that LCIA's practice is to pay the secretary's fees out of the deposits that have been lodged by the parties.[31]

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[30] Cf. Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 1011; Tarkan GÖKSU, Schiedsgerichtsbarkeit, Zurich 2014, para. 884 and footnote 1737. Marco STACHER however takes the position that the fees of the arbitral secretary form part of the fees of the arbitral tribunal arguing that the arbitral secretary's task would be performed by the arbitral tribunal if no arbitral secretary was appointed. Cf. Marco STACHER, in: Tobias ZUBERBÜHLER/Christoph MÜLLER/ Philipp HABEGGER (eds.), Swiss Rules of International Arbitration, 2nd ed., Zurich 2013, Article 38 N 9.

[31] LCIA Notes for Arbitrators, Article 8, para. 72.

The ICCA Guide provides that the expenses of the arbitral secretary should be paid out of the arbitral tribunal's fees where the arbitral tribunal is paid on the basis of the amount in dispute or by the parties where the arbitral tribunal is paid on an hourly basis.[32]

3.3 Remedies

3.3.1. The Arbitral Secretary Acting as the Fourth Arbitrator

If the arbitral secretary indeed acted as the fourth arbitrator, several remedies may, in chronological order, be considered.

First, a party can consider challenging the arbitral secretary. If the parties agreed on a sole arbitrator or on a three member tribunal, but the arbitral secretary acts as the second or fourth arbitrator respectively, a party may challenge the arbitral secretary based on Article 180(1)(a) or (b) PILS.[33] In domestic arbitration, this possibility can be inferred from Article 365(2) in conjunction with Article 367(1)(a) CPC.[34]

When the arbitral tribunal has rendered an award, and the secretary participated in the decision making process as if he or she were an arbitrator, a party can file a motion to annul the award based on Article 190(2)(a) PILS. The Swiss Federal Supreme Court expressly confirmed that possibility in its decision.[35]

At the enforcement stage, a party can consider invoking Article V(1)(d) NYC.[36]

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32 ICC Guide, Article 4(3).

33 Generally on the possibility of challenging arbitral secretaries in international arbitration cf. Tarkan GÖKSU, Schiedsgerichtsbarkeit, Zurich 2014, para. 883; Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 1009.

34 Cf. ZK-Stefan GRUNDMANN, 2nd ed., Zurich 2013, Article 365 CPC para. 4, who argues in the context of domestic arbitration that if the arbitral tribunal appoints a secretary against the will of both parties, the parties can challenge the secretary based on Article 367(1)(a) CPC. Cf. also BK-Christopher BOOG/Sonja STARK-TRABER, Bern 2014, Article 365 CPC para. 12.

35 DFC 4A_709/2014 consid. 3.2.2. Generally on the possibility to rely on Article 190(2)(a) PILS if the constitution of the arbitral tribunal is in breach of the parties' agreement cf. DFC 139 III 511; Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 1707.

36 Cf. Simon GABRIEL, ASA Bull. 1/2014, p. 167. Lawrence W. NEWMAN/ David ZASLOWSKY argue that if the secretary acts as a "fourth arbitrator", a party might invoke Article V(1)(c) NYC, the argument being that submission was predicated on the understanding that any award would be made by the arbitrators and not a surrogate, cf. Lawrence W.

Should a party learn at a later stage that the secretary participated in the decision making process, it can consider applying for a revision of the award based on the analogue application of Article 121(a) of the Swiss Federal Court Act ("**FCA**"). It is however disputed whether this provision can be applied by way of analogy to international arbitration.[37] Alternatively, the party can consider to invoke Article 123(2)(a) FCA. While it is acknowledged that this provision can be relied on in international arbitration, it is disputed whether it covers grounds for challenging an arbitrator (or an arbitral secretary).[38]

3.3.2. The Arbitral Secretary Acting in Violation of the Applicable Note

The question becomes more complex when the secretary does not participate in the decision making process, but if his or her services go beyond the permissible scope under the notes of the respective institution. By way of example, the ICC Note appears to exclude any drafting of the award by the arbitral secretary. If the secretary prepares the first draft of the award under the control of and in accordance with the directions of the arbitral tribunal, he or she does not assume a decision making function. But his or her work may potentially be inconsistent with the ICC Note.

Before turning to possible remedies by the parties, it must first be clarified whether the parties have actually agreed on the application of the respective note. This analysis is based on the assumption that Swiss law applies. In the arbitration agreement, parties typically refer to the rules of the designated institution. The notes do not form part of these rules. If the institution provides only the arbitral tribunal with a copy of the notes and the arbitral tribunal does not submit them to the parties or does not declare otherwise that it proposes that they form part of the agreement between the parties and the arbitrators, the parties have not agreed on them. Under this

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NEWMAN/David ZASLOWSKY, The fourth arbitrator: contrasting guidelines on use of law secretaries, New York Law Journal, November 29, 2012.

[37] Contra: Tarkan GÖKSU, Schiedsgerichtsbarkeit, Zurich 2014, para. 2253; Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 1956 et seq. Pro: Marco STACHER, Einführung in die internationale Schiedsgerichtsbarkeit der Schweiz, Zurich 2015, para. 472 et seq. The Swiss Federal Supreme Court has left this question open in 4A.528/2007 consid. 2.5; 4A.234/2008 consid. 2.1 and 2.2.1.

[38] Pro Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI, Arbitrage international, 2nd ed. 2010, para. 859. Cf. also BSK-Michael MRÀZ, Article 396 CPC para. 21 for domestic arbitration. Contra: Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 1956.

scenario, the notes may only become relevant in the relationship between the arbitral tribunal and the arbitral institution. In practice, it can however be observed that the terms of reference regularly incorporate the notes by way of reference when addressing the appointment of the arbitral secretary. In such a case, the notes become relevant in the relationship between the arbitrators and the parties and form part of the rules governing the arbitral procedure.

If the parties agreed on the application of the notes and a party believes that the secretary's work is inconsistent with the applicable note, it can consider challenging the secretary based on Article 180(1)(a) or (b) PILS.[39]

A party can however not have the award set aside only because the secretary's work is inconsistent with the applicable note (unless his or her work amounts to a decision making function). According to the case law of the Swiss Federal Supreme Court, the infringement of the agreement of the parties on procedural issues is not a sufficient reason to set aside the award (unless the infringement amounts to a violation of the principle of equal treatment of the parties or their right to be heard in adversarial proceedings, or is incompatible with public policy in the meaning of Article 190(2)(e) PILS).[40] Thus, a challenge under Article 190(2)(d) PILS is not possible. Unlike the scenario under which the secretary acts as if he or she were an arbitrator, the mere infringement of the applicable note by the arbitral secretary does not affect the constitution of the arbitral tribunal. Article 190(2)(a) PILS is therefore not applicable. In any event, the Swiss Federal Supreme Court suggested in DFC 139 III 511 consid. 5.4. that minor infringements of parties' agreements on the composition of the arbitral tribunal would not suffice to have the award annulled.[41]

At the enforcement stage, a party can consider relying on Article V(1)(d) NYC arguing that "*the arbitral procedure was not in accordance*

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[39] Cf. ZK-Stefan GRUNDMANN, 2nd ed., Zurich 2013, Article 365 CPC para. 4, who argues in the context of domestic arbitration that if the arbitral tribunal appoints a secretary against the will of both parties, the parties can challenge the secretary based on Article 367(1)(a) CPC. Cf. also BK-Christopher BOOG/Sonja STARK-TRABER, Bern 2014, Article 365 CPC para. 12. Generally on the possibility of challenging arbitral secretaries in international arbitration cf. Tarkan GÖKSU, Schiedsgerichtsbarkeit, Zurich 2014, para. 883.

[40] DFC 117 II 346 consid. 1.a. Cf. also Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 1743 ; Simon GABRIEL, ASA Bull. 1/2014, p. 167.

[41] Cf. also Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 910.

with the agreement of the parties". The threshold is however high.[42] The procedural defect must be essential.[43]

Should a party learn at a later stage that the secretary acted in violation of the applicable note (but his or her acts did not amount to a decision making function), it cannot demand revision of the award. Even if Article 121(a) FCA applied to international arbitration (which is disputed in legal writing), it cannot be analogously applied to arbitral secretaries who acted in violation of the parties' agreement. Revision under Article 123(2)(a) FCA is also not possible because this provision requires the newly discovered fact to be material, i.e. the fact may impact the finding of fact to such an extent that the outcome of the award would be different.[44]

3.4 Introduction of the Consultant

It seems that the article by Bernhard F. MEYER and Jonatan BAIER on arbitrator consultants was published just in time.[45] When addressing the arbitrator consultant, the Swiss Federal Supreme Court relied exclusively on the then just published article.[46] The authors describe arbitrator consultants as "*purely auxiliary persons, acting under the auspices and responsibility of the members of the arbitral tribunal [who] assist arbitrators to translate their factual and legal decisions into the technical or commercial language of the contract, or vice versa*".[47]

The decision makes clear that while the appointment of the arbitrator consultant is permissible under the Swiss *lex arbitri*, the same limits apply to

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42 Christian BORRIS/Rudolf HENNECKE, in: Reinmar WOLFF (ed.), New York Convention, Commentary, 2012, Article V NYC para. 315.

43 Christian BORRIS/Rudolf HENNECKE, in: Reinmar WOLFF (ed.), New York Convention, Commentary, 2012, Article V NYC para. 317, arguing that the defect must be causal to the arbitral tribunal's decision so that the decision would have been different without the defect. The same view is taken also by Patricia NACIMIENTO, in: Recognition and Enforcement of Foreign Arbitral Awards, 2010, p. 298 et seq. Cf. also Marco STACHER, Einführung in die internationale Schiedsgerichtsbarkeit der Schweiz, Zurich 2015, para. 516.

44 Cf. Bernhard BERGER/Franz KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., Bern 2015, para. 1961, with reference to decisions of the Swiss Federal Supreme Court.

45 Bernhard F. MEYER/Jonatan BAIER, Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations, ASA Bulletin 1/2015, pp. 37-57. This is however not the first time the arbitrator consultant was discussed in legal writing. See, e.g., Karl SPÜHLER/Myriam A. GEHRI, Die Zulassung von Experten zur Urteilsberatung: Neue Wege für Schiedsverfahren?, ASA Bulletin 1/2003, p. 20-25.

46 Cf. DFC 4A_709/2014 consid. 3.2.2.

47 Bernhard F. MEYER/Jonatan BAIER, Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations, ASA Bulletin 1/2015, p. 40.

the arbitrator consultant as to the arbitral secretary. Thus, the arbitrator consultant must not assume a decision making function but has to act under the control of and in accordance with the directions of the arbitral tribunal.

The Swiss Federal Supreme Court also explained that if the parties did not agree on the procedural rules (as in the present case), the arbitral tribunal is entitled, on the basis of Article 182(2) PILS, to retain an arbitrator consultant without previously obtaining the parties' consent. The position taken by the Swiss Federal Supreme Court is consistent with the legal writing on this topic.[48]

The Federal Supreme Court did however not render an own view as to whether the appointment of an arbitrator consultant would also have been admissible if the parties had determined the procedural rules, but without dealing with the appointment of an arbitrator consultant. Legal writing advocates that if the parties have determined the procedure of the arbitration by establishing the rules themselves or by referring to institutional arbitration rules and the rules do not grant the arbitral tribunal the right to appoint an arbitrator consultant, the arbitral tribunal shall first obtain the parties' consent before retaining an arbitrator consultant.[49]

In the commented decision, the Federal Supreme Court explained that while E. could not be characterised as an arbitral secretary, his role could be compared to an arbitrator consultant with the peculiarity that in the present case, the arbitrator consultant was not retained because of his technical expertise but because of the knowledge he possessed in the field of arbitral proceedings.

In practice, most arbitrators are lawyers and therefore, arbitrator consultants will commonly be technical experts. This also transpires from the article by MEYER and BAIER. The decision by the Swiss Federal Supreme Court makes clear that, even if unusual, under the Swiss *lex arbitri* an arbitral tribunal can also retain a *legal* arbitrator consultant.

The Swiss Federal Supreme Court did not provide clear criteria on how to distinguish between a legal arbitrator consultant and a legal arbitral secretary. These two functions may well be difficult to differentiate if (as in

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48 Bernhard F. MEYER/Jonatan BAIER, Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations, ASA Bulletin 1/2015, p. 43; Karl SPÜHLER/Myriam A. GEHRI, Die Zulassung von Experten zur Urteilsberatung: Neue Wege für Schiedsverfahren?, ASA Bulletin 1/2003, p. 23.

49 Bernhard F. MEYER/Jonatan BAIER, Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations, ASA Bulletin 1/2015, p. 43; Karl SPÜHLER/Myriam A. GEHRI, Die Zulassung von Experten zur Urteilsberatung: Neue Wege für Schiedsverfahren?, ASA Bulletin 1/2003, p. 23.

the present case) the arbitral tribunal is composed of non-lawyers. In legal writing, the appointment of a legal arbitral secretary has been recommended if the arbitrators are not lawyers.[50] Following the decision of the Swiss Federal Supreme Court it seems difficult to imagine that under such a scenario, the only lawyer in the room on the side of the arbitral tribunal will not assume the role of a "translator". Therefore, in light of the recent decision by the Swiss Federal Supreme Court, the role of the assisting lawyer will regularly have to be characterised as a legal arbitrator consultant.

The notion of a legal arbitrator consultant raises some interesting questions. In the case at hand, the arbitral tribunal was to decide *ex aequo et bono*, for which reason it did not need any guidance on substantive law. If a case is however governed by a substantive law and the only lawyer on the side of the arbitral tribunal is the arbitrator consultant, it becomes more challenging to ensure that the legal arbitrator consultant does not cross the line and assumes a decision making function. In such a case, the arbitral tribunal must make sure that the arbitrator consultant only acts as a "translator" between the technical and the legal aspects of the case, but does not advise the arbitral tribunal on how to decide the case. The distinction can be very tricky in practice.[51]

The proper use of the legal arbitrator consultant may well become more complex if the arbitration is administered by an institution whose note takes a rather strict position on the work that may be delegated to the arbitral secretary. If the applicable note suggests that the arbitral secretary must not prepare a draft of the award, the same rationale would seem to apply to the legal arbitrator consultant. It may be very challenging for an arbitral tribunal that consists of non-lawyers to draft an entire award without guidance on the proper legal terminology.

There are clearly cases in which the parties very legitimately prefer to entrust an arbitral tribunal with technical expertise with the resolution of the dispute. Under such a scenario, one possible solution to avoid any

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[50] Felix DASSER, in: Paul OBERHAMMER, Kurzkommentar ZPO, Article 365 CPC para. 1.

[51] In Sacheri v. Robotto, the Italian Supreme Court of Cassation decided that the arbitral tribunal crossed the line by totally abdicating their jurisdictional powers to a legal expert (Decision of the Supreme Court of Cassation of Italy from 7 June 1989, Giustizia Civile (1989), pp. 2345-2347, excerpt in English available in: Yearbook Commercial Arbitration, Volume 16 (1991), pp. 156-157). In that case, the arbitrators had no legal training and were incapable to decide issues other than technical construction questions. The Italian Supreme Court of Cassation underlined that the complete delegation of the drafting of the award to a legal expert in a case where the arbitrators were not able to conceive such an award themselves and could not critically examine it once it had been drafted amounted to delegating the drafting of the final award to a third party.

potential discussion on whether the arbitral tribunal made proper use of the legal arbitrator consultant is to agree on an arbitral tribunal that is composed of two party appointed technical arbitrators and the presiding arbitrator being a lawyer.[52]

4. Concluding Remarks

The Swiss Federal Supreme Court has taken a comparatively liberal position. On the basis of an agreement on an *ad hoc* arbitration with no procedural rules determined by the parties, it follows from the decision that (i) the arbitral tribunal can appoint an arbitral secretary (or an arbitrator consultant) without having to obtain prior approval by the parties or even without having to consult with the parties beforehand, and that (ii) the arbitral secretary's task is not limited to administrative work but can extend to certain assistance in the drafting of the award, provided that the arbitral secretary acts under the control of and in accordance with the directions of the arbitral tribunal. We submit that the decision suggests that it is permissible to have the arbitral secretary prepare the first draft of the award including its more sensitive sections, such as the legal reasoning, as long as the arbitral tribunal provides clear directions and critically examines the draft produced by the arbitral secretary. Compared to the stance taken by several arbitral institutions in their notes on the proper use of arbitral secretaries, this is a quite far-reaching, yet we submit correct position. The liberal approach taken in the decision fits not only to the long standing tradition in Switzerland which appreciates the advantages that can be gained by making proper use of arbitral secretaries,[53] but is also consistent with today's reality in international arbitration.[54]

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[52] An interesting example of collaboration between technical arbitrators and legal arbitrators is the Raad van Arbitrage voor de Bouw (Arbitration Board for the Building Industry), quoted by Andrea MEIER in: Assistance to the Tribunal: an Overview, ASA Special Series No. 42, Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions, p. 80.

[53] Cf. Constantine PARTASIDES, The Fourth Arbitrator?, The Role of Secretaries to Tribunals in International Arbitration, Arbitration International, 18(2), 2002, p. 148; Pierre LALIVE, Inquiétantes dérives de l'arbitrage CCI, ASA Bulletin 1995, p. 634-40; Pierre LALIVE, Secrétaire de tribunaux arbitraux: le bons sens l'emporte, ASA Bulletin, 1989, p. 1-4.

[54] Cf. Constantin PARTASIDES/Niuscha BASSIRI/Ulrike GANTENBERG/Leighla BRUTON/ Andrew RICCIO, Arbitral Secretaries, International Arbitration: The Coming of a New Age?, ICCA Congress Series, 2013, p. 330-32 and footnote 9.

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Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

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