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A Fourth Arbitrator or an Administrative Secretary?

A Study on the Appointment and Authority of Arbitral Secretaries in Swedish Arbitral Proceedings

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Abstract

Arbitral tribunals' engagement of secretaries has for several years been the subject of debate and surveys show that the use of arbitral secretaries varies in practice. The Swedish Arbitration Act as well as the Arbitration Rules and Rules for Expedited Arbitrations issued by the Arbitration Institute of the Stockholm Chamber of Commerce do not regulate the appointment and authority of an arbitral secretary. The requirements for the arbitrators' appointment of a secretary and the extent of the secretary's authority are, however, indirectly affected by general principles of law and provisions in the Swedish Arbitration Act.

Regarding the requirements for appointment of a secretary, it is asserted in this thesis that the arbitrators ought to obtain the parties' consent to the appointment. However, it is unclear if there are any other requirements that the arbitrators must observe when appointing a secretary.

The limitations on the secretary's authority mainly consist of agreements concluded by the parties and the provisions on challenge and invalidity of awards. Where the secretary has been appointed with the parties' consent and the parties have not agreed on the secretary's authority, the secretary is probably at least allowed to perform administrative tasks, but the arbitrators are not allowed to delegate their decision-making function or the duty to sign the award. However, the exact dividing line between proper and improper delegation cannot be established.

In the final discussion it is asserted that further guidance on the authority of the arbitral secretary would be beneficial. It is proposed that such guidance should be provided through guidelines issued by the SCC, which shall recommend the arbitrators to: obtain the parties' consent to the appointment of the secretary; conclude an agreement with the parties which states the duties that the arbitrators are allowed to delegate to the secretary; be transparent with the parties on the secretary's involvement in the arbitral proceedings; and refrain from delegating the tasks to sign the award and decide the dispute.

Sammanfattning

Skiljenämnders anlitande av sekreterare har i flera år varit föremål för debatt och undersökningar visar på att användandet av sekreterare varierar i praktiken. Lagen om skiljeförfarande samt Stockholms Handelskammares Skiljedomsinstituts skiljedomsregler och regler för förenklat förfarande reglerar inte sekreterarens tillsättande och behörighet. Kraven för att skiljemännen ska kunna tillsätta en sekreterare och omfattningen av sekreterarens behörighet påverkas dock indirekt av generella rättsprinciper samt bestämmelser i lagen om skiljeförfarande.

Angående kraven för att kunna tillsätta en sekreterare, hävdas i denna uppsats att skiljemännen borde inhämta parternas samtycke till tillsättandet. Det är dock oklart om skiljemännen måste observera några andra krav när de ska tillsätta en sekreterare.

Sekreterarens behörighet begränsas främst av avtal som parterna har slutit samt reglerna om klander och ogiltighet av skiljedomar. Om sekreteraren har blivit tillsatt med parternas samtycke och parterna inte har avtalat om sekreterarens behörighet, så får sekreteraren troligtvis åtminstone utföra administrativa uppgifter, men skiljemännen får inte delegera deras beslutsfattande funktion eller uppgiften att underteckna skiljedomen. Den exakta gränsen mellan tillåten och otillåten delegering kan dock inte fastställas.

I den avslutande diskussionen framhålls att det vore fördelaktigt med ytterligare vägledning angående sekreterarens behörighet. Det föreslås att sådan vägledning ska ges genom att SCC antar riktlinjer som rekommenderar skiljemännen att: inhämta parternas samtycke till tillsättandet av sekreteraren, avtala med parterna angående vilka uppgifter som skiljemännen får delegera till sekreteraren, vara öppna med parterna angående sekreterarens inblandning i förfarandet och avstå från att delegera uppgifterna att underteckna skiljedomen och avgöra tvisten.

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Abbreviations

FAI	Arbitration Institute of the Finland Chamber of Commerce
FAI Guidelines	FAI's Guidelines for Using a Secretary
FAI Note	FAI's Note on the Use of a Secretary
HKIAC	Hong Kong International Arbitration Centre
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
JAMS Guidelines	JAMS International's Guidelines for the Use of Clerks and Tribunal Secretaries in Arbitrations
SAA	The Swedish Arbitration Act (SFS 1999:116, *s*w: Lag om skiljeförfarande)
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCC Guidelines	SCC's Arbitrator's Guidelines
SCC Rules	SCC's Arbitration Rules and Rules for Expedited Arbitrations
SIAC	Singapore International Arbitration Centre
SIAC Note	SIAC's Practice Note for Administered Cases – On the Appointment of Administrative Secretaries
Task Force	Young ICCA Task Force on the Appointment and Use of Arbitral Secretaries
UNCITRAL	United Nations Commission on International Trade Law

1 Introduction

1.1 Background

Sweden has for long been an attractive venue for international commercial arbitration.[1] In order to facilitate large scale arbitral proceedings, the arbitral tribunal may appoint an arbitral secretary to assist the arbitrators with various duties. The appointment of a secretary could, supposedly, have numerous benefits, including increasing efficiency of the arbitral proceedings, reducing costs of the arbitration and allowing the arbitrators to focus on the merits of the case.[2] Moreover, the use of arbitral secretaries serves as a platform for the education of future arbitrators.[3] In international arbitration, the arbitral secretary is generally a junior lawyer from the law firm of the presiding arbitrator.[4]

In practice, the nature and degree of assistance provided by the secretaries vary enormously, and as the usage of arbitral secretaries has increased, a debate regarding the authority of arbitral secretaries has arisen. It has especially been questioned if and to what extent arbitrators can delegate tasks to the secretary that are not altogether administrative.[5]

The Russian Federation's recent challenge of the awards in the three arbitrations against the former shareholders of Yukos Oil Company, illustrates that the extent of the authority of arbitral secretaries is a practically relevant issue that needs to be addressed. On January 28 2015, the Russian Federation filed three writs with the District Court of The Hague seeking to set aside the Yukos awards, which granted the claimants more

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[1] Andersson *et al*. p. 29 and Hobér pp. 4-5.

[2] Partasides *et al*. 2013 p. 329, Secretaries to international arbitral tribunals p. 591, and the unofficial English translation of an excerpt from Lalive, *Inquiétantes dérives de l'arbitrage CCI (sur un recent "Oukase" du Secrétariat de la Cour d'Arbitrage CCI)*, ASA Bulletin 4 1995 pp. 634-640, in Partasides 2002 p. 148. In a survey made in preparation for the 2012 ICCA Congress ("2012 ICCA Survey") 94.8 % of the participants affirmed that the primary purpose of engaging a secretary is to support the presiding arbitrator or the arbitral tribunal. 57.7 % affirmed that the primary purpose was to save time and 58.8 % affirmed that it was to reduce costs. See Young ICCA Guide on Arbitral Secretaries p. 56.

[3] Tercier p. 554.

[4] Partasides *et al*. 2013 p. 333.

[5] See further Chapters 3 and 7.

than USD 50 billion in damages.[6] In the writs the Russian Federation alleges, *inter alia*, that the arbitrators failed to comply with their mandate, as the arbitrators did not fulfil their mandate personally.[7] The Russian Federation claims that the arbitrators delegated "substantive responsibilities that are not lawfully delegable" to Mr Valasek, who assisted the tribunal.[8] Moreover, the Russian Federation asserts that Mr Valasek acted as a fourth arbitrator and that the tribunal, thus, had been composed irregularly.[9] Whether the District Court of The Hague assents to the allegations remains to be seen.

It shall be noted that Mr Valasek formally was titled "assistant" and not "arbitral secretary". The Russian Federation argues that there is a difference between assistants and arbitral secretaries, as the latter, but not the former, is mentioned in the Dutch Code of Civil Procedure.[10] However, the Russian Federation claims that the arbitrators' delegation is unlawful even if the district court qualifies Mr Valasek as an arbitral secretary instead of an assistant.[11] Notwithstanding, the dispute demonstrates that an analysis of to what extent arbitrators can delegate tasks to their secretaries is of practical value.

Even though the debate regarding the appointment and authority of arbitral secretaries mostly has flourished among foreign commentators, it is of relevance to analyse the matter from a Swedish perspective, as secretaries also are used in proceedings conducted under Swedish law. As many arbitrations are administered by the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") and conducted under SCC's

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[6] Para. 1 of the writ. The writ can be accessed at the following webpage: http://old.minfin.ru/en/news/index.php?id_4=24358.

[7] Section V.E of the writ.

[8] Para. 469 of the writ. In para. 509 the Russian Federation concludes that "[t]he Tribunal has failed to comply with its mandate due to the fact that Mr Valasek as assistant or, alternatively, as secretary of the Tribunal, must be presumed to have participated in an unacceptable manner in the deliberations that led to the Final Awards and to the drawing up of parts, if not more, of the Final Awards". The Russian Federation, moreover, contends that the delegation to the secretary constitutes a violation of public policy, para. 105.

[9] Para. 511 of the writ.

[10] Para. 484 of the writ.

[11] Para. 508 of the writ.

Arbitration Rules or Rules for Expedited Arbitration ("SCC Rules"),[12] it is of interest to discuss the matter in relation to both *ad hoc* proceedings and proceedings under the SCC Rules. An analysis of the question is of extra importance since neither the Swedish Arbitration Act (SFS 1999:116, *Sw*: Lag om skiljeförfarande, "SAA") nor the SCC Rules provide any explicit guidance in the matter.

1.2 Purpose

The purpose of this thesis is to analyse the appointment and the authority of arbitral secretaries in Swedish arbitral proceedings, by examining both *ad hoc* proceedings and proceedings under the SCC Rules. The questions will be analysed from the arbitrators' perspective, by discussing to what extent arbitrators can appoint secretaries and delegate duties to secretaries without suffering any consequences. As the prevalent legal position regarding the extent of the secretaries' authority is unclear, it will also be discussed whether the matter needs to be regulated and what the proper form and content of such a regulation would be.

As the same rules are applicable, this thesis will discuss both arbitration based on contracts, contractual arbitration, and arbitration based on treaties, treaty arbitration. Moreover, as the SAA does not differentiate between domestic arbitration and international arbitration,[13] both domestic and international arbitration will be discussed in this thesis.

The aim of this thesis is to answer the following questions:

- Are there any requirements that arbitrators must observe when appointing arbitral secretaries?
- What is the extent of the arbitral secretaries' authority?

[12] See further Section 2.4.

[13] According to Section 46 of the SAA, the SAA "shall apply to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection".

- Should the authority of arbitral secretaries be regulated and if so, what is the proper form and content of such a regulation?

1.3 Delimitations

Arbitration can be based on both agreement, conventional arbitration, and on statutory provisions, statutory arbitration. This thesis will solely address conventional arbitration. Furthermore, the focus of this thesis will be on Swedish arbitral proceedings, either *ad hoc* proceedings or proceedings under the SCC Rules. Consequently, this thesis will not cover proceedings that take place outside of Sweden or that are governed by arbitration rules from an arbitration institute other than the SCC. Parties in Swedish arbitral proceedings could naturally agree to make a set of arbitration rules, other than the SCC´s, applicable to their dispute, e.g. the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules. Due to the limited size of this thesis and the vast number of arbitration rules that potentially could be applicable, the writer has deliberately decided not to discuss such situations. Nevertheless, arbitration rules from other arbitration institutions and material from other jurisdictions will occasionally be used to illustrate the issues from an international point of view. For example, in the *de lege ferenda* discussion regarding the need for regularisation and the appropriate form and content of a regulation, existing regulations regarding the authority of arbitral secretaries will be examined. Those existing regulations are not applicable to Swedish *ad hoc* proceedings or proceedings under the SCC Rules, but they are of interest in the discussion regarding the form and content of a regulation for Swedish arbitral proceedings. This should, however, not be seen as an attempt to fully investigate the appointment and authority of arbitral secretaries in other jurisdictions than the Swedish or under other institutional rules than the SCC´s.

There are four subjects that usually are discussed in the debate regarding arbitral secretaries; appointment, authority, remuneration, and characteristics of the secretary. All of these subjects entail interesting legal matters, but due to the limited size of this thesis only the first two subjects will be discussed in this thesis.

As this thesis focuses on the arbitrators' perspective, the nature of the legal relationship between the parties and the secretary will not be discussed. The nature of the legal relationship between the parties and the arbitrators will not be given much attention either. Moreover, this thesis will concentrate on arbitration law and will generally not consider questions regarding other areas of law, such as *inter alia* power of attorney, trusteeship, and immaterial services, even though such question could be of interest to discuss in relation to arbitral secretaries. However, the arbitrators' liability to pay damages will be considered to some extent as liability usually is mentioned as a potential consequence of the arbitrators' violation of their duties.

1.4 Methodology and Materials

1.4.1 General Remarks

The method used in this thesis is the traditional legal method, sometimes referred to as the legal dogmatic method. In accordance with the legal dogmatic method, legal authorities are used to determine the prevalent legal position (*de lege lata*),[14] and to determine what the law should be (*de lege ferenda*).[15] The legal authority of highest dignity in the Swedish legal system is generally considered to be statutory provisions, followed by precedents and preparatory works.[16] Legal literature is traditionally also mentioned as a legal authority, though the authoritative value of the legal literature varies depending on the type of literature.[17]

To fulfil the purpose of this thesis both a *de lege lata* and a *de lege ferenda* perspective will be applied. These two perspectives may not be entirely possible to separate as the

[14] Kleineman p. 26 and Lehrberg p. 203.

[15] Lehrberg pp. 203-204.

[16] Lehrberg pp. 106-107 and Bernitz *et al*. pp. 31-32. The hierarchy between precedents and preparatory works is not evident. Lehrberg asserts that clear precedents from the Supreme Court probably have higher value as sources of law than preparatory works, see Lehrberg p. 107. The authority of precedents and preparatory works varies depending on *inter alia* the area of law and the age of the legislation, see Bernitz *et al*. p. 32.

[17] Lehrberg pp. 205-207. The legal literature affects the legislation and the case law mainly through the convincing arguments provided therein, see Bernitz *et al.* pp. 32-33.

analysing and handling of the legal authorities unintentionally will be influenced by the writer's personal opinions. However, the aim is to keep the perspectives as separate as possible. A *de lege lata* perspective will be applied when discussing requirements that arbitrators must observe when appointing arbitral secretaries and when analysing the extent of the authority of arbitral secretaries. A *de lege ferenda* perspective will be used when discussing whether the authority of arbitral secretaries should be regulated. The *de lege lata* questions will be answered by examining to what extent arbitrators can appoint secretaries and delegate duties to secretaries without suffering any consequences.

1.4.2 International Arbitration

In relation to international arbitration, the conception of the relevant legal authorities must be modified. Strong maintains that there are seven types of legal authorities in international arbitration, namely: "[i]nternational conventions and treaties; [n]ational laws; [a]rbitral rules; [l]aw of the dispute (procedural orders and agreements between the parties); [a]rbitral awards; [c]ase law; and [s]cholarly work".[18] One of the special features of arbitration law is that private sources of law, i.e. authorities that are issued by non-state entities, play a significant role.[19] Regarding Swedish arbitral proceedings, the legislator has intentionally left several questions to the parties' and the arbitrators' discretion.[20] Moreover, the SAA includes several provisions which the parties can alter through an agreement.[21] Private sources are, thus, necessary complements to public sources.

[18] Strong p. 131.

[19] Strong p. 130. Private sources that can be relevant to determine the legal position include arbitration rules, arbitration agreements, and arbitral awards. Cf. Fouchard Gaillard Goldman on International Commercial Arbitration p. 153.

[20] Prop. 1998/99:35 p. 44.

[21] Regarding which provisions that shall be considered as mandatory, please refer to prop. 1998/99:35 p. 44.

1.4.3 Material

As the object of this thesis is Swedish arbitral proceedings, Swedish legislation, preparatory works, case law, and legal commentaries will be used to determine the prevalent legal position. The English translation of the SAA used in this thesis is an unofficial translation provided by the SCC.[22] The translation has, however, been compared, by the author, to the official Swedish version in order to verify the accuracy of the translation.

As mentioned in the introduction, there has not been much written about arbitral secretaries from a Swedish perspective and the SAA is silent on the issue. Therefore, this thesis will occasionally discuss foreign material on the matter, even though such material is not directly applicable to Swedish arbitral proceedings. However, it should be noted that the Swedish legislator strives to adapt Swedish arbitration law to international development and to promote Sweden as an attractive venue for dispute resolution in commercial disputes.[23] Moreover, some Swedish legal commentators have presumed that foreign materials may be used in addition to the traditional Swedish sources of law in order to solve judicial problems in the SAA.[24] Due to the Swedish legislator's ambition to adapt the Swedish regulation to the international development, it can be assumed that a Swedish court would turn to foreign materials if a question regarding the appointment and authority of arbitral secretaries was brought before the court. However, in this thesis it has been taken into consideration that such material has a limited value as source of law in relation to Swedish arbitral proceedings. Case law from other jurisdictions has occasionally been used to illustrate how the problem has been dealt with internationally.

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[22] The translation is available at the SCC's webpage, http://sccinstitute.com/media/37089/the-swedish-arbitration-act.pdf.

[23] See for example Dir. 2014:16 pp. 2 and 7.

[24] See for example Madsen 2006. p. 4. Heuman asserts that foreign case law should be permitted to influence the application of the SAA, as many national arbitration laws are similar to each other, see Heuman 2003 pp. 24-25. According to Lindskog, material from jurisdictions that have based their legislations on the UNCITRAL Model Law on International Commercial Arbitration can be taken into consideration when the prevalent legal position in Swedish law is to be discussed, see Lindskog p. 23.

In the *de lege ferenda* discussion regarding the need for regularisation, an international survey will be made and some of the existing regulations governing the authority of arbitral secretaries will be examined. The regulations are not applicable to Swedish *ad hoc* proceedings or proceedings under the SCC Rules. Nevertheless, the form and content of those regulations are of interest in the discussion concerning the appropriate form and content of a regulation for Swedish arbitral proceedings.

There are legal commentaries that deal with issues of arbitration from a general international perspective without limiting the application of the commentary to a certain jurisdiction. Such commentaries have been used in this thesis, as they can be considered to describe a generalised legal position within the field of international arbitration. Moreover, these legal commentaries can illustrate how arbitral proceedings are conducted in practice. Such commentaries include Born's *International Commercial Arbitration*, Lew, Mistelis and Kröll's *Comparative International Commercial Arbitration, Fouchard Gaillard Goldman on International Commercial Arbitration* and *Redfern and Hunter on International Arbitration*.[25]

Regarding the legal literature on arbitration law, it should be noted that many of the commentaries are written by practitioners. Such commentaries tend to focus on the suitable solution in practice, without supporting the advocated position with arguments based on sources of law, hence their value as sources of law may be questioned.

1.5 Terminology

Throughout this thesis, *arbitral secretary* and *secretary* will both be used as to describe a third party who arbitrators engage to assist in the arbitral proceedings. No difference between the two terms is intended. Other terms, e.g. administrative secretary or tribunal secretary, have been used by other commentators, but in order to streamline the language this thesis will only use the terms arbitral secretary or secretary. Employees at an arbitration institute, which the parties have agreed will administers the

[25] These are all categorized by Strong as excellent treatises within the field of international arbitration, see Strong p. 151.

proceedings, are not comprised by the definition of arbitral secretary or secretary in this thesis. The legal position regarding employees at an arbitration institute is most likely different than the legal position regarding arbitral secretaries, since the former's authority derives from the authority of the arbitration institute. Thus, other aspects would have to be taken into consideration in a discussion regarding the authority of such assistance providers.

As mentioned above, this thesis will focus solely on Swedish arbitral proceeding. The term *Swedish arbitral proceedings* comprises arbitral proceedings which are governed by the SAA. According to Section 46 of the SAA, the act applies to arbitral proceedings which take place in Sweden. The place of the arbitration shall be determined by the parties or, if the parties have not made such a determination, by the arbitrators.[26]

Both contractual arbitration and treaty arbitration will be addressed in this thesis. As the same rules apply to the two forms of arbitration, they will be dealt with together. Consequently, a reference to *arbitration* will comprise both contractual arbitration and treaty arbitration. Moreover, as the SAA does not distinguish between domestic and international arbitration,[27] a reference to arbitration will include both types of arbitration.

Moreover, this thesis will analyse both *ad hoc* proceedings and proceedings under the SCC Rules. Parties in *ad hoc* proceedings can agree to incorporate existing arbitration rules in their arbitration agreement.[28] However, in this thesis the term *ad hoc proceedings* will only refer to proceedings in which the parties have not agreed to apply a set of arbitration rules. Consideration must otherwise be made to the specific set of arbitration rules which the parties have agreed to apply.

The *SCC Rules* will be used to make reference to both SCC's Arbitration Rules and Rules for Expedited Arbitration. Thus, *arbitral proceedings under the SCC Rules* refers both to

[26] Section 22 of the SAA. It shall be noted that in accordance with the same provision, the arbitrators do not have to hold hearings and meetings at the place of arbitration, provided that the parties have not agreed otherwise.

[27] See Section 46 of the SAA.

[28] See further Section 2.4.

proceedings that are governed by the SCC's Arbitration Rules and proceedings that are governed by the SCC's Rules for Expedited Arbitration.

One of the special features of Swedish arbitration law is that the SAA makes a distinction between *invalidity of awards* pursuant to Section 33 of the SAA and *setting aside awards* (challenge of awards) pursuant to Section 34 of the SAA.[29] If Section 33 is applicable, the award is invalid *ab initio* and courts must take into account the provisions on invalidity *ex officio*. On the contrary, an award can be set aside only upon motion by a party and provided that the conditions in Section 34 are fulfilled.[30] It can be noted that an inquiry has proposed that the distinction between invalid and challengeable awards should be repealed and that the SAA only shall contain grounds for setting aside awards.[31] The amendments to the SAA are proposed to come into force on 1 July 2016.[32]

1.6 Disposition

This section will briefly describe the disposition of the thesis. Chapter 2 will provide a brief introduction to the general characteristics and fundamental principles of Swedish arbitrations. The chapter will *inter alia* discuss general principles regarding the conduct of arbitral proceedings and the difference between *ad hoc* arbitration and institutional arbitration. In Chapter 3, a presentation of the type of tasks that usually are assigned to arbitral secretaries in international arbitrations will be made. The presentation is based on surveys regarding the practice in international arbitration, which were conducted between 2006 and 2012.

In Chapter 4, the regulatory framework governing the use of arbitral secretaries, for both *ad hoc* proceedings and proceedings under the SCC Rules, will be discussed. Thereafter, statutory provisions and principles of law, which indirectly may affect the

[29] No jurisdictions, other than Sweden and Finland, seem to make such a distinction, see SOU 2015:37 p. 124.

[30] See further Section 5.3.2.

[31] SOU 2015:37 pp. 124-126.

[32] SOU 2015:37 p. 196.

use of arbitral secretaries will be discussed in Chapter 5. The first section will discuss duties of the arbitrators which may affect the appointment and authority of secretaries. The subsequent section will discuss the available remedies against arbitrators, in order to clarify to what extent arbitrators have incentives to observe requirements for the appointment of secretaries or to refrain from delegating tasks which exceed the secretaries' authority

Chapter 6 is devoted to investigating whether there are any requirements or a specific procedure that the arbitrators must observe when appointing secretaries. Thereafter, the extent of the secretaries' authority in Swedish arbitral proceedings will be discussed in Chapter 7.

In Chapter 8 it will first be discussed if a regulation on the secretaries' authority in relation to Swedish arbitral proceedings is needed. Subsequently, existing regulations regarding the authority of secretaries will be analysed. Finally, the appropriate form and content of a regulation governing the authority of arbitral secretaries will be discussed.

By way of conclusion some final remarks will be made in Chapter 9.

2 Arbitration in Sweden

2.1 Introduction

This chapter will provide a brief introduction to general characteristics and fundamental principles of Swedish arbitrations. After some general remarks about arbitration has been made, the following sections will discuss general principles regarding the conduct of arbitral proceedings and the difference between *ad hoc* arbitration and institutional arbitration

2.2 General Remarks

In Sweden, arbitration has long been the preferred method for settlement of commercial disputes.[33] Sweden recognises arbitration as an alternative to litigation before national courts, as the state has no independent interest in whether all disputes between individuals are settled by national courts, provided that the disputes do not concern public interests.[34] Consequently, Section 1 of the SAA states that "[d]isputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution". The arbitrators, who are selected by the parties or by a third party that has been appointed by the parties,[35] will then decide the dispute through the issuance of an award.[36] The issued award has legal force and res judicata effect,[37] and can be enforced in a manner correspondent to the enforcement of a court judgement.[38] Moreover, in relation to

[33] Nilsson & Rundblom Andersson p. 1 and Andersson *et al*. p. 29.

[34] NJA II 1929 p. 5.

[35] Sections 12-13 of the SAA.

[36] Section 27 of the SAA.

[37] NJA II 1929 p. 5, SOU 1994:81 pp. 58 and 69, and prop. 1998/99:35 pp. 35 and 42. See also NJA 1998 p. 189.

[38] Chapter 3 Section 1 and 15-18 of the Enforcement Code (SFS 1981:774, *sw:* utsökningsbalk).

issues that are comprised by the arbitration agreement, the agreement constitutes a bar to court proceedings.[39]

Arbitration is an exception to the state's monopoly of administration of justice.[40] This exception is justified by the fundamental principle of freedom of contract.[41] The legislator reasoned that if the judicial system accepts that parties regulate their dealings through agreements, it is consistent for the legislator also to accept the parties' agreement to let a third party settle their disputes.[42] However, as arbitration can entail an impairment on the legal rights of the individual, the arbitral procedure must comply with fundamental principles of due process, such as impartiality of the arbitrators and the right to present one's case, if the judicial system is to accept arbitration agreements and arbitral awards.[43] Therefore, certain procedural safeguards have been inserted in the SAA.

Arbitration differs from traditional court proceedings in many aspects. Some of the aspects that usually are emphasized as the advantages of arbitration include faster, cheaper and more flexible proceedings, as well as the ability to choose one's judge and thus, the possibility to appoint people with certain expertise to settle the dispute.[44]

Contrary to court judgements, an arbitral award can never be reviewed by a court on the merits.[45] Under the SAA, it is only possible to challenge an award on procedural grounds.[46]

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[39] Section 4 of the SAA and Chapter 10 Section 17a of the Swedish Code of Judicial Procedure (SFS 1942:740, *sw:* rättegångsbalk).

[40] SOU 1994:81 p. 67 and prop. 1998/99:35 p. 40.

[41] SOU 1994:81 p. 67 and prop. 1998/99:35 p. 40.

[42] SOU 1994:81 p. 67 and prop. 1998/99:35 p. 40.

[43] SOU 1994:81 p. 69 and prop. 1998/99:35 p. 42.

[44] SOU 1994:81 p. 68 and prop. 1998/99:35 p. 41.

[45] SOU 1994:81 p. 169, prop. 1998/99:35 p. 139, and Knuts p. 237.

[46] See Sections 33 and 34 of the SAA.

In the following sections, certain fundamental aspects of arbitration will be presented, namely general principles regarding the conduct of arbitral proceedings and the difference between *ad hoc* arbitration and institutional arbitration.

2.3 The proceedings

The SAA contains a few provisions regarding the arbitral proceedings,[47] but the parties and the arbitrators have the possibility to arrange the proceedings in a manner suitable to the parties' dispute. One of the fundamental principles in Swedish arbitration is the principle of party autonomy.[48] According to Section 21 of the SAA, the arbitrators are required to "act in accordance with the decisions of the parties insofar as there is no impediment to so doing". However, the parties do not have unlimited disposal of the procedure. The arbitrators do not have to comply with party instructions that are illegal or impossible to carry out in practice,[49] and it has been argued that the arbitrators do not have to comply with instructions, which entail that reasonable standards of due process are set aside.[50] Also, the SAA contains some mandatory provisions from which the parties cannot deviate.[51]

To the extent that mandatory provisions in the SAA or agreements concluded by the parties do not provide any guidance, the arbitrators can organise the proceedings at their own discretion.[52] Nevertheless, the arbitrators' discretion is, for instance, circumscribed by Section 21 of the SAA, which states that the arbitrators are obliged to "handle the dispute in an impartial, practical, and speedy manner". The discretion is

[47] See *inter alia* Sections 21-26 of the SAA.

[48] SOU 1994:81 p. 71 and prop. 1998/99:35 p. 43.

[49] SOU 1994:81 p. 142 and prop. 1998/99:35 p. 110.

[50] Lindskog pp. 64 and 607.

[51] Provisions that are mandatory include *inter alia* the provision on written form and signature of awards in Section 31 of the SAA and the provision stating the type of disputes which may be referred to arbitrators for resolution in Section 1 of the SAA, see SOU 1994:81 p. 256. According to the *travaux préparatories,* the fact that a provision does not explicitly state that consenting parties can deviate from that provision does not mean that the provision shall be presumed to be mandatory, see further prop. 1998/99:35 p. 44.

[52] Prop. 1998/99:35 p. 110.

furthermore limited by Section 24 of the SAA, which *inter alia* states that the parties shall be afforded "an opportunity to present their respective cases". The arbitrators must also adhere to the principle of equal treatment of the parties and handle the dispute in a manner so that the award cannot be set aside or declared invalid.[53]

2.4 *Ad Hoc* Arbitration and Institutional Arbitration

Arbitrations can either be so called *ad hoc* proceedings, which means that the arbitral tribunal is established for the occasion, or institutional proceedings, which means that an institute assists in the proceedings.[54] The parties can agree to delegate certain tasks to the arbitration institute, such as appointment of arbitrators, deciding challenges of arbitrators and administration of the proceedings.[55]

The majority of the arbitration institutes have composed arbitration rules, which the parties in their arbitration agreement can agree to make applicable to potential future disputes.[56] The rules of the arbitration institute will then be considered as part of the parties' arbitration agreement and the arbitrators are obliged to comply with the arbitration rules.[57] Thus, these rules can complement or modify provisions in the SAA, to the extent that the statutory provisions in question are not mandatory.[58]

Both *ad hoc* arbitration and institutional arbitration are common in Sweden.[59] The leading arbitration institute is the SCC.[60] In 2013 the SCC had 203 registered cases, out of which 42 % were international disputes, meaning that the dispute did not only involve

[53] Heuman 2003 pp. 264-265.

[54] Heuman 2003 p. 5.

[55] Prop. 1998/99:35 p. 35. See further Heuman 2003 pp. 5-6.

[56] Heuman 2003 p. 6.

[57] Lindskog p. 606 and Heuman 2003 p. 6.

[58] Cf. Heuman 2003 p. 6.

[59] Andersson *et al*. p. 30.

[60] Andersson *et al*. p. 30. Cf. Nilsson & Rundblom Andersson p. 14.

Swedish parties.[61] The SCC has composed two sets of arbitration rules: the Arbitration Rules and the Rules for Expedited Arbitrations.

2.5 Summary

As a method for dispute resolution, arbitration constitutes an alternative to litigation before national courts. Arbitration differs from litigation in many aspects. For example, the conduct of the arbitral proceedings is to a great extent object to the discretion of the parties and the arbitrators since the SAA only contains a few mandatory provisions.

Arbitrations can either be *ad hoc* proceedings, which means that the arbitral tribunal is established for the occasion, or institutional arbitrations, which means that an institute assists in the proceedings. Arbitrators are obliged to comply with arbitration rules issued by arbitration institutes which the parties have agreed to apply to their dispute.

[61] http://sccinstitute.com/media/45932/scc-statistics-2013.pdf.

3 The Use of Secretaries in Practice

3.1 Introduction

The general opinion among arbitration practitioners is that they do not mind an arbitrator who delegates part of the work to a third party.[62] In line with that, it is common practice for arbitrators in larger arbitrations to appoint secretaries to facilitate the proceedings.[63] In this chapter, a brief presentation of the nature of tasks that usually are assigned to arbitral secretaries in international arbitrations will be made. It should be noted that none of the surveys that are used in the presentation below specifically concern Swedish arbitral proceedings. Even though the practice in Swedish arbitral proceedings may differ somewhat from the picture presented below, the survey results may still suffice to illustrate the type of tasks a secretary may be assigned to perform.

3.2 Tasks Delegated to Secretaries in Practice

In preparation for the 2012 ICCA ("International Council for Commercial Arbitration") Congress in Singapore, a survey, 2012 ICCA Survey, about arbitral secretaries was conducted.[64] The participants in the survey were a cross-section of international arbitration actors, such as arbitrators, secretaries, and people with experience from arbitration institutes.[65] The following percentage of the participants in the survey confirmed that a secretary's tasks in practice include:

"Handling correspondence and evidence *86.0%*

[62] In a survey, 65 % of the participants, which were all experienced arbitration practitioners, answered that they did not mind an arbitrator who delegated part of the work to his or her staff. The result of the study was published in Schultz and Kovacs article *The Rise of a Third Generation of Arbitrators? – Fifteen Years after Dezalay and Garth*, at p. 170.

[63] Andersson *et al*. p. 94. According to *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, conducted by the School of International Arbitration, Queen Mary, University of London ("2012 International Arbitration Survey"), secretaries are used in approximately 35 % of the arbitrations. The survey is available at http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf.

[64] The survey is published in the Young ICCA Guide on Arbitral Secretaries, at pp. 55-68.

[65] Young ICCA Guide on Arbitral Secretaries pp. 2 and 55.

Organising meetings and hearings with the parties	*90.3%*
Reminding meetings and deadlines to the parties	*74.2%*
Performing legal research	*80.6%*
Drafting procedural orders	*77.4%*
Analysing parties' submissions	*62.4%*
Drafting part of the award	*69.9%*
Drafting the entire award	*26.9%*
Communicating with the parties on behalf of the arbitral tribunal	*69.9%*
Communication with the institution	*71.0%*
Giving his/her view on the matter to the arbitral tribunal	*25.8%*
Participating in the deliberations for the chairperson	*16.1%*
Taking part in the decision-making process of the arbitral tribunal	*17.2%*
Other	*10.8%"*[66]

From the results of the 2012 ICCA Survey, it is clear that most secretaries are assigned administrative tasks of organisational nature, such as communication, handling correspondence, and organising meetings and hearings. This is confirmed by the results of the *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* conducted by the School of International Arbitration, Queen Mary, University of London,[67] and the survey conducted by the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association ("2006 Survey").[68]

[66] Young ICCA Guide on Arbitral Secretaries p. 62.

[67] 94 % of the arbitrators who participated in the survey stated that a secretary usually carries out organisational tasks and 77 % of the arbitrators stated that a secretary handles communication with the parties. The survey is available at http://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf.

[68] The survey was made by interviewing 22 international arbitrators and practitioners in North America, Europe, Asia and Latin America and the result was published in *Secretaries to International Arbitral Tribunals*, The American Review of International Arbitration 2006 pp. 575-596 at pp.584-585. 14 out of 22 participants affirmed that the duties of the secretary "primarily [are] of an administrative nature and

It can also be concluded that, in most cases, the secretary's duties are not limited to purely administrative tasks. 80.6 % of the participants in the 2012 ICCA survey and 47 % of the participants of the 2012 International Arbitration Survey affirmed that the secretary's tasks typically include legal research. Also, it is common for the arbitrator to delegate to the secretary to write procedural orders and non-substantive parts of the award.[69] However, regarding drafting of substantive parts of the award or the award in its entirety arbitrators are generally restrictive in their delegation.[70] According to the results from the 2012 ICCA survey, the majority of the arbitrators do not seem to let the secretary take part in the deliberations and the decision-making process of the tribunal.[71] It should, however, be noted that some arbitrators will discuss the merits of the case with the secretary.[72]

3.3 Conclusion

By the statistics presented in the section above, it is clear that the duties assigned to arbitral secretaries by the arbitrators are of great variation. While some arbitrators only delegate strictly administrative tasks to the secretary, others may let the secretary give his or her opinion regarding the merits of the case or even draft the entire award.

include the organization of the documents in the file, the drafting of letters regarding scheduling and procedural matters, and the preparation and minutes of the hearing".

[69] In the 2006 Survey, 11 out of 22 participants affirmed that "[i]t is common for secretaries to draft certain portions of awards, which the chair considers to be "descriptive" or "non-substantive," namely, the procedural history of the arbitration, the description of the parties, and sometimes also the summary of the parties' contentions". Only 2 out of 22 participants affirmed that they "refuse to assign any drafting responsibilities to the secretary". In the 2012 International Arbitration Survey, 70 % of the arbitrators affirmed that the secretary's task typically include "[p]reparing drafts of procedural orders and non-substantive parts of the awards".

[70] In the 2006 Survey, only 3 out of 22 participants affirmed that "[i]n some cases, secretaries prepare a first draft of the award in its entirety". In the 2012 International Arbitration Survey only 10 % of the arbitrators considered "[p]reparing drafts of substantive parts of awards" as a task that is usually carried out by secretaries.

[71] However, in the 2006 Survey, 7 out of 22 participants affirmed that "[i]n some cases, secretaries observe and take notes during the deliberations" and only 3 out of 22 participants affirmed that "it is not uncommon for arbitrators to exclude secretaries from the deliberations entirely".

[72] In the 2012 International Arbitration Survey, 4 % of the arbitrators affirmed that "[d]iscussing the merits of the dispute with one or more of the arbitrators" was a task usually carried out by secretaries.

4 The Regulatory Framework Governing the Use of Secretaries

4.1 Introduction

Before the main questions regarding the appointment and the authority of arbitral secretaries shall be dealt with, the regulatory framework governing those matters will be discussed. This chapter will demonstrate that the regulatory framework does not provide much explicit guidance as to the appointment and authority of arbitral secretaries. Therefore, it is of interest to subsequently discuss whether provisions in the SAA or general principles of law indirectly can affect the appointment and authority of arbitral secretaries. This issue will be discussed in Chapter 5.

4.2 *Ad Hoc* Proceedings

The main regulation of *ad hoc* proceedings is provided by the SAA. In addition to the SAA the arbitral proceedings are governed by the arbitration agreement and other instructions from the parties.[73] The SAA contains no provisions that explicitly govern the appointment or the mandate of arbitral secretaries. However, there are provisions in the SAA that indirectly affect such matters, *inter alia* the provisions on invalidity and setting aside of awards.

4.3 Proceedings under the SCC Rules

If the parties have agreed to conduct their arbitration under the SCC Rules, those rules will be considered to form part of the parties' arbitration agreement and will thus regulate the proceedings, as a complement or as a modification to the SAA.[74] Neither the SCC's Arbitration Rules nor the SCC's Rules for Expedited Arbitrations contain any provisions regarding arbitral secretaries, but the possibility for the arbitral tribunal to

[73] Cf. Heuman 2003 p. 5.

[74] Heuman 2003 p. 6.

appoint a secretary is recognised in the SCC's Arbitrator's Guidelines ("SCC Guidelines"). The guidelines state that:

> *"If the arbitral tribunal wishes to appoint an administrative secretary, the SCC should be informed of whom the arbitral tribunal wishes to appoint. The SCC will then proceed to ask the parties whether they agree to the appointment. If any party disagrees, the arbitral tribunal may not appoint the suggested individual as secretary.*
>
> *The fee of the secretary is borne by the arbitral tribunal. The arbitral tribunal decides how the fee should be allocated. Any expenses that the secretary incurs are borne by the parties. The same applies to social security contributions. The fee of the secretary should be stated in the final award. For further information on tax liability, see the relevant sections below."*[75]

4.4 Conclusion

Apart from the brief note on arbitral secretaries in the SCC Guidelines, the regulatory framework as regards the use of arbitral secretaries is, in practice, the same for *ad hoc* proceedings and proceedings under the SCC Rules; accordingly the SAA and joint party instructions. However, as will be exemplified in Chapter 5, the SCC Rules occasionally contain provisions which do not explicitly govern arbitral secretaries, but which indirectly will result in that the legal position for proceedings under the SCC Rules deviates from the legal position in *ad hoc* proceedings.

[75] SCC Guidelines p. 6 under "Administrative Secretary".

5 Principles and Provisions that Affect the Use of Secretaries

5.1 Introduction

As the regulatory framework does not provide much explicit guidance as to the appointment and authority of arbitral secretaries, it is of interest to discuss whether provisions in the SAA or general principles of law indirectly can affect the appointment and authority of secretaries. This chapter will first discuss duties of the arbitrators that may affect the appointment and authority of secretaries. As the purpose of this thesis is to examine the matter from the arbitrators' perspective, the main focus of this chapter will be to discuss the available remedies against arbitrators, in order to clarify to what extent arbitrators have incentives to observe requirements for the appointment of secretaries or to refrain from delegating tasks which exceed the secretaries' authority.

5.2 Duties of Arbitrators

5.2.1 General Remarks

The nature of the relationship between the parties and the arbitrators has been discussed greatly in the legal doctrine. Traditionally, there have been two main approaches to this questions; the contract theory, under which it is argued that the relationship between the parties and the arbitrators is of contractual nature, and the status theory, under which it is argued that the arbitrators' authority and obligations are founded upon statutory provisions.[76] The contract theory has for long been the prevailing view.[77] Several legal commentators have, however, argued that the relationship shall be considered as a *sui generis* legal relationship.[78] The subject of this thesis is not to further discuss the source of the arbitrators' duties,[79] rather in this

[76] Hobér p. 160 and Heuman 2003 p. 199.

[77] Schöldström 1998 p. 139 with references.

[78] Hobér p. 160 and Lindskog p. 360.

[79] For a greater analysis of the question, please refer to Schöldström's *The Arbitrator's Mandate*.

section some of the duties that generally are considered to be incumbent on arbitrators will be discussed.

Hobér states that the arbitrators' duty, in general terms, "is to decide the dispute before them on the basis of the facts, arguments, and evidence presented by the parties".[80] Other more specific duties are imposed on arbitrators by the SAA, *inter alia* to be impartial, to afford the parties an opportunity to present their respective cases, and to handle the dispute in an impartial, practical, and speedy manner.[81] The arbitrators are also considered to have an obligation to adhere to the rules governing the procedure, such as statutory provisions, arbitration rules or agreements concluded by the parties,[82] and to conduct the arbitration in such a way that the award cannot be declared invalid or set aside.[83]

In the following sections the arbitrators' duty of confidentiality and duty not to delegate will be discussed more thoroughly, as these duties indirectly affect the appointment and authority of arbitral secretaries.

5.2.2 Confidentiality

One aspect of arbitration that disputing parties may consider as a great advantage is the confidential nature of the proceedings.[84] Contrary to court proceedings, arbitrations are private.[85] This means that third parties generally are not entitled to access information about the proceedings, e.g. pleadings or awards, or to attend hearings.[86] However, the SAA lacks provisions that govern the confidentiality of the arbitral proceedings. The Swedish Supreme Court has concluded that arbitration does not entail an obligation for

[80] Hobér p. 159. Cf. Schöldström 2013 p. 133, who states that "[t]he arbitrator's main duty is to administer justice between the parties".

[81] Sections 8, 21 and 24 of the SAA.

[82] Nordenson 1990 p. 29.

[83] Heuman 2003 p. 265 and Lew *et al.* p. 279.

[84] Hobér p. 137 and Nilsson & Rundblom Andersson p. 6.

[85] SOU 1994:81 p. 68, prop. 1998/99:35 p. 41, and Jarvin p. 156.

[86] NJA 2000 p. 538, Andersson *et al*. p. 30, and Nilsson & Rundblom Andersson pp. 6-7.

the parties not to disclose information about the proceedings to third parties, unless the parties explicitly have agreed thereto.[87] With respect to arbitrators, the general opinion is that they must exercise reticence and not disclose information relating to the arbitral proceedings.[88] Lindskog argues that the contractual relationship between the arbitrators and the parties as well as the requirement of confidence that an arbitrator's mandate is founded upon justify a confidentiality obligation.[89] In international arbitration, it is generally accepted that the arbitrators have a duty of confidentiality.[90] Such a duty is also imposed on the arbitrators by the SCC Rules, unless otherwise agreed by the parties.[91]

It is uncertain what a breach of the arbitrators' presumed obligation of confidentiality entails.[92] Some legal commentators are of the opinion that an arbitrator who violates the duty of confidentiality is liable for damages.[93] However, in practice it can be difficult to prove who has violated the confidentiality and to prove the damages incurred.[94] It can also be noted that a sanctioned obligation of confidentiality for arbitrators and party representative potentially also could be derived from the Swedish Trade Secrets Act (SFS

[87] NJA 2000 p. 538.

[88] NJA 2000 p. 538, Nilsson & Rundblom Andersson p. 7, Hassler & Cars p. 79, and Cars p. 69.

[89] Lindskog p. 376 footnote 83. According to Lindskog, that legal obligation entails that the arbitrator is not permitted to disclose information regarding the arbitration, unless the parties consent thereto. For another opinion see Heuman 2000-01 pp. 669-670. Heuman seems to be of the opinion that there is no legal basis for a sanctioned confidentiality obligation.

[90] Smeureanu p. 142 and Lew *et al*. p. 283. For a different opinion see *inter alia* Société d'investissements l'Excellence inc. v. Rhéaume, 2010 QCCA 2269, where it was emphasized that the status of an implicit confidentiality obligation in international arbitration is uncertain. In the case the Canadian court concluded that such an obligation of confidentiality is not imposed on Quebec arbitrators, unless an agreement thereof has been concluded.

[91] Article 46 of the SCC's Arbitration Rules and Article 45 of the SCC's Rules for Expedited Arbitrations.

[92] The Arbitration Commission states that the confidential nature of the arbitral proceedings is founded on a fairly weak legal basis and that the confidentiality mainly is dependent on the concerned actors' mutual understanding. The commission asserts that a code of honor probably is of greater influence than the legal sanctions. An arbitrator who violates that code of honor could, according to the Commission, probably not expect to receive further mandates. See SOU 1995:65 p. 186.

[93] Lindskog p. 388, Cars s. 69 and 104, and Jarvin p. 159. Cf. Smeureanu p. 147.

[94] Jarvin p. 159.

1990:409, *sw:* lag om skydd för företagshemligheter) and the confidentiality provisions applicable to members of the Swedish Bar Association.[95]

5.2.3 Duty Not to Delegate

One of the important advantages with arbitration, which also is one of the greatest differences between arbitration and litigation before national courts, is that the parties have the right to "choose one's judge".[96] By accepting an appointment, the arbitrator has agreed to contribute to the resolution of the dispute.[97] Moreover, the arbitrator is considered to have a duty to complete the mission.[98] Consistent therewith, the general opinion is that the arbitrator is obligated not to delegate his or her mission.[99] The arbitrator's mission is *intuitu personae.*[100]

The duty not to delegate can be said to contain two elements; that the arbitrator should not improperly delegate tasks to other members of the arbitral tribunal and that improper delegation should not be made to third parties, such as arbitral secretaries.[101] Notwithstanding the duty not to delegate, foreign courts have affirmed that arbitrators are allowed to appoint a secretary.[102] It might be misleading to talk of a duty not to delegate, as the general opinion is that arbitrators are allowed to delegate a certain

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[95] SOU 1995:65 pp. 184-185 and Heuman 2003 pp. 16-17.

[96] Hobér p. 145.

[97] Nordenson 1990 p. 29 and Lew *et al.* p. 281.

[98] Lindskog p. 371, Trygger p. 259, and Waincymer p. 91.

[99] Schöldström 1998 p. 329, Born p. 1999, Redfern & Hunter p. 303, Tercier p. 537, and Partasides 2002 p. 147 with reference to Schwartz, *The rights and Duties of ICC Arbitrators*, in: ICC International Court of Arbitration Bulletin, Special Supplement, *The Status of the Arbitrator*, 1995 p. 86.

[100] Partasides 2002 p. 147 with reference to Eisemann, *Déontologie de L'Arbitre Commercial International*, Rev. de l'Arb. 4 1969 p. 229.

[101] Waincymer p. 92.

[102] According to Born p. 2045, French, German and Nigerian courts have declared that arbitrators are "entitled to appoint a secretary" in the following judgments: judgment of 21 June 1990, Compagnie Honeywell Bull SA v. Computacion Bull de Venezuela CA, 1991 Rev. arb. 96, 100 (Paris Cour d'appel); judgment of 3 November 1916, 1917 JW 46, 47 (German Reichsgericht); and Clement C. Ebokan v. Ekwenibe & Sons Trading Co., [2001] 2 NWLR 32 (Lagos Ct. App.).

extent of tasks, at least if the parties have consented thereto.[103] Therefore, the duty will in the following be referred to as a duty not to delegate improperly, which might be considered as a more accurate description. However, the difficulty consists in determining the dividing line between proper and improper delegation. In Chapter 7 it will be further discussed whether an exact dividing line between proper and improper delegation can be established for Swedish arbitral proceedings.

5.2.4 Summary

By accepting the appointment as arbitrator, the arbitrator will incur several obligations, including the general duty to determine the parties' dispute and to render a valid award. It is unclear whether arbitrators in Swedish arbitral proceedings are under an implicit obligation of confidentiality and whether that obligation is sanctioned. In contrast, the arbitrators' obligation not to delegate improperly is generally accepted, even though it is uncertain where the dividing line between proper and improper delegation is drawn.

5.3 Remedies against Arbitrators

5.3.1 General Remarks

In this section it will be discussed to what extent there are remedies against arbitrators that provide any guidance as to the proper appointment and authority of secretaries. The potential consequences if an arbitrator has used a secretary improperly include invalidity and challenge of awards, challenge or removal of the arbitrator, reduction of the arbitrator's compensation and liability claims. Invalidity or challenge of awards is strictly a remedy exercised against the other party to the arbitration and not the arbitrators, but an award that is set aside or declared invalid could lead to liability for the arbitrators.[104] Moreover, as arbitrators to some extent rely on their standing and

[103] See further Chapter 7. Tercier asserts that the arbitrator's duty to personally complete the mission "does not necessarily imply that he or she is not allowed to delegate certain secondary tasks", see Tercier p. 538.

[104] Born p. 2017. See further Section 5.3.5.

reputation to get further appointments and as invalidity or setting aside of an award probably have a negative effect on their reputation,[105] arbitrators may be considered to have an interest in rendering a valid award.

Another potential consequence of arbitrators' improper use of a secretary is that the award cannot be recognised or enforced. However, the applicable rules governing enforcement of awards is dependent on in which country enforcement is applied for. Due to the variation of the applicable rules, such rules will not be considered in this thesis.[106]

5.3.2 Invalidity and Setting Aside of Awards

The provisions of most practical importance that affect how the arbitrators can conduct the proceedings are Sections 33 and 34 of the SAA, which state the situations in which an award is invalid or could be set aside. Situations that are in conflict with the interests of the public or a third party are comprised by the grounds for invalidity in Section 33, whereas circumstances that principally affect the parties' interests are covered by the grounds to have the award set aside in Section 34.[107] If Section 33 is applicable, the award is invalid *ispo facto* and *ab initio*.[108] A motion to have an award declared invalid does not have to be made within a certain time limit.[109] Furthermore, the parties cannot limit the applicability of the provisions on invalidity of awards.[110] Courts and executive authorities have to take the provisions into account *ex officio*.[111] On the contrary, an award can be set aside pursuant to Section 34 only upon motion by one of the parties. A party can also waive his right to challenge the award according to Section 34 para. 2.

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[105] Born p. 2013.

[106] It has also been asserted that the arbitrators do not have a duty to ensure that the award is enforceable, see Lew *et al.* p. 280.

[107] Prop. 1998/99:35 p. 139 and 141 and Heuman 1999 p. 585.

[108] Knuts p. 240 and Hobér p. 301.

[109] Prop. 1998/99:35 p. 141.

[110] SOU 1994:81 p. 256 and Heuman 2003 p. 255.

[111] SOU 1994:81 p. 256 and prop. 1998/99:35 p. 234.

According to Section 33 of the SAA an arbitral award is invalid:

> *"1. if it includes determination of an issue which, in accordance with Swedish law, may not be decided by arbitrators;*
>
> *2. if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system; or*
>
> *3. if the award does not fulfil the requirements with regard to the written form and signature in accordance with Section 31, first paragraph."*

According to the second paragraph of Section 33, the invalidity may apply to a certain part of the award. The points in the provision that could affect the appointment and authority of arbitral secretaries are point 2 and 3. Thus, if the award, or the manner in which the award arose, is clearly incompatible with the basic principles of the Swedish legal system, i.e. violates public policy, the award can be declared invalid. The same applies if the award has not been signed by the arbitrators.[112] The public policy provision may be applicable if there has been a violation of fundamental principles of substantive or procedural law, however, in order for the provision to be applicable, the case must be flagrant.[113]

Pursuant to Section 34 of the SAA an award may be set aside upon motion by a party:

> *"1. if it is not covered by a valid arbitration agreement between the parties;*
>
> *2. if the arbitrators have made the award after the expiration of the period decided on by the parties, or where the arbitrators have otherwise exceeded their mandate;*
>
> *3. if arbitral proceedings, according to Section 47, should not have taken place in Sweden;*
>
> *4. if an arbitrator has been appointed contrary to the agreement between the parties or this Act;*

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[112] Pursuant to Section 31 of the SAA the award shall be signed by the arbitrators. However, it is sufficient that a majority of the arbitrators have signed the award, if it is noted in the award why all of the arbitrators have not signed it. Also, if the parties have agreed thereof, the chairman may alone sign the award.

[113] SOU 1994:81 pp. 172-173 and 289 and prop. 1998/99:35 pp. 142 and 234. According to prop. 1998/99:35 pp. 141-142 situations that could entail a violation of public policy include, for example, awards that have been issued as a result of a crime, e.g. bribery, or awards that obliges a party to a performance that is prohibited by law.

5. if an arbitrator was unauthorized due to any circumstance set forth in Sections 7 or 8; or

6. if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case."

The provisions on challenge of awards are mandatory, and hence the court must set aside an award if the prerequisites are fulfilled.[114] However, it has been argued that the provisions on challenge of awards shall not be applied so strict that the arbitrators cannot handle the proceedings smoothly.[115] An award may be set aside wholly or partially,[116] but an action to set aside the award must be brought within three months from the date when the party received the award or received the award in its final wording, if the award has been corrected, supplemented, or interpreted by the arbitrators.[117]

According to Section 34 para. 2, "[a] party shall not be entitled to rely upon a circumstance which, through participation in the proceedings without objection, or in any other manner, he may be deemed to have waived". The legislator is of the opinion that a party shall not be allowed to await the outcome of the proceedings before he or she decides whether or not a certain circumstance shall be invoked to have the award set aside.[118] Pursuant to the *travaux préparatories* a party must have knowledge of the circumstance for the circumstance to be precluded.[119] However, the Supreme Court has stated that if a party has proof that a certain circumstance exists, that circumstance

[114] SOU 1994:81 p. 290 and prop. 1998/99:35 p. 235.

[115] Heuman 1999 p. 588.

[116] Section 34 para. 1 of the SAA.

[117] Section 34 para. 3 of the SAA.

[118] NJA II 1929 p. 49.

[119] NJA II 1929 p. 49, SOU 1994:81 p. 180, and prop. 1998/99:35 p. 148. The majority of the legal commentators also seems to be of the opinion that only circumstances of which the party had actual knowledge can be precluded, see e.g. Andersson *et al*. p. 175, Nerep pp. 443-444, Lindskog p. 909, and Heuman 1999 p. 296. For a different opinion see e.g. Hobér p. 186, Nordenson 1977 p. 717, and Madsen 2009 p. 281 footnote 878.

should be precluded if a party deliberately refrains from examining that circumstance more closely in order not to get actual knowledge of it.[120]

The points that may affect the appointment and authority of arbitral secretaries are points 4, 5 and 6. If the secretary has taken part in the determination of the dispute to such an extent that he or she can be equated with an arbitrator, point 4 or 5 might be applicable. Pursuant to point 4, an award can be set aside if an arbitrator has been appointed contrary to the agreement between the parties or the SAA. According to point 5, an award can be set aside if an arbitrator was unauthorized due to any circumstance set forth in Sections 7 or 8 of the SAA, i.e. lack of full legal capacity or if there exists any circumstances which may diminish confidence in the arbitrator's impartiality. Lindskog asserts that a third party, who has taken part in the tribunal's determination of the dispute as if he had the position of an arbitrator, can be considered as an unauthorized arbitrator pursuant to point 5.[121] It could, however, be questioned if point 4 would not be a more suitable provision to apply considering that point 5 presupposes that the arbitrator was unauthorized due to a circumstance set forth in Sections 7 or 8 of the SAA.[122] If a secretary has taken part in the determination of the dispute, the problem is not necessarily that the secretary does not have legal capacity or is not impartial, as prescribed by Sections 7 and 8. The problem is rather that a person who has not been duly appointed as an arbitrator has participated in the determination of the dispute to such an extent that he or she can be equated with an arbitrator.[123] Thus, point 4 would generally be a more suitable point to apply. It is however possible to argue that point 5 could be applicable if the secretary has taken part in the tribunal's determination of the dispute to such an extent that he or she can be equated with an arbitrator, if that secretary does not fulfil the requirements regarding legal capacity and impartiality.

[120] NJA 2013 p. 578. Cf. judgment of Svea Court of Appeal in case no. T 677-99.

[121] Lindskog pp. 882-883.

[122] Prop. 1998/99:35 p. 235.

[123] Cf. the Russian Federation's allegation that the arbitral tribunal in the Yukos arbitrations was irregularly composed, as Mr Valasek in practice acted as a fourth arbitrator, see Section VI of the writ.

If a secretary cannot be equated with an arbitrator, the general clause in point 6 may be applicable. According to that provision, an award may be set aside if it has occurred an irregularity in the course of the proceedings. An improper appointment of the secretary or an improper delegation by the arbitrators could be considered as a procedural irregularity which would make the provision applicable. Nevertheless, the point leaves no guidance as to when an improper delegation should be considered to have been made. It can be noted that the point is intended to be applied rather restrictively.[124] For point 6 to be applicable, the procedural irregularity must have occurred without fault of the party and it must also probably have influenced the outcome of the case. Nonetheless, if a material procedural irregularity has occurred it may be presumed that the irregularity influenced the outcome of the case.[125]

In conclusion, if the appointment of the secretary or the arbitrators' delegation can be considered as a flagrant violation of fundamental principles of procedural law or if the arbitrators have delegated the duty to sign the award, the award is invalid. If the arbitrators have delegated tasks to such an extent that the secretary can be equated with an arbitrator, the award can be set aside as the secretary thus can be considered as an unduly appointed arbitrator or potentially because the secretary does not fulfil the requirements regarding legal capacity and impartiality. The award can also be set aside if the appointment of the secretary or the arbitrators' delegation can be considered as a procedural irregularity, provided that the irregularity is without fault of the party and that the irregularity probably has influenced the outcome of the case or that it can be presumed that such influence has occurred. The provisions on invalidity and setting aside of awards, thus, provide some guidance as to the appointment and authority of arbitral secretaries.

[124] Prop. 1998/99:35 p. 148.

[125] NJA 2009 p. 128 and Heuman 1999 p. 637. In NJA 2009 p. 128 the Supreme Court stated that as the arbitration agreement provided that the award should include reasons, a lack of reasons constituted such a material procedural irregularity, which can be presumed to have affected the outcome of the case.

5.3.3 Challenge or Removal of an Arbitrator

Another remedy, which indirectly could affect the appointment and authority of arbitral secretaries, is the possibility to terminate the arbitrator's mission or by other means have the arbitrator removed.

An arbitrator can be discharged by a joint agreement by the parties.[126] If only one party wishes to remove the arbitrator, removal can be accomplished in only a limited number of situations. According to Section 14 para. 2 of the SAA, a party cannot unilaterally revoke the appointment of an arbitrator after the party has notified the opposing party of his choice of arbitrator. Pursuant to Section 17, an arbitrator can, however, be discharged if he or she has delayed the proceedings. Moreover, "[a]n arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator's impartiality", Section 8 para. 2. An arbitrator could potentially also be removed from the proceedings if he or she does not meet the requirement on full legal capacity in Section 7 or a competence requirement which has been agreed upon by the parties.[127]

In a case before the Iran-United States Claims Tribunal,[128] Iran challenged the Chairman of Chamber Three for his alleged "failure to act", asserting *inter alia* that the Chairman's delegation to his legal assistants had been to extensive.[129] The Appointing Authority rejected the challenge.[130] Nevertheless, the case illustrates that a party may attempt to have an arbitrator removed if the arbitrator has delegated an improper amount of tasks

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[126] SOU 1994:81 pp. 132 and 271 and prop. 1998/99:35 pp. 100 and 222.

[127] Lindskog p. 380. The SCC Rules explicitly provide that an arbitrator can be released from his appointment if he or she does not possess the qualifications agreed upon by the parties, see Articles 15 and 16.

[128] The proceedings before the Iran-United States Claims Tribunal are not *per se* traditional arbitral proceedings. The tribunal has been described as an institution *sui generis,* see further Wetter p. 203. However, as is visible from the introduction to the Tribunal Rules of Procedure, the proceedings before the tribunal is based on the UNCITRAL Arbitration Rules. Despite the special nature of the tribunal and the fact that the case is not directly applicable to Swedish arbitral proceedings, the case still serves to illustrate the problem which may arise if a party is of the opinion that the arbitrator has delegated an improper extent of tasks to the secretary. The documents relating to the case are published in the Iran-United States Claims Tribunal Reports vol. 27 pp. 291-336.

[129] Iran-United States Claims Tribunal Reports vol. 27 pp. 293-297 and 324-327.

[130] Iran-United States Claims Tribunal Reports vol. 27 p. 336.

to the secretary. However, the above enumerated possibilities to have an arbitrator removed pursuant to Swedish arbitration law does not seem to provide for a possibility to have the arbitrator removed because he or she has delegated non-delegable tasks to the secretary or because requirements for the appointment of the secretary have not been adhered to, unless both parties agree to terminate the arbitrator's mission. An improper appointment of the secretary or an improper delegation does not necessarily mean that the proceedings are delayed and it does not affect the impartiality of the arbitrator.

The SCC Rules, on the other hand, state that an arbitrator can be removed where the arbitrator "fails to perform his/her functions in an adequate manner".[131] It could be argued that this provision would enable a party to have an arbitrator removed if that arbitrator delegates tasks too extensively to the secretary. However, this provision does not provide any further guidance to the exact dividing line between proper and improper delegation.

5.3.4 Affect the Arbitrator's Right to Compensation

According to Section 37 of the SAA, the parties shall "pay reasonable compensation to the arbitrators for work and expenses". The remuneration to the secretary is generally considered as an expense for the arbitral tribunal.[132] Therefore, it is of interest to discuss whether improper appointment of a secretary or improper delegation to the secretary may affect the reasonableness of the compensation for the expense.

Regarding the requirements for appointment of secretaries, it is mentioned in the *travaux préparatories* that the arbitrators ought to obtain the parties' consent before hiring a secretary, as the reasonableness of the compensation to the arbitrators may, in case of greater expenses, be affected by the parties' attitude to the expense.[133] The

[131] Article 16.1 (iii) of the SCC Rules.

[132] NJA 1998 p. 574, Edlund p. 1038, Lindskog pp. 965 footnote 24 and 973, and Madsen 2006 p. 249 footnote 706.

[133] SOU 1994:81 p. 197 and prop. 1998/99:35 p. 163.

provision provides, thus, some guidance as to the requirements for appointment of secretaries.

It is not as evident, however, that the arbitrators' compensation is affected by the extent of the delegation to the secretary, provided that the parties' consent to the appointment of the secretary has been obtained. Assume that the arbitrators have delegated improper tasks to the secretary and that the expense for the secretary's remuneration, hence, is higher than it would have been if only proper delegation had been made. In such a situation, the secretary would have performed tasks that otherwise would have been incumbent on the tribunal. Consequently, the total costs for the arbitration will generally not have increased,[134] especially since the hourly rate of the secretary usually is lower than the arbitrators'.[135] An argument which focuses on whether the costs of the arbitration have increased may, however, not carry much weight as such a reasoning also would entail that it would not be necessary to obtain the parties consent to the appointment of the secretary as long as the costs of the arbitration did not increase as a result of the use of the secretary. It is not clear whether the legislator presumed that the engagement of a secretary would increase the costs of the arbitration when the statement in the *travaux préparatories* was made. However, if such a presumption is not made it is difficult to explain why the parties' consent to the expense is required.

A judgment from Halmstad District Court implies that the extent of the delegated duties could affect the arbitrator's compensation.[136] In the case, a party had brought an action in the district court against an award regarding the payment of compensation to one of the arbitrators. The party claimed that the court should reduce the arbitrator's compensation that referred to the arbitrator's cost for the secretary of the tribunal. The party claimed that the secretary's assignment was limited to taking minutes and

[134] Cf. Schöldström 2013 p. 136. For a different opinion see Ullman p. 109.

[135] Polkinghorne & Rosenberg p. 109 with reference to Karadelis, *The Role of the Tribunal Secretary*, Global Arbitration Review 21 December 2011 available at http://globalarbitrationreview.com/b/30051/.

[136] Halmstad District Court case no. T 271-83.

performing administrative tasks and that the secretary had performed duties that were not part of his assignment.

The district court stated that the extent of the secretary's tasks had not been regulated through an agreement, but concluded that the tasks the secretary had performed were tasks that regularly are appertained to arbitral secretaries. For this reason and as it was not evident from the case that a limitation on the secretary's assignment had been made by either of the parties, the district court rejected the claim.[137]

The judgment implies that the arbitrator's right to compensation could have been affected by the delegation if the parties had agreed on a limitation on the secretary's authority or if the secretary had performed tasks that were not regularly appertained to arbitral secretaries. However, it should be noted that district court judgments do not have a high value as sources of law in Sweden.[138] Consequently, the prevalent legal position is unclear, but it cannot be precluded that the arbitrators' right to compensation may be affected if the arbitrators have delegated improperly. Nevertheless, this remedy does not provide much explicit guidance as to the extent of the arbitral secretaries' authority.

Regarding proceedings that are conducted under the SCC Rules, it can be noted that the compensation to the arbitrators is based on the amount in dispute and regulated by a fixed table.[139] According to the SCC Guidelines, the fee of the secretary is borne by the arbitral tribunal and the arbitrators' remunerations are reduced in accordance with the allocation decided by the arbitrators.[140] The secretary's expenses or social security contributions are, however, borne by the parties.[141] Considering the fixed fees for the arbitrators and the provisions regarding the secretary's fee in the guidelines, it can be

[137] The district court also emphasised that the arbitrator's delegation had been appropriate and rational from a financial point of view. Moreover, the district court notes that the representatives of both parties had been aware of the delegation of tasks to the secretary and that neither of the representatives had opposed this delegation.

[138] Lehrberg p. 172.

[139] See appendix III to the SCC Rules.

[140] SCC Guidelines p. 6 under "Administrative Secretary".

[141] SCC Guidelines p. 6 under "Administrative Secretary".

assumed that the arbitrators' compensation would most likely not be affected by an improper appointment of or improper delegation to the secretary.

5.3.5 Liability

Even though the SAA does not contain any provisions governing the arbitrators' liability in damages, the general opinion is that the arbitrator' can be held liable for damages towards a party under general contract law principles.[142] However, to the knowledge of the writer, there is no case law on the issue. A general principle is considered to be that, if arbitrators neglect to fulfil their mission, they will be held liable for the damage incurred by the party as a result of the arbitrators' negligence.[143] A common opinion seems to be that arbitrators, *inter alia*, can be held liable for damages if they have not conducted the arbitration in accordance with statutory provisions or the parties' agreement, or if the award is set aside or declared invalid.[144] Accordingly, arbitrators could potentially be held liable for damages if they have not observed requirements for the appointment of the secretary or if they have delegated improperly. Considering the lack of case law and the difficulties in proving damages,[145] the success rate of such a claim can be questioned. Moreover, it has been argued that arbitrators probably cannot be held liable for damages if they have conducted the arbitration in violation of statutory provisions or the parties' agreement, unless the award is set aside or declared invalid due to that fault.[146] Consequently, for the purpose of this essay, the remedy in itself does not provide much further guidance on the appointment and authority of arbitral secretaries. It should also be noted that the SCC Rules include provisions on exclusion of

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[142]Andersson *et al*. p. 95 and Nordenson 1990 p. 29. Cf. NJA II 1929 p. 28 and Lindskog pp. 382-383. It was mentioned in Section 5.2.1 that the nature of the relationship between the parties and the arbitrators is disputed. However, regardless of the nature of that relationship, it has been proposed that the rules on contractual liability can be applied by analogy, see Nordenson 1990 p. 29.

[143] NJA II 1929 p. 28, Lindskog pp. 383 and 388, and Hassler & Cars p. 81.

[144] Lindskog p. 384, Nordenson 1990 p. 29, and Trygger p. 259.

[145] Hassler & Cars p. 81.

[146] Cars p. 69, Hassler & Cars p. 81, and Trygger pp. 259-260. Schöldström asserts, however, that the proposition is inaccurate pursuant to current Swedish law, Schöldström 1998 p. 338.

liability, which provide that the arbitrators are not "liable to any party for any act or omission in connection with the arbitration unless such act or omission constitutes wilful misconduct or gross negligence".[147]

5.3.6 Summary

In relation to the appointment of secretaries, it can be concluded that the arbitrators' compensation in *ad hoc* proceedings may be affected if the parties have not consented to the appointment of the secretary and that a secretary, who is delegated tasks to such an extent that he or she can be equated with an arbitrator, may have to fulfil the requirements regarding legal capacity and impartiality. Otherwise do the remedies not provide much guidance in relation to requirements that arbitrators must observe when appointing arbitral secretaries. Improper appointment of secretaries may, however, lead to liability, decrease of the arbitrators' compensation and invalidity or setting aside of the award.

Regarding the extent of the secretaries' authority, it is principally the provisions on challenge and invalidity of awards that provide some guidance as to what extent arbitrators can delegate tasks to secretaries. A violation of the duty not to delegate improperly does not give a party the right to remove the arbitrator, except if the proceedings are conducted under the SCC Rules where such a possibility potentially exists. The arbitrator's compensation could in *ad hoc* proceedings potentially be affected if the arbitrator has delegated improperly. If the arbitrators have violated an agreement conducted by the parties or provisions in the SAA or if the arbitrators fail to render a valid award, the arbitrators could potentially be held liable for damages.

5.4 Summary

Arbitrators have duties that to some extent may affect the appointment and authority of arbitral secretaries, including the duty to render a valid award, the duty not to

[147] Article 48 of the SCC's Arbitration Rules and Article 47 of the SCC's Rules for Expedited Arbitrations.

delegate improperly and the duty of confidentiality, provided that such an implicit duty exists.

Some of the remedies against arbitrators also affect the appointment and authority of arbitral secretaries. Generally, it is the provisions on invalidity and challenge of awards that provide the most guidance in the matter.

6 Appointment of Arbitral Secretaries – Prerequisites

6.1 Introduction

In Chapter 3 it was concluded that it is not uncommon for arbitral tribunals to engage an arbitral secretary and that such secretaries may be delegated a various extent of tasks. In the light of the conclusions drawn in the previous chapter, this chapter will examine whether there are any requirements that arbitrators must observe when appointing arbitral secretaries, e.g. if there is a specific procedure for the appointment. First it can be noted that the SAA is quiet on the matter. The issue could be regulated by an agreement conducted by the parties, but it could be assumed that such an agreement is not often concluded in practice.[148] Thus, the question arises if there are any requirements or a specific procedure that the arbitrators must observe when hiring secretaries.

6.2 The Consent of the Parties

As parties who submit a dispute for resolution by an arbitral tribunal most likely assume that the dispute shall be handled exclusively by the arbitral tribunal and not involve any third parties,[149] it can be discussed whether the appointment of an arbitral secretary has to be subject to the parties' consent. The result of the 2012 ICCA Survey and a supplementary survey conducted in 2013, 2013 ICCA Survey, affirm that most actors in international arbitration are of the opinion that the parties have to consent to the appointment of a secretary.[150] However, the regulations regarding arbitral secretaries

[148] In practice, parties usually do not take advantage of the autonomy they possess. Parties often include existing model clauses or arbitration rules into their arbitration agreement or delegate to the arbitral tribunal or an arbitration institute to decide the procedural rules, see Fouchard Gaillard Goldman on International Commercial Arbitration p. 152.

[149] Cf. Heuman p. 555.

[150] In the 2012 ICCA Survey, 72.4 % answered that the parties' consent to the appointment of a secretary always is required and in the 2013 ICCA survey, 76.9 % answered that the parties should be required to "consent to the appointment of an Arbitral Secretary in general" and 75.8 % answered that the parties should be required to "consent to the appointment of a particular Arbitral secretary". See Young ICCA Guide on Arbitral Secretaries p. 58 and 73.

that have been adopted by various arbitration institutions demonstrate that the consent of the parties is not always considered as a prerequisite. The SCC Guidelines provide that the arbitrators may not appoint a specific person as secretary if any of the parties disagree to the appointment.[151] A similar approach is found in the International Council for Commercial Arbitration's ("ICC") Note on the Appointment, Duties and Remuneration of Administrative Secretaries ("ICC Note"), JAMS International's Guidelines for the Use of Clerks and Tribunal Secretaries in Arbitrations ("JAMS Guidelines") and Singapore International Arbitration Centre's ("SIAC") Practice Note for Administered Cases – On the Appointment of Administrative Secretaries ("SIAC Note").[152] In contrast, the view of the Arbitration Institute of the Finland Chamber of Commerce ("FAI"), the Hong Kong International Arbitration Centre ("HKIAC") and the Swiss Chambers' Arbitration Institute is that the parties' consent is not a necessity for the appointment of a secretary.[153] Also, consent of the parties is not listed as a prerequisite in the Best Practice for the Appointment and Use of Arbitral Secretaries prepared by the Young ICCA Task Force on the Appointment and Use of Arbitral Secretaries ("Task Force").[154]

[151] SCC Guidelines p. 6 under "Administrative Secretary".

[152] Section 1 para. 5 of the ICC Note stipulates that an arbitral secretary shall not be appointed if a party has objected to the appointment. Point 1 of the JAMS Guidelines provides that the parties must approve of the arbitrators' use of a secretary. Point 3 of the SIAC Note prescribes that a secretary "may not be appointed without consent of all parties".

[153] Article 25.5 of the Arbitration Rules of the Finland Chamber of Commerce states that the parties must be consulted before the appointment of a secretary and according to Section 2.3 of FAI's Note on the Use of a Secretary ("FAI Note"), the tribunal may proceed with the appointment of the secretary, even if a party objects, provided that the tribunal "is convinced that this will benefit all parties by saving time and costs". This view is further affirmed in the institute's Guidelines for Using a Secretary ("FAI Guidelines"), which prescribe that "the arbitral tribunal has sole discretion to decide whether to appoint a secretary or not". Both Article 13.4 of the HKIAC Administered Arbitration Rules and Article 15.5 of the Swiss Rules of International arbitration provide that the arbitral tribunal may appoint a secretary, after consulting with the parties.

[154] Article 2(4) states that "[t]he parties shall be given an opportunity to object to the appointment of the arbitral secretary". According to Article 2(5) "[t]he arbitral tribunal shall rule on the objection unless the administering institution has developed its own procedures in this regard". Finally, Article 2(6) states that "[a]ssuming 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". See Young ICCA Guide on Arbitral Secretaries p. 87.

As mentioned above, the SAA contains no provisions regarding the appointment of arbitral secretaries, but it is mentioned in the *travaux préparatories* that the arbitrators ought to obtain the parties' consent before hiring a secretary as the consent may affect the reasonableness of the arbitrators' compensation.[155] In practice, arbitrators generally appoint secretaries only after the parties' consent has been received,[156] and legal commentators have assumed that the arbitrators are not allowed to appoint a secretary, unless the parties consent thereto.[157] However, only a minority of the commentators present arguments supporting that assumption.

As mentioned in Section 5.2.2, arbitral proceedings are private, which entails that third parties do not have a right to access the proceedings. Accordingly, Jarvin argues that the secretary should be considered as a third party, since he or she is not considered as part of the arbitral tribunal, and therefore does the secretary not have the right to access the proceedings, unless the parties consent thereto.[158] Moreover, hiring a secretary could imply a violation of the arbitrators' confidentiality obligation.[159] However, as discussed in Section 5.2.2, it is uncertain whether the arbitrators are bound by a sanctioned obligation of confidentiality, unless a confidentiality agreement has been concluded. Besides confidentiality, the potential increase in costs has been used as an argument for requiring the parties' consent.[160] Heuman argues that the assistance of a secretary is not

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[155] SOU 1994:81 p. 197 and prop. 1998/99:35 p. 163.

[156] Schöldström 2013 p. 136. See also Nordenson 1984 p. 9 and Ullman p. 109.

[157] Andersson *et al*. p. 94, Jarvin pp. 156-157, and Lindskog p. 602. Cf. Bolding p. 187 footnote 39, who is of the opinion that the parties consent ought to be obtained and Hobér p. 245, who asserts that the parties should be consulted. See also Ekdahl p. 96. Other authors who have presumed that the assertion proposed in the legal literature (that the parties need to consent to the appointment of a secretary) is accurate include: Heuman 2003 p. 555, Schöldström 1998 p. 144, and Hassler & Cars p. 100 footnote 6. It should however be noted that these latter commentators, according to their references, have based their assumptions on the *travaux préparatories,* which only state that the arbitrators ought to obtain the parties' consent, or on statements made by other commentators which allege that it is common practice for arbitrators to obtain the parties consent before the appointment of a secretary. The basis for their conclusions can thus be questioned. The parties' consent is by some commentators generally considered as a prerequisite in international arbitration, see Redfern & Hunter pp. 302-303, Waincymer p. 445 and Onyema para. 3. For a different opinion see Born p. 2045.

[158] Jarvin pp. 156-157.

[159] Lindskog p. 602.

[160] Bolding p. 187 footnote 39.

a necessity for the arbitrators and as the SAA presumes that disputes shall be resolved by three arbitrators, it may be against the parties' wishes to engage a third party in the arbitral proceedings.[161] An order where the arbitrators ask for the parties consent before the appointment of the arbitrator is also consistent with the fundamental principle of party autonomy that permeates the arbitral proceedings.[162]

Given the aforementioned reasons and the fact that a majority of the legal commentators have presumed that consent of the parties is a requirement for the appointment of arbitral secretaries, it can be assumed that a Swedish court would consider the parties' consent as a prerequisite. When the SCC Rules are applied to the arbitral proceeding, the arbitrators are, as previously mentioned, encouraged by the SCC Guidelines to obtain the parties' consent prior to the appointment. The guidelines shall, however, not be considered as additional arbitration rules.[163] Consequently, the arbitrators are not obliged to abide by the guidelines, but as the SCC Rules prescribe that the arbitrators, as a main rule, are under an obligation of confidentiality,[164] arbitrators in proceedings under the SCC Rules have an incentive to follow the guidelines.

An interesting question is what the parties shall consent to; the appointment of a secretary in general, or the appointment of a specific person as a secretary to the tribunal. This question has not been discussed by the commentators who have presumed that the parties need to consent to the appointment of secretaries in Swedish arbitral proceedings. Since the parties consent might be dependent upon whom the secretary is, it would be advised to obtain the parties consent to the appointment of a specific person as secretary. It can be noted that pursuant to the SCC Guidelines, the parties should consent to the appointment of a specific individual as secretary.[165]

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[161] Heuman 2003 p. 555.

[162] According to Heuman, the principle of party autonomy entails that the arbitrators should ask the parties for their view on the matter before making important procedural decisions, see Heuman 1999 p. 267.

[163] See the introduction to the SCC Guidelines.

[164] Article 46 of the SCC's Arbitration Rules and Article 45 of the SCC's Rules for Expedited Arbitrations.

[165] SCC Guidelines p. 6 under "Administrative Secretary".

If consent of the parties is considered as a prerequisite, an interesting question is what a lack of the parties' consent could entail. As mentioned above, it could be argued that a lack of the parties' consent constitutes a breach of a confidentiality obligation, provided that such an obligation exists. A breach of a confidentiality obligation could imply liability to damages or other prescribed sanctions, if the confidentiality derives from an agreement. The remuneration to the arbitral tribunal can also indirectly be affected, at least in *ad hoc* proceedings.

Furthermore, it could be argued that the award can be set aside if the arbitrators have engaged a secretary without the consent of the parties. Parties who agree to settle their dispute through arbitration must reasonably presume that the dispute shall be handled by no one other than the appointed arbitrators,[166] unless they have agreed to involve an arbitration institute in the proceedings. Thus, it can be argued that a procedural irregularity pursuant to Section 34 para. 1 point 6 has occurred if the parties' consent to the appointment of the secretary has not been obtained. However, it is not given that every use of assistance from third parties shall be considered as a procedural irregularity and also, it can be difficult to prove that the use of a secretary probably influenced the outcome of the case. However, the greater the extent of the delegation is, the more tenable it would be to argue that the irregularity is so material that an influence on the outcome of the case can be presumed.

In this connection, it can be noted that the consent potentially also could affect the extent of the secretary's authority. If the parties' consent has been obtained, the parties can be considered to have accepted that the arbitrators might delegate certain tasks to the secretary, whereas a secretary who has been appointed without the consent of the parties potentially may not even be authorised to perform basic administrative tasks.[167] Consequently, it can be assumed that the arbitrators can delegate tasks to a greater

[166] Cf. Heuman 2003 p. 555.

[167] Cf. Redfern & Hunter p. 303, who asserts that arbitrators are not allowed to delegate any duties unless the parties have granted them authority to do so. Also, performance of administrative tasks may entail that the arbitrators violate their confidentiality obligation, provided that such an obligation exists.

extent if the parties have consented to the appointment of the secretary compared to situations where the parties' consent has not been obtained.

6.3 A Comparison with the Appointment of Arbitrators

In the previous section it was concluded that the arbitrators ought to obtain the parties' consent before hiring a secretary. The parties' consent is the only prerequisite for the appointment of arbitral secretaries that have been discussed in the legal literature on Swedish arbitral proceedings, but it can be discussed whether there are other prerequisites. There is only one actor in the arbitral proceedings for which the SAA stipulates specific prerequisites; the arbitrator. As secretaries perform tasks that otherwise would be incumbent on the arbitrators, it is of relevance to examine whether the prerequisites that apply to arbitrators also should be considered applicable to arbitral secretaries. Considering the secretaries' position in the arbitral proceedings and their possible influence on the outcome of the dispute in relation to the arbitrators', it could be argued that more extensive requirements cannot be imposed on secretaries than those imposed on arbitrators, without support in a source of law.

As opposed to the situation with arbitral secretaries, the SAA carefully regulates how arbitrators shall be appointed, even if that procedure can be altered through an agreement concluded by the parties.[168] There are also some basic requirements set out in the SAA, which the appointed arbitrators must meet. An arbitrator must be impartial and possess full legal capacity in regard to his actions and his property.[169] Also, an arbitrator shall immediately disclose all such circumstances, relating to his legal capacity or his impartiality, which potentially could prevent him or her from acting as an arbitrator.[170]

[168] Section 12 of the SAA states that the parties may determine how the arbitrators shall be appointed, but if the parties have not entered into an agreement regarding the appointment procedure, Sections 13-16 of the SAA will be applicable.

[169] Sections 7-8 of the SAA.

[170] Section 9 of the SAA.

Without an explicit provision in the SAA, it is difficult to argue that secretaries must be appointed in the same way as arbitrators and that they must meet the same requirements regarding legal capacity and impartiality, including the requirement to disclose such circumstances, as an arbitrator must meet, provided that the parties have consented to the appointment of the secretary. The provisions governing appointment of and requirements for arbitrators explicitly refer to *the arbitrator* and it can be argued that an analogous application of the provisions entails a limitation on the party autonomy, which should require support in a source of law. Also, it can be noted that the provisions regarding the procedure for appointment of arbitrators are optional.[171] Therefore, even if the provisions where to be applied analogously on the appointment of secretaries, the parties' consent to the appointment would make the appointment legit. Concerning requirements for secretaries, Born is of the opinion that requirements of independence and impartiality, similar to those imposed on arbitrators, can be imposed on secretaries, even in instances where the matter is not regulated by legislation or institutional rules.[172] An analogous application of the provisions regarding legal capacity and impartiality may be motivated if the arbitrators have delegate tasks of such an extent that the secretary can be equated with an arbitrator.[173]

Due to the lack of statutory provisions and case law, it must be considered as unclear whether other prerequisites than the parties' consent exist.

6.4 Summary

The SAA does not stipulate any requirements for arbitral secretaries or a specific procedure for the appointment of the secretary. However, the arbitrators ought to

[171] Section 12 para. 2 of the SAA.

[172] Born p. 2045. Cf. general standard 5 (b) of the IBA Guidelines on Conflicts of Interest in International Arbitration, which states that arbitral secretaries have a duty of independence and impartiality equivalent to the arbitrators'. According to the explanation to general standard 5, that duty includes a duty of disclosure.

[173] In Section 5.3.2 it was mentioned that Section 34 para. 1 point 5 of the SAA, which prescribes that an award can be set aside if an arbitrator did not fulfil the requirements for legal capacity and impartiality, potentially could be applicable if the secretary performs tasks of such an extent that he or she can be equated with an arbitrator.

obtain the parties' consent before engaging an arbitral secretary in the proceedings. Such an order is consistent with the fundamental principle of party autonomy that permeates the arbitral proceedings. Furthermore, a lack of the parties' consent could potentially entail liability, a decrease of the arbitrators' compensation and challenge or invalidity of the award. The consent should preferably refer to the appointment of a specific person as secretary. It is unclear whether there are other prerequisites, besides the parties' consent, to the appointment of arbitral secretaries.

7 Authority of Arbitral Secretaries

7.1 Introduction

In Chapter 3 it was concluded that the nature of the tasks delegated to secretaries in practice varies from strictly administrative to more judicial tasks. The purpose of this chapter is to investigate if arbitrators are allowed to delegate such a great variation of tasks to their secretaries in Swedish arbitral proceedings. Given the conclusions drawn in Chapter 5, the discussion in the following sections regarding the dividing line between proper and improper delegation will mostly focus on when delegation could cause the award to be declared invalid or set aside pursuant to Sections 33 and 34 of the SAA. The discussion in this chapter presupposes that the arbitrators have obtained the parties consent to the appointment of the secretary.[174]

First, it will be discussed to what extent agreements conducted by the parties affect the secretaries' authority. Subsequently it will be discussed to what extent arbitrators can delegate tasks to secretaries, provided that the parties have not agreed on the authority. That discussion will be divided into to two sections, where the first concerns administrative tasks and the second concerns tasks of a judicial nature. In this discussion it should be remembered that the main rule is that arbitrators can organize the proceedings at their own discretion to the extent that mandatory provisions in the SAA or agreements concluded by the parties do not provide any guidance.[175]

[174] For a discussion on the extent of the secretaries' authority if the parties' consent have not been obtained please refer to Section 6.2. It shall be noted that many commentators do not seem to differentiate between situations where the parties' consent have or have not been obtained. This is, however, not problematic for this thesis as it can be assumed that tasks which arbitrators can delegate even if the parties' consent to the appointment have not been obtained, also must be delegable if the parties consent have been obtained. As was mentioned in Section 6.2, it can be argued that the arbitrators can delegate tasks to a greater extent if the parties have consented to the appointment of the secretary, compared to situations where the parties' consent have not been obtained. Similarly, it can be assumed that tasks that are not delegable even if the parties have consented to the appointment of the secretary, neither are delegable when such consent has not been obtained.

[175] See Section 2.3 above.

7.2 Party Agreements Governing the Secretary's Authority

As mentioned in Section 2.3, party autonomy is the prevailing principle that governs the arbitral proceedings and the arbitrators are, as a main rule, obligated to adhere to the parties' joint instructions. If the parties' instructions are not obeyed by the arbitrators, the arbitrators may be liable for damages and the award may be set aside.[176] It can be noted that, if the parties have regulated the secretary's authority through an agreement, a breach of that agreement cannot be challenged under Section 34 para. 1 point 2, which governs the arbitrators' excess of mandate, since that provision refers to the arbitrators' substantive determination of the dispute and not the conduct of the arbitral proceedings.[177] The applicable provision would instead be the general clause in Section 34 para. 1 point 6, according to which an award may be set aside if it has occurred an irregularity in the course of the proceedings.[178] In NJA 2009 p. 128, the Supreme Court stated that if the tribunal did not comply with party instructions governing how the arbitral proceedings should be conducted, a procedural irregularity would generally have been committed under point 6. However, it is not clear if every small deviation from the parties' agreement constitutes a procedural irregularity pursuant to point 6.[179]

Consequently, it is principally the parties' instructions that affect the secretary's authority if such instructions have been given. The authority is, however, still affected by the provisions on challenge and invalidity of awards. This means that the delegation of a task, which is permitted pursuant to the parties' agreement, potentially could be in violation of Sections 33 or 34 of the SAA. However, it should be remembered that the rule on preclusion of circumstances in Section 34 para. 2 prevents a party in a proceeding to set aside an award from relying upon a circumstance which he or she may be deemed to have waived, *inter alia* by participating in the proceedings without objection. Moreover, it can be argued that the provision in Section 34 para. 1 point 6 cannot be

[176] As regards liability, please refer to Section 5.3.5 above.

[177] NJA 2009 p. 128.

[178] NJA 2009 p. 128, Heuman 1999 p. 652, and Lindskog p. 901.

[179] See further Heuman 1999 pp. 652-653.

applied to delegation that is permitted according to an agreement concluded by the parties, as it would be difficult to argue that such a delegation constitutes an irregularity that has occurred without fault of the party. Consequently, it is principally the provisions on invalidity of awards that impose a limitation to the parties' disposal of the secretary's authority. As mentioned in Section 5.3.2, the parties cannot limit the applicability of the provisions on invalidity of awards. The parties can therefore, *inter alia*, not agree that the arbitrators can delegate the task to sign the award.[180]

The following two sections will discuss the extent of the secretary's authority provided that the parties have not concluded an agreement governing the issue.

7.3 Administrative Tasks

The general opinion amongst legal commentators is that a secretary is allowed to perform tasks of an administrative character.[181] Some commentators argue that the secretary solely should perform administrative tasks and consequently, not perform tasks of a judicial character.[182] Tasks that usually are described as being of an administrative nature include *inter alia* organising travels, arranging hearing rooms, and administering the parties' written submissions.[183] However, no uniform definition of "administrative" is to be found. It is uncertain when a task goes from being strictly administrative to including legal elements. Thus, even though there is a consensus among legal commentators that arbitral secretaries may perform administrative tasks, it does not provide much guidance in practice.

If the parties have consented to the appointment of a secretary, it is difficult to argue that the arbitrators have violated the duty not to delegate improperly by delegating administrative tasks. As the general opinion seems to be that secretaries usually

[180] Cf. Heuman 2003 pp. 255-256.

[181] Andersson *et al*. p. 94, Schöldström 1998 pp. 329-330, Waincymer p. 445, Redfern & Hunter p. 301, and Polkinghorne & Rosenberg p. 123. This approach is confirmed by many of the existing regulations governing the role of arbitral secretaries, see further Section 8.3.

[182] Andersson *et al*. p. 94. Cf. Section 2 of the ICC Note and Section 2 of the SIAC Note.

[183] See for example Waincymer p. 445 and Section 2 of the ICC Note.

perform, and are allowed to perform, administrative tasks, it can be presumed that parties who have agreed to the appointment of a secretary also have agreed to the secretary performing administrative tasks. Thus, it is hard to argue that the provisions on invalidity and challenge of awards can be applicable when the parties have consented to the appointment of a secretary.[184]

7.4 Judicial Tasks

7.4.1 Introduction

In the following sections, an overview of the discussion on the extent of the secretary's authority regarding tasks of a more judicial character will be presented.[185] First, a survey over proposed general dividing lines between proper and improper delegation will be presented. Secondly, tasks that specifically relate to the reaching of the tribunal's decisions will be discussed. Thirdly, tasks that relate to the recording of the tribunal's decision will be examined.

As concluded in Chapter 5, it is principally the provisions on challenge or invalidity of awards that determine the secretary's authority, when the parties have not regulated the matter through an agreement. Thus, pursuant to Section 33 of the SAA, arbitrators are not allowed to delegate tasks to such extent that a flagrant violation of fundamental principles of procedural law is considered to have occurred and the arbitrators cannot delegate the duty to sign the award. Moreover, an award can be set aside pursuant to Section 34 if the arbitrators have delegated tasks to such an extent that the secretary can be equated with an arbitrator or, under certain circumstances, if a procedural irregularity has occurred. Considering that the provisions do not provide much guidance as to the secretary's authority and that there is a lack of case law on the issue, it is of relevance to discuss the standpoints asserted in the legal literature. Many

[184] Cf. Schöldström 1998 p. 330, who contends that it, in determining whether the secretary's participation in the assessment of the merits of the dispute shall affect the validity of the award, would be "appropriate to start with what the arbitrants have expected or ought they be taken to have expected".

[185] For an overview of the arguments against and in support of the secretary performing tasks which are not strictly administrative see Partasides *et al*. 2013 pp. 331-332.

commentators do not refer their standpoints regarding the extent of the arbitrators' delegable duties to the provisions on challenge or invalidity of awards. However, if the arbitrators have delegated non-delegable duties, the delegation could at least be considered as a procedural irregularity and thus the award may be set aside, provided that the remaining prerequisites in Section 34 para. 1 point 6 are applicable. If the delegated duty is of a certain qualified nature it is possible that the provisions regarding unduly appointed arbitrator and violation of public policy also are applicable, see Section 34 para. 1 point 4 and Section 33 para. 1 point 2 of the SAA.

7.4.2 Proposed Dividing Lines between Proper and Improper Delegation

Various dividing lines between proper and improper delegation have been propounded in the literature on international arbitration. It has for example been contended that the arbitrators are not allowed to delegate any of their duties, unless the parties have granted them authority to do so.[186] Other commentators assert that it is only tasks of a more judicial nature that cannot be delegated. According to Born the non-delegable duties of the arbitrators include "deciding a case, attending hearings or deliberations, and evaluating the parties' submissions and evidence".[187]

The International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association contend that "[t]he appointment of a secretary may be reconciled with [the *intuitu personae* nature of the arbitrator's mission] as long as the arbitral tribunal exercises both close supervision of and has ultimate authority over the decision-making process".[188] Other commentators emphasise that a secretary may not usurp the functions of the arbitral tribunal or influence the tribunal's decision.[189]

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[186] Redfern & Hunter p. 303.

[187] Born p. 1999.

[188] Secretaries to International Arbitral Tribunals p. 586.

[189] Born p. 2000 and Redfern & Hunter p. 301. See also Waincymer p. 92, who asserts that the arbitrators are allowed to delegate tasks as long as it does not entail that the third party exercises "an adjudicative function or otherwise unduly influences the tribunal".

Many legal commentators, thus, seem to focus on that the secretary shall not assume any decision-making powers or otherwise be allowed to influence the arbitrators' decision. The same approach permeates several of the regulations regarding the duties of arbitral secretaries which have been issued by arbitration institutions.[190] Although that approach is generally accepted, it is not easy to determine whether the performance of a certain task entails that the secretary influences the arbitrators' decision or assumes a decision-making function.

Tercier asserts that the decision may not necessarily be affected just because the arbitrators have been assisted by another person.[191] Some commentators have assumed that the secretary indirectly will have some influence over the arbitral tribunal, even if the secretary performs basic tasks such as summarising the facts of the dispute.[192] Tercier seems to maintain that the arbitrators can retain their decision-making power by providing the secretary with clear instructions and by controlling and supervising the secretary's work.[193] Partasides suggests that it is for the arbitrators to decide how much they can delegate without risking the control over the decision-making.[194] Generally, it can be presumed that the secretary is more likely to influence the arbitrators' decision, the more the secretary is assigned tasks of a non-administrative nature.[195] The following sections will discuss in more detail whether certain tasks may be considered as proper or improper to delegate.

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[190] See *inter alia* Section 3.4 of the FAI Note and Section 3.4 of the HKIAC's Guidelines on the Use of a Secretary to the Arbitral Tribunal.

[191] Tercier p. 541.

[192] Partasides *et al*. 2013 p. 330.

[193] Tercier pp. 545-547. Cf. Partasides, who asserts that "[a]n arbitrator should never rely on a secretary's work to the exclusion of his own review of the file", see Partasides 2002 p. 157.

[194] Partasides 2012 p. 87. The statement is, however, made only in relation to whether the arbitrator can delegate the full drafting of the award to the secretary.

[195] Secretaries to International Arbitral Tribunals p. 586. Newman and Zaslowsky point out that "[i]n a sense, almost any work that a secretary might do for a tribunal of a non-administrative nature might be regarded as influencing, in some way, the tribunal's decision", see Newman & Zaslowsky 2015 para. 18.

7.4.3 Reaching the Decision

It is generally accepted that the arbitrators are not permitted to delegate their decision-making powers to the secretary.[196] Moreover, it has been argued that arbitrators cannot delegate to a secretary to attend a hearing in his or her place. [197] As these types of tasks could be considered to constitute fundamental aspects of the arbitrators' duty to decide the case,[198] it could be argued that the secretary in such situations can be equated with an arbitrator. Thus, the award could be challenged on the ground that an arbitrator was unduly appointed. It has also been argued that if the case has been decided solely by a secretary and the arbitrators have not made an independent assessment of the case, there has been a violation of public policy and thus, the award is invalid pursuant to Section 33 of the SAA.[199]

In the legal literature it has been asserted that the secretary is allowed to attend the tribunal's deliberations.[200] It has been argued, though, that the secretary's attendance during the deliberations is subject to the consent of the arbitrators due to the confidential nature of the deliberations.[201] Nevertheless, it shall be noted that there is no consensus among legal commentators regarding whether the secretary can participate actively in the discussions during the deliberations. Heuman asserts that if

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[196] Heuman 2003 p. 493, Born p. 1999 and 2043, and Polkinghorne & Rosenberg p. 127. See also Bolding p. 187 footnote 39. According to Heuman 2003 p. 493, derogation of the principle is allowed if the parties consent thereto. That the arbitrators are not allowed to delegate their decision-making powers to a third party was affirmed by the Italian Supreme Court in Sacheri v. Robotto, where the court stated that if the arbitrators are to decide the dispute according to rules of law and not decide *ex aequo et bono*, the arbitrators cannot delegate to a third party to decide legal issues, Sacheri v. Robotto, Corte di Cassazione [Supreme Court], 2765, 7 June 1989, paras. 3 and 4 of the decision. It can be noted that the third party in the case was a lawyer who was appointed as an expert and not an arbitral secretary. See also Threlfall v. Fanshawe (1850) 19 LJQB 344 (English Q.B.) in which the court, according to Born p. 1999 footnote 226, concluded that the "arbitral tribunal commits misconduct if it delegates decision to another".

[197] Born p. 2000.

[198] Cf. Born p. 1999.

[199] Heuman 2003 p. 589.

[200] Heuman 2003 p. 486 and Born p. 2043. The same approach has been adopted in a decision by a German court, see Born p. 2045 footnote 536 with reference to judgment of 3 November 1916, 1917 JW 46, 47 (German Reichsgericht).

[201] Berger pp. 256-257. Cf. Tercier p. 547. For another opinion see Heuman 2003 p. 486, who states that a secretary "of course [may] be present".

the parties have agreed to the appointment of a secretary, the parties thereby can be considered to have accepted that the secretary may express his or her views during the deliberations.[202] Other commentators contend that the secretary should not actively take part in the tribunal's deliberations.[203]

The secretary could be considered as an unduly appointed arbitrator if he or she has participated improperly in the deliberations of the tribunal.[204] If the secretary's participation in the deliberations was of a lesser extent, the delegation might be considered as a procedural irregularity pursuant to Section 34 para. 1 point 6 of the SAA.[205] For the award to be challenged in such a situation, the irregularity must have probably influenced the outcome of the case. Such an influence could be hard to prove,[206] but according to Lindskog it can be argued that a third party's active participation in the deliberations can be presumed to have influenced the outcome of the case.[207]

In relation to other tasks that lead up to the arbitrators' decision, it has been argued that the secretary may attend the hearings.[208] Moreover, several legal commentators are of the opinion that the secretary may perform tasks such as legal research, organising files and witness statements and summarise the parties' positions and their evidence.[209] However, such delegation presupposes, according to some commentators, that the arbitrators carefully conduct their own independent review of the material and

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[202] Heuman 2003 p. 493. Cf. Schöldström 1998 p. 330, who argues that the permissibility of the secretary's active participation in the assessment of the dispute should be dependent upon what the parties had to expect, which will vary from arbitration to arbitration.

[203] Redfern & Hunter p. 301 and Polkinghorne & Rosenberg p. 125. See also Tercier p. 547 with reference to judgment of 21 June 1990, Compagnie Honeywell Bull SA v. Computacion Bull de Venezuela CA, 1991 Rev. arb. pp. 96-102 (Paris Cour d'appel).

[204] Cf. Lindskog pp. 882-883. As mentioned in Section 5.3.2 Lindskog asserts, however, that the secretary in such a situation would be considered an unauthorized arbitrator pursuant to Section 34 para. 1 point 5 of the SAA and not as an unduly appointed arbitrator pursuant to Section 34 para. 1 point 4.

[205] Lindskog p. 905.

[206] Cf. Berger pp. 256-257 and Lindskog p. 905 footnote 225.

[207] Lindskog p. 905 footnote 225.

[208] Born p. 2043 and 2045.

[209] Born p. 2000, Waincymer p.445, Polkinghorne & Rosenberg pp. 123-124, Partasides 2002 pp. 157-158, and Partasides 2012 p. 87.

that they make an independent judgment.[210] It has also been asserted that the secretary's performance of research tasks "must be at the detailed direction of a member of the tribunal".[211]

As shown above, the opinions regarding the extent of the secretaries' authority varies amongst legal commentators and to the knowledge of the writer there is no Swedish case law that clarifies the prevalent legal position. A discussion on the type of tasks regularly assigned to arbitral secretaries can, however, be found in the judgement of Halmstad District Court regarding reduction of an arbitrator's compensation, which was discussed under Section 5.3.4. [212] In the case it was undisputed that the secretary had been present at all hearings and deliberations, had reviewed and structured evidence and background material and presented it to the tribunal, had conducted legal research, and had conducted purely administrative tasks, including handling the communication between the arbitrators and the parties.

The district court stated that the extent of the secretary's tasks had not been regulated through an agreement, but concluded that the aforementioned tasks were tasks that regularly are appertained to arbitral secretaries. Based on *inter alia* this reason, the district court rejected the claim to reduce the arbitrator's compensation.

As the case did not concern challenge or invalidity of the award it cannot be concluded whether the aforementioned types of tasks can be delegated to a secretary pursuant to the provisions on challenge and invalidity of awards. Moreover, judgments of district courts do not have a high value as sources of law in Sweden.[213] Therefore, the case does not clarify the prevalent legal position in relation to the extent of the authority of arbitral secretaries. Nonetheless, it can be argued that since these types of tasks are considered to be regularly appertained to arbitral secretaries, parties who have consented to the

[210] Partasides 2002 pp. 157-158, Born p. 2000, and Waincymer p. 445.

[211] Polkinghorne & Rosenberg p. 124.

[212] Halmstad District Court case no. T 271-83.

[213] Lehrberg p. 172.

appointment of a secretary, also have consented to the secretary performing these types of tasks, unless stated otherwise.

To conclude, no clear dividing line between proper and improper delegation can be established in relation to tasks that are performed in order to reach the decision. It can, however, be assumed that if the arbitrators delegate the decision-making function to the secretary, the secretary can be considered as an unduly appointed arbitrator, and it could also be considered as a breach of public policy.

7.4.4 Recording the Decision

In relation to the recording of the tribunal's decision, it can first be noted that it is evident from the provision on invalidity of awards in Section 33 of the SAA that the arbitrators cannot delegate the duty to sign the award.[214]

Regarding the drafting of the award, there is no consensus as to how much assistance, if any, the arbitrators are allowed to obtain from the secretary. In the case before Halmstad District Court, which was referred to above under Section 5.3.4, the court stated that it regularly appertained to an arbitral secretary to take part in the drafting of the award. It is, however, not evident from the judgment what that participation consisted of. Consequently, the case does not provide much clarity to the prevalent legal position.

It has been asserted that the arbitrators violate their duty not to delegate improperly if they merely sign an award that has been drafted by a secretary.[215] If this entails that the arbitrators have delegated the task to decide the case to the secretary and that they, as a result, have not made an independent assessment of the dispute, the delegation could constitute a violation of procedural public policy, which thus would make the award

[214] As Section 31 of the SAA provides that the award shall be signed by the arbitrators, an award could be declared invalid pursuant to Section 33 para. 1 point 3 of the SAA if the award is signed only by the secretary.

[215] Born p. 2000.

invalid pursuant to Section 33 of the SAA.[216] It could also be argued that the secretary in such a situation have acted as an unduly appointed arbitrator.

If the arbitrators have decided the dispute, but entrusted the secretary with the task of drafting the award, it is not as evident whether the arbitrators' delegation is in violation of the duty not to delegate improperly. Heuman argues that if the parties have agreed to the appointment of a secretary, the parties can be considered to have accepted that the task of drafting the award may be delegated to the secretary.[217] However, the arbitrators should, according to Heuman, issue instructions on how the rationale shall be written, if they want to delegate to the secretary to draft the award.[218] Other commentators have proposed similar restrictions on the delegation of drafting awards.[219]

Regarding delegation to the secretary to draft parts of the award, Born argues that such delegation is allowed, provided that the arbitrators carefully review the secretary's work.[220] However, as Partasides points out:

> *"[e]ven a careful review by an arbitrator of a secretary's first draft does not entirely remove the scope given to the secretary to make judgments as to what to emphasize and what to omit, judgments that the arbitrator reviewing the draft may not even be able to identify never mind control".*[221]

Partasides emphasizes that drafting the award is "the ultimate safeguard of intellectual control" and that the arbitrators therefore shall restrict the secretary's participation in

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[216] Heuman 2003 p. 589.

[217] Heuman 2003 p. 493.

[218] Heuman 2003 p. 493.

[219] See *inter alia* Tercier p. 547, who contends that the secretary should be allowed to assist in the drafting of the award provided that the tribunal "keeps control over the drafting process as well as the specific content of the draft and ensures that it duly reflects its deliberation and its reasoning". See also Waincymer p. 92, who asserts that the tribunal may be allowed to delegate to the secretary to write parts of the award, provided that the drafting is done "under the direction of the tribunal and flow from its own independent determinations".

[220] Born p. 1999.

[221] Partasides 2002 p. 158.

the drafting process.[222] Partasides proposes that the secretary should be allowed to draft formal and uncontroversial portions of the award, which do not influence the arbitrator's control over the decision-making.[223] Waincymer contends that it is accepted that the secretary is allowed to draft "the introductory portion of an award",[224] but not "[t]he essential parts of the award".[225] Polkinghorne and Rosenberg propose a similar approach and assert that the secretary is allowed to draft procedural orders and non-substantive parts of the award, but may not draft substantive parts of the award.[226] Onyema, on the other hand, is of the opinion that arbitrators should not delegate the tasks to draft procedural orders or to write portions of the award.[227]

To conclude, the secretary is not allowed to sign the award and the arbitrators must not delegate the task to write the entire award if it entails that the arbitrators do not make an independent assessment of the dispute. Other than that, can no clear dividing line between proper and improper delegation be established in relation to the recording of the decision.

7.4.5 Summary

In the presentation above, it has been established that the prevalent legal position is unclear in relation to the extent of the secretaries' authority to perform tasks of a judicial nature. Delegation of certain types of tasks is clearly not permitted pursuant to

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[222] Partasides 2002 p. 158.

[223] Partasides 2002 p. 158 and Partasides 2012 p. 87. Partasides further contends that it is for the arbitrator to decide how much of the drafting of the award he or she can delegate without the decision-making control being at risk, see Partasides 2012 p. 87 and Partasides *et al*. 2013 p. 332.

[224] To exemplify Waincymer mentions the following parts of an award, which thus would be permissible to delegate to the secretary to draft: "parts outlining the identities of the parties and counsel and if included, the procedural history and a brief outline of page the non-controversial facts", see Waincymer pp. 445-446.

[225] Waincymer p. 446.

[226] Polkinghorne & Rosenberg pp. 125-126. Polkinghorne and Rosenberg further contend that the secretary only is permitted to prepare such drafts if the arbitrators have provided the secretary with clear guidance and if the arbitrators will examine the draft before it is finalized, Polkinghorne & Rosenberg p. 125.

[227] Onyema para. 4.

Sections 33 and 34 of the SAA, namely the tasks to sign the award and the task to decide the dispute.

Besides the clearly non-delegable duties mentioned above, there are several dividing lines which at the moment cannot be established. As regards many types of tasks discussed above there is no consensus in the legal literature as to whether they are delegable or not. Furthermore, it is not clear how qualified the secretary's tasks can be before he or she is considered as an unduly appointed arbitrator or before the delegation is considered as a violation of public policy. There is, thus, not a clear dividing line as to when delegation becomes a procedural irregularity and it is further not clear when a delegation goes from being a procedural irregularity to becoming a more qualified ground for challenge or invalidity of the award. Moreover, a general thought in the legal literature seems to be that the secretary should not exercise unduly influence on the arbitrators' decision or assume the arbitrators decision-making function, but it is not evident when influence occurs to such an extent that the award can be declared invalid or set aside.

7.5 Conclusion

It is an intricate question to determine where the dividing line between proper and improper delegation lies. If the parties have agreed on the authority of the secretary, the question is not that complicated, since the secretary's authority is determined by the parties' agreement with the limitations provided by mainly the provisions on invalidity of awards.

If the parties have not entered into an agreement that governs the authority of the secretary, the authority is subject to the arbitrators' discretion. That discretion is, however, restricted by the provisions on challenge and invalidity of awards. As those provisions are of such general wording, there are not that many tasks which unquestionably can be compartmentalized as a task that either can or cannot be delegated. As a result, the exact dividing line between proper and improper delegation cannot be established. In the end, the authority of arbitral secretaries will be

determined by the case law on challenge and invalidity of arbitral awards.[228] At the moment, it can only be assumed that secretaries which have been appointed with the consent of the parties are allowed to perform administrative tasks and that the arbitrators are not permitted to delegate their decision-making function or the duty to sign the award.

[228] Cf. Heuman 2003 p. 265, who in relation to a discussion on the arbitrators' discretionary powers states that "[c]hallenge case law indicates the outermost limits of what is acceptable, but within the limits of acceptability several more or less appropriate procedural solutions are possible".

8 Discussion Regarding the Need for Regularisation

8.1 Introduction

In Chapter 7 it was concluded that Swedish law does not provide much guidance as to the authority of arbitral secretaries. Therefore, the following section shall be devoted to discussing whether a regulation governing the authority of arbitral secretaries is needed. After that question has been answered affirmatively, it is of interest to discuss the appropriate form and content of such a regulation. However, before that question is discussed, a survey over some of the existing regulations on the matter will be presented. It should be noted that none of these existing regulations are directly applicable to the types of proceedings that are subject to this thesis. The survey only serves as a basis for the subsequent discussion on the appropriate form and content of a regulation for Swedish arbitral proceedings.

8.2 The Need for a Regulation Governing the Authority of Secretaries

Even though arbitral secretaries are used in Swedish arbitral proceedings, there is not much guidance to be found on the authority of secretaries. It could be argued that the lack of case law from Swedish courts, where the secretary's authority has been discussed, indicates that it does not exist a need for further guidance on the matter. Some may contend that the problem is theoretical rather than practical. However, the Russian Federation's allegation in the challenge proceedings against the awards in the Yukos-arbitrations shows that the problem could become practical.

Further guidance on the secretaries' authority could facilitate for arbitrators to render awards that will not be declared invalid or set aside. Moreover, further guidance could potentially limit the number of challenge proceedings, since it would be easier for the parties to determine whether the secretary actually had exceeded his or her authority. Hence, in a clear case, the parties would have less reason to dispute the matter.

Some might argue that the need for further guidance is satisfied by the best practice stated in the Young ICCA Guide on Arbitral Secretaries. However, as will be shown below, the best practice may not necessarily represent the prevalent legal position in

Sweden and consequently, should the best practice not be adhered to without making independent considerations that take into account *inter alia* the provisions on challenge and invalidity of awards.

Considering the above mentioned reasons, further guidance on the authority of arbitral secretaries in Swedish arbitral proceedings would benefit the different actors of international arbitration and therefore it should be considered to regulate the issue. In the context it can be noted that 57.4 % of the participants in the 2012 ICCA Survey affirmed that greater regulation governing the secretary's role and function would be beneficial to the arbitral proceedings.[229]

8.3 Existing Regulations

8.3.1 Introduction

The increasing use of arbitral secretaries and the debate on their authority has caused several actors in international arbitration, mainly arbitration institutions, to adopt various forms of regulations governing the authority of arbitral secretaries. Some regulations only provide that the arbitrators, under certain circumstances, are allowed to engage secretaries without explicitly stating the secretaries' authority.[230] Other regulations explicitly govern the extent of the secretaries' authority. In the following sections, the nature and the content of some of the latter type of regulations will be discussed.[231]

[229] Young ICCA Guide on Arbitral Secretaries p. 67.

[230] See for example the SCC Guidelines, Article 15.5 of the Swiss Rules of International Arbitration, Article 365 of the Swiss Civil Procedure Code of 19 December 2008 (Status as of 1 May 2013), and Article 21(3) of the Arbitration Rules of the Nordic Arbitration Centre of the Iceland Chamber of Commerce.

[231] The following survey of existing rules is not exhaustive. Regulations which directly or indirectly govern the authority of arbitral secretaries, but that will not be discussed in the following sections include HKIAC's Guidelines on Use of Secretary to Arbitral Tribunal, UNCITRAL Notes on Organizing Arbitral Proceedings and the American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes. For a more thorough survey over existing regulations please refer to Polkinghorne & Rosenberg's article *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*.

8.3.2 ICC Note

The ICC Rules of Arbitration do not regulate the appointment and authority of arbitral secretaries. However, the ICC has issued a Note on the Appointment, Duties and Remuneration of Administrative Secretaries of 1 August 2012. The ICC Note replaced the Note Concerning the Appointment of Administrative Secretaries by Arbitral Tribunals of 1 October 1995 and is applicable to secretaries appointed on or after 1 August 2012.[232] Legal commentators have asserted that arbitrators in proceedings under the ICC Rules of Arbitration are under an obligation to comply with the ICC Note.[233] Also, in Section 1 of the ICC Note, which governs the appointment of arbitral secretaries, it is stated that prior to the appointment of a secretary, the secretary must undertake to act in accordance with the ICC Note and the arbitrators must undertake to ensure that the secretary's obligation is met. Consequently, both the tribunal and the secretary will be under an obligation to comply with the ICC Note's instructions on the proper functions of a secretary.[234]

The ICC Note governs questions of appointment, duties, remuneration, and disbursements. In Section 2, which governs the duties of arbitral secretaries, it is stated that:

> *"Administrative Secretaries act upon the Arbitral Tribunal's instructions and under its strict supervision. The Arbitral Tribunal shall, at all times, be responsible for the Administrative Secretary's conduct in relation to the arbitration.*
>
> *An Administrative Secretary may perform organizational and administrative tasks such as:*
>
> - *transmitting documents and communications on behalf of the Arbitral Tribunal;*

[232] See the introduction to the ICC Note.

[233] Newman & Zaslowsky 2012 para. 8. Cf. Stipanowich p. 95, who emphasizes that the note contains mandatory language, which requires the arbitrators to act in a certain way and to refrain from delegating certain tasks.

[234] Newman & Zaslowsky 2012 para. 9.

- *organizing and maintaining the Arbitral Tribunal's file and locating documents;*
- *organizing hearings and meetings;*
- *attending hearings, meetings and deliberations; taking notes or minutes or keeping time;*
- *conducting legal or similar research; and*
- *proofreading and checking citations, dates and cross-references in procedural orders and awards as well as correcting typographical, grammatical or calculation errors.*

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.

The Administrative Secretary may not act, or be required to act, in such a manner as to prevent or discourage direct communications among the arbitrators, between the Arbitral Tribunal and the parties, or between the Arbitral Tribunal and the Secretariat.

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.

When in doubt about which tasks may be performed by an Administrative Secretary, the Arbitral Tribunal or the Administrative Secretary should contact the Secretariat."

Regarding the duties of arbitral secretaries, the ICC Note only permits secretaries to perform purely administrative tasks, as well as legal or similar research. It can especially be noted that secretaries do not seem to be allowed to draft parts of the award pursuant to the ICC Note.

8.3.3 FAI Note and Guidelines

Article 25.5 of the Arbitration Rules of the Finland Chamber of Commerce acknowledges that the arbitrators may appoint a secretary, but provides no further guidance as to the authority of the secretary. The FAI has, however, issued two documents relating to the use of arbitral secretaries, Note on the Use of a Secretary and Guidelines for Using a Secretary. Section 1.2 of the FAI Note obliges all arbitrators and secretaries in proceedings under the Arbitration Rules of the Finland Chamber of Commerce or the Rules for Expedited Arbitration of the Finland Chamber of Commerce to comply with the FAI Note. The FAI Note governs the matters of appointment, duties, and remuneration of a secretary. Section 3, governing duties of a secretary, stipulates as follows:

> *"3. Duties of a secretary*
>
> *3.1 The mandate of an arbitrator is personal. By accepting appointment, an arbitrator undertakes not to delegate the mandate to any other person, including any tribunal-appointed secretary. An arbitrator may under no circumstances rely on a secretary to perform any essential duties of an arbitrator.*
>
> *3.2 A secretary acts under the supervision of the arbitral tribunal. A secretary shall strictly follow the arbitral tribunal's instructions and shall not exceed the scope of the tasks assigned to him or her. The arbitral tribunal shall be responsible for the secretary's actions in connection with the arbitration.*
>
> *3.3 A secretary may assist the arbitral tribunal by performing administrative tasks, such as transmitting documents and communications on behalf of the arbitral tribunal, organising meetings and hearings, taking notes or minutes of meetings, and recording witness testimonies at a hearing.*
>
> *3.4 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:*
>
> *(i) proofreading and checking the accuracy of cross-references, citations, dates and other figures in draft procedural orders and awards as well as correcting any clerical, typographical or computational errors found in the drafts;*

(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.

3.5 A secretary is under the same obligation as an arbitrator to maintain the confidentiality of the arbitration and the award."

The FAI Guidelines provide further guidance regarding the tasks that secretaries are allowed to perform. The FAI Guidelines seem to be slightly more restrictive as to the tasks which may be assigned to a secretary compared to the FAI Note. The FAI Note allows the secretary to "provide limited assistance to the arbitral tribunal in its decision-making process". The FAI Guidelines, on the other hand, state that the secretary not is allowed to participate in the deliberations of the tribunal, the decision-making of the tribunal or the drafting of the award.[235] The FAI Guidelines further states that the secretary "may not influence the content of the arbitral award in any other way".[236] Thus, the FAI Note allows the secretary to provide limited assistance in the decision-making process, while the FAI Guidelines seem to dissuade from all assistance in the decision-making. However, a difference between the regulations might not be intended as the FAI Note refers to the decision-making process, while the FAI Guidelines refer to the decision-making. Irrespective of a potential difference between the regulations, the permeated thought seem to be that secretaries are allowed to perform administrative tasks as well as tasks of a more judicial nature, provided that the secretary does not influence the arbitrators' decision in any way.

[235] FAI Guidelines paras. 4 and 5.

[236] FAI Guidelines para. 5.

8.3.4 JAMS Guidelines

JAMS International has regulated the use of arbitral secretaries by issuing Guidelines for the Use of Clerks and Tribunal Secretaries in Arbitrations. In contrast to the regulations issued by FAI, the JAMS Guidelines are brief and not mandatory.[237] Regarding the duties of the arbitral secretary, point 3 of the guidelines prescribes the following:

> *"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".*

Pursuant to the JAMS Guidelines, the arbitrators seem to have a wide discretion as to decide the authority of the secretary, as long as the arbitrators do not delegate to the secretary to engage in the deliberations or the decisions-making process. However, in contrast to many other regulations, the guidelines prescribe that the arbitrator shall state to the parties the types of tasks assigned to the secretary. Thus, despite the brief guidelines, the parties will be provided with information on the types of duties that may be delegated to the secretary.

8.3.5 SIAC Note

The most recently issued regulation on arbitral secretaries is the SIAC's Practice Note for Administered Cases – On the Appointment of Administrative Secretaries of 2 February 2015. SIAC's practice notes are guidelines that are intended to promote best practice in arbitration.[238] The brief note regulates the appointment and remuneration of arbitral secretaries, but does not provide much information on the duties of the secretary. The only relevant section in that respect is Section 2 which states that:

> *"In appropriate cases, administrative secretaries may be appointed to assist the arbitral tribunal in administrative matters."*

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[237] Tercier p. 552.

[238] http://www.siac.org.sg/our-rules/practice-notes.

As no definition of administrative matters is provided it is difficult to establish the exact extent of the secretaries' authority pursuant to the practice note.

8.3.6 Young ICCA Guide on Arbitral Secretaries

The Young ICCA Task Force on the Appointment and Use of Arbitral Secretaries has put together a guide on the appointment and use of arbitral secretaries, Best Practices for the Appointment and Use of Arbitral Secretaries. The best practice is published in the Young ICCA Guide on Arbitral Secretaries.[239] Article 3 of the best practice, which governs the role of the arbitral secretary, states that:

> *"(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*

[239] Young ICCA Guide on Arbitral Secretaries pp. 87-88.

(j) Drafting appropriate parts of the award."

Under the best practice the secretary is allowed to perform many tasks that go beyond the purely administrative. In the commentary to Article 3 it is asserted that the secretary's tasks must extend beyond the strictly administrative in order to ensure maximum benefit from the engagement of the secretary.[240] Moreover, it is stated that it shall be left to the arbitrators to determine the proper amount of delegation to the secretary.[241] As opposed to many other regulations, the best practice explicitly states that the secretary's tasks may involve attending the tribunal's deliberations and drafting portions of the award.

The aim of the best practice is to represent the international arbitration community's current approach to arbitral secretaries. In order to accomplish that, the content of the best practice is permeated by the 2012 and 2013 ICCA Surveys and the Task Force's research into modern practice.[242] It should be noted that the respondents of both surveys principally were practitioners, such as arbitrators, counsels, representatives of arbitration institutes and parties.[243] Thus, it might not be as unexpected that the guide takes a relatively liberal approach to the duties of arbitral secretaries.

Arbitration is a practical area of law, but the practice cannot be separated from the legal context in which it exists. Consequently, arbitrators that wish to engage a secretary, should not without reflection rely solely on the best practice proposed in the Young ICCA Guide on Arbitral Secretaries, as it is not guaranteed that the best practice is consistent with the provisions on *inter alia* challenge of awards in *lex arbitri*.[244]

[240] Young ICCA Guide on Arbitral Secretaries p. 11.

[241] Young ICCA Guide on Arbitral Secretaries p. 11.

[242] Young ICCA Guide on Arbitral Secretaries p. 4.

[243] Young ICCA Guide on Arbitral Secretaries pp. 55 and 69.

[244] As was analysed from a Swedish perspective in Chapter 5, there may be statutory provisions or general principles of law which limit the extent of the secretary's authority.

8.3.7 Similarities and Differences

It is principally arbitration institutions that have issued regulations governing the authority of arbitral secretaries,[245] but the survey above shows that there is a variety as to the binding effect of those regulations. The FAI and the ICC obliges arbitrators that conduct arbitrations under the rules of the respective institute, and the secretaries that they have appointed, to comply with their notes on arbitral secretaries. In contrast, JAMS International and SIAC have issued regulations that are merely constructed as guidelines for the arbitrators. The same applies to the best practice proposed in the Young ICCA Guide on Arbitral Secretaries.

As regards the content of the regulations, it can be noted that all regulations, except JAMS Guidelines, explicitly affirm that the secretary may perform administrative tasks. However, the ICC Note and the SIAC Note state that the secretary's duties are limited to purely administrative matters, while the most liberal regulations, JAMS Guidelines and the best practice in the Young ICCA Guide on Arbitral Secretaries, practically leave it to the arbitrator to decide the appropriate amount of delegation to the secretary.

It can be concluded that even though arbitration institutions have issued most regulations, there is a variety both in regards to the nature and the content of the existing regulations governing the authority of arbitral secretaries. A uniform international approach to the regulation of the secretaries' authority can, thus, not be deemed to exist.

8.4 Appropriate Form and Content of the Regulation

In Section 8.2 it was asserted that further guidance on the extent of the authority of arbitral secretaries would be beneficial to the actors in arbitrations. The interesting question that follows is what the form and content of such further guidance should be. The presentation of existing regulations showed that there is a variety as to the content and form of such regulations internationally.

[245] To the knowledge of the writer, this matter has not been given much attention by national legislators.

In a discussion on the form and content of a regulation on the matter, it must *inter alia* be considered whether the regulation shall strive to fulfil the interests of the national state, the arbitrators, or the parties. The Swedish legislator is not interested in regulating the arbitral proceedings in detail,[246] but wants the arbitral procedure to comply with fundamental principles of due process.[247] The parties might be interested in knowing the exact limits to the secretary's authority, while the arbitrators might want to maintain their discretion to adapt the conduct of the arbitral proceeding to the individual dispute. Consequently, there exists a tension between the parties' predictability and the flexibility of the proceedings.

The legislators' approach in the area of arbitration law, speaks against inserting a comprehensive mandatory regulation of the authority of arbitral secretaries in the SAA, even though such a regulation would increase the predictability for the parties. Also, such a regulation would not be in conformity with the current structure of the SAA, as the act does not even regulate the proceedings or the arbitrators' duties in detail. It could also be assumed that all parties and arbitrators will generally not take the same approach to the appropriate use of arbitral secretaries. Some may approve of an extensive delegation, whilst others are of the opinion that the delegation should be restricted to tasks of a purely administrative character. To exhaustively regulate the authority of arbitral secretaries by mandatory statutory provisions would thus entail a pronounced limitation on the party autonomy and on the arbitrators' possibility to arrange the proceedings in a manner suitable to the parties' dispute. Such limitations would, however, not be at hand if the provisions instead were constructed as optional provisions, i.e. provisions that will be applicable unless the parties have agreed

[246] According to the Swedish legislator, it is internationally recognised that the statutory provisions on arbitration shall not be complete and the same principle shall apply to Swedish arbitration law. Accordingly, it is the opinion of the legislator that several questions should be left to the arbitrators or the parties to decide, or left to be decided by the courts in the application of the law. See prop. 1998/99:35 p. 44.

[247] SOU 1994:81 p. 69 and prop. 1998/99:35 p. 42.

otherwise,[248] or provisions that only enumerate the specific tasks which the arbitrators cannot delegate without rendering the award invalid or challengeable.

It can be concluded that several arguments can be raised against inserting a regulation on the authority of arbitral secretaries in the SAA, even if the parties' predictability would benefit from such a regulation. Especially considering the legislators' approach to legislation within the area of arbitration law, it can be argued that it would not be reasonable to propose that the authority of arbitral secretaries should be regulated by statutory provisions.[249] The provisions on invalidity and setting aside of awards do, to some extent, already regulate the secretaries' authority, but due to the lack of case law, the legal situation is unclear.

Therefore, it may be considered whether it would be appropriate to regulate the authority of secretaries in another form, e.g. to incorporate a regulation in a set of arbitration rules or in non-binding guidelines issued by an arbitration institute. As shown in Section 8.3, arbitration institutions have issued the majority of the existing regulations governing the authority of arbitral secretaries; some are constructed as binding rules, while others are merely constructed as guidelines.

It can be questioned whether it is appropriate for an arbitration institute to regulate the secretaries' functions in detail, especially since it is not clear what kind of tasks that actually are delegable pursuant to the provisions on challenge and invalidity of awards.[250] Such a regulation would therefore risk being misleading. However, the regulation could potentially be appropriate if it was inserted in a set of arbitration rules. Arbitration rules are considered to form part of the parties' arbitration agreement and, as was concluded in Section 7.2, it is principally the provisions on invalidity of awards

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[248] It could, however, be assumed that unless the parties have regulated the matter beforehand, the parties' chances of concluding an agreement once a dispute has arisen potentially could be limited, see Heuman 1999 p. 266. Although, if the parties have agreed to the appointment of the secretary, they may also be able to agree on the authority of that secretary.

[249] In this connection it can be noted that the use of arbitral secretaries is not discussed in the recently published report which proposes amendments to the SAA, SOU 2015:37.

[250] In this connection, it can be noted that it, internationally, has not been established a general approach to the appropriate authority of arbitral secretaries, which the Swedish courts could adhere to. As shown by the contrasting regulations examined in Section 8.3.

that limits the party autonomy in relation to the authority of arbitral secretaries. Thus, a comprehensive regulation could be appropriate to insert in a set of arbitration rules if the provisions on invalidity of awards are observed. Such a regulation would comply with the parties' interest in predictability.

It could, however, be discussed if a comprehensive regulation of the authority really is necessary. As one of the primary reasons why it would be beneficial to regulate the authority of arbitral secretaries is to avoid challenge proceedings and proceedings to have an award declared invalid, it might be sufficient to provide the arbitrators with guidelines as to how they should act in order to reduce the risk of such proceedings being successful. Such a regulation should recommend the arbitrators to:

- obtain the parties' consent to the appointment of the secretary;
- conclude an agreement with the parties which states the duties that the arbitrators are allowed to delegate to the secretary;
- be transparent with the parties about the secretary's involvement in the arbitral proceedings; and
- refrain from delegating the tasks to sign the award and to decide the dispute.

The first point, about the parties' consent, is justified, as it in Section 6.2 was argued that the parties' consent to the appointment of the secretary could extend the secretary's authority. The second point, which stipulates that the arbitrators and the parties should agree on the delegable duties, is warranted as a challenge proceeding is less likely to succeed if the parties have consented to the delegation. It will *inter alia* be less likely that the delegation is considered as a procedural irregularity which occurred without fault of the party. The third point, which recommends transparency, is intended to preclude potential grounds for challenge of an award pursuant to the preclusion rule in Section 34 para. 2 of the SAA. Thus, if the arbitrators inform the parties about the tasks delegated to the arbitral secretary, a party cannot rely on that circumstance to have the award set aside, unless the party has objected to the delegation. The final point is inserted in the recommendation because, as was mentioned in Section 7.4, delegation of the tasks to sign the award or the task to decide the dispute might make an award

invalid. The proposed recommendations should preferably be updated as relevant case law on the issue emerges.

The provision proposed above does not have to be binding, as the regulation is based on the provisions on challenge and invalidity of awards. If the recommendations are not followed, the award might be set aside or declared invalid, which in itself give the arbitrators an incentive to follow the guidelines.

It can be concluded that it would be appropriate either to insert a detailed regulation of the secretaries' authority in a set of arbitration rules, provided that mandatory provisions of law are adhered to, or to issue guidelines that will recommend arbitrators as to how valid awards can be rendered. Given that the SCC is the leading arbitration institute in Sweden, it would be beneficial if such regulations were issued by the SCC.

If a regulation would be inserted in guidelines from the SCC or the SCC Rules, it would, however, not directly be applicable to *ad hoc* proceedings. A regulation inserted in the SCC rules, would only benefit those who arbitrate under the SCC Rules, as it naturally does not have the effect of a party agreement in other proceedings. However, if a regulation was inserted in guidelines from the SCC, it could provide guidance also in *ad hoc* proceedings. The SCC´s guidelines are available on the SCC´s webpage even for arbitrators who do not conduct arbitral proceedings under the SCC Rules and arbitrators who are unsure of how to use a secretary can thus turn to the guidelines. Consequently, it would be beneficial both for *ad hoc* proceedings and proceedings that are conducted under the SCC Rules if the SCC issued guidelines with the content proposed above. In this context, it can be noted that the need for further guidance perhaps also could be fulfilled by an increased discussion regarding this issue in the legal literature.

8.5 Conclusion

The actors in the arbitral proceedings would benefit from further guidance on the authority of arbitral secretaries and it is proposed that such guidance should be provided by guidelines issued by the SCC. The aim of the regulation should be to reduce the risk

that the arbitrators issue awards that can be set aside or declared invalid. The guidelines are proposed to recommend the arbitrators to:

- obtain the parties' consent to the appointment of the secretary;
- conclude an agreement with the parties which states the duties that the arbitrators are allowed to delegate to the secretary;
- be transparent with the parties on the secretary's involvement in the arbitral proceedings; and
- refrain from delegating the tasks to sign the award and to decide the dispute.

9 Concluding Remarks

From the presentation above one thing is clear – the prevalent legal position regarding the appointment and authority of arbitral secretaries in Swedish arbitral proceedings is unclear. As regards prerequisites to the appointment of secretaries it has been asserted that the arbitrators ought to obtain the parties' consent to the appointment. However, it is unclear if there are any other requirements that the arbitrators must observe when appointing secretaries.

Regarding the authority of arbitral secretaries, it was concluded that the limitations on the authority principally consist of agreements concluded by the parties and the provisions on challenge and invalidity of awards. However, it cannot be established where the exact dividing line between proper and improper delegation is drawn pursuant to the provisions on challenge and invalidity of awards. In order to reduce the risk of the award being set aside or declared invalid, the arbitrators are recommended to obtain the parties' consent to the appointment of the secretary, to regulate the authority of the secretary with the parties, to let the use of the secretary be governed by transparency, and to refrain from delegating the tasks to sign the award and to decide the dispute. If those recommendations are adhered to, the choice does not have to be between a fourth arbitrator and a purely administrative secretary. The secretary can play a qualified and legitimate role in the arbitral proceedings.

List of Cited Works

Official publications

Prop. 1998/99:35. Ny lag om skiljeförfarande

SOU 1994:81. Ny lag om skiljeförfarande

SOU 1995:65. Näringslivets tvistlösning

SOU 2015:37. Översyn av lagen om skiljeförfarande

Dir. 2014:16. Kommittédirektiv En översyn av lagen om skiljeförfarande

NJA II 1929 no. 1 Ny lagstiftning om skiljemän.

Literature

Andersson, Isaksson, Johansson and Nilsson, *Arbitration in Sweden*, Jure 2011 [Andersson *et al*.]

Berger, *Rights and Obligations of Arbitrators in the Deliberations*, ASA Bulletin vol. 31 no. 2 2013 pp. 244-261 [Berger]

Bernitz, Heuman, Leijonhufvud, Seipel, Warnling-Nerep & Vogel, *Finna rätt: Juristens källmaterial och arbetsmetoder*, 13 ed., Norstedts Juridik 2014 [Bernitz *et al*.]

Bolding, *Skiljeförfarande och rättegång: En stuide i processuell organisation och rättstillämpningsmetodik*, P.A. Norstedt & Söners Förlag 1956 [Bolding]

Born, *International Commercial Arbitration*, 2 ed., Kluwer Law International 2014 [Born]

Cars, *Lagen om skiljeförfarande: En kommentar*, Fakta Info Direkt Sweden 1999 [Cars]

Edlund, *Om ersättning till skiljemän*, Juridisk Tidskrift 1998-99 no. 4 pp. 1036-1039 [Edlund]

Ekdahl, *Skiljedomskostnad*, Tidskrift för Sveriges Advokatsamfund 1955 pp. 92-96 [Ekdahl]

Gaillard & Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International 1999 [Fouchard Gaillard Goldman on International Commercial Arbitration]

Hassler & Cars, *Skiljeförfarande*, 2 ed., Norstedts Förlag 1989 [Hassler & Cars]

Heuman, *Skiljemannarätt*, 1 ed., Norstedts Juridik 1999 [Heuman 1999]

Heuman, *Tystnadsplikt och underlåtenhet att ställa säkerhet i skiljetvist*, Juridisk Tidsskrift 2000-01 no. 3 pp. 662-685 [Heuman 2000-01]

Heuman, *Arbitration Law of Sweden: Practice and Procedure*, Juris Publishing 2003 [Heuman 2003]

Hobér, *International Commercial Arbitration in Sweden*, Oxford University Press 2011 [Hobér]

Jarvin, *Sekretess i svenska och internationella skiljeförfaranden*, Juridisk Tidsskrift 1996-97 no. 1 pp. 149-170 [Jarvin]

Kleineman, *Rättsdogmatisk metod*, In: *Juridisk metodlära*, Korling & Zamboni (eds.) 1 ed., Studentlitteratur 2013 pp. 21-45 [Kleineman]

Knuts, *Recourse to the Courts against an Arbitral Award*, In: *International Arbitration in Sweden: A Practitioner's Guide*, Franke, Magnusson, Ragnwaldh & Wallin (eds.) Kluwer Law International 2013 pp. 237-266 [Knuts]

Lehrberg, *Praktisk juridisk metod*, 7 ed., Iusté 2014 [Lehrberg]

Lew, Mistelis & Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International 2003 [Lew *et al*.]

Lindskog, *Skiljeförfarande: En kommentar*, 2 ed., Norstedts Juridik 2012 [Lindskog]

Madsen, *Commercial Arbitration in Sweden: A commentary on the Arbitration Act (1999:116) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 2 ed., Jure 2006 [Madsen 2006]

Madsen, *Skiljeförfarande i Sverige – En kommentar till lagen (1999:116) om skiljeförfarande och till reglerna för Stockholms Handelskammares Skiljedomsinstitut*, 2 ed., Jure Förlag 2009 [Madsen 2009]

Nerep, *Till frågan om skiljeavtalets särställning i svensk avtalsrätt*, In: *Festskrift till Sveriges Advokatsamfund 1887-1987*, Norstedts Förlag 1987 pp. 389-445 [Nerep]

Newman & Zaslowsky, *The Fourth Arbitrator: Contrasting Guidelines on Use of Law Secretaries*, New York Law Journal 29 November 2012 [Newman & Zaslowsky 2012]

Newman & Zaslowsky, *The Yukos Case: More On the Fourth Arbitrator*, New York Law Journal 28 May 2015 [Newman & Zaslowsky 2015]

Nilsson & Rundblom Andersson, *Fundamental Principles of International Arbitration in Sweden*, In: *International Arbitration in Sweden: A Practitioner's Guide*, Franke, Magnusson, Ragnwaldh & Wallin (eds.) Kluwer Law International 2013 pp. 1-23 [Nilsson & Rundblom Andersson]

Nordenson, *Anmälan av Arbitration in Sweden*, Svensk Juristtidning 1977 pp. 714-718 [Nordenson 1977]

Nordenson, *The Arbitral Proceedings in International Arbitration in Sweden*, In: *Swedish and International Arbitration 1984,* Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce pp. 6-15 [Nordenson 1984]

Nordenson, *The Arbitral Tribunal*, In: *Swedish and International Arbitration 1990,* Yearbook of the Arbitration Institute of the Stockholm Chamber of Commerce pp. 19-33 [Nordenson 1990]

Onyema, *The Role of the International Arbitral Tribunal Secretary*, Transnational Dispute Management vol. 2 no. 3 2005 [Onyema]

Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, Arbitration International vol. 18 no. 2 2002 pp. 147-163 [Partasides 2002]

Partasides, *Secretaries to Arbitral Tribunals*, In: Mourre & Hanotiau (eds.), *Players Interaction in International Arbitration*, Kluwer Law International 2012 pp. 84-88 [Partasides 2012]

Partasides, Bassiri, Gantenberg, Bruton & Riccio, *Arbitral Secretaries*, In: *International Arbitration: The Coming of a New Age*, van den Berg (ed.) Kluwer Law International 2013 pp. 327-368 [Partasides *et al*. 2013]

Polkinghorne & Rosenberg, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*, Dispute Resolution International vol. 8 no. 2 2014 pp. 107-128 [Polkinghorne & Rosenberg]

Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Arbitration,* Oxford University Press 2009 [Redfern & Hunter]

Schultz & Kovacs, *The Rise of a Third Generation of Arbitrators? – Fifteen Years after Dezalay and Garth*, Arbitration International vol. 28 no. 2 2012 pp. 161-171 [Schultz & Kovacs]

Schöldström, *The Arbitrator's Mandate: A Comparative Study of Relationships in Commercial Arbitration under the Laws of England, Germany, Sweden and Switzerland*, (Diss.) Jure 1998 [Schöldström 1998]

Schöldström, *The Arbitrators*, In: *International Arbitration in Sweden: A Practitioner's Guide*, Franke, Magnusson, Ragnwaldh & Wallin (eds.) Kluwer Law International 2013 pp. 115-136 [Schöldström 2013]

Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, *Secretaries to International Arbitral Tribunals*, The American Review of International Arbitration 2006 vol. 17 no. 4 pp. 575-596 [Secretaries to International Arbitral Tribunals]

Smeureanu (ed.), *Confidentiality in International Commercial Arbitration,* Kluwer Law International 2011 [Smeureanu]

Stipanowich, *Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings*, In: Newman & Radine (eds.), *Soft Law in International Arbitration*, JurisNet 2014 pp. 73-237 [Stipanowich]

Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, The American Review of International Arbitration 2009 vol. 20 no. 2 pp. 119-158 [Strong]

Tercier, *The Role of The Secretary to the Arbitral Tribunal*, In: Newman & Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration*, Juris Publishing 2014 pp. 531-554 [Tercier]

Trygger, *Skiljeaftal och Skiljemannaförfarande enligt svensk rätt*, Tidsskrift for Retsvidenskab 1895 pp. 1-31, 241-284 [Trygger]

Ullman, *Om reklamationer och arbitrager*, 2 ed., AB Svensk Trävaru-Tidning 1957 [Ullman]

Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International 2012 [Waincymer]

Wetter, *The Iran-United States Claims Tribunal*, Svensk Juristtidning 1982 pp. 193-213 [Wetter]

Internet Sources

Arbitration Institute of the Stockholm Chamber of Commerce, *The Swedish Arbitration Act (SFS 1999:116)*, (retrieved on 2015-05-13), http://sccinstitute.com/media /37089/the-swedish-arbitration-act.pdf

Arbitration Institute of the Stockholm Chamber of Commerce, *Statistics 2013: A strong year,* (retrieved on 2015-03-16), http://sccinstitute.com/media/45932/scc-statistics-2013.pdf

Ministry of Finance of the Russian Federation, *On writs filed by the Russian Federation seeking to annul the awards issued by an international arbitral tribunal in arbitrations commenced against the Russian Federation by the former shareholders of Yukos Oil Company*, 2015-02-06 (retrieved on 2015-03-06), http://old.minfin.ru/en/news/ index.php?id_4=24358

Singapore International Arbitration Centre, *Practice Notes*, (retrieved on 2015-04-28), http://www.siac.org.sg/our-rules/practice-notes

School of International Arbitration, Queen Mary, University of London*, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, (retrieved on 2015-01-28), http://www.whitecase.com/files/Uploads/Documents/ Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf [2012 International Arbitration Survey]

Other Sources

Documents Relating to the Challenge by Iran to Mr. Gaetano Arangio-Ruiz, Chairman of Chamber Three, Iran-United States Claims Tribunal Reports, vol. 27 no. 2 1991 pp. 291-336 [Iran-United States Claims Tribunal Reports vol. 27]

International Council for Commercial Arbitration, *Young ICCA Guide on Arbitral Secretaries*, the ICCA Reports no. 1 2014 [Young ICCA Guide on Arbitral Secretaries]

Institutional Rules

The Arbitration Institute of the Finland Chamber of Commerce's Guidelines for Using a Secretary [FAI Guidelines]

The Arbitration Institute of the Finland Chamber of Commerce's Note on the Use of a Secretary [FAI Note]

Arbitration Rules of the Finland Chamber of Commerce

Hong Kong International Arbitration Centre's Administered Arbitration Rules [HKIAC Administered Arbitration Rules]

Hong Kong International Arbitration Centre's Guidelines on the Use of a Secretary to the Arbitral Tribunal [HKIAC's Guidelines on the Use of a Secretary to the Arbitral Tribunal]

IBA Guidelines on Conflicts of Interest in International Arbitration

International Chamber of Commerce's Note on the Appointment, Duties and Remuneration of Administrative Secretaries [ICC Note]

Arbitration Rules of the Nordic Arbitration Centre of the Iceland Chamber of Commerce

Iran-United States Claims Tribunal's Tribunal Rules of Procedure

JAMS International's Guidelines for the Use of Clerks and Tribunal Secretaries in Arbitrations [JAMS Guidelines]

Singapore International Arbitration Centre's Practice Note for Administered Cases – On the Appointment of Administrative Secretaries [SIAC Note]

Arbitration Institute of the Stockholm Chamber of Commerce's Arbitration Rules [SCC's Arbitration Rules]

Arbitration Institute of the Stockholm Chamber of Commerce's Rules for Expedited Arbitrations [SCC's Rules for Expedited Arbitrations]

Arbitration Institute of the Stockholm Chamber of Commerce's Arbitrator's Guidelines [SCC Guidelines]

Swiss Rules of International arbitration

Table of cases

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NJA 2013 p. 578

NJA 2009 p. 128

NJA 2000 p. 538

NJA 1998 p. 574

NJA 1998 p. 189

Svea Court of Appeal case no. T 677-99

Halmstad District Court case no. T 271-83

Canada

Société d'investissements l'Excellence inc. v. Rhéaume, 2010 QCCA 2269

Italy

Sacheri v. Robotto, Corte di Cassazione [Supreme Court], 2765, 7 June 1989. Excerpt of the decision is available in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration 1991 - Volume XVI*, Kluwer Law International 1991 pp. 156-157