Tribunal Secretaries: Tasks, Transparency and Regulation

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The debate surrounding the use of tribunal secretaries in international arbitration is not new. In 2002, Partasides christened the issue "the Fourth Arbitrator".[1] Noting concern within the arbitration community at a perceived excessive role of tribunal assistants, Partasides argued that this concern could damage the legitimacy of the arbitral process. Hindsight shows that it is, at least, a fertile ground for arbitral challenges.

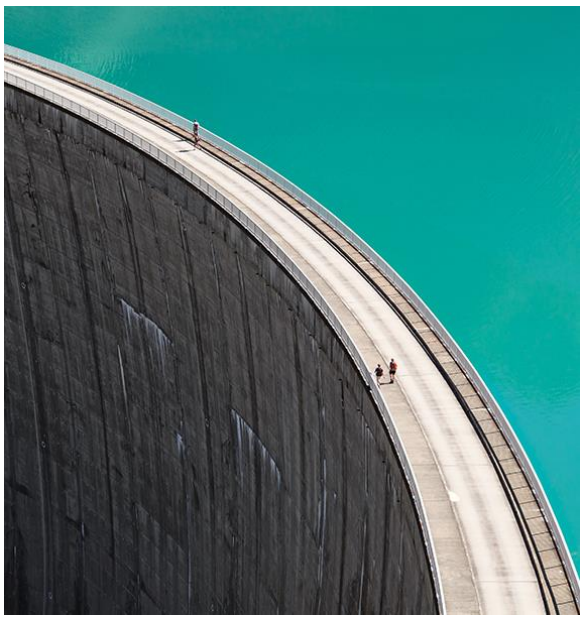
Background

The concern centres on the concept of the arbitrator's mandate as personal ('intuitu personae'). It therefore should not be delegated to a tribunal secretary, who is most often a junior lawyer.

The use of tribunal secretaries is now widespread: in 2015, the QMUL/White & Case International Arbitration Survey[2] (the "QMUL Survey") found that 82% of respondents had either used tribunal secretaries or had seen them used. It is not the use of tribunal secretaries that is the issue. Respondents to the QMUL Survey had an overall positive perception of tribunal secretaries. Interviewees commented that the use of tribunal secretaries enhances the efficiency of arbitral proceedings and presents a unique opportunity to train the next generation of potential arbitrators. The concern is rooted in the lack of transparency and regulation in the use of tribunal secretaries. Specific concerns centre on the sort of tasks that tribunal secretaries are permitted to conduct.

Tasks

The QMUL Survey also identified concerns relating to a lack of visibility of the tasks entrusted to tribunal secretaries. Many of these comments came from private practitioners. The same complaint was also made by arbitrators who commented that, when sitting as co-arbitrators, they were not always aware



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of what responsibilities were delegated to the tribunal secretary by the presiding arbitrator.

Three tasks were highlighted by a notable majority as appropriate for tribunal secretaries to undertake: organisational tasks, communications with the parties and preparing drafts of procedural orders and non-substantive parts of awards

The views on tribunal secretaries conducting legal research were mixed, with a slim majority of respondents believing they should do this. The conduct by tribunal secretaries of substantive or merits-related tasks received significantly less support. This included preparing drafts of substantive parts of awards and discussing the merits of the dispute with one or more of the arbitrators.

The QMUL Survey also found that arbitrators as whole share this opinion: 89% considered that tribunal secretaries should not be allowed to prepare drafts of substantive parts of awards and 92% thought that the secretary should not discuss the merits of the dispute with the arbitrators. However, a corollary of this data is that approximately one out of every ten arbitrators does not consider it improper to delegate these particular tasks.

[1] C. Partasides, The Fourth Arbitrator? "The Role of Secretaries to Tribunals in International Arbitration", 18 Arb Int'l (2002).

[2] http://www.arbitration.qmul.ac.uk/research/

There is no international set of standards regarding the use of tribunal secretaries in international arbitration. In an attempt to plug the gap, the Young ICCA produced *'A Guide on Arbitral Secretaries" in 2014".*

Article 3 of the Young ICCA Guide provides that with appropriate direction and supervision by the tribunal, the secretary's role may go beyond the purely administrative. Possible tasks are listed as:

- undertaking administrative matters as necessary in the absence of an institution
- communicating with the arbitral institution and parties
- organizing meetings and hearings with the parties
- handling and organising correspondence, submissions and evidence on behalf of the arbitral tribunal
- researching questions of law
- researching discrete questions relating to factual evidence and witness testimony
- drafting procedural orders and similar documents
- reviewing the parties' submissions and evidence; drafting factual chronologies and memoranda summarising the parties' submissions and evidence
- attending the arbitral tribunal's deliberations; and
- drafting appropriate parts of the award

The Institutional Response

ICC
The ICC has produced several 'notes' on the conduct of arbitration over the years. The most current is the 1 January 2019 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (the "Note"). It is intended to provide parties and tribunals with 'practical guidance concerning the conduct of arbitrations under the ICC Rules'.

Secretaries are to act upon the tribunal's instructions and under its 'strict and continuous supervision'. The tribunal is 'in no circumstances' released from its duty to personally review the file and 'under no circumstances may the arbitral tribunal delegate its decision-making functions'. Nor is it to rely on the secretary to perform any of the 'essential duties' of the arbitrator.

The Note goes on to outline the sort of organisational and administrative tasks that the secretary may perform. These are broadly similar to the Young ICCA Guide, with the exception that the secretary may only draft procedural orders and factual portions of the award. 'In no circumstances' is the tribunal released from 'its duty personally to review the file and/or to draft any decision of the arbitral tribunal.'

LCIA
Similarly, Article 14.8 of the LCIA 2020 Arbitration Rules provides that 'under no circumstances' may a tribunal delegate its decision-making function to a secretary. The tasks of the secretary are to be carried out under the supervision of the tribunal who has responsibility 'to ensure that all tasks are performed to the standard required by the LCIA Rules'. Article 14.10 provides that a tribunal may only obtain assistance from a tribunal secretary once the secretary has been approved by all parties. The approval of the parties is contingent on party agreement as to the tasks that the secretary may perform. However, Article 14.12 provides for deemed approval where a party has not objected within a reasonable time set by the tribunal. Article 14.11 provides that the tribunal must obtain the prior agreement of all parties if additional tasks are to be undertaken by the secretary. The 2017 LCIA Note to Arbitrators reiterates that the tribunal may not delegate its fundamental decision-making function. Paragraph 71 outlines possible tasks that the secretary may perform, all subject to the tribunal's 'specific instructions'. It permits the preparation of first drafts of awards. The tribunal must inform the parties of the tasks it proposes.

HKIAC
HKIAC's 'Guidelines on the Use of a Secretary to the Arbitral Tribunal' took effect on 1 June 2014. The Guidelines make clear that the tribunal secretary is under the tribunal's strict supervision. The tribunal shall not delegate any decision-making functions to a secretary or rely on a secretary to perform any essential duties of the tribunal. The tasks entrusted to the secretary are broadly similar to those outlined by the ICC.

HKIAC also has a tribunal secretary accreditation programme and a tribunal secretary service.[3]

The Courts

The English case of P v Q[4] is illustrative of the courts' attitude to the use of tribunal secretaries in arbitration.[5] It concerned an unsuccessful application for removal of co-arbitrators pursuant to the English Arbitration Act 1996, s24(1)(d)(i) for the improper delegation of functions by the tribunal to the secretary.[6] The arbitration was conducted under the LCIA Rules and the claimant had already filed an unsuccessful challenge with the LCIA Court.[7]

The judge in the High Court noted that the then current LCIA Rules provided at Article 14.2 that unless otherwise agreed by the parties under Article 14.1, the tribunal shall have the widest discretion to discharge its duties permitted by the applicable law. The parties agreed to the appointment by the chair of the secretary. They did not seek to place any constraints upon the tasks and functions which the secretary might perform so as to assist the tribunal. There was no agreement as to the limits of its permitted involvement in the process. The judge also noted that the LCIA Policy note was directed to best practice and was not prescriptive. This also applied to the Young ICCA Guide. The judge noted a distinction between process and function, stating that the evaluative function of the tribunal must not be delegated, but it is not the case that the involvement of a secretary in such tasks as part of the overall process is of itself incompatible with the non-delegable duties of the tribunal.[8]

The 'critical yardstick' for the purposes of AA 1996, s24 is that the use of tribunal secretaries must not involve any member of the tribunal abrogating or impairing their non-delegable and personal decision-making function:

'That function requires each member of the tribunal to bring his own personal and independent judgment to bear on the decision in question, taking account of the rival submissions of the parties; and to exercise reasonable diligence in going about discharging that function. What is required in practice will vary infinitely with the nature of the decision and the circumstances of each case.[9]

Conclusion

In the absence of greater transparency and party choice in the appointment and delegation of tasks of the tribunal secretary, the debate will continue.[10]

Party autonomy is the lynchpin of arbitration, and transparency is critical to justice.

It appears that there is an appetite for regulation within the arbitration community. The 2018 QMUL/White & Case international arbitration survey found that 70% of respondents believed that arbitration rules should deal with the use of tribunal secretaries. Institutions appear to be embracing this, with the LCIA updating its rules on the use of secretaries in 2020 (no doubt also in response to P v Q).

The 2020 LCIA route embraces party autonomy: the parties are invited to delineate exactly which tasks the secretary is permitted to perform. Transparency is another issue. It locks horns with the confidential nature of tribunal deliberations and decision-making. The P v Q disclosure decision indicates that it is only in wholly exceptional cases that disclosure of an arbitral

[3] https://www.hkiac.org/arbitration/tribunal-secretaries

[4] [2017] EWHC 194 (Comm)

[5] Other cases include *Sonatrach v Statoil* [2014] EWHC 875 (Comm); Judgment of 21 May 2015, 4A_709/2014 (Swiss Federal Tribunal), *Compagnie Honeywell Bull SA v Computacion Bull de Venezuela CA*, 1991(1) Rev.Arb.96 (Paris Cour d'Appel); Veteran Petroleum Limited (Cyprus), Yukos Universal Limited (Isle of Man), *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, The Hague Court of Appeal Case No. ECLI:NL:GHDHA:2020:234, Judgment dated 18 February 2020; Application to excuse Mr Gaetano Arangio-Ruiz, J Adlam and E Lauterpacht (editors), Iran-US Claims Tribunal Reports (Vol.27, 1991), pp. 293 to 297; Svea Court of Appeal Case No. T 10896-16 of 24 November 2017; *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* [2002] ZASCA 14

[6] The court also declined to order disclosure of documents in support of the claimant's application to remove the co-arbitrtors in *P v Q* [2017] EWHC 148 (Comm). An indication of the evidential hurdle claimants/applicants face.

[7] LCIA Reference No 142683, Decision Rendered 4 August 2016, available at <http://www.lcia.org/challenge-decision-database.aspx>

[8] At [67]

[9] At [65]

[10] Particularly where secretaries are used without the knowledge of the parties. Newman and Zaslowsky in their article 'The Fourth Arbitrator: Contrasting Guidelines on Use of Law Secretaries', N.Y. L.J. Nov. 29, 2012 note a conversation at an arbitration conference where an individual 'spoke knowledgably' about a pending arbitration in which one of the authors was counsel.

tribunal's internal communications will be granted. Parties and co- arbitrators must trust that an arbitrator will ensure that a secretary does not exceed his or her remit. Such trust may emanate from faith in the overall arbitral process, but 'trust' is a far too uncertain concept for lawyers and businesspeople.

One solution would be for arbitral institutions to appoint secretaries. This would ensure that the secretary is more closely affiliated with, and regulated by, the institution than the chair. Indeed, in the QMUL Survey, a significant majority of respondents thought that arbitral institutions should offer the services of tribunal secretaries. HKIAC and ACICA do provide a tribunal secretary service. However, HKIAC's service has not proved too popular, with only 20 appointments since the launch of the initiative in 2014.[11]

In the absence of uptake of institutional appointment of secretaries, it appears that there is a stalemate, where tribunal autonomy and confidentiality trumps transparency.

[11] 11 https://www.hkiac.org/node/2299