

Fourth arbitrator? The controversial role of arbitral tribunal secretaries



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Introduction

The use and the role of tribunal secretaries in international commercial arbitration has been subject to increasing scrutiny in recent years.^[1] Despite the potential benefits, concern has been expressed that secretaries may exercise the arbitral tribunal’s decision-making power, resulting in an un-appointed “*fourth arbitrator*”.^[2] This situation would lead to the breach of arbitrators’ mandate to perform their duties personally and create a ground for challenging the resultant award.

The purpose of this article is to briefly present and analyze the different approaches to the matter and to argue that a uniform approach is needed in order not to undermine the legitimacy of the arbitration process.

1. The use and the role of arbitral secretaries

The *intuitu personae* nature of the arbitrator's mandate is a tenet of the international arbitral process. Hence, there is a broad international consensus that arbitrators should not delegate their responsibilities or tasks to third parties.[\[3\]](#) In particular, an arbitrator cannot delegate the duty of deciding a case, attending hearings or deliberations, or evaluating parties' submissions and evidence.[\[4\]](#) Nevertheless, it is common for arbitrators to obtain assistance from third parties in the arbitration proceedings, especially in large and complex cases where the presence of a tribunal secretary can reduce the administrative burden on the tribunal and make the proceedings more efficient and cost-effective.[\[5\]](#) This practice seems to be well-supported by the arbitral community, as it is possible to infer from different surveys conducted on the matter which reveal that often junior lawyers are appointed to assist the arbitral tribunal.[\[6\]](#)

The question that arises spontaneously is the following: what is the scope of work that tribunal secretaries are allowed to undertake, without jeopardizing the mandate of the arbitral tribunal? Some advocate for broad responsibilities, comparing the role of the secretary to the role of the clerks of a national court. Others argue that the nature of the two systems is different: judges derive their adjudicative powers from the State while arbitrators are appointed directly by the parties for their expertise and when they accept a case they commit themselves to be available.[\[7\]](#) Hence, according to this approach, tribunal secretaries should only exercise very limited administrative functions, since, even by performing basic tasks such as summarizing the factual background, they would inevitably exercise some level of influence over the arbitral tribunal.[\[8\]](#)

For their part, several leading arbitration institutions have sought to regulate tribunal secretaries' role; however, no uniform standard exists. In 2012 the ICC International Court of Arbitration amended its *Note on the Appointment, Duties and*

Remuneration of Administrative Secretaries, specifying that (i) tribunal secretaries may perform “organizational and administrative tasks”, such as “transmitting documents and communications on behalf of the tribunal, organizing and maintaining files and documents, attending deliberations, performing legal research and proofreading procedural orders and awards”[\[9\]](#) and (ii) under no circumstance the arbitral tribunal should rely on the secretary to perform any essential duties of an arbitrator or decision-making functions.[\[10\]](#) The Hong Kong International Arbitration Centre (HKIAC) established similar provision in its Guidelines [\[11\]](#) while other arbitral institutions – such as the Arbitration Institute of the Stockholm Chamber of Commerce – provide no guidance at all.

In order to codify best practices in the use of tribunal secretaries, the Young International Council for Commercial Arbitration (ICCA) published recommendations in its Guide on Arbitral Secretaries, which reflect the growing consensus that the tasks of an arbitral secretary may appropriately go beyond the purely administrative.[\[12\]](#) Nonetheless, the extent to which such tasks should go beyond the purely administrative is a matter which depends on the particular arbitral tribunal in question.[\[13\]](#)

The uncertain definition of the role of tribunal secretaries and the “fourth arbitrator” issue were raised in the proceedings on setting aside of the *Yukos* awards[\[14\]](#) and more recently in the English High Court of Justice in *P v Q*.[\[15\]](#) With respect to the *Yukos* case, the Russian Federation filed a writ at the District Court in The Hague to set aside the awards, arguing that, since the tribunal secretary had spent more time on the arbitration than the members of the tribunal and since most of the hours were recorded during the preparation of the award, the arbitration tribunal breached its mandate to perform its duties personally.[\[16\]](#) Similar arguments were raised in *P v Q*, an annulment case where the claimant challenged under s24 of the English Arbitration Act

1996 an LCIA decision not to remove the arbitrators, on the grounds of improper delegation of functions by the tribunal to the secretary and by co-arbitrators to the chairman. While in *Yukos*, in setting aside the award the Dutch Court did not consider it necessary to address the challenge on the grounds that the secretary had significantly influenced the tribunal's decision, in *P v Q* the English Court analyzed the issue and then dismissed the complaint. In rejecting the argument, the Court acknowledged the fact that there is *"a divergence of views amongst commentators and practitioners as to the appropriate use of tribunal secretaries"* [\[17\]](#) and it found that the critical yardstick under s24 of the English Arbitration Act 1996 is that the use of a secretary must not involve any arbitrator *"abrogating or impairing his 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 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"*. [\[18\]](#) In particular, according to Justice Popplewell, the circumstances of the case in hand were not sufficient to demonstrate that the tribunal delegated its decision-making function to the secretary. [\[19\]](#) In rejecting the application, the Court also provided some examples of conduct which it did not consider were necessarily improper, including the use of tribunal secretaries to draft procedural orders. [\[20\]](#) This decision emphasizes the high degree of discretion afforded to arbitral tribunals.

Following the *P v Q* case, in October 2017 the London Court of International Arbitration (LCIA) updated its *LCIA Notes for Arbitrators*, listing some of the tasks that an arbitral tribunal may delegate to the secretary. These vary from simple administrative tasks, to attending meetings, hearings, deliberations and extend to summarizing submissions, reviewing

authorities and preparing first drafts of awards, even though all the delegated tasks must be carried out under the supervision of the arbitral tribunal and decision-making functions cannot be delegated by the tribunal.[\[21\]](#)

1. The necessity of a uniform approach

From the above analysis, it is clear that the lack of common legal-binding rules defining the role of tribunal secretaries and the arbitral tribunal's discretion on the matter negatively affect the perceived legitimacy of the arbitral process and the resulting award. Indeed, question may arise as to whether the secretary exceeded its position, with the risk of continuous attempts by a losing party to set aside the award on these grounds.[\[22\]](#) Therefore, it is desirable to develop and adopt a uniform standard in order to prevent the risk of a tribunal secretary becoming a "fourth arbitrator".

This uniform standard could consist in a set of guidelines which as a first preliminary step should compulsorily require the knowledge and the consent of the parties prior any appointment of a secretary, as already reflected in several institutional arbitration rules, e.g. in the ICC Note.[\[23\]](#) This obligation would necessarily promote transparency and protect the legitimacy of the international arbitration process. Moreover, it would allow the parties to have information about the secretary's access to confidential information, its independence and impartiality, and its role in the process. In this way, the probability that tribunal assistants become involved in decision-making functions, such as the drafting of dispositive portion of the award, would be reduced and losing parties would be discouraged to use this issue as a convenient means of attacking the award.

Secondly, these guidelines should clearly determine what are the duties that tribunal secretaries are not allowed to perform. For instance, the drafting of the award and the interpretation and application of legal research to the legal

and factual issues should be strictly retained by the arbitral tribunal, without any delegation to third parties.

Eventually, if arbitrators are over-burdened by their workloads and find themselves in a position where they are unable to provide personal service to the parties without delegation of substantial duties to a secretary, then they should not accept an appointment.

All of that notwithstanding, as considered by several authorities like Partasides, this uniform approach should recognize the fact that many responsible arbitrators habitually delegate activities that go beyond the purely administrative to diligent secretaries without this constituting an improper discharge of their decision-making functions. Indeed, a refusal to consider this practice would encourage arbitrators to be less transparent about the current reality, resulting in a damage to the legitimacy of the arbitral process.[\[24\]](#)

Conclusion

The use and the scope of the role of arbitral secretaries attract particular interest within the arbitration community and constitute the subject of various guidelines by arbitration institutions across the globe. Nevertheless, these institutions take differing approaches that reflect the discrepancy of views amongst commentators and practitioners. This situation undermines the perceived legitimacy of the arbitral process and increases the possibility and frequency of challenges of awards on the grounds of an improper delegation to third parties of arbitrators' decision-making functions. Therefore, there is the need to develop and adopt a uniform approach which clearly sets out the different duties that arbitral secretaries may undertake without the risk of becoming "fourth arbitrators", taking into account the existing practice and the necessary consent of the parties to the appointment of an arbitral secretary.

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[1] N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford University Press (2015), §4.195.

[2] C. Partasides, *The fourth Arbitrator ? The role of Secretaries to Tribunals in International Arbitration*, in *Arbitration International*, Vol. 18, No. 2 (2012).

[3] See e.g. AAA/ABA Code of Ethics; W.W. Park, *Rectitude in International Arbitration* in *Arbitration International Special Edition on Arbitrator Challenges*, Kluwer Law International, (2011), p. 479; E.A. Schwartz, *The Rights and Duties of ICC Arbitrators*, in ICC, *The Status of the Arbitrator*, 67, p. 86.

[4] G. B. Born, *International Commercial Arbitration*, 2nd ed., Kluwer Law International, (2014), p. 1999.

[5] C. Partasides, N. Bassiri, et al., *Arbitral Secretaries*, in *ICCA Congress Series*, Vol. 17, Kluwer Law International, (2013), p. 329.

[6] See ICCA, *Young ICCA Guide on Arbitral Secretaries*, the ICCA Report No.1, Annex B; 2012 International Arbitration Survey by White & Case and Queen Mary College.

[7] C. Partasides, N. Bassiri, et al., *Arbitral Secretaries*, in *ICCA Congress Series*, Vol. 17, Kluwer Law International, (2013), p. 331.

[8] *Ibid.*, p. 330.

[9] ICC, *Note on the Appointment, Duties and Remuneration of Administrative Secretaries* (ICC Note), 2012, s2.

[10] *Ibid.*

[11] HKIAC, *Guidelines on the Use of a Secretary to the Arbitral Tribunal*, (2014).

[12] International Council for Commercial Arbitration, ICCA Reports No. 1: *Young ICCA Guide on Arbitral Secretaries*, (2014).

[13] C. Partasides, N. Bassiri, et al., *Arbitral Secretaries*, in *ICCA Congress Series*, Vol. 17, Kluwer Law International, (2013), p. 332.

[14] The Yukos awards arose out of three parallel investment treaty arbitrations brought by former shareholders of OAO Yukos Oil Company against the Russian Federation. See *Veteran Petroleum Limited (Cyprus) v the Russian Federation*, PCA Case No. AA 228, Final award, July 18, 2014.

[15] *P v Q and others* [2017] EWHC 194 (Comm).

[16] The writ is available at: http://old.minfin.ru/en/news/index.php?id_4=24358

[17] *P v Q and others* [2017] EWHC 194 (Comm), §51.

[18] *Ibid.*, §65.

[19] *Ibid.*, §69.

[20] *Ibid.*, §70.

[21] LCIA, *Notes for Arbitrators*, (2017), clause 8.

[22] M. Polkinghorne and C. B. Rosenberg, "The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard" in *Dispute Resolution International*, Vol. 8, No. 2 (2014).

[23] The ICC Note requires the arbitral tribunal to inform the parties prior to taking any steps to appoint a tribunal secretary (s. 1).

[24] C. Partasides, "Secretaries to Arbitral Tribunals", in Bernard Hanotiau and Alexis Mourre (eds), *Players Interaction in International Arbitration*, Dossiers of the ICC Institute of

World Business Law, Volume 9, p. 87.