Tribunal secretaries – back in the limelight

Tribunal secretaries can make proceedings faster, cheaper, and, in some respects, can protect the integrity of the resulting award. They do this by lessening the tribunal's administrative burden, allowing it to concentrate on its core work of considering the dispute and coming to a decision. Despite these potential benefits, the position of tribunal secretary has attracted a degree of criticism, at the heart of which is the fear that a secretary will exercise the tribunal's decision making power.

A recent decision

Justice Popplewell's decision in *P v Q*[1] demonstrates tribunals' wide procedural discretion, including with respect to the role of tribunal secretaries. In the context of tribunal secretaries, parties ought to bear in mind that they are granted broad autonomy with respect to the arbitral process, and they are accordingly free to agree to safeguards to reduce the risk of impropriety by a tribunal secretary; or to prohibit a secretary's use entirely.

The role

A tribunal secretary is a personal and confidential aide to the tribunal, commonly acting solely under the direction of the chairperson. They are intended to reduce the administrative burden on the tribunal, and so help make arbitral proceedings more efficient and cost-effective. A secretary may also help protect the integrity of an award.

A secretary's proper functions can broadly be categorised as either administrative or substantive. Administrative tasks, such as liaising with the parties, arranging meetings, hearings and travel, and managing submissions and evidence, are relatively uncontroversial. The same cannot be said of the more substantive tasks. Opinion is divided as to whether a tribunal secretary should undertake research, review the parties' evidence and prepare chronologies, attend tribunal deliberations, or draft factual or routine aspects of an award. The concern is that, by undertaking such substantive tasks, the tribunal secretary becomes an un-appointed "fourth arbitrator", who may interfere with the tribunal's mandate, and invalidate the resultant award.

The controversy

The "fourth arbitrator" issue came up most notably in connection with the *Yukos* awards.[2] It was raised again earlier this year by the claimant in the English courts in *P v Q.*

The Russian Federation challenged the Yukos awards shortly after their publication, relying on:

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1 *P v Q and others* [2017] EWHC 194 (Comm); see also *P v Q and others* [2017] EWHC 148 (Comm).

2 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.

- the amount of time the arbitral assistant[3] had spent on the arbitration, which exceeded that of any tribunal member; and

- the fact that most of the hours were recorded after the hearing, and therefore during the award's preparation.

The claimant in *P v Q* put forward similar arguments and sought the removal of the co-arbitrators. The complaint was triggered by an email, which the chairperson had inadvertently sent to the claimant's lawyers. In that communication, the chairperson had asked for the secretary's views about the claimant's compliance with a document production order. The claimant alleged that the co-arbitrators "effectively passed their pens to the tribunal secretary" and that this was demonstrated by the difference between the co-arbitrators' time and that of the secretary; and by the co-arbitrators having recorded one hour to review a 65 page draft decision of the chairperson concerning a document production application.

P v Q also raises questions as to the role of the co-arbitrators. When responding to the allegations against them, the co-arbitrators provided the following description (which was endorsed by Justice Popplewell) as to a tribunal's standard procedure with respect to interlocutory matters:

> *"[T]he Chairman, with the assistance of the Secretary, has prepared a draft decision for our review. Having studied the relevant materials beforehand, including the submissions of the parties, we would then comment on the draft and review any subsequent drafts incorporating our suggested amendments. As expected, neither co-arbitrator was involved in the substantive drafting of the final decisions. This is, in our experience, standard procedure which is both expeditious and cost efficient."*

And as to the co-arbitrators' interaction with the tribunal secretary:

> "*It is unnecessary and impractical for the co-arbitrators to be apprised of all communications between the Chairman and the Secretary."*

The LCIA Court first heard the complaint and dismissed it. Justice Popplewell observed that the High Court should "be very slow to differ from" the LCIA Court's decision about an arbitrator's removal, and, accordingly, followed the LCIA decision. In doing so, the judge cited commentary published by institutions and commentators to the effect that a secretary may, if properly supervised, undertake legal research, and draft portions of awards: "an arbitrator who receives the views of a tribunal secretary does not thereby necessarily lose the ability to exercise full and independent judgment on the issue in question." The way a tribunal discharges its personal mandate will, in practice, vary infinitely; ultimately what is required is that each tribunal member brings her or his personal and independent mind to bear on the decision, and to exercise reasonable diligence in discharging that function. The decision emphasises the high degree of discretion afforded to tribunals, and the judiciary's respect for the arbitral process.

The benefits

- ***Efficiency***

  By performing time consuming administrative tasks at a lower charge out rate than tribunal members the secretary reduces the costs of the arbitration. Additionally, a tribunal relieved of that administrative burden may be able to more quickly deliver an award.

[3] The formal 'Tribunal secretary' role was performed by an appointee of the governing institution. The arbitral assistant role bears some analogies to the secretary role, however.

- ***Quality of decision making***

  A tribunal secretary may allow the tribunal to focus on its core task of determining the substantive issues. Given the finality of an arbitral award, and the limited avenues of appeal, this benefit may be attractive to parties and their representatives.

  A secretary can also protect the award's integrity by reviewing a draft award against the parties' submissions and evidence, bringing to the tribunal's attention any missed detail. Some institutions, for example the ICC, already provide this service but the practice is not consistent across all institutions.

- ***Encourage full-time arbitrators***

  As part of the debate it has been argued that more widespread use of tribunal secretaries will encourage arbitration practitioners to commit full time to the role of arbitrator, rather than maintain a practice and perform the role of arbitrator on a part time basis. The ability to delegate more administrative and junior tasks to a secretary (and the resultant potential increase in profitability) may appeal to some.

  If that is correct, a more widespread use of tribunal secretaries would help with another live issue in international arbitration,[4] namely the risk of conflicts arising by virtue of arbitrators remaining in practice, which has the potential to erode confidence in international commercial arbitration.

Safeguards

Properly used, tribunal secretaries can benefit the arbitral process and help address some of the criticisms currently made of international arbitration. That said, there have to be safeguards in place to guard against the risk of the secretary being used as a "fourth arbitrator".

With this in mind, a number of guides have been produced which set out the role of the tribunal secretary, and institutional rules are increasingly seeking to regulate the position.[5] Recent examples include the Australian Centre for Commercial Arbitration's Guidelines on the Use of Tribunal Secretaries which are said to "encourage transparency". The ACICA Guidelines are somewhat broader than the LCIA equivalent, and expressly contemplate the secretary's involvement in the drafting of non-dispositive aspects of the award. Compare this with the LCIA "Notes for Arbitrators" which suggest that tribunal secretaries should confine their activities to organising papers, highlighting relevant legal authorities, maintaining factual chronologies, reserving hearing rooms, and sending correspondence on the tribunal's behalf. As *P v Q* demonstrates, the LCIA's more limited formulation does not prevent the secretary's drafting of part of arbitral awards.

- ***Be careful who you choose as your arbitrators***

  Arbitrators are afforded significant procedural discretion when compared with their curial counterparts, and this, in part, gives arbitration its laudable flexibility. But it means that we also place a high degree of trust in our arbitrators, including with respect to who the tribunal might appoint as its secretary. The judicious appointment of arbitral members goes some way in ensuring that an appropriate secretary is appointed, and in ensuring that the secretary is not

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4 *W Limited v M SDN BHD* [2016] EWHC 422 (Comm); see also, The General Council of the Bar (UK), Information Note regarding barristers in international arbitration, 6 July 2015, available at: http://www.barcouncil.org.uk/media/376302/bc_information_note_-_perceived_conflicts_in_international_arbitration_-_060715.pdf

5 See for example, International Council for Commercial Arbitration, Young ICCA Guide on Arbitral Secretaries, The ICCA Reports No. 1, (2014); the Stockholm Chamber of Commerce's recent draft of its Arbitration Rules 2017; the International Chamber of Commerce's Note on the Appointment, Duties and Remuneration of Administrative Secretaries 2012; the Hong Kong International Arbitration Centre Guidelines on the Use of a Secretary to the Arbitral Tribunal 2014; and most recently the Australian Centre for International Commercial Arbitration launched its Guideline on the Use of Tribunal Secretaries.

"tasked with anything which involves expressing a view on the substantive merits of an application or issue,"[6] because ultimately the tribunal is the protector of its mandate.

- ***Be careful who the tribunal chooses as its secretary***

  Typically, parties will not mandate who the tribunal selects as its secretary; though they may do so, or they may set guidelines as to particular qualities that a secretary must (or must not) possess. The *Yukos* circumstances suggest that, ideally, a secretary will not be so experienced that she or he could be a tribunal member. Equally, where the parties agree that it is appropriate that a secretary undertakes more than a merely administrative role, they should consider whether it is necessary for the secretary to have had some level of training.[7]

  The ACICA's Guidelines suggest a relatively high level of party involvement in the secretary appointment process. Both the HKIAC and the ACICA require the tribunal to circulate a proposed secretary's resume to the parties for comment. The HKIAC Guidelines require only that the tribunal considers the parties' comments before appointing the secretary. In contrast, the ACICA Guidelines permit the secretary's appointment only with the parties' agreement. Under the LCIA Notes the parties are only involved in the decision to have a tribunal secretary. If so agreed, they are not consulted with respect to the secretary's identity or credentials. The different levels of party involvement contemplated by the institutions is reflected in the way secretaries are remunerated. For both the HKIAC and the ACICA, where the tribunal's fees are based on an hourly rate, the secretary's fees are additional; but where the tribunal's fees are ad valorem, then the secretary's fees form part of the tribunal's fees and are shared among them. For the LCIA, the secretary's fees are typically paid from the parties' deposits with the institution.

  Additionally, the ACICA maintains a panel of tribunal secretaries for appointment; and the HKIAC offers members of its HKIAC Secretariat to fill that role.

- ***A secretary's appointment and role should be, as far as possible, transparent***

  The parties should be told who the secretary is, and who the secretary is affiliated with. No secretary should be used in circumstances where the parties do not agree. Approval may be obtained by submitting a proposed secretary's resume to the parties for their anonymised comment – this is recommended by Article 2 of Young ICCA's Guide.

  When challenging the Yukos awards, and in *P v Q,* the applicants' sought detailed narrations of the secretary's tasks. Disclosure of that evidence was refused in both cases. In *P v Q* Justice Popplewell demonstrated the judiciary's non-interventionist attitude to arbitrations, and held that such disclosure will only be ordered in the 'very rarest of cases' where there are 'compelling reasons and exceptional circumstances'.[8] A balance must be struck between ensuring the tribunal's accountability and protecting the confidentiality of the tribunal's decision making process.

It must never be forgotten that arbitration is a process founded upon the consent of the parties – and use of a tribunal secretary is a tool some users feel strongly to be inappropriate. Such a position must ultimately be respected – but discussions between tribunals and parties as to whether, and if so how, it may be appropriate to use a tribunal secretary will be well served by the analysis reflected in recent decisions such as *P v Q* and the focus that decision gives to the assessment of leading arbitral institutions.

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6 *P v Q and others* [2017] EWHC 194 (Comm) at [68].

7 Institutions such as HKIAC, CIArb, ACICA and the ICC offer tribunal secretary training courses.

8 *P v Q and others [2017] EWHC 148 (Comm)* at [68].

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