Miss Moneypenny vs. the Fourth Musketeer: the Role of Arbitral Secretaries

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by James Menz and Anya George, Schellenberg Wittmer

The (proper) use of administrative secretaries is a recurring topic in the arbitration community. The debate has flared up again in recent months, following the issuance, in August 2012, of the ICC Secretariat's new Note on the Appointment, Duties, and Remuneration of Administrative Secretaries and, a few months after that, the publication of the Queen Mary / White & Case International Arbitration Survey.

The issue which has always prompted the most intense debate is the scope of the administrative secretaries' duties. The Queen Mary / White & Case survey shows some interesting figures in this regard: only 4% of the international arbitrators surveyed "*discuss the merits of the dispute*" with secretaries. Yet 77% state that secretaries "*communicate with the parties*", 70% that they "*prepare drafts of procedural orders and non-substantive parts of awards*", 47% that they conduct "*legal research"*, and 10% that they "*draft substantive parts of awards*".

By contrast, the new ICC Note places strong emphasis on the "administrative" aspect of the secretary's duties and discourages any more substantive involvement: in other words, it envisages an arbitral secretary in the Miss Moneypenny sense of the word (albeit with some legal skills). The Note also

stresses that it is the duty of the arbitral tribunal to personally draft "*any decision*".

The fairly stark gap between the ICC's stance and the reality reflected in the results of the survey is nothing new. As one eminent practitioner noted: "*I have long felt that there are few aspects of the practice of international arbitration that better deserve the unwelcome moniker of 'hypocrisy' than the approach to the role of the secretary to the tribunal*" (Constantine Partasides, *Chapter Seven: Secretaries to Arbitral Tribunals*, in B. Hanotiau and A. Mourre, Players' Interaction in International Arbitration 87 (ICC, 2012)).

At a recent seminar held to discuss the findings of the Queen Mary / White & Case survey, the managing counsel of the ICC is reported to have said that the institution would now be taking a *"tough line"* in enforcing the policies set forth in the 2012 Note. Similarly, the registrar of the LCIA indicated that the job of an administrative secretary is to organize papers and travel, help with research and maintain time sheets, but not to draft any portions of the award. The LCIA, she stated, would take up the issue with arbitrators if it found "*excessive delegation*".[1]

This push towards a stricter regulation stems from a fear that administrative secretaries might be allowed to intervene in the decision-making process. As Brazilian arbitrator Gilberto Giusti put it at the latest IBA Arbitration Day: "*We must make sure the tribunal secretary does not become the d'Artagnan of arbitral proceedings*".[2]

The question is, at what point does Miss Moneypenny become the fourth musketeer? Or rather, what are the duties which an arbitrator must, in all cases, fulfill personally? As pointed out in the ICC Note, arbitrators must review the file and must make a decision on the dispute. On this, at least, there is a consensus. What, then, should the duties of the administrative secretary be? To give a lawyer's answer, it depends—on the parties' stated preferences, on the particulars of the case, on the secretary, and significantly on the arbitrators. While it may be useful to specifically enumerate and agree in advance the activities of a secretary, a list of activities is no substitute for the most critical of all arbitrator qualities: good judgment.

One of the main expectations of parties choosing an arbitrator is that he or she will apply good judgment not only to the dispute itself, but also to the conduct of the

proceedings. Good judgment includes the ability to distinguish between the tasks that should not or cannot be delegated, and those whose delegation will enhance the efficiency of the proceedings. That ability cannot be imposed by policy or legislation. But just like parties trust their arbitrators not to consult Tarot cards in deciding the merits of their dispute, they should (and they do) have the option of trusting the arbitrator to use a secretary responsibly.

For example, large international arbitrations increasingly involve an amount of evidence that makes it desirable, if not necessary, to involve secretaries beyond purely administrative tasks—subject to adequate supervision, of course. It is not uncommon for cases with even moderate amounts in dispute to involve tens of thousands of pages of exhibits and dozens of fact witness statements and expert reports. The twin goals of personally reviewing the entire file and rendering an award in a time frame consistent with the parties' and the institutions' expectations can be difficult to reconcile. Parties who themselves employ teams of sometimes dozens of attorneys realistically cannot, and most likely do not, expect arbitrators to wade through such voluminous files unassisted. Arbitrators who make an astute use of the skills of an administrative secretary in such cases will often be able to more easily focus on the essentials of the case and not lose sight of the forest for the trees. For example, efficient and proactive arbitrators will define and deliberate on the central issues of the case as the arbitration develops. Secretaries can provide invaluable assistance in this respect by carrying out research and compiling facts and evidence throughout the arbitration.

It may happen that arbitrators exceed the scope of reasonable delegation, abdicating core responsibilities to the secretary. This is unacceptable. But surely the way to combat such abuse is to permit the unfettered operation of the market for arbitrator services. Much remains to be done in this respect. But already today, an arbitrator who consistently fails to take his or her duties seriously, is unprepared, and produces sub-standard awards will soon be black-listed by parties and peers. This holds true irrespective of whether or not that arbitrator relied on the assistance of a secretary. On the other hand, an arbitrator who is consistently well-prepared, conducts the proceedings in an efficient manner and produces well-reasoned awards will gain recognition – again, irrespective of whether or not he or she chooses to delegate some tasks to a secretary.

There is no question that the parties have a right to choose an arbitrator who will run every aspect of the case him/herself. A hands-on arbitrator cannot handle as

many cases as do most internationally prominent arbitrators today. This could drive up demand for the kind of younger arbitrators that most arbitral secretaries one day hope to become. The problem is that given the lack of transparency, users are often simply not aware of this issue. First-time users especially can be unfamiliar with the functions of an administrative secretary. They may be surprised to find out that he or she is a fully qualified lawyer and may have duties beyond taking minutes and keeping time at the hearing.

In this respect, the ICC Note has provided a welcome guideline which should lead to more transparency. At the same time, the Note does not reflect the reality – evident from the Queen Mary Survey – that both common law and civil law arbitrators use secretaries for a number of non-administrative duties. A regulation of the use of secretaries which ignores this reality or tries to suppress it could end up back-firing, leading to an underground economy of undisclosed secretaries or disclosed secretaries with undisclosed duties. And it may provide obstructionist or disgruntled parties with additional stumbling blocks to throw in the way of arbitration proceedings or enforcement.

In sum, the role of an administrative secretary lies somewhere between Miss Moneypenny and d'Artagnan. It is up to the parties and the arbitral tribunal to determine the "right" level of involvement. This decision should be guided by openness and consent, an appreciation for the need to reconcile the ever-growing complexity of disputes and volumes of evidence with the need to adjudicate disputes rapidly, and trust in the arbitrators' good judgment in delegating and supervising responsibly. The best check against abuse is not prohibition, but additional transparency and quality control mechanisms for arbitrator services generally.

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[1] *LONDON: Survey results explored,* conference report published on the website of the Global Arbitration Review, 14 May 2013.

[2] *What goes on in arbitrator deliberations?,* conference report published on the website of the Global Arbitration Review, 29 May 2013.