Tribunal secretaries: a tale of dependence and independence

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"Help! I need somebody
Help! Not just anybody
Help! You know I need someone, help …
And now my life has changed in oh so many ways,
My independence seems to vanish in the haze …"

Help raises a question of need, but does it lead to a loss of the fundamental decision-making power vested in the arbitral tribunal? John Lennon's lyrics to the song *Help* unwittingly but neatly summarised the current debate over tribunal secretaries more than half a century ago.

Indeed, in recognition of the increasing role of tribunal secretaries in arbitration, Clifford Chance recently hosted the HKIAC Tribunal Secretary Accreditation Programme in Singapore. This programme and a similar one being organised by the CIArb and LCIA are, to the authors' knowledge, the only programmes specifically designed to provide accredited training for tribunal secretaries. The HKIAC's stamp of approval can reassure parties, their counsel and their tribunals that the risk of 'fourth arbitrator' accusations would be minimised.

Such training and accreditation are timely, considering Russia's recent attack in the Dutch courts on the largest publicly-known arbitral award in history, that in the Yukos arbitration. One of Russia's arguments was that the tribunal had improperly delegated its duties to Martin Valasek, who was the tribunal's secretary – or, from Russia's perspective, the 'fourth arbitrator'.

In the event, the Dutch judges did not rule on this issue as they set aside the award on different grounds. That said, the colourful press that Russia's arguments received has revived interest in arguments in support of set-aside applications that target arbitrators' use of their secretaries and in the guarding of arbitrators, secretaries and awards from such attacks.

While there has been extensive discussion in this regard, blurred lines remain, particularly as to the appointment, scope of work and liability of tribunal secretaries. This post discusses these three areas of dissonance and measures that may address them.

Appointment
There are two competing philosophies with regard to the appointment of tribunal secretaries –

consent and efficiency – with the tribunal being the master of procedure.

These competing philosophies have led to a number of arbitral institutions adopting one of two types of approach. The first, the consent-focused approach (adopted by the SIAC, ICC, LCIA, SCC and JAMS) is that a secretary proposed by the tribunal can only be appointed if approved by all parties. After all, a distinguishing feature of arbitration is the parties' choice of their arbitrators, accompanied by an arbitrator's freedom to reject a nomination.

This approach resonated with participants in surveys conducted in 2012 and 2013 by ICCA and in 2015 by Berwin Leighton Paisner (BLP), in which 76-77% of them felt that consent, both to the appointment of tribunal secretaries in general, and to the appointment of a particular secretary, should be obtained prior to his/her appointment. Partasides elevates such consent to a "fundamental pre-requisite".

The second approach, adopted by the HKIAC and commended by ICCA, is for the tribunal to propose the secretary to the parties and then allow them to raise objections, but with the tribunal determining any objection and not being required to give reasons when doing so. This approach was endorsed by the Swiss Supreme Court in Decision 4A_709/2014 and (to some extent) by the English High Court in *Sonatrach v Statoil* [2014] 1 CLC 473 (*Sonatrach*).

Scope of the tribunal secretary's tasks

There is broad consensus among the international arbitration community that the appointment of a tribunal secretary should never result in the derogation of a tribunal's decision-making powers. This was the "principal reason for avoiding the appointment of a secretary" among the ICCA 2012 survey respondents.

Three tasks that are (on the basis of responses to the ICCA and BLP surveys) especially controversial are (i) reviewing or summarising evidence and submissions, (ii) participating in the tribunal's deliberations, and (iii) drafting substantive parts of the award. Further, Russia's arguments on setting aside the award on the basis of Martin Valasek's involvement in Yukos centred on his undertaking of these three tasks.

Two approaches towards the delineation of the tribunal secretary's scope of work can be distilled from the practice rules and guidance of the arbitral institutions.

The first approach broadly permits a tribunal secretary to undertake some or all of the substantive tasks set out above. For example, the HKIAC expressly permits the tribunal secretary to take on tasks that are not "organizational and administrative", including "preparing summaries from case law and publications", "producing memoranda summarizing the parties' submission and evidence", "attending the arbitral tribunal's deliberations", and "preparing drafts of … non-substantive parts of the tribunal's orders, decisions and awards". Such power is subject to veto by the parties, which must be agreed upon.

The second approach, which is narrower, restricts a tribunal secretary's remit. For example, the LCIA FAQs stipulate that secretaries should "confine their activities to such matters as organising papers for the tribunal, highlighting relevant legal authorities, maintaining factual chronologies, keeping the tribunal's time sheets and so forth".

Liability of tribunal secretaries

Confidentiality

In many jurisdictions, arbitrators are typically bound by express and/or implied obligations of confidentiality to the parties. Tribunal secretaries, if properly appointed, should also owe obligations

of confidentiality to the parties. For example, SIAC requires a tribunal secretary to execute a declaration of confidentiality prior to his/her appointment, while the HKIAC Guidelines place the tribunal secretary under an express obligation of confidentiality.

Conversely, if a tribunal secretary is not formally appointed, the existence and scope of his/her obligations of confidentiality are less clear. Arguably, however, such a tribunal secretary may still be sued for breach of confidence in tort in the same jurisdiction.

Thus, with regard to both the existence and the enforcement of a tribunal secretary's obligations of confidentiality, greater certainty is achieved if s/he is formally appointed by the tribunal.

Liability generally
Virtually all legal systems accord arbitrators a substantial degree of quasi-judicial immunity from civil claims arising out of their conduct of the arbitration. For example, section 25 of the Singapore International Arbitration Act (Cap 143A) states that an arbitrator "shall not be liable for … negligence … and … any mistake in law, fact or procedure …"

Such immunity does not apply with the same universality to tribunal secretaries. If properly appointed, tribunal secretaries may, however, derive some immunity from institutional guidelines. For example, the HKIAC Guidelines shield tribunal secretaries from liability save in the case of dishonesty, and oblige parties not to make a secretary a party or witness in proceedings arising out of the arbitration.

Conclusion: Keep the doors open
The door for tribunal secretaries has been opened and will almost certainly remain open. In arbitration hubs like Singapore, it is undeniable that top-notch arbitrators typically need assistance in order to manage their concurrent appointments. That assistance usually comes in the form of a tribunal secretary (who is also employed by the arbitrator's chambers). It is timely for institutions to lay down formal rules or guidelines applicable to some of the key issues surrounding the use of tribunal secretaries. This will allow for certainty for all stakeholders. Failure to address the issues surrounding appointment of tribunal secretaries proactively can affect the integrity of arbitration's most prized products – arbitral awards.

To this end, the following suggestions merit consideration.

(1) *Even if not required to do so by applicable rules or guidelines, arbitrators should obtain the parties' express written consent before appointing a tribunal secretary.* Alternatively, they should obtain deemed consent – for example, by stipulating a time period during which objections may be made. The following, in particular, should be proposed (or at least disclosed) to the parties: (i) the fact that a tribunal secretary will be appointed; (ii) the fact that a particular individual will be appointed; (iii) his/her CV; (iv) his/her declaration of impartiality/independence and any details that may reasonably give rise to doubts about his/her impartiality/independence; and (v) the scope of his/her tasks (including, importantly, the limits thereto).
(2) *There should be clear definition of the scope of work that tribunal secretaries are allowed to undertake.* Arbitral institutions should continue to take the lead on promulgating clear rules or guidelines to set out the scope of what is permissible and what is part of the integral decision-making process that should not be delegated by an arbitrator. Each institution may well draw the lines and set the balance differently, but this will result in clarity for all concerned, particularly the parties.
(3) *Limits on the scope of work for which a tribunal secretary may recover fees should be established and agreed to before s/he commences work.* This should involve the disclosure of timesheets, as is the case for arbitrators and counsel. This would increase transparency and ameliorate any adverse 'perception impact' of the self- or tribunal-policing of tribunal secretaries and the non-disclosure of

their memoranda and drafts (such disclosure was requested, but refused, in the arbitration in question in the *Sonatrach* case). This would also disincentivise tribunal secretaries from delving into work that is beyond their proper remit.

(4) *Arbitral institutions, and not tribunals, should determine objections to the appointment of tribunal secretaries.* While this may appear at odds with the 'light touch' approach to case administration preferred by some institutions, this would enhance the impartiality (and/or the appearance thereof) of such determinations.

(5) *Formal training and accreditation should be provided to budding tribunal secretaries, in addition to the HKIAC and CIArb/LCIA programmes mentioned above.* This would boost parties' confidence in the competence and integrity of secretaries and thereby reduce the incidence of objections. Formal training may also be extended to users and practitioners of arbitration, including counsel and arbitrators, so as to promote greater awareness and understanding of the proper role of the tribunal secretary.