

The Problem of Assistance in Investment Arbitration?

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Most investment treaties do not expressly provide for the appointment of assistants or secretaries to the arbitral tribunal. It is an institutional practice that has been subsequently codified by several arbitral institutions, while some institutions are still silent on the subject. Despite the significant attempts being made, the apprehension that arbitral secretaries may overstep their limits continues to haunt the parties and the arbitral process. The same apprehension was shared by Popplewell J in *P v Q*, wherein he illustrated the considerable and understandable anxiety in the international arbitration community that the use of arbitral secretaries risks them becoming the fourth arbitrators. It is an established institutional practice that the arbitral tribunal may appoint assistants or secretaries after consulting the parties. The tribunal is further required to present the curriculum vitae of the assistants to the parties. Moreover, the same standards of independence and impartiality extend to such assistants and they are required to comply by the disclosure requirements. However, it cannot be assumed that entrusting the assistant with substantive arbitral functions was contemplated by the parties while giving the consent to their appointment.

Prevailing Rules Regarding the Role of Arbitral Secretaries

The ICCA Guide on Arbitral Secretaries attempts to enlist the best practice principles for the appointment and exercise of assistance by secretaries. It also provides that the delegation of work to secretaries may legitimately go beyond the administrative roles. The ICCA Guide elaborates that the role played by arbitral secretaries may include, researching questions of law and questions relating to factual evidence and witness testimony. Moreover, the task of secretaries may extend to drafting and reviewing procedural orders, parties' submissions and evidence. They may also attend the arbitral tribunal's deliberations and draft appropriate parts of the award'. Other institutions such as the SCC and LCIA limit the extent of tasks of assistants to purely organisational and administrative work of the arbitral tribunal. The UNCITRAL Notes on Organizing Arbitral Proceedings limits the task of secretaries to listing and briefing in light of fostering a timely decision by the tribunal. The SCC's 2017 Arbitrator's Guidelines further provide that, subject to any agreement of the parties to the contrary, 'the administrative secretary's duties shall be limited to organisational, clerical and administrative functions'. While there is no conclusive determination as to what the administrative functions might entail, the guidelines explicitly state that the tribunal shall not delegate any decision-making authority to the administrative secretary'. The Singapore International Arbitration Centre (SIAC) is not elaborate on the subject and provides that a secretary may only be appointed with the consent of all the Parties. However, it does not entail the ambit of the secretary's duties and the same is subject to the

agreement between the parties. Moreover, the same standards of independence and impartiality are extended to the assistants. This is evident from the comparison given in the IBA Guidelines on Conflict of Interest in International Arbitration 2014 (“IBA Guidelines”) that both “secretaries and assistants to the Arbitral Tribunal are bound by the same duty of independence and impartiality (including the duty of disclosure) as arbitrators”.

Impact of delegation of Substantive functions to the Assistants or Secretaries

Over the years, the arbitral practice in Investment Arbitration, shows that arbitral assistants are sometimes appointed to assist the arbitrators. The complexity of the cases and the abundance of the submissions made by the parties triggers the appointment of assistants. The arbitral tribunal in *Caratube v. Republic of Kazakhstan* justified the appointment of the tribunal’s assistant by the need for logistical assistance on the file in this case. Furthermore, the appointment of assistants is in line with the objective of arbitration i.e. to ensure expedient and efficient resolution. The tribunal secretaries increase the efficiency of the arbitration proceeding by supplementing the arbitrators during the arbitral process. Moreover, they allow the arbitrators to focus on deliberating on the merits, and enable them to decide the cases expediently. Therefore, the appointment of arbitral secretaries provide a cost effective mechanism to ensure the efficiency and expediency of the proceedings.

However, it is important to draw the line between the essential functions of the arbitrators and the functions that can be delegated to the assistants. The excessive involvement of arbitral assistants raise the following concerns.

1. It shall be a ground for the disqualification of the Arbitrator

The delegation of substantive functions breaches the President’s duties to perform his function personally. Article 14 of the UNCITRAL Model Law provides that if an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, then either party may request the court for the termination of his mandate. Article 14 of the ICSID Convention requires the arbitrators to be of high moral character and recognized competence.[fn] ICSID Convention, 1986, Art. 14(1).[/fn] Moreover, the arbitrator must fulfill his role by exercising independent judgement to the best of his skill. The involvement of arbitral assistants and secretaries is contrary to the exercise of independent judgement. Furthermore, the position of arbitrators is voluntary and the same can be declined if they want to delegate essential functions to the secretary. Thus, the delegation of substantive functions by the arbitrator shall be a ground for a disqualification as it would render him unable to perform his duties.

2. The delegation of substantive functions would raise doubts over the credibility of the award

The duties of the arbitral assistant must be limited to organisational and administrative work not extend to substantive functions such as collecting evidence and drafting the award. It was highlighted by Professor Jan Hendrik Dalhuisen, in his Additional Opinion in *Compañía de Aguas v Argentina*, that the appropriate role of a tribunal secretary is one of ‘administration and support’ and that the secretary is not the ‘fourth member of ICSID tribunals or ad-hoc committees. The assistants’ role must

be limited to organisation and maintenance of the tribunal's files and other administrative work such as organising hearings and meetings, attending deliberations, performing legal research, and proofreading procedural orders and awards. The ICCA note on arbitral secretaries expressly states that under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary. The delegation raises concern of quality, impartiality and objectivity. Arbitral Institutions prescribe for certain qualifications for arbitrators in investment arbitration that ensure the integrity of the tribunal. Therefore, as the arbitrators in investment arbitration possess considerable expertise in the subject, the involvement of secretaries and assistants in decision making would raise claims against the authenticity and credibility of the award.

3. *It shall be a ground for subsequent Annulment of the Award*

The use of assistants in carrying out the substantive tasks of an arbitrator can directly impact the validity of an arbitral award. It must be noted that almost all domestic jurisdictions as well as international institutions recognise a serious procedural irregularity as a ground for annulling an arbitral award. The question was dealt by the Italian Supreme Court in *Sacheri vs Robotto*, wherein it was held that delegation of the decision-making function to a third party amounted to a violation of due process and annulled the impugned award. Therefore, the delegation of substantive functions is a fundamental departure from rule of law and would be a ground for annulment of award. The issue was brought to the forefront in the Yukos cases wherein the Russian Federation challenged the delegated substantive responsibilities to the Tribunal's assistant and argued that the award must be set aside on the basis of Article 1065(1)(c) of the Dutch Code of Civil Procedure as the arbitrator failed to fulfill its mandate. Though the District Court did not address the issue as it set aside the awards on the grounds that the ECT had not been ratified by the Russian Parliament, the appeal against the assistant playing role in decision making did raise questions of legitimacy over the involvement of secretaries in International Arbitration.

Conclusion

The limited role for tribunal secretaries stems from the *intuitu personae* nature of appointment of the arbitrators. Therefore, while the appointment of assistants makes the arbitral process smooth and expedient, there should be a line differentiating the role played by party appointment arbitrators possessing the requisite standards set by the arbitral institutions and the assistants appointed by the tribunals to assist in organisational and administrative tasks. In order to ensure greater transparency and evade the possible consequences mentioned in the last section, the work of the secretary must be clearly agreed by the parties, and known to them throughout the process. Moreover, there is a need for uniformity of regulation as the uncertainty regarding the proper role of the secretaries adds a negative connotation to the perceived legitimacy of the arbitral process and the award. Thus, risking the annulment of the award after a lengthy arbitral process.