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Different Strokes for Different Folks? The Role of the Tribunal Secretary

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The role of the tribunal secretary in international arbitration has been called an “enormously grey area” that has been subject to instances of “abuse.” With concerns of the secretary going beyond his or her position as an assistant to the tribunal and becoming a decision-making “fourth arbitrator,” the proper role of the tribunal secretary has been a regular topic of discussion within the international arbitration community in recent years.

Advocates for broad responsibilities contend that tribunal secretaries increase the efficiency of the arbitration proceeding, allow the arbitrators to focus on deliberating on the merits, and enable tribunals to render awards faster. It also is commonly noted that using a tribunal secretary is cost effective because the hourly rate of a secretary is well below the rate of the arbitrators.

By contrast, those who advocate for a limited role for tribunal secretaries argue that the selection of arbitrators is *intuitus personae* (“because of the person”) and therefore there should be no delegation by them. Unlike domestic judges who cannot refuse a case due to a busy docket, the position of arbitrators is voluntary and they can simply decline appointment if they would need assistance from a secretary. In addition, some express concern that any summary or research performed by the tribunal secretary necessarily bears the secretary’s perspective and thus might improperly influence the arbitrator’s own evaluation.

No doubt fueling this debate is the fact that no uniform standard exists, as different arbitration institutions provide different restrictions on the role of tribunal secretaries:

- The ICC’s [Note on the Appointment, Duties and Remuneration of Administrative Secretaries](#) specifies that secretaries may perform “organizational and administrative tasks,” including transmitting communications on behalf of the tribunal, organizing and maintaining the tribunal’s files, organizing hearings and meetings, attending deliberations, performing legal research, and proofreading procedural orders and awards.
- The LCIA’s [position on the appointment of Secretaries to Tribunals](#) allows secretaries to organize papers for the tribunal, highlight relevant legal authorities, maintain factual chronologies, and maintain the tribunal’s time sheets.
- The [Arbitration Institute of the Finland Chamber of Commerce’s Guidelines for Using a](#)

[Secretary in FCC Arbitration](#) allow secretaries to research legal and technical matters but prohibit them from participating in deliberations and drafting awards.

- ICSID’s Arbitration Rules preclude ICSID secretaries from attending deliberations without the tribunal’s consent.

Other arbitral institutions – including the Arbitration Institute of the Stockholm Chamber of Commerce, the Netherlands Arbitration Institute, and the Swiss Chambers’ Arbitration Institute – are silent on the role of the tribunal secretary.

While different arbitral institutions naturally do things differently, the varied and often non-existent restrictions on the role of tribunal secretaries contribute to the uncertainty regarding their proper role in international arbitration. This, in turn, might negatively affect the perceived legitimacy of the arbitral process and the resulting award, as questions might arise as to whether the secretary has exceeded his or her position as an assistant to the tribunal.

Accordingly, to enhance the perceived legitimacy of the arbitral process and the resulting award, the international arbitration community may want to consider promulgating a uniform standard for the role of tribunal secretaries in the form of guidelines of best practices that could be adopted by arbitration institutions and parties. Young ICCA has taken an important first step in this process by publishing its [Young ICCA Guide on Arbitral Secretaries](#), which reflects the effort of young practitioners to codify existing best practices based on surveys conducted in 2012 and 2013. The international arbitration community could build on Young ICCA’s work and consider promulgating guidelines on the role of the tribunal secretary that address, inter alia, the following issues:

- Should a potential secretary sign a “Statement of Impartiality and Independence” prior to appointment?
- Should a potential secretary’s *curriculum vitae* be circulated to the parties in advance of appointment?
- Should the parties consent to the appointment of a secretary?
- Should a potential secretary sign a Confidentiality Agreement prior to appointment?
- May a secretary perform organizational and administrative tasks, such as organizing meetings, coordinating logistics, and communicating with the parties?
- May a secretary summarize factual evidence and draft factual chronologies?
- May a secretary summarize the parties’ pleadings, witness statements, and expert reports?
- May a secretary research questions of law?
- May a secretary attend deliberations?
- May a secretary draft procedural orders?
- May a secretary draft non-substantive portions of awards?

- May a secretary draft substantive portions of awards?
- May a secretary have decision-making functions?
- May a secretary be paid for his or her time? If so, who is responsible – the tribunal or the parties – for such expenses?
- May a secretary receive reimbursement for reasonable expenses? If so, who is responsible – the tribunal or the parties – for such expenses?

A uniform standard in the form of guidelines of best practices that could be adopted by arbitration institutions and parties likely could well strengthen the perceived legitimacy of the arbitration process and resulting award by minimizing the likelihood that the secretary would exceed his or her position as an assistant to the tribunal and impermissibly become a decision-making “fourth arbitrator.” Indeed, even if it is considered too soon to opt for a universal standard, individual tribunals might do well to get the parties’ “buy-in” on many of these points at the outset of any particular case.


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