Kluwer Arbitration Blog

Stop Ignoring the Elephant in the Room!

Olga Boltenko (Fangda Partners) · Monday, June 9th, 2014

Recent posts suggest that "*double hats*" – practitioners who also act as arbitrators – have finally taken interest in the role of a tribunal secretary. Several years ago it would have been unthinkable for partners in major law firms to spend their time concerning themselves with what the tribunal secretary does, let alone post Kluwer blogs about it. Back in those dark days, major arbitral institutions, when asked directly, would either give a diplomatic and non-committal response or remain silent as to what their legal officers do when assigned the role of a secretary. That is largely why the tribunal secretary area of international arbitration has remained "*grey*", as Michael Polkinghorne elegantly put it in his latest Kluwer blog post.

The ICC improved this sad state of affairs by issuing a revised note on arbitral secretaries in 2012. Recognizing that "*administrative secretaries can provide a useful service to the parties and Arbitral Tribunals*", the note implies that the duties of the secretary are not purely administrative in nature as they include "*attending deliberations" and "conducting legal research*". At the same time, the note makes it clear that "*under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary*".

It is largely because of the quality and scope of secretarial services to arbitral tribunals that the Permanent Court of Arbitration (PCA) has risen from a peripheral and dormant institution to a bourgeoning powerhouse of investment and state-to-state arbitration. At the PCA, the role of the registry is often intertwined with the role of a tribunal secretary. Depending on the tribunal, the tribunal members either rely on the PCA legal counsel as tribunal secretaries or use the PCA for purely administrative purposes. Most PCA tribunals prefer to rely on the secretarial services of the PCA legal counsel.

Other institutions are increasingly looking to develop secretarial support as a part of their arbitration services. In 2010, the SCC recognized the importance of this by including the "*Administrative Secretary*" provisions in its 2010 Guidelines to Arbitrators. In June last year, the Arbitration Institute of Finland introduced its Note on the Use of a Secretary. In that note, the Finnish Institute acknowledged that the services of a secretary may go beyond purely administrative tasks and that "*a secretary may provide limited assistance to the arbitral tribunal in its decision-making process*". Much like the ICC, the Finnish institution makes it clear that "*An arbitrator may under no circumstances rely on a secretary to perform any essential duties of an arbitrator*."

The Hong Kong International Arbitration Centre has recently expanded its administration services

to include secretarial support to arbitral tribunals, and it is one of the first Asian institutions to do so. In line with the other modern institutional guidelines, the HKIAC secretary guidelines require that "*The arbitral tribunal shall not delegate any decision-making functions to a tribunal secretary, or rely on a tribunal secretary to perform any essential duties of the tribunal*".The HKIAC guidelines are also one of the first to introduce a secretary challenge mechanism.

Finally, Young ICCA has recently launched its Guide on Arbitral Secretaries which brings together the experience of institutions and counsel, as well as best practices in the field.

Perhaps the most non-transparent area of secretary work is what the secretary does in addition to the administrative management of the case. A secretary is in a position to brief the tribunals on the way the parties have articulated their arguments and what they relied on in support of their propositions. The secretary has the record at his or her fingertips and can pull out the required evidence at the tribunal's request. Often the secretary takes notes during the deliberations and produces minutes of the deliberation meetings to remind the tribunal members of what has been discussed.

In line with the institutional guidelines, a good secretary may be tasked with drafting and can produce a lead-up to the tribunal's analysis and decision well before the final hearing. This document may include the procedural history of the case, a summary of the parties' arguments, a synopsis of witness evidence, and many other chapters that can later assist the tribunals in preparing for the hearing. These working documents expedite the decision-making process and can save the parties' deposits.

The role of the arbitral secretary requires experience, knowledge of arbitration, as well as a certain degree of diplomatic skills. It comes as no surprise that talented practitioners have served or continue to serve as secretaries to prominent arbitral tribunals. Just to name a few: Mr. Martin Valasek in *HYV v Russian Federation* (Yves Fortier, Stephen Schwebel, Charles Poncet); Mr. Samuel Wordsworth QC in *Methanex v USA* (William Rowley, Warren Christopher, V.V. Veeder); Dr. Romesh Weeramantry in *McKenzie v Vietnam* (Neil Kaplan, Campbell McLachlan, John Gotanda), and many others.

More can be said about the role of the secretary, but the recent developments suggest that indeed this "*grey*" era is coming to an end. A new area of arbitration practice is emerging as institutions are developing notes on the use of arbitral secretaries, and more importantly, as the parties to arbitral proceedings realize the benefits of the use of secretaries.

The author's views do not necessarily reflect the views and the practice of Neil Kaplan CBE QC SBS.

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