Kluwer Arbitration Blog

When Does a Tribunal Secretary Overstep the Mark?

Peter Hirst (Clyde & Co.) · Tuesday, April 18th, 2017 · Clyde & Co.

The use of tribunal secretaries in arbitration is a hotly debated topic. For some time now, the use of a secretary has been increasing in the interests of cost and time efficiency. For some however, there is a fear that arbitrators delegate their duties and for a 'second' or 'fourth' arbitrator to be involved in the decision-making process (contrary to the very ethos of arbitration). A recent decision of the English High Court gives lessons for parties and arbitrators when considering tribunal secretary appointments.

P v Q

In *P v Q* [2017] EWHC 194 (Comm) (handed down in February 2017 but published in anonymised form this week) the Hon. Mr Justice Popplewell in the English High Court considered an application (the removal application) under s24(1)(d)(i) of the Arbitration Act 1996 (AA 1996) to remove two co-arbitrators from their positions in an ongoing LCIA arbitration. Section 24(1) (d) (i) provides that a party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on grounds that he has refused or failed to properly conduct the proceedings.

The application was founded on conduct in three procedural decisions made by the tribunal relating to the sharing of documents between two related arbitrations, an application for a stay and production of documents. Concerns were particularly raised when an email from the chairman intended for the tribunal secretary was mistakenly sent to a paralegal at P's solicitors containing a letter from P to the tribunal and asking for 'Your [the secretary] reaction to the latest from [P]?'.

P had previously applied to the LCIA Court (which appointed an LCIA Division to determine the matter) for the removal of all three members of the tribunal. The LCIA Division had revoked the chairman's appointment (though on different grounds relating to comments made at a conference), but refused to revoke the two co-arbitrators' appointments.

In its application to the High Court, P complained that the arbitrators had:

• improperly delegated their role to the tribunal secretary by systematically entrusting the secretary with a number of tasks beyond that permissible under the LCIA Rules and LCIA Policy on the use of tribunal secretaries
• breached their mandate as arbitrators and their duty not to delegate by not sufficiently participating in the arbitration proceedings and the decision-making process
• negligently and/or innocently misrepresented to P the position as to the existence and/or nature

and/or extent and/or effect of delegation of their roles to the secretary (this argument was put to the court but had not raised before the LCIA Division)

P also applied to the High Court for disclosure from the arbitrators of instructions, requests, queries or comments from the co-arbitrators (or from the chairman to which the co-arbitrators were copied) to the secretary. As well as all responses from the secretary to those emails and all communications sent or received by the co-arbitrators which related to either the role of the secretary of the tasks delegated to the secretary. This 'disclosure application' was refused.

As the disclosure application had been refused, P's removal application was largely based on the comparable time recorded by the arbitrators and the secretary along with one 'Misguided Email' which was accidentally sent by the original chairman to a paralegal at P's solicitors' firm instead of the intended tribunal secretary.

Applications dismissed

Popplewell J dismissed the removal application finding that 'there is no merit in any of the arguments, either singly or cumulatively, that the co-arbitrators failed properly to conduct proceedings'. He also held that no substantial injustice had been proven even if there had been merit in the claims made.

Claims on the merits

In considering the argument that the arbitrators improperly delegated their role, Popplewell J reviewed the time spent by the arbitrators on the case and their written evidence as to the work they had done on the interlocutory issues in question. He also drew on his own experience of arbitration and found that there could be no valid criticism of the manner in which they went about their adjudicatory functions in the way articulated in their letters. He found that it is entirely proper for co-arbitrators to consider submissions, leave it to the chairmen to prepare a draft of the decision consider the draft and approve or revise it as appropriate – such an approach avoids unnecessary delay or expense on procedural matters and is the way in which international arbitration panels commonly function. He noted that this was consistent with LCIA Art 14.3 which provides for the chairman to make procedural rulings alone with the consent of the co-arbitrators.

In reaching his conclusion, Popplewell J was keen to emphasise the court's supervisory and non-interventionist role noting that 'this court should be very slow to differ from the view of the LCIA Division'. He noted that the LCIA was the parties' chosen forum, had considerable experience and was well placed to judge how much time was required for a co-arbitrator to properly consider interlocutory issues of the type in question.

Substantial injustice

The test of substantial injustice was the same as that for an appeal under AA 1996, s 68, namely that the arbitrator's conduct goes 'beyond anything that could reasonably be defended' (Departmental Advisory Committee Report on the Arbitration Bill 1996). This places the burden on the applicant to show that the arbitrators' failure caused the tribunal to reach a decision(s) which, but for the failure it might not have reached (*Maass v Musin Events* [2015[2 Lloyd's Rep. 383; *Terna Bahrain Holding v Al Shamsi* [2012] EWHC (Comm) 3283). Popplewell J found no grounds for such a finding. He also noted that P's professed loss of confidence in the tribunal could

not constitute substantial injustice 'absent some concrete or substantive prejudice'.

Tribunal secretary

Since the questions over the use of tribunal secretaries came to the fore in *Yukos* (*Yukos Universal Limited v Russian Federation*, UNCITRAL, PCA Case No AA. 227), the use of secretaries has been under greater scrutiny. In this decision, Popplewell J noted the 'considerable and understandable anxiety in the international arbitration community that the use of tribunal secretaries risks them becoming the 'fourth arbitrators". He noted the divergent views among practitioners and commentators as to the appropriate use of tribunal secretaries, reviewing several sources of information on the role of tribunal secretaries including:

• Art 14 of the LCIA Rules 1998 (the rules applicable in this case[1)]) which provide that unless otherwise agreed by the parties under Art 14.1, the tribunal shall have the widest discretion to discharge its duties permitted by the applicable law. The judge noted that in this case, the parties agreed to the appointment by the chairman of a secretary, they did not place any constraints on the tasks and functions which the secretary might perform and no agreement as to the limits of his permitted involvement in the process.
• The LCIA's Notes for Arbitrators (29 June 2015) which are for guidance only, which provide at section 8 that subject to the parties' express written agreement a tribunal may appoint a secretary 'to assist it with the internal management of the case'. It states that the duties of the secretary should not, however conflict with those for which the parties have contracted with the LCIA nor constitute any delegation of the tribunal's authority. (Note that unlike the HKIAC for example the LCIA has no formal guidelines on the use of tribunal secretaries).
• The LCIA's Frequently Asked Questions which state that the LCIA has no objection in principle to the appointment of a secretary to the tribunal provided that the parties agree and subject to the usual conflict checks. It continues that administrative 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 timesheets and so forth.
• The 2014 Young ICCA Guide on Arbitral Secretaries which provides that 'it shall be the responsibility of each arbitrator not to delegate any part of his or her personal mandate to any other person, including an arbitral secretary'. The guide (commentary to Art 1(5)) acknowledges the risk of 'dilution in mandate' but states that there is significant acceptance in the arbitration community that this is a risk outweighed by the benefits inherent in the use of arbitral secretaries and that to minimise the risk tribunals must ensure that they maintain tight control over the tasks entrusted to the arbitral secretary and provide close oversight of their responsibilities. The guide provides that with appropriate direction and supervision by the tribunal, the secretary's role may go beyond the purely administrative and may include handling and organising correspondence, submissions and evidence on behalf of the tribunal, requesting questions of law, researching discrete questions relating to factual evidence and witness testimony and drafting appropriate parts of the award.

Popplewell J surmised that 'the safest way to ensure that the secretary does not become a 'fourth arbitrator' is for the secretary not to be tasked with anything which involves expressing a view on the substantive merits of an application or issue'. His key message was that the use of tribunal secretaries must not involve any member of the tribunal abrogating or impairing their non-delegable and personal decision-making function. This requires each member of the tribunal to bring their own personal and independent judgment to bear on the decision in question, taking account of the rival submissions of the parties; and to exercise reasonable diligence in going about

discharging that function. Popplewell J clarified however that soliciting or receiving views from a tribunal secretary would not of itself demonstrate a failure to discharge the arbitrator's personal duty to perform the decision-making function and responsibility themselves.

Be clear as to the secretary's role and remit

While no party would make an application to remove arbitrators lightly, this case demonstrates the difficulties of such an application both in terms of the ability to obtain potential evidence and to demonstrate that the tribunal has breached its duty and substantial injustice has been caused. Questions as to the role of tribunal secretaries in the abstract, and the influence of secretaries within a case, will most likely continue for some time. Parties and arbitrators should be alive to the rules and guidance on the role of tribunal secretaries including the guidance now given in this decision and address any concerns and parameters with the tribunal at the outset of any tribunal secretary appointment.

References

?1 Similar wording is at Article 14.5 of the LCIA Rules 2012

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