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The Problem of Padawan: Once More on the Issue of Tribunal Secretaries

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Most international arbitration institutions have already adopted regulations concerning the roles of tribunal secretaries and scope of their duties. Although this topic has not been on the radar for some time now, several incoming court decisions are likely to reverse this trend. This post sets out a few critical views on the current practice in arbitration, in order to clarify the role of tribunal secretaries in arbitration and address the problem of Padawan they create (For those who are not familiar with the Star Wars universe, a Padawan is a Jedi apprentice. As per the dictionary.com definition, "[i]t can also be used more generally to refer to a trainee, a beginner, or an inexperienced person.").

Tribunal Secretary vs Personal Assistant (PA)

The postulate that arbitrators write their awards from cover to cover may have been a good solution some years ago, when the typical arbitral award consisted of a few pages. Nowadays, when awards in more complicated cases run into hundreds of pages, with the entire case history and arguments presented at length, support of a secretary in drafting the award is not uncommon. Recent court decisions confirm this stance. As long as arbitrators do not delegate their powers in deciding the substance of the case, even preparation of an entire first draft by a tribunal secretary is *prima facie* acceptable.[1)] This is just as well, reflecting that being an arbitrator is primarily about resolving a dispute, and not about Benedictine labour and rivers of ink alone.

Some sets of rules provide that the tribunal secretary may be entrusted with drafting only the non-substantive parts of the award. The classification into substantive and non-substantive parts (as employed *inter al.* in HKIAC – Hong Kong International Arbitration Centre, *Guidelines on the use of a secretary to the arbitral tribunal*, effective 1 June 2014), does not contribute much to the problem of delegation of arbitrators' powers. For the sake of illustration, let us focus on the dispositive part of the award. In a situation where the arbitrator briefed the secretary about the outcome of the tribunal's deliberations with a view to draft the dispositive, the secretary indubitably drafted the dispositive, i.e. the substantive part of the award, but he or she did not decide it. The scope of work assigned to the secretary usually depends on the arbitrator's character, their methods and the legal tradition they come from – some arbitrators will draw up the entire first draft of the award by themselves, some will draft only selected parts, and yet some will rely entirely on the secretary. It is for the arbitrator in the given case to decide whether they can

delegate the full drafting of the award without jeopardising their decision-making control.

Tribunal Secretary vs Arbitrator

For the purposes of this post, I assume that the decision-making process consists of two elements: **gaining full knowledge of the case file** and **participation in the deliberations and formation of the tribunal's intent** (*see* M. Feit, C. Terrapon Chassot, *The Swiss.…*, op. cit.). In this context, there is no problem with the award being drafted by the secretary as long as it fully reflects the tribunal's will. As the parties appoint an arbitrator, they implicitly express trust in his or her integrity, and fundamental faith that their case will be resolved in a just manner. Seen from this perspective, the manner or scope of delegating arbitrators' tasks to the tribunal secretaries becomes but a technicality. If things turn out otherwise – if this trust of the parties proves to have been misplaced – then the problem likely lies with the arbitrator as such, not with the secretaries, as C. Partasides concluded.[2)]

In this vein, it appears obvious that secretary must not participate in the arbitrators' deliberations. The deliberations, it is fair to say, are the essence of the decision-making process. It is not for the secretary, by definition, to witness the process by which the arbitrators come to their mutual conclusions, or to hear the particular opinions voiced during this process. Such a prohibition is envisaged in *inter alia* CEPANI Rules (although in this case the prohibition covers drafting of the award as well). Thus, I disagree with the Swiss Supreme Court as regards its acceptance that, if a secretary is to draft parts of the award or its entirety, he or she should also be allowed to assist the arbitrators in the deliberations stage of the arbitration proceedings (*see* M. Feit, C. Terrapon Chassot, *The Swiss.…*, op. cit., pp. 908).

Finally, if we are all in agreement that the secretary is, by definition, not entrusted with any decision-making powers, it is difficult to understand why all institutional regulations apply the same test of independence and impartiality, including challenge prerequisites, as for the arbitrators themselves. This makes sense only if we want to treat the secretary as a fourth arbitrator, which is patently not the case. Accordingly, a confidentiality undertaking on the secretary's part would be perfectly sufficient.

Tribunal Secretary vs Consultant

The role of the tribunal's secretary cannot be mistaken with the role of a legal consultant, as envisaged in the Swiss Federal Supreme Court decision rendered in May 2015 (4A_709/2014 dated 21 May 2015). In this case, the sole arbitrator, not being a lawyer but an architect, was assisted by two lawyers, E. and F., referred to by the Swiss Court as counsel and a secretary respectively. This construction dispute was to be decided according to the principles *ex aequo et bono*. The award was rendered, in which the sole arbitrator made the following remark:

> *In view of the openly hostile attitude adopted by A., the Arbitral Tribunal chose to be assisted by Mr. E. and Mr. F. of the law firm of G. in Geneva, at its own expense and only to keep minutes of the hearing, to advise the Arbitral Tribunal during the*

> *hearing as to the innumerable objections raised by A. in particular (emphasis added), and to assist the Arbitral Tribunal in drafting the award. These two lawyers kept the minutes and advised the Arbitral Tribunal so that the elementary rules of arbitral procedure, with which the Sole Arbitrator is not necessarily entirely familiar as a non-lawyer, would be complied with. By doing so, Mr. E. and Mr. F. acted only upon the request of the Arbitral Tribunal in the framework of Art. 365 CPC without participating in the decision-making process or in the outcome of the award that the Arbitral Tribunal is alone responsible for, without influence or advice.*

This case manifestly shows what the role of the secretary is when compared to a consultant. The consultant E. advised the arbitrator on several legal matters, while secretary F. did not advise but purely acted under the direction of the arbitrator. The court noted that the role of E. as a consultant was very peculiar, namely because he was not retained for his technical skills but because of the knowledge in the field of arbitral proceedings.

The consultant in this case could have potentially gained a label of an extra arbitrator, as he was advising the non-lawyer arbitrator on all legal aspects of the case, and the parties to the arbitration had no opportunity to comment on the consultant's opinions. It was a very extraordinary situation; one that is found very rarely in practise and one that required individual approach and agreement of all participants of these proceedings. The consultant should have been subject to the test of independence and impartiality in the same manner as the arbitrator.

The comparison between the role of a consultant, as seen in the above case, and tribunal secretary, as performed in regular practise of arbitration, shows the real difference. The secretary is, at the maximum, hands and eyes of the tribunal. If this line gets crossed, the tribunal secretary's role metamorphoses into that one of a consultant.

Conclusion

To sum up, in modern arbitration practise, there is a tendency to treat tribunal secretaries as no more than PAs, hence confining their role to the logistics matters only. This stance, as illustrated above, is neither founded nor sustainable. Surprisingly, court decisions tend to take more flexible position in relation to this matter than arbitral institutions themselves. This state of affairs is somewhat unexpected given the very nature of arbitral institutions.

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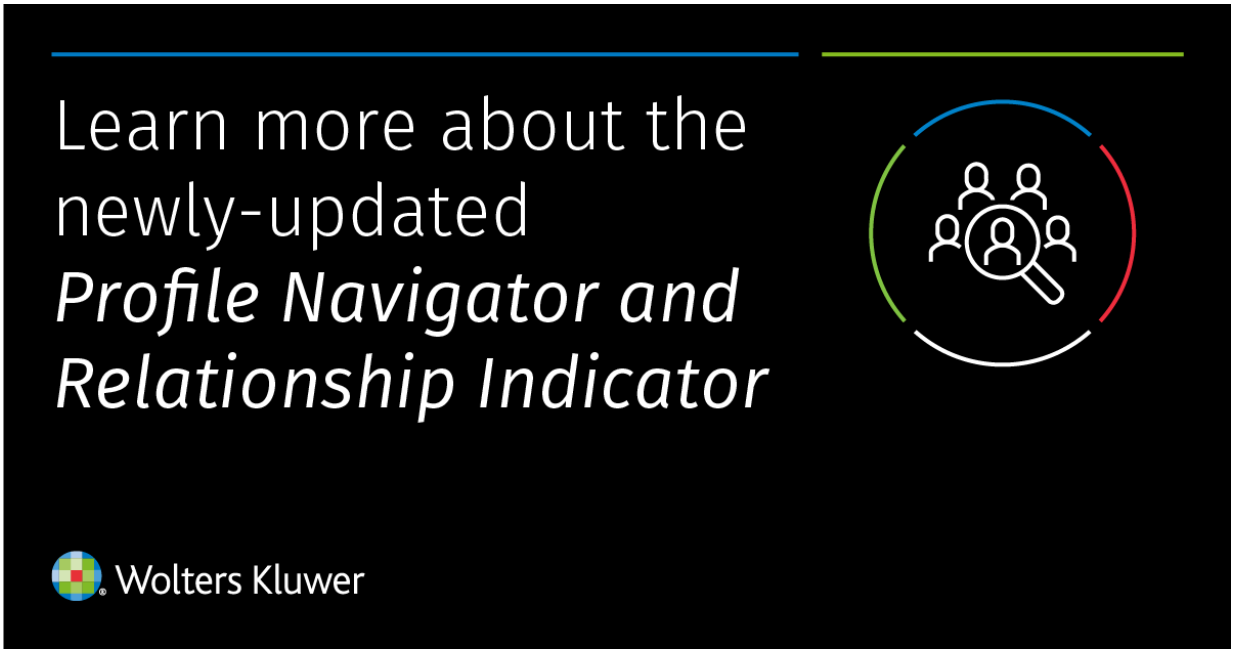

References

?1 Please *see* C. Sanderson, *Brussels court says tribunal secretaries can draft awards*, Global Arbitration Review, 30 June 2021, M. Feit, C. Terrapon Chassot, *The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultants under the Swiss lex arbitri: Case Note on DFC 4A_709/2014 dated 21 May 2015*, ASA Bulletin, Kluwer Law International 2015, Volume 33 Issue 4)

?2 C. Partasides, *Chapter 7. Secretaries to Arbitral Tribunal*, in B. Hanotiau, A. Mourre (eds), *Players interaction in International Arbitration, Dossiers of the ICC Institute of World Business Law*, Volume 9, International Chamber of Commerce (ICC) 2012, pp. 88.

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