

Kluwer Arbitration Blog

Highlights from CanArb Week 2023: A Deep Dive into the World of Tribunal Secretaries

Giacomo Marchisio (IMK LLP) · Friday, November 10th, 2023

On October 18, 2023, during the 2023 [Canadian Arbitration Week](#), members of the Young Canadian Arbitration Practitioners (“YCAP”) gathered at [Arbitration Place](#) in Toronto, Canada, to discuss the role of tribunal secretaries. Moderator [Philippe Boisvert](#) (BLG) and four distinguished panelists – [Anne-Marie Lacoste](#) (Quinn Emanuel), [Annie Lespérance](#) (Jus Mundi), [Kevin Nash](#) (SIAC), and [Elsa Sardinha](#) (VanIAC) – thoroughly debated the role of tribunal secretaries and, in particular, whether (and if so, how) they improve efficiency or, to the contrary, whether they pose a threat to the decision-making functions of tribunals.¹⁾

Rather quickly, the panelists agreed that, as the complexity of an arbitration increases, the contribution of a tribunal secretary can be key to ensuring a cost-effective arbitration by off-loading from tribunal members time-consuming tasks with no import on the disposition of the parties’ dispute. This is particularly true where the tribunal secretary’s remuneration is limited to an hourly rate set by the arbitral institution (as is the case, e.g., with the [LCIA](#)), and even more so where the tribunal secretary is not remunerated by the parties at all (which is the case in arbitrations conducted under the [ICC Rules](#)). To strike an appropriate balance, SIAC, for its part, has adopted a noteworthy approach – according to one of its [practice notes](#), “the parties are not to bear any fees for the use of an administrative secretary where the amount in dispute is under S\$15,000,000” (para. 5).

From a costs standpoint, the panelists noted that it cannot be disputed that the performance of non-controversial tasks such as the preparation of bench memos, the drafting of summaries of the parties’ positions and chronologies of undisputed facts at a lower hourly rate can result in significant savings for the parties. The delegation of such tasks further translates into more time for the tribunal, and particularly the presiding arbitrator, who can focus on the substance of the case.

The most compelling issue, one which captured much of the debate, was not whether tribunal secretaries can contribute to a cost-effective arbitration, but rather what tasks should not be assigned to them to ensure that they do not become the proverbial [fourth arbitrator](#). In this regard, there are very few precedents across the world (an indication that controversies on the role of tribunal secretaries are not that frequent), and they all show that the range of tasks that can be delegated is quite broad (for an overview, please refer to this [blog post](#)).

The existing case law sets out the basic principle pursuant to which the delegation of tasks to a tribunal secretary shall not result in an abdication of the personal decision-making functions of the

arbitrators. As Popplewell J. stated in an [unsuccessful setting-aside application](#) pursuant to s. 24 of the [1996 English Arbitration Act](#),

“[t]hat function requires each member of the tribunal to bring his 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” (para. 65).

Similarly, the Belgian *Cour de Cassation* [held](#), in a decision that was previously discussed on this [blog](#), that the prohibition against the delegation of the tribunal’s decision-making functions to a tribunal secretary does not prevent him or her from drafting notes and memoranda which may be included in the final award, provided that such notes and memoranda are personally reviewed, corrected and verified by tribunal members (see p. 5). Paraphrasing the words of the Hague Court of Appeal in *Yukos*, what matters, in the end, is that the arbitrators take ownership of the work of the tribunal secretary.

Obviously, it is one thing to say that delegation can be extensive, but quite another that it is desirable. As the [2015 SIAC Practice Note on the Appointment of Administrative Secretaries](#) underscores, seeking the Parties’ consent and approval as to the appointment of a tribunal secretary and the nature of his or her tasks is key. Furthermore, clear guidelines issued by arbitral institutions (such as the [2021 ICC Note to Parties and Arbitral Tribunals](#)) or, in case of *ad hoc* proceedings, implemented in a procedural order of the tribunal, can further delineate the concrete functions of the tribunal secretary, and provide comfort to the parties. Such guidelines also assist the tribunal secretary in understanding the scope and limits of his or her role. As a rule of thumb, tribunal secretaries should exercise restraint at all times, and keep in mind that they ought to contribute to raising the quality of the tribunal’s work, following closely the instructions received, and making sure that nothing goes amiss.

Overall, the panelists agreed that the assistance of an experienced tribunal secretary can provide great support to the tribunal. If this were not enough, one could add that operating in the light of the day is, after all, preferable to acting in the shadows, with no visibility for the parties. Likewise, assuming a formal role, along with disclosure obligations and an overarching duty of confidentiality can better protect the integrity of the proceedings.

However, with the new technology wave and advancements in generative artificial intelligence, it remains to be seen how these will impact the duties of tribunal secretaries. One panelist argued that such advancements will only heighten the role of tribunal secretaries in ensuring proper prompt drafting and verifying and cross-checking the large language model’s outputs. In essence, these tools won’t replace tribunal secretaries but will become assistants to the tribunal secretaries.

Beyond these considerations, it is clear that tribunal secretaries are increasingly appointed outside of the usual investment cases and large international commercial arbitrations. Furthermore, through an incremental specialization of the individuals called to serve as tribunal secretaries, a Weberian process of professionalization is now well under way, which is contributing to the creation of a new, distinct role. While there are certain similarities between judicial clerks and tribunal secretaries (from writing bench memos to attending hearings and deliberations), there are also some key differences (for instance, tribunal secretaries may be tasked with the drafting of certain

procedural orders and invariably need to work with diverse procedural rules and governing laws). In this sense, it can be argued that tribunal secretaries form indeed a new profession.

Will the professionalization of tribunal secretaries serve as a steppingstone for greener pastures, such as becoming a fully-fledged arbitrator? While only time will tell, we surely hope so.

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References

- ¹ See in general: J Ole Jensen, 'Tribunal Secretaries in International Arbitration', (Oxford University Press, 2019).

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