

ETHICAL IMPLICATIONS OF USING PARALEGALS AND TRIBUNAL SECRETARIES

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I OVERVIEW

World-wide practice: Long-term practice in Europe (long tradition in Switzerland). Growing practice in recently-developed jurisdictions such as Latin American countries:

Secretaries are used in only 35% of arbitrations; they are used more frequently in civil lawyers' arbitrations (46%) than common lawyers' arbitrations (24%). The use of tribunal secretaries is most common in arbitrations of Latin America respondents (62%) than North American (23%) and Asian (26%) (Queen Mary School of International Arbitration, White & Case. 2012 International Arbitration Survey: Current and Preferred in the Arbitration Process).

Scope of duties: logistics, filing, communication with parties, arbitrators and institutions, taking notes or minutes, legal research, collecting case law or published commentaries, preparing summaries, attending hearings, accounting and financial matters including opening a bank account.

- Should the paralegals or tribunal secretaries Draft procedural orders and parts of the awards?
- Should the arbitrators discuss the merits of the dispute with the paralegals and arbitral tribunals? Should they participate in deliberations?
- Constantine Partasides notes in 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' that there is tension between assisting in the actual decision-making process and assuming the decision-making function. The minimum restraints are: the arbitrators should review the file, the parties' written submissions and evidence, and the underlying authorities; a tribunal secretary's/paralegal's role is restricted to the drafting of awards to formal and uncontroversial parts.

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- Questions arise regarding the consequences of the enforcement of ICC awards if there have been violations of the tribunal secretary's/paralegal functions. It would have to be determined who assumes liability.

Only 10% of arbitrators said that the secretaries prepared drafts of substantive parts of awards, and 4% that discussed the merits of the dispute with them. 70% said that the secretaries had prepared drafts of procedural orders and non-substantive parts of the awards. 72% believed that secretaries should be allowed to prepare such drafts (Queen Mary School of International Arbitration, White & Case. 2012 International Arbitration Survey: Current and Preferred in the Arbitration Process).

Regulation of the activity by the arbitration institutions: should there be a restricted list of tasks? How would they be policed, given that the arbitrator is the ultimate person to control the limits on the use of legal assistance?

UNCITRAL Notes on Organising Arbitral Proceedings (1996): they do not establish specific directions or duties of the secretary, but hold that 'it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal'. They suggest that the proper focus of analysis is the parties' informed consent.

ICC Note on the Appointment, Duties, and Remuneration of Administrative Secretaries (2012): The tribunal should inform the parties and they can object. The administrative secretary should satisfy the requirements of independence and impartiality. The secretary may perform organizational and administrative tasks, but not decision-making functions or any essential duties of an arbitrator. The tribunal has a duty to personally review the file and to draft any of its decisions. Any compensation to be paid is deemed to be included in the tribunal's fees. Direct arrangements between the tribunal and the parties on these fees are prohibited. The tribunal may seek reimbursement from the parties of the secretary's justified reasonable expenses for hearings and meetings.

ICSID Administrative and Financial Regulations, Regulation 25 / Rule 15: A counsel from ICSID's Secretariat is appointed to serve as secretary to the tribunal. He conducts all communications with the parties and carries out all logistical arrangements for the tribunal. He attends the hearing, but not the deliberations unless the tribunal decides otherwise. In some ICSID cases, the tribunal appoints an assistant to serve alongside the secretary. (See 1.1 for provisions regarding LCIA / JAMS / HKIAC / Swiss Rules)

- **Benefits for the arbitration proceedings:** efficiency of proceedings, costs saving, dealing with numerous documents involved in complex arbitrations, allowing the arbitrator to concentrate on substantive work.
- **Benefits for young professionals:** excellent training and education for young professionals. The question is whether tribunals should be encouraged to implement procedures to incorporate the use of paralegals and tribunal secretaries in this regard.
- **Risks:** ex parte communications, violation of the arbitrator's *intuitu personae* mission, arbitrators' omission of critical supervision and review of the tribunal secretaries'/paralegals' activities.

*Code of Ethics for Arbitrators In Commercial Disputes (AAA/ICDR), Canon V(C): 'an arbitrator **should not delegate** the duty to decide to any other person'. Canon V(B): 'An arbitrator may obtain help from an associate, a research assistant or other **persons in connection with reaching his or her decision** if the arbitrator informs the parties of the use of such assistance and such persons agree to be bound by the provisions of this Canon'.*

- **Parties consent:** should parties be required to consent to the appointment of a secretary? Can they object it? To what extent should the parties be informed of the duties performed by the secretary and the paralegals? Should the tribunal provide the parties with a Terms of Appointment including points such as tasks assigned, remuneration, confidentiality, independence and impartiality?
- **Remuneration:** ICC Note: the cost of secretaries should come out of the fees paid to the arbitrator; LCIA (art 28, Schedule of Arbitration Costs) and Swiss Rules (art 38): secretaries should be paid in addition to the fees of the arbitral tribunal. Where arbitrators' fees are calculated on an *ad valorem* basis (ICC), treating the cost of a secretary as an additional expense would increase the cost of the arbitration for the parties. Where they are calculated on the basis of an hourly rate (LCIA), the costs could reduce for the parties.
- **Qualifications:** do tribunal secretaries/paralegals require any legal/administrative experience to be employed as a tribunal secretary?
- **Differences with national courts:** legal assistants may be introduced to assist the judge with a volume of work over which they have no control; arbitrators can select the number of tribunals upon which they will sit.
- **Confidentiality:** for example, art 44 of the Swiss Rules provides that the duty of confidentiality regarding awards, orders and all materials relevant to the arbitration applies also to the secretary of the arbitral tribunal.

II VARIOUS REGULATIONS REGARDING THE USE OF LEGAL ASSISTANCE

A UNCITRAL's Notes on Organizing Arbitral Proceedings. Section 4. Administrative Services that may be Needed for the Arbitral Tribunal to Carry out its Functions

24. Various administrative services (eg hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

25. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

26. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

27. To the extent the tasks of the secretary are purely organizational (eg obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (eg collecting case law or published commentaries on legal issues defined by the

arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision making function of the arbitral tribunal.

B ICC Note on the Appointment, Duties, and Remuneration of Administrative Secretaries

The ICC Rules of Arbitration ("Rules") are silent as to the appointment, duties and remuneration of Arbitral Tribunal administrative secretaries or other assistants ("Administrative Secretaries"). This Note replaces the Secretariat's previous note on the same subject. It sets out the policy and practice of the ICC International Court of Arbitration ("Court") and its Secretariat regarding the engagement of Administrative Secretaries by Arbitral Tribunals. It applies with respect to any Administrative Secretary appointed on or after 1 August 2012. Any Arbitral Tribunal proposing to appoint an Administrative Secretary shall provide the parties with a copy of this Note.

1 Appointment

Administrative Secretaries can provide a useful service to the parties and Arbitral Tribunals in ICC arbitration. While principally engaged to assist three-member Arbitral Tribunals, an Administrative Secretary may also assist a Sole Arbitrator. Administrative Secretaries can be appointed at any time during an arbitration.

If an Arbitral Tribunal envisages the appointment of an Administrative Secretary, it shall consider carefully whether in the circumstances of that particular case such an appointment would be appropriate.

Administrative Secretaries must satisfy the same independence and impartiality requirements as those which apply to arbitrators under the Rules. ICC staff members are not permitted to serve as Administrative Secretaries.

There is no formal process for the appointment of an Administrative Secretary. However, before any steps are made to appoint an Administrative Secretary, the Arbitral Tribunal shall inform the parties of its proposal to do so. For this purpose, the Arbitral Tribunal shall submit to the parties the proposed Administrative Secretary's curriculum vitae, together with a declaration of

independence and impartiality, an undertaking on the part of the Administrative Secretary to act in accordance with the present Note and an undertaking on the part of the Arbitral Tribunal to ensure that this obligation on the part of the Administrative Secretary shall be met.

The Arbitral Tribunal shall make clear to the parties that they may object to such proposal and an Administrative Secretary shall not be appointed if a party has raised an objection.

2 Duties

Administrative Secretaries act upon the Arbitral Tribunal's instructions and under its strict supervision. The Arbitral Tribunal shall, at all times, be responsible for the Administrative Secretary's conduct in relation to the arbitration.

An Administrative Secretary may perform organizational and administrative tasks such as:

- transmitting documents and communications on behalf of the Arbitral Tribunal;
- organizing and maintaining the Arbitral Tribunal's file and locating documents;
- organizing hearings and meetings;
- attending hearings, meetings and deliberations; taking notes or minutes or keeping time;
- conducting legal or similar research; and
- proofreading and checking citations, dates and cross-references in procedural orders and awards as well as correcting typographical, grammatical or calculation errors.

Under no circumstances may the Arbitral Tribunal delegate decision-making functions to an Administrative Secretary. Nor should the Arbitral Tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator.

The Administrative Secretary may not act, or be required to act, in such a manner as to prevent or discourage direct communications among the arbitrators, between the Arbitral Tribunal and the parties, or between the Arbitral Tribunal and the Secretariat.

A request by an Arbitral Tribunal to an Administrative Secretary to prepare written notes or memoranda shall in no circumstances release the Arbitral Tribunal from its duty personally to review the file and/or to draft any decision of the Arbitral Tribunal.

When in doubt about which tasks may be performed by an Administrative Secretary, the Arbitral Tribunal or the Administrative Secretary should contact the Secretariat.

3 Remuneration

With the exception of the Administrative Secretary's reasonable personal disbursements as detailed in this Note, the engagement of an Administrative Secretary should not pose any additional financial burden on the parties. Accordingly, the Arbitral Tribunal may not look to the parties for the reimbursement of any costs associated with an Administrative Secretary beyond the scope prescribed in this Note.

Any remuneration payable to the Administrative Secretary shall be paid by the Arbitral Tribunal out of the total funds available for the fees of all arbitrators, such that the fees of the Administrative Secretary will not increase the total costs of the arbitration.

In no circumstances should the Arbitral Tribunal seek from the parties any form of compensation for the Administrative Secretary's activity. Direct arrangements between the Arbitral Tribunal and the parties on the Administrative Secretary's fees are prohibited. Since the fees of the Arbitral Tribunal are established on an ad valorem basis, any compensation to be paid to the Administrative Secretary is deemed to be included in the Arbitral Tribunal's fees.

4 Disbursements

The Arbitral Tribunal may seek reimbursement from the parties of the Administrative Secretary's justified reasonable expenses for hearings and meetings.

C LCIA: www.lcia.org. FAQ. What is the LCIA's Position on the Appointment of Secretaries to Tribunals?

The LCIA will provide the Tribunal and the parties with the administrative support that they require. However, the LCIA has no objection, in principle, to the appointment of a Secretary or Clerk to the Tribunal, provided that the parties agree, and subject to the usual conflicts checks.

The duties of the administrative secretary should neither conflict with those for which the parties are paying the LCIA Secretariat, nor constitute any delegation of the Tribunal's authority. Whilst the LCIA is prepared to liaise with the Secretary on administrative matters, the LCIA Secretariat will finalise arrangements for hearing venues, transcripts and so on; provide any reminders that may be required on the procedural timetable; and deal with all matters required of it under the LCIA Rules.

Administrative secretaries should, therefore, confine their activities to such matters as organising papers for the Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, keeping the Tribunal's time sheets and so forth.

New York City Bar Association. Secretaries to International Arbitral Tribunals. Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association. (2006) 17 *American Review of International Arbitration* 580.

Secretaries are regularly appointed in complex commercial cases held under the auspices of the LCIA. When a tribunal advises the LCIA that it wishes to appoint a secretary, the LCIA administrative body seeks the parties' approval for such appointment. The LCIA requires that the secretary complete a statement of independence similar to the one completed by LCIA arbitrators. The secretary must also agree to an hourly rate for his or her services.

The LCIA rules do not formally prescribe the secretaries' duties and responsibilities. However, the LCIA typically provides the following instructions to secretaries prior to their appointment:

The Secretary to the Tribunal is concerned with the internal, day-to-day workings of the Tribunal, whilst the institution is concerned with the external relationship between the Tribunal and the parties. The duties of the Secretary should, therefore, neither conflict with those provided by the LCIA Secretariat, nor, of course, constitute any delegation of the Tribunal's authority.

Below is a sample statement regarding the role of the secretary to be submitted to the parties at the outset of the arbitration, which was prepared by a senior LCIA arbitrator wishing to remain anonymous:

"The primary function of a Secretary (legal assistant) is to assist the members of the Tribunal by providing both administrative support (not duplicative of the LCIA) and research capabilities. Examples of the former might include remaining aware of and managing the correspondence, submissions and evidence produced by the parties in order to be able to assist the Tribunal as may be required ("document handling"). An example of the latter would be directing the members of the Tribunal to submissions or items of evidence that they consider relevant to their discussions, or identifying in the record all evidence on a certain point, as well as researching, at the express request of the Tribunal, points of law. The work of a Tribunal and its members can be rendered more efficient by a legal assistant.

Of course, a Secretary to the Tribunal is not an arbitrator. He or she does not participate in the Tribunal's deliberations or decision-making. It is perhaps worth noting, in addition, that the functions and tasks of a Secretary are not those of the Secretariat of the arbitral institution (the LCIA in the present case). On the contrary, by becoming familiar with the procedure and substance of a particular dispute, a secretary complements, not duplicates, the support available to Tribunal members and parties from either the LCIA or from the arbitrators' own professional office staffs (if any). All of which, as mentioned, with a view to rendering the arbitral process more efficient and enabling the arbitrators to concentrate on issues going to the conduct of the arbitration and the merits of the parties' dispute'.

D ICSID: Administrative and Financial Regulations. Regulation 25: Secretary

The Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee. The Secretary may be drawn from among the Secretariat of the Centre, and shall in any case, while serving in that capacity, be considered as a member of its staff. He shall:

- (a) represent the Secretary-General and may perform all functions assigned to the latter by these Regulations or the Rules with regard to individual proceedings or assigned to the latter by the Convention, and delegated by him to the Secretary;
- (b) be the channel through which the parties may request particular services from the Centre;
- (c) keep summary minutes of hearings, unless the parties agree with the Commission, Tribunal or Committee on another manner of keeping the record of the hearings; and
- (d) perform other functions with respect to the proceeding at the request of the President of the Commission, Tribunal or Committee, or at the direction of the Secretary-General.

Rules of Procedure for Arbitration Proceedings. Rule 15: Deliberations of the Tribunal

- (1) The deliberations of the Tribunal shall take place in private and remain secret.
- (2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

E JAMS Guidelines

JAMS' arbitrators may use Clerks or Secretaries under the following guidelines:

The Tribunal's use of Clerks or Secretaries must be approved by the parties after disclosure. Clerks or Secretaries must complete a separate conflicts disclosure form which will be provided by JAMS and made available to the parties.

The arbitrator should explicitly disclose with other initial disclosures or as early as practicable in the fee agreement, fee schedule, engagement letter, scheduling order or other writing, that he or she intends to use a Clerk or Secretary or that it is the practice of the arbitrator to regularly use such assistance.

The arbitrator's disclosure regarding the use of a Clerk or Secretary will state the types of tasks assigned to the Clerk or Secretary, eg research and/or drafting. At no time can a Clerk or Secretary engage in deliberations or decision-making on behalf of an arbitrator or tribunal.

If a Clerk or Secretary is to be billed to the parties, that must be stated in the disclosure or fee agreement, including the amount that clients will be billed for clerk or secretary time.

F HKIAC Administered Arbitration Rules 2013. Section IV. Conduct of Arbitration. Article 13 General Provisions

13.4 The arbitral tribunal may, after consulting with the parties, appoint a secretary. The secretary shall remain at all times impartial and independent of the parties, and shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence prior to his or her appointment. A secretary, once appointed and throughout the arbitration, shall disclose without delay any such circumstances to the parties unless they have already been informed by him or her of these circumstances.

G Swiss Rules of International Arbitration (2102) Article 15(5)

5. The arbitral tribunal may, after consulting with the parties, appoint a secretary. Articles 9 (independence and impartiality), 10 (challenges) and 11 (procedure for challenges) shall apply to the secretary.

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