The role of the secretary to the arbitral tribunal: *Is there an emerging consensus?*

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Moscow, 16 September 2019
How often are secretaries appointed?

MKAS/ICAC at CCI RF: Practically every case
   List of reporters (degree in law, fluency in a foreign language)

ICAC at CCI Ukraine: 47% of all cases (2018)

LCIA: 10 to 16 % of cases
   2017: 38 out of 233 cases
   2018: 28 out of 271 cases

Queen Mary College arbitration survey (2015):
   97% of respondents are aware of the function
   82% of respondents have either used secretaries or have seen them used
Provisions on Administrative Secretaries

Arbitration Rules
AIFC (Kazakhstan)
CRCICA (Egypt)
ICAC (Ukraine), 2018
FAI (Finland), 2013
HKIAC (Hong Kong)
MKAS/ICAC (Russia)
NAI (Netherlands)
RSPP (Russia)
SCC (Sweden)
SIAC (Singapore)
Swiss Rules (SCAI)
Vienna Rules (VIAC)

Practice Notes and Guidelines
ACICA (Australia)
FAI (Finland), 2013
HKIAC (Hong Kong, 2014)
ICC (Paris)
JAMS (USA)
LCIA (London)
SIAC (Singapore)
SCC (Stockholm)
VIAC (Vienna)
Young ICCA Guide (2014)
Purpose of appointing secretaries

“Can provide a useful service to the parties and arbitral tribunals” (ICC Practice Note)

“Increase the cost-efficiency of the proceedings and allow the arbitral tribunal to better focus on the resolution of the merits of the dispute, thereby contributing to quality of award” (FAI Practice Note)

“Ensuring the efficacy of arbitral proceedings” (ACICA)

Queen Mary College arbitration survey (2015): 71% respondents think secretaries are useful 9% - not useful
Consultation with parties prior to appointment?

Information/Consulting with the parties
Before appointing a secretary, an arbitral tribunal shall inform the parties of its proposal (incl. CV, declaration of impartiality). The parties shall be granted the opportunity to comment. The arbitral tribunal shall make clear to the parties that they may object to such proposal. (FAI, HKIAC, ICC, VIAC)

Approval by the Parties:
Sec. 8.3. LCIA Notes for Arbitrators, Art. 24 SCC Rules

Swiss Federal Supreme Court (4A_709/2014, 21 May 2015): No prior consent required. If all parties jointly reject the appointment of a secretary, tribunal shall refrain from appointment
Appointment if one party objects to the appointment of a secretary?

**ICC:** “an administrative secretary **shall not** be appointed if a party has raised an objection.”

**SCC:** “If any party disagrees, the arbitral tribunal **may not** appoint the *specific* candidate as administrative secretary.”

**LCIA:** “An Arbitral Tribunal can only obtain assistance from a tribunal secretary once the tribunal secretary has been approved by the parties. If a party objects to the *person* proposed, the Arbitral Tribunal **must not** use *this* person as tribunal secretary, and may instead propose *another* individual.”

**FAI:** “If any party objects to the use of a secretary, the tribunal **may proceed** with the appointment only where the tribunal is convinced that this will benefit all parties by saving time and cost.”
“ICC staff members are not permitted to serve as administrative secretaries.” (ICC Practice Note)

“Members of the HKIAC Secretariat are available to act as secretaries. Such Secretariat member shall not act as a case manager in the same arbitration.” (HKIAC Guidelines)
Secretaries for three-member tribunals or sole arbitrators?

“While principally engaged to assist three-member arbitral tribunals, an administrative secretary may also assist a sole arbitrator.” (ICC Practice Note)

“An arbitral tribunal may appoint a secretary, irrespective of whether the arbitral tribunal is composed of a sole arbitrator or three arbitrators.” (FAI Practice Note)
Impartiality and Independence of Secretaries

- Same standards of impartiality and independence as arbitrators (FAI, HKIAC, ICC)

- Statement of impartiality and independence prior to appointment (ACICA, HKIAC, ICC, LCIA, SCC, VIAC)
Tasks and Duties

- No essential duties of the arbitrator to be fulfilled by secretary
- No delegation of decision-making
- Under the supervision of the tribunal
- Duties shall be limited to organisational, clerical and administrative functions
- Follow the tribunal’s instructions and shall not exceed the scope of the tasks assigned to him/her
- Administrative tasks: transmitting documents on behalf of tribunal, organising meetings and hearings, taking notes or minutes of meetings, recording witness testimonies at hearings, proof-reading and checking citations, attending hearings and deliberations, conducting legal or similar research.
Tasks and Duties

ICC Practice Note:
Secretaries may prepare for the arbitral tribunal’s review drafts of procedural orders as well as factual portions of an award, such as the summary of the proceedings, the chronology of facts, and the summary of the parties’ positions;
This shall in no circumstances release the arbitral tribunal from its duty to personally review the file and/or to draft any decision of the arbitral tribunal.

Young ICCA Guide on Arbitral Secretaries (2014):
With appropriate direction and supervision by the arbitral tribunal, an arbitral secretary’s role may legitimately go beyond the purely administrative: Drafting procedural orders and appropriate parts of the award
Chart 39: What tasks do you think tribunal secretaries should perform?

- Organisational tasks (e.g., logistical arrangements, coordinating secretarial services): 93%
- Communications with the parties: 81%
- Preparing drafts of procedural orders and non-substantive parts of awards: 75%
- Legal research: 55%
- Preparing drafts of substantive parts of awards: 13%
- Discussing the merits of the dispute with one or more of the arbitrators: 12%
- Other: 3%

Percentage of respondents (respondents were able to select multiple answers)
Young ICCA Guide on Arbitral Secretaries (2014)

Should the Arbitral Secretary prepare the first draft of the award? Yes: 33%

Should the Secretary draft any parts of the Award? Yes: 63%

Should the Secretary draft:
- the procedural background of the award? Yes: 85%
- the factual background of the award? Yes: 70%
- Parties‘ positions? Yes: 63%
- legal reasoning? Yes: 32%
Remuneration

- No extra cost for the parties.
- Secretary’s fees shall be paid from the fees of the Arbitral Tribunal.
- Only justified reasonable expenses (hearings and meetings) to be borne by parties (FAI, HKIAC, ICC, SCC, VIAC etc.)

When the tribunal is paid on an hourly basis, there can be an hourly rate for the secretary.
The LCIA suggests £50 to £150 per hour for tribunal secretaries if remuneration is appropriate. Parties must expressly consent.
Consensus?

Consensus:
- Remuneration
- Impartiality and independence
- Supervision by the Arbitral Tribunal

Different approaches:
- Regulation of secretaries in the Arbitration Rules
- May the administrative secretary draft parts of the award?
- Institutions‘ s staff members as secretaries
Thank you for your attention!

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