International Arbitration

Research based report on the use of tribunal secretaries in international commercial arbitration

BERWIN LEIGHTON PAISNER

Contents

Partner foreword

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>
> We wanted to find out where practitioners thought the line is to be drawn on what should be permitted activities for a tribunal secretary?

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Partner, International Arbitration

Over the last few years, BLP's International Arbitration Group has conducted a number of surveys on party perceptions of various issues affecting the arbitration process: conflicts of interest (2010), delay (2012), document production (2013) and choice of seat (2014). The final report on each of those studies can be found on our website.

This year we wanted to examine the use of tribunal secretaries in international commercial arbitration.

The appointment of tribunal secretaries is nothing new but, until relatively recently, it has been a low-key, behind-the-scenes occupation that happened, or not, according to the preferences or needs of the arbitrator/s. The acceptable scope of the responsibilities assumed by a tribunal secretary, and the nature of the relationship between those responsibilities and the obligations owed by arbitrator/s to the parties, was a grey area that parties appeared content to leave well alone. In recent years, concerns have been expressed about the nature of the tasks to be performed by tribunal secretaries, with calls for greater transparency and regulation, but in spite of this, a uniform approach to the involvement of tribunal secretaries has yet to be achieved.

This is not an academic issue. Recent cases, notably the Yukos arbitrations, have highlighted the fact that the improper delegation of authority to tribunal secretaries can give rise to a challenge to the award.

We were interested in finding out whether practitioners thought it was in the best interests of all concerned to have clear and consistent guidelines. In addition, and of critical importance, we wanted to find out where practitioners thought the line is to be drawn on what should be permitted activities for a tribunal secretary.

We have once again canvassed the opinions of a great many of our colleagues within the BLP preferred firm network who work in international arbitration. We also extended an invitation to participate to other international arbitration practitioners and users with whom we work. We would like to thank all those who participated in the survey.

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At a glance

Some highlighted responses from our survey are shown here

74%

Felt that a tribunal secretary should be a lawyer or legally qualified

33%

Felt that the tribunal should pay for the tribunal secretary

86%

Felt that nominee secretaries should be asked to provide a certificate of independence and impartiality

Felt that consistency of approach across institutional rules and guidance was not a good idea

78%

Said that there should be complete transparency for the parties about how the tribunal secretary spent his/her time

90%

Thought it would be inappropriate for the secretary to participate in the tribunal's deliberations

76%

Felt that all party consent should be a requirement for the appointment of a tribunal secretary

58%

Thought it appropriate that the secretary should attend the tribunal's deliberations

The issues

The 2012 International Arbitration Survey by Queen Mary University of London found that tribunal secretaries are appointed in 35% of cases. But what are the rules governing the activities of tribunal secretaries and how informed are the parties about those activities?

Where is the line to be drawn on work done by tribunal secretaries?

Most practitioners would accept that a tribunal secretary may contribute to the efficiency of an arbitration by relieving the arbitrator/s of the burden of the administrative tasks inevitably present in large commercial arbitrations. They can also prepare timelines, précis submissions and first draft procedural orders. The key question is where is the line to be drawn between legitimate support and improper delegation of duty by the arbitrator/s. Is there a danger that an element of subjectivity or partiality may creep into a research note or summary of evidence on a particular issue? Will the tribunal secretary have a role in the tribunal's deliberations?

> "what are the rules governing the activities of tribunal secretaries and how informed are the parties about those activities?"

Why does it matter?

When parties agree to arbitrate, they effectively renounce their right to go to court and instead entrust their dispute to an arbitrator that they, or an agreed institution, has chosen as the appropriate person to determine their differences. It is not unreasonable that they should expect the decision making process, the weighing of evidence, and the necessary legal analysis to be undertaken by the chosen arbitrator. The improper delegation of that responsibility can lead to the award being challenged. For example, in a recent attempt by Sonatrach to challenge an award in the English Court (La Société pour la Recherché, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures SpA v Statoil Natural Gas) one of the arguments relied on was that "the tribunal improperly delegated authority to its administrative secretary or impermissibly allowed her to participate in its deliberations".

The challenge to awards made in the Yukos arbitrations (Yukos Universal Ltd v The Russian Federation, Hulley Enterprises Limited v The Russian Federation and Veteran Petroleum Limited v The Russian Federation) mounted by Russia in the Dutch Courts relied in part on arguments that, given the number of hours recorded by the tribunal secretary, and the tribunal's refusal to provide the secretary's time records because they would provide insight into the tribunal's deliberations, she "must be presumed to have performed a substantive role in analysing the evidence and arguments, in deliberations and preparing the final awards". It has been reported that expert evidence involving an analysis of the writing styles of the arbitrators and the tribunal secretary in that case suggests that it is 95% certain that the tribunal secretary wrote 79% of the preliminary objections section of the awards, 65% of the liability section and 71% of the damages section.

Given such situations is it in the best interests of all concerned to have clear and consistent guidelines or rules that can be followed and relied on if a challenge is made?

A lack of consistency in institutional rules

The rules of some institutions make no reference to tribunal secretaries. In others, they are mentioned but their role is not described (for example, the HKIAC Administered Arbitration Rules (Article 13.4), the Swiss Rules of International Arbitration (Article 15.5) and the Arbitration Rules of the Netherlands Arbitration Institute (Article 20)). Several institutions have in recent years produced written guidance on one or more of the appointment, role and payment of a tribunal secretary.

In 2012 the ICC produced an updated Note on the Appointment, Duties and Remuneration of Administrative Secretaries. In addition to dealing with issues around the appointment procedure and who should be responsible for meeting the fees of the tribunal secretary, the ICC note contained a non-exhaustive list of the duties that could properly be undertaken. These include attending tribunal deliberations and conducting legal research.

The LCIA has guidance on its website covering similar ground and indicating that a secretary should confine his or her activities to such matters as "organising papers for the Tribunal, highlighting relevant authorities, maintaining factual chronologies and keeping the tribunal's time sheets...". Other bodies that have issued guidelines include the Swiss and Hong Kong institutions mentioned above (Guidelines for Arbitrators: Administrative Secretaries and Guidelines on the use of a Secretary to the Arbitral Tribunal respectively), the Singapore International Arbitration Centre (Practice Note on the Appointment of Administrative Secretaries) and Jams International (Guidelines for the use of Clerks and Tribunal Secretaries in Arbitrations). In 2014 the International Council for Commercial Arbitration published a very detailed commentary and set of principles for the appointment and use of tribunal secretaries (Young ICCA Guide on Arbitral Secretaries).

In October 2014 the International Bar Association adopted revisions to the IBA Guidelines of Conflicts of Interests in International Arbitration that include extending the duty of impartiality and independence to tribunal secretaries (Standard 5 (b)). In November 2015, the UNCITRAL Secretariat published draft revised UNCITRAL Notes on Organising Arbitral Proceedings which include text reiterating the need for transparency around the appointment and scope of duties of a tribunal secretary, and emphasising the need for impartiality. However, the drafting options also include a statement that secretaries "do not typically perform any decision-making function", implying that in certain situations the secretary might do so.

Are the various positions taken by different institutional rules on some of these issues a reflection of market diversity or just a failure by the arbitral community to act sufficiently quickly to develop consistent standards?

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The questions asked

We wanted to assess how useful respondents considered a tribunal secretary to be – in particular, what advantages the use of a secretary was thought to offer to the arbitration process.

We were interested in finding out if users felt that the decision to appoint should be a matter for the tribunal, or for the parties. If a decision to appoint was made, who should make the appointment?

We considered whether a tribunal secretary should be subject to the same requirements of impartiality and independence as arbitrators, and whether parties should have the opportunity to challenge the appointment of a nominee secretary.

Most importantly, we wanted to assess where respondents thought the line should be drawn between activities that it was acceptable for a tribunal secretary to carry out, and those activities that it was not appropriate for them to perform. We presented respondents with a list of possible activities and asked them on what side of the line each activity fell.

Lastly, we asked respondents who should meet the fees and expenses of a tribunal secretary.

“We wanted to assess where respondents thought the line should be drawn between activities that it was acceptable for a tribunal secretary to carry out, and those activities that it was not appropriate for them to perform.”

Key findings

The survey results confirm that the use of tribunal secretaries is relatively common. There is a widespread recognition that tribunal secretaries can make a valuable contribution to the arbitration process regardless of the value of the dispute. However, in the majority of cases, respondents' views on whether it was desirable to appoint a tribunal secretary were linked to the question of what tasks the secretary would carry out.

A majority of respondents thought that a tribunal secretary should only be appointed if this was agreed to by both parties. The appointment should be made by the tribunal but paid for by the parties. Most respondents felt that a tribunal secretary should be legally qualified.

The independence of the tribunal secretary is an important issue. 86% of respondents felt that nominee secretaries should be asked to provide a certificate of independence and impartiality.

“78% of respondents said that there should be complete transparency for the parties about how the tribunal secretary has spent his/her time.”

Surprisingly, there was a range of views on whether it would be a good idea to have consistency of approach to the use of tribunal secretaries across the various institutional rules and guidance. A significant minority (26%) felt that it would not be a good idea.

A key focus of the survey was to establish respondents' views on what tasks it was appropriate, and not appropriate, for a tribunal secretary to carry out. There was a marked consistency of response with a relatively clear dividing line between 'neutral' tasks and those with a potentially subjective element that might influence or impact on the tribunal's decision-making function. The divide between the two categories of function is illustrated by the responses relating to deliberation meetings. Although a surprisingly high percentage of those responding (58%) thought it appropriate that the secretary should attend the tribunal's deliberations, nearly all respondents felt that it would be inappropriate for the secretary to actually participate in the deliberations.

The parties' ability to monitor how tasks were allocated was considered to be an important issue. 78% of respondents said that there should be complete transparency for the parties about how the tribunal secretary has spent his/her time.

On a number of issues there was a small but discernible difference between the views of civil lawyers and those from common law backgrounds.

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The results

The results

The Respondents

We received 58 responses to our survey. Respondents included lawyers working in law firms, as well as arbitration users, corporate counsel, and arbitrators. 34% of respondents were lawyers with a civil law background, 47% had a common law background and 15% had experience of both systems. The geographical regions in which respondents worked included East and West Africa, the Asia-Pacific region, West and East Europe, the Middle East and North Africa, South and North America, and Scandinavia.

How common is the use of tribunal secretaries?

We wanted to assess how widespread is the use of tribunal secretaries. We asked respondents to indicate whether, in their experience, a tribunal secretary is appointed in more than 75% of cases, in more than 50%, in less than 50% or in less than 25%. The results were fairly evenly spread across these categories. It appears that tribunal secretaries are used in a significant number of arbitrations. 40% of those responding to this question said that a tribunal secretary was used in more than 50% of cases. It appears that the use of tribunal secretaries may be higher amongst civil lawyers than those with a common law background. Only 16% of common law lawyers said that they had experienced the use of tribunal secretaries in more than 75% of cases, compared with 44 % of civil lawyers who had done so.

How desirable is the use of tribunal secretaries?

We asked respondents whether the use of tribunal secretaries is desirable. Only 30% of respondents gave an unequivocal yes to the desirability of appointing secretaries. 5% felt it was undesirable. Of most significance is the fact that a majority (63%) of those responding felt that the desirability of appointing a tribunal secretary depends on the nature of the task/s that the tribunal will delegate to that secretary. However, there was an interesting split in numbers between civil lawyers and common law lawyers on this issue. 74% of lawyers from a common law tradition felt that the nature of the tasks to be undertaken was relevant to the desirability of having a tribunal secretary compared with only 44% of civil lawyers.

73% of arbitrators who responded identified an improvement in organisation and procedural efficiency as a potential advantage of appointing a tribunal secretary.

The advantages of having a tribunal secretary

We listed a number of potential advantages of using a tribunal secretary and asked respondents to indicate those with which they agreed. Unsurprisingly, a majority of respondents (74%, 77% and 53% respectively) felt that the potential advantages of using a tribunal secretary include an improvement in the organisation and procedural efficiency of the process, the tribunal spending less time on administrative tasks (with consequent savings in fees), and the arbitrator/s having more time to focus on a determination of the dispute. A smaller number (28% and 23% respectively) felt that other advantages might be that the use of a secretary would result in a faster award or that the tribunal would have to spend less time on preparation. The lower percentages are perhaps an indication of the two-edged nature of these last two considerations. Everyone wants an award as quickly and as efficiently as possible, but probably not at the expense of quality of determination by the tribunal. One additional advantage raised by more than one respondent that was not covered in options listed was that the use of tribunal secretaries provided education and training for the next generation of arbitrators.

The amount in dispute was felt by a healthy minority to be a relevant factor in considering whether to appoint a tribunal secretary. 29% of those responding felt that a secretary should be appointed only in cases where the amount in dispute exceeds a set amount.

What level of consensus should there be around the appointment of a tribunal secretary?

We asked respondents whether a tribunal secretary should be appointed only if both parties agree to this. A very significant majority of those responding (76%) agreed that all party consent should be a requirement, although more common lawyers (84%) than civil lawyers (60%) agreed with this statement. 67% of those responding said that the tribunal should make the appointment – perhaps because of concerns about the ability of the parties to agree and/or the risk that a party might try to use the appointment to its advantage.

Impartiality and Independence

We asked respondents whether a nominee secretary should be asked to provide a statement of impartiality and independence. The results confirm that this is considered an important issue. 86% of those responding felt that this should be a requirement for appointment. What is more surprising is that 14% felt that it should not be a requirement.

We also asked respondents whether parties should be able to challenge the proposed appointment of a tribunal secretary. 81% of those responding felt that the parties should have this right.

Legal qualification or not?

Tribunal secretaries are often drawn from the ranks of junior lawyers. We asked respondents whether they felt that a tribunal secretary should be a lawyer or legally qualified. A substantial majority (74%) said that they should.

Consistency of institutional rules and guidance

Given the current lack of consistency across institutional rules and guidance in relation to the use of tribunal secretaries, we asked respondents whether they felt it would be desirable to have consistency. A substantial majority (62%) of those who responded felt that consistency was desirable. 12% said that they did not know whether it would be a good idea to have consistency and a significant minority (26%) said that it would not be a good idea. We can only speculate as to the reason for the last level of response. The choice of rules is generally made at the time that the transaction underpinning the dispute is concluded. It is hard to believe that those comparing the relative merits of different institutional rules for incorporation into an arbitration clause will give detailed (or any) consideration to the variances in approach to tribunal secretaries that may exist among the different institutional rules.

30%

of respondents gave an unequivocal yes to the desirability of appointing tribunal secretaries

63%

of respondents felt that the desirability of appointing a tribunal secretary depends on the nature of the tasks to be undertaken

73%

of arbitrators who responded identified an improvement in organisation and procedural efficiency as a potential advantage of appointing a tribunal secretary

67%

of those responding said that the tribunal should make the appointment

What tasks is it appropriate for the tribunal to delegate to a tribunal secretary?

A fundamental issue in relation to the use of tribunal secretaries is the question of where is the line to be drawn between tasks that it is appropriate for the tribunal to delegate and those that should be reserved to the tribunal as the parties' appointed decision-maker. We listed a number of tasks for respondents and asked them to indicate which they considered to be appropriate for delegation and which they felt were not appropriate for delegation. The percentage of respondents indicating "appropriate" or "not appropriate" to each of the tasks described is set out in the table opposite.

	Task	Appropriate	Not Appropriate
1	Organize hearings	98%	2%
2	Organize the tribunal's files	95%	5%
3	Attend hearings to take notes/keep time	93%	7%
4	Send documents on behalf of the tribunal	91%	9%
5	Deal with invoicing and fee payment	88%	12%
6	Prepare a note of the procedural history for inclusion in the award	74%	26%
7	Attend the tribunal's deliberations	58%	42%
8	Draft procedural orders	51%	49%
9	Conduct legal research	47%	53%
10	Write non-substantive parts of the award	40%	60%
11	Prepare a summary of fact or expert evidence for inclusion in the award	33%	67%
12	Review evidence	24%	76%
13	Prepare written legal analysis of the parties' arguments for inclusion in the award	14%	86%
14	Participate in the tribunal's deliberations	10%	90%
15	Write substantive parts of the award relating to the merits or determination	10%	90%

On the basis of the table, there is a relatively clear demarcation line between tasks facilitating the arbitration process and those that trespass on the exercise of the tribunal's duties to the parties. Unsurprisingly, nearly all respondents were happy that the tribunal secretary should perform purely administrative tasks (items 1, 2, 4 and 5). A majority (albeit a small one in the case of item 8) were content that the secretary should be involved in the drafting of material whose content is unlikely to be controversial.

In marked contrast, only a minority thought that it would be appropriate for the secretary to carry out functions that involved an assessment or analysis of evidence (14% in the case of a written legal analysis of the parties arguments, 24% in relation to a review of evidence and 33% in connection with preparation of a summary of fact or expert evidence for inclusion in the award). Writing substantive parts of the award relating to the merits or a determination on the issues was a definite no-go area with only 10% of those responding expressing the view that this was an appropriate task for the tribunal secretary.

The divide between the two categories of function is illustrated by the responses relating to deliberation meetings.
A surprisingly high percentage of those responding (58%) thought it appropriate that the secretary should attend the tribunal's deliberations. In marked contrast, 90% of respondents were of the view that it would be inappropriate for the secretary to actually participate in the deliberations.

We also asked respondents if there should be complete transparency for the parties about how the tribunal secretary has spent his/her time. 78% of those responding said that there should be. Only 15% said there should not. This is clearly an important factor in enabling parties to monitor the nature of the work done by the secretary.

Who should pay for the tribunal secretary?

Lastly, we asked respondents who should meet the fees and expenses of the tribunal secretary. A large majority (67%) felt that the parties should pay. 33% felt that the tribunal should meet the costs. However, there was a substantial divergence between civil lawyers and those from a common law background when responding to this question.

"There is a relatively clear demarcation line between tasks facilitating the arbitration process and those that trespass on the exercise of the tribunal's duties to the parties."

Only 56% of civil lawyers thought that the parties should pay the costs and expenses of the secretary compared with 83% of common law lawyers who thought this.
In combination with the views expressed on party consent to the appointment of a tribunal secretary, it appears that lawyers from a common law background may favour a greater degree of control and financial responsibility in relation to tribunal secretaries than those from civil law jurisdictions.

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