



TRIBUNAL SECRETARIES THE LCIA SEEK TO REIN IN THE 'FOURTH ARBITRATOR'

The appointment and use of Tribunal Secretaries has come under increasing scrutiny in international arbitration in recent years. A lingering uneasiness remains over the perceived risk that Tribunals may permit the administrative role of legal assistants to become unsupervised, or, even worse, to morph into that of a delegated decision maker.

This concern has led to the coining of the phrase the *'fourth arbitrator'*. Tasks such as research; drafting procedural orders and attending hearings have received intense criticism, to counter this, the LCIA has recently revamped its guidance in an attempt to counter such criticisms.

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Recent Legal Development

The issue of Tribunal Secretaries was further thrown into the limelight earlier this year when a claimant in an LCIA Arbitration applied under s.24(1)(d) of the Arbitration Act 1996 to remove co-arbitrators from a Tribunal on the grounds that they improperly delegated the functions of the Tribunal to the Secretary.¹ The basis of the application stemmed from a misdirected email from the Chairman to the claimant’s lawyer, which had been intended for the Tribunal Secretary, stating: “Your reaction to this latest from [Claimant]?”. The claimant alleged that:

- the Secretary had been entrusted with a number of tasks beyond what was permissible under the LCIA Rules and the LCIA Policy; and
- by virtue of their delegation, the co-Arbitrators had breached their mandate as arbitrators and were not sufficiently participating in the arbitration proceedings and the decision-making progress.

Ultimately, Mr Justice Popplewell dismissed the application, finding no fault on the part of the co-arbitrators. However, in his decision, the judge acknowledged: “there is a considerable and understandable

anxiety in the arbitration community that the use of tribunal secretaries risks them becoming, in effect ‘fourth arbitrators’” and commented that a Secretary should not be “tasked with anything which involves expressing a view on the substantive merits of an application or issue. If he is so tasked, there may arise a real danger of inappropriate influence.”

Updated LCIA Guidance Notes

In what appears to be a direct reaction to the issues in this case, the LCIA has updated their Notes for Arbitrators, effective as of October 2017. These Notes have significantly strengthened their guidance on the role of Tribunal Secretaries, and include the following:

- explicit statements that in no circumstances may an Arbitral Tribunal delegate its fundamental decision-making function, and that any assistance from a Tribunal Secretary does not relieve the Tribunal from their personal responsibility;
- that not only must there be express written approval from the parties to the use of a Tribunal Secretary (as was the case in the previous Guidance Notes), but now the parties must also agree the tasks that may be carried

out by the Tribunal Secretary. In addition, the Guidance Notes have moved away from listing the tasks a Tribunal Secretary could undertake; to listing tasks that the Tribunal may wish to propose to the parties that the Tribunal Secretary may undertake.

- a much clearer approval process related to the specific individual being appointed as Tribunal Secretary; with opportunities for the parties to object to an appointment;
- an enhanced confidentiality, conflict and impartiality obligation on the Tribunal Secretary involving the signing of a Statement of Independence and a Consent to Appointment; and
- clarity on a removal/replacement of a Tribunal Secretary.

The updated LCIA Guidance Notes can be found at the following link: <http://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx>

HFW Commentary

The debate continues to evolve over the use of Tribunal Secretaries as they become ever more ingrained within the fabric of international arbitration. The majority of institutions now set

¹ P v Q, R, S, U [2017] EWHC 194.

The current position of the arbitral institutions in respect of Tribunal Secretaries.

| ICC | LCIA | SIAC | HKIAC | DIAC |
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| Launched a new one-day training course for Tribunal Secretaries at the Paris Arbitration Week in April 2017. | Updated its Guidance Notes for Arbitrators in October 2017. | Issued its Practice Note – <i>On the Appointment of Administrative Secretaries</i> in February 2015. | Launched its Tribunal Secretary Training Programme in December 2015. Participants must pass both a written and oral exam | DIAC is preparing for the launch of its new DIAC 2018 Arbitration Rules. |

out formal guidelines, like the LCIA, providing a framework for their role.

The arguments in favour of using Tribunal Secretaries are well versed and remain relevant. Their purpose is clear - to add efficiency to the proceedings and allow the Tribunal to focus on the substantive merits at hand, and to encourage junior lawyers to become arbitrators. From a client's perspective the appointment should assist in reducing fees, as administrative tasks will be at a much lower charge out rate – recommended at between £50 - £150 an hour which the parties must consent to in advance, rather than at up to £450 an hour (the maximum charge out rate for a Tribunal member) and enable Awards to be published in a shorter time frame.

The newly published LCIA Guidelines are certainly a step in the right

direction. They have clearly been drafted with an understanding of the reservations that many hold in relation to Tribunal Secretaries. The LCIA's solution is to seek consensus and agreement from the arbitrating parties at all stages of the appointment and use of a Tribunal Secretary. This should allow parties, with advice from their legal advisors, to maintain a clear boundary on the terms of the involvement of any Tribunal Secretary. It should be noted however, that these Guidelines still sit outside of the formal LCIA rules and are a 'best practice' guide.

It remains to be seen whether the other arbitral institutions will follow suit in updating their own guidelines with a more thorough and formulaic approach to Tribunal Secretaries. Some institutions, (for example the ICC and the HKIAC), have rolled out training courses for prospective

Tribunal Secretaries to pass prior to allowing their appointment. The table above sets out the current position of the arbitral institutions in respect of Tribunal Secretaries. As use of Tribunal Secretaries develops across international arbitration, the Institutions will want to ensure that their reputations for impartiality cannot be undermined.

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