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Out of the shadows

Khaled Moyeed

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Russia's challenge to the *Yukos* awards has made the appropriate use of arbitral secretaries the issue of the day. An event in London convened by six young arbitration groups shone a light on the role they do and should play. **Khaled Moyeed** of Clyde & Co in London reports.

Out of the shadows

Held at the London offices of Freshfields Bruckhaus Deringer, the packed event brought together over 100 international arbitration practitioners who joined in the lively debate. Among them were several who had participated in the drafting of the Young ICCA Guide on Arbitral Secretaries, which was launched at the ICCA Conference in Miami last year, and performed the role of secretary themselves.

Audience members participated enthusiastically in the discussion and highlighted that although there is broad acceptance of the use of secretaries, there are also many concerns about their roles.

These include whether there is party consent to their appointment, whether there has been appropriate opportunity to object to their use and the extent to which they are bound by obligations such as confidentiality that bind the tribunal members.

By coincidence, the event coincided with the launch of new guidance on the subject – the Singapore International Arbitration Centre's Practice Note on the Appointment of Administrative Secretaries – which provided a talking point.

The event also coincided with Russia's publication of one of its writs for the set-aside of the *Yukos* awards – which relies on the allegedly excessive role played by Canadian lawyer Martin Valasek, as assistant to the tribunal (a tribunal secretary equivalent).

Broad acceptance

Joshua Fellenbaum, senior associate at Clyde & Co in London and co-author of the Young ICCA Guide chaired the discussion and began by setting out the context for the guide. It was premised on a survey carried out in 2012 to 2013 seeking the views of 200 members of the international arbitration community, he said.

Of those surveyed, 95 per cent approved the use of arbitral secretaries, so the evening's discussion assumed the arbitration community's acceptance of their use.

In recent years, institutions such as the Hong Kong International Arbitration Centre, the ICC International Court of Arbitration , the Finland Chamber of Commerce and now the Singapore International Arbitration Centre have weighed in, publishing notes and guidelines on the use of tribunal secretaries, he said.

Fellenbaum presented a number of issues that have emerged in relation to the use and appointment of arbitral secretaries. He said that while the discussion would

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focus on the underlying themes of transparency, qualification, and compensation, "the aim of the evening is to raise a number of practical scenarios to see if we can define what in fact is 'proper' and 'best practice'".

Perpetuating problems?

Panellist **Lucy Reed**, the Singapore-based global co-head of international arbitration at Freshfields Bruckhaus Deringer, began by congratulating Young ICCA for its Guide on Arbitral Secretaries.

However, Reed was of the view that we should not use arbitral secretaries to perpetuate problems that persist in international arbitration, for example, the production of records that are too voluminous and awards that are too long.

Arbitral secretaries often tend to be used to draft overly long sections setting out the procedural history and the parties' legal positions, she noted.

Reed was generally in favour of the arbitral secretary being a qualified lawyer, for reasons of efficiency. For example, a qualified lawyer would understand why a case might need to be bifurcated and therefore schedule a timetable accordingly, which could not be done as efficiently by a non-lawyer secretary, she said.

A novel approach

Reed ended her presentation by highlighting a novel approach in SIAC's Practice Note on the Appointment of Administrative Secretaries, which was published that same day.

The note states that administrative secretaries may be appointed in appropriate cases. However, parties will not bear the fees of an administrative secretary if the amount in dispute is under S$15 million whereas the parties will bear such fees if the amount in dispute is S$15 million or more.

Be humble

Per Runeland, senior counsel at Setterwalls in Stockholm, talked about the desirable characteristics of an arbitral secretary. He drew a comparison between the use of reporters in Moscow tribunals [constituted under the rules of the International Commercial Arbitration Court at the Russian Federation's Chamber of Commerce and Industry] and arbitral secretaries.

A Moscow tribunal could not function without the use of a reporter, who might be a graduate or a PhD student and work extremely hard to gain experience and eventually become an arbitrator, he said.

Similarly, Runeland said that arbitral secretaries would benefit from taking a long perspective and learning the art of arbitration while essentially being invisible in the background. This requires true humility, which is an important trait for any arbitral secretary, he stated.

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Three types of secretary

David Caron, a professor of King's College London, outlined the three types of arbitral secretaries: those appointed from within arbitral institutions; those employed by tribunals on an ad hoc basis and those still in education.

Although Caron mused that he does not expect too much from the third kind of arbitral secretary mentioned, he said that it is an opportunity for them to gradually make the transition from their educational phase.

An ICC perspective

José Feris, deputy secretary general of the ICC International Court of Arbitration, outlined that institution's experience of using arbitral secretaries, stating that it does not take a "one size fits all" approach when dealing with problems.

A common problem is party-complaints in relation to the amount of time spent on a case by an arbitral secretary and the remuneration that they were entitled to. Feris stated that in one extreme case, the chairman of the tribunal had spent 35 hours on the case whereas the secretary spent 141 hours. It appeared as though the arbitral secretary was doing most of the work.

However, Feris explained that a junior lawyer as secretary may spend more time on a case than tribunal members because they are learning or handling administrative tasks, which tend to be time consuming.

Feris stated that another time the ICC encounters problems is at the review stage of draft final awards, when it may appear that an arbitral secretary was too heavily involved in the drafting of the award. This can result in a draft award that is not of the necessary quality to be approved by the ICC and cause delay to the issuance of the final award.

Finally, he remarked that parties sometimes complain when arbitral secretaries respond to parties' communications while the tribunal members do not.

The ICC's Note on the Appointment, Duties and Remuneration of Administrative Secretaries published in 2012 addressed some of these problems encountered by the ICC.

A secretary's perspective

The final panellist to speak was **Christopher Bloch**, associate at King & Spalding in Singapore, who has had experience as an arbitral secretary in more than 15 cases, most of which were under the supervision of **Michael Hwang SC**.

Bloch said that each case should be considered on its own merits to determine whether it is appropriate to appoint an arbitral secretary. The tribunal must take into account the factual and procedural complexity of the case and not just the amount in dispute when exercising its discretion.

He relayed his own experience of an expedited arbitration with Hwang in which the

parties needed an award within seven months, an extremely tight timeframe given its procedural and factual complexity.

Given his prior commitments and travel schedule, Hwang suggested Bloch's appointment as an arbitral secretary and agreed Bloch's remuneration with the parties on an hourly basis. Bloch's roles and responsibilities were clearly defined with the parties, and in the end, the tribunal was able to deliver the award within the required timeframe.

The case was admittedly unique but Bloch stated that the parties saw and appreciated the value of having an arbitral secretary involved in the matter.

As one of the authors of the Young ICCA Guide on Arbitral Secretaries, Bloch stated that it was always meant to be more than a discussion piece and serve as a practical tool. He noted that tribunals have now started circulating the guide to the participants in an arbitration on the appointment of an arbitral secretary.

The guide's purpose is to take tribunal secretaries out of the shadows, Bloch said. If there is transparency about their involvement in a case, it will be harder for parties to argue that an arbitral secretary was too heavily involved in drafting the award, he added.

Emerging themes

As the discussion shifted from the panel to the floor, a number of themes emerged that the delegates felt were particularly important.

The first was transparency: delegates agreed that tribunals should not be allowed to make use of arbitral secretaries without the parties' knowledge (the "shadow secretary").

Aside from the parties' right to know of the secretary's existence, it was suggested that it could be problematic if he or she is handling confidential data relating to a case without their knowledge.

However, both Reed and Caron suggested that it may be acceptable for an arbitrator to ask someone to carry out a small research task without having to go through the procedural steps of formally appointing a secretary.

Secondly, delegates appeared to agree that there must be an opportunity for parties to object to the appointment of a particular arbitral secretary. This should not simply be a matter for the tribunal to decide.

However, it was acknowledged that parties may feel reluctant to do this for fear of displeasing the tribunal.

Finally, there was general consensus that there should not be an arbitrary cap on the experience of a tribunal secretary, just as there is none for a judicial clerk.

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As Feris pointed out, careers progress at different rates internationally. In Latin America, partners in smaller law firms often act as secretary and the option should not be ruled out.

Bloch added that respondents to the 2012/13 Young ICCA survey had rejected the idea of having a maximum PQE level for arbitral secretaries.

A living document

The panel concluded with Fellenbaum posing a number of questions relating to the duties of arbitral secretaries, such as whether they should be expected to draft substantive portions of an award, share every memorandum received with the entire tribunal and liaise directly with the parties. The audience eagerly participated with a show of hands.

Leilah Bruton, senior associate at Freshfields and a member of the Young ICCA task force that prepared the guide, said "our intention was always that the guide would be a living document that would be updated as and when necessary to reflect the arbitral community's evolving views on this important issue."

Discussions such as this are key in driving the debate forward, she said. "We will certainly be drawing upon them as we reflect further on the development of the guide".

The guide, which has been shortlisted for a GAR Award in the category of "best innovation by an individual or organisation in 2014", is available here.

It has four main sections, on general principles, appointment, the role of secretaries and costs as well as providing a model "plug-in" clause in contracts for the appointment of arbitral secretaries.

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