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Tribunal Secretaries

- When Playing the Games of Thrones –

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Overview of Discussion

- Introduction
- Possible Aspects:
 - Appointment process
 - Role of the Tribunal Secretary
 - Does a Tribunal Secretary need to be impartial and independent
 - Consequences/Remedies if Tribunal Secretary violates his/her duties?
 - Challenge of Secretary
 - Challenge of Award
 - Personal liability of the Tribunal Secretary

Role of the Tribunal Secretary

- Lord Varys, Season 2, Episode 3 (with Tyrion Lannister):
Power resides where men believe it resides. It's a trick, a shadow on the wall. And, a very small man can cast a very large shadow
- Multitude of diverging opinions emerged in recent years in:
 - Doctrine: discussion on «fourth arbitrator», «miss moneypony» vs. «fourth musketeer» etc.
 - and guidelines to institutional rules → LCIA Notes, ICC Notes, Young ICCA Guidelines, SIAC Practice Notes, VIAC Guidelines for Arbitrators
 - and some case law

Role of the Tribunal Secretary

- Minimum common denominator:
 - Tribunal Secretary's task may go beyond the purely administrative
 - Decision-making function **must** remain with the Tribunal
 - VIAC Guidelines for Arbitrators, section 6:
“The arbitral tribunal is not permitted to transfer any tasks to the administrative secretary that are genuinely reserved to the arbitral tribunal, such as in particular the decision-making power.”
 - ICC Note, para. 184
 - LCIA Notes, para. 68
- Ned Stark summarized it as follows (Season 1, Episode 1):
The man who passes the sentence should swing the sword.

Role of the Tribunal Secretary

- As to the specific tasks of the Secretary:
 - Some institutional rules/institutions do **not** provide any/clear guidance on the tasks a Tribunal Secretary may perform:
 - Swiss Rules silent
 - SCC Rules → art. 24(2): Tribunal shall consult parties re. tasks
 - SIAC Rules and Practice Note silent
 - VIAC, section 6: everything except «*tasks genuinely reserved to the arbitral tribunal, such as in particular the decision-making power*»
 - » Sounds rather liberal..?

Role of the Tribunal Secretary

- Young ICCA Guidelines (rather liberal)

Article 3. Role of the Arbitral Secretary

- (1) With appropriate **direction and supervision by the arbitral tribunal**, an arbitral secretary's role may legitimately go beyond the purely administrative.
- (2) On this basis, the arbitral secretary's tasks may involve all or some of the following:
 - (a) Undertaking **administrative matters** as necessary in the absence of an institution;
 - (b) **Communicating** with the arbitral institution and parties;
 - (c) **Organizing** meetings and hearings with the parties;
 - (d) **Handling and organizing correspondence, submissions and evidence** on behalf of the arbitral tribunal;
 - (e) **Researching** questions of **law**;
 - (f) **Researching** discrete questions relating to **factual evidence and witness testimony**;
 - (g) **Drafting procedural orders and similar documents**;
 - (h) **Reviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence**;
 - (i) **Attending** the arbitral tribunal's **deliberations**; and
 - (j) **Drafting appropriate parts of the award**.

Role of the Tribunal Secretary

- ICC Notes (used to be rather restrictive, seemingly more liberal now)

185. Notwithstanding the above, an administrative secretary **may perform organisational and administrative tasks such as:**

- **transmitting** documents and communications on behalf of the arbitral tribunal;
- **organising** and maintaining the arbitral tribunal's file and locating documents;
- **organising** hearings and meetings and liaising with the parties in that respect;
- **drafting correspondence** to the parties and sending it on behalf of the arbitral tribunal;
- preparing 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;**
- **attending hearings, meetings and deliberations;** taking notes or minutes or keeping time;
- conducting **legal or similar research;** and
- proof-reading and checking citations, dates and cross-references in procedural orders and awards, as well as correcting typographical, grammatical or calculation errors.

Role of the Tribunal Secretary

- LCIA Notes

71. An Arbitral Tribunal must inform the parties of the tasks that it proposes the tribunal secretary be entitled to carry out. While the LCIA does not endorse any particular tasks as necessarily being appropriate for a tribunal secretary to carry out, an **Arbitral Tribunal may wish to propose any or all of the following:**

- a) that the tribunal secretary carries out **administrative tasks**, such as communicating on behalf of the Arbitral Tribunal, organising documents, proofreading, organising procedural matters, and dealing with matters relating to invoices;
- b) that the tribunal secretary **attends hearings, meetings, and deliberations**; and
- c) **the extent, if any, to which the tribunal secretary carries out substantive tasks, such as summarising submissions, reviewing authorities, and preparing first drafts of awards, or sections of awards, and procedural orders,**

provided always that paragraphs 68 and 69 above are fully complied with and that such tasks are carried out in accordance with the Arbitral Tribunal's specific instructions.

→ LCIA Court made clear in Decision 4 August 2016 (142683) that standard under LCIA Notes not necessarily different from Young ICCA Guidelines (cf. P v. Q and Ors, EWHC 194, High Court of England and Wales, QB Div., 9 February 2017)

Role of the Tribunal Secretary

DISCUSSION

Independence/Impartiality of the Tribunal Secretary

- Rules/Guidelines require Statement of Independence
 - Art. 24(4) SCC Rules
 - ICC Notes, paras. 180 and 181, Declaration of Independence
 - LCIA Notes, para. 74(d), Statement of Independence
 - SIAC Guidelines, para. 4
 - Young ICCA Guide, Art. 2 (3) → Tribunal confirms that Secretary is independent and impartial
 - VIAC Guidelines, section 6, CV and declaration of impartiality, independence and confidentiality
- Only relevant if Secretary fulfills tasks that go beyond purely administrative?

Appointment Process

- Who has the final say on the appointment?
 - Again Lord Varys' quote from a different angle:
«***power resides where men believe it resides***»
 - «believe» not sufficient, but under most rules and guidelines approval needed or at least the absence of an objection, i.e. tacit agreement?!
 - Different wording/solutions in rules and guidelines, but to my view no major differences in substance

Appointment Process

- **Explicit approval** from parties needed:
 - Art. 24 SCC Rules: subject to approval of the parties
 - LCIA Notes, para. 74: agreement required re. tasks, remuneration , statement of independence → para. 75: party may object
 - 74. An Arbitral Tribunal can only obtain assistance from a tribunal secretary once the tribunal secretary has been **approved by the parties**. A tribunal secretary is approved once:
 - a) the parties have agreed the tasks that may be carried out by the tribunal secretary;
 - b) the parties have agreed that **Article 30.2 (Confidentiality) and Article 31 (Limitation of Liability) of the LCIA Rules apply, *mutatis mutandis*, to the tribunal secretary;**
 - c) if an hourly rate is to be charged and the tribunal secretary is to be entitled to have expenses reimbursed, the parties have agreed to this hourly rate and entitlement to reimbursement; and
 - d) the completed **Statement of Independence** and Consent to Appointment has been provided to the parties, and the parties have agreed to the particular person filling the role of tribunal secretary.
 - 75. 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.
 - See also SIAC Guidelines, para. 3, and Young ICCA Guidelines, art. 1(2): knowledge and consent of parties

Appointment Process (ii)

- Similarly, parties may **comment and veto**:
 - ICC Note, paras. 181 and 182: Tribunal shall inform parties of intention and parties may object to proposal from Tribunal
 - Art. 15(5) Swiss Rules: «*Tribunal may, after consulting with the parties, appoint a secretary*».
- Parties may comment:
 - VIAC Guidelines, section 6: «*The parties shall be granted the opportunity to **comment***»
 - what does that mean?

Appointment Process (iii)

- Excursus Switzerland:
 - Generally, in practice the provisions in the institutional rules and accompanying guidelines will be determinative:
 - » generally, Swiss Rules would be understood to require approval from parties (appointment only after consultation of parties)
 - » Other Rules and Guidelines:
 - From a dogmatic point of view it is questionable whether e.g. ICC Note is part of parties' arbitration agreement and rules chosen
 - Note may become part of parties' agreement through ToR or SPR etc.
 - Yet, whether or not appointment process is stipulated in rules or notes/guidelines is in practice of minor importance

Appointment Process (iv)

- Different approach in DFSC 4A_709/2014?
 - particularities of case: ad-hoc, decision of *ex aequo et bono*
 - Involving a Secretary was considered part of the organizational autonomy of arbitral tribunal (cf. art. 182(2) SPILA)
 - Consent of Parties was no prerequisite → however, if all parties object, an appointment would not be possible (because there would be an agreement by the parties not to appoint a Secretary)

Consequences/ Possible Remedies for Parties

- Cersei Lannister, Season 1, Episode 7:
«*When you play the game of thrones, you win or you die*»
- Tyrion Lannister, Season 1, Episode 1, less melodramatic, more realistic:
 - «*Never forget what you are. The rest of the world will not. Wear it like armor, and it can never be used to hurt you*»

Possible Remedies for Parties

- Tribunal secretaries operate in an environment of different stakeholders:
 - Institution
 - Arbitrators
 - Parties
- Lord Baelish, Season 7, Episode 3
«*Everyone is your enemy, Everyone is your friend*»

Possible Remedies for Parties

- Challenge of Secretary
 - Rules
 - Art. 10 LCIA Rules (LCIA Guideline, para. 80)
 - Art. 10 Swiss Rules (cf. art. 15(5), art. 9-11 apply also to Secretary)
 - Art. 19/24 SCC Rules
 - Challenge for lack of independence and impartiality
 - Analogous application of challenge provisions when excess of powers/tasks?

Possible Remedies for Parties

- If challenge of secretary is possible for excess of tasks, then also challenge of tribunal possible
 - Tribunal does not fulfil its personal mandate
 - Opens up possibility for challenge of an award
- Case law, e.g.:
 - P v. Q and Ors, EWHC 194 (Comm), High Court of Justice of England and W; LCIA Court Decision No. 142683 of 4 August 2016
 - DFSC 4A_207/2015
 - Supreme Court of Italy, Sacheri v. Robotto
 - Yukos case in Netherlands
 - Gazprom in Sweden

Possible Remedies for Parties

- Challenge of award
 - When excess of powers/tasks...
 - Should challenge of an award also be possible if Secretary (but not any of the arbitrators) holds a bias against a party?
- Personal liability
 - Rules
 - Under most rules the Tribunal remains liable for Secretary
 - Other rules exclude liability, except for gross negligence or wilful misconduct
 - Contract law
 - Contractual basis only vis-à-vis Tribunal?
 - direct contractual basis against Secretary e.g. based on appointment?

Take aways

- Know the rules → wear them like an armor (Tyrion Lannister)
- Know the players → everyone is your friend / enemy (Lord Baelish)
- play safe → If you play the games of thrones you either win or you die (Cersei Lannister)
- Be pro-active to learn and discuss with tribunal – but do not swing the sword (Ned Stark)

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