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Izotov Dmytro
Associate at AGA Partners

UKRAINIAN RESPONSE TO THE ACTIVE ROLE OF SECRETARIES DURING ARBITRAL PROCEEDINGS

Summary. Today it is a common and acceptable practice for the arbitrator to appoint an assistant in order to facilitate the effective consideration of the dispute by entrusting him/her with administrative and organizational tasks. But what if the functions of the tribunal's assistant go further than just maintaining the correspondence with the parties and additionally involves legal tasks? Does it mean that arbitrator basically transferred his/her decision-making mandate to another person? Within this article, the author intends to analyze the existent precedents related to the excessive role of the assistant during arbitration proceedings and to illustrate how major arbitral institutions responded to this issue. Using the results of this analysis the author proposed to amend the current procedural regulations of the main Ukrainian arbitration centers in order to reflect the current trend of limitation of the assistant's functions in order to ensure the parties' right during the proceedings.

Keywords: international arbitration, arbitral secretary, tribunal's assistant, ICAC, UMAC, recognition and enforcement of arbitral awards, set aside of arbitral awards.

Ізотов Д.А.
AGA Partners

ВІДПОВІДЬ УКРАЇНИ НА ВИКЛИК, ПОВ'ЯЗАНИЙ З АКТИВНОЮ УЧАСТЮ СЕКРЕТАРІВ ПІД ЧАС АРБІТРАЖНОГО ПРОВАДЖЕННЯ

Анотація. Популярність міжнародного арбітражу як засобу вирішення спорів між сторонами зростає кожного року. Відповідно, зростає й завантаження арбітрів, які змушені розглядати по декілька справ одночасно. В таких обставинах арбітри змушені шукати допомогу у розгляді справ, сортуванні матеріалів справи, комунікації зі сторонами процесу тощо. Саме тому, на сьогодні досить поширеною та загальноприйнятною практикою є призначення арбітром помічника з метою сприяння ефективному розгляду спору шляхом доручення йому адміністративних та організаційних завдань. Своїми діями арбітражні помічники дійсно допомагають арбітрам швидше впоратися із покладеними на них завданнями, одночасно задовольняючи інтереси сторін в якнайшвидшому розгляді їх спору. Однак, якщо уявити, що функції помічника арбітражного трибуналу виходять за рамки суто організаційних (ведення листування зі сторонами, надання рахунків для оплати арбітражних витрат, тощо) та додатково включають в себе юридичні завдання? Чи означає це, що арбітр фактично передав свій мандат на прийняття рішень по справі іншій особі, тис самим зробивши свого помічника «четвертим арбітром»? Які загрози та ризики несе активна участь арбітражного секретаря в самому процесі та чи потрібно детально регламентувати обов'язки та функції таких секретарів на рівні арбітражних правил? У цій статті автор має намір проаналізувати існуючі прецеденти, пов'язані з надмірною участю помічника в арбітражному проваджені. Зокрема, автор аналізує справи, в яких сторони скаржилися, що арбітражний секретар своїми діями прямим чином впливав на арбітражний процес, порушуючи тим самим права учасників процесу. Автор також ілюструє, як найбільш відомі арбітражні інституції відреагували на зростання подібних справ. Для цього, автором були проаналізовані положення арбітражних правил світових інституцій, включаючи регламенти Лондонського міжнародного арбітражного суду, регламент ЮНСІТРАЛ тощо. На основі цього аналізу, автор запропонував внести зміни до чинних процесуальних регламентів основних українських арбітражних інституцій, маючи на меті підтримати сучасну тенденцію обмеження функцій арбітражного помічника з метою забезпечення прав сторін під час розгляду справи.

Ключові слова: міжнародний арбітраж, арбітражний секретар, помічник трибуналу, МКАС, УМАК, визнання, виконання та оскарження рішень міжнародного арбітражу.

Introduction. Nowadays, the issue of the excessive role of the arbitral secretary/ tribunal's assistant (for the purposes of this article, the said terms will be used interchangeably) is becoming increasingly important, given the rising number of cases where parties tried to revoke the arbitral award on the grounds that the arbitrators illegally delegated their powers to the tribunal's assistant. This tendency can be explained by thorough scrutiny of the arbitration process by parties wishing all procedural rules are strictly complied with. After conducting such careful examination, the parties realized that it is common for the arbitrators to entrust their assistants with some administrative or even legal task in relation to arbitration proceedings. Such delegation, in turn, puts in danger the very essence of the arbitration – the parties' agreement to submit the dispute to "*individual whose judgment they are prepared to trust*" [1, p. 2].

As it will be illustrated below, numerous arbitral institutions have already made a step towards the existent problem by implementing rules and guidelines which directly handle the conduct and limit the authority of the arbitral secretaries. At the same time, no visible changes were made in this regard by Ukrainian arbitration centers, which thereby remain exposed to the abovementioned risks.

Analysis of recent research papers and publications. The problem of excessive use of arbitral secretaries was firstly spotlighted by Constantine

Partasides who coined the ironic term "fourth arbitrator" in relation to tribunal's assistant [2]. Partasides in his article described the first publicly known attempt to challenge the arbitrator due to the overuse of assistant while preparing an award in a case before Iran-United States Claims Tribunal [2, pp. 150–151]. By analyzing the said precedent and examining the similar issues in national court systems, the author proposed to limit the set of secretaries' responsibilities in order to avoid the risk of the arbitral award to be a defective one [2, pp. 156–160].

Discussion on the excessive role of tribunal's secretary as a ground for setting aside of arbitral award was continued by Lawrence W. Newman and David Zaslowsky [3]. It should be noted that this discussion was not born out of thin air and was prompted by another attempt to attack an award on the grounds of the tribunal's influence on the arbitral process in *Veteran Petroleum Limited (Cyprus) v. the Russian Federation* [3]. While focusing on the parties' arguments in the cited case, the authors additionally explored the regulation of the matter in question within the international arbitration community. In particular, L.W. Newman and D. Zaslowsky referred to the rules on the use of arbitral assistants adopted by ICC and Young ICCA [3, p. 3–4].

Another notable example of possible consequences caused by the engagement of an arbitral assistant was also illustrated in the work of Tracey Timlin [4]. The author examined the legal principles of secretaries' involvement during arbitration proceedings established by the Swiss Supreme Court [4]. The author of the present article will revert to these principles in more detail below.

Additional cases of challenging arbitrators or award in general due to overuse of arbitral secretaries as well as responses of arbitration community to the described risks were also reflected in the works of C. Carswell and L. Winnington-Ingram [5], S. Uvarov [6], Simon Maynard [7] and others.

Problematic issues not covered by the analyzed publications. It should be stressed that while all the abovementioned authors thoroughly analyzed the relevant cases and rules related to the role of arbitral secretaries, none of them touched the regulation of this matter in Ukraine. And it is not surprising, given the absence of any movement towards facing the said problem by Ukrainian arbitration institutions. The focus of Ukrainian arbitration practitioners and publicists is currently aimed at other problems thereby leaving aside the need in amending current procedural regulations of Ukrainian top arbitrations institutions – International Commercial Arbitration Court (the "**ICAC**") and Ukrainian Maritime Arbitration Commission (the "**UMAC**") at the Ukrainian CCI.

Research objectives. The main purpose of the article is to shift the said focus to the problems related to the engagement of secretaries/assistants during arbitral proceedings. While the attempts to challenge the arbitral award on the above grounds are not yet known for Ukrainian arbitration practice, it does not indicate that this problem should not be highlighted. Otherwise, when the issue of the active role of tribunal's assistant strikes, Ukrainian arbitration institutions as well as courts considering the arbitration-related disputes will be simply unprepared to face this problem.

Therefore, within this article, the author would like to analyze and consolidate the arbitration trends and precedents on the role of arbitral secretary in order to formulate the main postulates on the engagement of secretary by arbitral tribunals. The author also intends to provide his proposals on how the said postulates can be smoothly implemented in regulations of Ukrainian arbitration institutions.

The main analysis. Before jumping directly to the analysis of the existent regulations of the conduct of arbitral secretary within the arbitration proceedings, the author would like to clarify his views on the necessity of the secretary's appointment. In particular, the author genuinely believes that the engagement of the assistant to arbitral tribunal does not necessarily prejudice the arbitration process. On the contrary, both arbitrators and the parties can benefit from such an appointment. C. Partasides pointed out in this regard that, considering the high demand for international arbitration and, accordingly, the overload of the arbitrators, tribunal's assistants can play an important role in helping the arbitrators to handle all the administrative or organizational tasks [2, pp. 156–157].

At the same time, the authority and responsibilities of the arbitral secretaries should not be unlimited, since they can easily endanger the decision-making powers of the arbitrators. In order to define, to what tasks the activity of the secretary should be limited, the author invites a reader to examine the relevant authorities and precedents shaping the modern perception of the secretary's role within the arbitration community worldwide.

As it has been already mentioned, the first publicly known arbitration case where the parties cast doubt on the relevance of the secretary's appointment was the proceedings before Iran-United States Claims Tribunal. C. Partasides described that in 1991 the Iranian representatives lodge the motion on the challenge of the chairman of the arbitration tribunal – Mr. Gaetano Arangio-Ruiz [2, p. 150]. Having the information that the arbitrator dedicated to the case "*no more than 40 working days during the previous 12 months*", the Iranian agents alleged that majority of the tasks related to the consideration of the dispute were performed by his assistant [2, p. 150]. However, the challenge invoked by Iran was subsequently rejected as the deciding authority was not satisfied with the lack of evidence proving their serious assertions [2, p. 151]. The final decision on the challenge of Mr. Gaetano Arangio-Ruiz is completely understandable, as the Iranian representatives simply did not provide any solid evidence proving their accusations on the overuse of the tribunal's assistant. In the author's view, it is not sufficient just to provide the information on the arbitrator's working time. Instead, evidence on the direct involvement of the secretary in deciding the arbitration case should be presented by the parties for the challenge to be successful.

Arguments presented by the Russian Federation in a notable investment arbitration dispute against Cypriot investor Veteran Petroleum Limited can serve as a good illustration of how solid evidence of the excessive role of the assistant should look like. As it was mentioned by L.W. Newman and D. Zaslowsky, the Russian representatives ini-

tiated set-aside proceedings before The Hague District Court asking the judges to revoke USD 50 billion-worth award on numerous grounds, including the improper delegation of the arbitrator's authority to the secretary [3, p. 2]. The authors explained that the Russian lawyers managed to provide the Dutch court with evidence indicating that the assistant appointed by the arbitrator Yves Fortier:

worked 3,006 hours on the case, 381 hours through hearings on jurisdiction and admissibility and 2,625 hours on the remainder of the case, which consisted of the substantive hearings and the preparation of the award [2, p. 2].

Apart from that, C. Carswell and L. Winnington-Ingram revealed that Russia additionally presented an expert report on linguistic analysis of the arbitral award allegedly confirming that assistant could participate in writing certain parts of the tribunal's decision [5, p. 63].

Unfortunately, the court did not address Russia's arguments and evidence on the excessive role of the secretary, as it set aside the award on separate grounds [5, p. 63]. At the same time, the attempt of Russia to challenge the billion-worth award on these grounds, as well as solid evidence supporting its position considerably influenced the perception of this problem within the arbitration community. In particular, S. Uvarov explained that the said example prompted arbitration institutions throughout the world to require the arbitrators to confirm, before accepting appointment, that they are capable to personally participate in the arbitration process and are not overloaded with other pending proceedings [6].

While the above-described cases indeed became a foundation for global changes in regulations of the conduct of tribunal secretaries, none of the authorities deciding the said dispute provided carefully crafted principles on the role of secretaries within arbitration and boundaries secretaries should honor in order not to exceed their authority. This situation was changed in 2017 with the adoption of the decision by the English High Court in the case *P v. Q and Ors* [8].

As it is evidenced by para.10 of the said decision, the party to the pending arbitration proceedings exercised its right under the English Arbitration Act and applied to the national court with a request to remove two arbitrators. The ground for such an application was the fact that the chairman of the arbitral tribunal erroneously sent the parties an e-mail asking them "*your reaction to this latest from [Claimant]?*" [8]. In fact, this letter from the chairman of the arbitral tribunal was addressed to his assistant [8]. Para. 14 of the decision further reveals that on the basis of the cited message the claimant tried to prove the improper delegation of the functions of an arbitrator to the secretary by "*systematically entrusting the Secretary with a number of tasks beyond what was permissible under the LCIA Rules and the LCIA Policy on the use of arbitral secretaries*" [8]. Despite the fact that the High Court denied the claimant's request due to lack of evidence of delegation of arbitrator's authority, Mr. Justice Popplewell analyzed in great detail the massive volume of materials concerning the role of the secretary in the arbitration process and concluded in para. 65 of the decision that:

use of a tribunal secretary must not involve any member of the tribunal abrogating or impairing his non-delegable and personal decision-making function. That function requires each member of the tribunal to bring his own personal and independent judgment to bear on the decision in question, taking account of the rival submissions of the parties; and to exercise reasonable diligence in going about discharging that function [8].

Thus, the court in the case of *P v. Q and Ors* developed a straightforward legal test that would facilitate national courts and arbitration tribunals in considering specific actions as a violation of the arbitrator's mandate by delegating it to another person. The approach implemented by this decision suggests that one should take into account the nature of obligations performed by the assistant. If the tasks carried out by the assistant involves decision-making powers (including drafting the award), it should indicate the illegal delegation of the arbitrator's mandate to the third party.

A similar standard was also proposed a few years earlier by the Swiss Supreme Court in case No. 4A_709 / 2014, where the court concluded in para. 3.2.2 of its judgment that:

the arbitrator must fulfill his mission himself without delegating to a third party, even to a colleague working in the same firm if he is an attorney. When the decision is to be made, it is therefore important that the arbitrator should know the file, deliberate, and participate in shaping the will of the arbitral tribunal; to this effect, the chairman must keep intellectual control of the outcome of the dispute and the co-arbitrators must contribute to the decision-making process [9].

At the same time, as explained by T. Timlin, this decision has some serious flaws [4, p. 285–288]. In particular, the Swiss Supreme Court considerably broadened the authority of the secretary, even suggesting that he/she can participate in the drafting of non-substantial parts of the arbitral award and attending the tribunal's deliberations and hearings [9]. T. Timlin correctly points out that such an approach contradicts the established principles on the impossibility of arbitrator to delegate decision-making power to another person [4, p. 287–289]. The author agrees with the position of T. Timlin. If the assistant is able to attend the hearings, he/she is capable of shaping their own opinion on the events of the case, which can be different from one of the arbitrators. Even drafting some portions of the award, the assistant thereby can reflect the events through his/her own perspective and influence the decision-making process even not participating in writing of substantial part of the decision.

Such vague and broad formulation of the responsibilities of the tribunal's assistant was similarly objected to by the international arbitration institutions which chose a more coherent path.

For example, the world-renowned London Court of International Arbitration (the "**LCIA**") adopted a special Notes for Arbitrators which are intended to provide guidance to arbitrators conducting proceedings in accordance with the LCIA Arbitration Rules [10]. Section 8 of the Notes is entirely devoted to the role of the arbitral secretary and stipulates, *inter alia*, that the arbitral tribunal can entrust the assistant with the following tasks (para. 71):

– communication between the tribunal and the parties, organization of documents exchange, proofreading, billing and issuance of invoices;

– attendance of the hearings, meetings, and deliberations; and

– summarizing submissions, reviewing authorities, and preparing first drafts of awards, or sections of awards, and procedural orders [10].

While allowing the secretary to perform the broad range of tasks during the proceedings, the Notes restricts his/her authority by stipulating that the secretary shall carry out only those responsibilities which was agreed and approved by the parties (para. 70) and only under the strict supervision of the arbitrators (para. 69) [10]. The LCIA Notes clearly provides that it is the tribunal's responsibility to ensure that all these principles on the use of assistant are complied with [10].

This is a perfect example of how the secretaries' engagement can and should be regulated. The LCIA carefully considered the balance between the need in assisting the tribunal with the number of tasks and the parties' confidence that the decision-making powers remain with the person specifically appointed or agreed by them.

A similar approach was adopted by UNCITRAL in its 2012 Notes on Organizing Arbitral Proceedings [11]. In particular, according to para. 27 of the said Notes:

to the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal […] Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal [11].

All the above clearly demonstrates that an appropriate compromise has been formed within the international arbitration community on the functions and role that the secretary should play in the arbitration process. Given the number of sources that reflect the relevant principles of the involvement of the assistant, it is possible to make a conclusion on the high importance and relevance of this issue, especially given the potential consequences of non-compliance with these rules (which were illustrated in the cases presented above). The necessity and importance of formulating clear and transparent regulations were also highlighted by S. Maynard [7, pp. 10–11]. In his words, the lack of the respective rules "*can be used to place in jeopardy the outcome of a process that the institution of secretaries is designed to facilitate*" [7, p. 11].

At the same time, procedural regulations of both the ICAC and the UMAC are currently silent not only on the functions of the tribunal's assistant but also on the very possibility to appoint such a person to facilitate the proceedings. Despite the fact that the issue of appointment and role of the secretary is still at an early stage of the development within the professional community, the author believes that Ukraine should not stand aside from other countries that have already adopted respective regulations. On the contrary, decisive steps towards thorough and detailed regulation of this matter may be another factor in increasing Ukraine's popularity as a venue for international arbitration cases, especially given the growing number of cases on set-aside of international arbitration awards on this basis.

Conclusions and proposals. That is why the author proposes to amend the existing version of the ICAC's and the UMAC's Arbitration Rules by adding a specific section regulating the procedure of appointment of the tribunal's assistant and the range of functions he/she is allowed to perform within arbitration proceedings.

The author suggests that list of assistant's responsibilities can be incorporated from the regulations of other institutions that already have experience in handling the arbitration process with the facilitation of arbitral secretary (for instance, rules adopted by the LCIA in Notes for Arbitrators). More importantly, the amended Arbitration Rules should contain the mechanism protecting the parties' interests in the conduct of a legitimate and transparent arbitration process. In particular, the author would like to stress the importance of adopting the provision allowing to appoint tribunal's assistant only after the approval from both parties. Similarly, it is necessary to envisage the possibility of the parties to regulate the exact range of the assistant's functions within the specific arbitration proceedings. In the view of the author, this will allow to substantially decrease the possibility of revoking the arbitral awards on the grounds of misuse of the secretary, since the parties themselves will be in charge of defining the permissible level of assistant's intervention in the arbitration process.

Apart from that, the adoption of the proposed amendments can also assist Ukrainian courts responsible for consideration of arbitration-related disputes. In particular, in case of adoption of the respective regulations, the courts thus will have an appropriate source to which they can refer in order to analyze whether the assistant exceeded its authority or acted within the frames agreed by the tribunal and parties.

Considering the above, the author believes that the said proposals, subject to their implementation, will be able to effectively ensure the rights of the parties to the arbitration and provide an effective mechanism for challenging the arbitration award in case of the excess on behalf of the tribunal's assistant.

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