



THE ROLE OF TRIBUNAL REGISTRARS IN MARITIME ARBITRATION: A PRACTITIONER'S PERSPECTIVE BY OBOSA AKPATAⁱ

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Introduction

It is common practice locally and internationally to have arbitral tribunals engage the services of a tribunal registrar to facilitate the smooth and efficient management of the arbitration proceedings whilst freeing up the tribunal to focus on the substantive adjudication of the arbitral reference. Tribunal registrars are also referred to as 'arbitral secretaries', 'tribunal secretaries' or 'administrative secretaries'. I shall refer to them as 'tribunal registrars'.

In arbitration, reference to registrars may include the provision of infrastructure and oversight services of the arbitral proceedings by an Institution, such as the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Commission (SIAC), India Council of Arbitration (ICA), etc. In these Institutions the services of a registrar go beyond the administration of the arbitration reference to include powers to accept or reject an application for arbitration by the Institution, approval of the arbitrators who may be nominated by the parties, scrutiny and approval of the draft award before it is issued, extension of time limits, review of set fees and costs of the arbitration, etc.ⁱⁱ

As the title of this paper indicates, the focus of my presentation is the registrar whose services are required by the tribunal and the parties for the running of the arbitral proceedings. This service may however be provided by an institution or an individual.

Maritime Arbitrations

The primary purpose of the engagement of a tribunal registrar is to provide assistance in organizing the arbitral proceedings. There are no standard criteria for appointment as a tribunal registrar. Consequently, the nature and degree of assistance provided by the registrar varies from one arbitration to another being dependent on a number of factors such as the scope of the functions, experience and efficiency of the registrar, etc.

A review of the rules of the Maritime Arbitrators Association of Nigeria (MAAN) does not reveal any unique provisions for arbitration different from the provisions of the rules applicable to other commercial arbitrations. The Indian Council of Arbitration Maritime Arbitration Rules however provides details of the scope of application of its rules to include maritime disputes in respect of the following:

1. Interpretation of charter party, any contract of affreightment and bills of lading;
2. Carriage of goods by sea;
3. Marine salvage, towage of vessels or other floating objects;
4. Damages arising out of collisions, groundings, fire or any such accidents whether in port or at sea, including damage to fix or floating objects at ports;
5. Interpretation of any shipping documents;
6. Ownership of vessels and aspects relating to lines and mortgages;
7. General Average, particular average and matters arising out of contracts of marine insurance;
8. Wreck removal and marine pollution;
9. Disputes relating to other matters connected with shipping and not mentioned above.ⁱⁱⁱ

It is therefore safe to infer from the foregoing that maritime transactions being commercial in nature are not different from commercial arbitrations in any significant respect. It is on this premise that I shall be making my presentation on the role of Tribunal Registrars in maritime arbitrations.

It is however recommended that a good understanding of the maritime industry as well as the arbitration process should be helpful to a tribunal registrar in providing useful assistance to the tribunal in maritime arbitrations.

The Tribunal Registrar in Arbitration Proceedings

One of the major differences between litigation and arbitration is that while litigation is a dispute resolution mechanism provided by the state; arbitration, like other alternative dispute resolution (ADR) processes is a private dispute resolution mechanism. The effect of this is that, in litigation, the state provides the venue, the process and the judge; while arbitrating parties have to make these arrangements either directly by appointing an institution to administer the process or indirectly through the chosen arbitrator where it is an ad hoc arbitration.

Other than in documents-only arbitrations, arrangements have to be made for the venue and all the administrative preparations needed for the smooth running of the arbitration, such as recording and transcription of the proceedings, collection of fees and expenses, transmitting documents and communication between the parties and the tribunal, etc. It falls on the sole or presiding arbitrator to make these arrangements.

Other than in small and simple arbitrations, it is the usual practice for the arbitral tribunal to appoint a tribunal registrar to take charge of all the administrative arrangements and to act as a link between the tribunal and the parties. While it is not mandatory to appoint a tribunal registrar except if mandated to do so by the applicable rules or the institution administering the arbitration, it is usually expedient to appoint one in large or complex arbitrations involving a full hearing.

The appointment and remuneration of the tribunal registrar are usually determined by the tribunal with the consent of the parties. The registrar's fees generally form part of the

administrative expenses of the reference, particularly in ad hoc arbitrations. Most institutions have fixed fees based on hourly or daily rates for the services of a registrar, e.g. Chartered Institute of Arbitrators, LCIA. In some other institutions such as the ICC and SIAC, the administrative expenses are determined on the basis of the claim.

The Role of the Tribunal Registrar

Some arbitration institutions provide some guidance on the appointment and use of tribunal registrars either in their rules or guidelines and notes while others simply acknowledge their use but provide no guidance. The International Chamber of Commerce (ICC)'s Note on the Appointment, Duties and Remuneration of Administrative Secretaries, the United Nations Commission on International Trade Law (UNCITRAL)'s Notes on Organising Arbitral Proceedings, Hong Kong International Arbitration Centre (HKIAC) published Guidelines on the use of a Secretary to the Arbitral Tribunal, Singapore International Arbitration Centre (SIAC) Practice Note on the Appointment of Administrative Secretaries, are some examples.

From the guidelines and notes of the foregoing arbitration institutions, the functions of a tribunal registrar clearly include administrative tasks such as transmitting documents and communications between the tribunal and the parties, coordinating logistics for hearings and meetings, etc.

Some arbitration institutions extend the functions of the tribunal registrar to include conducting legal research for the tribunal, collecting case law or published commentaries on legal issues defined by the tribunal, attending the tribunal's deliberations, preparing drafts of non-substantive parts of the tribunal's orders, decisions and awards. An example is the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes which permits an arbitrator to "obtain help from an Associate, a research assistant or other persons, in connection with reaching his or her decision"^{iv}. The London Court of International Arbitration (LCIA) though silent in its rules has published on its website "LCIA's position on the appointment of Secretaries to Tribunal."^v It states that the secretary's duties should not constitute a delegation of the tribunal's authority but should involve organizing papers for the tribunal, highlighting relevant legal authorities, maintaining factual chronologies, etc.

Some guidelines such as that of the ICC^{vi} go further to provide a clear boundary on the duties of tribunal registrars and expressly list examples of what "organizational and administrative tasks" may include, as to expressly prohibiting them from engaging in deliberations and decision making. Also, HKIAC^{vii} expressly prohibits the tribunal registrars from drafting any substantive parts of the tribunal's orders, decisions and awards and prohibits the tribunal from delegating any decision making functions to a tribunal registrar. The International Centre for Settlement of Investment Disputes (ICSID) prohibits Secretaries attending deliberations unless the tribunal consents. It strictly limits the role of the tribunal registrar by providing that "under no circumstances may the Arbitral Tribunal delegate decision-making functions to an administrative secretary. Nor should the Arbitral Tribunal rely on the Administrative secretary to perform any essential duties of an arbitrator....."^{viii}

It is clear that while many of the institutional rules, guidelines and notes provide for the appointment of tribunal registrars the extent of their services vary from one to another. It is my view that the recent guidelines and notes by international arbitration institutions are not unconnected with the on-going debates over the scope of the role of tribunal registrars in the arbitration process.

Limits on the functions of a Tribunal Registrar

Whilst there seems to be a consensus on the need for tribunal registrars, particularly in complex and large arbitrations, there is however an obvious absence of consensus over their functions. It is therefore important for the sole or presiding arbitrator and the tribunal registrar to have a clear understanding of the limits of the functions and responsibilities of the tribunal registrar.

It is the view of the proponents in favour of broad responsibilities of tribunal secretaries that they “increase the efficiency of the tribunal proceedings, allow the arbitrators to focus on deliberating on the merits, and enable tribunals to render awards faster.”^{ix} On the other hand, proponents in favour of a limited role for tribunal secretaries argue that “the selection of arbitrators is institution personae (in view of the person) and therefore there should be no delegation.”^x

The relevance of a clear understanding and agreement of the specific functions of a tribunal registrar is underscored by the recent case of **The Russian Federation v. Yukos Oil Company**.^{xi} In July, 2014 three awards (the Yukos Awards) were rendered under the aegis of the Permanent Court of Arbitration (PCA) in the arbitration brought against the Russian Federation by former Shareholders of Yukos Oil Company. The Arbitral Tribunal found the Russian Federation liable for breach of its international obligations under the Energy Charter Treaty (ECT) and ordered it to pay over \$50 billion in damages.

The Russian Federation sought an annulment of the Yukos Awards in the District Court in The Hague. Of particular interest is one of the three applications for annulment premised on the role played by the Tribunal’s Secretary. One of the grounds in support of the application for annulment was that the three member arbitral tribunal “did not personally fulfill their mandate”. The premise for this allegation was that the assistant to the arbitrators, who the tribunal had previously stated would be responsible only for the administrative tasks, billed the parties 40% to 70% more hours than any of the arbitrators. This led the claimant to infer that the arbitrators may have delegated to the assistant certain of their personal responsibilities, including analysing the evidence and applicable law, participating in deliberations, and preparing the arbitral awards. The issue now becomes whether the assistant breached the terms of his engagement in carrying out these services if indeed he did so?

In the earlier case of **Sonatrach v. Statoil**^{xii}, an ICC award for \$536 million against Sonatrach was unsuccessfully challenged on the grounds that the ICC tribunal had improperly delegated authority to its administrative secretary and impermissibly allowed the secretary to participate in the deliberations.

In the light of the foregoing cases, there is no doubt about the risk presented by an absence of a uniform standard for the role of tribunal registrars, more so where there are no guidelines or the rules applicable to the arbitration do not make any provision for same.

Recommended Role of a Tribunal Registrar

Taking into consideration the restrictions placed on the functions of a tribunal registrar by some of the arbitration institutions and in the light of the risk of challenges to awards on the basis of a possible substantive involvement in the arbitral process by the tribunal registrar, I am of the view that it is sensible for a tribunal to specify the scope of the tribunal registrar's functions and inform the parties of same. Furthermore, to avert any possibility of challenge to an award on the basis of the tribunal registrar's involvement, it is recommended that the role of the tribunal registrar should be limited to the following listed administrative tasks:

- Channel of communication: The tribunal registrar plays a key role in ensuring:-
 - that the orders of the tribunal are properly communicated to the parties;
 - that all oral and written communication between parties are effectively and efficiently transmitted;
 - that all processes arising from the reference are circulated timeously.
- Ensure safe custody of the documents generated in the course of the arbitration:
The tribunal registrar is responsible:
 - for maintaining a record of filings and correspondences; and,
 - for the safe custody of all the documents in the reference.
- Financial Administration: The tribunal registrar, where required to do so:-
 - holds the parties' deposits towards administrative expenses;
 - makes disbursements with the approval of the Tribunal; and,
 - renders periodic accounts and a final account at the end of the reference.
- Logistical support for meetings and hearings: It is the responsibility of the tribunal registrar to:-
 - make all arrangements as to transportation, travel arrangements, hotel reservations, etc;
 - ensure the availability and preparedness of meeting venues and hearing rooms, e.g. availability of a Bible and a Quran for swearing the witnesses; and
 - ensure all support services are available e.g. catering, recording facilities, transcription services, etc.
- General Secretarial Support: The tribunal registrar should:-
 - prepare the Agenda for proceedings (which must be approved by the Arbitrator);
 - always have an Attendance Sheet to be filled by the parties and their representatives;
 - maintain good records of proceedings (minutes or transcriptions);
 - review transcribed records to ensure accuracy; and,

- carry out any tasks requested by the Tribunal or the parties as it relates to the reference.
- Confidentiality of the information:
 - Considering the private nature of arbitration, it is essential for the tribunal registrar to take all reasonable measures in ensuring the confidentiality of the information made available during the reference.

In addition to the foregoing, where a tribunal requires more from its registrar, I commend the guide ‘Best Practices for the Appointment and Use of Arbitral Secretaries’ by the Young International Council for Commercial Arbitration (ICCA) issued after two extensive surveys of users and practitioners of arbitration conducted in 2012 and 2013. The Guide extends the functions to include researching questions of law and discrete questions relating to factual evidence and witness testimony, drafting procedural orders and similar documents, reviewing submissions and evidence, attending the tribunal’s deliberations and drafting appropriate parts of the award.

Conclusion

In the absence of a universal standard for the role of the tribunal registrar, the uncertainty regarding the proper role of the registrar will likely persist. Whether the tribunal registrar has exceeded his or her role as an assistant to the tribunal may continually be a ground for an attempt to set aside an award by a losing party. Considering the enormity of this risk for a tribunal and invariably the successful party in an arbitration, it will augur well to have the tribunal expressly agree with the tribunal registrar the functions to be provided and obtain the consent of the parties.

Thank you.

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ⁱⁱ The Effective Registrar – a Presentation by Obosa Akpata to the Lagos Multi Door Courthouse on 31st March 2010.

ⁱⁱⁱ Article 7 of the Indian Council of Arbitration Maritime Arbitration Rules 2014

^{iv} American Arbitration association code of Ethics for Arbitrators in Commercial Disputes

(<https://www.adr.org/aaa/faces/arbitratorsmediators/aboutarbitratorsmediators/codeofethics>) accessed on 9th November, 2015 .

^v LCIA’s Position on the appointment of Secretaries to Tribunal (http://www.lcia.org/frequently_asked_questions.aspx) – accessed 9th Novemebr, 2015

^{vi} ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries 2012 (<http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Flash-news/Revised-Note-on-the-Appointment,-Duties-and-Remuneration-of-Administrative-Secretaries/>) – accessed 9th Novemebr, 2015.

^{vii} Hong Kong International Arbitration Centre Guidelines on the use of a Secretary to the Arbitral Tribunal 1st June 2014 (www.hkiac.org/en/arbitration/tribunal-secretary-service) – accessed 10th Novemebr, 2015.

^{viii} ICSID Financial and Administrative Regulations, Art 25 (“The [ICSID] Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee.”).

^{ix} The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard by **Michael Polkinghorne and Charles B Rosenberg** (<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=987d1cfc-3bc2-48d3-959e-e18d7935f542>) –accessed 10th Novemebr, 2015.

^x Ibid

^{xi} The Russian Federation v. Yukos Oil Company (https://en.wikipedia.org/wiki/Yukos_shareholders_vs._Russia)

^{xii} Sonatrach v Statoil Natural Gas LLC [2014] EWHC 875 (Comm), (A copy may be downloaded from <http://www.bailii.org/ew/cases/EWHC/Comm/2014/875.html>)