

# The Australian Centre for International Commercial Arbitration's Guideline on the Use of Arbitral Secretaries

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On 1 January 2017, the Australian Centre for International Commercial Arbitration ('ACICA') released a new Guideline on the Use of Tribunal Secretaries. This new Guideline addresses a silence in the existing ACICA Arbitration Rules as to the scope for tribunals to appoint arbitral secretaries, and the basis upon which they might be appointed. This post provides an overview of the Guideline and assesses how it compares to guidelines on arbitral secretaries that have been developed by other arbitration institutions.

### **Overview of the Guideline**

ACICA is an international dispute resolution institution operating in the Asia-Pacific region, and based in Sydney, Australia. ACICA facilitates the mediation and arbitration of international commercial disputes, including under its own institutional arbitration rules. The new Guideline will apply from 1 January 2017 to any arbitral secretary appointments made in arbitrations administered by ACICA. This includes arbitrations administered by ACICA under the ACICA Arbitration Rules, as well as those administered under the UNCITRAL Arbitration Rules. The Guideline is also expressly made available for use in non-ACICA administered proceedings, but only after consultation with ACICA.

The Guideline is designed to "encourage transparency with respect to the appointment, duties and remuneration of tribunal secretaries". To this end, the Guideline covers a range of topics relevant to the use of arbitral secretaries, including their appointment and removal, their duties, and remuneration for their costs and expenses. Consistent with the goal of increasing transparency, the Guideline stipulates particular expectations as to the matters subject to consultation between the tribunal and disputing parties and further identifies a number of matters subject to disputing party agreement. This includes, for example, a requirement that the parties consent to any appointment or modification to the terms of appointment of arbitral secretaries.

### **The Guideline in Context**

With the release of this Guideline, ACICA joins a number of other institutions seeking to better regulate the use of arbitral secretaries in international commercial arbitration. Institutional guidance on this matter has been released, *inter alia*, by the Stockholm Chamber of Commerce (2017), UNCITRAL (2016), the Hong Kong International Arbitration Centre (2014), and the International

Chamber of Commerce (2012). These institutional guidelines respond to broader concerns about the processes by which secretaries are appointed and the duties performed by them in arbitration proceedings. In 2015, for example, 68% of the 763 respondents to the International Arbitration Survey considered that the use of tribunal secretaries was an area which required regulation. Concerns related to the existing state of regulation have been canvassed previously on this blog, including in 2013 and 2016.

The ACICA Guideline thus matches broader institutional attempts to regulate the use of arbitral secretaries. In fact, the structure and content of the ACICA Guideline closely follows, though modifies, the Guidelines on the Use of a Secretary to the Arbitral Tribunal released by the Hong Kong International Arbitration Centre ('HKIAC') in 2014. This indicates the propensity for institutions to develop their own approaches on such matters, even where those approaches clearly build upon existing institutional rules and guidelines. This highlights the particular unlikelihood of a uniform standard developing to guide practice in this area in the future. Whilst most arbitral institutions now provide guidance on the appointment and use of arbitral secretaries, important differences in the substance of such regulation remain.

A first key difference amongst the various institutional guidelines is their approach to the requirement for there to be party consent to the appointment of arbitral secretaries. A range of approaches are possible, ranging from there being no requirement that the tribunal even consult with the parties as to the appointment, to a requirement that the parties (or even arbitral institution) agree to such appointment. The ACICA Guideline requires that the tribunal consult with the parties before appointing a secretary, and "only proceed with the appointment of the proposed secretary upon the agreement of the parties". The SCC Arbitrator's Guidelines, and Article 24(1) of the 2017 SCC Arbitration Rules, similarly require that the tribunal notify the SCC Secretariat of its intention to appoint an arbitral secretary and conditions that appointment on the consent of the disputing parties. By contrast, other rules and guidelines require only consultation with the parties for appointment. The HKIAC Guidelines and Article 13.4 of the HKIAC Rules, for example, require merely that the tribunal receive and consider the parties' comments on the proposed appointment before exercising its discretion to appoint a secretary.

A second key difference is how each set of guidelines defines the permissible scope of a secretary's duties. Guidelines differ both as to substance and the amount of guidance they provide on this issue. The ACICA Guideline takes an approach roughly occupying the middle ground of existing approaches. It addresses the permissible duties of arbitral secretaries by limiting such duties to: "(a) provid[ing] administrative assistance; (b) summar[ing] and/or research[ing] factual and legal issues in the record; and (c) prepar[ing] drafts of procedural orders and non-substantive parts of awards". The Guideline appears to contemplate the scope for the duties of the arbitral secretary to be extended on the basis of party agreement to that effect. The ACICA Guideline precludes, however, the secretary from exercising "any decision-making functions". The SCC Arbitrator's Guidelines, by contrast, appear to envisage a more limited role for the arbitral secretary, extending their duties only to the exercise of "organizational, clerical and administrative functions". The ICC Note similarly limits the secretary's functions to "organizational and administrative tasks", but defines those tasks broadly, including to encompass "conducting legal or similar research" and "attending hearings, meetings and deliberations". Unlike these three sets of guidelines, the HKIAC Guidelines attempt to regulate in greater detail the permissible scope of a secretary's duties, providing an itemised 13-point list of the duties that may be performed by the secretary.

A final point of differentiation between the various institutional guidelines is the approach taken in each set to the calculation of the secretary's remuneration. The ACICA Guideline provides for two options, depending upon whether the tribunal is paid by the hour or by reference to the amount in dispute. Where the tribunal is compensated on an hourly basis, the Guideline provides that the

secretary's fees will be billed separately on the basis of an hourly rate. Where, however, the tribunal's compensation is based on the amount in dispute, the Guideline provides for the secretary's compensation to form part of the tribunal's fees, being shared equally amongst the members of the tribunal unless agreed otherwise. The ACICA Guideline closely follows the approach set out in the HKIAC Guidelines to secretary remuneration but reduces the detail there provided in relation to certain matters such as, for example reimbursement of costs incurred by the secretary and travel allowances. Unlike the ACICA Guideline, the HKIAC Guidelines supplement existing regulation of secretary fees in the HKIAC Arbitration Rules. Schedule 2 of those Rules, for example, stipulates a cap on the hourly rate that can be charged by secretaries to HKIAC proceedings. The adoption of only the structure and content of the HKIAC Guidelines, even if subject to modifications, means that the ACICA Guideline does not benefit from a similar context of regulation. The Guideline therefore leaves certain matters, including the permissible rates a secretary may charge, unaddressed. The ACICA Guideline, in opting for the HKIAC approach to costs, departs from other institutional practice which precludes the direct payment by the disputing parties of a secretary's fees. The ICC Note, for instance, provides that the engagement of a secretary "should not pose any additional financial burden on the parties", such that the secretary's fees must come out of the fees of the arbitrators and "not increase the total costs of the arbitration".

### **The Guideline's Contribution to the Better Regulation of Arbitral Secretary Appointments**

Along with the Guideline, ACICA has also launched a Tribunal Secretary Panel. The requirements for applicants to be considered for inclusion on the Panel further the goal of the Guideline to better regulate the appointment of arbitral secretaries to ACICA proceedings. Candidates may be appointed to the Panel for a term of three-years on the basis of an application meeting specified criteria. In particular, the applicant must demonstrate prior experience as a tribunal secretary and completion of a recognised training course. The Guideline and Panel provide a useful resource for disputing parties, arbitrators and secretaries in specific cases. In addition, however, these efforts by ACICA demonstrate serious efforts by the organisation to respond to broader concerns about the processes attaching to the appointment of tribunal secretaries and the functions they perform. The creation of a Panel also indicates a move to professionalise the role of arbitral secretaries. The Panel and Guideline both provide a useful point of information for stakeholders and the broader public. These developments contribute to ongoing discussions as to the proper role of party consent in secretary appointments, the appropriate qualities of arbitral secretaries and the scope of their duties. It will be interesting to see how other institutions weigh in on this debate in the future.