



ICDR® Publishes Guidelines on the use of Arbitral Tribunal Secretaries

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Over the past few years, the use and role of tribunal secretaries in international arbitration has garnered considerable interest. In its 2021 International Arbitration Rules (“Rules”), the International Centre for Dispute Resolution® (“ICDR”), recognizing the growing interest in the use of tribunal secretaries, established Article 17 entitled “Arbitral Tribunal Secretary” that simply provides:

The tribunal may, with the consent of the parties, appoint an arbitral tribunal secretary, who will serve in accordance with the ICDR guidelines.

Following the issuance of the Rules, the Committee¹ charged with the revision of the Rules, with input from arbitrators, counsel, and case managers from multiple jurisdictions, as well as extensive interviews and conversations with persons who have served as tribunal secretaries, began crafting the Guidelines. The Guidelines represent, in the view of the ICDR, best arbitral tribunal secretary practices.

Originally, the Guidelines were to be included in the actual ICDR Rules released in 2021. As the Committee debated various drafts of the Rules, however, it concluded that the scope and detail necessary to articulate accurately the role of an arbitral secretary should be released as separate Guidelines. Guidelines have the advantage of providing greater process, practice and policy detail, as well as allowing broader adoption and use of the Guidelines in cases governed by different rules.

These Guidelines are effective in all cases administered by the ICDR, unless the parties agree otherwise in writing and may be adopted in any other cases at the discretion of the tribunal and upon the agreement of the parties.

The overarching goal of the use of an arbitral tribunal secretary is to increase efficiency and reduce the aggregate costs of the arbitration. Consequently, the Guidelines recognize that the appointment of tribunal secretaries should be limited to suitable cases, particularly complex proceedings, where the use of a tribunal secretary would improve the arbitration process and lower costs.

Based upon frequent observations, feedback and public commentary, the ICDR sought to enhance transparency in three key areas: (1) the decision-making control of the parties; (2) the role and duties of the tribunal secretary; and (3) financial considerations.

¹ The committee members contributing to these guidelines were: Ann Ryan Robertson, Chair (USA); Alan Crain (USA); John Townsend (USA); Beata Gessel (Poland); Reza Mohtashami (UK); Christine Kang (China) and Lucia Ojeda Cardenas (Mexico). Eric Tuchmann GC and ICDR SVP, Steve Andersen ICDR VP, Michael Lee, ICDR VP, Luis Martinez ICDR VP, Miroslava Schierholz, ICDR AVP, Thomas Ventrone ICDR VP, Yanett Quiroz, ICDR Director and many others on the ICDR team.



Parties Retain Decision-Making Control

It is a common refrain that parties feel compelled to accept the appointment of a tribunal secretary when suggested by the presiding arbitrator in the first procedural hearing of the case. The Guidelines establish that the parties have decision-making control as to whether or not a tribunal secretary is appointed. The Guidelines provide that if the tribunal wishes to use a tribunal secretary, they must send a written request to the parties through the case manager. The written request is to include the *curriculum vitae*, role and compensation rate for the secretary. Because the case manager, and not the tribunal, relays the request to the parties, the parties can candidly share and consult with the case manager regarding the suitability of a tribunal secretary for their case. At all times, the final decision as to whether a tribunal secretary will be employed rests with the parties and all parties must agree that use of a tribunal secretary is appropriate. A tribunal secretary will not be appointed if there is any objection from any party to the appointment of a tribunal secretary.

Equally importantly, the tribunal secretary is bound by the same standards of ethical conduct as the arbitral tribunal, including disclosure, communication, and confidentiality obligations. The parties are provided an opportunity to review and comment on the disclosures and to object to the appointment or continued service of a tribunal secretary as a result of a tribunal secretary's disclosure or potential conflict of interest. If objection is made based on a disclosure, the Administrator determines whether the proposed candidate may serve.

To shield the identity of a party objecting to or otherwise commenting on any aspect of the use of a tribunal secretary, all communications regarding the potential appointment or continued service of a tribunal secretary are to be made solely to the case manager.

The Tribunal Secretary's Role

The second, and most important area of clarification, is defining the secretary's role, duties, and responsibilities and ensuring that the tribunal secretary does not have decision-making authority. The Guidelines specifically provide that the exercise of decision-making authority, in all cases, is reserved for the arbitrators and may not be delegated to a tribunal secretary.

The parameters of the tribunal secretary's role are:

- The tribunal secretary has no decision-making authority.
- The tribunal secretary's role does not duplicate or replace the responsibilities of the Administrator.
- The tribunal secretary may assist the arbitral tribunal with such tasks as scheduling and coordinating hearings, research, preparing and disseminating correspondence, and preparing documents for the arbitral tribunal's review and approval, including drafting factual or procedural histories, summaries of parties' positions and procedural orders.
- The tribunal secretary works under the supervision of, and may be dismissed by, the arbitral tribunal.



Finances

The last clarification involves financial concerns: (1) that the use of tribunal secretaries encourage proportionality to the overall cost of the case and (2) that the billing be transparent.

To that end, the tribunal secretary is to submit clear detailed invoices showing the specific amount of time and the nature of the work performed. All billing and invoicing guidelines applicable to arbitrators also apply to any tribunal secretary.

Fundamentally, the use of a tribunal secretary should increase the efficiency and economy of the case with tasks being performed by the tribunal secretary at a lower cost than tasks being performed by the tribunal. This principle should not be lost in practice. For this reason, the Guidelines expressly state that the arbitral tribunal and tribunal secretary shall work together to maintain a commitment to these principles. To demonstrate the savings to the parties is the requirement of specificity in tribunal secretary's billing. This specificity not only will differentiate time between the arbitrator and the secretary, but also will highlight cost-saving activities and remove task redundancy. Unless otherwise agreed to by the parties, the parties share the compensation and expenses of the tribunal secretary on the same allocation as that of the arbitrators and may be reallocated by the arbitral tribunal in its award.

The promulgation of these Guidelines coincides with the increased use of tribunal secretaries and the concomitant dialogue regarding the appropriate role of tribunal secretaries. These Guidelines support the use of a tribunal secretary in the appropriate case while delineating the tribunal secretary's role. The ICDR is pleased to release these Guidelines and to again universally endorse and invite all involved to worked towards increased efficiency and economy in each and every arbitration proceeding.



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