

Kluwer Arbitration Blog

Delegation of Tasks to Arbitral Secretaries: Striking the Right Balance?

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A recent, still unpublished, judgment of the French-speaking section of the Brussels Court of First Instance (Belgium) (the “Brussels court” or the “court”) provides an excellent opportunity to take stock of recent developments on the much-debated topic of delegation of tasks to arbitral secretaries. Russia famously put the arbitral secretary in the spotlight in the annulment litigation following the *Yukos* award (see blog posts [here](#) and [here](#)). While a final decision in that case is still pending before the Dutch Supreme Court, state courts in other jurisdictions have in the meantime also had the opportunity to reflect on the role of arbitral secretaries. In its judgment of 17 June 2021, the Brussels court provides clear guidance on the issue.

Allegations of Improper Delegation to the Arbitral Secretary

The court was asked to rule on a petition for annulment of an interim award in an ongoing ICC arbitration. The request was based (*inter alia*) on allegations of improper delegation by the arbitrators. The tribunal, composed of three arbitrators, had appointed an arbitral secretary in accordance with the procedure prescribed by the ICC’s *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration* in the 2019 version (the “ICC’s Note” or the “Note”), available [here](#). The parties had expressly consented to the appointment of the arbitral secretary, an associate at the chairman’s law firm.

After the award was rendered, the defendants raised questions about the role of the arbitral secretary with regard to a particular issue that was decided in favor of the claimant. The defendants queried whether the secretary had authored the chair’s list of questions for the expert witnesses, and which role she had played in drafting the arbitral award. The chairman of the tribunal affirmed that the secretary had prepared his questions. He also acknowledged that she had been present during the deliberations of the tribunal and had assisted in drafting the award, though that he had reviewed every sentence and footnote, and that he had corrected the draft where he thought appropriate based on his judgment and the deliberations with the co-arbitrators.

The defendants concluded that it was in fact the secretary who had decided the issue in question, in violation of the guidelines in the *ICC’s Note*. To further substantiate their allegation, the defendants asked the arbitral tribunal to produce a detailed break-down of the hours spent by the secretary on the list of questions and on the different sections of the award, as well as a copy of the

list of questions and award sections drafted by the secretary. The tribunal dismissed the request.

Shortly thereafter, the defendants filed a petition for annulment of the award before the Brussels court. They argued that the involvement of the secretary surpassed her legal powers, resulting in irregularities in respect of both the composition of the tribunal and the conduct of the arbitral proceedings. Under Belgian law, pursuant to [Article 1717, §3, a\), v\) of the Judicial Code](#), such irregularities can lead to annulment of an arbitral award.

How Far Can an Arbitral Tribunal Go in Delegating Tasks to the Secretary?

To address the issues raised, the court predominantly focused on the *ICC's Note*. It first reiterated that a variety of tasks can be assigned to a secretary, including legal research, drafting factual portions of the award, and taking notes of the deliberation (para. 185 of the Note). In the view of the court, this means that a secretary's work is not limited to purely administrative tasks. It also encompasses intellectual contributions, which could potentially impact the decision-making process of the tribunal. However, the court continued, there must be safeguards in place to prevent undue influence by the secretary. As an example of such safeguards, it referred to para. 184 of the *ICC's Note*, which prohibits the tribunal from delegating any of its decision-making functions.

The court went on to analyze para. 187 of the *ICC's Note*, which states that “*a request by an arbitral tribunal to an administrative secretary to prepare written notes or memoranda shall in no circumstances release the arbitral tribunal from its duty personally to review the file and/or to draft any decision of the arbitral tribunal*”. In the court's opinion, para. 187 implicitly authorizes a tribunal to rely on its secretary to draft parts of an arbitral award or even the entire award, as long as the tribunal reviews and corrects the draft according to its own views. If the ICC would have wanted to exclude this possibility, the court ruled, it would not have used the words “and/or” in para. 187.

The court then proceeded to apply these principles to the facts of the case. It noted that the parties had consented to the appointment of the arbitral secretary after review of her *curriculum vitae*. They had also accepted the applicability of the *ICC's Note*. In addition, the secretary had followed specific trainings for arbitral secretaries organized by the ICC, including sessions on “drafting enforceable awards”. She was also of relatively young age, which reduces the risk of undue influence on the tribunal when compared to a more experienced secretary.

First, the court held that asking the secretary to draft a list of questions does not amount to delegation of decision-making in and of itself. In its view, there were no factual elements indicating the contrary, despite an allegation that the president did not seem to know the questions at the hearing. That allegation did not find support in the transcripts and was also contradicted by one of the co-arbitrators as well as the chairman, who confirmed that he had reviewed the questions.

Second, the court did not consider the secretary's assistance in drafting the award to constitute improper delegation by the tribunal. The chairman as well as the co-arbitrators confirmed that the award was the result of their joint intellectual efforts and that each arbitrator contributed to the award, which they had thoroughly discussed. The secretary had attended the deliberations with the consent of the tribunal but had not taken part in the substantive discussions between the arbitrators. Any drafts provided by the secretary had been reviewed and corrected by the chairman. Given

these circumstances, the Brussels court dismissed the allegation of improper delegation by the tribunal.

Conclusion: Striking the Right Balance

The judgment of the Brussels Court of First Instance clearly illustrates the need to strike the right balance when it comes to the role of arbitral secretaries. It is in the first place up to the tribunal itself to guard the appropriate balance and to carry out its decision-making tasks with integrity. Nonetheless, the question remains which role the secretary can play. The Brussels court clearly sides with those who consider the arbitral secretary to be more than just an administrative aid. It accepts the possibility of intellectual contributions by the secretary and is even open to the idea of an award that is fully drafted by the secretary, provided that proper checks and balances are in place to ensure that ultimately the arbitral tribunal makes the decisions.

The opinion of Advocate General Vlas in the *Yukos* case (see blogpost [here](#)) goes in the same direction and adopts a similar, pragmatic view when it comes to the role of the arbitral secretary. It remains of course to be seen whether the Dutch Supreme Court will follow suit. In our opinion, (careful) delegation and decision-making can go hand in hand. As Constantine Partasides has pointed out on different occasions, balancing delegation and decision-making is not at all unique to arbitration. Indeed, similar considerations apply for example to Law Clerks assisting the US Supreme Court or Referendaires at the European Court of Justice, without leading to much controversy regarding the decision-making process.

Finally, this case also illustrates the difficulty of balancing transparency to the parties on the one hand with the secrecy of deliberations on the other hand. This is perhaps even the trickiest topic, as parties alleging improper delegation would certainly benefit from further transparency by the tribunal and/or the secretary, which at the same time may endanger the secrecy of deliberations. The Brussels Court of First Instance clearly gave a lot of weight to the statements of the chairman and the co-arbitrators in response to the allegations raised, with very limited other evidence being available. Parties alleging improper delegation therefore seem to face an additional, evidentiary, hurdle.

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