

Kluwer Arbitration Blog

Belgian Supreme Court Rules on Delegation of Tasks to Arbitral Secretaries

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In a **decision of 24 April 2023**, the Belgian supreme civil court (“*cour de cassation*”) dismissed the petition against a judgment of the Brussels court of first instance (“*tribunal de première instance*”; hereafter the “lower court”) that addressed the question to what extent arbitrators can delegate tasks to arbitral secretaries. The supreme court decision analyzed in this post is an interesting ruling that has the potential to further shape the landscape of arbitration in Belgium, yet should be read in light of the specific grounds raised in the petition for appeal. In this post, we first outline the context of the ruling, followed by an analysis of the two legal questions at stake, as well as our main takeaways from the decision. To conclude, we briefly reflect on selected institutional guidance on delegation of tasks by arbitrators.

Factual Background and Procedural Context

On 17 June 2021, the lower court had dismissed a request for annulment of an interim award in an ongoing ICC arbitration on the grounds of (*inter alia*) allegations of improper delegation of certain tasks by the arbitrators to an arbitral secretary. To our knowledge, this was the first Belgian judgment on the topic (see our earlier blogpost about the judgment of the lower court [here](#)). Under Belgian law, this judgment was not open to a full review by an appellate court. A lower court decision in respect of a request for annulment of an arbitral award is only susceptible of a petition before the supreme court, whose powers are limited to a review on legal grounds. The facts and merits of the case are no longer up for debate. The plaintiffs before the supreme court raised two main legal arguments, which we discuss in turn.

Does the Legal Prohibition for Judges to Delegate Their Decision-Making Power Also Apply to Arbitrators?

The first legal argument to be answered by the supreme court was as follows: does the prohibition for a judge to delegate his decision-making power (as enshrined in Article 11 of the **Belgian Judicial Code**), which is a rule of public policy (“*ordre public*”), also apply to arbitral tribunals? If so, is the assistance by the arbitral secretary in this specific case, *i.e.*, drafting portions of the award and a list of questions, to be considered as an improper delegation of such power?

The supreme court, which usually renders very short decisions (comparable to the French *cour de cassation*), did not have to answer the second -and arguably most interesting- part of this question because it found that the “*the provisions of the Belgian Judicial Code (with the exception of the specific provisions dealing with arbitration in Part Six thereof), including the prohibition on judges to delegate their decision-making power, do not apply to arbitration proceedings*”. As the prohibition does not apply, the fact that it is of public policy is also irrelevant.

With this ruling, the supreme court reaffirms the procedural autonomy of arbitration under Belgian law. The common rules of civil procedure in the Belgian Judicial Code as such are clearly not designed or intended to apply to arbitration proceedings. The Code contains a specific subset of rules in relation to arbitration (**Part Six**), as reminded by the supreme court. These rules are based on the UNCITRAL Model Law and were first introduced in 2013. They are wholly silent on delegation of tasks to an arbitral secretary. This ruling reaffirms that there is no legal provision in Belgian law that would prevent an arbitral tribunal from delegating certain tasks to an arbitral secretary.

Was the Lower Court’s Interpretation of the ICC Note Flawed?

The second question was whether the lower court had allowed a procedural deficiency in the ICC arbitration to remain unsanctioned, and more specifically, whether it had gone too far in its interpretation of the **2019 version of the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration**, as applicable to the arbitration (the “ICC Note”).

In this case, the parties had agreed to appoint an arbitral secretary and to apply the ICC Note. The annulment proceedings dealt with the question of whether the procedural rules as agreed between the parties, including the ICC Note, had been respected in relation to the delegation of certain tasks by the tribunal. The lower court had ruled that the ICC Note 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 lower court had said, it would not have used the words “*and/or*” in paragraph 187 of the 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”.

Precisely this decision was at the heart of the discussion before the supreme court. In essence, the plaintiffs’ argument was that the lower court had given a meaning to paragraph 187 that was irreconcilable with the wording of the ICC Note. To support this, they also referred to other provisions of the note, such as paragraph 185, which states that an arbitral secretary may draft “*factual portions of the award*”. In the plaintiffs’ view, it is therefore clear that the ICC Note as a whole does not allow for delegation of more substantial portions of the award, even if the tribunal were to review and correct those portions.

The supreme court disagreed. It strictly adhered to testing whether the lower court had given an

interpretation to the ICC Note that was irreconcilable with the wording of the note. This legal test is known in Belgium as verifying whether the interpretation “violates the probative force of the document” (“*violation de la foi due à l’acte*”). In applying this test, the supreme court did recognize that the ICC Note implies a duty for the tribunal not to delegate its decision-making powers, but it considered that the interpretation by the lower court of the ICC Note – allowing arbitral secretaries to prepare substantial portions of an award as long as the ultimate decision-making authority rests with the arbitral tribunal – could be upheld. Similar to the first legal question, the supreme court did not give any further reasons for its decision.

Analysis of the Ruling

The importance of this ruling should be somewhat nuanced in view of the fact that the supreme court’s review is limited to the legal grounds put before it. Nevertheless, had the supreme court considered the prohibition to delegate decision-making power as absolutely fundamental, then it would have likely set the procedural autonomy of arbitration aside to apply this principle. Even though the supreme court did not in so many words endorse the content of the ICC Note, the judgment certainly is a step in that direction.

Belgium therefore seems to have joined a growing number of jurisdictions that accept the delegation of certain tasks to arbitral secretaries. That is of course as long as the applicable procedural rules or guidelines allow some leeway in that respect. It is still up to the parties to decide on the procedural framework. This ruling further places this topic on the forefront and may nudge the parties and arbitrators to carefully consider the issue of delegation.

One topic that remains unaddressed in the judgement is the evidentiary hurdle faced by parties alleging improper delegation of tasks to arbitral secretaries. It was not part of the legal review to be carried out by the supreme court, and remains perhaps the toughest nut to crack. As the international consensus on the use of arbitral secretaries has grown over the past years, arbitral institutions may be further incentivized to think about potential internal processes or optimizations to strike a balance between transparency towards the parties on delegation of tasks on the one hand, and the secrecy of deliberations on the other hand. For now, tribunals often seem to have the final word.

Importance of Institutional Guidance

This case clearly illustrates the importance of institutional guidance on delegation of tasks by arbitrators. The ICC Note **was updated in 2021**, but the provisions on arbitral secretaries remain substantially the same when compared to the 2019 version that was at stake in this case. One exception is paragraph 224 of the new version, which now provides that factual portions of the award may be drafted by secretaries “*provided that [they] are subsequently reviewed by the arbitral tribunal itself*”. This still leaves room for ambiguity, as it does not directly address the question of whether assistance in drafting other, more substantial portions of the award would be prohibited.

Other institutions take a different approach. The **CEPANI guidelines**, for example, oblige the tribunal to draw up a specific and detailed description of the secretary’s role. However, paragraph

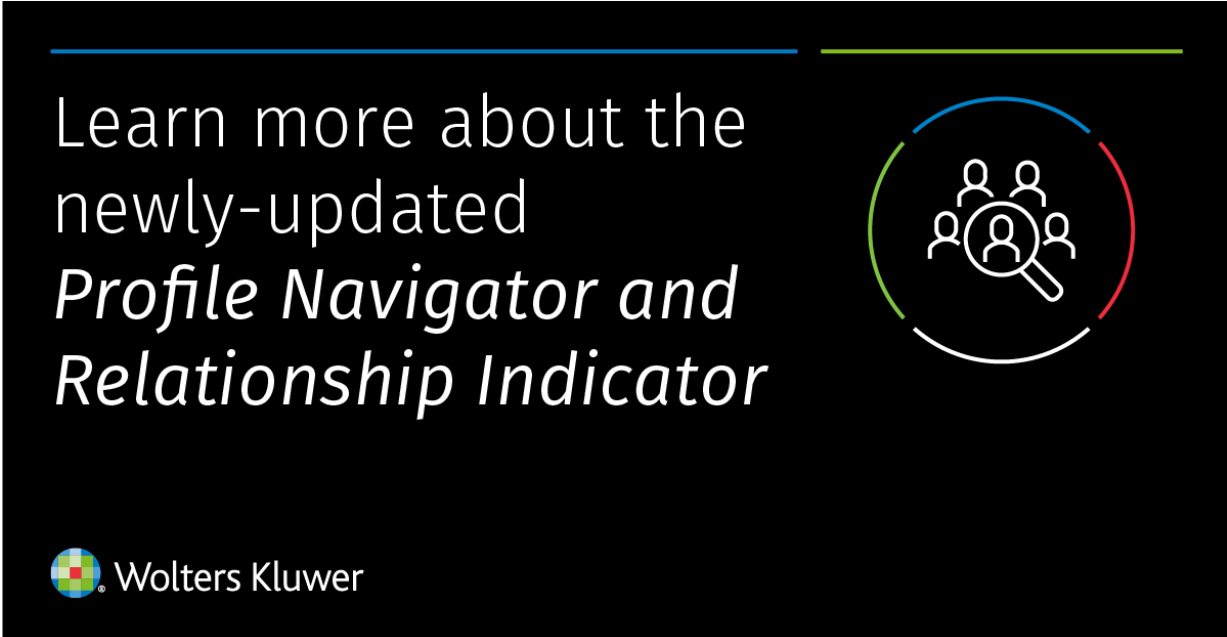
2.5 dictates that “*the secretary to the arbitral tribunal is not an arbitrator. As such, he/she may not be involved in the deliberations of the arbitral tribunal or be entrusted with drafting the arbitral award*”. While this plainly excludes any secretarial assistance in drafting the award, it does leave room for the secretary to attend the deliberations. This is also accepted in Belgian practice, as long as he or she does not actively intervene with the discussions.

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