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Green Light for Secretaries to Assist in Drafting Arbitral Awards so Long as Tribunals Call the Shots: Nothing New Under the Belgian Sun

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In its decision of 24 April 2023, the Belgian Supreme Court upheld the Brussels Court's judgment of 17 June 2021 (discussed here), thereby confirming that arbitral secretaries can assist in drafting arbitral awards, provided that the arbitral tribunal is still calling the shots.

This post explains how this recent decision (discussed here) reflects the doctrine's approach towards secretaries' competences, and is aligned with similar court decisions from other jurisdictions. It nonetheless highlights that parties will need to meet a high burden of proof to show that an arbitrator's judicial duties have been delegated.

Underlying Context

In an ICC arbitration, the parties had consented to the appointment of the secretary, who undertook, together with the tribunal, to comply with the ICC Note. The unsuccessful party submitted a setting-aside request to the Brussels Court on the ground that the secretary had been involved in drafting the award and preparing the list of questions addressed to the expert witnesses during the hearing. This, in the unsuccessful party's view, meant that the secretary had been given too much decisional power in the arbitration.

In the Brussels Court's opinion, paragraph 187 of the ICC Note implicitly authorised the secretary to prepare a draft award (in its entirety or partially), as long as the arbitrators reviewed, corrected and edited it in accordance with their personal views on the matter. The Brussels Court highlighted that the crux of the matter is that the arbitrators retain their decisional power. Some see drafting as the ultimate safeguard of the intellectual act, while others believe that the same degree of control can be achieved without drafting the first version of the award. According to the Brussels Court:

> "*it is ultimately a question of the integrity and professional conscience of the arbitrators themselves, whom the parties have chosen precisely for their qualities*".

The Brussels Court relied on (i) both parties' consent to the appointment of the secretary, and (ii)

the arbitrators' statements. The chair of the tribunal mentioned that every single sentence and footnote in the award had been reviewed, checked, and corrected where necessary in order to reflect his point of view and the tribunal's deliberations. The arbitrators added that the secretary did not intervene during the deliberations. The Brussels Court, however, could not consider the hours spent by the arbitrators and the secretary on the case since the ICC refused to provide this confidential information.

The Belgian Supreme Court's Confirmation of Secretaries' Power to Draft the Award

As analysed here, the Belgian Supreme Court found that the Brussels Court's interpretation of the ICC Note was not "*irreconcilable with its terms, and therefore does not violate the faith owed to the act containing them*", also considering that the ICC itself organised training for secretaries on drafting awards. However, the Supreme Court did not refer to the Brussels Court's reliance on the statement of the arbitral tribunal.

A Decision in Line with Young ICCA and Jensen's Recommendations

The Belgian Supreme Court's decision is in line with recommendations on this issue. The Young ICCA Guide on Arbitral Secretaries ("ICCA Guide") also includes the drafting of parts of awards among the tasks of tribunal secretaries. According to the ICCA Guide, secretaries' involvement in preparing drafts of an award is justified by the fact that it "*can be a time-consuming process for a sought-after arbitrator with a demanding schedule of commitments*". This is especially so when it comes to summarising the procedural and factual background and the parties' positions. However, the drafting of the legal reasoning, the final analysis, and the operative sections of the award remains more controversial according to the ICCA.

Furthermore, J. Ole Jensen's proposed Traffic Light Scale of Permissible Tribunal Secretary Tasks distinguishes among three categories of tasks (green, orange and red) to determine when and to what extent the parties' consent is required. According to Jensen, the tribunal is not required to disclose the assistance of a secretary in drafting non-substantive parts of the award (the front page, the preliminary matters, etc.), which are categorised as green in his scale. Jensen categorises the drafting of the reasoning of the tribunal's procedural and substantive decision as orange, which implies that such a task can be delegated to a formally-appointed secretary without the parties' specific consent, as long as the tribunal carefully scrutinises and instructs the secretary. When performed without the arbitrator's prior instruction, supervision and verification, the drafting of substantive parts of the award is categorised as red, meaning that it can only be delegated with the parties' clear consent.

In line with the ICCA Guide, Jensen admits that this remains subject to debate and "*some might say that such tasks are an absolute taboo, which tribunal secretaries may not carry out under any circumstances.*"

The Supreme Court's reasoning is therefore in line with Jensen's suggested scale. Specific consent from the parties regarding the tasks performed by the secretary was not necessary in light of the tasks performed (i.e. drafting parts of the award under the tribunal's supervision).

A Decision also in Line with the Positions Taken in Other Countries

The Belgian approach seems to align with the few decisions rendered elsewhere on this issue.

In the Netherlands, the Hague District Court ruled in 2004 on an annulment submitted by the claimant in an ICC arbitration (discussed in De Ly, Rules and Case Law on Tribunal Secretaries). The claimant alleged that the arbitrators had not devoted sufficient time to the case, invoking the enormous number of hours the secretary had spent on the case (according to data provided by the ICC). The court denied the application, noting that the high number of hours spent were not surprising in light of the substantial sum in dispute. This decision was followed by the Hague Court of Appeal decision in the *Yukos* case, which gave rise to much debate. The Dutch courts therefore seem to be quite lenient towards the delegation of powers to secretaries.

In Switzerland, the Supreme Court also expressed its views on a secretary's role in a decision of 21 May 2015. The setting-aside proceedings focused on the fact that the sole arbitrator was assisted at the hearing by (i) a counsel, with regard to procedural and legal issues and (ii) a secretary. Although the Supreme Court mostly focused on the support provided by the counsel, it nonetheless showed a certain tolerance towards the delegation of tasks to secretaries. Notably, it ruled that the parties' consent was not necessary for the tribunal to appoint a secretary, and that the secretary could attend deliberations and assist with drafting the award under the control and in accordance with the instructions of the tribunal.

Lastly, in the United Kingdom, the High Court ruled in a decision of 9 February 2017 on an application for the removal of two co-arbitrators from their positions in the LCIA arbitration (pending at the time) for their failure to properly conduct the arbitral proceedings. The action had been initiated after the chair accidentally sent an email to one of the parties intended for the secretary, asking for the secretary's "*reaction to this latest from* [Claimant]". The claimant requested the disclosure of correspondence between the co-arbitrators and the secretary related to the secretary's role and tasks, which was rejected. The High Court dismissed the application and stated that asking for the secretary's views on an issue did not demonstrate that the tribunal's decisional power had been impaired or delegated. It also ruled that the safest way to ensure that the secretary does not become a 'fourth arbitrator' "*is for the secretary not to be tasked with anything which involves expressing a view on the substantive merits of an application or issue*".

Proving Delegation of the Tribunal's Decisional Power: Mission Impossible?

These decisions illustrate the liberal approach taken by the courts in various countries on the issue. In sum, as long as the decisional power of the tribunal is not delegated, the secretary can take on various tasks, e.g. attending deliberations, drafting the award, and even giving an opinion on certain issues. This liberal view is also shared by Jensen and the authors of the ICCA Guide, according to which "*there appears to be a growing consensus that the tasks of an arbitral secretary may appropriately go beyond the purely administrative*".

One cannot help but wonder if this approach is not simply due to the almost impossible mission that the parties would have to undertake to prove that the arbitrator did delegate decisional power to the secretary. If, as the Belgian Courts suggest, the issue of delegation depends on how each

arbitrator envisions his or her mission, it seems that the only person able to determine whether the power has indeed been delegated would be the arbitrator. Probably, the only way for a judge to rule on this issue without making any assumptions would be to rely on a party's specific agreement to the tribunal's delegation of certain tasks to its secretary (if any). As a result, setting aside an award based on the alleged delegation of the tribunal's decisional power to the secretary seems nearly impossible unless the parties and arbitrators have reached such an agreement. The parties should therefore thoroughly consider this issue before agreeing to a secretary's appointment. Arbitral institutions should encourage parties and tribunals to raise this issue at the beginning of the arbitral process.

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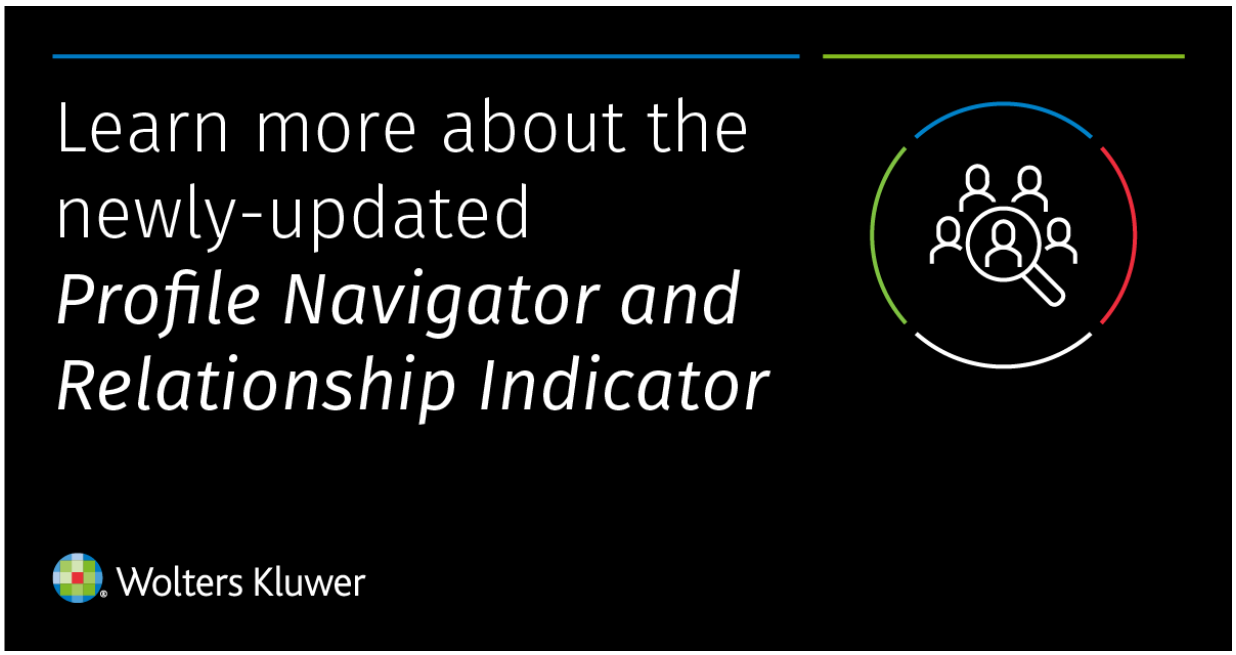

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