ENTRUSTING THE SECRETARY TO THE TRIBUNAL WITH THE PREPARATION OF THE ARBITRAL AWARD: TAKING THE AIM AT THE ARBITRATOR'S OWN ASSESSMENT OF *COÛT D'OPPORTUNITÉ*

Hakem Heyeti Sekreterinin Hakem Kararının Hazırlanmasıyla Görevlendirilmesi: Hedefi Hakemlerin Kendi Fırsat Maliyeti Değerlendirmesine Almak

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Abstract

Given the overwhelming workload, particularly in large international arbitrations, it is not uncommon for a tribunal to appoint an arbitral secretary who works with the arbitrators for the purpose of contributing to the process by carrying out the tasks entrusted by them. Although it is generally accepted that such assistance may be beneficial both for the parties and the tribunal, the lack of consensus is on the permissible scope of secretaries' activities. Amongst many other tasks that raise concerns as to an improper derogation of responsibilities, the crux of the controversy centres on the practice of entrusting the secretary with the drafting of the arbitral award. Following the explanation of three different views on the issue, this paper offers a practical solution for the parties who do not wish to encounter secretary-related problems in the enforcement of their awards and assessments for the arbitrators of some situations that might occur in practice.

Keywords Arbitration, Arbitral Award, Arbitral Secretary, Delegation, Draft, Intuitu Personae, Mandate, Secretary to the Tribunal.

Özet

Özellikle büyük uluslararası tahkimlerde söz konusu olabilen çok yoğun iş yükü nedeniyle, hakem heyetlerinin kendisine verilecek görevleri yerine getirerek tahkim yargılaması sürecine katkıda bulunmak amacıyla çalışacak bir hakem heyeti sekreteri ataması nadir rastlanılan bir durum değildir. Bu tür yardımların hem uyuşmazlığın tarafları hem de hakem heyeti açısından yararlı olabileceği genel olarak kabul edilmekle birlikte, bu konudaki tartışmalı mesele hakem heyeti sekreterlerinin faaliyetlerinin uygun kapsamına ilişkindir. Hakemlerin sorumluluklarının uygun olmayan bir şekilde derogasyonuna ilişkin endişe uyandıran diğer birçok görev arasında, ihtilafın özü, hakem kararlarının hazırlanmasını sekreterlere emanet etme uygulamasında toplanmaktadır. Konuyla ilgili üç farklı görüşün açıklanmasının ardından bu makale hakem kararlarının uygulanmasında hakem sekreterlerinin faaliyetleri ile ilgili sorunlar yaşamak istemeyen taraflar için pratik bir çözüm ve uygulamada karşılaşılabilecek bazı durumlar için hakemlere değerlendirmeler sunmaktadır.

Anahtar Kelimeler Tahkim, Hakem Kararı, Hakem Sekreteri, Delege Etme, Hazırlama, Arbitration, Intuitu Personae, Görev, Hakem Heyeti Sekreteri.

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INTRODUCTION

Arbitration is a dispute resolution process where parties agree to settle the disputes that have arisen or may arise between them by persons called arbitrators instead of state courts.[1] As a foundational principle that the contemporary arbitration is predicated on, 'party autonomy' reflects the ultimate power of the parties to determine the character, administration and other details of the arbitration.[2] As an outcome of this principle, parties are entitled to designate their arbitrator.[3] Since appointments are made based on the arbitrators' personal qualifications and reputation, parties' choice of an arbitrator is considered to be *intuitu personae*[4]; in other words, it is 'in view of the person' or 'because of the person'.[5] Hence, the arbitrators 'must fulfil their mandate personally, without delegation to a third party'.[6]

However, particularly in large international arbitrations, the tremendous amount of evidence submitted, as well as the voluminous size of the memorials exchanged and the considerable length of multiple witness hearings, may leave the sole or the presiding arbitrator with an ample workload.[7] When sufficient administrative support is not provided by an arbitral institution,[8] the facilities available to the representatives of the parties in handling such extensive documentation are often disproportionate to those at the tribunal's disposal.[9] In view of this overwhelming workload that tribunals comprised of one or three human beings hardly have the means to manage,[10] it becomes old-fashioned to dwell on 'the idea of the lone arbitrator sitting among a mass of files and papers in a stuffy office somewhere churning out flawless legal prose with a fountain pen.'[11]

1 Saim Üstündağ, *Kanun Yolları ve Tahkim* (İstanbul Üniversitesi 1968) 68; Rasih Yeğengil, *Tahkim (L'Arbitrage)* (Cezaevi Matbaası 1974) 94; Ziya Akıncı, *Milletlerarası Tahkim* (Vedat Kitapçılık 2010) 5.

2 Julian D.M. Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 4; Tracey Timlin, 'The Swiss Supreme Court on the Use of Secretaries and Consultants in the Arbitral Process' (2016) 8 Yearbook on Arbitration Mediation 268, 268; See, İbrahim Doğan Takavut, *Milletlerarası Ticari Tahkimde Doğrudan Uygulanan Kurallar* (On İki Levha Yayıncılık 2018) 7–31; As regards the limits of such autonomy see generally, Burak Huysal, 'Milletlerarası ticari tahkimde hakemlerin müdahaleci kuralları uygulama yükümlülüğü' Maltepe Üniversitesi Hukuk Fakültesi Dergisi, 1(1-2) Maltepe Üniversitesi Hukuk Fakültesi Dergisi 129; See also, as regards party autonomy and multiparty arbitration, Pelin Akın, 'Uluslararası Tahkimde Çok Taraflılık' 18(3-4) Gazi Üniversitesi Hukuk Fakültesi Dergisi 299.

3 Pierre Lalive, 'Le choix de l'arbitre' in Mélanges Jacques Robert, *Libertés*, (Montchrestien 1998) 353, 363; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, 'Secretaries to International Arbitral Tribunals' (2006) 17 American Review of International Arbitration 575, 586; Cevdet Yavuz, 'Türk Hukukunda Tahkim Sözleşmesi ve Tabi Olduğu Hükümler' in *Marmara Üniversitesi Hukuk Fakültesi II. Uluslararası Özel Hukuk Sempozyumu "Tahkim"* (Istanbul 2009) 133, 133 <http://dosya.marmara.edu.tr/huk/Sempozyumyayınları/ll.%20Uluslararası%20Özel%20Hukuk%20Sempozyumu/3prof.dr.cevdet_yavuz.pdf> accessed 15 January 2020; Selvi Nazlı Güvenç Uluçlar, 'Tahkim Anlaşmasının Hukuki Niteliği', T.C. İstanbul Ticaret Üniversitesi Dış Ticaret Enstitüsü Tartışma Metinleri WPS NO/ 47/2016/08 <https://www.ticaret.edu.tr/uploads/dosyalar/921/TAHKİM%20SÖZLEŞMESİNİN%20HUKUKİ%20NİTELİĞİ.pdf> accessed 15 January 2020; For the theories concerning the mandate of arbitrators see, Hong-Lin Yu and Masood Ahmed, 'Keeping the Invisible Hand under Control? -Arbitrator's Mandate and Assisting Third Parties' (2016) 19(2) Vindobona Journal of International Commercial Law and Arbitration 213, 216–220.

4 'It is axiomatic say of an arbitrator's mission that it is 'intuitu personae'.' Constantine Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 Arbitration International 147, 147, citing Frédéric Eisemann, 'Déontologie de L'Arbitre Commercial International' (1969) 4 Revue de l'Arbitrage 217, 229; Pierre Lalive, 'Mission et Démission des Arbitres Internationaux' in Marcelo Kohen, Robert Kolb and Djacoba Liva Tehindrazanarivelo (eds) *Perspectives of International Law in the 21st Century / Perspectives du Droit International au 21e Siecle: Liber Amicorum Professor Christian Dominica in Honour of His 80th Birthday* (Bilingual edn, Brill-Nijhoff 2011) 269, 277; Guy Keutgen and Georges-Albert Dal (avec la collaboration de Marc Dal et Gautier Matray), *L'arbitrage en droit belge et international* (3rd edn, Bruylant 2015) para 264; Damien Charlotin, 'Identifying the Voices of Unseen Actors in Investor-State Dispute Settlement' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019) 392, 408; cf. As to possibility that the identity of the arbitrator may not be a subjectively essential element of the arbitration agreement and that the appointment may not be *intuitu personae* see, Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (3rd edn, Oxford University Press 2015) 158–159; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 245ff.

5 Michael Polkinghorne and Charles Rosenberg, 'The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard' (2014) 8 Dispute Resolution International 107, 107–108; Timlin (n 2) 268.

6 Lalive (n 4) 274; Kaufmann-Kohler and Rigozzi (n 4) 235; Francisco Blavi and Gonzalo Vial, 'The Tribunal Secretary in International Arbitrations' (2017) 30 New York International Law Review 1, 4; James U. Menz and Anya George, 'How Much Assistance Is Permissible? A Note on the Swiss Supreme Court's Decision on Arbitral Secretaries and Consultants' (2016) 33 Journal of International Arbitration 311, 313; Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2043.

7 Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 683; Alan Redfern and others, *Law and Practice of International Arbitration* (4th edn, Sweet & Maxwell 1999) 224.

8 See, United Nations Commission on International Trade Law 'Draft Notes on Organizing Arbitral Proceedings: report of the Secretary-General (A/CN.9/423)' in *Yearbook of the United Nations Commission on International Trade Law Vol. XXVII (A/CN.9/SER.AI)* (United Nations 1996) 45, 50.

9 Gaillard and Savage (n 7) 683.

10 Lalive (n 4) 270

11 Zachary Douglas, 'The Secretary to the Arbitral Tribunal' in Bernhard Berger and Michael E. Schneider (eds) *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions (ASA Special Series No. 42)* (Juris 2014) 87, 88–89.

Secretary to the Arbitral Tribunal and the Bitter Controversy

The secretary to the arbitral tribunal/arbitral secretary[12] is generally a junior lawyer[13] who works with the tribunal for the purpose of contributing to the process by carrying out the tasks entrusted to him/her by the arbitrators. According to the 2014 Young ICCA Guide,[14] these tasks in practice charge the secretaries with many different functions concerning both the case file and the hearings. Some case file related tasks that are enumerated in the 2014 ICCA Guide may be listed as follows:

a. Handling correspondence and evidence
b. Communicating with the parties on behalf of the arbitral tribunal
c. Reminding deadlines to the parties
d. Performing legal research
e. Analysing parties' submissions
f. Drafting part of the award
g. Drafting the entire award
h. Participating in the deliberations for the chairperson
i. Giving his/her view on the matter to the arbitral tribunal and
j. Taking part in the decision-making process of the arbitral tribunal[15]

In addition to these, there are other tasks which are especially related to the hearings, for instance:

a. Organising the hearings with the parties[16] and
b. Taking the minutes

12 As to the terminology of the present paper, the author would like remark that the terms 'secretary', 'secretary to the arbitral tribunal' 'arbitral secretary' and 'assistant' are used interchangeably. See, Sofia Andersson, 'A Fourth Arbitrator or an Administrative Secretary? A Study on the Appointment and Authority of Arbitral Secretaries in Swedish Arbitral Proceedings' (Master's Thesis in Arbitration Law, Uppsala University 2015) 8–10; Yu and Ahmed (n 3) 221; For Russia's allegations regarding the difference between an 'arbitral secretary' and an 'arbitral assistant' in the annulment process of *Yukos* awards see, Writ of Summons (28 January 2015), 181ff <https://www.italaw.com/sites/default/files/case-documents/italaw4158_0.pdf> accessed 19 September 2019.

13 According to a survey conducted as part of the 2012 International Council for Commercial Arbitration (ICCA) Congress in Singapore, junior lawyers (%89.8), trainee lawyers (%26.5), experienced lawyers (%26.5) young arbitrators (%25.5), law students (%9.2), paralegals (%6.1) and office secretaries or assistants (%1) are sought for as secretaries to the tribunals. International Council for Commercial Arbitration, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014) 57; See, Keutgen and Dal (n 4) para 264; Partasides (n 4) 147.

14 International Council for Commercial Arbitration (n 13) 62.

15 Ibid.

16 Ibid.

Furthermore, arbitral secretaries may also be appointed for dealing with financial and tax-related issues particularly in the absence of an arbitral institution.[17]

While it is generally accepted that both the parties and the arbitrators would benefit from the assistance of a properly appointed, supervised and diligent secretary to keep the arbitral proceedings organized and on schedule,[18] there is a lack of consensus on the question of which tasks should a secretary be allowed to perform.[19] Arbitrators from different legal systems, and even within the same jurisdiction, hold contradictory views on the appropriate scope of secretaries' activities.[20] While there are arbitrators who restrict the involvement of their assistants exclusively to simple non-substantive clerical tasks, there are others who assign their assistants to more substantive duties such as analysing the parties' submissions, collecting case law or published commentaries, participating in the tribunal's deliberations and preparing the drafts of portions or even the entirety of awards.[21]

It is uncontroverted that a secretary should not be able to influence the decision of the tribunal; nevertheless, it is less clear is what kind of functions should be deemed risky.[22] While there are authors who put forward their concern about functions such as legal research,[23] drafting a summary of the research on points of law,[24] drafting factual chronologies and memoranda summarizing the parties' submissions and evidence,[25] compiling resources, and handling sole documentation of proceedings,[26] it would not be inaccurate to state that

17 See, infra (n 18).

18 Guillermo Aguilar-Alvarez, 'Foreword' in International Council for Commercial Arbitration, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014) vii, vii; This may be provided by the secretaries' help with various administrative matters such as 'the coordination of funds, preparation of the arbitral tribunal's statements of fees and expenses, tax matters related to the fees of the tribunal and the distribution of submissions, orders and awards to the parties.' International Council for Commercial Arbitration (n 13) 12.

19 The 2012 International Council for Commercial Arbitration Survey indicates that respondents have divergent views on the question of 'What should the tasks of a secretary be?', International Council for Commercial Arbitration (n 13) 63.

20 Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill - Nijhoff 2010) 142.

21 Partasides (n 4) 149; Rovine (n 20) 142; Doug Jones, 'Ethical Implications of Using Paralegals and Tribunal Secretaries' (2014) 17 Hors Serie 251, 251.

22 Peter Ashford, *Handbook on International Commercial Arbitration* (Juris 2009) 143.

23 United Nations Commission on International Trade Law (n 8) para 27.

24 Yu and Ahmed (n 3) 224.

25 See, Aguilar-Alvarez (n 18) vii; Ashford (n 22) 143.

26 Courtney J. Restemayer, 'Secretaries Always Get a Bad Rep: Identifying the Controversy Surrounding Administrative Secretaries, Current Guidelines, and Recommendations' (2012) 4 Yearbook on Arbitration Mediation 328, 338–339; Michael Feit and Chloé

inter alia, the most controversial debate surrounding such delegation is on the preparation of a draft award.[27]

An arbitral award is a final decision issued by a sole arbitrator or an arbitral tribunal with regard to the merits of the dispute that is subject to the claims that are put forward by the parties.[28] Given that an incorrect drafting of the role of facts and the parties' arguments may lead to misunderstanding and misstating the award,[29] before examining the issue, it may be beneficial to briefly explain why this kind of a delegation with 'such importance resting on the pen of the secretary'[30] may occur. Like any method of alternative dispute resolution, international arbitration endeavours to increase the speed and lower the costs of the proceedings; in other words, it seeks to maximize the efficiency of the justice that it offers.[31] Leaving aside situations where some arbitrators accept too many cases concurrently and are thus led to delegate the duty of drafting to secretaries due to their lack of time,[32] Restemayer explains that 'the prominence grew, simply through necessity to the future of arbitration.'[33] Since the old reputation of arbitration proceedings as 'quick and cheap' is no longer sufficient in view of the fact that arbitrations are getting more and more expensive, it becomes necessary for practitioners and arbitral institutions to come up with cost-effective methods in order to survive in today's business.[34] Where the arbitrators are paid on an *ad valorem* basis, drafting every single word of every single award may not be time-efficient; where they are remunerated on

Terrapon Chassot, 'The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultants under the Swiss lex arbitri: Case Note on DFC 4A_709/2014 dated 21 May 2015' (2015) 33 ASA Bulletin 897, 897.

27 Yu and Ahmed (n 3) 222.

28 Hereby, it should be mentioned that in practice there are different types of awards that are issued by arbitral tribunals. These include final, partial, interim, consent and default awards. For the distinctions between types of awards as well as discussions regarding the "final" *(endgültig)* character of arbitral awards see, Ersin Erdoğan, *Hakem Kararlarının Kesin Hüküm Etkisi* (2nd edn, Yetkin 2020) 93ff.

29 See, Kyriaki Karadelis, 'The Role of the Tribunal Secretary' (Global Arbitration Review 21 December 2011) <www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/> accessed 19 September 2019;

30 Restemayer (n 26) 329.

31 Partasides (n 4) 156; Restemayer (n 26) 329; See generally, Loukas A. Mistelis, 'Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems theories and party autonomy' (15 April 2019) Queen Mary School of Law Legal Studies Research Paper No. 313/2019 <https://ssrn.com/abstract=3372341> accessed 19 September 2019.

32 Pierre Lalive, 'On the Reasoning of International Arbitral Awards' (2010) 1 Journal of International Dispute Settlement 55, 57; Lalive (n 4) 274.

33 Restemayer (n 26) 329.

34 ibid 329; See also, generally, Pierre Lalive, 'Dérives arbitrales (II)' (2006) 24 ASA Bulletin 2, 8.

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an hourly basis, it may not be cost-efficient.[35] Therefore, benefitting from the assistance of secretaries is a widely utilized method to lower costs in drafting awards.[36]

Three Different Approaches: the Strict, the Popular and the Liberal.

In answering the question of whether it is appropriate to entrust the secretary with the preparation of the draft award, the strictest –yet, the most risk-free– approach dictates that the tribunal should in no circumstances be released from its duty to personally draft the award and notes that the tribunal's responsibilities include the preparation of the award as part of its own personal mandate without drawing a distinction between substantive and non-substantive or adjudicative and non-adjudicative parts.[37] For instance, Professor Lalive –who is said to be '[a]n outspoken champion of the use of secretaries over the years'[38]– explains his view on the issue as follows:

> '[H]ow can the arbitrator be satisfied with indicating to his/her secretary or "*law clerk*" in what sense he/she should draft the sentence? How to admit that the form of the award would be independent of the substance and thus left to the activity of the secretary? Clearly, its content and expressions are inseparable and interdependent, and it is ultimately in the choice of words during the final drafting that the arbitrator will reach a relative certainty as to the correctness, and justice, of his decision. The "*intuitu personae*" mission of the international arbitrator, therefore, in principle does not allow any dichotomy, no delegation of this kind.'[39]

In parallel with Professor Lalive, Maynard notes that while a conscientious arbitrator, eager to fulfil his/her mandate responsibly, should have little difficulty in applying the clear distinction between appropriate delegation and irresponsible derogation, the secretaries' role in drafting awards should be

35 Polkinghorne and Rosenberg (n 5) 125.

36 Rovine (n 20) 139.

37 Yu and Ahmed (n 3) 222.

38 See, Partasides (n 4) 148.

39 ('[C]omment en effect l'arbitre pourrait-il se contenter d'indiquer à son secrétaire ou « *law clerk* » dans quel sens il doit rédiger la sentence? Comment admettre que la forme de celle-ci serait indépendante du *fond* et donc laissée à l'activité du secrétaire? À l'évidence, contenu et expressions de celui-ci sont inséparables et interdépendants, et c'est finalement lors de la rédaction finale, dans le choix des mots, que l'arbitre parviendra à une relative certitude quant à la justesse, et à la justice, de sa décision. La mission de l'arbitre international « *intuitu personae* », ne permet donc en principe aucune dichotomie, aucune délégation de ce genre.') Lalive (n 4) 277.

restricted.[40] Onyema likewise mentions that the task of writing portions of the award should not delegated to the arbitral secretaries.[41]

According to the authors sharing this view, the secretary might be regarded as influencing the tribunal when he/she is given writing assignments as to the award.[42] For instance, Souleye states that 'any research performed or draft prepared by the arbitral secretary necessarily finds its roots in the secretary's perspective, and thus might improperly influence the arbitrator's own evaluation.'[43] Such delegation was also mentioned to be inappropriate in the context of investor-state arbitration by Professor Dalhuisen via his additional opinion in the case of *Compañía de Aguas v Argentina*, where he criticised the expanded role of tribunal secretaries in ICSID arbitrations with the following words:

> "During cross-examination it was asked why and questioned how some arbitrators could do so many cases. One way is to farm out the drafting to others, in the case of ICSID to the Secretariat. There appears to be much appreciation for this by busy arbitrators, but it is improper."[44]

While the first approach strictly restricts the involvement of a third party in the drafting process, there are authors who are of the view that such an absolute prohibition is not necessary[45] and that, although they should never be permitted to draft the substantive portions, secretaries may be allowed to draft non-substantive parts of the awards.[46] According to those who advocate this view,

40 Simon Maynard, 'Laying the fourth arbitrator to rest: re-evaluating the regulation of arbitral secretaries' (2018) 34 Arbitration International 173, 182.

41 Emilia Onyema, 'The Role of the International Arbitral Tribunal Secretary' (2005) 3 Transnational Dispute Management para 4 <https://www.transnational-dispute-management.com/article.asp?key=452> accessed 19 September 2019.

42 Lawrence W. Newman and David Zaslowsky, 'The Yukos Case: More on the Fourth Arbitrator' (New York Law Journal 28 May 2015) <www.private-dispute-resolution.com/uploads/Newman_Zaslowsky_2015_The%20Yukos%20Case.pdf> accessed 19 September 2019.

43 Alexandre-Yacine Souleye, 'Fourth chair: the controversial role of arbitral tribunal secretaries' (Young ICCA Blog 16 February 2017) <http://www.youngicca-blog.com/fourth-chair-the-controversial-role-of-arbitral-tribunal-secretaries/> accessed 19 September 2019.

44 *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 (Annulment Proceeding), Additional Opinion of Professor Jan Hendrik Dalhuisen under Art 48(4) of the ICSID Convention, 30 July 2010, [8].

45 Partasides (n 4) 158.

46 Blavi and Vial (n 6) 12; For instance Polkinghorne and Rosenberg (n 5) 125–126; This view was criticized by a practitioner during a Global Arbitration Review event in London suggesting even limited merely to the 'mechanistic' parts of award, such as the facts or procedure, delegating the duty of drafting to the secretary constitutes a problem since the act of intellect through the facts and the parties' arguments is 'key' to the arbitrator's

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unlike non-substantive parts, it is the essential duty of drafting the substantive portion of an award which 'goes to the heart of the arbitration' and must remain with the arbitrators due to the principle of *intuitu personae*.[47] Authors who share this view also underline the risk that if drafting substantial portions are left to the secretary, the evaluation of the arbitrators may be improperly influenced by the latter's perspective, which may be sunk into the reasoning or dispositive section of the award.[48] For instance, according to Partasides

> 'in those cases where jurisdiction has not been disputed, an arbitrator might legitimately ask a secretary to produce a first draft of those parts of an award identifying the parties and describing the basis of the arbitral tribunal's jurisdiction without sacrificing decision-making control. Similarly, in those cases where the procedural decisions taken by the tribunal have not been controversial, an arbitrator might responsibly charge a secretary to produce a first draft of that part of the award in which the procedure is described. In exceptional cases, where the facts of a dispute or even its outcome are in the tribunal's view sufficiently clear and uncontroversial, decision-making control may not be sacrificed even by having a secretary produce a first draft of that part of the award in which the dispute is described or the merits discussed. An absolute prohibition would ignore such distinctions in a way that could only undermine its legitimacy.'[49]

This view is also shared by Waincymer, who states that a secretary should be able to draft the introductory part of an award which may consist of outlining the identities of the parties and counsel, the procedural history and a brief summary of the non-controversial facts.[50] Waincymer expresses that these latter merely concern non-contentious information on certain agreed or uncontested matters.[51] Polkingthorne and Rosenberg support this view as well, provided that two conditions are fulfilled: the secretary must be provided with detailed instructions before drafting and the draft must be subjected to

decision-making. See, Karadelis (n 29).

47 Polkinghorne and Rosenberg (n 5) 126.

48 ibid; Similarly, Rovine explains that 'any function beyond the purely administrative carries with it the possibility of influencing the tribunal's decision, despite the fact that the ultimate decision maker remains the tribunal.' Rovine (n 20) 142.

49 Partasides (n 4) 158.

50 Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 446; See also, 'These specific tasks could be required to be undertaken by an assisting third party in order to furnish purely descriptive information to the tribunal which would *not* include the third party's interpretation, analysis or application of the law to the issues in dispute.' Yu and Ahmed (n 3) 239–240.

51 ibid 446.

the meticulous examination of the tribunal before finalization.[52] It may be said that this approach, which draws a distinction between substantive and non-substantive, is also indicated by Hon. Mr Justice Popplewell in the case of *P v Q*,[53] where he noted that:

> '[c]are must be taken to ensure that the decision-making is indeed that of the tribunal members alone. The safest way to ensure that that is the case is for the secretary not to be tasked with anything which involves expressing a view on the substantive merits of an application or issue. If he is so tasked, there may arise a real danger of inappropriate influence over the decision-making process by the tribunal, which affects the latter's ability to reach an entirely independent minded judgment. The danger may be greater with arbitrators who have no judicial training or background, than with judges who are used to reaching entirely independent adjudicatory decisions with the benefit of law clerks or other junior judicial assistants. However, the danger exists for all tribunals. Best practice is therefore to avoid involving a tribunal secretary in anything which could be characterised as expressing a view on the substance of that which the tribunal is called upon to decide. If the secretary's role is circumscribed in this way, the parties can have confidence that there is no risk of inappropriate influence on the personal and non-delegable decision-making function of the tribunal.'[54]

A survey conducted by White & Case and Queen Mary University of London, which surveyed 710 respondents (including private practitioners, arbitrators, in-house counsel, counsel from arbitral institutions, academics, and expert witnesses), indicates that this view is favoured by the participants since 75 percent of them were of the opinion that tribunal secretaries should be able to prepare 'non-substantive parts of awards.'[55] This tendency is also

52 Polkinghorne and Rosenberg (n 5) 126.

53 [2017] EWHC 194 (Comm).

54 Nevertheless, Justice Popplewell continued as follows 'However a failure to follow best practice is not synonymous with failing properly to conduct proceedings within the meaning of s. 24(1)(d) of the [Arbitration] Act. Soliciting or receiving any views of any kind from a tribunal secretary on the substance of decisions does not of itself demonstrate a failure to discharge the arbitrator's personal duty to perform the decision-making function and responsibility himself. That is especially so where, as in this case, the relevant arbitrator is an experienced judge who is used to reaching independent decisions which are not inappropriately influenced by suggestions made by junior legal assistants.' ibid [68].

55 White & Case and Queen Mary University of London School of International Arbitration, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 43 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf> accessed 19 September 2019.

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confirmed by the results of another survey conducted by the International Council for Commercial Arbitration, where amongst 63.4 percent of the respondents who considered that an arbitral secretary should draft some part or parts of the award, 84.9 percent of them were comfortable with the preparation of the 'Procedural Background'; 69.4 percent with the 'Factual Background' and 65.3 percent with the 'Parties' Positions' as a first draft by the secretary.[56] Furthermore, a survey of a small number of highly prominent international arbitrators conducted by the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association reveals that 50 percent of the participants (11 out of 22) state that '[i]t is common for secretaries to draft certain portions of awards, which the chair considers to be "descriptive" or "non-substantive," namely, the procedural history of the arbitration, the description of the parties, and sometimes also the summary of the parties' contention.'[57]

Finally, according to a 'more liberal'[58] –yet, apparently less favoured[59]– approach, as long as it reflects the tribunal's decision, drafting the award should be acceptable. This practice is advocated[60] as 'reflecting a conversation'[61] 'rather than an invitation for secretaries to give opinion'.[62] It is stated that the Swiss Federal Supreme Court also anchored itself 'at the more liberal end of the spectrum'[63] with an *obiter dictum* in its decision[64] dated 21 May 2015 where it expressed some opinions on the issue:

56 International Council for Commercial Arbitration (n 13) 15, 79.

57 International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association (n 3) 584–585.

58 Blavi and Vial (n 6) 13.

59 Delegating secretaries the duty to prepare drafts of substantive parts of awards received the support of only 13 percent of the participants in the survey of White & Case and Queen Mary University. White & Case and Queen Mary University of London (n 55) 43; In the 2013 survey conducted by International Council for Commercial Arbitration 67 percent of respondents opposed to an arbitral secretary being tasked with drafting the entirety of the award. International Council for Commercial Arbitration (n 13) 15, 79. In the survey of International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association only 3 participants out of 22 agreed that '[i]n some cases, secretaries prepare a first draft of the award in its entirety.' International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association (n 3) 584–585.

60 Jerry Yulin Zhang, 'Arbitration Award' in Daniel R. Fung and Wang Sheng Chang (eds) *Arbitration in China: a practical guide* (Sweet & Maxwell 2004) 215, 11-05(d).

61 See, Karadelis (n 29).

62 Restemayer (n 26) 339.

63 Menz and George (n 6) 311; See generally Timlin (n 2).

64 Tribunal Federal 4A_709/2014 21 May 2015. English translation available at <http://www.swissarbitrationdecisions.com/sites/default/files/21%20mai%202015%204A%20709%202014.pdf> accessed 19 September 2019.

> 'The role of the legal secretary is comparable to a clerk in state proceedings: to organize the exchange of briefs, to prepare the hearings, to keep the minutes, to prepare the statements of costs, etc. They do not exclude certain assistance in drafting the award under the control of and in accordance with the directives from the arbitral tribunal, or if it is not unanimous, from the majority arbitrators, which presupposes that the secretary participates in the hearings and the deliberations of the arbitral tribunal.'[65]

Feit and Chassot state that this passage should be construed to mean that the duty of drafting substantial parts of the award can also be entrusted to the arbitral secretary, since it would make little sense to require the arbitral secretary's participation in the hearings and deliberations if his/her tasks were limited to the non-substantive portion of the award.[66] According to Feit and Chassot, the references given by the Federal Court, namely those to Göksu[67] and Kaufmann-Kohler and Rigozzi,[68] further support such interpretation given the fact that while the possibility for taking assistance in drafting the award is accepted in both publications, neither of these authors mention that the function of the arbitral secretary should be restricted to the particular sections.[69] This view is also held by Heuman, who contends that should the appointment of a secretary is confirmed by the parties, the parties can be deemed to have accepted that the duty of preparing the draft may be delegated as long as the tribunal provides guidance on how the rationale must be written.[70]

Such 'more liberal' opinion more or less reminds of the case of *Oliva v Heller,*[71] where the United States Court of Appeals for the Second Circuit held that:

> ' [...] the work done by law clerks is supervised, approved, and adopted by the judges who initially authorised it. A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve.'[72]

Applying a similar reasoning to international arbitration, one may ask: Does it make a difference who drafted the award as long as secretary is supervised

65 ibid 3.2.2.
66 Feit and Chassot (n 26) 908.
67 Tarkan Göksu, *Schiedsgerichtsbarkeit* (Dike 2014) n. 879.
68 Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage international : droit et pratique à la lumière de la LDIP* (2nd edn, Bern 2010) 678.
69 Feit and Chassot (n 26) 908.
70 Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris 2003) 493; See also Andersson (n 12) 57ff.
71 839 F.2d 37 (2d Cir. 1988).
72 839 F.2d 37 (2d Cir. 1988) [40].

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by the arbitrator and the draft award is subsequently carefully reviewed by the tribunal? After all, if an arbitrator is eager to delegate the decision-making process to a third party, would not this willingness to derogate from his/her duty by adjudicating without having sufficiently worked on the case constitute a problem on its own, regardless of the appointment of a secretary?[73] However, the issue may not be that simple.[74]

First, notwithstanding the guidance provided by the tribunal, an award which is initially drafted by a secretary may unavoidably contain this latter's own assessment of the issues,[75] and even the tribunal's subsequent scrutiny of this draft does not entirely eliminate the ability granted to the secretary to make decisions as to what to emphasize and what to omit since an arbitrator reviewing the draft may not even be able to identify these decisions.[76] A similar concern also found voice in the expert opinion[77] of Professor Bermann offered in the DC Circuit proceedings of the flamboyant *Yukos* saga. Bermann explained that irrespective of the degree of care a tribunal brings to its subsequent review:

> '[a]s a general rule, the drafting of the substantive parts of the final award, which include its operative part, must be reserved for the arbitral tribunal. *It is particularly in this substantive section where writing one's own text instead of reading the text prepared by someone else remains the ultimate means of intellectual control of the tribunal's decision of the dispute* as the essential tool for safeguarding the proper performance of the arbitrators' personal decision-making duty owed to the parties that have appointed them, thereby preserving the integrity of the arbitral process as such.'[78]

Authors who consider drafting the award the 'ultimate safeguard of intellectual control'[79] over the decision-making process believe that writing at least the substantial parts of the award is the only way to avoid any influence

73 Partasides (n 4) 158.
74 ibid 158ff.
75 Waincymer (n 50) 446; Yu and Ahmed (n 3) 224–225.
76 Partasides (n 4) 158.
77 D.C, *Hulley Enterprises Ltd., Yukos Universal Ltd*., and *Veteran Petroleum Ltd., v. The Russian Federation*, Case No. 1:14-cv-01996-ABJ, Document 24-7, Expert Opinion of Professor George A. Bermann, Filed on 20 October 2015.
78 ibid [94]; Klaus Peter Berger, Part III, '27'th Scenario: Deliberation of the Tribunal and Rendering of the Award' in Klaus Peter Berger, *Private Dispute Resolution in International Business Negotiation, Mediation and Arbitration* (3rd revised edn, Kluwer Law International 2015) 613, para 27-19.
79 See, Partasides (n 4) 158; Charlotin (n 4) 408; cf Despite strongly believing that the act of writing is the ultimate safeguard of intellectual control of the tribunal's decision of the dispute, Douglas appreciates that there may also be other legitimate ways to satisfy the parties in an arbitration.' Douglas (n 11) 89.

on the part of the secretary and thus fulfil the *intuitu personae* mandate of the tribunal.

Moreover, delegating the duty of drafting may significantly affect the quality of the award. Charlotin emphasizes the crucial role of 'the act of writing' by citing Sir Frank Kitto, who was a Justice of the High Court of Australia from 1950 to 1970, when he left to become Chancellor of the University of New England.[80] In his paper presented to a 'Convention of Judges of the High Court and of the Supreme Courts of the States and Territories' in 1973, Sir Kitto explains that:

> 'only in the throes of putting ideas down on paper, altering what has been written, altering it a dozen times if need be, putting it away until the mind has recovered its freshness, even tearing it up and starting again, can most of us hope to get, in a difficult case, the fruits of the requisite intensity of penetrating thought.'[81]

Accordingly, it matters that the arbitrators hold the pen of the decision not only because of the *intuitu personae* mandate that they have, but also due to the expectation of the parties to receive the most compelling judicial outcome.[82] In other words, by delegating the draft award to their secretaries, arbitrators 'miss out on the re-thinking and re-examination of their views that flow from having to wrestle with the task of writing.'[83]

80 Charlotin (n 4) 407–408.

81 Although it was presented in 1973, the paper was published in 1992. Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 Australian Law Journal 787, 796; See Stephen Gageler, 'Why Write Judgments?' 36 Sydney Law Review 189.

82 Charlotin (n 4) 408; '[…] it seems that the multiplication of appeals based on Article 190 al. 2 PILA reflects, at least in part, an increase in low quality, confused or erroneous, and poorly drafted awards - whether by the arbitrator himself or (according to a recent mode in worrying progress) by the collaborator to whom he or she would have delegated his task' ('[…] il semble bien que la multiplication des recours fondés sur l'Article 190 al. 2 LDIP reflète, pour partie au moins, une augmentation des sentences de qualité médiocre, confuses ou erronées, et mal rédigées – que ce soit par l'arbitre lui-même ou (selon une mode récente en inquiétants progrès) par le collaborateur auquel il aurait délégué sa tâche' Pierre Lalive, 'L'Article 190 al. 2 LDIP a-t-il une utilité ?') (2010) 28 ASA Bulletin 726, 728; But see also the response from Schweizer to Professor Lalive, '[…] I will not let you say, without rebelling, even if only with an eyebrow, that a part of the mediocre quality of the Swiss awards is due to the call in question, if I may say so, to the "collaborators"!' ('[…] ne vous laisserai-je pas dire, sans me rebiffer ne serait-ce que d'un lever de sourcil, qu'une partie de la qualité médiocre des sentences suisses est due à l'appel en cause, si je puis dire, de « collaborateurs » !') Philippe Schweizer, 'Correspondance Au Sujet de L'Article 190(2) LDP: Quelques lignes en réponse à l'article du Professeur Lalive « L'article 190 al. 2 LDIP a-t-il une utilité ? »' (2011) 29 ASA Bulletin 66.

83 This view was expressed by Wiehern when criticizing the influence of the law clerks at the US Supreme Court. Nadine J. Wiehern, 'A Court of Clerks, Not of Men' (1999) 49 De Paul Law Review 621, 662.

On the other hand, could not it be argued that with the arbitrator's guidelines and subsequent scrutiny a secretary, especially an extremely competent one with excellent linguistic and rhetoric skills, can draft a flawless award, better than the one that the party-appointed arbitrator would ever be able to draft alone? Perhaps he or she can. Perhaps an award drafted by such prodigy even minimises the risk of a challenge. However, does not a party in arbitration, differently than the state courts, appoint its arbitrator already believing that he or she is the best choice amongst others to resolve the dispute? Even in the case that a party which abstains from bringing the dispute to the state courts cannot designate the arbitrator it deems the 'best' but a less desired one due to the unavailability of the former, does not the party appoint that arbitrator because it trusts that he/she is sufficiently competent to decide on the dispute? If this is the case, and if it is nothing but 'axiomatic' to say that a party's choice of an arbitrator is *intuitu personae*, do parties really need a better version of what they already believe to be the best or sufficient? Yet, what happens if the arbitrator himself/herself is absolutely sure that the draft of his/her 'miraculous secretary' is nothing but excellent?[84] In other words, what happens if the person appointed as the best choice to settle the dispute strongly believes that the best way decide on the case is to use the secretary's draft? From the contractual viewpoint, does a party designate an arbitrator because it trusts that the arbitrator *himself/herself* decides in the best way, or because it believes that no matter what he/she does and what kind of assistance he/she takes, *at the end* he/she comes with the best award? However, if the issue is the latter, what is the difference between the logic of having a secretary to draft the award and of –assuming a case where confidentiality is not invoked– calling an elite group of arbitrator friends to barbeque to jointly draft the award at the poolside afterwards? After all, is it not the arbitrator who believes that the award would be better crafted with the help of several others? After all, is it not the arbitrator who supervises everything?

According to Yu and Ahmed, it may be argued that the obligation of writing an award by the tribunal itself is implied into the appointment agreement.[85] This view seems to be indicated by the Notes for Arbitrators of the London Court of International Arbitration which mentions that:

84 A similar case found its way into the 2018 Philip C. Jessup Moot Court problem where the arbitrator had 'nothing to add' to the draft award prepared by the secretary. International Law Students Association, Philip C. Jessup International Law Moot Court 2018 Problem with Corrections & Clarifications (*Case Concerning the Egart and the Ibra* [*People's Democratic Republic of Anduchenca v. Federal Republic of Rukaruku*]) para 33 <https://www.ilsa.org/Jessup/Jessup18/2018%20Combined%20Compromis%20and%20CandC%20final.pdf> accessed 19 September 2019.

85 Yu and Ahmed (n 3) 224.

> 'An arbitrator's confirmation as to availability imports a commitment not only to devote sufficient time to the proceedings, over an appropriate timeframe, but also to *draft* any award promptly after the last submission from the parties (oral or written) on the issues to be addressed by that award'[86] [emphasis added]

A (bit scary) Solution for the Parties and Assessments for the Arbitrators

Leaving aside those that do not provide any guidance, restrictions on the scope of the secretaries' functions vary across different arbitral institutions.[87] For instance, HKIAC Guidelines as well as the ACICA Guideline allow the tribunal secretaries to draft non-substantive parts of awards (such as procedural histories and chronologies of events)[88] whereas the ICC Note on the Conduct of Arbitrations strictly restricts secretaries from drafting with the following words:

> '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.'[89]

While the London Court of International Arbitration 'does not endorse any particular tasks as necessarily being appropriate for a tribunal secretary to carry out', it notes that an Arbitral Tribunal may wish to propose to which extent, if any, the tribunal secretary prepares the drafts of the substantive part of the award.[90] The UNCITRAL Notes on Organising Arbitral Proceedings[91]

86 London Court of International Arbitration, LCIA Notes for Arbitrators 3.13. According to the LCIA notes arbitral tribunal may delegate the draft only with the parties' consent. <https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx> accessed 19 September 2019.

87 Polkinghorne and Rosenberg (n 5) 107–108.

88 Hong Kong International Arbitration Center, Guidelines on the Use of a Secretary to the Arbitral Tribunal, 3.4 <https://www.hkiac.org/images/stories/arbitration/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%20Arbitral%20Tribunal%20-%20Final.pdf> accessed 19 September 2019; Australian Centre for International Commercial Arbitration, ACICA Guideline on the Use of Tribunal Secretaries, para 11 <https://acica.org.au/wp-content/uploads/2017/01/ACICA-Tribunal-Secretary-Guideline.pdf> accessed 19 September 2019.

89 International Court of Arbitration of International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (1 January 2019) para 187 <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf> accessed 19 September 2019.

90 London Court of International Arbitration (n 86) para 71.

91 United Nations Commission on International Trade Law, UNCITRAL Notes on Organizing Arbitral Proceedings (March 2012) 12 <https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> accessed 19 September 2019.

and the JAMS Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations[92] content themselves with stating that the secretary cannot perform any decision-making function of the tribunal. According to the 2014 Young ICCA Guide, with appropriate direction and supervision by the tribunal, the role of the secretary may 'legitimately go beyond the purely administrative' and include drafting 'appropriate parts' of the award.[93]

Stating that the absence of a uniform standard fuels the debate, Polkingthorne and Rosenberg see no good reason for different arbitration institutions to place considerably different restrictions and call for greater uniformity of regulation.[94] According to the authors, the discrepancy between the restrictions provided by institutions on the role of arbitral secretaries provokes the uncertainty as to the proper role of the tribunal secretary, which is a potential perturbator to the perceived legitimacy of the arbitral process and the award.[95]

On the other hand, there are authors who mention that there may be simpler ways than promulgating yet another set of guidelines[96] since the bottom line is the danger posed by the lack of transparency and the informed consent of the parties.[97] As Maynard states, not only would a uniform standard be unlikely to satisfy all parties, but, as long as there is clarity, transparency and, above all, consent as to the role of the secretary, there seems to be no principled reason why there should not be a diversity in practice, allowing arbitral secretaries to be entrusted with different tasks contingent upon the institutional rules that the parties select.[98]

Indeed, the issue should not raise much concern in a case where both (or all) parties in an arbitration clearly give their permission to the secretary to draft the substantive part of the award and there is no deficiency with regard to the subsequent examination of the tribunal; neither should it in a case where the tribunal does not delegate any task to the secretary regarding the preparation

92 Judicial Arbitration and Mediation Services, Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations <https://www.jamsadr.com/files/Uploads/Documents/JAMS-International-Guidelines-for-Use-of-Clerks-and-Tribunal-Secretaries-in-Arbitrations.pdf> accessed 19 September 2019.

93 International Council for Commercial Arbitration (n 13) 11.

94 Polkinghorne and Rosenberg (n 5) 108, 121ff.

95 ibid, 121.

96 See, Benjamin Hughes, 'The Problem of Undisclosed Assistance to Arbitral Tribunals' in Patricia Shaughnessy and Sherling Tung, *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Kluwer Law International 2017) 161, para 17.03.

97 International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association, Secretaries to International Arbitral Tribunals (n 3) 591; Douglas (n 11) 88.

98 Maynard (n 40) 183.

of the draft on the ground that only one of the parties has given its consent. However, in this latter case, problems may occur should such delegation happen.

As mentioned by Wilmot-Smith, the case *P v Q* has clarified that even in the event that a tribunal secretary engages in a more extensive function than anticipated and effectively pre-empts the role of the tribunal in decision-making, the party challenging the award may be left with very limited, if any real, rights of recourse.[99] In the case, an email from the chairman intended for the arbitral secretary was mistakenly sent to a paralegal at P's solicitors which contained a letter from P to the tribunal and asked for his 'reaction to this latest from [P]?'[100] For the removal of all three members of the tribunal, P had previously applied to the LCIA Court which appointed an LCIA Division to determine the matter.[101] Refusing to exclude the two co-arbitrators' from the tribunal, the LCIA Division had revoked the chairman's appointment; however, on different grounds relating to comments made at a conference.[102] P challenged the award in the High Court *inter alia* on the ground that the secretary was excessively involved in the decision-making process. However, since Hon. Mr. Justice Popplewell saw the test for annulment to be one of 'substantial injustice',[103] even if P could somehow prove that the secretary made the decision and wrote the award, in order to convince the court for vacatur, it would further have to show that a different conclusion would have been reached if the arbitrators themselves wrote the award.[104]

Since the appointment of the secretary was approved by the parties in *P v Q*,[105] it may be argued that seeking the annulment of the award through different grounds –such as irregular constitution of the arbitral tribunal– may be successful in cases where the party challenging the award had not consented to the use of the secretary. However, it is still not certain whether this would be sufficient. In legal writing of some jurisdictions, such as Switzerland, it is disputed whether an arbitral tribunal may retain an arbitral secretary in a manner contrary to the consent of the parties.[106] Furthermore, given the relative

99 Claudia Wilmot-Smith, Tribunal secretaries and decision-making in arbitration (Thomson Reuters 3 August 2018) <arbitrationblog.practicallaw.com/tribunal-secretaries-and-decision-making-in-arbitration/> accessed 19 September 2019.

100 *P v Q* (n 53) [10]ff.

101 ibid [14]ff.

102 ibid [19]ff.

103 ibid [30].

104 Wilmot-Smith also states that it is hard to see on which basis can a damages claim be quantified or formulated in such circumstances. Wilmot-Smith (n 99).

105 *P v Q* (n 53) [6].

106 Even though the Federal Court noted in its abovementioned decision that 'the common will of the parties to the arbitration agreement or in a subsequent agreement must be reserved

recency of the issue and the paucity of relevant case-law, the question may never even have been discussed neither in the doctrine, nor by the courts in some other jurisdictions, such as in Turkey. This makes it even more difficult to predict the future of the award.

In view of all the above, the author believes that as to the decision-maker side, an arbitrator should not appoint a secretary without the consent of both parties both to the appointment and the clear description of the tasks the secretary can do. On the parties' side, the author is of the opinion that in view of the difficulty to prove the existence of any unwanted assistance in drafting or any improper influence on decision-making,[107] for a party that is strictly against the use of a secretary, the best way to ensure this is to take aim at the arbitrator's own assessment of *coût d'opportunité*. This can be done by adding an exceptionally strict clause to the arbitration agreement which states that the parties shall never be bound by any decision drafted by anyone else other than the appointed arbitrator(s) and which requires the arbitrator(s) to sign a paper

to exclude the appointment of a secretary' (Tribunal Federal (n 64) 3.2.2.) Feit and Chassot state that 'the Swiss Federal Supreme Court was not confronted with that scenario since there was no joint opposition of the parties to the appointment of the arbitral secretary. Against this background, we submit that the statement by the Swiss Federal Supreme Court is not specific enough to be construed as having ruled on the question as to whether the arbitral tribunal may retain an arbitral secretary on its own motion against the will of the parties (provided that the arbitral tribunal bears the costs of the arbitral secretary). In our reading, that particular question has not been addressed by the Swiss Federal Supreme Court.' Feit and Chassot (n 26) 907; See, Jean Marguerat and Tomás Navarro Blakemore, 'Note: A. SA v. B. Sàrl, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_709/2014, 21 May 2015' 2016 13 Revista Brasileira de Arbitragem 199, 203–204.

107 In *P v Q*, P's 'disclosure application' concerning the instructions, requests, queries and comments from the arbitrators to the secretary as well as all responses from the secretary to those emails and all communications sent or received by the arbitrators regarding either the role of the secretary or the tasks delegated to the secretary was refused by the High Court. See, *P v Q* (n 53) [67]; In *Yukos*, the PCA Secretariat refused a request from counsel for the Russian Federation for further details regarding the hours worked by the assistant, on the ground that disclosing such details would invade the confidentiality of the Tribunal's deliberations: 'In the view of the Tribunal, the attached Statement of Account provides the Parties with the appropriate level of detail while assuring the confidentiality of the Tribunal's deliberations.' *The Russian Federation versus Hulley Enterprises Limited*, The Hague District Court C/09/481619 / Ha Za 15-112, Respondent's February 16, 2015 Letter, Annex 2, Writ of Summons dated November 10, 2014, filed by the Russian Federation with the District Court in The Hague on January 28, 2015, [499]–[501]; See also, *Sonatrach v Statoil* [2014] EWHC 875 (Comm) [46]ff; Supreme Court of the Netherlands decision of 29 January 2010, LJN BK 2007 related to the appeal of the decision of the Amsterdam Court of Appeal *Knowsley SK Ltd v AGJ Van Wassenaer van Catwijck*, Amsterdam Court of Appeal, 2 December 2008, LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39.

declaring that no assistance is going to be taken in the drafting process.

In this regard, it may be interesting to have a look on a memory of Professor Douglas.

> 'Just over a year ago after I moved to Geneva I received a CV applying for the job assistant to me. I always think when I get these CVs that times must be tough because I have never advertised for such a position nor have I ever hired an assistant. Nonetheless, I opened the attachment out of curiosity and one thing caught my eye immediately. There was a heading with the formulation "Awards that I have drafted". I had never heard of this person before, but I looked down the lists of awards that he drafted and, surprise, one of the awards was in a case in which I appeared as counsel. [...] Here is where my story moves from fact to fiction. Suppose the CV is forwarded to the party who lost. It is a major case where hundreds of millions were paid out in satisfaction of the award. The seat of the arbitration is New York and a challenge proceeding is launched there. The person who drafted the award is now doing an LLM at NYU and he is subpoenaed and has to give evidence. […] Such a challenge would be very damaging –and I am talking of the perfect storm– to the reputation of international arbitration.'[108]

What is more, such a challenge would also be very damaging –'of the perfect storm'– to the reputation of an arbitrator in the presence of a clause implemented to the arbitration agreement strictly restricting such practice and of a paper he/she signed. In a market where an arbitrator who fails to take his or her duties seriously is 'black-listed by parties and peers',[109] it is even more frightening to imagine the occurrence of such a case during the annulment process of a well-known multi-billion dollar award. For instance, what would have happened to the arbitrators in *Yukos* if the scene-top forensic linguist attested with over 95% percent certainty that Mr. Valasek, who had been presented as the assistant of chairman Fortier, wrote approximately 70% of the awards[110] notwithstanding the (imaginary) existence of such a clause in the arbitration agreement and their signed declarations stating that they were not going to take any assistance in the drafting process? Would not such precaution

[108] Douglas (n 11) 87–88.

[109] James U. Menz, Miss Moneypenny vs. the Fourth Musketeer: the Role of Arbitral Secretaries (Kluwer Arbitration Blog 9 July 2013) <arbitrationblog.kluwerarbitration.com/2013/07/09/miss-moneypenny-vs-the-fourth-musketeer-the-role-of-arbitral-secretaries/> accessed 19 September 2019.

[110] Alison Ross, Valasek wrote Yukos awards, says linguistic expert (Global Arbitration Review 20 October 2015) <https://globalarbitrationreview.com/article/1034846/valasek-wrote-yukos-awards-says-linguistics-expert> accessed 19 September 2019.

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–at least to some extent– prevent those practices which provoke Professor Lalive into using exclamation marks, such as delegating the duty of drafting to secretaries for the purpose of being able to accept more remunerative files[111] or appointing unofficial secretaries based on the 'tacit and presumed consent' of the parties?[112]

However, in the absence of such a strict clause in the arbitration agreement to solve any potential problems beforehand, then the question remains: should the secretary be able to draft the award? There are two main factors that should be taken into consideration in answering this question, namely the will of the parties and the potential efficiency in terms of time and costs. From the authors point of view, although both very important, primary concern in this regard must be the consent of the parties in the sense that in which terms they agreed to solve their dispute by means of arbitration. Therefore, instead of answering the question with a general statement, it may be more reasonable to consider some possible situations that may arise in practice and to give specific answers to them.

First of all, in view of the explanations above, the arbitral secretary should not be involved in the draft of the award at all if one of the parties has been against such involvement or the secretary's appointment was made against the consent of either one of the parties or both parties.

If nothing is mentioned about the draft of the award while there are other duties that are enumerated in the appointment of the secretary, ideally, the arbitrators who nevertheless want to delegate such duty should communicate with the parties before any involvement and ask for their consent. Without communicating with the parties and having both parties' consent, the arbitral secretary should not be entrusted with drafting any part of the award. The

[111] 'In any event, the fundamental rule remains and must remain: the international arbitrator [...] has been chosen to arbitrate. And this is "*intuitu personae*" and not to delegate to anyone, whoever it is, this difficult task – in order to be able to accept a larger number of remunerative files!' ('Quoi qu'il en soit, la règle fondamentale demeure et doit demeurer: l'arbitre international [...] a été choisi *pour arbitrer*. Et ceci «*intuitu personae*» et non pas pour déléguer à autrui, quel qu'il soit, cette difficile tâche – afin de pouvoir accepter un plus grand nombre de dossiers rémunérateurs !') Lalive (n 4) 274.

[112] 'It is therefore astonishing that, during an interesting Symposium organized in 2009 by the *School of International Arbitration of Queen Mary College*, London, we heard one of the "*panelists*", a well-known Geneva practitioner, who supported the natural and justified character of the delegation by the arbitrator, to a collaborator, of his/her decision-making function. And this is on the basis of the *tacit* and presumed consent of the disputing parties!' ('C'est donc avec étonnement que, lors d'un intéressant Colloque organisé en 2009 par la *School of International Arbitration* de *Queen Mary College*, Londres, nous avons entendu l'un des « *panelists* », praticien genevois connu, soutenir le caractère normal et justifié de la délégation par l'arbitre, à un collaborateur, de sa fonction de décision. Et ceci sur la base du consentement, *tacite* et présumé des parties en litige !') Lalive (n 4) 277.

author believes that in this case, even if there are other tasks foreseen in the appointment that might affect the decision-making process of the arbitrators, such as performing legal research for the tribunal, these tasks do not imply that secretary can also draft the award. Even though charging the secretary with merely drafting the non-substantive portion of the award might seem time and cost efficient as well as harmless particularly when there are even substantive tasks of the secretary that the parties agreed upon, in this case it should be assumed that the parties considered to the duties of the secretary in an exhaustive manner.

If there are no tasks enumerated in the appointment but only the administrative or non-substantive character of the assistance is mentioned as in the following example

> 'The Arbitral Tribunal would be glad to count on the assistance of a Secretary. The status of the Secretary will only consist in assisting the Tribunal and its Chairman in the administrative tasks.'[113]

in this case, the author believes that such appointment would allow the secretary to be charged with the draft of the non-substantive part of the award since parties may be deemed to have envisaged such function in the appointment. The same applies in cases where some tasks are mentioned non-exhaustively after stipulating the non-substantive character of the assistance.

If both parties have consented to the appointment of the secretary but no statement was made as to his/her duties and no specific duty was enumerated in the appointment, ideally, the arbitrators should ask the parties for their consent before charging the secretary with any task relating to the award. If not, the involvement of the secretary should be limited to the draft of the non-substantive part of the award at most. The author believes that in this case, this is a question of 'best practice' rather than a question of 'to what extent can the duties be delegated to an arbitral secretary without getting the award set aside'. Not only from a theoretical point of view, but also because the latter

[113] A similar appointment was made in *Sonatrach v Statoil* [2014] EWHC 875 (Comm) where Algerian state oil company Sonatrach had applied for the vacatur of an International Chamber of Commerce award worth US$536m in favour of Norwegian state oil company Statoil: 'The Arbitral Tribunal would be glad to count on the assistance of an Administrative Secretary. The status of the Administrative Secretary will only consist in assisting the Tribunal and its Chairman in the administrative tasks for the proceedings, the organization of the hearings and the preparation of documents that may be useful for the decision. In no way the Administrative Secretary will have the right to participate in the decision.' However, in this case, the claim did not concern the draft of the award but the notes which were produced by the secretary for the deliberations of the arbitral tribunal. The challenge was dismissed by the High Court. Although the issue was different, it can be claimed that the expression 'administrative tasks for the proceedings' may be deemed to cover the task of drafting the non-substantive part of the award.

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is anyways uncertain in practice considering particularly the abovementioned paucity of case-law concerning award-drafting secretaries and in view of the fact that such challenges are not very frequent as awards usually do not declare that they have been drafted by the secretaries but only contain the signatures of the arbitrators. In other words, even though normally 'a failure to follow best practice is not synonymous with failing properly to conduct proceedings'[114], nor secretaries' involvement to the draft seems entirely unsusceptible to possible annulments. Furthermore, although it can be claimed that neither national legislation nor case-law at the moment is enough to consider that delegating the draft of the substantial part to the secretary certainly constitutes a ground for setting aside an arbitral award, it is particularly difficult to legitimize the situation where the secretary's intervention to the substantial part disturbs the equitable character of the proceedings in the eyes of the losing party because an arbitrator wanted to do so in order to be able to accept more files or simply because he/she accepted the case without having sufficient time. On the other hand, from the point of view of the arbitrator, is it really a reasonable deal to delegate the draft of the substantial part to save some time considering that in case somehow known by the parties, not only the award might be challenged and even set aside but also the mere fact that he/she did not write his award may have reputational consequences in addition to the high probability of not being re-appointed by the losing party or maybe even by the winning one?

On the other hand, if the appointment states that the secretary's duties include the drafting of the award, such statement would also be deemed to cover the substantial part of the award. Particularly, in cases where the sole arbitrator or all arbitrators have no legal training as they are selected for their technical knowledge (for instance, in cases where all the arbitrators are accountants or where a sole arbitrator is appointed for a technical construction problem) appointing an arbitral secretary with a legal background can be necessary to be able to formulate the final decision. In such cases, it is crucial to explicitly empower the arbitral tribunal to delegate the task of drafting the arbitral award as this type of cases are even more vulnerable to challenges. For instance, in *Sacheri vs Robotto*[115] dated 1989, The Italian Supreme Court was confronted with a situation where arbitrators, who had no legal training appointed a lawyer to draft the award for them and did not participate in the drafting. Underlining that arbitrators cannot delegate their decision-making duty, Italian Supreme Court held that:

[114] EWHC 194 (Comm) [68].

[115] *Sacheri v. Robotto*, Corte di Cassazione, 2765, 7 june 1989 available in Albert Jan van der Berg, *Yearbook Commercial Arbitration Volume XVI* (International Council for Commercial Arbitration 1991) 156–157.

> *'[d]ue to the arbitrators' professed incapacity to decide issues other than technical construction problems, it amounted to delegating a third person to formulate the final decision, which the arbitrators were not able to conceive and which they could not critically examine once it had been drafted'*[116]

The author is of the opinion that in cases where parties explicitly envisage the task of drafting the award to be delegated to the secretary, seeking for expressions that specifically cover the substantive part such as 'prepare a first draft of the award in its entirety' would be unnecessary, particularly in cases where arbitral tribunal is comprised of arbitrators with no legal training.

Conclusion

In answering the question whether it is appropriate that the task of drafting the award be delegated to the secretary, the strictest approach dictates that the tribunal should in no circumstances be released the from its duty to personally draft the award. According to this view, which does not draw a distinction between the substantive and non-substantive, even delegating the draft of merely mechanistic parts to the secretary constitutes a problem since the act of intellect through the facts and the parties' arguments is 'key' to the arbitrator's decision making. While this approach is the most risk-free one on the bright side, on the not-so-bright side, it forces the arbitrator to draft every single word of every single award which may be neither time-efficient, nor cost-efficient, where the remunerations are on an hourly basis.

The second approach rejects such an absolute restriction and suggests that a secretary may be allowed to draft non-substantive parts of the awards which may consist of outlining the identities of the parties and counsel, the procedural history and a brief summary of the non-controversial facts. According to the authors who advocate this view, such parts of the award do not belong to the heart of an arbitrator's mandate and their delegation does not pose the risk of influencing the decision-making process of the tribunal. Furthermore, surveys reveal that this view is favoured in the practice.

Finally, the authors who position themselves at the most liberal part of the spectrum argue that as long as the guidance is provided by the tribunal and the draft is subjected to the careful examination of the arbitrators, there is no point of restricting a secretary from drafting the substantive portions of the award. This approach is criticized by authors who emphasize the power of the 'act of writing' and state that such practice is not only in contrast with the *intuitu personae* mandate that an arbitrator may have but also with the expectation of the parties to receive the most compelling judicial outcome.

[116] ibid, Decision para 1.

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While the surveys indicate that the second one is the most favoured and the third one is the least popular amongst these three approaches, restrictions on the scope of the secretaries' functions regarding the draft of the award vary across different rules or guidelines. While some authors call for greater uniformity of regulation in order to reduce the uncertainty as to the proper role of secretaries, others state that such a uniform standard would be unlikely to satisfy everyone and emphasize that the bottom line is the lack of transparency and the informed consent of the parties.

The author believes that if the consent of both parties is obtained, the tasks of the secretary is clearly described and there is no lack of transparency, the issue should not raise much concern. However, if one of the parties does not approve such assistance, the arbitrator should not appoint a secretary, since this may leave the objector party in a lurch with no real rights of recourse. First, it seems quite difficult to prove the existence of any unwanted assistance in drafting. Secondly, even if the party shows that the arbitrator took assistance in drafting, a state court may decide that the arbitrator has the right to appoint a secretary in a manner contrary to the consent of the parties. Additionally, even in a case where a party somehow proves the existence of the unwanted secretary assistance in drafting and convinces the state court that the this was contrary to its consent, it would further have to show that there would have been a different conclusion if the arbitrators themselves wrote the award.

To avoid such a situation, the author believes that if a party is strictly against the use of an arbitral secretary and abstains from bringing the dispute to the state courts, it should take its aim at the arbitrator's own assessment of *coût d'opportunité* by implementing an exceptionally strict clause to the arbitration agreement which states that the party shall never be bound by any decision drafted by anyone else other than the appointed arbitrator(s) and requires the arbitrator(s) to sign a declaration ensuring that no assistance is going to be taken in the drafting process. In the author's opinion this would not only prevent the arbitrators from delegating the draft to accept too many cases concurrently, but also would eliminate –to a certain extent– the unofficial appointments made without disclosure.

In the absence of this kind of strict clauses, the question whether the secretary should be able to draft the award should be answered on a case-by-case basis by taking into account primarily the consent of the parties. From the author's point of view, the secretary should only be allowed to draft the entire award in cases where parties explicitly envisage the task of drafting to be delegated to the secretary. In other cases where parties' intent about the tasks of the secretary is not crystal clear, communicating with them in order to have their consent before the drafting process is primordial for an arbitrator in providing the parties with the best practice. This is particularly

important for cases where both parties have consented to the appointment of the secretary without any statement as to his/her duties since these bring out the most difficult situation for an arbitrator to interpret the framework that the parties intended to establish for the task of the secretary. In such cases, the author believes that delegating merely the procedural part –if any– should be favored over delegating the entire award to avoid potential problems. Not only that it is not easy to claim that secretaries' involvement to the draft is entirely unsusceptible to possible annulments but also because it is very difficult to assert that every action of an arbitrator that would increase the efficiency and not lead to the annulment of the award should be deemed best practice. Because even though in many jurisdictions arbitral awards can be set-aside on a scarce number of grounds, there are many other factors to be taken into account such as reaching an entirely independent minded judgment, reputation of arbitration and satisfying both parties, even the losing one, with both the process and the arbitral award.

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