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II Comentário

In General

The literature concerning the role of the secretary to the arbitral tribunal has gained momentum in the past years. With critics describing the topic as an “enormously grey area” (1) , where the functions of secretaries normally vary from one arbitrator to another (2) , some authors have therefore proposed for the establishment of a Uniform Standard in the regulation of tribunal secretaries (3) . The uncontested fact is that nowadays, and especially in large international arbitrations, an arbitral tribunal appoints a secretary to assist in the proceedings (4) .

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The relevance of this topic lies on the fact, as highlighted by this Federal Tribunal's decision, that it impinges on the role of the arbitral tribunal when determining the outcome of the dispute. While the role of secretaries is nowadays seen as essential in facilitating and ensuring the efficiency of the decision-making process, it is also widely agreed that there is no room for them in the decision-making itself. In that last scenario, it would be rightly argued that the tribunal had been improperly constituted and the award would then be ripe for annulment.

A number of arbitral *institutional rules and guidelines* contain provisions on the appointment, role and remuneration of arbitral secretaries. With regards to their appointment, most rules and guidelines subject the appointment of an arbitral secretary to the consent of the parties and to the guarantee of their independence and impartiality

Regarding their role, there is a consensus on the use of secretaries for administrative services and organizational tasks and on their ban from the decision-making process as well as from other essential duties of the arbitral tribunal. For other duties, there is a wide disparity: first, while some institutions explain in great length what is allowed or not, others are being very concise or silent; secondly, the scope of the permitted tasks varies from an institution to another. As a matter of illustration, the ICC and LCIA Rules do not provide any provisions regarding the secretary to the arbitral tribunal (5) , while the Swiss Rules of International Arbitration indicate that the tribunal, after consulting the parties, may appoint a secretary (6) – though without defining their role. A further difference can be found with the Hong Kong International Arbitration Centre (hereinafter: “HKIAC”) which has issued detailed Guidelines on the Use of a Secretary to the Arbitral Tribunal' (hereinafter: the “HKIAC Guidelines”) (7) .

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In an effort to codify best practices, *Young ICCA* published the Young ICCA Guide on Arbitral Secretaries in 2014, which emphasised as best practices, among others, the following: (i) an arbitral secretary should only be appointed with the knowledge and consent of the parties (8) ; (ii) the arbitral tribunal should notify the parties of its intention to appoint an arbitral secretary at its earliest convenience (9) ; (iii) the arbitrators cannot delegate any part of their personal mandate to an arbitral secretary (10) ; (iv) an arbitral secretary's role may legitimately go beyond purely administrative tasks (11) such as even drafting some parts of the award (12) .

It is acknowledged, among a *number of authors* and in practice, that arbitral secretaries perform tasks that go beyond the purely administrative and in fact support arbitral tribunals in the legal research and drafting of orders or parts of awards (13) . It is also unanimously agreed that under no circumstances secretaries are to assume the tribunal's functions of deciding the case. This is based on the premise that an arbitrator has been specifically chosen for his/ her personal skills. An arbitrator's mission is strictly personal and consequently he/she cannot delegate “*his/her duties to* [...] *participate in the decision-making*” (14) as well as “*other essential tasks* [...] *in particular organising the proceedings, assessing the parties' written submissions, attending the hearings, taking evidence and so forth*” (15) . There are limits to the role of the secretary and therefore in both reaching the decision as well as drafting the decision, the arbitrator must always maintain a control on the decision-making (16) .

The issue of the tribunal's secretary's role has recently gained particular notoriety in relation with the *Yukos Award*. In July 2014, an arbitral tribunal under the Permanent Court of Arbitration in the Hague awarded former majority shareholders in the now defunct Yukos Oil Company USD 50 billion in damages against Russia. In its attempt to get the Award set aside before the Dutch courts, Russia alleged that the arbitrators breached their personal mandate and allowed the assistant to the arbitral tribunal to become effectively the “fourth arbitrator”.

P 201 According to Russia, in its first challenge before the Dutch courts, the billing information submitted by the arbitral tribunal showed that this assistant had spent between 40% and 70% more time on the substantive phases of the arbitration than any of the three arbitrators (17) . In a further report submitted to the Dutch courts, Russia asserts, on the basis of analysis of the writing styles of the arbitrators and their assistant conducted by an expert in forensic linguistics, that it is 95% sure that the assistant wrote parts of the awards that include reasoning on substantive issues (18) . This would constitute according to Russia clear evidence of the tribunal's impermissible delegation to its assistant of its power to decide.

In The Specific Case

Swiss domestic arbitration law expressly provides that *an arbitral tribunal may appoint a secretary* who is then subject to the same degree of independence and impartiality as the arbitrators (Art. 365 CPC).

In the present case, the Federal Tribunal extended and applied by analogy the scope of this provision to international arbitration. An interesting mechanism that the Federal Tribunal may use again in the future in order to fill certain gaps of the PILS, as the CPC – being newer and more detailed than the PILS – expressly addresses certain issues which are not expressly covered in the PILS.

These principles are not new in Switzerland. The Intercantonal Arbitration Convention of 27 August 1969, which preceded the adoption of the PILS (1987) and of the CPC (2008) already contained a specific provision on secretaries (19) . The Federal Tribunal therefore simply applied, in this case, principles that are well established in Swiss arbitration law.

What is interesting in this decision is that the Federal Tribunal describes the tasks of legal secretaries in more detail than many of the above mentioned rules or guidelines do, e.g., by stating that assistance in the drafting of the award is not excluded, a step considered as "*highly debated and controversial*" (20) and that many rules, guidelines and authors are not ready to make, some authors considering that "*the act of writing is the ultimate safeguard of intellectual control*" (21) . Furthermore, the Federal Tribunal considers that it implies "*the attendance of secretaries to hearings and deliberations*", another controversial task.

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The Federal Tribunal seems to take a pragmatic approach, certainly based as well on its own practice, when it compares the legal secretaries to law clerks in domestic procedures (22) .

At the same time, the Federal Tribunal clearly underlines that *the decisional function is personal and cannot be delegated*. According to the Federal Tribunal, the Chairman or sole arbitrator cannot therefore delegate the "*intellectual control over the outcome of the dispute*", and the party-appointed arbitrator cannot delegate its contribution to the decisional process.

The clear statement of these principles is welcome. However, they remain quite abstract and their application in practice may pose delicate questions of delimitation and of evidence. And as authors mention: "*it would be naive to assume that an arbitral secretary will not have a degree of influence, however indirect, over the arbitrator and the arbitral tribunal*" (23) .

In the present case, the Federal Tribunal considered that it was not noticeable from the transcript or from other elements of the case that the secretary and the consultant had participated in the decision-making process. But how can one prove that the intellectual outcome of the dispute has not been influenced by the secretary? By the number of hours spent on the case? By the parts of the award written by the secretary? The decision of the Dutch courts on the above mentioned Yukos award may bring interesting development in this regard.

In the case at hand, the Federal Tribunal reached the conclusion that the role of the lawyers E and F did not infringe upon the adjudicating function of the arbitrator. Their role was to ensure that the arbitral procedural rules were correctly applied. The Federal Tribunal in its decision follows the view in the doctrine and institutional rules mentioned above that the use of secretaries is accepted as long as the decisional function remains in the hands of the arbitral tribunal appointed by the parties. The appointment of a legal assistant, lawyer E, and a legal secretary, lawyer F, constituted procedural steps permissible under the arbitration clause of the Contract.

The decision of the Federal Tribunal also shows the relevance of *transparency* and *consent*.

P 203 In the present case, the arbitrator disclosed the role of the secretary and of the consultant early in the proceedings, and the contractor did not object to it until the witness hearing. In this way, the contractor shall be deemed to have tacitly accepted the secretary and the consultant. This is the reason why the Federal Tribunal questioned the contractor's s good faith considering that it did not raise any objections from the moment it knew this information.

Regarding consent, the Federal Tribunal considered that in the event the parties have not decided on the procedure, as it was the case here in this *ad hoc* arbitration, the arbitral tribunal has the discretion to appoint a secretary even without the prior consent of the parties. The Federal Tribunal however reserved the situation where the parties, in the arbitration clause or later, agree to exclude the designation of a secretary. The Federal Tribunal did not make further developments on that point – which is controversial in legal writing – as such an agreement did not exist in this case. Commentators of this decision have therefore considered

that this particular question has not been addressed by the Federal Tribunal (24) .

The function of the consultant has been analysed by the Federal Tribunal, which assimilated it to the figure of an "Arbitrator Consultant" as proposed by Bernhard F. Meyer and Jonatan Baier (25) . The tasks of "Arbitrator Consultants" are not analogous to those of an expert and should not influence the decision-making itself. On the contrary, "Arbitrator Consultants" are "*purely auxiliary persons*" who have "*the necessary know-how to support the arbitral tribunal internally*" (26) . While Meyer and Baier frame the "Arbitrator Consultant" more as a special assistant providing technical or commercial expertise and thus helping to translate the arbitral tribunal's decision into the particular technical or commercial language of a contract or *vice versa*, E, as an expert on arbitral procedures, could also be to a certain extent assimilated to this figure. E was selected for his expertise in arbitral procedure and his role was solely limited in supporting the sole arbitrator in respecting mandatory rules of the arbitral procedure.

Another interesting point in this decision is the position of the sole arbitrator, in view of its role as architect of the project object of the dispute, contracted by the principal, which may raise questions regarding his impartiality and independence. Though there was no claim raised by the parties in this respect, the Federal Tribunal described the choice of the parties to designate the architect of the project as sole arbitrator as "*at least singular*" and has referred to "*the possible consequences or even risks*" related to this choice.

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Conclusion

This decision of the Federal Tribunal is welcome, as it clarifies the role that secretaries and consultants can have in arbitrations seated in Switzerland. This decision is in line with the self-proclaimed "liberal" attitude of the Federal Tribunal towards international arbitration (27) , as it leaves a great organisational autonomy to the arbitral tribunal.

The decision highlights one core principle: the decision-making must be made by the arbitrators and cannot be delegated. The application of this principle in a given case can certainly raise difficult questions of interpretation and evidence, but the decision of the Federal Tribunal has the merit of imposing a clear conceptual limit. We submit that the appropriate direction and supervision of the arbitral tribunal shall in the first place guarantee the respect of this principle (28) .

This decision also details the scope of tasks which may be delegated to secretaries or assistants in a liberal way, allowing a broader delegation than most institutional rules or guidelines. One should however not forget that this decision concerns an *ad hoc* arbitration and that rules agreed by the parties or institutional rules may impose a different framework.

Regarding the appointment of assistants, the Federal Tribunal considered that the sole arbitrator was free to appoint assistants without the parties' consent, as the parties did not establish procedural rules in this *ad hoc* arbitration. In this case, the sole arbitrator, when asked by a party, disclosed the fact that he was assisted by a secretary and a consultant. We consider that the consultation of the parties prior to the appointment of a secretary is not only in line with most institutional rules and guidelines, but also with the consensual nature of arbitration. One cannot lose of sight that arbitration is based on consent; and there can be no informed consent (even implicit) without transparent information on behalf of the arbitral tribunal.

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2) Partasides Constantine, The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration. *Arbitration International* 18(2), 2002, p. 149.
3) See POLKINGHORNE Michael and ROSENBERG Charles B., The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard. *Dispute Resolution International*, 8(2), October 2014, p. 107.
4) BORN Gary B., *International Commercial Arbitration*, 2nd ed., Kluwer law International, 2014, p. 1999; see also BERGER Bernhard and KELLERHALS Franz, *International and Domestic Arbitration in Switzerland*, 3rd ed., Stämpfli, Berne, 2014, p. 356.
5) However, the ICC published an ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries (2012) and the LCIA issued Notes for Arbitrators (2015) which contain a section 8 on secretaries providing at § 71: "*Tribunal secretaries should, therefore, confine their activities to such matters as organizing papers for the Arbitral Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, reserving hearing rooms, and sending correspondence on behalf of the Arbitral Tribunal*".

6) Swiss Rules of International Arbitration (2012), Art. 15.5.
7) Whereas it allows a tribunal secretary, unless the parties agree or the arbitral tribunal directs otherwise, in "*(a) conducting legal or similar research; collecting case law or published commentaries on legal issues defined by the arbitral tribunal;* [...] *(b) researching discrete questions relating to factual evidence and witness testimony; (c) preparing summaries from case law and publications as well as producing memoranda summarizing the parties' respective submissions and evidence;* [...] *(e) attending the arbitral tribunal's deliberations and taking notes; and (f) preparing drafts of non-substantive letters for the arbitral tribunal and non-substantive parts of the tribunal's orders, decisions and awards (such as procedural histories and chronologies of events)*". However, the arbitrator cannot request the tribunal secretary to "*draft any substantive parts of itsorders, decisions and awards*".
8) Young ICCA Guide, art. 1(2).
9) Young ICCA Guide, art. 1(3).
10) Young ICCA Guide, art. 1(4).
11) Young ICCA Guide, art. 3(1).
12) Young ICCA Guide, art. 3(2)(j).
13) BORN Gary B., *op. cit.*, p. 1669; KLEIMAN Elie, Arbitre *Intuitu Personae*, in: Lévy Laurent and DERAINS Yves, *Liber Amicorum en l'honneur de Serge Lazareff*, Pedone, 2011, p. 373.
14) BERGER Bernhard. Rights and Obligations of Arbitrators in the Deliberations. *ASA Bulletin*, 31(2), 2013, p. 255.
15) *Ibid*, p. 256.
16) PARTASIDES Constantine, *op. cit.*, p. 158.
17) MENZ James, The fourth arbitrator? Die Rolle des Administrative Secretary im Schiedsverfahren. *SchiedsVZ*, 13(5), Sept./Okt. 2015, pp. 211-212; GALAGAN Dmytro and ŽIVKOVIC Patricia, The Challenge of the Yukos Award: an Award Written by Someone Else – a Violation of the Tribunal's Mandate? Kluwer Arbitration Blog, 27 February 2015, http://bit.ly/1EEYuIz (accessed 27 October 2015).
18) ROSS Alison, Valasek wrote Yukos awards, says linguistic expert. *Global Arbitration Review*, 20 October 2015, http://bit.ly/1OVudeZ (accessed 27 October 2015).
19) Art.15(1) "*The arbitral tribunal, with the agreement of the parties, may designate a secretary*"; (2) "*Articles 18 to 20 (on challenge of arbitrators) shall be applicable to objections raised in respect of a secretary*".
20) BERGER Bernhard and KELLERHALS Franz, *op. cit.*, p. 357.
21) PARTASIDES Constantine, *op. cit.*, p. 158.
22) The Federal Tribunal's Statute actually provides, at Art. 24, that law clerks ("greffiers") to the Federal Tribunal are to draft its judgments. In fact it is one of the law clerks" "essential tasks", see Wurzburger Alain. *Commentaire de la LTF*, CORBOZ, WURZBURGER, FERRARI, GIRARDIN (eds.), Berne, 2009, N 21 ad. Art. 24. Also, in CAS procedure, the participation of the secretary or "ad hoc clerk" in the drafting process is a well-established practice, see KAUFMANN-KOHLER Gabrielle and RIGOZZI Antonio, *International Arbitration: Law and Practice in Switzerland*, Oxford University Press, 2015, pp. 404-405.
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24) FEIT Michael and TERRAPON CHASSOT Chloé, The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Abitrator Consultants under the Swiss lex arbitri: Case Note on DFC 4A_709/2014 dated 21 May 2015. *ASA Bulletin*, 33(4), 2015, pp. 905-906.
25) See MEYER Bernhard F. and BAIER Jonatan, Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations. *ASA Bulletin*, 33(1), 2015, p. 37.
26) MEYER Bernhard F. and BAIER Jonatan, *op. cit.*, pp. 40-41.
27) Decision of the Federal Tribunal 129 III 727, at 5.3.1.
28) "*In order to minimize the risk of diluting the arbitrators' personal mandate, however, tribunals must closely instruct and supervise the arbitral secretary. Ultimately, it should be left to the discretion of the arbitral tribunal to determine what duties and responsibilities can appropriately be entrusted to the arbitral secretary, taking into account the circumstances of the case and the arbitral secretary's level of experience*" (Young ICCA Guide, Commentary ad Art. 3(1), p. 11).

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