Be Nice to the Kid in the Corner: Brussels Cour de Cassation provides Charter for Overworked and/or[1] lazy Arbitrators

Written by Taner Dedezade

In a recent and unique case, the chair of an ICC Arbitral Tribunal admitted that his Administrative Secretary drafted lists of questions for him to ask the technical experts; and also drafted the decision-making parts of the award.

The case has been examined by the Belgian courts, where it was argued that such conduct constituted an unlawful delegation of authority by the arbitrator.

- On 17 June 2021[2], the Court of First Instance of Brussels held that in ICC Arbitration an Administrative Secretary is permitted to draft decision-making parts of an award as long as the Arbitral Tribunal personally reviews the file and validates or corrects the said draft in light of its review of the file. The court's decision turned on its interpretation of the words 'and/or' in paragraph 187 of the January 2019 ICC Note.
- On 24 April 20233, the Cour de Cassation upheld the first instance decision noting that the prohibition from the Arbitral Tribunal to delegate its jurisdictional function does not prevent the Administrative Secretary from preparing notes and memoranda which form part of the award as long as the tribunal carries out a personal examination of the file and reviews, corrects and validates. In essence, therefore, the Cour de Cassation upholds the lower court's interpretation of paragraph 187 of the January 2019 ICC Note. In addition, the Cour de Cassation ruled that provisions of Part 6 of the Belgian judicial code (particularly Article 11, paragraph 1, which provides that judges cannot delegate their jurisdiction) do not apply to arbitration proceedings.

Taner Dedezade

Partner

+44 (0)20 3755 5731

Taner.Dedezade@howardkennedy.com

Introduction

International construction and engineering projects often have voluminous documentation, the requirement for analysis of delay (often requiring expert evidence in delay and quantum issues), and the requirement to analyse highly complex contractual and technical issues. In FIDIC Contracts, there is a multi-tiered dispute resolution mechanism which is designed to ensure Parties can resolve their disputes without recourse to arbitration. In the unfortunate event that this is not possible, it is widely accepted that the last tier of dispute resolution should not be the court system but international arbitration. FIDIC opts for ICC arbitration and due to the complex nature

[1] In *Raine v. Drasin* 621 S.W.2d 895 (1981), a dissenting Justice of the Kentucky Supreme Court discouraged the use of *"and/or"* as *"the much condemned conjunctive-disjunctive crutch of sloppy thinkers"*.

[2] French-speaking Court of First Instance of Brussels, Civil Section – 202 0/2745/A

[3] *Cour de Cassation case number: C.21.0548.F/6*

of these projects, unless the Parties agree otherwise, there will usually be 3 arbitrators.

Selection of appropriate arbitrators, therefore, is fundamental to the success of effective dispute resolution[4]. The lower Belgian court acknowledged this and described one of the *"cardinal principles of arbitration" as*:

> "the intuitu personae character of the appointment of an arbitrator, chosen for his personal, intellectual and human qualities. The appointed arbitrators therefore undertake to personally decide the dispute submitted to them by the parties, thus excluding any delegation."

Where an Administrative Secretary enters the frame, there is a sliding scale of what amounts to delegation. At one end, the role of the Administrative Secretary is purely administrative; here there are no concerns about delegation. On the other end, the Administrative Secretary undertakes more substantive legal and analytical tasks, perhaps the drafting of the first draft of the decision-making parts of an award or the drafting of questions to experts. Where should the line be drawn? When does the role of Administrative Secretary shift to being more akin to a 'fourth arbitrator' (which amounts to an unlawful delegation)?

Do parties want the decision to be drafted by the experienced Tribunal that they or the ICC have appointed, or do they want it drafted by a junior lawyer from the law firm of the Chair and only reviewed by the Tribunal? How important is the first draft, particularly if it is a lengthy first draft? The longer the draft, and the lazier the Arbitrator, the greater the risk that the draft becomes the default position. Is that what the Parties signed up for?

In recent years, in the *Yukos* and *Gazprom* cases, the issue of the 'fourth arbitrator' has become controversial, particularly as the awards have involved significant sums of money, in the billions of USD. In these cases, the Parties did not have clear evidence as to whether, or to what extent, the Administrative Secretary overstepped its role and strayed into the ambit of the Arbitrator's role. In the *Yukos* awards, for example, linguistic experts were deployed to give opinions on the matter. In the Belgian court case, the evidence was admitted by the Arbitral Tribunal, but still the Belgian courts were not prepared to annul the award. Whilst the Belgian court decision strictly only represents the position in Belgium, will it be a charter for lazy and/or overworked arbitrators to follow in the rest of the world?

Is it time for the ICC to make it clearer what it expects from its arbitrators? Will users delete ICC from their FIDIC contracts if other institutions insist on tribunals doing the key decision-making drafting themselves? In the LCIA Rules, the Administrative Secretary is referred to as the tribunal secretary and is only approved once the parties have agreed the tasks that may be carried out by that tribunal secretary.

Finding of the Belgian court case

The Court of First Instance found that:

> "Nevertheless, it is well known that in practice the Arbitral Tribunal increasingly relies on the assistance of an administrative secretary whose tasks may go beyond the purely administrative and organisational framework…
> it appears from [Chair of the Arbitral Tribunal] email of 20 March 2020 that the Administrative Secretary did draft her list of questions to be asked of the experts at the hearing as well as a portion of Section VI [the decision parts] of the Award, including the Arbitral Tribunal's reasons for decision."

The Belgian courts then concluded that in ICC Arbitration there was no unlawful delegation on the part of the Arbitrator:

- if the Administrative Secretary drafted all or part of an award; so long as the Arbitral Tribunal personally reviews the file and validates or corrects the said draft in light of its review of the file.

[4] In ICC arbitration, the Parties will each nominate their own arbitrator for confirmation by the ICC Court and the President will be appointed by the ICC Court unless the parties can agree another procedure.

- If the Administrative Secretary drafted lists of questions for the expert technical witnesses.

What do the commentators say?

The use of Tribunal Secretaries varies around the world. As noted by Polkinghorne and Rosenberg[5]:

> "No uniform standard exists for the role of a tribunal secretary. As discussed below, some arbitration institutions define the role of the secretary, while others provide no guidance at all"

The ICC decided to give some guidance and produced a Note that deals with the role of the Administrative Secretary. The first note was issued in 1995: *"Note concerning the appointment of Administrative Secretaries by Arbitral Tribunals"*[6]. That Note specified that:

> "The duties of the administrative secretary must be strictly limited to **administrative tasks**. The choice of the person is important. Such person must not influence in any manner whatsoever the decision of the arbitral tribunal.
>
> In particular, the administrative secretary must not assume the functions of an arbitrator, notably by becoming involved in the decision-making process of the tribunal or expressing opinions or conclusions with respect to the issues in dispute."

Mr Partasides sets out in his 2002 article that in his view:

> "…the ICC's position has been absolute. Adamant that a secretary must not assume the decision-making function, it outlaws any activity other than the purely administrative. In doing so, the ICC Note takes a far more extreme position than that of its nearest equivalent"

The Handbook of ICC Arbitration: Commentary, Precedents, Materials 4th Ed. provides:

> "[32-12] The secretary may also assist in the drafting of certain parts of the Award, provided it leaves him or her with no discretion in the assessment of facts or analysis of legal argument. As stated by a learned author "the judgment making really takes place only at the time and through the drafting of the decision – form and substance being not separable".

James Menz and Anya George state:[7]

> "By contrast, the new ICC Note [2012 Note] places strong emphasis on the "administrative" aspect of the secretary's duties and discourages any more substantive involvement: in other words, it envisages an arbitral secretary in the Miss Moneypenny sense of the word (albeit with some legal skills). **The Note also stresses that it is the duty of the arbitral tribunal to personally draft "any decision".**(emphasis added)

[5] "The Role of the Tribunal Secretary in International Arbitration" by Michael Polkinghorne and Charles B Rosenberg, Dispute Resolution International Vol 8 No.2 October 2014

[6] This note can be found at PDF page 16 (Page 162) of C. Partasides (2002) "The Fourth Arbitrator?" Arbitration International Volume 18 Number 2 147, LCIA

[7] J. Menz and A. George (2013) 'Miss Moneypenny vs The Fourth Musketeer: The Role of Arbitral Secretaries', Kluwer Arbitration Blog.

Commentary on whether an Administrative Secretary should be able to draft an award

The lower Belgian Court referred to two articles written by Mr Partasides QC. The first article was written in 2002, in which he said:

> "…Even a careful review by an arbitrator of a secretary's first draft does not entirely remove the scope given to the secretary to make judgements as to what to emphasise and what to omit, judgements that the arbitrator reviewing the draft may not even be able to identify never mind control. **The act of writing is the ultimate safeguard of intellectual control**. An arbitrator should be reluctant to relinquish it."

The second article was written ten years later in 2012[8] where he stated:

> "For some people, the act of drafting is the ultimate safeguard of intellectual control. For others, the same level of control can be achieved without producing the first draft. Ultimately, this must be a question for the arbitrator's judgment. If the arbitrator gets such a significant decision wrong, then the problem is not with the institution of secretaryship but with the choice of arbitrator."

The relevant question in issue for the Belgian courts

As a result of the admissions by the Chair, the Respondent challenged the award in the Belgian court - the key ground of appeal being that there was an irregularity of the arbitration procedure, and more specifically the delegation of decision-making power to the Administrative Secretary. The relevant question that the Belgian Court chose to decide was not whether it is generally appropriate for an Arbitral Tribunal to delegate to its Administrative Secretary the task of drafting the award/lists of questions for witnesses, but whether the ICC Rules permit such approach in its Note.

Relevant extracts from the January 2019 ICC Note

- Paragraph 184 states that the duties entrusted to the Administrative Secretary shall "in no circumstances release the arbitral tribunal from its duty to personally review the file";
- paragraph 185 restricts the Administrative Secretary to performing "organisational and administrative tasks" such as "preparing for the arbitral tribunal's review drafts of procedural orders as well as factual portions of an award, such as the summary of the proceedings, the chronology of facts, and the summary of the parties' positions"; and
- paragraph 187 provides: "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."

Lower Belgian Court's interpretation of the ICC Note

The central reasoning of the lower Belgian Court (which the Cour de Cassation endorsed) turned on its interpretation of the words "and/or" in paragraph 187 of the ICC Note:

[8] "Secretaries to the Arbitral tribunal », in Player's interaction in International Arbitration, ICC Institute Dossiers, 2012, pp.90-91

> "Nevertheless, and contrary to what [the Respondents] maintain, by using the words "and/or", the above-mentioned Article 187 implicitly but certainly authorises the Administrative Secretary to draft all or part of an award, with the onus on the Arbitral Tribunal to personally review the file and validate or correct the said draft in the light of its review of the file.
> In other words, the ICC would not have used these alternative terms "and/or" if it had wanted to exclude the drafting of all or part of the award by the Administrative Secretary…
> Therefore, by submitting their dispute to the ICC International Court of Arbitration, the parties have subscribed to the type of intervention of administrative secretaries as provided by ICC.
> In any event, the mere fact of entrusting the administrative secretary with the drafting of all or part of the award or of a list of questions to the experts is not in itself sufficient to demonstrate a delegation of the arbitrators' decision-making power...
> Consequently, there is nothing to show that [Administrative Secretary] exceeded the powers recognised to her in the ICC Memorandum or that she was delegated decision-making powers by [Chair of Arbitral Tribunal]."

Comment on the lower Belgian Court's interpretation of paragraph 187 ICC Note

The opening words of paragraph 187 of the ICC Note relate to an Arbitral Tribunal requesting its Administrative Secretary to prepare *"written notes or memoranda".* It is not about an Administrative Secretary being asked by the Arbitral Tribunal to draft an entire award including decision-making parts of the award.

If an Administrative Secretary prepares *"written notes or memoranda",* then it is not controversial and a common-sense interpretation of paragraph 187 of the ICC Note is that the Arbitral Tribunal should not blindly accept what the Administrative Secretary has drafted in those written notes or memoranda. To do so would plainly be an unlawful delegation of its role. Paragraph 187 of the ICC Note therefore stipulates that the Arbitral Tribunal must personally review the file (i.e. not just rely on the Administrative Secretary's notes) and/or draft any decision itself (i.e. not just rely on the Administrative Secretary's notes).

So what does "and/or" mean?

> "X and/or Y" means X or Y or both", either or both of two stated propositions[9].

The Belgian Court opted to interpret "and/or" as being a disjunctive only, namely that there is a choice between reviewing the file or drafting the award.

The other possibility is that "and/or" means "both" – the tribunal must both review the award and draft the award.

If the use of the conjunction "and/or" gives the Arbitral tribunal a choice of deciding between reviewing the file or drafting the decision as a result of the Secretary drafting *"written notes or memoranda"* , then that would potentially mean that should the

[9] See the following articles by Ira Robbins and Adams & Kaye:

- "And/or" and the Proper use of legal language by Ira Robbins, 2018, MARYLAND LAW REVIEW [VOL. 77:311 *"And/or, however, is not ambiguous at all. It has a definite, agreed-upon meaning: when used properly, the construct signifies "A or B or both." In most areas of law, there is simply no compelling reason to avoid using and/or. The term is clear and concise. It derives criticism mainly from instances in which people use it incorrectly. Pleadings, contracts, statutes, and patent claims all allow for a cogent use of and/or."*
- "Revisiting the ambiguity of "and" and "or" in legal drafting" by KENNETH A. ADAMS† & ALAN S. KAYE, St John's Law Review Vol 80: 1167 states that "and/or" has a specific meaning "X and/or Y means X or Y or both".

Tribunal opt for reviewing the file then it does not need to draft the decision. In such circumstances, that would leave the Administrative Secretary with permission to draft the decision. This seems absurd to the author.

If that is what the ICC intended, then the author suggests that the wording in paragraph 184 would have been widened to include drafting the entire award rather than being restricted to: "*preparing for the arbitral tribunal's review drafts of procedural orders as well as* ***factual portions of an award, such as the summary of the proceedings, the chronology of facts, and the summary of the parties' positions****".(emphasis added)*

In the author's opinion, the likely intention of the drafters of the clause was that "and/or" should mean "both". An Arbitral Tribunal when receiving "written notes or memoranda" from the Administrative Secretary should not only review those notes (and the file) but be careful to draft the decision parts of the decision itself. To find otherwise would lead to what the author considers to be manifestly absurd, especially considering paragraph 184 sets out what role the Administrative Secretary is expected to take.

The 2021 ICC Note[10] still utilises the words 'and/or'. In the author's view, following the Belgian Court's decision, the ICC should clarify – beyond any remaining doubt – that its tribunals must draft decisions. Otherwise, users may choose other Rules or reject the use of Administrative Secretaries.

Conclusion

The author considers that the lower Belgian court (which the Cour de Cassation upheld) misinterpreted the ICC Note and that in ICC arbitration it was never intended that an Administrative Secretary would be drafting the first draft of the Tribunal's decisions and reasons. The ICC should act promptly to make clear that Tribunals may not delegate this key drafting function.

The author of this article acted for the Respondents in the arbitration proceedings.

Tell us your views

Please get in touch with the author taner.dedezade@howardkennedy.com with your thoughts:

1. Is it OK for an Administrative Secretary in ICC arbitration to draft decision-making parts of an award, as long as the Arbitral Tribunal reviews the award?
2. Does that stray outside the "organisational and administrative" boundaries set by the ICC in paragraph 185 of its January 2019 ICC Note?
3. Did the Belgian Court properly interpret "and/or" in paragraph 187 of the ICC Note?
4. Does delegation of the decision-making parts of an award necessarily amount to a delegation of an Arbitral Tribunal's decision-making powers?

[10] Paragraph 223, the 2021 ICC Note states: " Under no circumstances may the arbitral tribunal delegate its decision-making functions to an administrative secretary or rely on an administrative secretary to perform on its behalf any of the essential duties of an arbitrator. Likewise, the tasks entrusted to an administrative secretary, such as the preparation of written notes or memoranda, will not release the arbitral tribunal from its duty to personally review the file and/or draft itself any arbitral tribunal's decision."