

# Belgian Court settles long-standing controversy: arbitral secretaries may draft awards (Brussels Court of First Instance)

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In *Emek İnşaat Şti and WTE Group v European Commission*, the Brussels Court of First Instance confirmed explicitly that arbitral secretaries may draft arbitral awards and that such a task is perfectly in line with the ICC Court's practice, provided that arbitrators do not delegate their decision-making powers.

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### Speedread

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The Brussels Court of First Instance has accepted that, as a matter of principle, arbitral secretaries are allowed to draft portions of awards or entire arbitral awards provided that arbitrators do not delegate their decision-making powers. The court also considered that the drafting of awards by tribunal secretaries is in line with the ICC's definition of the arbitral secretary's role in ICC arbitration proceedings.

In ICC arbitration proceedings, an arbitral secretary had attended the arbitral tribunal's deliberations, prepared draft awards, including the decision on the merits, and had prepared the list of questions that the tribunal's president put to the expert witness.

In an application to set aside the award at the Brussels Court of First Instance, the court found that all of these tasks were perfectly permissible provided that the arbitrators had not delegated decision-making powers to the tribunal's secretary. Mere reliance on the secretary for award drafting did not in itself indicate an illegitimate delegation of such powers. Whether such delegation occurs depends on the arbitrators' personal understanding and execution of their mandate, and on their integrity and professional conscience. It is for the arbitrators to organise their work in such a way so as not to delegate their decision-making. The parties choose arbitrators taking into account, among other things, an arbitrator's reputation in relation to organising their work.

The court also interpreted the 2019 version of the ICC Note on the Conduct of the Arbitration under the ICC Rules of Arbitration (ICC Note). The court's interpretation of the ICC Note was that arbitral

secretaries are "implicitly but surely" allowed to draft parts of or entire awards on the condition that arbitrators do not delegate their decision-making powers.

This decision is important as it is one of the very few cases that explicitly pave the way for broad acceptance of arbitral secretaries' more substantive involvement in the award drafting process.

The decision also offers a unique detailed commentary on the ICC Note. Therefore, it will likely influence not only the parties to ICC arbitration proceedings, but it may also influence the ICC's and others' (for example, Young ICCA's), future guidance on arbitral secretaries' roles. (*Emek İnşaat Şti and WTE Group v European Commission*) (16 June 2021).)

## Background

One of the cardinal principles of arbitration is that arbitrators are selected on a personal basis (*intuitu personae*) and they may not delegate their decision-making powers.

In Belgium, if an arbitrator does delegate their powers, the award they render may be set aside under article 1717 § 3 (a) (v) of the Belgian Judicial Code (BJC) (which is based on article 34(2)(a)(iv) of the UNCITRAL Model Law) or exequatur of the award may be refused on the ground of article V(1)(d) of the New York Convention. Both provisions require the composition of the arbitral tribunal or the arbitral proceedings to be in accordance with the parties' agreement.

Moreover, it is arguable that the arbitral delegation of decision-making powers may constitute an infringement of article 34(2)(a)(iii) of the UNCITRAL Model Law and of article V(1)(c) of the New York Convention, under which non-compliance with the personal nature of the arbitrators' mandate may, in very specific circumstances, constitute a ground for setting aside or refusal of exequatur of the award.

## Facts

In an ICC arbitration, the arbitral tribunal, with the parties' consent, relied on an arbitral secretary's assistance. Following a partial defeat, the losing party asked each arbitrator to clarify the secretary's role in the preparation of the arbitral award and to inform them whether the arbitral secretary had prepared a list of all, or some, of the questions posed by the tribunal's president to expert witnesses.

The president confirmed that the arbitral secretary had prepared the draft list of questions that he had then reviewed. He also confirmed that the secretary had attended but not participated in the discussions between the arbitrators. The president stated that he had been assisted in the drafting of the award but there was not a single sentence and not a single footnote in the award that he had not reviewed, verified or corrected so as to align it with the result of the tribunal's deliberations. The co-arbitrators added that all arbitrators had a thorough knowledge of the case file and that all arbitrators had worked collectively and intensely on the draft award.

In subsequent correspondence, the losing party sought to obtain additional clarifications and documents both from the arbitrators and from the ICC. These documents included detailed timesheets, draft awards prepared by the secretary, lists of the questions to the expert (as prepared by the secretary) and information on whether the arbitral tribunal received the ICC's Secretariat's assistance regarding the arbitral secretary's role. According to the losing party, none of these documents or information were confidential and all of them ought to have been shared to provide

transparency about the secretary's role. The ICC Secretariat and the arbitrators disagreed, whereas the other party objected to what it described as a fishing expedition.

The president of the tribunal then resigned having considered that he was not used to working in an atmosphere of accusations and mistrust and that he was not impartial anymore.

Subsequently, the losing party applied to the Brussels Court of First Instance to set aside the award. It argued that there was an irregularity in the arbitral procedure due to the illegitimate delegation of the arbitral decision-making powers to the arbitral secretary and that the arbitral tribunal's president was impartial.

## Decision

The Brussels court held that, as a matter of principle, arbitral secretaries are allowed to draft portions of awards or entire arbitral awards on the condition that arbitrators do not delegate their decision-making powers. The court also concluded that the drafting of an award by an arbitral secretary is consistent with the arbitral secretary's role as envisaged in the specific context of ICC arbitration proceedings.

According to the court, arbitral decision-making powers are not delegated by mere reliance on a secretary's drafting the award. Whether such powers are delegated depends on the arbitrators' personal understanding and execution of their mandate, and on their integrity and professional conscience. It is the arbitrators' personal choice and personal responsibility to correctly fulfil their mandate. Indeed, one of the cardinal principles of arbitration is that arbitrators are selected on a personal basis (*intuitu personae*), taking into account all of their personal, intellectual and human qualities. These qualities include how the arbitrator organises their work, that is whether they perform all of their actions or confer part of their task to an arbitral secretary. The parties choose the arbitrators considering all of the arbitrator's qualities.

Other elements of the case, according to the court, were an additional safeguard that the arbitrators did not delegate their decision-making powers. The arbitrators chose a young lawyer as a secretary whose limited experience would have had none or limited influence on the decision-making process. Moreover, the arbitrators made sure that the secretary's appointment was accepted by the parties. The parties had also accepted the application of the 2019 ICC Note on the Conduct of the Arbitration under the ICC Rules of Arbitration (ICC Note).

As to the role of arbitral secretaries in ICC proceedings, in the Brussels court's view, they are "implicitly but surely" authorised to draft parts of awards or entire arbitral awards provided that the arbitrators do not delegate their decision-making powers. The fact that arbitral tribunals may not be released from their "duty personally to review the file and/or to draft any decision" when they request a secretary to prepare written notes or memoranda (paragraph 187 of the ICC Note), implies that secretaries are authorised to draft arbitral awards. Moreover, according to the court, the ICC itself recognises that arbitral secretaries may draft awards because it organises training on drafting enforceable awards for the attention of arbitral secretaries.

The court also decided that the president was not impartial before the rendering of the award but only became so after and so his impartiality did not constitute a ground for setting aside the award. The court refused to accept the other grounds invoked by the losing party.

## Comment

The Brussels court is one of the first courts to address, in such explicit language, one of the most controversial aspects of the arbitral secretaries' role, namely whether arbitral secretaries are permitted to draft arbitral awards under the arbitrators' supervision.

The arbitration community is divided about this issue. To some, drafting the award is an inherent aspect of the decision-making process, one which cannot be delegated by the arbitrators, and arbitral secretaries' tasks should be limited primarily to administrative ones. Others advocate that draft awards may be prepared by arbitral secretaries as long as it is the arbitrators who decide the case and carefully review and correct the draft. In their view, award drafting by secretaries increases the overall quality of the award.

To date, only the Hague Court of Appeal in its judgment of 18 February 2020 in the Yukos case offered similarly explicit views on the matter. That court also considered that, as long as the arbitrators decide the case themselves, without the influence of third parties, it remains within their discretion as to whether and to what extent they rely on arbitral secretaries in the preparation of draft awards (see *Hulley and others v Russian Federation* (ECLI:NL:GHDHA:2020:234), discussed in [Legal update, Court of Appeal in The Hague overturns District Court decision and revives Yukos awards](#)) The Hague court's decision is currently subject to review by the Dutch Supreme Court.

Other state courts have only expressed incomplete views on this issue. In 2015, the Swiss Supreme Court ruled that arbitral secretaries could provide "certain assistance" to tribunals in the drafting of awards (see Decision 4A\_709/2014, discussed in [Legal update, Swiss Supreme Court outlines permissible use of administrative secretaries and "consultants" to arbitral tribunals](#)). This ruling has been broadly construed as permitting secretaries to draft awards, including sections concerning the merits of the case. Meanwhile, the English High Court showed more restraint when it ruled that there was nothing wrong with arbitrators asking the opinions of others as long as they made their own mind up by exercising independent judgment. The court stated that the best way to ensure that arbitral secretaries do not engage in decision-making is for them not to perform any task that involves "expressing a view on the substantive merits of an application or issue" (see *P v Q* [2017] EWHC 194 (Comm), discussed in [Legal update, Involvement of tribunal secretary did not give rise to grounds to remove tribunal \(English Commercial Court\)](#)).

Therefore, the importance of the Brussels' court decision cannot be understated. The reality is, as prominent authors emphasise, that secretaries' tasks very often exceed purely administrative ones and that secretaries often prepare first draft awards. This latter task, in particular, continues to be a taboo as many fear that arbitral secretaries might become fourth arbitrators. Therefore, arbitrators are often reluctant to offer full transparency about the secretaries' role. In openly confirming that secretaries are allowed to prepare draft awards, even as regards the sections on the merits, the Brussels court is one of the first to break the taboo and to enable the arbitrators to admit the true secretaries' role without risk of ostracism. As such, this court opens the door to greater transparency regarding the role of arbitral secretaries' and may contribute to changing the arbitration community's perception of this role.

The Brussels court also offered an interesting interpretation of the ICC Note. The ICC has so far taken a rather reserved attitude toward award drafting by arbitral secretaries. Indeed, the ICC tends to raise concerns when secretaries seem to be very involved in award drafting and it seeks confirmation that the arbitrators themselves are the ones actually drafting and revising the award. However, according to the Brussels court, the ICC practice certainly allows arbitral secretaries to prepare draft awards under the arbitrators' supervision. Therefore, the Brussels court's decision provides a unique explicit commentary on the ICC Note of Conduct. This decision will likely influence not only the parties to ICC arbitration proceedings, but may also influence the ICC's and others', such as Young ICCA's, future guidance on best practices regarding arbitral secretaries' roles.

## Case

[Emek İnşaat Şti and WTE Group v European Commission \(16 June 2021\)](#).

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