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ACADEMIC ARTICLES

# Secretaries to Arbitral Tribunals: Judicial Assistants Rooted in Party Autonomy

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International arbitration is deeply rooted in party autonomy. Parties are free to decide whether they want to resolve their disputes by arbitration at all; how the arbitral proceedings should be conducted; and who their adjudicators should be. While parties to state court litigation may be able to designate a competent court (by way of a choice of court agreement) this freedom usually does not extend to the identity of the individuals who decide their cases. By contrast, it is one of the hallmarks of international arbitration that parties may determine the identity of their arbitrators. It is the proposition of this article that the exercise of this right results in an *intuitu personae*-choice of arbitrators and that this choice defines the degree to which international arbitrators may resort to assistance. In international arbitration, such assistance is usually referred to as the secretary of the arbitral tribunal. The article analyzes this position of a tribunal secretary, compares it to judicial assistants and suggests that the appropriate use of tribunal secretaries is defined by the parties' express agreements and implicit expectations regarding the arbitral process.

**Keywords:** International arbitration; arbitrator's mandate; decision-making; tribunal secretary

## 1. Introduction

This special issue of the International Journal for Court Administration is devoted to judicial assistants. Throughout the issue, it has become clear that judicial assistants support judges in many courts around the globe, be they domestic or international, first instance or supreme courts. Similarly, it has become clear that these assistants take over a variety of tasks that go well beyond purely administrative support. In fact, some of the assistants at the world's top courts are directly involved in judicial decision-making – sometimes selecting which cases the judges will eventually decide and sometimes being afforded 'advisory votes'.[1]

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[1] See also Federal Statute Organizing the Swiss Federal Tribunal (Bundesgesetz über das Bundesgericht, BGG), Art 24(1) ('The court clerks participate in the instruction of the cases and in the decision-making process. They have an advisory vote.').

Such tasks raise the question which role judicial assistants may legitimately have without unduly encroaching upon judicial decision-making. Identical questions have been raised in the context of the support arbitral tribunals enlist to conduct international arbitrations – and parties have attempted to attack arbitrators and arbitral awards in challenge proceedings for the tribunals' allegedly impermissible use of assistance.[2]

International arbitration is not dissimilar to the courts and tribunals analyzed in this journal. It is a quasi-judicial dispute resolution method rooted in party autonomy. The awards rendered by arbitral tribunals are enforceable around the world and can only be attacked based on limited grounds related to due process and public policy.[3] The arbitrators rendering these awards thus carry profound responsibilities. Parties and appointing authorities, such as arbitral institutions, carefully select individuals to act as arbitrators based on the candidate's experience, knowledge, skills and reputation.

This choice based on personal traits implies that international arbitrators are expected to discharge their duties personally. However, the personal nature of the arbitrator's mandate is not absolute and does not require international arbitrators to discharge their duties without any recourse to assistants. Such arbitral assistants are usually referred to as secretaries of arbitral tribunals ('tribunal secretaries'). **Section 2** introduces their role and compares tribunal secretaries to judicial assistants in the state court context. It is suggested that there are at least two fundamental distinctions between tribunal secretaries and judicial assistants which prevents simply equating tribunal secretaries with judicial assistants: the structural need for assistance and the legal bases upon which they are appointed.

Rather, an independent approach as to the desired role of tribunal secretaries in international arbitrations must be developed. This is what **Section 3** is concerned with. It is suggested that the role of assistance is intrinsically connected to the role of the arbitrator and how he or she discharges his or her mandate. What tasks a tribunal secretary may carry out depends on what tasks an arbitrator may delegate or receive support in. This makes it necessary to analyze how personal the arbitrator's role actually is. This question is answered from the perspective of the juridical and contractual nature of the arbitrator's mandate.

From the results of this analysis, **Section 4** develops a proposal of how secretaries should be employed in arbitral proceedings. It is the proposition of this article that because international arbitration is a dispute resolution method rooted in party autonomy, the support of arbitral tribunals by tribunal secretaries should be guided by transparency, consent and trust.

## 2. Tribunal secretaries and judicial assistants: similarities and differences

The first similarity between judicial assistants and tribunal secretaries is their background. Just like judicial assistants, tribunal secretaries usually have a legal education and support arbitrators in their adjudicative work.[4] Often, arbitrators are practicing lawyers who appoint

[2] See, e.g., Hague Court of Appeal, *Judgment of 18 February 2020* (*Yukos*), Case No. 200.197.079/01; *P v Q* [2017] EWHC 194 (Comm); Swiss Federal Tribunal, *Judgment of 21 May 2015*, (2015) 33 ASA Bulletin 879; Constantine Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 Arbitration International 147; Pierre Tercier, 'The Role of the Secretary to the Arbitral Tribunal' in Lawrence W Newman and Richard D Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (3rd edn, Juris 2014); Benjamin Hughes, 'The Problem of Undisclosed Assistance to Arbitral Tribunals' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Kluwer 2017). For an analysis of the grounds for challenge of arbitrators and their awards based on the misuse of tribunal secretaries, see J Ole Jensen, *Tribunal Secretaries in International Arbitration* (Oxford University Press 2019) chs 7 and 8.

[3] See 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V; United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, Art. 34.

[4] CCJE Opinion No. 22 (2019) on The Role of Judicial Assistants, section 4; Jensen (n 2) paras 4.04–4.06; J Ole Jensen, 'Aligning Arbitrator Assistance with the Parties' Legitimate Expectations: Proposal of a "Traffic Light Scale of Permissible Tribunal Secretary Tasks"' [2020] ASA Bulletin 375, 379.

their colleagues as tribunal secretary (*e.g.* law firm partners appointing their associates). Similarly, law professors who sit as arbitrators may appoint their research assistants or PhD students. In the context of investor-state arbitration, the administering institutions usually appoint a member of their secretariats as tribunal secretary, while arbitrators may appoint their personal assistants in addition.

A second similarity is the role fulfilled by judicial assistants and tribunal secretaries. Tribunal secretaries support international arbitrators in their administrative duties (*e.g.* by providing logistical support and keeping the case file in order, tasks which would otherwise be conducted by court registries) and with procedural case management (*e.g.* by assisting in rendering procedural decisions and ensuring compliance with them). Yet, it remains a highly contested question which precise role a tribunal secretary may have when it comes to attending the arbitral tribunal's deliberations, rendering the tribunal's decision, and drafting the arbitral award – tasks in which judicial assistants are frequently involved.[5]

These similarities have led many to readily compare tribunal secretaries to judicial assistants.[6] Indeed, state courts in Switzerland and England have made that comparison when ruling on the permissible use of tribunal secretaries in arbitration.[7] The idea is that since recourse to legal assistants is permissible in virtually all other systems of dispute resolution, there is no reason why international arbitration should be treated differently. What is a legitimate form of the division of labor in the highest domestic and international courts must surely be suitable for the arbitral process.[8] This would suggest that the rules on the appropriate role of judicial assistants may simply be applied to tribunal secretaries by analogy. Yet, there at least two important distinctions between judicial assistants and tribunal secretaries which prohibit such an analogous treatment for lack of sufficient comparability.

### *2.1. Structural necessity for assistance*

First, the structural necessity for judicial assistants and the reason why their role has been created does, by its nature, not exist in international arbitration. The existences of judicial assistants dates back to the realization that the relevant judicial decision-makers were overburdened by their caseloads.[9] For a jurisdiction or international organization with budgetary

[5] For an in-depth discussion of the secretary's role in the discharge of the arbitrator's mandate and the different views regarding the propriety of a secretary's tasks, see Jensen (n 2) paras 5.136–5.284.

[6] See, *e.g.*, Jean-François Poudret and Sebastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007) para 594; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 4.195; Tercier (n 2) 538–39; Simon Maynard, 'Laying the Fourth Arbitrator to Rest: Re-Evaluating the Regulation of Arbitral Secretaries' (2018) 34 Arbitration International 173, 181.

[7] *P v Q* [2017] EWHC 194 (Comm), para 67 ('A judge may be assisted by the views of a judicial assistant or law clerk, but that does not prevent him or her from reaching an independent judgment in accordance with the judicial function. An arbitrator who receives the views of a tribunal secretary does not thereby necessarily lose the ability to exercise full and independent judgement on the issue in question.'); Swiss Federal Tribunal, *Judgment of 21 May 2015* (2015) 33 ASA Bulletin 879, 885 ('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.'). See also Hague Court of Appeal, *Judgment of 18 February 2020*, Case No. 200.197.079/01, para. 6.6.11.

[8] Notably, these state courts have adopted a rather lenient view on the use of tribunal secretaries, acknowledging that tribunal secretaries may have a far-reaching scope of tasks. This might well relate to the common use of judicial assistants in these jurisdictions. See also Jensen (n 2) para 9.04 ('State courts [which] parties [are] asking to set aside awards in many cases employ clerks or assistants themselves. Though tribunal secretaries are not readily comparable to state court assistants, it is not unthinkable that judges are reluctant to conclude that a judicial decision-maker relinquishes his mandate if he receives support from a legal assistant.').

[9] In the United States, increasing case loads were the main reason for the introduction of clerks in the federal judiciary at the end of the nineteenth century. See Nina Holvast, *In the Shadow of the Judge: The Involvement of Judicial Assistants in Dutch District Courts* (Eleven 2017) 14; Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (Times Books 1998) 19. For similar reasons, judicial assistants were introduced in England (The Law Society Gazette, 'Courting Appeal – for Budding Lawyers a Spell

restrictions, the appointment of additional judges to handle increased workloads is often impossible. The only means of handling that caseload is to create the institution of a judicial assistant who supports the judge in various ways. In other words, the primary need for judicial assistants derives from the restricted number of judges paired with the unrestricted number of incoming cases. For international arbitration, the opposite is true. At least in theory, there is an unrestricted number of international arbitrators (because there are hardly any formal qualification requirements for arbitrators) and a restricted number of new cases (as any arbitrator may decline appointment if his or her docket is 'full'). This structural difference is not levelled off by the fact that, in reality, a quite similar need for assistance exists in international arbitration: Parties tend to opt for the same overburdened individuals, as they are looking for the best-qualified individuals with the most experience – or, in the case of an opportunistic respondent, intend to slow down proceedings.[10] This means that the number of international arbitrators selected for high-caliber cases is still relatively small, and their 'dockets' relatively full.[11]

Still, relief by other arbitrators is more readily available than in the state court context, all the more because important diversification efforts are under way.[12] Indeed, if assistance by tribunal secretaries was not available, the market would likely self-regulate by forcing parties to take their cases to a more diverse group of arbitrators.[13] As has been well documented, a diversification of arbitral tribunals would not only increase efficiency as less overburdened individuals would have more time to devote to individual cases; but there is also reason to believe that this would increase the quality of decision-making as a broader ranger of experiences and perspectives can contribute to a more balanced decision.[14]

### *2.2. Legal bases for assistance*

The second distinction between judicial assistants and tribunal secretaries relates to the legal bases for their participation in the judicial and arbitral process, respectively. Virtually all judicial assistants can be traced back to an express legal basis in the organizing statutes

at the Court of Appeal Is an Unrivalled Way to Learn Court Procedure' [*Law Society Gazette*, 15 January 2001] <https://www.lawgazette.co.uk/news/courting-appeal-for-budding-lawyers-a-spell-at-the-court-of-appeal-is-an-unrivalled-way-to-learn-court-procedure-/21547.article> accessed 28 August 2020); Germany (Constantin Körner, 'Jobprofil Wissenschaftlicher Mitarbeiter am BVerfG: Der "Dritte Senat"' [*Legal Tribune Online*, 30 October 2012] <http://www.lto.de/recht/job-karriere/j/jobprofil-wissenschaftlicher-mitarbeiter-am-bundesverfassungsgericht/> accessed 28 August 2020); Spain (Mar Jimeno-Bulnes and Valerie Hans, 'Legal Interpreter for the Jury: The Role of the Clerk of the Court in Spain' [2016] 6 Oñati Socio-Legal Series 197); and Switzerland (Peter Bieri, 'Law Clerks in Switzerland – A Solution to Cope with the Caseload?' [2016] 7 International Journal for Court Administration 29).

[10] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387, 423; Susan D Franck and others, 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 Columbia Journal of Transnational Law 429, 465–67.

[11] See, *e.g.*, Sebastian Perry, 'Portrait of the Arbitrator: Sebastian Perry Interviews Karl-Heinz Böckstiegel' (2014) 9 Global Arbitration Review 11, 13 (quoting KH Böckstiegel: 'Right now I probably have at least 15 cases, all of them rather large'); Kaj Hobér, 'Interview with Dr. Prof. Kaj Hober' [2015] RAA 40 Newsletter (May 2015) 20, 20 ('I sit as an arbitrator in about 12–15 cases').

[12] Jacomijn J van Haersolte-van Hof, 'Diversity in Diversity' in Albert Jan van den Berg (ed), *Legitimacy: Myths, Realities, Challenges* (Kluwer 2015); Lucy Greenwood, 'Tipping the Balance – Diversity and Inclusion in International Arbitration' (2017) 33 Arbitration International 99.

[13] Jensen (n 2) paras 10.16–10.17.

[14] See, most recently, ICCA, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings* (ICCA 2020) 14 ('Social science literature shows that diversity can improve the quality of group reasoning and decision-making because "[w]orking with people who are different from you may challenge your brain to overcome its stale ways of thinking and sharpen its performance."').

of the respective judicial body.[15] In Croatia, judicial assistants are even mentioned in the constitution.[16]

Tribunal secretaries, in contrast, are not mentioned in most of the organizing statutes for international arbitration. The 1958 New York Convention and the UNCITRAL Model Law on International Commercial Arbitration are both silent on assistance to arbitral tribunals generally and tribunal secretaries specifically. The same applies to most national arbitration laws. There are only a few exceptions. Some Latin American jurisdictions provide for the mandatory participation of tribunal secretaries in arbitrations seated in those jurisdictions.[17] The purpose of such 'mandatory secretaries' is to serve as a certifying authority by 'witness[ing] the proceedings and certify[ing] the authenticity of all acts by the arbitrator'.[18] This is an unusual task for tribunal secretaries who are otherwise entirely subject to the arbitral tribunal's directions and do not fulfil an independent supervisory purpose. More traditional tribunal secretaries are mentioned in other arbitration laws, including those of Switzerland and the Netherlands.[19]

Increasingly, arbitral institutions have started regulating tribunal secretaries in their arbitration rules and procedural guidelines. These rules apply to international arbitrations by virtue of the parties' agreement to conduct their arbitration under the auspices of the relevant institution. Widely used arbitral institutions such as the Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Arbitration Institute at the Stockholm Chamber of Commerce (SCC) now acknowledge that arbitral tribunals may be supported by tribunal secretaries.[20] Recently, the International Centre for Settlement of Investment Disputes (ICSID) and United Nations Commission on International Trade Law (UNCITRAL) have also addressed assistance to arbitral tribunals in their 2020 Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement.[21]

Still, these legal bases are not attributable to the will of a legislator but are rooted in the parties' choice of the relevant arbitration rules. Crucially, many of these rules do not specify

[15] See, *e.g.*, Statute of the International Court of Justice, Art. 21(2) (law clerks at the International Court of Justice); Rome Statute of the International Criminal Court, Art. 44(1) (legal officers at the International Criminal Court); Statute of the Court of Justice of the European Union, Art. 12 (*référendaires* at the Court of Justice of the European Union); European Convention on Human Rights, Art. 24(2) (*rapporteurs* at the European Court of Human Rights); Title 28 of the United States Code (Judiciary and Judicial Procedure), § 752 (clerks in the United States Federal Judiciary); UK 'Judicial Assistant Scheme' (judicial assistants at the English Court of Appeal and Supreme Court); Statute organizing the German Federal Constitutional Court (Geschäftsordnung des Bundesverfassungsgerichts), § 13 and German Courts Constitution Act (Gerichtsverfassungsgesetz; GVG), § 193(1) (*wissenschaftliche Mitarbeiter* at the German Federal Constitutional and other Federal Courts); Federal Statute organizing the Swiss Federal Tribunal (Bundesgesetz über das Bundesgericht), Art. 24 (*Gerichtsschreiber* at the Swiss Federal Tribunal).

[16] Constitution of the Republic of Croatia, Art. 121(2) ('Lay magistrates and court advisors shall participate in court proceedings in compliance with law.').

[17] Chilean Code of Civil Procedure, Art. 632(1); 2012 Colombian Arbitration Law, Art. 27(2); 2006 Ecuadorian Arbitration and Mediation Law, Arts. 27, 32(2).

[18] Jan Kleinheisterkamp, *International Commercial Arbitration in Latin America* (Oceana 2005) 208; See also Jensen (n 2) para 2.53.

[19] Swiss Code of Civil Procedure, Art. 365 (stating that arbitral tribunal may appoint secretary and that duty of impartiality and independence applies to secretary as it does to arbitrators); Dutch Code of Civil Procedure, Arts. 1033(1), 1034 (duty of impartiality and independence applies to secretary as it does to arbitrators).

[20] See 2019 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, sections 177–88; 2020 LCIA Arbitration Rules, Art. 14A; 2017 SCC Arbitration Rules, Art. 24.

[21] See 2020 Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Art. 1(2) ("'Assistants' means persons working under the direction and control of the adjudicators, who assist them with case-specific tasks, including research, review of documents, drafting and other relevant assig[n]ments as agreed in the proceeding"); Art. 2(1) (stating that the Code applies to assistants *mutatis mutandis*).

how exactly an arbitral tribunal may be supported by tribunal secretaries. It is therefore suggested that the exact scope of the tribunal secretary's duties depends on the degree to which international arbitrators must carry out their mandate personally. The following section addresses this question.

## 3. The personal nature of the arbitrator's mandate

Today, it is largely undisputed that the arbitrator's mandate is hybrid in nature.[22] On the one hand, the mandate has a juridical dimension. Arbitrators perform a 'quasi-judicial' function as foreseen in the applicable arbitration law (*lex arbitri*).[23] As such, they are vested with adjudicatory powers and carry out a genuine judicial role. On the other hand, the mandate is defined by the parties' contract with the arbitrator (*receptum arbitri*) in which they are free to shape the arbitrator's mandate in any way they see fit.[24] In that sense, the arbitrator is a service provider to the parties.

It follows that any attempt to define the arbitrator's mandate must take into account its juridical and contractual dimensions. Specifically, the arbitrator's mandate is shaped by the *lex arbitri*, the applicable arbitration rules and the parties' procedural and contractual agreements. In addition, general principles of international arbitration law must be taken into account.[25]

### *3.1. The parties' intuitu personae-choice of the arbitrator*

One of the core distinguishing features of international arbitration as a dispute resolution method is the parties' freedom to choose the decision-maker that they trust.[26] This right is considered a 'cardinal feature' of international arbitration[27] and remains one of the core reasons why parties choose arbitration to resolve their disputes.[28] Accordingly, the parties' right

[22] Julian DM Lew, Loukas A Mistelis and Stefan M Kröll, *Comparative International Commercial Arbitration* (Kluwer 2003) para 5–26: 'The mixed or hybrid theory has become the dominant world-wide theory as elements of both the jurisdictional and the contractual theory are found in modern law and practice of international commercial arbitration'; cf Hanns Prütting, 'Zur Rechtsstellung des Schiedsrichters – dargestellt am richterlichen Beratungsgeheimnis' in Peter Gottwald and Hanns Prütting (eds), *Festschrift für Karl Heinz Schwab zum 70. Geburtstag* (CH Beck 1990) 413–14; Philippe Fouchard and others, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer 1999) para 1122; Jan Schäfer, 'The Arbitrator as a Private Judge' in Guy Keutgen (ed), *Walking a Thin Line: What an Arbitrator Can Do, Must Do or Must Not Do: Recent Developments and Trends* (Bruylant 2010) 23–26; Klaus Peter Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration* (3rd edn, Kluwer 2015) para 19–8; Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer 2020) §13.03[A]; Klaus Peter Berger and J Ole Jensen, 'The Arbitrator's Mandate to Facilitate Settlement' (2017) 40 Fordham International Law Journal 887, 900.

[23] Cf RG, *Judgment of 29 November 1904* [1905] RGZ 59, 247, 249; *Jivraj v Hashwani* [2011] UKSC 40, para 41.

[24] Fouchard and others (n 22) para 1105; Schäfer (n 22) 26–29; Berger, *PDR* (n 22) para 19–8.

[25] Donald Francis Donovan, 'The International Arbitrator as Transnational Judge' (2013) 7 World Arbitration and Mediation Review 193, 194–95.

[26] Born (n 22) §12.01; George A Bermann, 'International Commercial Arbitration: Present Challenges and Future Prospects' in Andrea Carlevaris and others (eds), *International Arbitration Under Review: Essays in Honour of John Beechey* (ICC 2015) 63.

[27] George A Bermann, 'The Yukos Annulment: Answered and Unanswered Questions' (2016) 27 The American Review of International Arbitration 1, 15; cf Thomas H Webster, 'Selection of Arbitrators in a Nutshell' (2002) 19 Journal of International Arbitration 261, 261; Thomas Clay, 'Le secrétaire arbitral' (2005) 2005 Revue de l'Arbitrage 931, 953; Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (OUP 2013) 79; Born (n 22) §12.01[A].

[28] See the surveys conducted by Christian Bühring-Uhle, 'A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration' in Christopher R Drahozal and Richard W Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer 2005) 33; and Queen Mary University and PriceWaterhouseCoopers, '2006 International Arbitration Study: Corporate Attitudes and Practices' (2006) 6 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2006.pdf> accessed 28 August 2020; cf Joachim Strieder, *Rechtliche Einordnung und Behandlung des Schiedsrichtervertrages* (Heymanns 1984) 92; Yu-Jin Tay, 'Reflections on the Selection of Arbitrators in International Arbitration' in Albert Jan van den Berg

to select specific arbitrators has always been safeguarded[29] and is today acknowledged by legislators[30] and state courts alike.[31]

The exercise of the right to choose an arbitrator can have important consequences. The selection of the 'right' arbitrator for one's case is a key element to a successful outcome.[32] Conversely, in light of the limited recourse parties have against an arbitral award, the choice of the 'wrong' arbitrator can frustrate their entire access to justice. Indeed, as 'arbitration is only as good as its arbitrators',[33] many parties spend considerable efforts and resources on identifying the best fit for their case.[34] As a natural consequence of these efforts, arbitrators are assumed to have been appointed because of their specific qualities or *intuitu personae* ('with regard to the person').[35] The contemporary conclusion drawn from this choice and

(ed), *International Arbitration: The Coming of a New Age?* (Kluwer 2013) 132; Born (n 22) §12.01[A]; Blackaby and others (n 6) para 4.34; Jan Heiner Nedden and Johanna Büstgens, 'Die Beratung des Schiedsgerichts – Konfliktpotential und Lösungswege' [2015] SchiedsVZ 169, 177; Anna-Gesine Zimmermann, *Parteivereinbarungen über die Qualifikationen von Schiedsrichtern* (Dr Kovač 2016) 23.

[29] Cf Werner Melis, 'The Role of Individuals in International Arbitration' in Patricia Shaughnessy and Sherlin Tung (eds), *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Kluwer 2017) 225–26 (with a short historical account).

[30] See, *e.g.*, New York Convention, Art. V(1)(d); UNCITRAL Model Law, Art. 11(2); French Code of Civil Procedure, Art. 1508; Swiss Statute on Private International Law, Art. 179(1); US Federal Arbitration Act, s 5. Also cf Art. 15 Hague I Convention 1899: 'International arbitration has for its object the settlement of differences between States *by judges of their own choice*, and on the basis of respect for law.' (emphasis added).

[31] Instead of many, see *BKMI Industrieanlagen GmbH & Siemens AG v. Dutco Construction*, Cour de cassation, 7 January 1992 (1992) Rev de l'Arb 470; *AKN v ALC* [2015] SGCA 18, para 37 ('A critical foundational principle in arbitration is that the parties choose their adjudicators.').

[32] Doak Bishop and Lucy Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration' (1998) 14 Arbitration International 395, 395; Webster (n 27) 262; Laurens JE Timmer, 'The Quality, Independence and Impartiality of the Arbitrator in International Commercial Arbitration' (2012) 78 Arbitration 348, 348; Edna Sussman, 'Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them' (2013) 24 The American Review of International Arbitration 487, 509; Gerald Aksen, 'The Tribunal's Appointment' in Lawrence W Newman and Richard D Hill (eds), *Leading Arbitrators' Guide to International Arbitration* (3rd edn, Juris 2014) 333; Born (n 22) §12.01[A]; Puig (n 10) 400; Blackaby and others (n 6) para 4.13.

[33] This statement is credited to former ICC Secretary General F Eisemann, see Bernardo M Cremades, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration' (1998) 14 Arbitration International 157, 157. It has often been repeated in arbitral scholarship, see Klaus Peter Berger, *International Economic Arbitration* (Kluwer 1993) 201–02; Bishop and Reed (n 32) 395; Jean-Flavien Lalive, 'Some Practical Suggestions on International Arbitration' in René-Jean Dupuy (ed), *Mélanges en l'honneur de Nicolas Valticos: Droit et justice* (Pedonne 1999) 289; Fernando Estavillo-Castro, 'Ethics in Arbitration' in Miguel Ángel Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (Kluwer 2010) 388; David Hacking, 'Arbitration Is Only as Good as Its Arbitrators' in Stefan Michael Kröll and others (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer 2011) 224; Tay (n 28) 124; Born (n 22) §12.01[A]; Pierre A Karrer, *Introduction to International Arbitration Practice: 1001 Questions and Answers* (Kluwer 2014) para 249; Berger, *PDR* (n 22) para 6-123.

[34] Lalive (n 33) 293; VV Veeder, 'Strategic Management in Commencing an Arbitration' in Albert Jan van den Berg (ed), *Arbitration Advocacy in Changing Times* (Kluwer 2011) 30; Puig (n 10) 400; David D Caron, 'Regulating Opacity: Shaping How Tribunals Think' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 391; Hilary Heilbron, 'Dynamics, Discretion, and Diversity: A Recipe for Unpredictability in International Arbitration' (2016) 32 Arbitration International 261, 266; cf Sussman (n 32) 510–11.

[35] SFT *Judgment of 21 May 2015* (2015) 33(4) ASA Bull 879, 884; Fréderic Eisemann, 'Déontologie de l'arbitrage commercial international' [1969] Revue de l'Arbitrage 217, 229; J Martin H Hunter and Jan Paulsson, 'A Code of Ethics for Arbitrators in International Commercial Arbitration' (1985) 13 International Business Lawyer 153, 158; Franz Hoffet, *Rechtliche Beziehungen zwischen Schiedsrichtern und Parteien* (Schulthess 1991) 224; Franz T Schwarz and Christian W Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer 2009) para 7–152. For a more unusual explanation of why the arbitrator is appointed *intuitu personae*, see Jong-Lin Yu and Masood Ahmed, 'Keeping the Invisible Hand Under Control? – Arbitrator's Mandate and Assisting Third Parties' (2015) 19 Vindobona Journal of International Commercial Law & Arbitration 213, 220–21 ('Based on the appointment agreement, the tribunal's commitment to carry out the mandate by applying his knowledge to the disputes sees itself financially rewarded. Consequently, from the contractual viewpoint, the substantial financial remuneration which the tribunal is entitled provides a reasonable basis for *intuitu personae*.').

appointment is that the parties are entitled to an arbitral procedure that is not fundamentally different from what they were entitled to expect *ex ante*.[36]

As a matter of course, the arbitral procedure and final outcome of the case is not exclusively determined by the arbitrator the relevant party nominates. Arbitral tribunals usually consist of three arbitrators, one appointed by the other side and the presiding arbitrator appointed by (usually) the co-arbitrators or appointing authority. But it remains a fundamental right of parties to influence the composition of the arbitral tribunal by nomination of at least one arbitrator of their own choosing.

A similar freedom to appoint judges does not exist in the context of litigation. While most legal systems allow for choice of court agreements, party autonomy usually does not extend so far that parties may designate a specific judge to hear their dispute. Accordingly, the trust they afford the judiciary when they opt for state court litigation is always an institutional trust, comprising the entire judicial apparatus including any legal assistants and similar support. The same cannot be said of international arbitration. By default, the parties' trust applies only to the individual they appoint and not to any third-party support that individual makes use of in the discharge of his or her mandate.

The scope of the personal nature of the arbitrator's mandate is directly defined by this trust and the expectations of how the arbitrator will handle the dispute. To determine to what extent parties may legitimately trust in personal discharge and what tasks the arbitrator may delegate or receive support in, it is necessary to consider what impact the parties' reasons for appointment have on the juridical and the contractual dimensions of the arbitrator's mandate. Even if an arbitrator is juridically entitled to delegate a certain aspect of his or her mandate, he or she may not be able to do so under his or her contractual obligations and *vice versa*.

### *3.2. Consequences for the arbitrator's juridical mandate*

As a consequence of the parties' expectations when choosing their arbitrator, domestic legal orders accept that the arbitrator's juridical mandate is eminently personal.[37] This personal nature prevents the arbitrator from delegating his or her mission to another person.[38] In the words of the English High Court:

> 'No one has heard of an Arbitrator who has been agreed upon between the parties to a dispute being allowed to appoint someone to act in his place, because it is of the very essence of his office that he himself is the person who has to deal with the dispute referred to him.'[39]

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[36] Noah Rubins, 'In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration' [2000] The American Review of International Arbitration 309, 314 ('Since arbitrators derive their power to adjudicate from the agreement of the parties, they must strive to match procedure and substance with the *ex ante* expectations of participants'). See also Gary Born, 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' (2009) 30 University of Pennsylvania Journal of International Law 999, 1002–03.

[37] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA)(Pty) Ltd* [2002] ZASCA 14, para 41; Swiss Federal Tribunal, *Judgment of 21 May 2015* (2015) 33(4) ASA Bull 879, 884 ('La mission juridictionelle confiée à l'arbitre est éminemment personelle').

[38] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA)(Pty) Ltd* [2002] ZASCA 14, para 41; John Baker, 'Arbitrators – Legal Assistance' (1961) 27 Arbitration 39, 40; Andrew VB Bartlett, 'Taking Legal Advice in Relation to an Arbitration: Arbitrators' Direct Access to the Bar' (1989) 55 Arbitration 165, 165; Humphrey Lloyd, 'Writing Awards: A Common Lawyer's Perspective' (1994) 5 ICC International Court of Arbitration Bulletin 38, 39; Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris 2003) 493; Peter Schlosser, 'Band 10: §§ 1025–1066', in Reinhard Bork and Herbert Roth (eds), *Stein/Jonas: Kommentar zur Zivilprozessordnung* (23rd edn, Mohr Siebeck 2014) § 1042 para 10; Berger, *PDR* (n 22) para 27-11; Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (OUP 2015) para 4.189; Bermann (n 27) 16.

[39] *Barnard v National Dock Labour Board* [1953] 2 QB 18, 45.

Yet it is unclear how far this prohibition of delegation extends. What is clear is that the arbitrator may not refer his entire mandate to a third person, having that person conduct and decide the case in his or her stead.[40] It is equally clear that the arbitrator may receive support in the discharge of certain 'acts of a [m]inisterial character',[41] even though they are part of his or her mandate. Hence, there are some parts of the arbitrator's juridical mandate that are 'more personal' than others.

This general distinction between essential and non-essential parts of the arbitral mandate is acknowledged by arbitration rules, case law, and commentators. However, they all find different ways of describing the non-delegable parts of the arbitrator's mandate. For instance, Article 24(2) of the 2017 SCC Arbitration Rules provides that the arbitral tribunal 'may not delegate any decision-making authority'.[42] Similarly, courts across different jurisdictions have held that an arbitral tribunal is required to 'exercise its own discretion',[43] its 'own judgment',[44] and that an arbitrator must 'make his own decision'[45]. The resulting award 'shall be [the arbitrator's] award' and 'the act of his own mind'.[46] In other words, an arbitrator 'must not substitute the opinion of another for his own'.[47] This requires the arbitrator 'to bring his own personal and independent judgment to bear on the decision in question, taking account of the rival submissions of the parties; and to exercise reasonable diligence in going about discharging that function'.[48] Commentators concur, stating that an arbitral tribunal may not delegate 'its decision-making function',[49] must retain the 'ultimate authority over the decision-making process',[50] and must personally carry out 'the act of judging'.[51] These sources thus focus on the arbitrator's substantive decision as the core of what he or she owes to the parties.[52]

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[40] *Neale v Richardson* [1938] 1 All ER 753, 755–7; *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor* [1999] 5 MLJ 137, 148; *Clement C. Ebokan v. Ekwenibe & Sons Trading Company* [2001] 2 NWLR (Pt.696)32; cf Patrik Schöldström, *The Arbitrator's Mandate* (Jure 1998) 329; Bernhard Berger, 'Rights and Obligations of Arbitrators in the Deliberations' (2013) 31 ASA Bulletin 244, 255–56; Born (n 22) §13.04[A][8].

[41] *Clement C. Ebokan v Ekwenibe & Sons Trading Company* [2001] 2 NWLR (Pt.696) 32; cf *Barnard v National Dock Labour Board* [1953] 2 QB 18, 40; *Millthorpe v Spa Hydraulic Slucing & Gold Mining Co* (1892) 14 LR (NSW) 292; Baker (n 38) 40; Sundra Rajoo, *Law, Practice, and Procedure of Arbitration* (2nd edn, LexisNexis 2017) 496.

[42] Also cf CETA Code of Conduct for Arbitrators and Mediators, section 8 ('An arbitrator shall […] not delegate [] his duty to any other person'); 2020 LCIA Rules, Art. 14.8 ('Under no circumstances may an Arbitral Tribunal delegate its decision-making function to a tribunal secretary'); 2017 CAS Code, Art. S18(2) ('CAS arbitrators and mediators shall sign an official declaration undertaking to exercise their functions personally)'; 2013 FAI Note, section 3.1; HKIAC Guidelines 2014, section 3.2.

[43] *Sharp v Nowell* (1948) 6 CB 253, 259–60.

[44] *Louis Dreyfus & Co. v. Arunchala Ayya* (1931) 33 BOMLR 1536, para 50 ('[The arbitrator has not] left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon'); *Total Support Management (Pty) Ltd v Diversified Health Systems (SA)(Pty) Ltd* [2002] ZASCA 14, para 41 ('[T]he arbitrator [must have] exercised his own judgment in deciding the issues'). Cf *Giacomo Costa fu Andrea v British Italian Trading Co* [1961] 2 Lloyd's Rep 392, 402.

[45] *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor* [1999] 5 MLJ 137, 148.

[46] *Whitmore v Smith* (1861) 7 H & N 509, 516; cf *Continental Materials Corp. v. Gaddis Mining* 306 F.2d 952, 955 (10th Cir, 1962).

[47] *Ellison v. Bray* [1864] 9 LT 730; cf *P v Q* [2017] EWHC 194 (Comm), para 66.

[48] *P v Q* [2017] EWHC 194 (Comm), para 65.

[49] Blackaby and others (n 6) para 4.195; cf Axel Benjamin Herzberg, 'Vor Art. 11 ff. ICC-SchO' in Jan Heiner Nedden and Axel Benjamin Herzberg (eds), *ICC-SchO, DIS-SchO: Praxiskommentar zu den Schiedsgerichtsordnungen* (Otto Schmidt 2014) para 12; James Menz, 'The Fourth Arbitrator? Die Rolle des Administrative Secretary im Schiedsverfahren' [2015] SchiedsVZ 210, 216; Daniel Girsberger and Nathalie Voser, *International Arbitration: Comparative and Swiss Perspectives* (3rd edn, Schulthess 2016) para 733.

[50] New York City Bar Association, 'Secretaries to International Arbitration Tribunals: Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association' (2006) 17 The American Review of International Arbitration 575, 586.

[51] Clay (n 27) 954 (author's translation).

[52] Also cf Karl Heinz Schwab and Gerhard Walter, *Schiedsgerichtsbarkeit: Kommentar* (7th edn, CH Beck 2005) para 19.3; Christian Hausmaninger, '§§ 577–618 ZPO' in Hans W Fasching and Andreas Konecny (eds), *Kommentar zu den Zivilprozessgesetzen* (3rd edn, Manz 2016) s 604 para 39; Rajoo (n 41) 402.

Based on this understanding of the arbitrator's juridical mandate some draw rather progressive conclusions. The English High Court has acknowledged that as arbitration practice evolves, the concept of the arbitrator's mandate may undergo changes as well.[53] Schultz and Kovacs consider that in light of the findings of a survey they conducted amongst 'lawyers and arbitrators engaged in international arbitration' and their idea of the arbitrator as a 'manager', the arbitrator's mandate has undergone a dramatic change in the advent of a new generation of arbitrators:

> 'Sixty-five per cent of participants responded that they did not mind if an arbitrator delegated the arbitrator's preparation for hearings, issuing procedural orders and even writing the award. Brutally simplified, this seems to be an indication that arbitrators are seen as managers today, only responsible for the product, with no mandate to do the work themselves. The theory about the mission of arbitrators, then, if it intends to be descriptive and not prescriptive, may have to be adapted.'[54]

In light of the expectations parties attach to their arbitrator selection, it is doubtful whether Schultz and Kovac's findings really justify an adaption of the arbitrator's juridical mandate to the extent that arbitrators are 'only responsible for the product, with no mandate to do the work themselves'. A core reason for parties' choice of one arbitrator over another is that they can predict what product they will get. If parties cannot rely on who contributes to the making of that product, they lose the basis for their assessment and their legitimate expectations are frustrated. After all, the concrete form of the product they receive, i.e. the arbitral award, is decisively influenced by the procedure leading to its making. Indeed, where 'writing' the award refers to an intellectual process requiring the exercise of judgment (rather than the mechanical 'typing up' of a pre-determined decision), it is doubtful that parties are only interested in the final product.

A wider understanding of the eminently personal core of the arbitrator's juridical mandate is therefore warranted. Delegation is not only prohibited in terms of substantive decision-making, but, more comprehensively, of all 'functions of a juridical nature',[55] 'adjudicative function[s] and responsibilities',[56] and 'core juridical activities'.[57] Accordingly, the arbitrator must remain 'master of the proceedings',[58] and 'control the[m] in their entirety'.[59] He or she

[53] Cf *Agrimex Ltd v Tradigrain SA* [2003] EWHC 1656 (Comm), para 31: 'The law of arbitration has undergone a profound change in the last 150 years; it was of no assistance to be referred by counsel to a decision made in 1850 as to what was to be expected of arbitrators 150 years ago as guidance as to what was to be expected of arbitrators today.'

[54] Thomas Schultz and Robert Kovacs, 'The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth' (2012) 28 Arbitration International 161, 164 and 171.

[55] SFT, *Judgment of 21 May 2015* (2015) 33(4) ASA Bull 879, 885 (author's translation); cf OLG Düsseldorf, *Judgment of 27 October 1975* (1976) BB 251, 252; Walther J Habscheid and Constantin Calavros, 'Aus der höchstrichterlichen Rechtsprechung zur Schiedsgerichtsbarkeit' [1979] Konkurs-, Treuhand- und Schiedsgerichtswesen 1, 7; Emmanuel Gaillard, 'Les manôeuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international' [1990] Revue de l'Arbitrage 759, 785; Hans van Houtte, 'The Use of an Expert to Handle Document Production: IBA Rules on the Taking of Evidence (Art. 3(7))' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* (Kluwer 2006) 627; Rajoo (n 41) 495.

[56] *P v Q* [2017] EWHC 194 (Comm), para 46; cf Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer 2012) 92; Yu and Ahmed (n 35) 240.

[57] BGH, *Judgment of 22 May 1957* (1958) 71 ZZP 427, 428 (author's translation); cf Svea Court of Appeal, *Judgment of 31 October 1996* [1997] RH 1997:110; *Proctor v Williams* (1860) CBNS 386, 389.

[58] Jens Gal, *Die Haftung des Schiedsrichters in der internationalen Handelsschiedsgerichtsbarkeit* (Mohr Siebeck 2009) 303 (author's translation).

[59] Tercier (n 2) 545 (emphasis omitted).

must at all times 'keep the intellectual control over the arbitration, that is both the conduct of the proceedings and the outcome of the dispute'.[60]

Thus, from a juridical point of view, the personal nature of the arbitrator's mandate not only comprises the making of the substantive decision, but also the conduct of the arbitral proceedings leading up to that decision.

### *3.3. Consequences for the arbitrator's contractual mandate*

Most domestic contract laws, too, acknowledge the time and effort parties put into arbitrator selection and that they thus choose the arbitrator *intuitu personae*.[61] From this personal choice follows a special relationship of trust and confidence between the parties and arbitrator, prohibiting delegation of the arbitrator's contractual mandate.[62] Indeed, early US Supreme Court Justice Joseph Story noted that

> 'where the work is one of art, in the execution of which the genius, talent, and skill of the particular artist may fairly be presumed to be contracted for [...] he is not allowed to substitute another person without the consent of the employer.'[63]

This conclusion also derives from another aspect of the arbitrator's contract. Regardless of its precise qualification,[64] the *receptum arbitri* is essentially a contract providing for delegation. Initially, the parties have the authority to resolve their dispute by themselves – be it in the form of a negotiated settlement, relinquishment of rights, or any other agreement. When they conclude the arbitrator's contract, they transfer that authority to the arbitrator.[65] Thus, the arbitrator's authority to resolve the parties' dispute is a delegated authority.[66] The contract laws of most legal systems provide that a delegated duty may not be re-delegated

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[60] Kaufmann-Kohler and Rigozzi (n 38) para 4.189; cf Hans Jakob Maier, *Handbuch der Schiedsgerichtsbarkeit* (Neue Wirtschafts-Briefe 1979) para 380; Nassib G Ziadé, 'Achieving Efficiency in Arbitration: The Role of the Institutions' (2008) 25 News from ICSID 3, 5.

[61] Cf on Swiss law: SFT, *Judgment of 21 May 2015* (2015) 33(4) ASA Bull 879, 884 'la contrat d'arbitre est conclu *intuitu personae*'; Hans-Heinrich Inderkum, 'Der Schiedsrichtervertrag' (Universität Freiburg in der Schweiz 1989) 116–17; Stephan A Vogt, *Der Schiedsrichtervertrag nach schweizerischem Recht* (ADAG 1989) 129; Kaufmann-Kohler and Rigozzi (n 38) para 4.189; on German law: Egon Lüdtke, *Der Schiedsrichtervertrag* (Konrad Triltsch 1933) 31; Strieder (n 28) 94; Richard H Kreindler, Jan K Schäfer and Reinmar Wolff, *Schiedsgerichtsbarkeit: Kompendium für die Praxis* (Recht und Wirtschaft 2006) para 578; Gal (n 58) 300.

[62] Strieder (n 28) 94; Vogt (n 61) 129; Hoffet (n 35) 224–25; Reinmar Wolff, 'Rights and Duties of Arbitrators' in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2nd edn, Kluwer 2018) 2733.

[63] Joseph Story, *Commentaries on the Law of Bailments: With Illustrations from the Civil and Foreign Law* (4th edn, Maxwell and Son 1846) 430.

[64] There are different approaches regarding the *receptum arbitri*'s qualification or characterisation, ranging from an agency relationship over an agreement for the provision of services to a *sui generis* contract with characteristics of the former two. For comprehensive analyses of the different approaches, see Fouchard and others (n 22) paras 1113–25; Emilia Onyema, *International Commercial Arbitration and the Arbitrator's Contract* (Routledge 2010) 102–04; Annekathrin Holzberger, *Die materiellrechtliche und kollisionsrechtliche Einordnung des Schiedsrichtervertrages* (PL Academic Research 2015) 59–66; also cf Schäfer (n 22) 28–29; For criticism regarding the existence of the 'arbitrator's contract', see Eugen Bucher, 'Was macht den Schiedsrichter? Abschied vom "Schiedsrichtervertrag" – und Weiteres zu Prozessverträgen' in Birgit Bachmann and others (eds), *Grenzüberschreitungen – Festschrift für Peter Schlosser* (Mohr Siebeck 2005) 101–05.

[65] Gilles Cuniberti, 'Three Theories of Lex Mercatoria' (2014) 52 Columbia Journal of Transnational Law 369, 417; Alec Stone Sweet and Florian Grisel, 'The Evolution of International Arbitration: Delegation, Judicialization, Governance' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance* (OUP 2014) 24.

[66] *George Watts & Son, Inc. v. Tiffany and Co.* 248 F.3d 577, 580–81 (7th Cir. 2001); Waincymer (n 56) 946–47; cf *Challenge by Iran to Mr Gaeton Arangio-Ruiz*, IUSCT, Documents Relating to the Challenge [1992] 27 Iran-US CTR 293, 325 ('The Tribunal arbitrator's power of adjudication has been delegated to them by the States parties to the Algiers Declarations').

without the principal's consent: *delegatus non potest delegare*.[67] This is because the principal has no way of ascertaining the third person's suitability to carry out the contractual mandate.[68] Hence, under the *delegatus non potest delegare*-principle, arbitrators may not delegate their contractual mandate to any other person.[69]

Yet, this prohibition is not absolute. In contract law, even a highly personal mandate does not require the debtor to carry out all and any tasks connected to that mandate him- or herself.[70] Rather, while he or she must carry out the principal obligations personally, he or she may delegate ancillary tasks. But even in the discharge of his or her principal obligations, the debtor may receive support as long as he or she does not assign independent and discretionary duties to the supporter.[71] Only a substitution, i.e. a delegation of the entire mandate, is prohibited.[72]

This gradual nature of a personal mandate is widely accepted with regard to other contracts that are concluded strictly *intuitu personae*. A classic example are contracts for the provision of medical services. If a cancer patient engages a renowned brain surgeon to remove his brain tumor, the patient is entitled to expect that the surgeon will personally carry out all tasks that pertain to her special skills, expertise, and experience, i.e. the difficult and dangerous dissection and resection of the tumor.[73] However, the patient cannot expect that the famous brain surgeon will prepare him for the procedure or subsequently close the wound.[74] Similarly, an architect engaged to construct a house must retain the intellectual authority to conclusively decide on matters of planning, design, and site management – but will have an abundance of support from his architectural firm in the process.[75] The same applies to a party's contract with legal counsel. Though the attorney-client relationship is of a personal nature, '[n]obody would suggest that counsel chosen by a party must perform all of their tasks personally or write the entirety of the submissions themselves.'[76]

The decisive question, then, is what an arbitrator's principal and what his or her ancillary obligations are under the *receptum arbitri*. First and foremost, a obligor's duties are determined by the parties' express agreement. Yet, it does not generally happen that the arbitrator and the parties agree on terms regarding what specifically the arbitrator's principal obligations comprise. Where parties have failed to provide an essential term, that term must

[67] England: *De Bussche v Alt* (1878) 8 Ch D 286, 310; Germany: BGB, s 613 sentence 1, s 664(1) sentence 1; Switzerland: CO, Art. 398(3). See also ABGB, Art. 1165 (Austria) as well as restatements of transnational and uniform law, such as DCFR, s II.–6:104; PECL, Art. 3:206, 7:106; TransLex-Principle II.6, available at <http://www.trans-lex.org/915500> accessed 28 August 2020.

[68] *Proctor v Williams* (1860) CBNS 386, 389.

[69] Cf Onyema (n 64) 71; Kaufmann-Kohler and Rigozzi (n 38) para 4.189; Nassim Eslami, *Die Nichtöffentlichkeit des Schiedsverfahrens* (Mohr Siebeck 2016) 217–18; Marco Stacher, *Einführung in die internationale Schiedsgerichtsbarkeit der Schweiz* (Dike 2015) para 187; also cf *Challenge by Iran to Mr Gaeton Arangio-Ruiz*, IUSCT, Documents Relating to the Challenge [1992] 27 Iran-US CTR 293, 325; Rajoo (n 41) 459.

[70] Matthias Weller, *Persönliche Leistungen* (Mohr Siebeck 2012) 533; cf Tercier (n 2) 539.

[71] On BGB, s 664: BGH, *Judgment of 17 December 1992* (1993) NJW 1704, 1705.

[72] Story (n 63) 430; Weller (n 70) 101–02. On the arbitral mandate specifically, see H Teßmer, *Das Schiedsverfahren nach deutschem Recht* (Veit & Comp 1915) 142.

[73] See, *e.g.*, BGH, *Judgment of 19 July 2016* [2016] NJW 3523, 3524–25.

[74] Cf BGH, *Judgment of 20 December 2007* [2008] BGHZ 175, 76, 79–80; Jürgen Miebach and Joachim Patt, 'Persönliche Leistungserbringung und Vertretung des Chefarztes bei wahlärztlichen Leistungen' [2000] NJW 3377, 3379; Elmar Biermann, Klaus Ulsenheimer and Walther Weißauer, 'Persönliche Leistungserbringung und Vertretung des Chefarztes bei wahlärztlichen Leistungen' [2001] NJW 3366, 3366–7; Andreas Spickhoff, 'Wahlärztliche Leistungen im Krankenhaus: Leistungspflicht und Haftung' [2004] Neue Zeitschrift für Sozialrecht 57, 58; Weller (n 70) 73.

[75] RG, *Judgment of 20 May 1913* [1913] RGZ 82, 285, 287; Weller (n 70) 76–78. For an account from practice, see Oliver Herwig, 'Vom Reiz großer Namen' (2015) 2 *squaremeter* 20, 28.

[76] Tercier (n 2) 538; cf Weller (n 70) 75; Michael Hwang, 'Musings on International Arbitration' in Michael Hwang, Eunice Chan and Elaine Lim (eds), *Selected Essays on International Arbitration* (Academy Publishing 2013) 15.

be implied into the contract based on what the parties would have provided for had they considered the problem (*ergänzende Vertragsauslegung*); when in doubt, what the parties would have wanted is determined by what is objectively usual in practice (*Verkehrssitte*).[77]

Different commentators have found different ways of describing arbitrators' principal obligations based on what the parties can be presumed to have wanted under an objective standard. One author has referred to these principal obligations as 'all tasks of an increased intellectual quality'.[78] Others base their description on the arbitrators' juridical mandate and locate their principal obligations 'at the core of his juridical activities'.[79] The content of these core juridical activities varies. In a tax matter involving the secretariat of the Claims Resolution Tribunal for Dormant Accounts in Switzerland,[80] the Swiss Federal Tribunal has addressed what it considers principal and ancillary obligations of the arbitrator's contract:

> 'The arbitrators' principal obligation is the professional assessment of often difficult legal and factual questions and the corresponding legal decision-making. This obligation is supplemented by ancillary obligations such as clerical tasks, taking minutes, drawing up invoices and so on.'[81]

Similarly, some authors consider the 'actual, crucial activity of ascertaining and deciding the dispute' the arbitrator's principal obligation.[82] According to them, it suffices if 'the arbitral award is that of the arbitral tribunal'.[83]

Yet, the parties' considerable effort in selection engenders the objective inference that they are not only interested in a personal decision but also in individualized procedure.[84] Thus, the arbitrator's principal contractual obligations are his 'jurisdictional obligations',[85] i.e. conducting the arbitration and deciding on the merits of the case.[86] In a nutshell, the arbitrator's contract allows him to delegate all tasks that do not leave any room for discretion.[87] In light of the reasons for arbitrator selection, this applies equally to procedural and substantive tasks.

Both the juridical and contractual prong of the arbitrator's mandate therefore lead to the same conclusion: While the arbitrator's mandate is eminently personal in principle, certain parts of it may be entirely delegated and others supported. Those of the authorities – whether

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[77] On English law: *Marks and Spencer v BNP Paribas* [2015] UKSC 72 para 21; Richard Calnan, *Principles of Contractual Interpretation* (2nd edn, OUP 2017) para 8.01; cf FMB Reynolds, 'Agency' in HG Beale (ed), *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) para 31–040. On German law: BGH, *Judgment of 22 April 1953* [1953] BGHZ 9, 273, 277; cf Weller (n 70). With a comparative perspective: Alexander Lüderitz, *Auslegung von Rechtsgeschäften* (CF Müller 1966) 386–401, 413–18.

[78] Teßmer (n 72) 141–42 (author's translation).

[79] Strieder (n 28) 95 (author's translation); cf Inderkum (n 61) 117; Vogt (n 61) 129–30; Gal (n 58) 301.

[80] The Claims Resolution Tribunal was a standing arbitral tribunal, responsible for processing claims relating to assets deposited in Swiss banks by victims or targets of Nazi persecution prior to, and during, World War II. See <http://www.crt-ii.org> accessed 28 August 2020.

[81] Swiss Federal Tribunal, *Judgment of 19 June 2009* (2009) 27(4) ASA Bull 821, 824–25 (author's translation).

[82] Lüdtke (n 61) 31 (author's translation); cf Wolfgang Hiepe, *Der Schiedsrichtervertrag und die Rechte und Pflichten des Schiedsrichters* (Pöppinghaus 1930) 34; Vogt (n 61) 129; Gal (n 58) 300; Arthur W Rovine, 'Cost Concerns in the Drafting of Arbitral Awards – An Issue of Ethics' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2009* (Martinus Nijhoff 2010) 140.

[83] Gustav KL Real, *Der Schiedsrichtervertrag* (Heymanns 1983) 145 (author's translation). In terms of ancillary obligations, which the arbitrator may delegate, authors refer to 'subsidiary, non-independent activities of an auxiliary and ancillary nature', such as weighing, writing and taking notes, see Lüdtke (n 61) 31 (author's translation); cf Teßmer (n 72) 142; Gal (n 58) 301; Wolff (n 62) 2733.

[84] See Jensen (n 2) para 5.28ff.

[85] Kaufmann-Kohler and Rigozzi (n 38) para 4.189.

[86] Gal (n 58) 303; Tercier (n 2) 539; Stacher (n 69) para 187.

[87] Cf Strieder (n 28) 95; Inderkum (n 61) 117.

juridical or contractual – that identify the nondelegable parts only as those pertaining to the tribunal's decision on the merits fall short of taking into account all reasons for the arbitrator's appointment. It is true that parties are first and foremost interested in the arbitrator's substantive decision. However, that decision is decisively influenced by how the arbitration is conducted until the moment of decision-making. Accordingly, parties appoint arbitrators not only for their decision on the merits but also for their procedural conduct. Thus, the arbitrator must not delegate any duty that relates to his or her procedural and substantive discretion and is coloured by his or her identity, in particular his or her skill, qualifications, and experience.

## 4. The Participation of Tribunal Secretaries: Transparency, Consent and Trust

How, then, can arbitrators make use of the support by tribunal secretaries? One can come up with comprehensive lists of specific tasks, assigning some tasks to the core functions of arbitrators and others to the arbitrator's ancillary duties that may readily be delegated to tribunal secretaries.[88] This article takes a different approach. On a more general level, it is suggested that the primacy of party autonomy as one of the hallmarks of international arbitration also informs the appropriate use of assistance by arbitrators. After all, ultimately, the arbitrator's mandate is only considered personal in nature because parties and arbitral institutions choose arbitrators based on their personal characteristics. If parties provide their informed consent to the arbitrator delegating or receiving support in specific tasks, this does negatively impact but simply shape the arbitrator's mandate.

While, in default, absent a party agreement arbitrators have the power to determine their own procedure and, arguably, their internal organization, there is good reason to take into account the parties' expectations and preferences before resorting to assistance. At the same time, parties appoint arbitrators with the implicit trust that the arbitrator will act professionally and make use of assistance in a responsible manner that complies with his or her mandate. As a reflections of these elements, this article proposes that the participation of tribunal secretaries in international arbitration be guided by the three virtues of *transparency*, *consent* and *trust*.

### *4.1. Transparency*

The first proposal relates to the selection of arbitrators. Regardless of who chooses the arbitrator – the parties, the co-arbitrators or an appointing authority – the choice is always personal and entails certain expectations. The specific reasons for choosing one arbitrator over another are manifold and differ from case to case. Increasingly, one of these reasons is the arbitrator's recourse to assistance by tribunal secretaries.

Parties and appointing authorities have different views as to the propriety of arbitrator assistance. Some consider that 'parties aren't appointing a team, they want you personally',[89] and that 'when parties nominate their arbitrators they normally expect that the arbitrators will do the work themselves'.[90] Others do not mind or even expect arbitrators to make use of assistance. They are of the opinion that having a qualified tribunal secretary at the arbitrator's disposal is an important asset in arbitrator selection: '[P]arties are looking for candidates with

[88] For an example of such a list, see Jensen (n 2) paras 5.132–5.284.

[89] Perry (n 11) 14 quoting KH Böckstiegel.

[90] Sebastian Perry, 'Q&A with Professor Pierre Lalive' (2008) 3 Global Arbitration Review 1, 2 quoting P Lalive. See also Clay (n 27) 952 (when parties appoint an arbitrator, they 'have entrusted to him and not to his law firm'); Richard M Mosk, 'Deliberations of Arbitrators' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 495 ('Parties are not likely to select arbitrators who are prone to being overly influenced by legal assistants'); Hughes (n 2) 165.

a back-office, i.e. who have administrative and legal support at their disposal, not for the lone wolf '.[91] Indeed, some of the most sought-after international arbitrators are also those who most heavily rely on the support of tribunal secretaries. When appointing these arbitrators, most parties trust that the arbitrator will fulfil his or her duties properly and make use of assistance in a way that does not conflict with his or her personal mandate.[92]

In essence, working with or without a tribunal secretary – neither option is inherently better or worse. But it should be up to the parties to decide which option they prefer. Hence, the first proposal is for arbitrators to be transparent about their general approach to assistance when they are approached regarding a potential arbitrator appointment.

### *4.2. Consent*

The second proposal concerns the way tribunal secretaries come to participate in the proceedings. Not all arbitrators appoint tribunal secretaries. Not all arbitrators who appoint tribunal secretaries appoint them in all cases. Hence, where transparency is lacking, it is impossible for parties to assess whether a tribunal secretary is participating 'behind the scenes', unless they come into account with him or her throughout the proceedings. It is the proposition of this article that parties should be able to have a say in whether a tribunal secretary participates in the proceedings and which tasks he or she will be assigned.

In fact, most of the arbitral institutions administering arbitrations now require arbitrators who intend to rely on tribunal secretaries to communicate in some meaningful way with the parties regarding the intended use of assistance.[93] This requirement should be understood as a chance to engage the parties and explain the role of the tribunal secretary to them. Usually, an appropriate time and place for such discussions is the initial case management conference at the beginning of the arbitration, with the arbitral tribunal providing the parties with pertinent information on the candidate beforehand (*e.g.* curriculum vitae).

Ideally, the appointment process is formalized in some way so all essential information on the secretary is on file. This way all participants in the arbitral proceedings are aware of the secretary's identity and role. Depending on the circumstances of the case and the stage at which the need for a secretary becomes apparent, a step-by-step appointment process involving the parties could look like this:

(i) As part of his or her pre-appointment disclosure, the arbitrator candidate states his or her preferences regarding the appointment and duties of tribunal secretaries.

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[91] Menz (n 49) 213 (author's translation); also cf Alexis Mourre, 'Debate: Does Each Player Meet the Others' Expectations? Does the Arbitration Process Meet the Users' Expectations?' in Bernard Hanotiau and Alexis Mourre (eds), *Players' Interaction in International Arbitration* (ICC 2012) 132 quoting H Gharavi: 'Personally I am relieved as a counsel when I see a chairman of the arbitral tribunal who has an administrative secretary' (author's translation); Karton (n 27) 63; and Douglas Thomson, 'Does Your Arbitrator Prefer Puppies or Kittens?' (*Global Arbitration Review News*, 14 April 2016) <http://globalarbitrationreview.com/news/article/35224/does-arbitrator-prefer-puppies-kittens/> accessed 28 August 2020 quoting a Swiss practitioner who 'would not consider appointing a chairperson without a back office of assistants, taking the view that it is unrealistic for an arbitrator to handle multiple cases without support'.

[92] Poudret and Besson (n 6) para 594; Tercier (n 2) 550; cf Thomas Rüede and Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht: nach Konkordat und IPRG* (2nd edn, Schulthess 1993) 192; Partasides (n 2) 159–60.

[93] See, *e.g.*, 2020 LCIA Arbitration Rules, Art. 14.10 ('An Arbitral Tribunal may only obtain assistance from a tribunal secretary once the tribunal secretary has been approved by all parties.'); 2017 SCC Arbitration Rules, Art. 24(1) ('The appointment is subject to the approval of the parties.'); 2019 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, section 181 ('[B]efore any steps are taken to appoint an administrative secretary, the arbitral tribunal shall inform the parties of its intention to do so.'); 2015 SIAC Practice Note on the Appointment of Administrative Secretaries, section 3 ('No administrative secretary may be appointed without the consent of all parties to the arbitration.').

(ii) Upon constitution of the tribunal and a first screening of the case file, the tribunal collegially decides whether it requires the support of a secretary.
(iii) The chairperson selects an appropriate candidate (usually a colleague or employee of the arbitrator) and confirms the individual with the co-arbitrators.
(iv) The secretary candidate conducts a check for conflicts of interest and provides the tribunal with all relevant information.
(V) The tribunal provides the parties with a formal appointment proposal, including the proposed tasks the secretary will be assigned, a proposed method and (if borne by parties) rate of remuneration, a declaration of impartiality and independence, curriculum vitae, and confidentiality undertaking.
(Vi) The appointment proposal is discussed with the parties (for instance in the initial case-management conference), affording the parties a sufficient opportunity to voice their opinion on the appointment.
(Vii) The secretary's appointment is formalized by the issuance of a procedural order, stand-alone 'Tribunal Secretary Terms of Reference' or otherwise.

### *4.3. Trust*

The final proposal relates to parties and their counsel. There are still many cases in which transparency, consent or both are lacking. This is not ideal but a reality. In these cases, some parties dissatisfied with the conduct and outcome of the arbitration have sought to remove arbitrators from cases by way of challenges and to set aside awards based on the arbitrator's use of assistance. By and large, such challenges have remained unsuccessful.[94]

The core reason why parties are unlikely to be successful with any complaints about the arbitrators' use of a tribunal secretary is the tribunal's right to secret deliberations and decision-making.[95] The secrecy of deliberations is a personal right for each arbitrator, intended to ensure that the arbitrator has a full and unrestricted possibility to state his or her convictions in the deliberations.[96] As complaints about tribunal secretaries pertain to their allegedly impermissible involvement in the tribunal's decision-making, proving the secretary's actual involvement will constitute an insurmountable hurdle in most cases. Accordingly, it remains first and foremost a matter of trust and skill for parties to choose an arbitrator they believe will make appropriate use of third-party support. The transparency that is crucial at the outset of the secretary's involvement is unavailable once the secretary has been appointed and, even more so, once an award has been rendered.

## 5. Conclusion

Judicial assistants who participate in international arbitrations are referred to as tribunal secretaries. In many ways they are similar to judicial assistants in state courts. Tribunal secretaries support arbitrators in the entire conduct of the arbitration up to the rendering of the arbitral award. The same applies to judicial assistants and judges. But there are also important differences regarding the foundation of the assistant's participation. These differences are directly rooted in one of the main distinguishing features of arbitration from state court proceedings: flexible procedures tailored to the parties' specific agreements and needs.

[94] See, *e.g.*, Hague Court of Appeal, *Judgment of 18 February 2020*, Case No. 200.197.079/01, para. 6.6; *P v Q* [2017] EWHC 194 (Comm); Swiss Federal Tribunal, *Judgment of 21 May 2015* (2015) 33 ASA Bulletin 879; *Sonatrach v Statoil* [2014] EWHC 875 (Comm); *Compagnie Honeywell Bull SA v Computacion Bull de Venezuela C.A.*, Cour d'appel de Paris, 21 June 1990 (1991) Rev de l'Arb 96.

[95] See French Code of Civil Procedure, Art. 1479; Scottish Arbitration Rules, Rule 27; 2006 ICSID Rules of Procedure for Arbitration Proceedings 2006, Art. 15(1); 2020 LCIA Arbitration Rules, Art. 30.2.

[96] *Rhéaume v Société d'investissements l'Excellence Inc* [2010] QCCA 2269, para 31.

It is the proposition of this article that the proper use of tribunal secretaries by arbitral tribunals is informed by this difference and the greater degree of autonomy afforded to parties in arbitral proceedings. Hence, while state courts can legitimately regulate the participation of judicial assistants as a matter of internal court organization, the greater focus on party autonomy in international arbitration should lead international arbitrators to employ tribunal secretaries with transparency and the consent of the parties. The parties, in turn, should trust in the professionalism and integrity of the arbitrator once the secretary is appointed.

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