KEEPING THE INVISIBLE HAND UNDER CONTROL? – ARBITRATOR'S MANDATE AND ASSISTING THIRD PARTIES

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1 INTRODUCTION

Facing the possibility of being forced to pay over $50 billion dollars awarded in the *Yukos* arbitration, unsurprisingly, the Russian Federation filed a writ[1] at the District

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1 New Release, Ministry of Finance of Russian Federation, 6 February 2015, available at: <http://old.minfin.ru/en/news/index.php?id_4=24358>

Court in The Hague to set aside the awards.[2] As expected, the controversial issues related to the award of the tribunal are listed as the grounds for setting aside; the tribunal's lack of jurisdiction under arts 21(1), 26 and 45 of the Energy Charter Treaty, invalidity of the arbitration agreement,[3] the composition of the tribunal,[4] arbitrability of tax issues, the mandate of the tribunal,[5] and the breach of public policy.[6] What is interesting for researchers watching the development of the *Yukos* case is the RF's argument over the possible inputs contributed to the awards by the arbitral tribunal's legal assistant.[7] In essence, the RF argues that the arbitrators delegated substantial responsibilities to the tribunal's assistant and thus breached their mandate to perform their duties personally. As a consequence, the Russian Federation contends that the award should be set aside on the grounds of art 1065(1) (c) of the DCCP.[8]

In support of its arguments, the RF points to the disproportionate fees charged by the assistant as evidence of the tribunal's delegation of its responsibilities in breach of its mandate.[9] The RF claims that the tribunal failed to fulfil its obligation to review the evidence and arguments and to decide the case personally. Maintaining the view that an assistant to an arbitral tribunal should only be appointed to carry out liaison duties,[10] the RF argues that:

> *the assistant a fortiori may not partly or wholly take over the mandate of the arbitrator, nor may he function as a fourth arbitrator, or even participate in the deliberations leading to the arbitral award, nor may he write any drafts of the award. In addition to the prohibition against the arbitrators delegating their personal tasks, the justification for these restrictions on the position of an assistant*

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2 *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (Hulley) PCA Case No AA 226; *Yukos Universal Limited (Isle of Man) v The Russian Federation* (YUL) PCA Case No AA 227, and *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (VPL) PCA Case No AA 228.

3 Art. 1065(1)(a) of the Dutch Code of Civil Procedures (DCCP).

4 DCCP, Art. 1065(1)(b).

5 DCCP, Art. 1065(1)(c).

6 DCCP, Art. 1065(1)(e).

7 See *supra* fn 1, at paras. 179-193.

8 See *supra* fn 1, at para. 469.

9 The fees charged by the assistant are recorded as Euro 970,562 (Award para. 1863).

10 During the procedural hearing held on 31 October 2005, without formal consent from the parties or formal appointment procedures being carried out, the Chairman informed the parties that the assistant was appointed to assist the chairman. The words are: 'I would like to bring to the attention of the parties that I have asked one of my colleagues in my office in Montreal to assist me in the conduct of this case. Because, like all of us, I travel a lot, if at any time I am unreachable, you could always contact him…It may come to pass that you wish to find out something with respect to the tribunal that Brooks Daly [tribunal secretary, of the PCA] might not be aware of. Martin [Valasek] at my office in Montreal could be reached and hopefully will have the answer for you.' See the Writ, para. 488.

> *is that there is no disclosure obligation for an assistant and an assistant cannot be challenged under the code.*[11]

This claim has brought into sharp focus the complex yet interesting issue of whether and to what extent an arbitral tribunal may delegate its substantive obligations to its assisting third parties including analysing the merits of the parties' respective cases and drafting the whole or part of the arbitral award. Undoubtedly, the major hurdles the RF must overcome are to establish the tribunal's personal mandate and to persuade the court that the suspected delegation is not merely a suspicion on its behalf but that it actually occurred. RF must also prove that the award in dispute was drafted by the assistant who, as a consequence, exercised influence over the decision making process, that the tribunal breached its mandate entrusted to it by the parties and, as a consequence, the award should now be set aside.[12] Whether the RF can successfully summon the assistant as a witness or prove its presumption that the assistant actively engaged in the decision making process or influenced the tribunal's decision and thereby resulted in the tribunal effectively consisting of four persons is a matter to be decided by the Dutch court.

Nevertheless, while the issue of a third party's potential involvement has thus far only been addressed from the perspective of arbitration practice,[13] the current literature lacks

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11 *See* supra fn 1 para. 485. This claim was based on the amount of fees charged by an assistant to the tribunal who had spent between 65percent and 70percent more time to the case than any of the tribunal members. (para. 469). RF claimed that the total number of hours charged cannot be explained by the assistant's logistical or administrative role. The statement of account supplied by the Secretariat further strengthened the RF's suspicion on the irregularities in the composition of the tribunal as the assistant spent 381 hours during the procedural hearings stage but spent 2,625 hours during the period of merits hearing and the drafting of the awards, which are much more than those spent by any tribunal members (paras. 494-499). Furthermore, both the tribunal and the Secretariat's refusal to provide any details concerning the breakdown of the assistant's work during the merits stage of arbitration to safeguard the confidentiality of the deliberations further arouse the RF's suspicion that the assistant must have performed a substantive role in analysing the evidence and arguments, in deliberations and in preparing the final awards was drawn from the calculation of the fees and hours spent on arbitration as suggested by the RF.

12 Jenkins, J., *International Construction Arbitration Law*, Arbitration in Context Series, Volume 3, 2013, Kluwer Law International, Alphen aan den Rijn, at p. 273.

13 Wong, V. V., "Administrative Secretaries to Arbitral Tribunals" (2013) 2(2) *Slovenian Journal of Arbitration* 14; Berger, B. and Schneider, M. E. (eds.), Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions, (2013) 42 *ASA Special Series*; Berger, B., "Rights and Obligations of Arbitrators in the Deliberations", (2013) 31 *ASA Bull* 244; Jones, D., "Ethical Implications of Using Paralegals and Tribunal Secretaries" *AMINZ – IAMA Dispute Resolution Conference 2013*, <available at: www.aminz.org.nz/Attachment?Action=View&Attachment_id=290>; Leimacher, E., "Efficiency under the New ICC Rules of Arbitration of 2012: First glimpse at the new practice" (2013) 31 *ASA Bull* 298; Martinez, A., "The International Chamber of Commerce's Note on the Appointment, Duties and Remuneration of Administrative Secretaries dated 1 August 2012", (2012) 6 *International Arbitration Law Review* 50; Newman, L. W., and Zaslowsky, D., "The Fourth Arbitrator: Contrasting Guidelines on Use of Law Secretaries" (2012) 248 *New York Law Journal* 104; Onyema, E., "The Role of the International Arbitral Tribunal Secretary" (2005) (9)1 *Vindobona Journal of International Commercial Law & Arbitration* 99; Partasides, C., "The Fourth Arbitrator? The Role of Secretaries to Tribunals in

parallel research concerning the extent to which judges may delegate their adjudicative responsibilities to their clerks and how this may be compared with the position in arbitration. Therefore, it is the researchers' intention to put forward an in-depth legal analysis on the decision making process in both arbitration and courts involving third parties and to critically analyse the extent to which adjudicators in both methods of dispute resolution may delegate tasks to third parties.

For this research, the authors will firstly consider the theoretical debates surrounding the relationship between the parties and the arbitrator with a focus on the issue of an arbitrator's mandate. This will be followed by an examination of the tripartite relationship between the tribunal, the assistant or secretary to the tribunal and the parties to the dispute after which a detailed analysis of the topics of confidentiality, impartiality and independence will be presented. A comparative discussion with the court process will focus on the relationship between judges and their clerks in three common law jurisdictions (the US, Canada and England) and will specifically consider the extent to which judges delegate their responsibilities to their clerks and the extent to which they may be involved in the decision making process. The research will conclude with an analysis on how the issue of third parties' involvement in arbitration may be resolved.

2 THEORIES OF ARBITRATOR'S MANDATE

Based on the information on the costs contained in the awards, the RF expressed its suspicion that the assistant has performed tasks outside of his administrative remit and 'almost certainly performed a substantive role in analysing the evidence, in the Tribunal's deliberations, and in preparing the final awards.'[14]

Consequently, a request to set aside the *Yukos* awards on the basis of irregularities in the composition of the tribunal and breaching the requirement of *intuit personae* in fulfilling their mandate is made.[15] Nevertheless, before the RF can hold arbitrators personal responsible for their mandate, it is essential to explore the sources of tribunal's mandate, the remit of the mandate and the interaction between the mandate and third parties assisting the tribunal from theoretical perspectives.

The sources of arbitrators mandate are usually discussed under the jurisdictional and contractual theories. The jurisdictional theory is based on the complete supervisory powers of states to regulate any international commercial arbitration within their jurisdiction, whereas the contractual theory argues that international commercial

International Arbitration" (2002) 18 *Arbitration International* 147; Schwartz, E. A., 'On the Subject of "Administrative Secretaries": A Reply by Mr. Eric Schwartz, Secretary General of the ICC Court', (1996) 14 *ASA Bull* 32.

14 See, *supra* fn 1, at paras. 15-16.

15 DCCP, Art. 1065(1)(b).

arbitration originates from a valid arbitration agreement between the parties and that, therefore, arbitration should be conducted according to the parties' wishes.

2.1 JURISDICTIONAL THEORY

Moutulsky once said that '[a]rbitrators are individuals whom the legal system permits to perform a function that is in principle reserved to the state.'[16] Viewing arbitration as an exception granted by the state to its monopoly over the administration of justice in its jurisdiction,[17] proponents of the jurisdictional theory maintain that arbitrators resemble judges of national courts because the arbitrators' powers are drawn from the states by means of the rules of law. In relation to the status of arbitrators, the jurisdictional theory mainly follows the approach of the delegation theory.

According to the delegation theory, in order to settle disputes between parties, an arbitrator must possess a delegated authority given by a state in which he sits to conduct arbitration. An award made by an arbitrator lacking this authority will be void and can be challenged. Because of the special status granted by the state, arbitrators are regarded as resembling judges of national courts.[18] The only difference between them, as pointed out by Niboyet, is that a judge 'derives his nomination and authority directly from the sovereign,' whilst an arbitrator 'derives his authority from the sovereign but his nomination is a matter for the parties.'[19]

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16 Moutulsky, H., *Ecrits*, 1974, Dalloz, Paris, at p. 14; translation from Samuel, A., *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US, and West German Law*, 1989, Schulthess, Zürich, at p. 55.

17 *Ibid*.

18 Lew, J. D. M., *The Applicable Law in International Commercial Arbitration*, 1978, Oceana, Dobbys Ferry, at paras 66 and 67.

19 Based on such a quasi-judicial status, arbitrators are granted certain powers and immunities with the intention of safeguarding the public interest and the efficiency of arbitration procedures; furthermore, they are given the power to avoid unreasonable obstacles or deliberate delays made by the parties during the arbitration procedures. The jurisdictional theory does provide a strong argument for the judicial elements of international commercial arbitration, such as the issues concerning the nature of arbitration, the powers and immunity of arbitrators and the recognition or enforcement of arbitral awards. Niboyet, J-P., *Traité de Droit International Privé Français*, 1950, Sirey, Paris, at p. 137 (para. 1985); cited from Lew, J., *The Applicable Law in International Commercial Arbitration*, 1978, Oceana, Dobbs Ferry, at p. 53.

2.2 *CONTRACTUAL THEORY*

Proponents of the contractual theory[20] argue that arbitration is based on the agreement between the parties. They maintain that parties have the freedom to decide the relevant issues, including the arbitrator's mandate. In most jurisdictions, the relationship between the appointing parties and arbitrators is undeniably based on the contractual theory as illustrated by both *Cereals S.A. v. Tradax Export S.A.*[21] and *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd*[22] where the court held that the arbitrators' entitlement to remuneration was based on a trilateral contract between the two parties and the appointed arbitrators.[23] The contractual relationship discussed here is, in fact, comprised of two contracts: the first is the contract between the parties. That is, the arbitration agreement which is beyond the scope of this paper. The second is the appointment agreement between the parties and the arbitrators. The implied terms of this kind of trilateral contract require arbitrators to 'conduct the arbitration with due diligence and at a reasonable fee,'[24] by using all reasonable means in entering on and proceeding with

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20 Such as Merlin, Foelix, Balladore-Pallieri, Bernard and Klein in France and Kellor, Domke and Kitagawa outside France. See Kellor, F., *Arbitration in Action*, quoted by Stone, M., "A Paradox in the Theory of Commercial Arbitration" (1966) 21 *Arb. J.* 156. Domke, M., *The Law and Practice of Commercial Arbitration*, Mundelein, 1968, p. 31, he stated that 'the express intent of both parties to enter into the arbitration agreement is essential existence.' T. Kitagawa, "Contractual Autonomy in International Commercial Arbitration Including a Japanese Perspective" in Sanders, P. (ed), *Liber Amicorum for Martin Domke*, 1967, Martinus Nijhoff, The Hague, 133, at p. 138, who believes that 'the binding force of the arbitration agreement comes from *'pacta sunt servanda'* as well as other ordinary contracts without any state authorisation.' Proponents of the contractual theory also ignore the fact that, within the existing framework, most states do exercise powers to supervise the arbitration held in their territories and the awards brought to their national courts seeking recognition or enforcement. For instance, the issue of arbitrability displays the weakness of the contractual theory.

21 For instance, the English judges in *Cereals S.A. v. Tradax Export S.A.* [1986] 2 Ll L R 301 upheld that a contractual relationship indeed existed between the parties and the arbitrators, furthermore, arbitrators became parties to the arbitration agreement once their appointment was accepted. An injunction was granted in this case where a breach of the arbitration agreement had been committed by the arbitrators who were regarded as one of the parties to the arbitration agreement. The court observed: 'It is the arbitration contract that the arbitrators become parties to by accepting appointments under it. All parties to the arbitration are, as a matter of contract (subject always to the various statutory provisions), bound by the terms of the arbitration contract.'

22 *K/S Norjarl A/S v. Hyundai Heavy Industries Co. Ltd.* (*Norjarl*) [1991] 1 Ll L Rep 524 (CA).

23 *Ibid*. 537, the court stated: 'So far as the parties are concerned, their obligations under the trilateral contract include the liability to pay remuneration for the service of the arbitrators ... The contractual obligation on Hyundai and Norjarl to pay such remuneration could not be altered without the consent of both.' Also at page 531: 'Once the arbitrator has accepted an appointment, no term can be implied that entitled him to a commitment fee, and the arbitration agreement cannot be varied in that way without the consent of all parties.'.

24 *Norjarl*, at p. 532.

the reference.[25] In other words, the contractual theory focuses on the element of *intuitu personae*.

In respect of the status of arbitrators, Merlin[26] and Foelix[27] suggest that arbitrators are, in fact, the agents of the parties who appointed the arbitrators to resolve the dispute on their behalf.[28] Being the agents of the parties, arbitrators represent the parties who appoint them to resolve the dispute according to the parties' instructions; moreover, any decisions, including arbitral awards, made by the agents have a binding effect on the parties.[29]

However, this agency theory has been rejected by Lainé.[30] As Lainé points out, the functions of arbitrators contradicts the agency theory which requires the agent to work on the principal's behalf in their best interest. Clearly, this does not apply to the relationship between arbitrators and the parties within the present arbitration framework on the basis of impartiality, independence[31] and the tribunal's power to impose an award on both parties.

Furthermore, other contractualists disagreed with Merlin and Foelix.[32] Among them, Bernard[33] viewed the appointment agreement as 'a contract *sui generis*, governed by rules appropriate to it and which must be dealt with by taking into account both the principles governing contracts in general and the particular nature of the function

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25 This was referred in s. 13(3) of the Arbitration Act 1950 (UK).

26 Merlin, P-A., *Recueil Alphabétique de Questions de Droit*, Vol. 9., 4th ed., 1829, Tarlier, Brussels, at p. 144; translation from Samuel, A., *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US, and West German Law*, 1989, Schulthess, Zürich, *supra* fn 17, at p. 34.

27 Both Merlin and Foelix regarded compulsory arbitration as outside their definition. See Merlin, P-A., *Recueil Alphabétique de Questions de Droit*, at p. 144; translation from Samuel, A., *supra* fn 17, at p. 34. Foelix, J., *Traité du Droit International Privé*, 2nd ed., 1847, Joubert, Paris, at p. 461; translation from Samuel, A., *supra* fn 17, at p. 35.

28 Lew, J., *The Applicable Law in International Commercial Arbitration*, *supra* fn 19, at p. 54.

29 Accordingly, in some commodities arbitration, in the case of price disputes men were appointed by the parties to put a reasonable price forward, regarded as the agents of the parties. See *supra* fns 26 and 27.

30 Lainé, A., "De l'exécution en France des sentences arbitrales étrangères" (1899) 26 *J.D.I.* 641; discussed in Lew, J., *The Applicable Law in International Commercial Arbitration*,, *supra* fn 19, at pp. 52-61.

31 Some commentators criticise the contractual theory on the basis that it fails to explain the nature of the duty of the arbitrator to give the parties an impartial and fair hearing - commentators such as Weiss, Balladore-Pallieri, Bernard and Klein. See *infra* fns 32 and 33.

32 Balladore-Pallieri, G., "L'arbitrage privé dans les rapports internationaux" (1935) 51 *Recueil des Cour* 285; Bernard, A., *L'arbitrage volontaire en droit privé*, 1937, L.G.D.J., Paris, at p. 28; Klein, F-F., "Autonomie de la volonté et arbitrage" (1958) 47 *Rev. Crit*. 255 discussed in Samuel, A., *supra* fn 17, at p. 40.

33 Bernard, A., *L'Arbitrage volontaire en droit privé* at p. 152; translation from Samuel A., *supra* fn 17, at p. 41.

exercised by the arbitrator.'[34] Bernard's argument has been supported by Klein, who stated that '[t]he arbitral agreement is the work of the parties alone. The award is the work of the arbitrators. The appointment of the arbitrators is the work of the parties and the arbitrators together.'[35]

3 ARBITRATOR'S MANDATE

In contrast to the ample theoretical analysis on the role and functions of an arbitral tribunal, little, if any, consideration has been given to the issue of third party assistance to the tribunal. Placing this issue within the context of the current research, the intertwined relationship between the tribunal, parties and third parties will be analysed. The analysis will determine the extent to which arbitrators may benefit from the assistance provided by the third parties even though the tribunal receives its mandate from the parties. Would the appointing power by either the parties or the tribunal make any difference in determining the scope of assistance the tribunal can receive? Similarly, if the sources of the tribunal's power lies in the delegation from the state, should the assistance provided by a third party be defined accordingly?

As discussed, the tribunal's mandate does not flow from the arbitration agreement between the parties but derives from an appointment agreement between tribunal and parties. The appointment agreement is a trilateral contract existing among the tribunal and the parties which offers the tribunal the mandate to resolve the disputes.[36] It is said that arbitrators can accept the mandate 'only if he is fully satisfied that he is competent to determine the issues in dispute'[37] and 'only if he is able to give the arbitration the time and attention which the parties are reasonably entitled to expect'.[38] This has led to Partasides's conclusion that arbitrator's mission is '*intuitu personae*'.[39]

3.1 INTUITU PERSONAE?

After establishing the trilateral relationship between the parties and the tribunal, the immediate question demanding an answer is whether such a tripartite appointment agreement is *intuitu personae*. Partasides[40] believes so. Based on the appointment agreement, the tribunal's commitment to carry out the mandate by applying his

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34 *Ibid*.

35 Klein, F-F., "Autonomie de la volonté et arbitrage" p. 260; translation from Samuel, A., *supra* fn 17, at pp. 43-44.

36 Such a mandate can take the written form defining the terms and conditions of the appointment. For instance, Art. 1029(1) of the DCCP requires arbitrators to accept his mandate in writing.

37 IBA Rules of Ethics for International Arbitrators 1987, Art. 2.2.

38 *Ibid*., Art. 2.3.

39 Partasides, C., "The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration" (2002) 18(2) Arb Int'l 147 at p. 147.

40 *Ibid*., at p. 156.

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*.

The characteristics of the relationship between arbitrators and the parties are also reinforced by the emphasis on the contractual element of the appointment agreement, such relation is also subject to statutory duties in some jurisdictions; for instance, a tribunal is usually required to conduct arbitration without unnecessary delay and expenses[41] and observe requirement of privacy in its deliberations.[42]

For example Art 184(1) of the Swiss Federal Statutes of Private International Law 1987, for example, provides that the tribunal shall conduct the taking of evidence[43] and can only discharge the function as arbitrators by completing the mandate in issuing decisions, orders and awards itself.[44] Any documentation issued by a third party may result in the tribunal failing to complete its mandate.[45]

3.2 DELEGATION WITHOUT INFLUENCE OR INFLUENCE WITHOUT DELEGATION?

The issue at the heart of *Yukos* is not about whether the tribunal's mandate is *intuitu personae* but whether such *intuitu personae* duty can be delegated to a third party. Most of the literature holds a negative view on this question as '[i]t is axiomatic to say of an arbitrator's mission that it is "*intuitu personae".*' A party's choice of arbitrator is, of essence, personal and so is the chosen arbitrator's mandate. In accepting appointment, an arbitrator necessarily accepts a duty not to delegate that mandate.'[46] This view is also

41 *Scottish Arbitration Rules*, r. 24; *English Arbitration Act* 1996 s. 33(1); DCCP, Art. 1036(2) and (3).

42 *Scottish Arbitration Rules*, r. 27.

43 This issue is further discussed in Veit, M. D., "Commentary on Chapter 12 PILS, Article 184 [Procedure: taking of evidence]" in Arroyo, M., (ed) *Arbitration in Switzerland: The Practitioner's Guide*, 2013, Kluwer Law International, Alphen aan den Rijn, at p. 127.

44 *English Arbitration Act* 1996, s. 20, s. 22, s. 46; Scottish Arbitration Rules, r. 47: 'decide the dispute' were used in both provisions. Dutch Code of Civil Procedure, Art. 1049 stipulates that 'Awards shall be rendered by the tribunal.'

45 According to Waincymer, J., *Procedure and Evidence in International Arbitration*, 2012, Kluwer Law International, Alphen aan den Rijn, at p. 446,: 'incomplete mandate' has two folds; one is the delegation of duties related to the use of third parties performing tribunal's tasks and the other one is the delegation of duties to the co-arbitrators. Using taking evidence as an example, he is of the view that care should be taken in the latter case even though he acknowledges that such practice is authorised by some statutes and in practice as pointed out by Born, in Born, G., *International Commercial Arbitration*, 2014, Kluwer Law International, Alphen aan den Rijn, at. p. 1998.

46 Partasides, *supra* fn 39, at p. 147.

agreed by Park[47] and Born[48] who highlight that delegation of the tribunal's tasks to third parties or the third parties assuming the responsibility of the tribunal is undesirable. In practice, a similar opinion can also be seen in art 1(4) of Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries and the UNCITRAL Notes on Organizing Arbitral Proceedings 1996 (UNCITRAL Notes).[49]

Among others, the most controversial debate surrounding delegation is whether 'deciding the disputes or making or rendering an award' also includes the deliberation and the writing of any parts of the awards. To what extent can an assisting third party participate in the tribunal's deliberations? And once those deliberations are completed, could the task of drafting the award be delegated to the third party? In answering these questions, some view the tribunal's responsibilities as carrying out all substantive tasks, no matter adjudicative or non-adjudicative, as part of its own personal mandate,[50] and drafting the award is seen as the 'ultimate safeguard of intellectual control'[51] on the tribunal's mandate which is required by the parties. For others, as long as the delegation does not influence the tribunal's decision-making process, drafting the award is

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47 Park, W. W., "Rectitude in International Arbitration" in Park, W. W. (ed), *Arbitration International Special Edition on Arbitrator Challenges*, 2011, Kluwer Law International, Alphen aan den Rijn, at p. 479. Citing the AAA/ABA Code of Ethics (Code of Ethics for Arbitrators in Commercial Disputes) (2004), available at: <www.abanet.org/dispute/commercial_disputes.pdf> ('*AAA/ABA* Code of Ethics') and the ICC Note on Appointment of Administrative Secretaries by Arbitral Tribunal, Park holds the view that the contours of integrity demands the tribunal not to delegate the tasks to third parties. He referred to the Note from the Secretariat of the ICC Court concerning Appointment of Administrative Secretaries by Arbitral Tribunals in (1995) *ICC Int'l Ct Arb. Bull.* (November) 77-78 and stressed the administrative nature of Arbitral Secretary's tasks. The current version of the document is the "The International Chamber of Commerce's Note on the Appointment, Duties and Remuneration of Administrative Secretaries dated 1 August 2012".

48 Born, G., *International Commercial Arbitration*, 2014, Kluwer Law International, Alphen aan den Rijn, at p. 2043.

49 The UNCITRAL Notes, para. 27. It reads: 'Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). *Views or expectations may differ* especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal.'

50 This issue was discussed in Partasides, C., Bassiri, N. et al., *Arbitral Secretaries, ICCA Reports No. 1: Young ICCA Guide on Arbitral Secretaries, ICCA Reports, Volume 1* (International Council for Commercial Arbitration 2014), at pp. 27-28.

51 *Ibid*., at p. 28. The study of the survey discussed in this paper reveals that drafting part of the award and analysing the parties' submissions are no the top six tasks identified. The least appropriate delegation is drafting the entire award.

acceptable. However, such view, as *Yukos* has demonstrated, attracts further complication.

Reviewing this issue from the contractual viewpoint, the tribunal would have fulfilled its mandate once it produces a final decision on the disputes. The issue of who drafted the award can be said to be immaterial as long as the award reflects the true contents of the tribunal's deliberation. This is the position taken by art 3(1) of Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries which suggests that an arbitral secretary's role may legitimately go beyond the purely administrative tasks under the appropriate direction and supervision of the tribunal, including researching questions of law, researching discrete questions relating to factual evidence and witness testimony, drafting procedural orders and similar documents, reviewing the parties' submissions and evidence and drafting chronologies and memoranda summarising the parties' submissions and evidence, attending the tribunal's deliberations and drafting appropriate parts of the award.[52] Following such an approach, 'an arbitrator's use of a legal assistant's summary of the parties' positions and their evidence would be acceptable as long as it does not replace the tribunal's view on the files being reviewed.

The same analogy will apply to the justification of using the assistant' legal research and drafting non-controversial issues as long as it does not take the place of the tribunal's own review of underlying authorities.' [53] Furthermore, the practice of delegating drafting of non-controversial issues, such as stating facts and non-disputed arbitration procedures to the secretary may be seen as appropriate.[54] Nevertheless, it is worth pointing out that in ICC arbitration, the delegation of conducting legal or similar research or preparation 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.[55] This can also be seen in a Swiss case where one saw the Swiss Supreme Court uphold

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52 Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries, Art. 3(2)(e)-(j).

53 Partasides, C., *supra* fn 39, at p. 158. An interesting point on the issue of confidentiality is that according to Art. 1(5) of the ICC International Rules of the International Court of Arbitration, while maintaining the confidentiality, the President or the Secretary General of the Court has similar power as the tribunal to authorise researchers to undertake work of an academic nature to acquaint themselves with awards and other documents of general interest.

54 *Ibid.*. at p. 158.

55 Schnyder, R. F., "Commentary on the ICC Rules, Article 2 [Definitions]" Arroyo, M., (ed) Arbitration in Switzerland: The Practitioner's Guide, 2013, Kluwer Law International, Alphen aan den Rijn, at p. 670 where the author stated that the secretary is excluded from the definition of arbitrators. Also, besides the usual administrative tasks, the administrative secretaries appointed within ICC arbitration are allowed to attend hearings, meetings and deliberations; taking notes or minutes or keeping time; conducting legal or similar research; and proofreading and checking citations, dates and cross-references in procedural orders and awards as well as correcting typographical, grammatical or calculation errors.

the parties' right to object an order drafted by the secretary to the tribunal without the tribunal's prior knowledge.[56]

However, concerns over such an approach may arise, especially from the losing party's viewpoint because the challenge may lie in the award as well as in the way how the tribunal applies, reaches or interprets the legal reasoning to the conclusion of the award. Consequently, it may be argued that the obligations of conducting research to form its view and writing an award by the tribunal itself are implied into the appointment agreement. Therefore, any direct or indirect involvement of a third party could be seen as a breach of the tribunal's mandate. Legal research, drafting a summary of arguments and evidence and drafting a summary of the research on points of law will inevitably convey the third parties' personal view to the tribunal. After all, introducing a secretary or assistant into the process would 'introduce his views into the award.'[57] Their choice of research sources will certainly inject their own view, however small, unless the assistants only summarise the actual legal analysis of the research sources specified by the tribunal.

Partasides stresses the importance of *intuit personae* in arbitrator's mandate and further points out that a secretary can still exert influence over the tribunal by the selective choices of materials decided by him. Consequently, 'it would be naive to assume that an arbitral secretary will not have a degree of influence, however indirect, over the arbitrator and the arbitral tribunal'[58] even if the secretary is only '"merely" tasked with basic matters such as summarising the factual background and the parties' submissions or with identifying key documents for the arbitral tribunal to review.'[59]

Besides, there may be a real perspective that the non-controversial issues may become controversial at the stage of setting aside. The real concerns are whether these third parties, serving as an apprentice in arbitration practice, only observe and carry out the tribunal's tasks independently or do so under the strict instructions or supervision of the tribunal.[60] It is clear that the tribunal has to form its own independent view on the disputes and not to be influenced by others. Nevertheless, as Waincymer[61] highlights,

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56 Swiss Federal Supreme Court, Decision 4A_274/2012 of 19 September 2012, see "Tribunal fédéral, Ière Cour de droit civil, 4A_274/2012, Arrêt du 19 septembre 2012, Fédération X. contre European Chess Union (ECU), Mme et MM. les Juges Klett, présidente, Corboz et Kolly. Greffier: M. Carruzzo." (2013) 31 *ASA Bulletin* 149. Discussed in Scherer, M., "Introduction to the Case Law Section" (2013) 31 *ASA Bulletin*, 52.

57 Partasides, *supra* fn 39, at p. 157.

58 Partasides, C. and Bassiri, N. et al., *Arbitral Secretaries, ICCA Reports No. 1: Young ICCA Guide on Arbitral Secretaries, ICCA Reports, Volume 1*, at p. 26.

59 *Ibid*. 26.

60 Partasides pointed out that scare stories abound in practice and used the words 'over-influential legal assistants' in his paper. Partasides, *supra* fn 39, at p. 149.

61 Waincymer, J., *Procedure and Evidence in International Arbitration*, 2012, Kluwer Law International, Alphen aan den Rijn, at p. 446.

an award which is initially drafted by a third party under the tribunal's instructions may inevitably contains that party's independent evaluation of the issues in dispute. This is when difficulties may arise.

However, Partasides seems to brush aside the concerns the parties may have over the tasks carried out by the third party by citing the support of this practice within the arbitration community and suggesting that the ICCA survey[62] indicates that the benefit of having a third party out-weighs the risk of a 'dilution in arbitrator's mandate.[63] Nevertheless, as discussed previously, in ICC arbitration, the delegation of conducting legal or similar research does not, in any circumstance, release the arbitral tribunal from its personal duty to review the file and/or to draft any decision.[64]

4 ASSISTING THIRD PARTIES IN DISPUTE

In relation to RF's challenge over the suspected assistant's involvement in drafting the awards, RF made an effort in the writ to distinguish between the tribunal's secretary and assistant by pointing out the assistant's duty is less than those of the secretary on the basis that assistant's duty is not anchored to the Dutch Code of Civil Procedure.[65] However, such distinction is not always followed. For instance, Waincymer does not make such a distinction and suggests that apart from legal research, summarising evidentiary materials to help point tribunal members towards the areas where key deliberation are required, *both secretary and tribunal's assistant* are permitted in practice to draft the introductory portion of an award such as those parts outlining the identities of the parties and counsel and if included, the procedural history and a brief outline of the non-controversial facts.[66]

Also, Partasides does not distinguish between a secretary and assistant when he states 'these assistants, known commonly as secretaries to tribunals'.[67] This is also demonstrated by the interchangeable use of the terms in his work as well as the scope of coverage of both arbitral secretaries and assistants in the IBA Guidelines on Conflict of Interests in International Arbitration 2014 on the issue of duty of independence and impartiality.[68]

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62 ICCA, *Young ICCA Guide on Arbitral Secretaries*, ICCA Reports, Volume 1, (International Council for Commercial Arbitration), Annex B and Annex C, pp. 55-86.

63 Partasides, C., Bassiri, N. et al., *Arbitral Secretaries, ICCA Reports No. 1: Young ICCA Guide on Arbitral Secretaries, ICCA Reports, Volume 1*, at p. 27.

64 Schnyder, , *supra* fn 55, at p. 670.

65 See *supra* fn 1, para. 485.

66 Waincymer, J., *supra* fn 61, at p. 445.

67 Partasides, *supra* fn 39, at p. 148.

68 IBA Guidelines on Conflict of Interests, Art. 5(b). However, it is now the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.

4.1 THE USE OF ARBITRAL SECRETARY

As a common practice in today's arbitration,[69] Lalive highlights the economic importance of a secretary-lawyer relationship but points out that the remit of a secretary is limited to 'administrative tasks … under the supervision and the responsibility of the arbitrator.'[70] The roles and functions of such parties are mainly provided by institutional arbitration rules that require the appointment to be made with the consultation with the parties.[71] While Born pointed out that the role of a secretary is not 'seriously questioned' by national law,[72] his observation that French and Germans courts do not view that 'a secretary's presence at hearings violated the parties' due process rights was also upheld by Bühler and Webster.[73]

The main concerns over the involvement of third parties, usually junior lawyers, are generally centred on the lack of transparency in terms of the potential input they may make into the tribunal decision and the lack of clear definition of adjudicative and non-adjudicative tasks.

The involvement of third parties may compromise the integrity of the tribunal and the validity of the awards,[74] among others, the UNCITRAL Notes on Organizing Arbitral Proceedings 1996,[75] the ICC Note Concerning the Appointment, Duties and Remuneration of Administrative Secretaries[76] and the Young ICCA Guide on Arbitral

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69 Dias S., F., *Commercial Arbitration between China and the Portuguese-Speaking World*, 2014, Kluwer Law International, Aalphen aan den Rijn, at p. 70. See Swiss Code of Civil Procedure, Art. 365 and DCCP, Art. 1033(1).

70 Lalive, P., "Inquiétantes dérives de l'arbitrage CCI" (1995) 4 *ASA Bulletin* 634-640. English translation in Partasides, *supra* fn 39, at p. 148.

71 *Swiss Arbitration Rules*, Art. 15(5). Lazopoulos, M., "Commentary on the Swiss Rules, Article 15 [General provisions]" in Arroyo, M., (ed) Arbitration in Switzerland: The Practitioner's Guide, 2013, Kluwer Law International, Alphen aan den Rijn, at p. 452, here the author pointed out that whether the tribunal could disregard the parties' objection and go ahead with an appointment is a matter of academic discussion. By citing ICC Note "Concerning the Appointment of Administrative Secretaries by Arbitral Tribunal" (1 October 1995), the author held the view that, an appointment will be made only with the consent of the parties in practice.

72 Born, *International Commercial Arbitration* at p. 2044.

73 Bühler, M. and Webster, T., *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 2d ed., 2008, ICC Publishing, Inc., Paris, at p. 411; see *supra* fn 48 at p. 2044.

74 A party may appeal to the Outer House against the tribunal's award on the ground of serious irregularity, such as 'an arbitrator having been incapable of acting as an arbitrator in the arbitration (or there being justifiable doubts about an arbitrator's ability to do act)' under the Scottish Arbitration Rules, r. 68(2)(i) and 'any other irregularity in the conduct of the arbitration or in the award which is admitted by the tribunal, or any arbitral appointment referee or other third party to whom the parties give powers in relation to the arbitration' under the Scottish Arbitration Rules, r. 68(2)(k).

75 UNCITRAL Notes on Organizing Arbitral Proceedings 1996 provide that arbitral secretary may only carry out administrative tasks such as booking meeting accommodation and providing secretaries support, paras. 26-27.

76 ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries, 1 August 2012..

Secretaries[77] provide that the function of the arbitral secretary may only be limited to carry out purely organisational or administrative activities and under no circumstances the arbitral tribunal may delegate decision-making functions to others or rely on them to perform any essential duties of its own.[78] An arbitral secretary should not engage in deciding the dispute, express his views on the disputes, nor should he influence the tribunal's decisions in any ways or assume any of the tribunal's functions.

Once a secretary is appointed, he is subject to the same level of independence and impartiality as the arbitrator.[79] This approach corresponds with Lainé's emphasis on the jurisdictional element of arbitration and his supports for statutory or implied impartiality and independence of the tribunal. Such a duty was well illustrated in *Commonwealth Coatings Corp*,[80] and the Canons of Judicial Ethics which stated that both judges and arbitrators 'should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct.'[81] Similar rules can be also seen in both IBA Guidelines on Conflicts of Interest in International Arbitration[82] and Art. 1 of the ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries.[83]

However, whom do the secretaries owe the duty to? In the case of statutory duty,[84] clearly, such duty is owed to both the parties and the tribunals who appoint them. In the case where institutional arbitration rules contain such duty, the contractual element and the appointment process indicate that such duty is owed to the parties who made the appointment and paid for the services.

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77 Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries, Art. 1(4).

78 ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries, Art. 2.

79 For instance, Dutch Code of Civil Procedure, Art. 1035 indirectly acknowledges the use of arbitral secretary in practice and requires that the same level of independence and impartiality shall be imposed on arbitral secretary. It stipulates that 'if the arbitral tribunal is assisted by a secretary, Article 1033 to 1035, inclusive, shall apply *mutatis mutandis*.'

80 *Commonwealth Coatings Corp v. Continental Casualty Co.* 393 U.S. 145 (89 S.Ct. 337, 21 L.Ed.2d 301), at p. 149.

81 Canon 33, The Canons of Judicial Ethics of the American Bar Association.

82 Art. 5(b) reads: 'Arbitral or administrative secretaries and assistants, to an individual arbitrator or the Arbitral Tribunal, are bound by the same duty of independence and impartiality as arbitrators, and it is the responsibility of the Arbitral Tribunal to ensure that such duty is respected at all stages of the arbitration.'

83 The ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries requires that the administrative secretaries must satisfy the same independence and impartiality requirements as those which apply to arbitrators under the Rules as well as to submit a declaration of independence and impartiality.

84 For instance, DCCP, Art. 1033 provides that an arbitral secretary assigned to the tribunal can be challenged for the same reasons as an arbitrator as well as that a secretary has the authority to sign a copy of the arbitral award that is sent to the parties under DCCP, Art. 1058.

4.1.1 RELATIONSHIP BETWEEN THIRD PARTIES AND THE TRIBUNAL OR THE PARTIES

4.1.1.1 WHO APPOINTS THE ADMINISTRATIVE SECRETARY?

Although the Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries stated that the parties shall be given an opportunity to object to the appointment of the arbitral secretary,[85] the selection of an appropriate candidate is usually made at the discretion of the tribunal.[86] In the case of the ICC, the appointment contract seems to exist between the administrative secretary and the tribunal. According to the Note, subject to the consent of the parties, the appointment of administrative secretaries is made by the tribunal. The tribunal has a duty to supply the proposed administrative secretary's *curriculum vitae* and make the parties aware that no appointment shall be made if one of the parties objects to such an appointment.[87] Once the secretary is appointed, he shall act upon the tribunal's instructions and under its strict supervision. Their relationship with the parties shall be explored further from the perspective of remuneration, immunity, and relevant procedural matters.

4.1.1.2 WHO PAYS FOR IT?

It is said that the fees of the administrative secretary may 'be fixed by the parties, and paid directly by them as part of the costs of arbitration, or drawn from the fees of the arbitrator(s).' [88] However, different arrangements may indicate different legal relationships between third parties and the parties or arbitrators respectively. Taking the Scottish Arbitration Rules as an example, r. 60(1)(b)(i) provides that 'the parties are severally liable to pay to the arbitrators expenses incurred by the tribunal when conducting the arbitration, including – the fees and expenses of any clerk, agent employee or other person appointed by the tribunal to assist it in conducting the arbitration'[89] as well as '[…] any other third party to whom the parties give powers in relation to the arbitration.'[90] Similar rule can be seen in the Singapore International Arbitration Centre Arbitration Rules 2013. R. 31.2(c) indicates that the costs of assistance required by the tribunal can be included in the total amount of the costs of

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85 Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries, Art. 2(4).

86 *Ibid*. Art. 2(1).

87 ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries, Art. 2(1).

88 Rawding, N., Fullelove, G. et al., "Chapter 18: International Arbitration in England: A Procedural Overview" in Lew, J. D. M., Bor, H. et al. (eds), *Arbitration in England, with chapters on Scotland and Ireland*, 2013, Kluwer Law International, Alphen aan den Rijn, at pp. 361–398, 369. Also see, Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries, Art. 4(3).

89 *Scottish Arbitration Rules*, r. 60(1)(b)(i).

90 *Ibid*. r 60(2)(b).

the arbitration.[91] The former case outlines a direct contractual relationship between the third parties and the parties, whereas the latter case implies that there is an indirect contractual relationship between the third parties and the parties. For the latter case, interestingly, the parties are still liable to pay for the fees and expenses to those third parties despite the lack of direct contractual relationship. Suppose, the involvement of the third parties received the parties' consent, would the combination of remuneration and consent transfer the appearance of an indirect relationship into a direct relationship between the third parties and the paying parties? Consequently, should the mandate of those third parties be determined by the parties? In the absence of the parties' consent to the appointment, would difficulties arise in interpreting the connection between remuneration between the parties and third parties as well as the appointment contracts between the tribunal and third parties?

In contrast, s. 28(1) of the *English Arbitration Act 1996* provides for direct contractual relationships between the tribunal and the parties who have joint and several liabilities to arbitrators for reasonable fees and expenses and third parties and the tribunal. The remuneration shall be paid by the tribunal. Further support on this view can be found in s. 59 of the *English Arbitration Act 1996*[92] where the fees and expenses of third parties are not included in the costs payable by the parties. Similarly, under the ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries, any remuneration payable to the administrative secretary shall be made by the tribunal out of the total funds available for the fees of all arbitrators and the engagement of administrative secretaries and it shall not increase the total costs of arbitration.[93] This view is also agreed by Müller-Chen and Pair who stated that costs for the secretary to the tribunal are not separate costs, but are included in the arbitrator's fees in ICC arbitration[94] and the Swiss Rules of International Arbitration.[95] This is due to the consideration that the secretary's tasks would have to be performed by the arbitrators themselves if no secretary was appointed. A similar opinion was also expressed by Waincymer who sees that the secretary fees are to be included in the tribunal's fees in the cases where the parties consented to the appointment of the secretary. In the case

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91 The provision reads: 'The term 'costs of the arbitration' includes: a. the Tribunal's fees and expenses; b the Centre's administrative fees and expenses; and c. the costs of expert advice and of other assistance required by the Tribunal.'

92 It provides that the separate costs of arbitration include the arbitrators' fees and expenses, the fees and expenses of any arbitral institution concerned, and the legal or other costs of the parties.

93 ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries, Art. 3.

94 Müller-Chen, M. and Pair, L. M., "Commentary on the ICC Rules, Article 37 [Decision as to the costs of the arbitration]" in Arroyo, M. (ed), *Arbitration in Switzerland: The Practitioner's Guide*, 2013,Kluwer Law International, Alphen aan den Rijn, at p. 869.

95 The Swiss Rules of International Arbitration 2012, Arts. 15(5) and 38(c). Also see Habegger, P. A., "The Revised Swiss Rules of International Arbitration: An Overview of the Major Changes" (2012) 30 *ASA Bulletin* 289; Lazopoulos, *supra* fn 70, at p. 453.

where no consent could be obtained, the secretary's fees will be categorised as tribunal's private expense.[96] This approach clearly avoids the parties being charged for duplicated tasks done by third parties and the tribunal. As a result, it is only reasonable to have the tribunal to bear the costs and share the remunerations with any third parties providing assistance to reduce the tribunal's workloads.

4.1.1.3 ACCOUNTABILITY

Despite the effort to address the relationship between third parties and the parties from contractual theory, undeniably, judicial elements of arbitration can add to the complexities of the issue. This can be seen from the issues of accountability and immunity from civil liability. Regarding accountability, the question is whether third parties shall be held accountable by the parties or tribunal. If it is the parties who pay directly to the third parties, then the mandate of the third parties shall be decided by the parties. Nevertheless, such logic does not correspond with the arbitration practice where parties are usually unaware of the specific tasks carried out by third parties. However, if the payment came out from the tribunal's fees then it is up to the tribunal to set the mandate for the third parties. Also, a contractual relationship between the tribunal and the third parties would allow immunity to be extended to third parties, such as any clerk, agent, employee or other person assisting the tribunal to perform its functions.[97] Outlining a direct relationship between the third parties and the parties on a contractual basis would cause difficulties in interpreting the immunity enjoyed by third parties. Therefore it may be more logical if third parties are appointed contractually by the tribunal as an employee who is protected to enjoy statutory immunity.

4.1.1.4 DOES ASSISTANCE COMPROMISE CONFIDENTIALITY?

In arbitration practice, confidentiality is used as a selling point by the major arbitration institutions.[98] However, confidentiality issue can arise in various stages of arbitration proceedings such as deliberations and writing-up of the awards. The danger of third parties posed on confidentiality is much greater than one can imagine, especially if a

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96 Waincymer, J., *supra* fn 61, at p. 1253.

97 *Scottish Arbitration Rules*, r. 73(3).

98 London Court of International Arbitration Rules (LCIA Rules 2014), Art. 30(1); 2014 Australian Centre for International Arbitration Rules (ACICA Rules 2014), Art. 18; Beijing Arbitration Commission (BAC Rules 2014), Art. 25; British Columbia International Commercial Arbitration Centre Rules (BCICAC Rules), Art. 25; Commercial Arbitration and Mediation Centre for the Americas Mediation and Arbitration rules 1996, Art. 12; 2012 China International Economic and Trade Arbitration Commission Arbitration Rules 2014, Art. 38; Dubai International Arbitration Centre Arbitration Rules 2007, Art. 41; 2013 Hong Kong International Arbitration Centre Administered Arbitration Rules 2013 (HKIAC Rules), Art. 42; 2014 The Japan Commercial Arbitration Association Arbitration Rules 2014 (JCAA Rules), Art. 38; 2010 Netherlands Arbitration Institution Arbitration Rules (NAI Rules), Arts. 5 and 13; 2013 Singapore International Arbitration Centre Arbitration Rules 2013 (SIAC Rules), Art. 35; Stockholm Chamber of Commerce Arbitration Rules 2010 (SCC Rules), Art. 46.

secretary may be requested to carry out legal or other research and attend the deliberation. This danger is observed by Schwartz who points out that the replacement of secretary would become necessary when a secretary drafted the award during the time that the arbitrator was affected by his own alcohol consumption and unable to carry out his duty as an arbitrator in drafting the award himself.[99] Linking the types of tasks, third parties may encounter with confidentiality, one will appreciate the concerns over third parties who have access to confidential information but not subject to the duty confidentiality.

While the consensus is that the tribunal's deliberation shall take place in private and remain secret,[100] two types of practice emerge. One practice[101] is to have deliberation conducted strictly among the tribunal members unless the parties discharge the tribunal such duty. Such duty is said to ensure the serenity of the tribunal and their freedom of expression during deliberations[102] as well as avoid challenges over the process of deliberations and the dissenting opinions.[103]

In the case of ICSID arbitration, differently, a tribunal is allowed to admit the third parties into the deliberation room. This practice is said to exclude any potential input such third parties may have on this issue and directly places the full control into the hands of the tribunal. Although Berger urges the tribunal to exercise caution in consulting the parties before doing so, doubts were expressed about the likelihood of a successful challenge of the award due to the lack of parties' consent.[104] After all, the objecting party must prove that there is a link between admitting a third party into the deliberation and his presence had a material influence on the tribunal's decision.

Despite the possibility of third parties being present at the deliberations, a strict duty of confidentiality must be observed. This could be seen in *Rhéaume v. Société d'Investissements L'Excellence Inc*., [105] where the court held that the arbitral award

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99 Schwartz, E., "The Rights and Duties of ICC Arbitrators" in *The Status of the Arbitrators ICC International Court of Arbitration Bulletin, Special Supplement*, 1995, ICC, Paris, at p. 86.

100 ICSID Arbitration Rules, Art. 15; Scottish Arbitration Rules, r. 27.

101 In the case of the IBA Rules of Ethics for International Arbitrators (1987), rule 9 reads, 'The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation. An arbitrator should not participate in, or give any information for the purpose of giving any assistance in, any proceedings to consider the award unless, exceptionally, he considers it his duty to disclose any material misconduct or fraud on the part of his fellow arbitrators.'

102 Karrer, P., "Responsibility of Arbitrators and Arbitral Institutions – Let Sleeping Dogs Lie" in Newman, L. W. and Hill, R. D. (eds) *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, 2008, Juris Publishing, Inc., New York,, at p. 618.

103 Waincymer, J., *supra* fn 61, at p. 1297.

104 Berger, B., "Rights and Obligations of Arbitrators in the Deliberations" (2013) 31 *ASA Bulletin* 256.

105 *Rhéaume v. Société d'Investissements L'Excellence Inc*. [2010] QCCA (Québec Ct. App.) 2269, para. 25.

should be the work of the tribunal alone and it shall be free from any outside influence. Therefore, nobody shall be allowed to probe the secrecy of deliberations[106] as well as communicate the matters to be decided by the tribunal to the parties. To eliminate the potential danger of compromising confidentiality by third parties, it may be desirable for the tribunal obtaining consent from the parties; i.e. confidentiality agreement, and taking 'reasonable steps to prevent unauthorised disclosure of confidential information by any third parties involved.'[107] After all, the scrutiny of the draft of award for typographical errors is different from the scrutiny of the deliberation.[108]

5 JUDICIAL DELEGATION TO CLERKS

The previous sections discussed the controversial issue of the involvement of a tribunal's assistant in discharging some of the duties and responsibilities of the arbitrators and the strong argument from the contractual theoretical perspective that the nature of the appointment agreement as being *intuitu personae*[109] – a contract of personal service *vis-à-vis* the parties and the arbitrators – means that the arbitrators themselves should resolve the dispute between the parties (including drafting the award) without the involvement of any third parties in that process. Both the appointment of the arbitrator and his mandate are viewed as personal to the parties, any level of delegation to his assistant may raise doubts over its justification. As the RF has contended in *Yukos*, any deviation from this would constitute a breach of the arbitrators' mandate.

Having considered the theoretical and practical perspective of delegation of an arbitral tribunal's responsibilities to its assistants, this section provides a comparative discussion with the court process and considers the parallel relationship between judges and their law clerks.[110] The discussion will focus upon the nature and role of clerks and will specifically consider the extent to which judges in civil and commercial disputes may delegate their responsibilities (including some of their adjudicative powers such as the drafting of opinions) to their clerks and the extent to which clerks are involved in the decision making process. The discussion will concentrate upon three common law

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106 *Rhéaume v. Société d'Investissements L'Excellence Inc*. [2010] QCCA (Québec Ct. App.) 2269, para. 31.

107 Scottish Arbitration Rules, r. 26(2). In the context of these rules, the term 'third parties' means any third parties taking part in the arbitration proceedings. However, it is worthwhile noting that, subject to parties' agreement, r. 27 requires the deliberation to be private.

108 Waincymer, J., *supra* fn 61, at pp. 1263 – 1348, 1297.

109 Partasides, C., *supra* fn 39, at p. 147.

110 Although various jurisdictions use different terminology to describe a judge's clerk (for example in England they are referred to as 'judicial assistants'), the functions which they perform are similar (e.g. legal research, diary keeping, administrative court functions) and therefore, for the purposes of this article, the authors adopt the term 'clerk' to refer to the work carried out by both law clerks and judicial assistants.

jurisdictions each of which have varying traditions and practices of employing clerks: the US, Canada and England and Wales (hereinafter 'England').

It is trite that a judge's mandate, that is, his powers to adjudicate a dispute between litigating parties, derives from the powers delegated to him by the State. The State maintains the power to formulate and regulate laws and the power to administer justice between litigating parties is delegated from the State to the judiciary. Consequently, the issues of appointment, remuneration, accountability and confidentiality examined in the previous section do not apply to clerks since the issue of *intuitu personae* becomes irrelevant. The issues which do arise, however, include the extent to which a judge may delegate his duties and responsibilities to his clerk, whether that influences the decision making process and the policy rationale for permitting such delegation. Before exploring these issues, we must understand the nature of clerks and the types of duties they undertake before considering the controversial issues of judicial delegation and the potential or actual influence of clerks on the decision making process.

5.1 THE ROLE AND RESPONSIBILITIES OF CLERKS

The US, Canada and England[111] employ clerks to work alongside judges.[112] Some of the tasks delegated to clerks will be similar to those undertaken by assistants to an arbitral tribunal (such as administrative duties). However, other specific tasks which a judge may delegate to his clerk, for example drafting appellate opinions, will be peculiar to certain jurisdictions and may be considered as forming part of the decision making process.

Clerks are legally qualified professionals who are employed by the courts to assist judges in various tasks in discharging their adjudicative and administrative responsibilities. In the US and Canada, they are typically graduates from elite law schools and considered to be of the highest calibre,[113] whereas in England they will comprise of qualified barristers or solicitors who are seconded by their chambers or

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111 Other jurisdictions using clerks/assistants include Australia, New Zealand and many civil law jurisdictions.

112 The US and Canada use clerks in Federal and Supreme Courts, whereas in England they are primarily used in the Court of Appeal.

113 Oakley, J. B. and Thompson, R. S., "Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges" (1979) 67 *Californian Law Review* 1, 2. See also Domnarksi, W., *In the Opinion of the Court*, 1996, University of Illinois Press, Urbana, at pp. 38-40; Newland, C., "Personal Assistants to Supreme Court Justices: The Law Clerks" (1961) 40 *Oregan Law Review* 299 for a detailed historical discussion of the role of the clerk in the US.

firms for a year to the Courts.[114] DiLeo and Rubin[115] attempted to define the role of a clerk as follows:

> *[…] the clerk serves at the direction of the judge and performs a broad range of functions. Clerks are usually assigned legal research, drafting, editing, proof-reading, and verification of citations. Frequently, clerks also have responsibility for library maintenance, document assembly, service as courtroom crier, and some personal errands for the judge. Clerks often attend conferences in chambers with the attorneys in a case and also engage in conferences and discussions with the judge regarding pending cases.*

In the US, clerks first came about in response to the ever increasing caseloads and delay in judicial actions in the appellate courts.[116] As Baier points out, the introduction of the law clerk in the US Supreme Court was 'the invariable, now deliberate, response to the growth of appellate caseloads.'[117] Lord Woolf MR also stressed the beneficial nature of judicial assistants, in particular in cases involving litigants-in-persons. In the only case concerning the nature of clerks in the Court of Appeal,[118] he said:

> *The judicial assistants are of great benefit to the Court. They assist the Court to understand the issues on an appeal. This is especially helpful in cases involving litigants in person where the litigant in person frequently will not have prepared a skeleton argument. They save the time of members of the Court by drawing to their attention relevant authorities decided in this jurisdiction or abroad.*[119]

The types of tasks which a judge may delegate to his clerk will vary depending on the judge to whom the clerk has been assigned[120] and will be similar to those tasks carried

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114 See Jaemison, P., "Of judges, judgments and judicial assistants" (1998) 17 *Civil Justice Quarterly* 395 and Peppers, T. C. and Zorn, C., Law Clerk Influence on Supreme Court Decision Making, available at: <http://ssrn.com/abstract=925705>.

115 DiLeo, A. and Rubin, A., *Law Clerk Handbook: A Handbook for Federal District and Appellate Law Clerks*, 1977, Federal Judicial Centre, Washington, § 1.100.

116 Dunnewold, M. L., Honetschlager, B. A. and Tofte, B. L., *Judicial Clerkships A Practical Guide*, 2010, Carolina Academic Press, 2010, Durham, at p. 19. In the US, the first clerk was hired in the 1870s by Justice Horace Gray of the Massachusetts Supreme Court in response to the pressure of an increasing workload. The idea of judicial clerks was taken-up by the US Supreme Court a few years later. Eventually, in 1919, Congress authorised the hiring of law clerks for each Supreme Court justice.

117 Baier, P. R., "The Law Clerks: Profile of an Institution" (1973) 26 *Vanderbilt Law Review* 1125, 1132.

118 *Parker v The Law Society* [1999] C.O.D. 183.. Canada also introduced clerks in response to the increased workload in its appellate courts and partly because of the success of using clerks in the US courts. For a detailed account of the historical development of clerks in Canada see Snell, J. G., and Vaughan, F., *The Supreme Court of Canada: The History of the Institution*, 1985, University of Toronto Press, Toronto, at p. 223.

119 *Parker*, *supra* fn 117, para. 3.

120 Wasby, S. L., "The World of Law Clerks: Tasks, Utilization, Reliance, and Influence" 98(1) *Marquette Law Review* 111.

out by an assistant to an arbitral tribunal. In the US Supreme Court, clerks have broadened the duties of the clerks over the last thirty years to include reviewing cert. petitions, drafting memoranda summarising the petitions and recommending whether to grant or deny review, drafting bench memoranda that prepare the judges for oral argument, and preparing the first draft of majority, concurring and dissenting opinions.[121] In general terms, clerks in the US collaborate with judges to ensure that judicial decisions are well thought out, accurately take the law and facts into account and are communicated clearly.[122] Thus, clerks adopt a significant role in testing the arguments and views of their judges as Dunnewold makes clear:

> *A clerk lays an important screening role in this decision-making process, directing the judge's attention to the most important or difficult matters in a case. The clerk also acts as a "sounding board" to the judge, helping the judge test ideas and arguments, and letting the judge know if a decision is off-track.*[123]

5.2 CLERKS ARE SIMPLY EXTENSIONS OF THE JUDGES AT WHOSE PLEASURE THEY SERVE

Although clerks are ultimately considered as merely 'extensions of the judges' whom they are appointed to serve, it is common for some judges to delegate significant tasks to their clerks which go beyond legal research and court administrative duties. Clerks may be required to draft bench memoranda and, in the US, draft judicial opinions.[124]

In his work on the use of clerks in US courts, Wasby, drawing on the comments of former US judges, observes that judicial opinions have become more legalistic because they are more likely to be written by clerks than the case earlier.[125] Indeed, Judge Richard Posner has stated: 'Today most judicial opinions are written by law clerks, which was not true a century ago, when very few judges even had law clerks…and less true decades ago, when judges had fewer law clerks and law still had a writing culture.'[126]

The bench memoranda in the appeal courts of all three jurisdictions are prepared by the clerks for their judges and consist of a summary of the facts involved in a particular appeal, a history of the proceedings in the lower courts, an indication of the issues on

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121 Peppers, T. C. and Zorn, C., The Law Clerk Influence on Supreme Court Decision Making, available at: <http://ssrn.com/abstract=925705>.

122 Dunnewold , Honetschlager,. and Tofte, *supra* fn 115, at p. 20.

123 *Ibid*., at p. 20.

124 Whether a first draft of a whole opinion or a portion of an opinion.

125 Wasby, *supra* fn 119, at p. 116. The views of Judge Alfred T. Goodwin and Judge Richard Posner's views are discussed by Wasby.

126 Posner, R. A., *How Judges Think*, 2008, Harvard University Press, Cambridge, at p. 221

the appeal and any opinion which the judicial assistant has on the merits of the appeal.[127] Lord Woolf MR in *Parker* explained that the bench memoranda will be provided to each member of the Court hearing an application or appeal and will often:

> *'[…] be supplemented by discussions between members of the Court and the judicial assistant. The judicial assistant when carrying out research will copy cases which he or she considers will assist members of the court.'*[128]

The drafting of these important court documents by clerks may be considered to be part of the decision making process or, at the very least, influencing the judges final decision in a case. Nevertheless, the judge/clerk relationship and the permissibility of judges to delegate significant duties such as drafting the bench memoranda and opinion writing has been an accepted and established practice of the court process as compared with the position in arbitration. The difference in approach appears to be rooted in the nature of the two dispute resolution processes and, in particular, the acceptance that judges are agents of the State from which judges receive their powers to adjudicate disputes but do so with limited resources. The strain of ever increasing caseloads on judges and the need for judges to adjudicate on a wide variety of disputes, some of which may not fall within their expertise, means that judges should be assisted and supported in discharging their duties. It is common for judges to instruct their clerks to research and therefore 'educate' the judge in respect of areas of law which they are unfamiliar[129] and to assist in conserving finite judicial time by highlighting the most significant element of a case. Thus, ever since the introduction of the clerk in the court system, the primary rationale underpinning the acceptance, use and delegation of judicial duties to clerks has been the need to alleviate the substantial burden on limited court resources and, consequently, to avoid any delays in judicial action. John Frank, in his biography of the US Supreme Court, makes the convincing argument in favour of the use of clerks when he states '[a]s the work load increases, the methods must be streamlined or else the work output will go down.'[130] An arbitral tribunal, in comparison, is appointed by the parties and as such the agreement is, as Partasides has argued,[131] *intuitu personae*. As such, the arbitral tribunal's substantial financial reward in applying its expert knowledge to the dispute and adjudicating on the issues in contention between the parties means that the tribunal itself should carry out its duties and responsibilities. Consequently, one cannot see how

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127 Coonan, G., The Role of Judicial Research Assistants in Supporting the Decision Making Role of the Irish Judiciary (2006) 6 *Judicial Studies Institute Journal* 171; Sossin, L., The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911416>.

128 *Parker*, *supra* fn 117, para. 4. Emphasis added.

129 See *Parker*, supra, fn 117. Wasby notes that some US judges regularly use clerks to do research to help them understand the law areas of law of which they were unfamiliar - see Wasby, *supra* fn 119, at p. 114.

130 Frank, J. P., *Marble Palace: The Supreme Court in American Life*, 1972, Greenwood Press, Westport, at p. 113.

131 *Supr*a fn 39.

the arguments of 'agent of the State', 'educating function' and 'alleviation of burden on court resources' could be applied to arbitrators, otherwise why would the parties engage with arbitration and incur substantial costs in doing so?

5.3 DELEGATION WITHOUT BEING INFLUENCED

Bench memoranda are important because through them the clerks may help frame the issues the judges consider or on which they focus. Wasby explains that as part of the bench memoranda the clerk may also pose questions to be asked of counsel at argument as if they are used, the clerk has helped affect the content and tone of argument.[132] Similar to the concerns over the input of third parties in arbitration procedures, such assistance would inevitably influence how the judges view the arguments put forwarded by parties. Wasby also asserts that a clerk's contributions through his bench memoranda are likely to be greater in more complex cases, the clerk has more time than the judge to devote to the case, giving the clerk an 'information advantage'. However, the judge's greater experience provides heuristics used to cut through many cases and judges do not feel held to the position proposed by their own clerks.[133] This could be said for arbitrators if the issue of remunerations was not considered.

There is also the issue of delegation of tasks such as opinion writing to clerks and the impact or influence this may have upon the final decision. The position in the US in this regard is that, although some judges can and do delegate the drafting of opinions to their clerks, the ultimate decision is taken by the judge himself. It was made clear in the case of *Oliva v Heller* that: '…the work done by law clerks is supervised, approved, and adopted by the judges who initially authorised it. A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve.'[134]

Significant research into the role and influence of law clerks at the US Supreme Court was conducted by Peppers and Ward and Weiden, both in 2006.[135] Peppers considered the extent of clerks' influence on Court outcomes and concluded that 'The necessary conditions for the exercise of influence by law clerks have rarely, if ever, existed on the Supreme Court.'[136] Similarly, Ward and Weiden's research records one former high-ranking clerk, Ronald Klain, strongly refuting any claim that clerks influenced their

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132 Wasby, *supra* fn 119, at p. 111.

133 *Ibid*.

134 *Oliva v Heller* 839 F.2d 37 (2d Cir. 1988) 40.

135 Peppers, T. C., *The Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*, 2006, Stanford University Press, Stanford and Ward, A. and Weiden, D. L. *Sorcerer's Apprentice: 100 Years of Law Clerks at the United States Supreme Court*, 2006, New York University Press, New York.

136 *Ibid*., 206.

judges. Klain argued 'Supreme Court law clerks have less impact on the Supreme Court than the staff of Congress and the White House.'[137] However, it has been suggested that a clerk's *political ideology* may have an independent effect on how Supreme Court justices vote on the merits of a case.[138] Peppers and Zorn have also contended that, although clerks do not inappropriately wield influence, their findings suggest that justices rely heavily upon their clerks as sounding boards and advisers in deciding how to vote on the merits of cases.[139]

In Canada, recent research has revealed that clerks are having an increasing influence on judicial opinions. Bodwin, Rosenthal and Yoon's study[140] into the opinion writing of the Supreme Court of Canada has shown that judges who rely heavily on their clerks will produce more varied judgments in terms of style as compared to those judges who write their own judgments.

In contrast, the judges of the English courts are far more conservative and restrained when delegating to their clerks. Lord Woolf MR summarised the position in *Parker* when he explained that the primary responsibility of clerks is to prepare bench memoranda and conduct research for members of the Court as well as discharging certain administrative tasks.[141] The clerks do not, however, draft any aspect of the judgment: this task is strictly confirmed to the judge and there is no suggestion that clerks have involvement or influence in the drafting of judgments.[142]

It is clear that the practice of judges delegating some of their duties and responsibilities to their clerks is an established an accepted practice and the acceptance of this practice lies with the notion that the State delegates adjudicative powers to judges who then exercise those powers in administering justice between disputing parties. As will be discussed, there are also convincing policy considerations which justify the use of clerks and the delegation of some judicial functions to clerks.

The delegation of the types of tasks from judges to clerks are similar, if not the same, as those which an arbitral tribunal may delegate to an assistant and cover the range of tasks as outlined by art 3(1) of the Young ICCA's Best Practice for the Appointment and Use of Arbitral Secretaries. However, although there is some controversy concerning whether the clerks do actually influence the final decision, it is clear that the

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137 *Ibid*., 233.

138 Peppers T. C. and Zorn, C., The Law Clerk Influence on Supreme Court Decision Making, p.233 available at: <http://ssrn.com/abstract=925705>.

139 *Ibid*.

140 Bodwin, K., Rosenthal, J.S. and Yoon, A. H., "Opinion Writing and Authorship on the Supreme Court of Canada", (2013) University of Toronto Law Journal, p. 63.

141 For example keeping the judicial diary and drafting extra-judicial speeches.

142 See Paterson, A., Final Judgment - The Last Law Lords and the Supreme Court, 2013, Hart, Oxford.

tasks which they perform are considered as *supporting* the decision making process or even *enhancing* that process. In any event, the ultimate decision rests with the judge.

Although some may view judicial delegation to clerks negatively, the policy arguments in favour of judicial delegation to clerks justify the use of clerks in assisting the judicial role. Braden has previously asserted that '…if a judge has a competent law clerk to help him, his decision ought to be better than would be the case if the judge had to work alone.'[143] As discussed previously, clerks first came about in order to counter the increased case load experienced in the courts and the associated delays in discharging judicial functions. McInnes has argued that access to trained research assistants '…eases the burdens placed on the judges and improves the quality of justice delivered by the bench.'[144] Lord Woolf emphasised the significant role played by clerks in saving the Court of Appeal time and, at the time the case of *Parker* was decided, in assisting the Court in cases involving litigants-in-persons. The important tasks of drafting the bench memoranda and carrying out legal research allow judges to focus on the key legal and factual issues, especially in large and complex disputes. And where the judge is unfamiliar with an area of law or legal issue, legal research conducted by clerks allows the judge to be educated in the law. This avoids the judge being draw into unnecessary tasks which has the adverse effect of consuming available judicial time and resources. Further, the assistant of the clerk has the advantage of allowing the judge to determine which tasks he wishes the clerk to undertake and which those tasks which he himself will focus upon.

6 CONCLUSION

The nature and role of a third party and the extent to which arbitrators may delegate their duties and responsibilities in adjudicating the parties' dispute is complex and controversial. Tensions exist between the need to uphold and protect the status of the appointment agreement as *intuit personae* on the one hand and the arbitral tribunal's potential need to delegate some of its duties and responsibilities on the other.[145] However, in the light of the theoretical, practical and comparative analysis raised in this article, there are three major arguments (explored below) which support the contention that the involvement of an assisting third party should be restricted to carrying out non-controversial tasks which do not impact or form part of the adjudicative functions of the tribunal. The authors refer to the delegation of these types of non-controversial tasks as 'non-adjudicative delegation' and would include administrative duties, as discussed

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143 Braden, G., "The Value of Law Clerks" (1953) 24 *Mississippi Law Journal* 295, 295.

144 McInnes, M., Bolton, J. and Derzko, N., "Clerking at the Supreme Court of Canada" (1994) 33 *Alberta Law Review* 58, at pp. 60-61. See also Russell, P., *The Judiciary in Canada: The Third Branch of Government*, 1987, McGraw-Hill Ryerson, Toronto, at p. 352.

145 Born, *International Commercial Arbitration* at p. 2301.

earlier, as well as more specific tasks, but ones which do not impact or influence the decision making process of the tribunal, such as carrying out legal research and drafting the memoranda. These specific tasks could be required to be undertaken by an assisting third party in order to furnish purely descriptive information to the tribunal which would *not* include the third party's interpretation, analysis or application of the law to the issues in dispute.

All 'adjudicative tasks' - that is those duties and responsibilities which pertain to the resolution of the issues between the parties – should be strictly retained and discharged by the arbitral tribunal without the involvement of the assisting third party. This would include, for instance, the drafting of all parts of the award and the *interpretation and application* of legal research (carried out by the assisting third party) to the legal and factual issues of the dispute. Finally, the arbitral tribunal should exercise control over the delegation and supervision of tasks delegated to an assisting third party.

So what are the three arguments in support of restricting and, indeed, controlling an assisting third party? The first argument relates to the issue of the arbitrator's mandate. As argued previously, judges receive their mandate to adjudicate disputes between parties from the State: judges are agents of the State and derive their adjudicative powers from the State. The same cannot be said of arbitrators who are not considered to be agents of the parties and whose mandate, powers and immunity status are subject to intense academic debate. Arbitrators have been nominated and appointed by the parties to fulfil their mandate to the parties.[146] Therefore, the issue which arises is whether a contractual relationship exists between parties and arbitral assistants or simply between arbitrators and assisting third party. In the absence of a clear definition of this tripartite relationship, it is difficult to decide whether an arbitral assistant should receive its mandates from the parties or receive its mandate from the arbitrators and enjoy immunity from the arbitrator's appointment.

Secondly, an assisting third party should not be tasked with having to 'educate' the arbitral tribunal as compared with the relationship between judges and clerks where this practice is accepted and justified,[147] especially given the limited court resources. Assisting third parties in arbitration are usually junior lawyers who fulfil the role as 'apprentices' to the arbitrators so as to gain valuable experience of the arbitral process. In arbitration, surely it should be the arbitrators who 'educate' the assisting third parties on aspects of law and procedure as their 'apprentices'? This is evident from the Young

146 See the discussion in Part 2, Theories of Arbitrator's Mandate.

147 In many continental European states, to become a judge the candidate must be first a clerk or secretary for certain time. This is equally a learning process for the clerk.

ICCA's Best Practices and research done by Partasides invoking the supervisory role of the arbitrators in the tasks carried out by third parties.[148]

Finally, it is trite that, by accepting an appointment, an arbitrator is under a strict duty to dedicate his attention and expertise in adjudicating on the matter. This is further reinforced by the substantial financial remuneration which the arbitrator will receive for his services. If arbitrators are over-burdened by their workloads and find themselves in a position whereby they are unable to provide personal service to the parties without delegation of substantial duties to their assisting third parties (including adjudicative tasks) then, it is submitted, arbitrators should not accept an appointment. Consequently, the justification for the use of clerks in the court process as assisting in saving judicial time clearly do not apply to arbitral assistants.

Having considered the arguments in favour of restricting the involvement of assisting third parties and the lack of justification for delegation of adjudicative tasks, the following three mechanisms may improve the practice of delegating non-adjudicative tasks to assisting third parties:

1. Delegation to the assisting third parties without influence from them;
2. Strict supervision by the arbitral tribunal of tasks delegated to the assisting third parties;
3. Assisting third parties having a clear and express mandate from the parties or the arbitrators.

It is clear from the comparative discussion of the court process that judges may delegate their responsibilities to their clerks but that judges will make the final decision on the merits of the case. This, however, is more problematic in arbitration, as *Yukos* demonstrates, where the contract is *intuit personae*. Given the fact that assisting third parties do not enjoy statutory mandate as those enjoyed by clerks as well as clearly lack a direct mandate from the parties, they cannot be considered as extensions of the arbitrators who they serve (as compared with the same position in the court process). Consequently, as suggested earlier, a more rational way to proceed would be for an arbitral tribunal to only delegate non-adjudicative tasks which do not impact on the decision making process. So, for example, the assisting third party may be required to simply rehearse the facts of the dispute, carry out legal research but without expressing an opinion or applying the legal principles to the facts, or simply setting out the parties' legal arguments. A key element of delegation would be carried out under clear instructions and supervision by the arbitral tribunal. This would be similar to the relationship between a partner in a law firm who delegates and supervises the work of

[148] See Young ICCA's Best Practices for the Appointment and Use of Arbitral Secretaries, Born, *supra* fn 48, Park, *supra* fn 47, and Partasides, *supra* fn 39, at p. 149.

his assistant and trainee solicitors. The assisting third parties would be provided with strict instructions not to express their opinions of the issues and this would be monitored through a review process by the arbitrators and thereby reducing the risk of the assisting third party influencing the decision making process. It may be argued that the practice of close supervision by the tribunal of non-adjudicative tasks undertaken by the assisting third party would increase the costs unnecessarily.

A further argument may be that the tribunal's valuable time will be unnecessarily incurred in supervising and monitoring non-adjudicative tasks – tasks which will not impact on the decision making process. However, the cost of arbitration is substantial as compared with other dispute resolution processes and therefore the parties would understandably look to the arbitrators to provide a service for which they are paying. Arbitrators should be primarily responsible in the completion of all necessary work pertaining to the arbitration (as a partner in a law firm would be when engaged to advise on a substantial dispute) and the delegation of non-adjudicative tasks (which would not include analysis etc.) should not incur substantial time and costs regardless whether the assisting third party is appointed by the arbitrators or the parties. This would avoid the situation which had arisen in *Yukos* in which the RF is contending that the assisting third party has carried out adjudicative tasks and therefore the tribunal has breached its mandate.

While the authors' suggestion will significantly reduce the 'risk inappropriately involving a secretary or other junior lawyer in the tribunal's deliberations or decision-making,'[149] the issues examined in this article are ultimately influenced by the tribunal's view on delegation. After all, if an arbitrator 'is willing to cede control of the decision –making process to his secretary, then the problems lies with the arbitrator himself.'[150]

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149 Born, *International Commercial Arbitration* at p. 2000.

150 Partasides, The Role of Secretaries at p. 157