

THE REGULATORY AND PRACTICE CONCERNING ROLE OF TRIBUNAL SECRETARY IN INTERNATIONAL ARBITRATION

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ABSTRAK

Arbitrase merupakan salah satu metode penyelesaian sengketa internasional secara damai yang tersedia. Sebagai badan yang independen, pada proses arbitrase, para pihak dapat menentukan sendiri aturan prosedural dalam arbitrase, jumlah arbitrator dan aturan apa saja yang ingin digunakan, dengan tetap memperhatikan prinsip-prinsip hukum umum yang digunakan pada proses arbitrase.

Sudah merupakan praktek yang lumrah pada saat dilakukannya proses arbitrase, para arbitrator biasanya menggunakan sekretaris untuk tugas-tugas administratif. Karena tidak adanya aturan yang seragam sebagai acuan, tugas dari sekretaris ini terkadang diperluas sampai diluar kewenangannya, seperti menjadi arbitrator keempat hingga sampai menyusun putusan arbitrase.

Metode penelitian yang digunakan dalam tulisan ini yaitu metode penelitian normatif dipadukan dengan pendekatan perbandingan, perundang-undangan, kasus, literatur terkait dan analisis konsep hukum. Berdasarkan penelitian, dalam prakteknya, tugas sekretaris dalam proses arbitrase tidaklah lebih dari administratif dan tidak terlibat dengan proses pengambilan keputusan. Dikarenakan saat ini belum ada aturan yang sama sebagai acuan yang mengatur secara tegas mengenai peran dan juga tugas yang dapat dilakukan oleh sekretaris di proses arbitrase, munculah kasus-kasus baru berdasarkan pada kecurangan sekretaris karena dinilai melebihi kewenangannya. Pada kesimpulannya, adanya aturan umum mengenai sekretaris di proses arbitrase internasional sangat dibutuhkan untuk kejelasan dari kelangsungan praktek di arbitrase internasional.

Kata kunci: Arbitrase, Sekretaris, Peran, Praktek.

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ABSTRACT

Arbitration is one of some peaceful dispute settlement methods available. As an independent entity, in arbitration process the parties are free to choose their own rules of procedure, amount of arbitrators, and the law that will be applicable in the proceeding by still based upon the general principle that is used in arbitration proceeding.

It is a general practice in arbitration proceeding, that arbitrators are usually hired a secretary for administrative tasks. In the absence of uniform rule as reference, it caused the role of secretary is sometimes expanded until it exceeded its power, for instance being the forth arbitrator until drafting the arbitration award.

The method that is used in this writing is the normative legal research combined with comparative, statutory, case, relevant literature, analytical and conceptual approach. Based on the research, in the arbitration practices, the role of secretary in arbitration proceeding is only administrative task and they are not allowed to be involved in decision making process. As there is still no rules of role and task that could be done by secretary in arbitral proceeding, it raised new cases which based upon secretary's fraudulent intention, by exceeded its power. In conclusion, it is needed to establish the uniform rule concerning role of the secretary in international arbitration process to give clarity for the continuity in international arbitration practice.

Keywords: **Arbitration, Secretary, Role, Practice.**

I. INTRODUCTION

1.1 Background

International peace and security are the primary purposes of the United Nations, to fulfill this purpose, the United Nations provides for the peaceful settlement of disputes through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies and arrangements, or other peaceful means.¹

International arbitration is a well-recognized dispute settlement in international law.² It was held to be the most effective and equitable manner of dispute settlement, when diplomacy had failed to occur.³ International law also recognize that the practice of an arbitration is including choosing judges by parties own's choice⁴ and on the basis of respect of law.⁵

As an independent entity,⁶ the parties are also free to form or choose their own rules of procedure,⁷ the place of the tribunal which they deem contributing the impartiality and independence of the tribunal, duties of the arbitrator and secrecy of the

¹United Nations, 1945, *Charter of the United Nations*, 1 UNTS XVI, Article 33.

²Malcolm N. Shaw, 2014, *International Law 7th Edition*, Cambridge University Press, United Kingdom, p.760; Mauro Rubino-Sammartano, 2014, *International Arbitration Law and Practice - Third Edition*, Juris Publishing, Inc, New York, p.133.

³*Ibid.*

⁴Liber Amicorum, 2011, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Kluwer Law International, The Netherlands, p.223.

⁵The Hague Convention for the Pacific Settlement of International Dispute, 1907, Art. 37; *Intrepetation of Article 3, paragraph 2, of the Treaty of Lausanne*, 1925, Advisory Opinion, PCIJ, Series B, No. 12, p.26; *Maritime Delimitation and Territorial Questions*, 2001, Qatar v. Bahrain, ICJ Reports, pp.76-77.

⁶Halil Rahman Basaran, 2015, *Is International Arbitration Universal*, 21 ILSA J. Int'l & Comp. L. 49, p.505.

⁷Edward Brunet *et. al*, 2006, *Alternative Dispute Resolution: The Advocate's Prespective Cases and Materials Third Edition*, Lexis Nexis, Unites States, p.430.

proceeding.⁸ This condition made various standard regulation and procedures in the arbitration proceeding because of the flexibility.

In some cases of international arbitration, the tribunal commonly hire an arbitral tribunal secretary (“tribunal secretary”).⁹ The hiring of a tribunal secretary has numerous benefits, including increasing efficiency of the arbitral proceedings, reducing costs of the arbitration and allowing the arbitrators to focus on the merits of the case.¹⁰ Despite many practices in international law, there is still no uniform standard exist for hiring of the tribunal secretary. In some regulations, a tribunal secretary may handle administrative tasks, such as coordinating logistics and secretarial services, the more contentious area is that they attend the deliberation and drafting procedural orders and portion of awards.¹¹

That circumstances make an inconsistency of the regulation that will be applied when a tribunal hired secretary and has been to be the subject of unlawfulness with concerns that the secretary going beyond their position in the tribunal, for instance becoming a decision making or fourth arbitrator,¹² having work-hours more than the arbitrators,¹³ and so forth.

In *Yukos v. Russia* case, on January 28, 2015, the Russian Federation filed three writs (“Writ”) to The Hague District Court,

⁸Halil Rahman Basaran, *op.cit.*, p.506.

⁹“Arbitral Award written by the Tribunal Assistant”, (<https://www.lexology.com/library/detail.aspx?g=bea9a0fe-6d1b-4f71-9bbe-7548a6e3875a>), accessed on April 29th 2018, 4:00 PM.

¹⁰Sofia Andersson, 2015, *A Fourth Arbitrator or an Administrative Secretary*, Uppsala Universitet Departement of Law, p.9.

¹¹Jean-François Poudret, Sébastien Besson, 2007, *Comparative Law of International Arbitration*, Sweet & Maxwell, Switzerland, p.513.

¹²Gabrielle Kaufmann-Kohler, Antonio Rigozzi, 2015, *International Arbitration: Law and Practice in Switzerland*, Oxford University Press, United Kingdom, p.404; Michael McIlwrath, John Savage, 2010, *International Arbitration and Mediation: A Practical Guide*, Netherlands, Kluwer Law International, The Netherlands, p.265.

¹³*Ibid.*

that seek to annul the Award, alleging that the arbitrators did not fulfil their mandate personally because the Tribunal's secretary played a significant role in analyzing the evidence and legal arguments, in the Tribunal's deliberations, and drafting the Award.¹⁴

Based on that concerns, it is needed to analyze the role of the secretary of arbitral tribunal in some regulations and the practices in international tribunal. Therefore, this legal research is compiled with the title "*THE REGULATORY AND PRACTICE CONCERNING ROLE OF TRIBUNAL SECRETARY IN INTERNATIONAL ARBITRATION.*"

1.2 Formulation of the problems

1. How is the role of the tribunal secretary that has regulated in international law?
2. How are the practices of the hiring the tribunal secretary in international arbitration?

1.3. Objective

The objective of this legal research is to analyze role and practices of the tribunal secretary in international arbitration from the international law perspective. It aims to explain and describe the regulation that regulates about the role of tribunal secretary, and the comparison of the practices in international law.

II. CONTENT

2.1 Research Method

2.1.1 Type of Research Method

The type of research method that used in this legal research is the normative legal research. Normative legal research is a legal

¹⁴Writ of Summon by Russia, paras.15(b),21(c),363(3),509, (https://www.italaw.com/sites/default/files/case-documents/italaw4158_0.pdf) accessed on April 29th 2018, 4:05 PM.

research conducted by examining primary and secondary sources.¹⁵

2.1.2 Type of Research Approach

This legal research is using the statute approach, analytical and conceptual approach.¹⁶

2.1.3 Legal Materials

The data that are used in this legal research is secondary data. Which the secondary data are:

1. Primary legal materials, which includes procedural rule of several international arbitral tribunal.
2. Secondary legal materials, which includes legal materials that explain about the primary legal materials, for instance legal research, cases or literature that relevant with the problems in this legal research.
3. Tertiary legal materials, which includes legal materials that will give guidance and explanation about the primary and secondary materials such as dictionary, encyclopedia and so forth.

2.1.4 Technique of Collecting Legal Materials

This legal research is using normative legal research. The steps are including collecting, reading, and analyzing literatures that related with the problems in this research as well as quoting some opinions or statements that support to answer the problems in this research. Subsequently, all of the materials are arranged systematically as the legal basis to answer the problems.

2.1.5 Technique of Analyzing Legal Materials

¹⁵Soerjono Soekanto dan Sri Mamudji, 2006, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, PT. Raja Grafindo Persada, Jakarta, p.13.

¹⁶Peter Mahmud Marzuki, 2009, *Penelitian Hukum*, Kencana Prenada Media Group, Jakarta, p. 93.

The techniques of analyzing legal materials that is used in this legal research are descriptive and systematic techniques. The descriptive technique is a technique that explaining about the real condition or position from the legal or non-legal proportions. The systematic techniques is a technique that used to find the relation of the concept of law of legal proportion between regulations.

2.2 Result and Analysis

2.2.1 The Regulation Regarding the Role of the Tribunal Secretary in International Law

It is a well-established practice in large and complex international arbitrations for a secretary, often a junior lawyer, to be appointed as the assistant of the tribunal.¹⁷ The secretary will usually organise and attend the hearings and the deliberations of the tribunal.¹⁸ In several regulations and procedural rules of arbitration institution, they have regulated about role of tribunal secretary, they are:

1. The International Arbitration of the International Chamber of Commerce (ICC)

In 2017 Arbitration Rules of ICC, there is no rule regulating about the role of tribunal secretary, however in *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration 2017* Part XVII and *Note on the Appointment, Duties and Remuneration of Administrative Secretaries 2012*¹⁹, those two notes provide that in ICC Arbitration, the Administrative

¹⁷*The Rompetrol Group N.V. v. The Republic of Romania*, 2008, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, ICSID Case No. ARB/06/3; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, 2012, Award, ICSID Case No. ARB/08/12; *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru*, 2006, Decision on Jurisdiction ICSID Case No. ARB/03/28.

¹⁸Michael McIlwrath, *op.cit*, p.265.

¹⁹Note on The Appointment, Duties and Remuneration of Administrative Secretaries, (<https://actuarbitragealtana.files.wordpress.com/2015/04/note-on-administrative-secretaries-icc.pdf>), accessed on April 29th 2018, 4:12 PM.

Secretaries can be appointed at any time during an arbitration. Administrative Secretaries must satisfy the same independence and impartiality requirements, and before any steps are made to appoint an Administrative Secretary, the Arbitral Tribunal shall inform the parties of its proposal to do so.²⁰

Moreover, for the role of the secretary, the ICC provided that an Administrative Secretary may perform organisational and administrative tasks such as transmitting documents and communications on behalf of the arbitral tribunal; organising and maintaining the arbitral tribunal's file and locating documents; organising hearings and meetings; attending hearings, meetings and deliberations; taking notes or minutes or keeping time; conducting legal or similar research; proofreading and checking citations, dates and cross-references in procedural orders and awards, as well as correcting typographical, grammatical or calculation errors.²¹ Importantly, under no circumstances may the arbitral tribunal delegate decision-making functions to an Administrative Secretary, nor should the arbitral tribunal rely on the Administrative Secretary to perform any essential duties of an arbitrator.²² The role of tribunal secretary in ICC arbitration is organizational and administrative task, and it is emphasized that there is no circumstances that tribunal secretary may perform decision-making functions.

2. The International Centre for Settlement of Investment Dispute (ICSID)

²⁰Appointment part, *Note On The Appointment, Duties and Remuneration of Administrative Secretaries*, 2012; *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, 2017, Part XVII, para.142.

²¹*Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, 2017, Part XVII, para.144.

²²*Ibid*, para.145.

In *ICSID Administrative and Financial Regulations* (“ICSID Regulations”) provides that the secretary shall be appointed to each ICSID tribunal. in accordance with Regulation 25 ICSID Regulations, the appointment of the tribunal secretary is conducted by the ICSID Secretary General, however, it is unstated about consent of the parties about the hiring of the secretary.

Furthermore, in ICSID Regulations, the role of tribunal secretary are also regulated in Regulation 25 ICSID Regulations, which are ***firstly***, they shall represent the Secretary-General and may perform all functions assigned to the latter by these Regulations or the Rules with regard to individual proceedings or assigned to the latter by the Convention, and delegated by him to the Secretary; ***secondly***, be the channel through which the parties may request particular services from the Centre; ***thirdly***, keep summary minutes of hearings, unless the parties agree with the Commission, Tribunal or Committee on another manner of keeping the record of the hearings; and ***lastly***, perform other functions with respect to the proceeding at the request of the President of the Commission, Tribunal or Committee, or at the direction of the Secretary-General. In which, in that ICSID Regulations the role of tribunal secretary is purely administrative.

3. United Nations Commission On International Trade Law (UNCITRAL)

In UNCITRAL Arbitration rules, there is no exact rule regulated about the tribunal secretary, however, according to 2016 UNCITRAL *Notes on Organizing Arbitral Proceedings* (Second Edition), the UNCITRAL arbitration proceeding recognize the hiring of the secretary of the tribunal. The appointment of the secretary in UNCITRAL arbitration would normally disclose, and the parties may wish to agree on the role and practices to be adopted in

respect of the assistant, as well as the financial conditions applicable to their services.

Meanwhile, for the role of the tribunal secretary, the notes provided that the secretary may provide purely organizational support,²³ such as making reservation for hearing and meeting rooms and providing or coordinating administrative services and it is recognized that assistants are not involved and do not participate in the decision-making of the arbitral tribunal, except in the certain rare.

4. Young ICCA Guide on Arbitral Secretaries

International Council for Commercial Arbitration (ICCA) is a world wide and accredited by United Nations NGO devoted to promoting the use and improving the processes of arbitration, conciliation and other forms of resolving international commercial disputes.²⁴ In 2014 ICCA established the 2014 Young ICCA Guides on Arbitral Secretaries (“Guides”) which focuses on transparency, party consent and cost efficiency.

In this Guides, according to Article 1(2) and Article 2, the appointment of tribunal secretary should only be appointed with the knowledge and consent of the parties, they may suggested by the tribunal and the tribunal shall confirm to the parties that the proposed candidate for tribunal secretary is independent, impartial and free of any conflicts of interest. Moreover, in Article 3(2)a, regulated that the parties shall be given an opportunity to object to the appointment of the tribunal secretary and accompanied by reasons justifying said objection.

²³UNCITRAL, *Notes on Organizing Arbitral Proceedings* (Second Edition), 2016, para.36.

²⁴“About the International Council for Commercial Arbitration”, (<http://www.arbitration-icca.org/about.html>), accessed on April 29th 2018, 4:18 PM.

In accordance with Article 3 of the Guides, the role of tribunal secretary are involving:

1. Administrative or organizational nature, for example undertaking administrative matters as necessary in the absence of an institution, organizing meetings and hearings with the parties, and handling and organizing correspondence, submissions and evidence on behalf of the arbitral tribunal.
2. Beyond the administrative or organizational nature, for example drafting procedural orders and similar documents and drafting appropriate parts of the award.

In this Guides, it gives an extention for the meaning of administrative or organization tasks, which it is including drafting appropriate parts of the award.

Based on that analysis, it can be concluded that the role of the tribunal secretary are regarding administrative tasks (which are transmitting documents and communications on behalf of the arbitral tribunal; organising and maintaining the arbitral tribunal's file and locating documents; organising hearings and meetings; attending hearings, meetings and deliberations; taking notes or minutes or keeping time; conducting legal or similar research; proofreading and checking citations), and purely organizational support, such as making reservation for hearing and meeting rooms and providing or coordinating administrative services, and there is an regulation regulated that beyond administrative tasks for example drafting procedural orders and similar documents and drafting appropriate parts of the award.

Therefore, all regulations regulated that the role of the secretary is only in the scope of administrative or organizational task, however the meaning of administrative and organizational task is depending on the institution. It means that when the

secretary substantial part in arbitration process especially regarding the award, it can be categorized as the secretary has exceeded their capacity.

2.2.2 The Practices of Hiring the Tribunal Secretary in International Arbitration

There still no cases regarding the annulment of an award because of the excessive role of tribunal secretary, however, there are several cases that have discussed about the hiring of tribunal secretary, which some of them are also controversial:

1. *Compañía de Aguas del Aconquija S.A., Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3.

In this 2007 ICSID case, in the decision annulment of award proceeding, there is an additional opinion of Professor JH Dalhuisen under Article 48(4) of ICSID Convention,²⁵ which essentially discussed about the role of secretary in the tribunal, it is because of the matter concerning the arbitral secretary has been caused multiple complications and delayed final decisions. He emphasized that the role of the secretary was one of 'administration and support' and that the secretary is 'not the fourth member of ICSID Tribunals or ad hoc Committees and a tribunal secretary should not draft any portion of an award because they have no power of decision-making process.'²⁶

2. *Yukos v. Russia*, 2016, The Hague District Court.

On 20 April 2016, the Hague District Court annulled the award between Yukos and Russia on the background of the tribunal lacked of jurisdiction. One of the grounds that Russia has

²⁵*Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, 2010, Annulment Proceeding, ICSID Case No ARB/97/3, Additional Opinion of Professor JH Dalhuisen under Art 48(4) of the ICSID Convention, p.67.

²⁶*Ibid*, paras.3,21.

to challenge the awards by Permanent Court of Arbitration (PCA) had a relation with arbitral secretary. It is because of the tribunal secretary, Mr. Valasek was engaged as an assistant without prior notification to both parties.

Moreover, the work-hours of Mr. Valasek in total 65% more than the time spent by the chairman, and 70% and 40% more than the time spent by each of the other two arbitrators.²⁷ Therefore, the Russia argued that the secretary goes beyond the essence of arbitral function.²⁸ The Hague District Court decided that because the Russia never ratified the *Energy Charter Treaty*, thus the tribunal lacked of jurisdiction, and the other arguments by Russia including the matter regarding tribunal secretary remain undiscussed.

3. *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12.

According to the award of this case, both of the parties have agreed to hired the “assistant” for the president of the tribunal. Which it is stated that “The Parties agreed to the possibility of the President of the Tribunal hiring an assistant of the Tribunal for logistical assistance on the file in this case, ...”²⁹ there is no further explanation about the meaning logistical assistance in that award.

Based on the writer analysis, those practices have shown that the role of secretary is not as ‘forth arbitrator’, of for logistical assistance and they must not beyond the administrative tasks or decision-making process.

²⁷“*Arbitral Award written by the Tribunal Assistant*”, (<https://www.lexology.com/library/detail.aspx?g=bea9a0fe-6d1b-4f71-9bbe-7548a6e3875a>), accessed on April 29th 2018, 4:00 PM.

²⁸Writ of Summon by Russia, p.167, accessed on April 29th 2018, 4:05 PM(https://www.italaw.com/sites/default/files/casedocuments/italaw4158_0.pdf)

²⁹*Caratube International Oil Company LLP v. Republic of Kazakhstan*, 2012, Award, ICSID Case No. ARB/08/12, para.14.

III. CLOSING

3.1 Conclusion

In accordance with the analysis above, the writer concludes that:

1. There is still no uniform rules regulated about the role of secretary in international arbitration, however some regulation in essence regulated that the role of tribunal secretary are administrative or not beyond administrative tasks.
2. Based on cases law analysis regarding the role of tribunal secretary, most of the regulations ruled that the role of secretary must not beyond the administrative tasks or decision-making process.

3.2 Suggestion

Suggestion that the writer can give are:

1. The formulation of the uniform regulation regarding the role of tribunal secretary is needed, since there are several cases regarding annulment of arbitral award based on the claim excessive role of tribunal secretary.
2. It is a common practice about the hiring of tribunal secretary, however before the tribunal process begin it is needed to every tribunal declare and inform the parties regarding the using of tribunal secretary, to reduce the speculation of the excessive role of tribunal secretary.

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