CHAPTER I

INTRODUCTION

1.1. Background

Arbitration, whether domestic or international, is increasingly being used as the preferred alternative dispute resolution mechanism in this modern era. This is due to the fact that as the economic welfare of nations increase, the number of disputes increase alongside it.[1] The use of international arbitration is increasing especially since a nation's trade and investments has globalized and has become more integrated and reliant to one another.[2] However, as the number of disputes rise, the individuals with an expertise in the field of arbitration are exposed to an increase in arbitration-related activities, either as counsel or as arbitrator.[3] This is particularly more relevant in arbitration due to some it's specialized nature. In many cases, arbitration is preferred due to the ability of the parties to choose an arbitrator that has knowledge regarding the subject matter, such as finance or construction.[4] The importance of the parties' choice of arbitrators in specialized fields could be characterized by the following:

> "The choice of the persons who compose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightly been said that arbitration is only as good as the arbitrators."[5]

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[1] Klaus Berger, *International Economic Arbitration*, (Boston: Kluwer Law International, 1993), p. 247.
[2] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter et. al., *Redfern and Hunter on International Arbitration*, 5th ed., (Oxford: University Press, 2009), p. 10.
[3] C. Brown, "The Evolution and Application of Rules Concerning the 'International Judiciary'", *The Law and Practice of International Courts and Tribunals*, 2 (2003), p. 63.
[4] Gary B. Born, *International Commercial Arbitration: Commentary and Material*, 2nd edition, (Netherlands: Kluwer Law International, 2014), p. 24.
[5] J. Lalive, *Melanges en l'honneur de Nicolas Valticos in Droit et Justice*, (Editions A. Pedone, 1989), p. 289.

Parties in these specialized fields of arbitration may be confined to choosing the same counsels and arbitrators to take part in many cases.[6] This would inevitably lead to a risk in the existence of a conflict of interest between the parties involved in the arbitration, which could be between the parties, their counsels the arbitrators, and even external parties such as third party funders.[7]

An existence of a conflict of interest relating to an arbitrator violates the basic principles of impartiality and independence, which are vital in ensuring the fairness of an arbitration proceeding.[8] Arbitrators serve an adjudicatory role and, as a result, must have an impartial position and be independent of the parties.[9] It is for this reason that an arbitral award, like the judgment of a national court, may be subject to challenge if the adjudicating body, namely the arbitral tribunal, was linked economically to one of the parties to the dispute, or lacked impartiality with respect to a party or the subject matter of the dispute.[10]

A conflict of interest constitutes a circumstance in which a party who is in the position of deciding a case has a material interest which is either in actual conflict with that party making or participating in making that decision, or can be reasonably so inferred in the circumstances.[11] That interest could arise out of a relationship in which that arbitrator or other party is involved and that goes to the

[6] Philippe Fouchard, Emmanuel Gaillard, and Berthold Goldman, *International Commercial Arbitration*, (Kluwer Law International, 1999), p. 339.
[7] Born, *op. cit.*, p. 110.
[8] W. Lawrence Craig, William W. Park, and Jan Paulsson, *International Chamber of Commerce Arbitration*, (Oxford University Press, 2002) p. 196.
[9] Redfern and Hunter, *Op. Cit.*, para. 4–68.
[10] *Ibid.*
[11] Fouchard, O*p. Cit.*, p. 11.

arbitrator's independence; or it can arise by virtue of the behavior or other course of conduct involving that arbitrator and that relate to that arbitrator's impartiality.[12]

In order to avoid possible conflicts of interest, arbitration rules normally require the disclosure from the arbitrator of any circumstances or facts that may influence a reasonable person against one of the parties.[13] The disclosure requirement is an ongoing requirement for the arbitrator throughout all the arbitral process, if any new circumstances arise that may influence his impartiality or independence, he should disclosure them.[14] However this inclusion of the disclosure requirement has not been standardized in the codes and rules of international arbitral institutions.[15] This may be due to the fact that some arbitral institutions aim differentiate themselves from one from another, and thus the requirements are more specific in some institutions than others.[16]

Most arbitration laws include this as a requirement, and arbitral institutions embed such requirements in their arbitration rules.[17] Even *ad hoc* arbitrations using the UNCITRAL Arbitration Rules are not exempt from these requirements.[18] This shows that there is a consensus in the field of arbitration that arbitrators, similar to judges, must uphold the principles of impartiality and independence to some extent.

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[12] Sam Luttrel, *Bias Challenges in International Commercial Arbitration: The Need for a 'Real Danger' Test*, (Kluwer Law International, 2009), p. 195.
[13] *Ibid.*
[14] Leon Trakman, "The Impartiality and Independence of Arbitrators Reconsidered." *University of New South Wales Faculty of Law Research Series* 25 (2007), p. 30.
[15] *Ibid.*, p. 31
[16] *Ibid.*
[17] Jean-Francois Poudret, Sebastien Besson, Stephen Berti and Annette Ponti, *Comparative Law of International Arbitration*, (London: Sweet and Maxwell, 2007), p. 122
[18] Stewart A. Baker, and Mark D. Davis, *The UNCITRAL Arbitration Rules in Practice*, (Kluwer Law and Taxation Publishers, 1992), p. 50.

In this regard, Indonesia has also included this requirement in Article 12 of Law No. 30 of 1999 Concerning Arbitration and Alternative Dispute Resolution ("Indonesian Arbitration Law"), which states as follows:

> "The parties who may be appointed or designated as arbitrators must meet the following requirements:
> a. Being authorized or competent to perform legal actions;
> b. Being at least 35 years of age;
> c. Having no family relationship by blood or marriage, to the third degree, with either of the disputing parties;
> d. Having no financial or other interest in the arbitration award; and
> e. Having at least 15 years' experience and active mastery in the field."[19]

The third and fourth requirements set out in this article constitutes a requirement of impartiality and independence of the arbitrators, which shows that the Indonesian Arbitration Law is in line with the aforementioned principles. Furthermore, the Badan Arbitrase Nasional Indonesia ("BANI Arbitration Center") also stipulate such requirements in the same way with the Indonesian Arbitration Law in its arbitration rules as follows:

> "Besides possessing ADR/Arbitration qualifications as referred to in paragraph 1 above, all arbitrators shall possess the following requirements:
> a. authorized or qualified to take legal actions;
> b. being at least 35 years of age;
> c. not having familial relationship based on descent and marriage down to the third generation, with any of the parties in dispute;
> d. not possessing financial interest or anything whatsoever on the result of arbitration resolution;
> e. experienced for at least 15 years and mastering actively the relevant field;
> f. not serving or acting as judge, prosecutor, clerk of court, or other court official."[20]

[19] Art. 12(1) of the Indonesian Arbitration Law.
[20] Art. 10(3) of the BANI Arbitration Rules.

The BANI Arbitration Center Rules Concerning Arbitrators, Mediators and Code of Ethics ("BANI Code of Ethics") elaborates potential conflicts of interests further, stating that an arbitrator must:

> "Reveal all facts or circumstances that might give rise to justifiable regarding their impartiality or independence, which is not limited to the existence of a close personal or professional relationship, whether directly or indirectly, including previous appointments as arbitrators, that concerns all parties in the arbitration proceeding, or a representative from one party, or an individual who is chosen as the main witness."[21]

In practice, in party appointed arbitrations, the person approached to act as an arbitrator will normally disclose informally any relevant circumstances to the party seeking to nominate or appoint an arbitrator. If the prospective appointing party considers that the facts disclosed by the arbitrator are not relevant to influence the arbitrator's independence and impartiality, the arbitrator should, after the appointment, formally state the facts disclosed delivering them to both parties of the arbitration.[22] Hence, these disclosure requirements in international commercial arbitration are intended to avoid any justifiable doubt regarding the impartiality of an arbitrator.[23] Once the arbitrator has fulfilled the requirement of disclosure of the circumstances, any subsequent challenges to the arbitrator based on these circumstances cannot be used as a basis to remove the arbitrator in the event of a challenge.[24]

[21] Art. 5A(1) of the BANI Code of Ethics and Code of Conduct for Arbitrators.
[22] Craig, *et al*, *Op. Cit.*, p. 152.
[23] *Ibid.*
[24] Aron Broches. *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*. Deventer, Netherlands: Kluwer Law and Taxation Publishers, 1990, p. 144.

However, parties to the arbitration can accept the nomination of an arbitrator if and when they are made aware of the connections which the proposed arbitrator may have with the other parties, their counsel, and, possibly, the other members of the Arbitral Tribunal.[25] It is also accepted in certain jurisdictions that the parties may waive the independence of the arbitrators, but they can only do so to the extent they are aware of the existing relationships of the arbitrators with the parties or with the parties' counsel.[26] The essential requirement is the honesty with which the arbitrator should disclose in order to permit the parties to concretely assess his or her situation in the parties' eyes. That being said, an inaccurate or otherwise incomplete statement should not automatically lead to a recusal of the arbitrator or to annulment of the award.[27]

In the event that a party seeks to remove an arbitrator due to possible conflicts of interest, most rules and regulations provide a challenge mechanism to assess the merits of the challenge.[28] In determining such challenges, most rules and regulations allow the arbitral tribunal, the arbitral institution, or an appointing authority to determine whether or not the arbitrator should be removed and replaced.[29]

Despite the availability of the challenge mechanism in order to ensure impartial and independent arbitrators, arbitration rules and regulations seldom

[25] Poudret, et al. *op. cit.*, p. 147.
[26] Cour d'appel, Regional Court of Appeal, Paris, 1e ch., Nov. 18, (2004).
[27] Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968).
[28] Craig, *et al*, *Op. Cit.*, p. 151.
[29] Poudret, et al. *op. cit.*, p. 149.

provide parties with a standard to assess the impartiality or independence of an arbitrator. That being said, in 2004, the International Bar Association ("IBA") provided the arbitration community with the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines").[30] The IBA Guidelines received minor updates in 2014, and hereinafter, this thesis will refer to the 2014 version of the IBA Guidelines when referring to the IBA Guidelines.

The IBA Guidelines aim to provide insight regarding potential conflicts of interest in order to determine the impartiality and independence of arbitrators.[31] The IBA Guidelines classify possible conflicts of interest into three separate categories, namely the Red List, the Orange List, and the Green List.[32] These lists provide specific situations that may range from situations that give rise to justifiable doubts regarding an arbitrator's impartiality and independence, to situations that do not amount to such doubts.[33]

In assembling the IBA Guidelines, the IBA Working Group on Conflicts of Interest in International Arbitration ("Working Group") considered the usefulness of existing standards, which was taken into consideration in the formulation of the IBA Guidelines.[34] The Working Group also strived to formulate new standards for situations that had not previously been addressed.[35] This was also done in close

[30] Redfern and Hunter, *op. cit.*, para. 4–63.
[31] *Ibid.*
[32] Broches, *Op. Cit.*, p. 145.
[33] *Ibid.*, p. 144.
[34] Peters, Anne, Lukas Handschin, and Daniel Högger. *Conflict of Interest in Global, Public and Corporate Governance*, (Cambridge: Cambridge University Press, 2012), p. 114.
[35] *Ibid.*, p. 115.

consideration regarding the application of the IBA Guidelines in multiple jurisdictions.[36]

The Working Group first established General Standards setting forth the best international practice with regard to impartiality and independence.[37] These are the core of the Guidelines. In addition, the Working Group proposed concrete examples of how to apply the General Standards, because such practical guidance was considered essential if the Guidelines were to be useful to practitioners.[38] In developing the practical application of the General Standards, members of the Working Group drew up a list of recurring situations based on the case law of different jurisdictions, as well as their own experiences.[39]

Throughout the process of drafting the IBA Guidelines, the Working Group sought comments from numerous arbitration institutions, practitioners and corporate general counsels in order to create a guideline that is practical in nature.[40] Contributors include the French-based International Court of Arbitration of the International Chamber of Commerce ("ICC"), the Deutsche Institution für Schiedsgerichtsbarkeit e.V. or the German Institution of Arbitration ("DIS"), the London Court of International Arbitration ("LCIA"), the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), the Singapore International Arbitration Centre ("SIAC"), among others.[41] The comments and issues that were

[36] IBA Guidelines, Introduction.
[37] Luttrel, *Op. Cit.*, p. 110
[38] *Ibid*.
[39] IBA Guidelines, p. 25
[40] *Ibid.*, p. 26
[41] *Ibid.*, p. 28

raised by representatives of these organizations led to numerous changes to the Guidelines and to a reconsideration of certain principles.[42]

The Working Group aimed to create a document that will be well accepted within the international arbitration community.[43] While the IBA Guidelines are not legally binding, the Working Group's aim is that the document will help arbitration practitioners, arbitration institutions and national courts in determining issues on the matter of impartiality, independence and the requirement of disclosure.[44]

Much of the arbitration laws and arbitration rules merely provide for an impartial and independent arbitrator, however, unlike the IBA Guidelines, they do not provide the assessment that is necessary in order to prove an arbitrator's impartiality and independence, or lack thereof. Considering such facts, the Author is interested to explore how the IBA Guidelines could be used as a standard to determine the impartiality and independence of an arbitrator, and to find out how the international arbitration community has responded to the introduction of the IBA Guidelines.

1.2. Research Questions

Based on the abovementioned background, the Author seeks to find the answer to the issue:

[42] Anja Seibert-Fohr, "Judicial Independence in Transition". *Springer*, (2012), p. 94.
[43] Fouchard, O*p. Cit.,* p. 79.
[44] Brown, *Op. Cit.* p. 96.

1. How do the IBA Guidelines determine the standards of an arbitrator's impartiality and independence?

2. To what extent are the IBA Guidelines recognized and implemented in arbitration proceedings and in national courts?

1.3. Research Objectives

According to the aforementioned issues, the objective of the Author are as follows:

1. To explore the formulation of standards set out in the IBA Guidelines in determining an arbitrator's impartiality and independence.

2. To determine whether the extent of the recognition and implementation of the IBA Guidelines in domestic and international arbitration.

1.4. Research Benefits

Following the completion of this research, the Author hopes that this thesis will have benefits for both the academic and practical perspectives in the specialized field of arbitration:

1.4.1. Theoretical Benefit

From a theoretical perspective, the Author hopes that this thesis could benefit the study of international arbitration, specifically in Indonesia. The Author hopes that the result of this research could be a catalyst to a clearer understanding of the role of arbitrators and their rights in arbitration for law students as well as law practitioners.

1.4.2. Practical Benefit

The Author hopes that the practical benefit of this research would be in the form of a better execution of arbitral proceedings that concern Indonesian nationals in order for them to be able to compete at an international level. Furthermore, with this research, the Author hopes that law students that are interested in the field of arbitration could fully understand the topic in order for them to become better practitioners in the future.

1.5. Systematics of Writing

With the purpose of properly framing the discussion of the thesis, the Author shall divide the different segments of discussions into five interconnected chapters, which are as follows:

CHAPTER I : INTRODUCTION

The first chapter provides the background of international commercial arbitration and the views concerning conflicts of interest in arbitration according to relevant legal sources which includes the Indonesian Arbitration Law. It also provides an understanding of the impartiality and independence of an arbitrator according to various rules and regulations. This chapter also contains the core issues that will be discussed in this thesis along with its

primary purpose. Overall, the first chapter should hopefully enhance the knowledge of the reader to the point that they may better understand the coming chapters.

CHAPTER II: LITERATURE REVIEW

The second chapter shall elaborate the definitions and understandings of impartiality and independence of arbitrators in the field of arbitration. It will explain how the impartiality requirement is being implemented in different courts and compare the outcome. Furthermore, it will discuss the implementation of the IBA Guidelines as a tool used by parties, counsels, and arbitrators in determining an arbitrator's impartiality and independence. This chapter will thoroughly discuss the different approaches made by prominent arbitration institutions as well as jurisdictions with a more developed arbitration regime.

CHAPTER III: METHOD OF RESEARCH

Chapter three covers the research methods used for this thesis, which shall include the types of research

used by the Author to properly focus in on the issues. It shall also include the obstacles the Author came across, and the solution found to counter such obstacles.

CHAPTER IV: ANALYSIS AND RESULT OF RESEARCH

The fourth chapter shall provide an analysis of how and why the IBA Guidelines are considered as the compilation of best practices in international arbitration when it comes to assessing the impartiality and independence of arbitrators. This section will also showcase that the IBA Guidelines are considered as the preferred international standards for an arbitrator's impartiality and independence.

CHAPTER V: CONCLUSIONS AND SUGGESTIONS

In chapter five, the Author would summarize the entire thesis and provide suggestions to the discussed issue, with the hopes that it would provide benefits to the future development of the subject in Indonesia, as well as to assist in the internationalization of the Indonesian arbitration community.