THE IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS AND ITS IMPLICATION ON THE VALIDITY OF ARBITRAL AWARDS*

I Ketut Dharma Putra Yoga**

Abstract

Arbitration is a way to resolve disputes outside the courts as a form of an alternative dispute resolution. The submitted dispute will be decided by one or more arbitrators, who will then render an arbitral award. One of the most fundamental principles of arbitration that must be adhered to by all arbitrators worldwide is the impartiality and independence of arbitrators, which have been regulated in various international laws. Arbitrators are not allowed to communicate with any party related to the case they are hearing. Further, arbitrators should not be influenced by others in making their decision and drafting the arbitral award to ensure objectivity and prevent any bias. An arbitrator's failure to act impartial and independent can lead to the invalidity or annulment of an arbitral award.

Intisari

Arbitrase adalah cara untuk menyelesaikan senketa di luar penga- dilan sebagai bentuk resolusi sengketa alternatif. Sengketa tersebut akan diputuskan oleh satu atau lebih arbiter, yang mana akan mengeluarkan putusan arbitrase. Salah satu prinsip arbitrase yang paling mendasar adalah prinsip imparsial dan independensi. Prinsip tersebut harus dipatuhi oleh semua arbiter di seluruh dunia dalam menyelesaikan sengketa arbitrase. Imparsial dan independensi para arbiter telah diatur dalam berbagai hukum internasional. Arbiter tidak diperkenankan untuk berkomunikasi dengan pihak yang terkait dengan kasus yang ditangani. Selain itu, arbiter tidak boleh terpengaruhi oleh orang lain dalam membuat putusan dan penulisan keputusan arbitrage untuk menjaga objektivitas sehingga tidak akan ada bias. Ketidakpatuhan terhadap prinsip imparsial dan independensi dapat menyebabkan ketidakab-sahan atau pembatalan putusan arbitrase.

Keywords: arbitration, arbitral award, impartiality and independence of arbitrators
Kata Kunci: *arbitrase, keputusan arbitrage, imparsialitas dan independensi arbiter*

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** 2014; Faculty of Law, Universitas Lampung; Lampung, Indonesia.

A. Introduction

Arbitration is a dispute settlement mechanism outside of courts that is decided by arbitrators. The product of arbitration is called the arbitral award, rendered by the arbitrators, which is legally binding on the parties and enforceable in courts (Arthur O'Sullivan and Steven M Sheffrin, 2003).

The impartiality and independence of arbitrators is one of the most fundamental principles in arbitration that must be upheld in practice. This principle derives from an arbitrator's essential obligation towards the parties: to fairly adjudicate the dispute submitted to their jurisdiction by virtue of the parties' arbitration agreement.

Section 24(1) (a) of the Arbitration Act 1996 grants the court the power to remove an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality. The circumstances which may arise are not exhaustively listed but subject to a general test. As pointed out by Figueroa Valdes and Juan Eduardo, arbitration is based in trust and consent. As such, the arbitrators' respect of professional ethics acquires great importance for the respectfulness of the arbitral institution itself as an alternative dispute resolution mechanism.

Practically, in State-to-State arbitration that was being practiced in the 19th century and during the beginning of the 20th century, arbitrators were regarded as agents of the State (Richard H. Kreindler and Thomas Kopp, 2013). They were, on the bench or tribunal, representing states and stressing the case of the state that had appointed them to the tribunal. Thus, arbitration was seen as sort of a continuation of classic diplomacy on another platform. The arbitrators were seen as representatives of their respective States. However, over time, this understanding an arbitrator's function progressively gave way to the later notion of the impartial arbitrator.

The impartiality and independence of arbitrators are crucial to ensure justice and fairness for both parties in the dispute. An arbitrator's failure to act in accordance with the principle of impartiality and independence can potentially harm the parties. This would also lead to the issuance of impartial and non-objective decisions. The party who feels aggrieved may argue that the award rendered it is null and void, and that is has no binding power on the parties.

B. The Concept of Impartiality and Independence

At first glance, the concept of impartiality and independence is similar, yet both are actually different. Alan Redfern and Martin Hunter stated that the concept of independence is related to the personal connection or relationship between the arbitrator and the parties or their counsel-personal, social and financial. The stronger of the connection between the arbitrator and one of the parties, the less independent the arbitrator is. Each arbitrator to declare whether there pre-exists any kind of relationship, past or present, direct or indirect, with any of the parties or counselors assisting them.

Unlike independence, the concept of impartiality is more abstract; it is more of a state of mind that only can be proved through facts. Impartiality is the absence of any bias in the mind of the arbitrator towards a party or the matter in dispute. Thus, impartiality and independence are conceptually different. An arbitrator who is impartial but not wholly independent may be qualified, while and independent arbitrator who is not impartial must be disqualified.

Impartiality is said to be the defining feature of the judge, but the

mirage of absolute judicial impartiality becomes more distorted when it is superimposed onto the arbitrator. All the guarantees that ensure the impartiality are either missing or openly flouted in the arbitral process. Catherine A. Rogers explained the example, wherein attorneys can only be eligible for appointment or election as judges if they possess certain professional qualifications, while arbitrators are not formally required to have any minimum qualifications, and in most cases they are not even required to possess any legal training.

As explained above, the impartiality and independence of arbitrators are required during the entire arbitration process to protect the arbitral institution and guarantee an objectively rendered the arbitral award. In such case, to make arbitration keep neutral, parties from different nationalities will require the presiding arbitrator to have a different nationality (Loretta Malintoppi, 2015). Ideally, in the process of drafting an arbitral award, there should be no kind of bias predisposing the arbitrator towards one of the parties.

C. Legal Framework of Impartiality and Independence of Arbitrators

The impartiality and independence of the arbitrators have are regulated in various international laws. The United Nations Commission on International Trade Law ("**UNCITRAL**") Arbitration Rules uses the twin concepts of impartiality and independence. Moreover, the UNCITRAL Model Law on International Commercial Arbitration specifies in Article 12(2) that:

"*An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.*"

Following that, any challenge must be brought within 15 days of the appointment of the arbitrator or the discovery of the fact and determined by the relevant appointing authority as agreed between the parties or as stipulated by the Permanent Court of Arbitration ("**PCA**").

Under Article 14(1) of the Stockholm Chamber of Commerce ("**SCC**") 2010, there is an explicit requirement of a type akin to the UNCITRAL formulation (on which the SCC Rules were based), that is, every arbitrator must be impartial and independent, and also arbitrator shall sign a statement of impartiality and independence disclosing any circumstances which may give rise to justifiable doubts. In addition to SCC, the International Chamber of Commerce Rules of Arbitration ("**ICC Rules**") also prescribed the impartiality and independence of the arbitrators, as within in the Article 7 provides that every arbitrator must be and remain independent of the parties involved in the arbitration.

Article 6(4) of the PCA Optional Arbitration Rules for Two Parties, of Which Only One is a State provides:

"*The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.*"

Moreover, an arbitrator's partiality and dependency can also be caused by conflict of interest. The International Bar Association Guidelines on Conflict of Interest in International Arbitration 2014 provides a non-binding standard of independence and impartiality in international arbitration. The guidelines are written in two parts. The first part consists

of general standards expressing the principles that should guide arbitrators, parties and arbitral institutions when deliberating over possible bias. The second part consists of a list of specific situations meant to give practical guidance.

The list is divided into three parts: a red list, an orange list and a green list. The red list describes situations in which an arbitrator should not accept appointment, or withdraw if already appointed. The guidelines deem certain situations described in the red list as non-waivable, such as when there is an identity between a party and the arbitrator, or the arbitrator has a significant financial interest in one of the parties or the outcome of the case. The orange list is a non-exhaustive enumeration of specific situations, which, in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence.

The rules explained above are ensures that the principle of impartiality and independence is upheld in arbitration. The principle applies wherever arbitration proceedings take place, whether it is ad hoc or not. Therefore, the withdrawal of the concept by the arbitrator is hostile act and cannot be tolerated.

D. The Implications on the Validity of the Arbitral Award

Under Article 35 of International Law Commission Draft on Model Rules on Arbitral Procedure ("**ILC**") 1958 explained that there are four grounds that can be used to challenge the validity of an arbitral award by either party. These grounds include: (a) the tribunal has exceeded its powers; (b) there was corruption on the part of a member of the tribunal; (c) there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure; and (d) the undertaking to arbitrate or the *compromis* is a nullity.

In practice, the corruption conducted by one of the members of the tribunal that can lead to the invalidity of the arbitral award is *ex parte* communications, which is one of the things that violate the principle of impartiality and independence. IBA Guidelines on Party Representation in International Arbitration (2013) stated that *ex parte* communications means oral or written communications between a Party Representative and an Arbitrator or prospective Arbitrator without the presence or knowledge of the opposing Party or Parties. The IBA International Code of Ethics 1988 stipulates that the asking qualifications and availability, and discussion of the appointment of the presiding arbitrator are accepted.

Article 13 of the International Centre for Dispute Resolution ("**ICDR**") Rules specifies that *ex parte* communications relating to the case is prohibited. It is stated that no party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any *ex parte* communications relating to the case with any candidate for presiding arbitrator.

In practice, *ex parte* communications has become a problem that has occurred in several international trials. An example is in the case between *The Republic of Croatia*

v The Republic of Slovenia pursuant to the Croatia-Solvenia Bilateral Investment Treaty submitted to the PCA. The tribunal held that wrongful behavior arbitrators could serve as a ground to invalidate an arbitral award.

In that case, there was telephone conversations between the arbitrator appointed by Slovenia and one of Slovenia's Agents, in which the Slovenia Agent provides the arbitrator with argument and facts that will be discussed with another member of the tribunal. It was ruled that *ex parte* communications impacted the procedural fairness, due process, impartiality and independency to the extent that the arbitration proceedings have been systematically and gravely violated.

Another case that showcases an arbitrator's impartiality is an ICSID case, called the *Victor Pey Casado et al. v. Chile* case. One of the arbitrators provided the party with a partial draft of the decision on jurisdiction prepared by the president. *Ex parte* communications conducted by the tribunal with one party has ruled out the impartiality and independence of the tribunal and also caused the invalidity of the arbitral award.

Another possibility is that the *ex parte* communication could occur in cases where the lawyer of the State without instruction or approval of the State. Yet in any case, the lawyer of the State can still be categorized as an agent or organ of the State who is mandated to represent the State.

Under article 4(2) of ILC Responsibility of States for Internationally Wrongful Acts, it is stipulated that a State organ refers to any person or entity that has status in accordance with the internal law of the State. Moreover, under article 7 of ILC Responsibility of States for Internationally Wrongful Acts states that even if the organ of the State exceeds its authority or contravenes instructions, he or she shall be considered an act of the State.

In the case of *Velasquez Rodriguez v Honduras* in 1998, the Inter-American Court of Human Right adjudicated that all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity, even when acts outside the sphere of their authority. *Ex parte* communications has been clearly and convincingly able to invalidate the arbitral award and disown the impartiality and independence principles.

In addition, non-compliance with the principle of impartiality and independence are not only caused by external factors, but also internal factors, i.e. tribunal themselves. Theoretically, apart from the looking at the arbitrators' impartially and independently, the role of their assistants and/or secretary must also be paid attention to in order to ensure the clarity of the arbitral award.

If the assistant or the secretary caused any mistake or worked improperly, it is possible for the arbitral award to be challenged by the parties or annulled. The tasks of the assistant or secretary should not exceed the tasks of the arbitrators themselves. This is because it can cause the decision to be not objective and biased.

Basically, the tasks of the assistant or secretary are only limited in the scope of administrative services in order to help the tribunal's tasks. In the Notes on Organizing Arbitral Proceedings that published by UNCITRAL stipulated that various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required

administrative support to the arbitral tribunal.

Furthermore, in the Notes on Organizing Arbitral Proceedings (2012) that was published by UNCITRAL explains that to the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services). 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 o 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). However, it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal. It would be inappropriate for the secretary to do legal research and other professional assistance to the arbitral tribunal.

The ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries emphasizes that secretary shall not perform any decision-making functions to an administrative secretary. Drafting award is one of the essential duties of an arbitrator, whereas, arbitral secretaries were only allowed to carry out administrative tasks thereby the name "administrative secretary" (Young ICCA Guide on Arbitral Secretaries, 2014).

Article 1(1) of Young International Council for Commercial Arbitration ("**Young ICCA**") stipulates that an arbitral secretary or assistant should only be appointed with the knowledge and consent of the parties. This is because the remuneration and reasonable expenses of the arbitral secretary are paid by the parties, whereas the arbitral tribunal is paid on an hourly basis.

Article 1(4) of Young ICCA also specifies that an arbitrator must not delegate any part of his/her decision-making to the secretary or assistant in a way that could dilute the arbitrator's mandate. The task of an assistant or secretary becomes a noteworthy concern in the proceeding, as it will also affect the validity of the arbitral award. The task of an assistant or secretary should not be more dominant than the tribunal's tasks.

Article 3 (j) of Young ICCA mentions about the roles of the arbitral secretary in drafting appropriate parts of the award. Under the commentary, an arbitral secretary is permitted to draft some basic parts of the award, such as Procedural Background, Factual Background, and the Parties' Positions. The legal reasoning section, the final analysis and operative portions of the award can only be written by the arbitrators.

Undoubtedly, hiring a secretary or assistant is important for the course of the trial effectively and efficiently (The ICCA Reports, 2013). In particular, it could increase the level of efficiency in terms of organization and preparatory assistance to the arbitral tribunal, allow the arbitral tribunal to cope with voluminous submissions, improve the quality of the work done by the arbitral tribunal, and act as a central means of communication between parties and the arbitral tribunal.

There are some cases where the secretary or assistant is played out of his capacity. Thus, it must be noted that the arbitral secretary or assistant has a limited scope of work.

In the case of OAO *Yukos Oil Company*, the PCA tribunal rendered an award ruling that they unanimously decided that the Russian Federation had breached Article 13(1) of the Energy

Charter Treaty by taking measures having an effect "equivalent to nationalization or expropriation" and ordered the Russian Federation to pay damages in excess of USD 50 billion.

Despite that, 7 months later, the Russian Federation filed three writs to the Hague District Court seeking to annul the award by arguing that the arbitrators were not independent, as the assistant played a significant role in analyzing the evidence and legal arguments, in the tribunal's deliberations, and in drafting of the arbitral award.

The fact that the assistant spent far more time on the arbitrations than did any of the arbitrators was confirmed by information provided by the PCA Counsel for the Russian Federation requested the secretariat of the PCA for a specification of the time of the assistant and the arbitrators. It showed that the assistant spent 2,625 hours, whereas the three arbitrators billed between 1,700 hours each.

In particular, this information indicates that an assistant to the tribunal, who was supposedly responsible only for administrative tasks, instead devoted between 40% and 70% more time than any of the arbitrators. As such, the assistant must be presumed to have performed a substantive role in analyzing the evidence and arguments, in deliberations, and in preparing the final award. Additionally, such evidence indicates that the arbitrators delegated to the assistant substantive responsibilities that are not lawfully delegable.

In result, the actions of the assistant that exceeded the mandates of the tribunal resulted in unfairness or injustice for one of the disputing parties. This subsequently becomes a ground objection for the aggrieved party to challenge the validity of the arbitral award.

E. Conclusion

International arbitration always obliges the appointed arbitrators to uphold the principle of impartiality and independence. An arbitrator's partiality and dependency is considered as a ruthless corruption, resulting in problems dealing with the validity of the rendered arbitral awards.

Arbitrators shall be independent at all times, and they should not be influenced by anyone, even by the State who appointed him or her as an arbitrator in a dispute. Additionally, the duties and relationship between arbitrators and their assistant and/or secretary must not exceed the standards set.

The drafting of the arbitral award and considering legal research on a dispute should only be done by the arbitrators, not by the assistant or secretary. Otherwise, it will create a concern on the impartiality and the independence of the arbitrator, and ultimately impact the validity of the arbitral award.

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