ISSN: 2302-1217

JURIS GENTIUM LAW REVIEW

Volume 6, Number 1, May 2018

Faculty of Law
Universitas Gadjah Mada
Indonesia

Community of
International
Moot Court

JURIS GENTIUM LAW REVIEW

JOURNAL OF INTERNATIONAL LAW

Published by Community of International Moot Court twice a year

Volume 6, Number 1, May 2018

In collaboration with the *Asian Internatinal Arbitration Centre*

(formerly known as the *Kuala Lumpur Regional Centre for Arbitration*)

JURIS GENTIUM LAW REVIEW is an expert-reviewed and peer-edited law journal dedicated as a place for undergraduate students from any major to contribute in scientific research and writing in regards to Business Law, Public International Law, Private International Law and Comparative Studies. The Editorial Board receives any research paper and conceptual article that has never been published in any other media. The writing requirement can be found at the inside back cover of this journal.

FOREWORD FROM THE DEAN
FACULTY OF LAW UNIVERSITAS GADJAH MADA

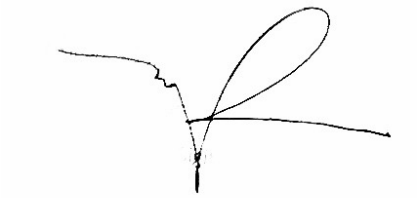
Legal publication has been influential in the development of law, as it communicates ideas about a particular legal issue, followed by possible solutions. In countries that adopt the common law system, legal reviews are frequently cited as a persuasive authority since it offers intriguing perspectives concerning the discussed legal matter. Yet in Indonesia, the importance of legal reviews is not as recognized and materialized. This is perhaps due to the lack of interest and awareness of its benefits.

This is where the Juris Gentium Law Review **("JGLR")** steps in: it is the first medium in Indonesia – run solely by students – that encourages and provides an opportunity for law students from any institution to both enhance their legal research and writing skills and express their views through legal articles regarding issues on the topics of public international law, private international law and even comparative law.

The submitted articles that are written by students will undergo a blind-review process by a handful of Executive Reviewers to ensure its quality. But more importantly, the insights and suggestions will lead to the exchange of ideas that offers new or different perspectives concerning the chosen fields of law.

In this line, I would like to congratulate JGLR and the Community of International Moot Court for publishing another remarkable edition. Hopefully, with the work of the Editorial Board, JGLR can become one of the most renowned legal journals in not only Indonesia, but also worldwide in the future.

Prof. Dr. Sigit Riyanto, S.H., LL.M.



Dean
Faculty of Law, Universitas Gadjah Mada

FOREWORD FROM THE PRESIDENT
COMMUNITY OF INTERNATIONAL MOOT COURT
FACULTY OF LAW, UNIVERSITAS GADJAH MADA

The Juris Gentium Law Review ("**JGLR**") is long-standing student-run law journal, dating back since the establishment of the Community of International Moot Court ("**CIMC**") itself. JGLR is aimed to promote the significance of legal writing and research skills, in which law students must undoubtedly possess. Passed down as the legacy of CIMC, the journal has shown consistent improvements within each editions, possessing the potential to be recognized and accessible to individuals globally. In fact, JGLR has taken a few steps in putting its name on the world map, namely by collaborating with the Asian International Arbitration Centre located in Kuala Lumpur, Malaysia.

As the president of CIMC, it is with pride and honor that I present you this year's first edition of JGLR. Through this journal, one can expect coherent discussions on the topics of arbitration, international humanitarian law as well as competition law. These articles are submitted by law students from all over Indonesia; not only from Universitas Gadjah Mada (Yogyakarta), but also from Universitas Pelita Harapan (Jakarta) and Universitas Lampung (Lampung).

With that said, it is without hesitation that I express my greatest gratitude towards the Editor in Chief – Naila Sjarif – and the rest of the Editorial Board – Refah Anyar, Rahma Reyhan, Nabila Oegroseno, Felicity Salina, Arinta Pratiwi, and Aicha Rebbeca – for their unrelenting dedication and hard work in making this edition possible. Not only that, I wish to extend my gratitude to the Authors, Expert Reviewers, and Universitas Gadjah Mada's Faculty of Law for their immeasurable contribution.

Kusuma Raditya

President of the Community of International Moot Court
Faculty of Law, Universitas Gadjah Mada

FOREWORD FROM THE EDITOR IN CHIEF
JURIS GENTIUM LAW REVIEW
FACULTY OF LAW, UNIVERSITAS GADJAH MADA

The *Juris Gentium Law Review* ("**JGLR**")'s sixth volume marks its seventh year of publication. Throughout the years, JGLR has immensely grown, *inter alia*, in terms of the diversity of Authors and Executive Reviewers, the variety of topics discussed and even its involvement in events; this year, JGLR collaborated with the Asian International Arbitration Centre ("**AIAC**"). Yet these milestones do not diminish JGLR's spirit to always strive for the better.

There are five thought-provoking articles in this edition. *First,* I Ketut Dharma Putra Yoga's "*The Impartiality and Independence of Arbitrators and its Implication on the Validity of Arbitral Awards*" scrutinizes the application of one of the most important principles of arbitration by analyzing the available frameworks and consequences of its violation. *Second,* Kaizar Setiadji and Heza Ramanda address the issue of arbitrators' repeated appointments by the same or affiliated parties in "*Exploring the Application of Section 3.1.3 of the IBA Guideline*". These first two articles were evaluated and selected by the AIAC for a conference regarding international arbitration in Kuala Lumpur, Malaysia on 1-2 March 2018.

Third, in "*The Issue of Arbitral Award Enforcement in Indonesia*", M. Ibnu Farabi and Nabila Oegroseno look into the presumably convoluted process of enforcing arbitral awards in Indonesia and accordingly, provide recommendations. *Fourth,* Felicity C. Salina's "*Lethal Autonomous Weapon Systems: Legal and Ethical Perspectives*" weighs the possible outcomes of the idea of humanizing war through the utilization of autonomous machines, such as robots. *Lastly,* the fifth article titled "*Integrating Leniency Program in Indonesia's Cartel Enforcement System*" by Rosari Sarasvaty discusses how Indonesia's Competition Law and Commission for the Supervision of Business Competition can effectively implement a program that provides penalty reduction for those who report on cartels, which is difficult to detect and prove.

To close, I would like to express my utmost gratitude for being able to run JGLR for the past year alongside the most determined and cooperative Editorial Board: Refah Anyar, Rahma Reyhan, Nabila Oegroseno, Felicity Salina, Arinta Pratiwi, and Aicha Rebecca. Allow me to also take this opportunity to thank Universitas Gadjah Mada's Faculty of Law, the Authors and Executive Reviewers for making this edition possible. May JGLR continue to achieve many more triumphs far beyond what we have envisioned.

Naila Sjarif

Editor in Chief of the *Juris Gentium Law Review*
Faculty of Law, Universitas Gadjah Mada

JURIS GENTIUM LAW REVIEW

Volume 6, Number 1, May 2018

Table of Contents

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*

* Preferred Citation Format: Yoga, I.K.D.P. (2018). The Impartiality and Independence of Arbitrators and its Implication on the Validity of Arbitral Awards. J.G.L.R., 6(1), page 1-8.
This article was selected by the Asian International Arbitration Centre for a presentation at the AIAC YPG Conference for Students and Young Practitioners at the Asian International Arbitration Centre in Kuala Lumpur, Malaysia, on 1-2 March 2018.
** 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.

BIBLIOGRAPHY

Books and Journals

Basaran, H. R. 2015. Is International Arbitration Universal?. *ILSA Journal of International & Comparative Law*, *21*(3), 497-534.

Bastida, B. M. (2007). The Indepen-dence and Impartiality of Ar-bitrators in International Co-mmercial Arbitration. *e-Mer-catoria*, *6*(1), 4-8.

Crowdford, J., Peel, J & Olleson.

International Bar Association (IBA). (1988). *IBA International Co-de of Ethics*. United King-dom: International Bar Association.

International Bar Association (IBA). (2013). *IBA Guidelines on Party Representation in International Arbitration*. United Kingdom: International Bar Association.

Kreindler, R. H. & Kopp, T. (2013). International Commercial Arbitration. *Oxford Public International Law*, November, 15-16.

Malintoppi, L. (2008). Independence, Impartiality, and Duty of Dis-closure of Arbitrators. *Ox-ford Public International Law*, June, 13-15.

O'Sullivan, A. and Sheffrin, S. M. (2003). *Economics: Principles in Action*. New Jersey: Pearson Prentice Hall.

Redfern, A. & Hunter, M. 2003. *Law and Practice of International*

Commercial Arbitration. Lon-don: Sweet & Maxwell.

Rogers, C. A. (2005). Regulating In-ternational Arbitrators: A Functional Approach to Dev-eloping Standards of Conduct. 41 Stan. *J Int'l L. 53, Lexis-Nexis*, Winter, 4-5.

Simon. (2001). The ILC's Article on Responsibility of the States for Internationally Wrongfull Acts: Completion of the Second Reading. *Euro-pean Journal of International Law (EJIL)*, *12*(5), 11-24.

Reports

International Chamber of Commerce. (2012). *ICC Note on the Appointment, Duties and Remuneration of Administra-tive Secretaries*. International Chamber of Commerce.

United Nations Document No. A/56/10. (2001). *Responsibility of States for Internationally Wrongful Acts, with commentaries*. United Nations: General Assembly

United Nations Commission on Trade Law. (2012). *UNCITRAL Notes on Organizing Arbitral Proceedings*. United Nations Commission on Trade Law.

The ICCA Reports No. 1. (2014). *Young ICCA Guide on Arbitral Secretaries*. International Council for Commercial Arbitration

Case Laws

Velasquez Rodriguez v. Honduras, 1998 Inter-American Court of Human Rights.

The Republic of Croatia v. The Republic of Slovenia, 4 November 2009, PCA Award.

Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile, ICSID Case No. ARB/98/2, Final Award, 8 May 2008.

EXPLORING THE APPLICATION OF SECTION 3.1.3 OF THE IBA GUIDELINES*

Kaizar Setiadji and Heza Ramanda*****

Abstract

The topic of *Repeated Appointments* or *Repeating Arbitrator* has been vastly discussed since the launch of the 2004 IBA Guidelines as well as the Orange List in Section 3.1.3 of the 2010 IBA Guidelines. An arbitrator's neutrality or impartiality may be directly impacted by its multiple appointment by the same or affiliated parties. This phenomenon becomes an interesting subject of research and deliberation by academicians and practioners. This Article then serves as a reflective report to the existing framework, practices, case laws and application of Section 3.1.3 of the IBA Guidelines.

Intisari

Adanya Penunjukan Berulang atau Pengulangan Arbiter telah sering menjadi topik pembahasan sejak peluncurannya IBA Guidelines 2004 dan juga Orange List pada Bagian 3.1.3 di IBA Guidelines 2010. Neutralitas atau ketidakberpihakan seorang arbiter dapat secara langsung dipengaruhi oleh pengangkatannya yang berganda oleh pihak yang sama atau berafiliasi. Fenomena ini merupakan subjek yang menarik untuk penelitian dan pertimbangan oleh para akademisi dan praktisi. Dengan demikian, Artikel ini berfungsi sebagai semacam laporan terhadap kerangka, praktik, kasus, dan penerapan Bagian 3.1.3 dari IBA Guidelines.

Keywords: international arbitration, repeated appointments, repeating arbitrator, 2004 IBA Guidelines on Conflicts of Interest in International Arbitration
Kata Kunci: *arbitrase internasional, pengulangan dalam penunjukan arbitrator, 2004 IBA Guidelines on Conflicts of Interest in International Arbitration*

* Preferred Citation Format: Setiadji, K. & Ramanda, H. (2018). Exploring the Application of Section 3.1.3 of the IBA Guideline. J.G.L.R., 6(1), page 9-17.
This article was selected by the Asian International Arbitration Centre for a presentation at the AIAC YPG Conference for Students and Young Practitioners at the Asian International Arbitration Centre in Kuala Lumpur, Malaysia, on 1-2 March 2018.
** 2014; International Law; Faculty of Law, Universitas Gadjah Mada, Yogyakarta, Indonesia.
*** 2014; Business Law; Faculty of Law, Universitas Gadjah Mada, Yogyakarta, Indonesia.

A. General Rules and Standards in case of Repeating Arbitrators

The concept of *Repeating Arbitrators* have garnered significant academic spotlight.[6] It has been especially relevant due to its nature that may or may not lead to myriad of possible ethical problems, so much so that the IBA Guidelines listed the scenario of repeating appointment of arbitrator in the Orange List, which describes a "*situation that may give raise doubts to the impartiality and independence of the arbitrator*" (See Mullerat, 2009, pg. 17).

Broadly speaking, *Repeating Arbitrator* can be duly defined as circumstances where an arbitrator has been previously appointed on several occasions by the same party, company, counsel, or an affiliate to one of the parties *(Giraldo, 2011, pg. 81)*. This jargon also refers to the situation in which the same parties or companies belonging to the same group of companies as the party, appoints the same arbitrator in several arbitration *(Slaloui, 2009, pg.109)*.

The above circumstances are listed in Section 3.1.3 of the 2010 *Guidelines on Conflicts of Interest in International Arbitration* as provided by the International Bar Association ("**IBA Guidelines**"). The IBA Guidelines neither *per se* manifests as a binding instrument in the practices of arbitral proceedings, nor does it professes to have such authority. (*IBA Guidelines pg. 2, ¶¶ 3, 7*). However, due to nature of IBA Guidelines that seeks to provide integrated and homogenous reference of the best arbitral practice, various arbitral institutions such as Stockholm Chamber of Commerce, London Court of International Arbitration and various others arbitral institutions have explicitly shown positive reception to the IBA Guidelines.[7]

With the exception of the International Chamber of Commerce, which had asserted that there are *fundamental incompatibility* between the ICC Rules and the IBA Guidelines – specifically philosophical divergence in regard to disclosure rules –there is almost no traction against the application of IBA Guidelines as the primary guidelines in determining the ethical standards of arbitrators *(Jung, 2008, pg 20-21)*.[8] The next sections will discuss briefly the elements of Section 3.1.3.

1. General Framework of Section 3.1.3

Repeating Arbitrator as described in Section 3.1.3, indicates that: *the arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties* are to categorized in the Orange List.

The Orange List provides a number of situations that may raise *justifiable doubts* from a *reasonable third person having knowledge of the fact and*

[6] See various academic piece : Fatima-Zahra Slaoui, *The Rising Issue of Repeat Arbitrators : A Call for Clarification,* Arbitration International, Vol. 25, No. 1, LCIA, (2009); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, 96 *Cornell Law Review*, 1, 47-90 (2010); Natalia Giraldo, *The Repeat Arbitrator Issue : A Subjective Concept, 19 International Law, Revista Colombiana de Derecho Internacional, (2011).*

[7] See Helena Jung, *The Standards of Independence and Impartiality for Arbitrators in International Arbitrators : A comparative study between the standards of the SCC, the ICC, the LCIA and the AAA,* Master Thesis, Faculty of Law Uppsala University (2008), pg. 8, 9, also Nigel Blackaby, *Redfern and Hunter on International Arbitration*, 272 (5th ed., Oxford University Press, Oxford, 2009).

[8] See http://arbitrationblog.practicallaw.com/the-end-of-the-blanket-application-of-the-iba-guidelines-on-conflicts-of-interest-a-wake-up-call-for-arbitration-practitioners/ that states 80% of the modern arbitration practices have used the guidelines as reference

circumstances, and the primary obligation that arises from situations that are listed in the Orange List are disclosure by either the Arbitrator or the affiliate party. *(General Standard 7 (a); Practical Application of the General Standard, pg. 17-18, ¶. 2, 3)*.

2. Challenges against Arbitrator under Section 3.1.3

Concerning the situations listed in the Orange List, once the arbitrator or the concerned parties communicates any of the circumstances that may influence the independence or impartiality as set in the Orange List, the parties can object to the appointment or the continuity of the arbitrator. This objection needs to be done in a reasonable time after the circumstance is disclosed by the arbitrator or the party learns about it, which General Standard 4 (a), Explanation to General Standard 4(a) currently requires that an explicit objection needs to be made within 30 days after the receipt of the arbitrator's disclosure or after the party learns of the circumstance that could constitute a potential conflict. (*Practical Application of the General Standard, pg. 18, ¶ 6; See Mullerat, 2009, pg.6*)

Generally, practices affirm the 30-days limitation set out by General Standard 4, when a party has had ample notice of an arbitrator's impartiality, but has failed to raise any objection until the award is rendered, the parties will not thereafter be allowed to repudiate the award on the grounds of the arbitrator's partiality[9] or when a representative of a party has, during the proceedings, become aware of the existence of bias, prejudice fraud, partiality or dependence of the arbitrator to one of the parties, but does not raise an objection, such inaction would render the right of the parties to challenge the arbitrator to be waived[10] *(See also Mullerat, 2009, pg. 7-8)*.

3. Expanding the Term *Affiliate to one of the Parties*

In the opinion of several drafters of the IBA Guidelines, the construction of the word "*Affiliate*" would have a long-reaching effect that encompasses various mode of relationship between the disputing parties and external parties (*See Mullerat, 2009, pg. 7-8)*.

To help illustrate the extent the wording of *Affiliate*, picture a situation where Arbitrator X was appointed by Company A, whereas Company B has also appointed Arbitrator X previously in another arbitration. Both Company A and B are within the same Group of Companies, or has parent-subsidiary relationship.

In such a case, Mullerat finds that distinction would be irrelevant if not probably harmful; subjects that belong in one group of companies even if considered as separate legal entities, parent and subsidiary companies must fall under the definitions of *affiliated* (*Mullerat, 2009, pg. 7; Explaination to General Standard 6(b); Pratical Application of the General Standard ¶2.3.4)*.

For the purposes of the IBA Guidelines, any entity having any relationship, direct or indirect with the arbitrator and the party, or any third party that exerts controlling influence over the party, including parent company, major shareholders managers, directors and members of the supervisory board of a legal entity of a parent or subsidiary company as equivalent to the legal entity itself. Note 5 of the Guidelines states that:

[9] See for example : *Fox v. Hazetton*, 27 Mass. 275, 10 Pick 275 (1830), *Cook Industries, Inc. v. C. Itoh & Co. (America) Inc.*, 449 F.2d 106 (2nd Cir. 1971) *cert. denied*, 405 U.S. 921, 92 S.Ct. 957 (1972).

[10] See for example : *Tobacco Co. v. Alliance Ins. Co.*, 131 N.E. 213, 238 Mass. 514 (1921).

"… throughout the Application Lists, the term "affiliate" encompasses all companies in one group of companies including the parent company" *(Kumar, 2014, pg. 16-17; Explanation to General Standard 6(b))*.

This view is particularly supported under the Investment Company Act, 15 U.S.C.A. § 80a-(3) (A). Where it can be understood that a company could be considered as an affiliate of another, if the latter holds an ownership (direct or indirect) of 5% or more of the voting stock, both companies could be understood as affiliated. This is because economic involvement, no matter how incremental, would exert undue controlling influence *(Mullerat, 2009, pg. 14)*.

Limitation that requires the affiliate is "directly involved" in the subject matter of the dispute is unnecessary. The independence and impartiality of the arbitrator, to a certain degree, may be affected if the arbitrator had served an affiliate to the current disputing parties, even if the affiliate is not involved or is indirectly involved in the subject matter of the dispute. *(Kumar, 2014, pg. 16-17; Mullerat, 2009, pg. 14)*.

B. Cases and Practices of the Section 3.1.3 of the IBA Guidelines

This section will briefly highlight and analyse the cases in various arbitral institutions that have invoked Section 3.1.3 of the IBA Guidelines as grounds to challenge the appointment of arbitrators.

1. *Opic Karimum v. Venezuela*

On 28 May 2010, *OPIC Karimum Corporation*, a company based in Panama, entered into a dispute against the Bolivarian Republic of Venezuela. The Claimant, OPIC Karimum Corporation proposed Prof. Guido Santiago Tawil an Argentine national, as an arbitrator. Respondent, or the Bolivarian Republic of Venezuela appointed Professor Philippe Sands, a UK nationals and France as arbitrator (*Opic Karimum, ¶¶5-6*).

Based on the Declaration made by Professor Sands, it became evident that Professor Sands has been appointed by both Respondent and the law firm that represented Venezuela, Curtis Mallet-Provost LLP twice within the past three years (*Opic Karimum, ¶10*). Claimant then filed notion to disqualify Professor Sands at October 18, 2010, citing that the connection between Professor Sands and Respondent would be well beyond the threshold of the Orange List (*Opic Karimum, ¶19*).

In identifying the connection between Professor Sands and Respondent that manifest lack of independence and impartiality, Claimant put forward a 4-pronged test as upheld in the *Suez Case (Opic Karimum ¶22)*. The tests include:

a. The proximity of connection test

Claimant asserts that, by virtue of his appointments, "the connection between Professor Sands and the Respondent and its counsel is direct" while the Respondent does not challenge the directness of the connection. Respondent contends that the proximity is limited to the relation as a judge in dispute against third party, and that repeating appointments are not uncommon under ICSID (*Opic Karimum ¶36*).

b. The intensity or frequency of any interaction

Claimant submitted that, the frequency of which Professor Sands and the Respondent or Respondent's law firm has interacted and contacted each other seems to suggest substantial intensity. This is exacerbated by the assumption that Professor Sands appears to have relied on

the Respondent and Respondent's law firm to provide substantial amount of arbitration appointments, which is referring to the fact that Professor Sands was appointed by Respondent's law firm to sit in 3 pending ICSID cases, and Professor Sands that 5 of 8 concluded arbitration that has been concluded in the last year have been appointed by the Respondent's Law firm *(Opic Karimum, ¶18)*.

Despite that Respondent contends that the appointment of Professor Sands in the Nova Scotia Commercial Arbitration and in the Related UNCITRAL Arbitration cases were publicly known, and had been disclosed. Further, the IBA Guidelines does not prove anything beyond the existence of situation triggering disclosure, but not automatic disqualifications that are affirmed in the Practical Application to the General Standard ¶4 *(Opic Karimum, ¶18)*.

The tribunal ruled its positions regarding repeating appointment and departs from the positions in *Tidewater* that suggest multiple appointments by the same party in an unrelated case cannot be a sole reason to challenge arbitrator. [11] Instead, the tribunal here finds that multiple reappointments must be carefully considered in a case of challenge. Multiple appointment of the same arbitrator could foster unwarranted relationship, familiarity and confidence inimical to the requirement of independence established by the Convention *(Opic Karimum ¶47)*.

The tribunal surprisingly announced that *multiple appointments of an arbitrator are an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case,* casting multiple appointment of arbitrator by the same parties in a very negative light, and acquiesced that this practice may raise suspicion *(Opic Karimum, ¶47)*.

However, despite this revelation, the tribunal sets a standard that ***two appointment in two unrelated cases by the same parties*** does not in itself demonstrate lack of independence required to manifest lack of independency *(Opic Karimum ¶53)*.

c. The degree of dependence of an arbitrator upon a party for any benefits and the materiality or significance of any benefit

The fact that Professor Sands have received appointment multiple times would indicate that he receives direct financial benefits or advantage from the Respondent and Respondent's law firm, to a point of major financial significance. In its core, the cluster of appointments by Respondent and Respondent's law firm and the accompanying financial incentives would have suggested economic interest or dependencies that is material enough and thus cast justifiable doubts against Professor Sands ability to exercise independent judgment.

Respondent points that the existence of financial remuneration in a previous case does not translate to the existence of other *financial incentives*. In addition to this, the standard of *financial dependencies* requires more ***than singular, or sporadic remuneration, but indicatives to an arbitrator to derive substantial financial reliance, if not primary financial reliance to one of the alleged parties in question.***

Such requirement is not met in this case, as Professor Sands has other professional activities *(Opic Karimum ¶34)*. He acted as a barrister, tenured professor in certain universities, and had declined a

[11] *Tidewater v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, dated Dec. 23, 2010 ¶ 60.

number of arbitration proposals including the one that was proposed by Respondent in several occasions. As such, this indicates financial independence. *(Opic Karimum ¶39)*. The tribunal affirmrs Respondent's positions *(Opic Karimum ¶55)*.

2. *Tidewater Inc. v Republic of Venezuela*

On 16 February 2010, Tidewater Inc., Tidewater Investment SRI, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., (together Tidewater) as the Applicant filed a Request for Arbitration under the ICSID Convention against the Republic of Venezuela as the Respondent. Tidewater appointed Dr. Andreas Rigo Sureda as an arbitrator, while Respondent appointed Professor Brigitte Stern as an arbitrator. (*Tidewater ¶3-5)*

Based on the Declaration made by Professor Stern, it became evident that Professor Stern has been appointed by both Respondent and the law firm that represented Venezuela, Curtis Mallet-Provost LLP two times within the past six year,[12] with a pending case that are not yet constituted[13](*Tidewater ¶8, 14)*. Later, Claimant acquired information outside the Declaration made by Professor Stern, which is the fact that Professor Stern has been appointed 4 times by the Venezuelan Attorney General (*Tidewater ¶14)*.

Claimant then filed notion to disqualify Professor Stern following the disclosure by virtue of ICSID Arbitration Rule 6 (2) and Section 3.1.3 of IBA Guidelines (*Tidewater ¶13-14)*.

a. Claimant's Position

Claimant argues that *first,* the doubt against Professor Stern's independence and impartiality are compounded by the failure to disclose the multiple appointments in the first statement, and not all of the circumstances of these appointments are publicly known (*Tidewater ¶16.)*.

Second, Claimant underlines that the *Vanessa* Arbitration case takes place in 2004, which exceeds the three-year time bar of the Section 3.1.3, must be taken into account as a factor exerting undue influence. This is because IBA Guidelines are not to be applied in a rigid formalistic manner to avoid dilatory tactics that could undermine Section 3.1.3. Thus, Claimant asserts to extend ambit of Section 3.1.3 to also include *Vanessa* (*Tidewater, ¶19-21)*.

b. Respondent's Position

On the other hand, Respondent argued that Professor Stern has made all appropriate disclosure in accordance to ICSID Arbitration Rule 6. Moreover, all of Professor Stern's appointments by the Respondent have been made available in the ICSID Website, even prior to the first declaration. As such, the information are publicly available (*Tidewater ¶22)*, Respondent does not raise significant arguments against the second argument of Claimant (*Tidewater ¶23)*.

c. Professor Stern's Statements

Professor Stern affirms the position of the Respondent. She also acknowledges her duty to disclose facts that are still undisclosed or unknown and also not to reiterate publicly known facts; such has been her practice throughout all her appointment (*Tidewater ¶29)*. She also added that the number of States and of most experienced arbitrators is limited. If a State cannot nominate the same arbitrator

[12] *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB(AF)/04/6), in the year 2004; *Brandes Investment Partners LP v. The Bolivarian Republic of Venezuela, ICSID* Case No. ARB/08/3, in the year 2008.

[13] *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9).

in several cases, it *would undermine the freedom of States to choose their arbitrator* (*Tidewater* ¶*27*).

d. The Tribunal's Position

Prior to assessing each formulation of the two parties, the Tribunal clarifies that the standard of '*likely to give rise to justifiable doubts*', referred to in the ICSID Arbitration Rule 6(2)(b), and Article *57* of the ICSID Convention, exerts a very high burden of proof and standard. It requires not only ***the possibility*** that the arbitrator might not be able to exercise independence and impartial judgment, but ***obvious and highly probable*** (*Tidewater* ¶*39*).

That being said, the mere input of *justifiable doubt* due to the view that non-disclosure would itself indicate such gravity that would manifest lack of impartiality only if the facts or circumstances should be carefully applied (*Tidewater* ¶*40*).

i. Non-disclosure of other ICSID Arbitral Appointments by the same party

The parties disagree on the matter concerning whether information relating to appointment of Professor Stern in the *Vanessa Arbitration* and *Brandes Arbitration* are within the public domain. Arbitration Rule 6(2) does not limit disclosure to circumstances that would not be known in the public domain. The wording of this rule is broadly encompassing without distinguishing among categories of circumstances to be disclosed. (*Tidewater* ¶*40*). Further, the arbitrators have the burden to conduct sufficient due diligence to find out information that might raise potential conflicts (*Tidewater* ¶*51*).

For example, despite that the ICSID Website provided the appointments of Professor Stern in *Brandes Arbitration* and *Vanessa Arbitration,* it does not provide the parties that appoint them. Yet at the same time such information, including the name of the parties that appoints arbitrator, are available for inspection on the ICSID Register of Request for Arbitration. Thus, the Tribunal cautioned that although the Arbitration Rule 6 (2) requires disclosure of all information, both publicly known or otherwise, non-disclosure itself should not be the sole ground of disqualification, considering the vast publicly available information in the website (*Tidewater* ¶*54)*

Although Professor Stern cannot avail herself by claiming that her appointment was publicly known and thus unrequired of to be included in her declaration, the tribunal finds that failure to disclosure alone does not warrants automatic disqualification. It must be assessed in light of other relevant factors (*Tidewater* ¶*47*). In this situation, Professor Stern failure to disclose must be deemed as an honest exercise of judgment that believed publicly available information does not require specific disclosure, compounded with the fact that the vast availability of the said information.

The Tribunal could not find that she harbor the intent of hiding the circumstances of appointment, and thus offered no threat to her independence or impartiality (*Tidewater* ¶*55*).

ii. Multiple Arbitral Appointments

The tribunal accepted that Section 3.1.3 of the IBA Guidelines, would be useful but this can be no more than a rule of thumb. Depending on the particular circumstances of the case, either fewer or more appointments might, in combination with other factors, be needed to call into question an arbitrator's impartiality. Hence, canonical and strict usage of Section 3.1.3 would be unnecessary, and degree of flexibility could be exercised (*Tidewater* ¶*59*).

While the Tribunal preliminarily asserts that the singular fact that an arbitrator sat in two different cases brought against the same State, or appointed multiple times by the same or affiliate parties are not situation manifestly against the independence and impartiality, such fact must also be asserted in conjunction with other objective circumstances (*Tidewater ¶63)*.

Additionally, the Tribunal held that there must be a rationale for the potential conflict of interest which may arise from multiple arbitral appointments by the same party if either: (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases (*Tidewater ¶62)*.

In this regard, the tribunal investigated Professor Stern's practice in her previous cases appointed by Respondent. Professor Stern shown degree of independence evident by its positions in *Vanessa and Brandes,* where she rejected preliminary application by Venezuela (*Tidewater ¶64)*. [14] Other than that, she had shown objectivity in those previous cases. Therefore, Professor Stern remained to be seated as an arbitrator in *Tidewaters Arbitration* case.

C. Conclusion

In conclusion, Section 3.1.3 have seen degrees of practice, and had indeed referred to directly and explicitly by both of the discussed cases.

The significant elements of Section 3.1.3 point to the notion of *Repeating Arbitrator* and its influence to independence and impartiality. Based on that, we could see the divergent views between the two aforementioned cases, which are: the Proximity of Connection test and *OPIC Karimum v. Venezuela*. These cases shed negative light on *Repeating Arbitrators*, asserting that such repeat appointment alone would indirectly foster certain influences towards the arbitrator.

In contrast, the case of *Tidewaters v. Venezuela* deemed the matter of *Repeating Arbitrator* alone as a neutral factor that does not give weight to either disqualification or to allow an arbitrator to remain to be appointed. Lastly, other factors must be considered for further assessments.

A consistent finding in both of the aforementioned cases, however, demonstrated that financial benefits that are materially significant would nonetheless plays a very large role in determining independence and impartiality.

As held in the case of *OPIC Karimum v. Venezuela*, financial dependence of an arbitrator to a party might create undue influence to the arbitrator in question. But of course, the threshold from which the standard of *financial dependencies* would be of high standard that would require more ***than*** singular, or sporadic remuneration. There must be indication that the arbitrator to receives substantial financial reliance, if not primary financial reliance to one of the alleged parties in question.

There are of course unexplored elements of Section 3.1.3 that requires more clarification, such as in the issues of defining the phraseology of "affiliate of one of the parties" that have seen little scholastic attention.

[14] See *Vannessa* (Decision on Jurisdiction) on 22 August 2008; *Brandes* (Decision on Preliminary Objection) on 2 February 2009.

BIBLIOGRAPHY

Books and Journals

Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Treaty Arbitrations*, 96 *Cornell Law Review* No. 1, pp. 47-90 (2010).

Fatima-Zahra Slaoui, *The Rising Issue of Repeat Arbitrators: A Call for Clarification,* Arbitration International, Vol. 25, No. 1, LCIA, (2009).

Helena Jung, *The Standards of Independence and Impartiality for Arbitrators in International Arbitrators: A comparative study between the standards of the SCC, the ICC, the LCIA and the AAA,* Master Thesis, Faculty of Law Uppsala University (2008).

International Bar Association IBA Guidelines on Conflicts of Interest in International Arbitration, 2010.

Leela Kumar, *The Independence and Impartiality of Arbitrators in International Commercial Arbitration, available at:* http://ssrn.com/abstract=2428632 Accessed on 28 January 2018.

Natalia Giarldo Carrillo, *The Repeat Arbitrator's Issue: A Subjective Concept 19 International Law, Revista Colombiana de Derecho Internacional, 75-106 (2011).*

Neil Andrews, *Arbitration And Contract Law: Common Law Perspectives,* Ius Gentium: Comparative Perspectives on Law and Justice, Ser.54, Springer International Publishing (2016).

Nigel Blackaby, *Redfern and Hunter on International Arbitration*, 272 (5th ed., Oxford University Press, Oxford, 2009).

Ramon Mullerat, *The IBA Guidelines on Conflicts of interest revisited, Another contribution to the revision of an excellent instrument which needs a slight Daltonism Treatment,* (2009), International Workshop on ADR/ODRs. Universitat Oberta de Catalunnya.

Case Laws

Brandes Investment Partners LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3, in the year 2008.

Cook Industries, Inc. v. C. Itoh & Co. (America) Inc, 449 F.2d 106 (2nd Cir. 1971) *cert. denied*, 405 U.S. 921, 92 S.Ct. 957 (1972).

Fox v. Hazetton, 27 Mass. 275, 10 Pick 275 (1830)

OPIC Karimum Corporation v. Bolivarian Republic of Venezuela ICSID Case No. ARB/10/14 (Decision on the Proposal to Disqualify Professor Phillipe Sands, Arbitrator)

Tidewater Inc. v. Venezuela, ICSID Case no. ARB/10/5 (Decision on the Proposal to Disqualify Professor Stern, Arbitrator)

Tobacco Co. v. Alliance Ins. Co., 131 N.E. 213, 238 Mass. 514 (1921).

Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/9.

Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/04/6 (2004).

THE ISSUE OF ARBITRAL AWARD ENFORCEMENT IN INDONESIA*

M. Ibnu Farabi and Nabila Oegroseno*****

Abstract

International arbitration has been significantly growing in many countries. This dispute settlmement mechanism has been pursued in cases not only between companies, but also between investors and State. Despite that, the enforcement of arbitral awards can be problematic. In Indonesia, both domestic and foreign arbitral awards must be enforced through the national court. In this regard, the Indonesian law that governs arbitration allows the annulment of arbitral award if it contradicts public order. However, the definition of public order is quite unclear and provides loophole that leads to its misapplication. Numerous arbitral awards in Indonesia are annulled based on public order grounds. As such, there is a need for countries, particularly Indonesia, to provide certainty for parties of arbitration in enforcing arbitral awards that have been rendered.

Intisari

Arbitrase internasional telah berkembang secara signifikan di banyak negara. Mekanisme penyelesaian sengketa ini banyak diupayakan bukan hanya di antara perusahaan, tetapi juga antara penanam modal asing dan negara. Meskipun demikian, proses pelaksanaan putusan arbitrase dapat menimbulkan masalah. Di Indonesia, baik putusan arbitrase domestik maupun asing, harus ditetapkan melalui pengadilan nasional. Dalam hal ini, hukum Indonesia yang mengatur mengenai abritrase mengizinkan pembatalan sebuah putusan arbitrase jika bertentangan dengan ketertiban umum. Namun, definisi ketertiban umum tidak jelas dan justru memberikan celah yang dapat menyebabkan penerapan yang salah. Berbagai macam putusan arbitrase di Indonesia telah dibatalkan bedasarkan alasan terkait dengan ketertiban umum. Oleh karena itu, timbul kebutuhan bagi negara-negara, khususnya Indonesia, untuk memberikan kepastian bagi para pihak arbitrase dalam pelaksanaan putusan arbirtrase.

Keywords: arbitration, enforcement of arbitral awards, Arbitration Law No. 30/1999
Kata Kunci: *arbitrase, pelaksanaan putusan arbitrase, UU Arbitrase No. 30/1999*

* Preferred Citation Format: Farabi, M. I. & Oegroseno, N. (2018). The Issue of Arbitral Award Enforcement in Indonesia. J.G.L.R., 6(1), page 18-23.
** 2014; International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.
*** 2014; Business Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. Introduction

The effects of the growth of technology in this current century are no doubt extensive and rapid. It influences every individual's day-to-day lives in the form of social media, gadgets, medical tech and so on. It grows and births business relationship from all kinds of background and legal subjects, whether it is between individuals, multi-national companies, or even big investments of States. This however, will unfortunately and inevitably, open the doors to disputes and fragile business agreements prone to clashes of claims and problems. These disputes will then handle a diverse legal issue, complex relationships and settlement, and a lot of money.

The settlement of disputes involves strategic planning and settlement, which creates a risk to the companies' money and reputation. The law is present to fill and accommodate such scenario by providing access to litigation or through the judicial process. Yet these mechanisms comes with its own disadvantages as well. From costly expenses, tiered trials that takes a long time to get to a final and binding decision, too much administration, to even incompetent judges.

Therefore, a dispute resolution process was introduced with non-litigation channels outside the judicial process through Alternative Dispute Resolution ("**ADR**") mechanism. ADR is a dispute resolution mechanism through procedures agreed upon by the parties (*Pariadi, p. 54*). One of the forms of ADR is arbitration (*Hutagalung, p. 315*).

Article 1 (1) of Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement ("**Arbitration Law No. 30/1999**") provides that Arbitration refers to the means of settling a civil dispute outside a general court based on an arbitration agreement made in writing by the parties to the dispute. Arbitration Law No. 30/1999 regulates the composition and jurisdiction of an arbitration agreement, the execution of arbitration proceedings, the taking of evidence, the applicable law, the annulment and rejection of the verdict, and the involvement of the court through the recognition and execution of the verdict, including the grounds for not executing.

According to the Indonesian National Arbitration Centre or *Badan Arbitrase Nasional Indonesia* ("**BANI Arbitration Center**") and its Rules and Procedure ("**BANI Rules**"), the purpose of arbitration is to provide fair and speedy settlement in civil disputes arising out of trade, industry, both national and international (*Preamble, BANI Arbitration Center Rules and Procedure*).

In essence, arbitration does in fact delivers its promise, but the problem in Indonesia now is the execution of arbitral awards. In order for an arbitral award to be implemented, Indonesia must execute and recognize the award. Otherwise, the award is void and pointless. This is not only a crucial step to ensure the effectiveness in arbitration, but can also be considered as major flaw in Indonesian law.

A discussion regarding the implementation of an arbitral award in Indonesia will in turn involve a discussion regarding its execution. Arbitration is commonly known as one of the ADR settlements, wherein a claimant sets forth a claim/s agaist a respondent to the arbitration institution or body that is selected as a third party to resolve their dispute (*Harahap, p. 61*).

Thus, what is the point of bringing a case to arbitration and arguing before a panel of arbitrators when the outcome of the arbitration cannot be executed?

What an ironic situation: a tremendous loss suffered by the winner of

the arbitration. With that being said, it is important to note how it will impact and has impacted previous arbitration cases.

B. Arbitral Award Execution in Indonesian Law

Indonesia ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**the New York Convention**") in 1981 by virtue of the Presidential Decree No 34 of 1981. Article III of the New York Convention states that every contracting state must recognize and enforce awards rendered in other contracting states without imposing substantially more onerous conditions than are imposed upon recognition or enforcement of domestic awards. As a contracting party, Indonesia implemented its regulation for enforcement of arbitral awards, by designating the District Court of Central Jakarta (*Pengadilan Negeri Jakarta Pusat*) as the venue to enforce arbitral awards as set out in the Supreme Court Regulation No. 1 of 1990.

The execution of arbitral awards in Indonesia is regulated in Chapter VI Article 65 to Article 69 of Arbitration Law No. 30/1999. It is stated that the authority to handle the issue of recognition of the implementation of International Arbitration Ruling is the Central Jakarta District Court after the decision has been submitted and registered by the arbitrator (*Art. 21, Arbitration Law No. 30/1999*).

If the Central Jakarta District Court decides not to enforce the award, such award can be brought to the Supreme Court, which will be examined and decided at the latest 30 (thirty) days after the application for cassation has been received by the Supreme Court. Article 66 of Arbitration Law No. 30/1999 states that foreign arbitration awards are only recognized and may be exercised in the jurisdiction of the Republic of Indonesia, if they meet the following conditions:

1. The foreign arbitral award must be rendered by an arbitrator or an arbitral tribunal in a country, in which the Indonesian State is bound to by virtue of a bilateral or multilateral treaty on the acknowledgment and implementation of the International Arbitration Ruling.
2. The foreign arbitral award must only be pertaining to commerce.
3. The foreign arbitral award can only be executed in Indonesia if it is not contrary to public order.
4. The foreign arbitral award can only be executed in Indonesia after obtaining an exequatur from the Chairman of the Central Jakarta District Court.
5. The foreign arbital award must involve the Republic of Indonesia as one of the parties to the dispute, and can only be executed after obtaining an exequatur from the Supreme Court of the Republic of Indonesia and subsequently delegated to the Central Jakarta District Court.

Although Arbitration Law No. 30/1999 clearly regulates the implementation of the arbitral award, the Vice Chairman of BANI Arbitration Center, [*Umar*], Indonesia is still referred to by the international community as "*an arbitration unfriendly country*" due to the difficulties in enforcing or executing an arbitral award in Indonesia. This is due to the legal uncertainty in the Arbitration Law No. 30/1999.

Where there are two outlines of this legal uncertainty is first, the definition of the arbitration itself and second, the unclear meaning of public policy or public order as the reason for not executing arbitration decision (*Sudiarto, p. 72*).

C. The ambiguous definition of "Arbitration" in Arbitration Law No. 30/1999

Arbitration is defined in Article1(9) of Arbitration Law No. 30/1999 as a decision imposed by an arbitral tribunal or personal arbitrator outside the jurisdiction of the Republic of Indonesia or the decision of an arbitration or personal arbitrator which, according to the law of the Republic of Indonesia is considered as an international arbitration ruling. It means that arbitration decisions outside Indonesia are foreign or international arbitration rulings, and those within Indonesian territory are national arbitration rulings.

In comparison, Article 1 of the United Nations Commission on International Trade Law Model Law ("**UNCITRAL Model Law**") states that international arbitration is when the disputing parties are of different countries, nationality, business location, and others. Thus, what is interesting about Arbitration Law No. 30/1999 is that it does not distinguish between national and international arbitration, except for the purpose of the execution of the verdict, which relates to the time period for the award to be executed.

National arbitral awards takes 30 days after the submission to be executed, whilst international arbitral awards is not stated. The possible problem arising from this is that if an international arbitration is declared a national arbitration only because it is conducted in Indonesia, it would entail a different procedure that will conform to Indonesian procedure. In turn, it will create more problems between the parties as the procedure will evidently effect the timeline and outcome on the execution (*Gunawan, p. 177*).

For instance, in the case of *Pertamina v. PT Lirik Petroleum*, the South Jakarta District Court declined to hear Pertamina's application to set aside an arbitration award arising from a case seated in Jakarta governed by the ICC Rules. The Supreme Court, however, took the view the award was a foreign award due to the fact that the arbitration was conducted under the ICC Rules. This shows that the interpretation of some judges in Indonesia towards the definition of arbitration based on Arbitration Law No. 30/1999 depends on the seat of arbitration.

D. The non-exhausted use of "Public order"

Indonesia is no stranger to using public policy reasons as an excuse to not execute an international arbitral award. The international community considers this reason not to give legal certainty at all because the application of the criteria of public policy is unclear. This incident can be seen in the case of *Karaha Bodas co., L.L.C. v. State Petroleum and Natural Gas Company (Pertamina)* in the United States Court of Appeals (*Karaha Bodas Co., L.L.C., v. Perusahaan Pertambahan Minyak dan Gas Bumi Negara; et al.*).

Karaha Bodas entered into an agreement with Pertamina from 20 September 1997 to 2000. The project implementation agreement of Karaha Bodas was suspended and continued 4 times. Finally, Karaha Bodas, on April 30, 1998, brought the case to the Geneva Arbitration in Swiss in accordance with the place chosen by the parties in the agreement. The tribunal ordered Pertamina to pay compensation to KBC approximately US $ 270,000,000. Even though the decision is indeed final and binding, Pertamina refused to pay and Karaha Bodas responded by filing an application to implement the Geneva Arbitration Ruling in Courts of several countries where Pertamina's assets and goods are located, except in Indonesia

(*Karaha Bodas Co., L.L.C., v. Perusahaan Pertambahan Minyak dan Gas Bumi Negara; et al; LSM*).

On 27 August 2007, the Central Jakarta District Court granted Pertamina's written suit and ordered Karaha Bodas to take no action on the implementation of the arbitration award and to impose a fine of US $ 500 thousand per day if Karaha Bodas ignored the ban (*Silambi, p. 43*). The Central Jakarta District Court's reasoning was due to the action the implementation of the Geneva arbitration decision violates the public order and should be tried in the jurisdiction of Indonesia. Because of annulment of the already final and binding arbitration award in Geneva, the Texas District Court considered Pertamina conducting contempt of court.

On the other hand, it can also be seen in the case of *Pertamina v PT Lirik Petroleum*. Pertamina filed an application to the Central Jakarta District Court to set aside the award rendered by an arbitral tribunal constituted under ICC Rules. One of the arguments was that the award has violated the public order because it disregarded Pertamina's authority as the government's only representative in the oil and gas sector. By the fact that Pertamina failed to commercialize PT Lirik Petroleum's oil and gas fields, Pertamina viewed that it was a violation of public order.

In the end, the Central Jakarta District Court rejected the argument and declared that the ICC Tribunal had exclusive jurisdiction to examine and adjudicate the dispute between them. This is because both parties have mutually agreed in their dispute settlement and the application to set aside the award by Pertamina was rejected. Furthermore, the Supreme Court affirmed this finding, as the decision issued by the Central Jakarta District Court was final and binding. This shows that the term "public order" was interpreted broadly in order to set aside the obligations rendered under the awards.

E. Conclusion

As the economic of Indonesia is constantly developing, there will be a lot of foreign investors entering into Indonesia, which will lead to the conclusion of multifarious contracts between Indonesian companies with foreign legal entities.

Arbitration is the most neutral mechanism compared to the national court and/or domestic arbitration in Indonesia. As such, international arbitration would then most likely be the most feasible dispute settlement mechanism that will be chosen by the parties.

Despite that, by the fact that there are circumstances that could infringe the interest of one of the parties, Indonesia is still considered as "*an arbitration unfriendly country*" for foreign legal entities in order to resort their dispute settlement agreement to an international arbitration.

Against these backgrounds, Indonesia should consider to amend the Arbitration Law or at the very least establish a clear definition of "public order" and an array of illustration that could fall within the definition of such term. The relevant articles are Article 62 (for national arbitration) and Article 66 (for international arbitration) that deals with the matter concerning the annulment of arbitral awards.

Last but not least, Indonesia is also advised to the revise the term "international arbitral awards" under Article 9 of the Arbitration Law No. 30/1999. The literal meaning of such term would be different from the UNCITRAL Model Law. This ambiguity will impact the procedure that must be undergone by the parties to execute the arbitral awards.

BIBLIOGRAPHY

Books and Journals

Gunawan, Widjadja, *Arbitrase vs. Pengadilan*, Jakarta Prenada Media Group, 2008.

Harahap, Yahya, *Arbitrase, Ed. II*, Jakarta: Sinar Grafika, 2001.

Hutagalung, Sophar, *Praktik Peradilan Perdata dan Alternative Penyelesaian Sengketa*, Jakarta: Sinar Grafika, 2012.

Pariadi, Eko, *Penyelesaian Sengketa Melalui ADR*, Rumah Keadilan, 2002.

Silambi, Erni Dwita, *Penyelesaian sengketa Ekonomi dan Bisnis Melalui Arbitrase Internasional (Studi Kasus Pertamina Vs Karaha Bodas),* Journal Ilmu Eknomi & Sosial, Universitas Musamus Merauke, 2012.

Sudiarto, H., *Mengenal Arbitrase*, Jakarta: PT Raja Grafindo Persada, 2004.

Case Laws

Karaha Bodas Co., L.L.C., v. Perusahaan Pertambahan Minyak dan Gas Bumi Negara; et al., United States Court of Appeals, Nos. 02-20042, 03-20602.

Judgment of the Supreme Court of Indonesia Number 203 K/Pdt/2012, PT. Pertamina EP v. PT. Lirik Petroleum.

Miscellaneous

Badan Arbitrase Nasional Indonesia, Preamble, *BANI Arbitration Center Rules and Procedure.*

Law Number 30 Year 1999 concerning Arbitration and Alternative Dispute Settlement.

Lubis, Santosa & Maramis Law Firm, *Karaha Bodas, Sampai Kapan*, Lubis, Santosa & Maramis, Law Firm, 2012.

M. Husseyn Umar, Pokok-Pokok Masalah Pelaksanaan Putusan Arbitrase Internasional di Indonesia, Hukum Online, 2010.

LETHAL AUTONOMOUS WEAPON SYSTEMS: LEGAL AND ETHICAL PERSPECTIVES*

Felicity C. Salina**

Abstract

Much of the focus in reshaping the law of armed conflict is fixated on the vision of humanizing war, thus the term "humanitarian". But when self-governing, soulless, and machines are introduced into the scheme, does it project betrayal towards this objective? This article attempts to provide insight in answering the question through three sections. *First,* we will venture into the current and expected future progress of utilizing autonomous weapons systems in armed conflicts. *Second*, it will thoroughly observe the relevance of substituting human beings with robots in the battlefield with the cardinal concept of "just war" from the viewpoint of both jus ad bellum and jus *in bello*. This is mainly dedicated to overview and reconcile the pessimistic stance upon the issue against the vulnerable ethics in combat. *Third,* the article discusses the potential candidates who should be prepared to bear the legal cost of using insentient objects astride the frontier of warfare.

Intisari

Sebagian besar fokus dari pengembangan hukum konflik bersenjata terpaku pada visi untuk memanusiakan perang, oleh karena itu istilah 'humaniter' digunakan. Namun apabila mesin berotonomi dan tidak berjiwa diperkenalkan dalam skema yang ada, apakah hal tersebut menunjukkan perlawanan terhadap tujuan di atas? Artikel ini mencoba untuk menyediakan ide dalam menjawab pertanyaan tersebut melalui tiga bagian. Pertama, kita akan mendalami progres saat ini dan di masa depan dalam konteks penggunaan sistem persenjataan otonom dalam konflik bersenjata. Di bagian kedua, kita akan mendiskusikan secara menyeluruh hubungan antara mengganti manusia dengan robot di medan perang dengan konsep penting 'just war' dari sudut pandang jus ad bellum dan jus in bello. Aspek ini utamanya didedikasian untuk meninjau dan merekonsiliasi sikap pesimis terhadap isu yang ada jika disandingkan dengan etika pertempuran yang rapuh. Bagian terakhir mendiskusikan kandidat yang mungkin harus bersiap untuk menanggung konsekuensi hukum dari penggunaan objek tak bernyawa dalam batasan terdepan perang.

Keywords: autonomous weapons, robots, international humanitarian law, *jus ad bellum*, *jus in bello*, armed conflict, ethics

Kata Kunci: *senjata otonom, robot, hukum humaniter internasional, jus ad bellum, jus in bello, konflik bersenjata, etika*

* Preferred Citation Format: Salina, F.C. (2018). Lethal Autonomous Weapons Systems: Legal and Ethical Perspectives. J.G.L.R., 6(1), page 24-35.

** 2015; International Law, Faculty of Law, Universitas Gadjah Mada; Yogyakarta, Indonesia.

A. Introduction

Similar to its other controversial companions such as blinding laser weapons (dazzlers) and cluster munitions, lethal autonomous weapons systems ("**LAWs**") have been around for longer than depicted in today's coverage. The most archaic and rudimentary version of this weapon system can be traced back to the 1960s, during the escalation of the Cold War and when research in artificial intelligence surged as both the Eastern and Western Blocs competed in an endless attempt to augment their respective armaments. Prototypes of LAWs go even way further back to Leonardo da Vinci's design of possibly the first ever automaton: a sketch of a knight equipped with complex mechanics as to simulate human movements (McCormick, 2014).

However, the relevance of LAWs in modern warfare debates only arose within the past three decades; whilst détente among warring nations was in sight, the use of unmanned military systems gained its popularity, prompting the regime of armed conflict to respond. The ICRC released its first official report on the legal and ethical issues of LAWs in 2011. Although there is no agreed definition of what can be considered as LAWs, the ICRC recognizes them as "a weapon system that can independently select and attack targets".

The report departs from the understanding that LAWs can hardly bear the decision-making capacity of human beings in carrying out its functions, marking only one serious problem under the customary principles of international humanitarian law ("**IHL**") out of many. Another important aspect in the legal assessment of LAWs is what the ICRC names as the "accountability gap"; when violations of IHL occur due to the use of LAWs in the battlefield, current legal regime would be in eclipse, unable to establish a proper and just culpability (ICRC, 2011).

Discussions among experts as of currently on the deployment of killer robots, [20] including those engaging the States Parties to the Convention on Certain Conventional Weapons ["CCW"], mainly focus on the somewhat double-edged question of what the law should be aimed at: prohibiting LAWs or accommodating their use and other prospective technological advancements in the methods of warfare?

Several States, however, argue that any negotiations intended to outlaw LAWs at this point in time would be premature, since the weapon system has not been empirically utilized with operational force in the battlefield. Indeed, the rising uproar against LAWs under international law is mainly motivated by the potential of their production and proliferation as opposed to their actual use by military forces. Even so, the ICRC remains adamant that taking preventive steps to counter the use of weapons with foreseeable destructive effects is necessary to protect humanity (Iaria, 2017).

B. LAWs in Practice

1. Current Technology

Although resembling one another in nature, LAWs are different from unmanned military systems such as UAVs or UMSs.[21] LAWs are built with partial or total autonomy specifically to detect, select, and attack targets. They are weaponized, thus imposing a certain degree of lethality with

[20] 'Killer robots' is the most commonly used terminology to refer to LAWs. Others may use terms such as 'Lethal Autonomous Robotics' or LARs.

[21] Unmanned aerial vehicles and unmanned maritime systems, otherwise known as 'drones' are military technologies developed to serve more versatile purposes (inclusive of commercial applications). They are generally ground-controlled and supported with direct communication links to their bases.

minimum to no human supervision. The core intention of LAWs developers is for them to undertake the tasks of human soldiers. Within this understanding, LAWs are more prone to unpredictability and surpassing the existing humanitarian bounds (ICRC, 2014).

There is no evidence of robots with full lethality or autonomy currently being used. But the fact remains that their development is underway in a number of States with the wherewithal to improve their defense systems and see it as an investment. Based on a report by the HRC Special Rapporteur Christof Heyns in 2013, semi-autonomous robots are presently in use, the list includes (Heyns, 2013):

a. The US Counter Rocket, Artillery and Mortar (C-RAM) system, an automatic destroyer of incoming rockets, artillery and mortar rounds;
b. Sentry guns, including the Samsung Techwin surveillance and security guard robots positioned in the demilitarized zone between North and South Korea, can be set to an automatic mode;
c. IAI Harpy ('Self-Sacrificing Drones'), developed by Israel to detect and attack radar emitters. Classified as a loitering munition.

These States were among those who expressed the opinion that there is no pressing and imminent need for any legal framework to be designed in this respect as there is no ongoing plan to create and/or utilize fully autonomous lethal robotics.[22]

[22] See Report of the 2014, 2015, and 2016 Informal Meetings of Experts on Lethal Autonomous Weapons Systems (LAWS) convened by the UN CCW, UN Docs. CCW/MSP/2014/3 para. 17, CCW/MSP/2015/3 para. 14, CCW/CONF.V/2 para. 13.

2. The Human Oversight: In v Out of the Loop

Apart from their purported functions, the differentiation between unmanned military systems and LAWs also rests on their human control engagement scheme. The 'human in the loop' system or HITL, applied to most unmanned military systems, allows for human operators to directly intervene in the deployment and commission.[23] In the 'human out of the loop' (HOTL) system, contrarily, the operators are in charge only when autonomous robotics diverge from their assigned mission or if any other malfunctions are found during their performance of duties (Geiss, 2015). This translates to the machines' ability to wholly rely on its preprogrammed algorithms, inclusive of determining their own methods of mission accomplishment (Dinstein, 2018).

Early prophecies suggest that even if today's HOTL system is understood to allow authoritative human superintendence, HOTL in the future would take humans completely out of the loop, leaving the actors in field to rely solely on their computing processes and built-in programming (Warren, Hillas, 2017). Subsequently, the newest proposition introduced by the HRC is the 'human on the loop' narrative, in which human beings may conduct supervised autonomy, letting LAWs function through their program, but with the cardinal decision of activating or deactivating them when necessary (Heyns, 2013).

3. The Futuristic Outlook

On the flip side, the now well-functioning and operational autonomous technologies are mostly used as means of preserving States' peace and security.

[23] Some experts still venture into the acceptable threshold of the HITL system, (Arkin, 2009, p. 7) opines that arguments can be made as regards the specific time-frame in which the human intervention can take place and the scale of mission in question.

When the first diplomatic talks concerning LAWs were held by the High Contracting Parties to CCW in 2014, several delegations refuted the belief that technologies such as this will only open more possibilities of humanitarian violations (CCW, 2014). Instead, they had earlier asserted that with sufficient design enhancement efforts backed by nascent legal readiness, autonomous robotics could very well contribute to reducing the "political cost" of war (Espada, Hortal, 2013).

The United States and United Kingdom have been particularly vocal in maintaining their stance. The case for consolidating the beneficial existence of LAWs surrounds the following aspects (UK Ministry of Defense, 2017):

a. Risk removal: autonomous systems suppress the expense of military crew or combatants compared to manned operations;
b. Time-efficiency: suitability with time-sensitive targets, swift response;
c. 'Domesticable' LAWs: with better technology, it is expected that autonomous systems can alternatively paralyze its military objectives through immobilization or disarmament rather than by killings[24] (Kahn, 2013).
d. Force multiplication: armed robots allow for fewer military resources to do and achieve more. Due to their hardwearing makeup, the machines may also be assigned to do dirty, dull, and dangerous work (Marchant, 2011).

[24] See the US Opening Statement at the CCW Meeting of 2017 at https://geneva.usmission.gov/2017/11/15/u-s-opening-statement-at-ccw-meeting-of-group-of-governmental-experts-on-lethal-autonomous-weapons-systems/

C. Relevance with the 'Just War' Doctrine

1. (In)ability to Distinguish

As the yardstick of the moral philosophy of armed conflict, the modern 'just war' doctrine dictates that a war should be based on a just cause, adhere to the indispensable humanitarian considerations, and waged upon the intention to avoid evil (Dinstein, 2012). The methods by which a belligerent may engage targets in an armed conflict are not without limit.

The prevailing regime of the law of war, the Geneva Conventions of 1949 and its Additional Protocols of 1977 embody the customary safeguards to be respected in military operations. One of the most long-standing principles is that of distinction. As stipulated by Articles 51 and 52 of Additional Protocol I, every belligerent taking part in armed hostilities must distinguish combatants and civilians. Acts of violence must not be directed at the latter at all times (Henckaerts, Doswald-Beck, 2009).

In the debate, it has been repeatedly noted that by having LAWs at States' disposal, IHL is at the risk of being dehumanized (Warren, Hillas, 2017). The robots, although designed on the sense-think-act paradigm, are doubted to be able to match human judgment in the context-dependent and complicated decision-making process concerning life and death in armed conflicts (Heyns, 2013).

The proponents of LAWs, on the other end, believe that there is a high chance for the more developed LAWs of the future to increase precision in combat. Once the robots are preset with adequate strategic and tactical calibrations, they are much more reliable to aim at targets accurately, with the possibility of human error mitigated (Arkin, 2011). Others,

moreover, go beyond the discussion of noncombatants and entertain the issue of technicalities, e.g. software, instruments, trajectories (Anderson, Waxman, 2012; Schmitt, 2013).

Roff sets forth a hypothetical case whereby an Afghani famer wearing civilian attire whilst openly carrying an AK-47 on countryside is hardly distinguishable from a Taliban insurgent wearing the exact same clothing and visibly carrying arms, too. In this instance, proximity for the determination of a lawful military target can only be measured by complex human discernment (Roff, 2014).

However, the Author argues that the deployment of LAWs in the battlefield is a gradual and deliberate process. Although concession can be made on the lack of technological capacity that LAWs pose currently, delegating combat duty to LAWs is not tantamount to an automaton apocalypse. [25] So long as today's technology can ensure that LAWs are being used responsibly (to exemplify, through strategic placement in accordance with the environment, location and military necessity as an initial step), there will eventually be a point where human ingenuity may endow the machines with more precision and advanced mechanics, allowing them to learn from combat experience, whilst policy-makers may adapt to the evolution and create a fitting legal framework.

[25] Many imply the negative connotation that the operation of LAWs in armed conflicts as marking a dramatic alteration in the dynamics of the law of war is an onset of technological doom. See examples: Ball, P. *We can't ban killer robots – it's already too late* at https://www.theguardian.com/commentisfree/2017/aug/22/killer-robots-international-arms-traders and Elon Musk's call for the ban of LAWs at https://www.deccanchronicle.com/science/science/161117/killer-robots-leading-ai-scientist-warns-of-an-apocalypse.html

2. The Ethical Dimension

In terms of humanitarian protection, the law can sometimes be overly normative and rigid. The ethical aspect of the use of LAWs no longer deals with the notion that we could, but whether or not we should. The 'just war' doctrine may have gone through the vicissitudes of history, but ethical considerations are always there, with ever-changing standpoints (Patterson, 2009). Additional Protocol I, as also affirmed by the International Court of Justice in 1996 (Legality of the Threat or Use of Nuclear Weapons, ICJ 1996), has crystallized the 'Martens Clause' which states:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from **the principles of humanity and from the dictates of public conscience.**" (Protocol I, Art. 1)

One shared opinion is that using robots with autonomy as surrogate for human soldiers would erode the 'interpersonal relationship' in the battlefield, as coined by Sparrow, between the attacker and the target, which naturally gives leeway for humanity appeals; it consequently shows utmost affront towards human dignity (Sparrow, 2007; Alston, 2010). Unfortunately, this claim is fallible for three reasons: first, the LAWs may think for themselves, but they are not entirely detached from control. Further, the psychology of war is established upon the idea that while killing is bad, when done in battle the only influential factors are motivation and purpose.

Thus, from the viewpoint of the most fundamentally deontological assessment, conducts of autonomous machines is just as ethically sound. Be it a human person or not, the presence of justifiable grounds to commit an attack is enough to satisfy the moral reasoning, as it has always been.

Second, the claim implies denial of how far the evolution of armed conflicts has come. Reconnaissance combat hardware and improvised explosive devices are solid examples of how remote-control warfare has gained notoriety not only since LAWs became a trend (Hickie, Abbott, Zaffran, 2014). In response, the attitude of contemporary IHL has been quite categorical: the development does not incapacitate the law; it reinforces change.[26]

Finally, even by acknowledging that self-governing robots lack the morality and conscientiousness to determine life and death, the qualitative underpinnings of human dignity will always be inalienable from the fluidity of general ethos. This entails the willingness to accept that the acts influence the ethical basis, and not the other way around. Fortifying this, some behavioral studies even go on to show that looking at the susceptibility of human judgment to both internal and external driving forces, which can lead to poor decisions, autonomous robots may hold a promising future for warfare (UNIDIR, 2015).

3. The Lopsided Argument of the Right to Go to War

A further scrutiny brings some to argue that the use of LAWs would affect political decisions and its interlink with *jus ad bellum* or the right to go to war. It follows that restraints to resort to force is mainly due to the consideration of minimizing the loss of life. When States are not dealt with the existential risk of falling victim to the ramifications of war, there would be no hesitation to start one (Heyns, 2013). Although the Author does not object to the bearing technological advancements have on the paradigm of armed conflicts, one must not overlook its in-depth analysis.

There are two conceivable extremes. First, what would happen if LAWs were easily accessible to all States? War is contingent upon circumstances; it is not a crass tool to solve problems. If the political constraints are removed, States are aware that by abusing their right to self-defense, in light of the economic, social and security considerations would cost them more than they do benefit. If anything, the emergence of state of the art methods in warfare bolsters the desire to achieve multilateralism and diplomacy, mitigating the likelihood of hasty decisions.

Second, what if the situation was asymmetrical and LAWs were at the disposal of several States only? Setting aside the more ambitious odds of a systematic international cooperation in the placement and utilization of LAWs for the greater good, asymmetric war is not an unfamiliar theory (Paulus, Vashakmadze, 2009). There are two counters to this prediction.

First, we look at the codependent relationship between asymmetry in military capacity and asymmetry in political footing, as put forward by Arreguín-Toft. Principally, asymmetric conflicts **could** benefit the weak because the wider the disparity between military powers is, the less politically vulnerable and the more resolute the weak becomes, and vice versa (Arreguín-Toft, 2001). This theory, albeit

[26] The Hague Regulations of 1899 and 1907, as a start, lost their prevalence due to their incompatibility with developments of modern arms (Kunz, 1951; Alexander, 2015). Read further (Liivoja, 2015) on how technology has opened the doors for legal transformations in this respect over the years.

inherently strategic and highly predictive, revisits the structure of conflict and is well-suited to the relativity of a futuristic combat.

Another reason that frequently surfaces is what Joerden refers to as the lack of "knightliness" caused by the usage of remote-controlled machines—namely when one's soldiers can freely operate outside the dangerous periphery of warzone against the enemies (Joerden, 2018). The way to see this is by drawing the analogy of using military vehicles to maneuver estimated distance between one's soldiers and the enemies—inevitably this would result in the same tactical intention of sparing as many ground forces as possible from falling victim to counter-attacks.

In addition to the notion of 'clean killings' (waging war without shouldering the moral cost of human suffering) by virtue of technology consequently jeopardizes one's proportionality calculations. Roff makes a compelling case here by providing evidence of how the usage of unmanned systems by the USA in fighting Al-Qaeda generated hatred among as it was seen as disrespectful. This, in turn, pushed the success rate in recruiting people for terrorist organizations, directly going against the former's military purpose (Roff, 2015). Quite rationally, the mere capacity of a State to deploy LAWs does not entirely drive its intention to go to war, at least to the extent that long-term consequences are accounted for.

IV. Attempts to Diminish the Accountability Gap

1. Individual Responsibility

The attempt to incorporate the use of LAWs in the applicable regime of armed conflict has been largely impeded by the issue of legal responsibility (Beard, 2014). This problem is approachable through two perspectives, each with its own setbacks. On one end, individual responsibility may rely on criminal culpability or civil liability (Asaro, 2012) – both of which are unlikely to be extended to LAWs as a matter of punishment without establishing their legal personhood.[27] Hence, this section would isolate the discussion to potential entities to bear the responsibility.

First, the Rome Statute of the International Criminal Court ["ICC"], and the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda ["ICTY" and "ICTR"] Statutes stipulate that any person who "orders, solicits, or induces …" and "[facilitates] the commission of [the] crime …" may be held as individually responsible (Rome Statute, Art. 25; ICTY Statute, Art. 7.1; ICTR Statute, Art. 6.1). It seems that the concept of vicarious responsibility can bind any person who is an accessory in the production and/or operation of LAWs (McFarland, McCormack, 2014). Post WW II trials used to impose criminal responsibility to corporate executives who manufactured and distributed the apparatus used in the Nazi genocide (Beard, 2014), so it is plausible to be applied in the current scenario.

The same goes to the traditional command responsibility whereby LAWs are considered as subordinates in the military ranks (Heyns, 2013). This logic, however, is met with the elements of *actus reus* and *mens rea*. Even if *actus reus* is independent from intent (Van der Vyer, 2005), the chain of responsibility from the manufacturers to the conduct of LAWs in field is broken

[27] Constitutions of international judicial bodies strictly states that they have jurisdiction over natural persons only (Rome Statute, Statutes of ICTY & ICTR), coupled with the requirement of moral agencies (Asaro, 2012). Whereas the conceptual understanding of civil liability of non-state actors under international law is extendable insofar as corporates are involved and is interlinked with the obligation to repair (Mongelard, 2006).

when there is no "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" (Furundzija, ICTY, 1998).

Moreover, Additional Protocol I describes the requirement of intent as when he/she know or should have known of the committed breach of the Protocol but did not prevent it nor punish it following the act (Protocol I, Arts. 86(2), 87). Thus, for a commander to be liable, it must be proven that he/she acknowledges the risk of LAWs to violate its mandate, understand how their program works, and readily admit the possibility of malfunction (Hammond, 2015).

Another proposed solution is in the form of product liability. Proponents suggest that strict liability is suitable to hold manufacturing and/or developing companies in incurring defective operational LAWs responsible, which is analogous to cases of environmental hazard and torts. (Beard, 2014). If successful, this argument overrides the notion of corporate negligence where the omission of the company in question is deemed as a breach of duty which conjures the obligation of reparation (Weston, 1963). However, it is also problematic due to several reasons: in terms of military equipment and weapons, companies are seldom held accountable for defects, let alone when violations of IHL occur (HRW, 2012).

Assuming that this was a viable option, in the contrary, would result in another problem where it is possible for the producers to increase their sales price in an attempt at shifting the liability to consumer States who are willing to assume the risks caused by utilizing LAWs (Hammond, 2015). Some also maintain that bringing civil lawsuits against companies on this ground would disadvantage victims of war who are most likely at a loss in gaining access to redress (HRW, 2012).

2. State Responsibility

On the other end, State responsibility and the attribution of internationally unlawful acts seem more reliable appertaining to both armed conflicts of an international or non-international character. The ILC Articles on State Responsibility stipulates that any acts committed by the organs of a State, directed, empowered, or otherwise contravening the instructions given by a State are attributable to that State (ARSIWA, Arts. 4, 7, 8). If the parties are States, then the preferable forum is the ICJ.[28]

In a different narrative where the nationals of a State suffer from injury caused by the negligence of the armed forces of his/her State, the claim then can be inquired into by the International Humanitarian Fact-Finding Commission, although this might be rather weak considering that the Commission's competence is based on the parties' consent (ICRC, 2010).

V. Conclusion

The pursuit of discovery is intrinsic to the processes of human civilization. In his essay titled "*Contemporary Governance Architecture Regarding Robotics Technology: An Assessment*", Richard O'Meara wrote:

"Even a cursory review of the contemporary governance architecture regarding military

[28] As the primary judicial organ of the UN, the ICJ may adjudicate over international contentious cases between the States who have expressed their consent towards its jurisdiction. This scheme would also help individual victims who seek remedy as a result of grave breaches committed by the armed forces of a foreign State, given the prerequisite assumption of *locus standi* is fulfilled by the State of nationality. See also *acta jure imperii* which debars individuals from claiming against a State's sovereign acts before a foreign domestic court (Jurisdictional Immunities, ICJ, 2012).

technological innovation generally reveals a disturbing lack of consensus regarding the necessity for governance and the methodologies to be utilized to achieve it."

And it is true: when technology becomes a watershed in the revolution of the legal order, it is not so much about anticipation as it is motivated by experience.

This article pivots on how foreseeable designs of uprising military technology can fit into the grand picture of the law of armed conflict and those granted with protection under it. This is largely driven by the Author's wish of paying due regard to what *may* be the case, instead of the *status quo,* which is a more fitting rationale to draw a line of parallel to a forthcoming object.

Amidst the controversies, one thing that all key actors can seem to agree on is that the law is continuously evolving, much to the natural apprehension of everyone involved. War comes at a steep, inevitable price. The answer to whether or not new weapon systems can play a role in it relies solely on the unified vision of creating clearer safeguards and rules to protect those who are exposed to its threats.

BIBLIOGRAPHY

Books and Journals

Warren, A. & Hillas, A. (2017). Lethal Autonomous Weapons Systems: Adapting to the Future of Unmanned Warfare and Unaccountable Robots. *Yale Journal of International Affairs, 12,* 71-85.

Arkin, R. (2009). *Governing Lethal Behavior in Autonomous Robots*. Boca Raton, FL: Taylor & Francis Group.

Espada, C. & Hortal, M. (2013). Autonomous Weapons Systems, Drones and International Law. *Revista del Instituto Español de Estudios Estratégicos, 2,* 1-30.

Kahn, P. (2013). Imagining Warfare. *European Journal of International Law, 24(1),* 199-226.

Marchant, G., Allenby B., Arkin, R., Barrett, E., Borenstein, J., Gaudet, L., Kittrie, O., Lin, P., Lucas, G., O'Meara, R. & Silberman, J. (2011). International Governance of Autonomous Military Robots. *Columbia Science and Technology Law Review, 12,* 272-315.

Dinstein, Y. (2012). *War, Aggression and Self-Defence*. Cambridge, United Kingdom: Cambridge University Press.

Dinstein, Y. (2018). Autonomous Weapons and International Humanitarian Law in *Dehumanization of Warfare: Legal Implications of New Weapon Technologies*. Springer International Publishing.

Joerden, J. (2018). Dehumanization: The Ethical Perspective in *Dehumanization of Warfare: Legal Implications of New Weapon Technologies*. Springer International Publishing.

Asaro, P. (2012). A Body to Kick, But Still No Soul to Damn: Legal Perspectives on Robotics in *Robot Ethics: The Ethical and Social Implications of Robotics*. Cambridge, MA: The MIT Press.

Henckaerts, J. & Doswald-Beck, L. (2009). *Customary International Humanitarian Law: Volume I*. Cambridge, United Kingdom: Cambridge University Press.

Roff, H. (2015). Lethal Autonomous Weapons and Jus Ad Bellum Proportionality. *Case Western Reserve Journal of International Law, 47(1),* 37-52.

Beard, J. (2014). Autonomous Weapons and Human Responsibilities. *Georgetown Journal of International Law, 45,* 618-681.

Arkin, R. (2011). The Case for Ethical Autonomy in Unmanned Systems. *Journal of Military Ethics, 9(4),* 332-341.

McFarland, T. & McCormack, T. (2014). Mind the Gap: Can Developers of Autonomous Weapons Systems be Liable for War Crimes? *US Naval War College International Law Studies, 90,* 361-385.

Arreguín-Toft, I. (2001). How the Weak Win Wars: A Theory of Asymmetric Conflict. *International Security, 26(1),* 93-128.

Paulus, A. & Vashakmande, M. (2009). Asymmetrical war and the notion of armed conflict – a tentative conceptualization. *International Review of the Red Cross, 91(873),* 95-125.

Anderson, K. & Waxman, M. (2012). Law and Ethics for Robot Soldiers. *Policy Review, 76*.

Schmitt, M. (2013). Autonomous Weapons Systems and International Humanitarian Law: A Reply to the Critics. *Harvard National Security Journal Features*.

Roff, H. (2014). The Strategic Robot Problem: Lethal Autonomous Weapons in War. *Journal of Military Ethics, 13(3),* 211-227.

Patterson, E. (2009). Just War Theory and Explosive Remnants of War. *Journal of*

Conventional Weapons Destruction, 13(1), Article 2.

Liivoja, R. (2015). Technological change and the evolution of the law of war. *International Review of the Red Cross, 97(900),* 1157-1177.

Alexander, A. (2015). A Short History of International Humanitarian Law. *European Journal of International Law, 26(1),* 109-138.

Kunz, J. (1951). The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision. *American Journal of International Law, 45(1),* 37-61.

Sparrow, R. (2007). Killer Robots. *Journal of Applied Philosophy, 24(1),* 62-77.

Hammond, D. (2015). Autonomous Weapons and the Problem of State Responsibility. *Chicago Journal of International Law, 15(2),* 652-687.

Mongelard, E. (2006). Corporate civil liability for violations of international humanitarian law. *International Review of the Red Cross, 88(863),* 665-691.
Van der Vyer, J. (2004). The International Criminal Court and The Concept of Mens Rea in International Criminal Law. *University of Miami International and Comparative Law Review, 12(1),* 57-149.

Weston, S. (1963). Contributory Negligence in Product Liability. *Cleveland State Law Review, 12,* 424-436.

UN Documents and Reports

ICRC. (2011). *International Humanitarian Law and the challenges of contemporary armed conflicts.* (32IC/15/11). Geneva, Switzerland: 31st International Conference of the Red Cross and Red Crescent.

ICRC. (2014). *Autonomous Weapons Systems: Technical, Military, Legal and Humanitarian Aspects.* Geneva, Switzerland: Expert meeting of the Red Cross and Red Crescent.

UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns,* 9 April 2013, UN Doc. A/HRC/23/47.

Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report of the 2014 informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS),* 11 June 2014, UN Doc. CCW/MSP/2014/3.

Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report of the 2015 informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS),* 2 June 2015, UN Doc. CCW/MSP/2015/3.

Fifth Review Conference of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Report of the 2016 informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS),* 10 June 2016, UN Doc. CCW/CONF.V/2.

Geiss, R. (2015). *The International-Law Dimension of Autonomous Weapons Systems.* (Study). Berlin, Germany: Friedrich-Ebert-Stiftung.

UNIDIR. (2015). *The Weaponization of Increasingly Autonomous Technologies: Considering Ethics and Social Values.* (Resources No. 3).

HRW. (2012). *Losing Humanity: The Case Against Killer Robots.* Retrieved from: https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots

UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial,*

summary or arbitrary executions, Philip Alston, 28 May 2010, UN Doc. A/HRC/14/24/Add.6

Cases

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226.

Prosecutor v. Anto Furundzija (Trial Judgment), Case No. IT-95-17/1-T, ICTY, 10 December 1998.

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, ICJ Reports 2012, p. 99.

Treaties

UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010),* 17 July 1998.

UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002),* 25 May 1993.

UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (last amended on 13 October 2006),* 8 November 1994.

International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts,* November 2001, Supplement No. 10 (A/56/10), chp. IV.E.1.

Miscellaneous

Ty McCormick (2014). How killer robots became more than just scary science fiction. Retrieved from http://foreignpolicy.com/2014/01/24/lethal-autonomy-a-short-history/

Adriano Iaria (2017). Lethal Autonomous Weapon Systems and the Future of Warfare. Retrieved from http://www.iai.it/sites/default/files/iaicom1730.pdf

UK Ministry of Defence. (2017). Unmanned Aircraft Systems. (Joint Doctrine Publication). Wiltshire, United Kingdom.

Scott Hickie, Chris Abbott & Raphaēl Zaffran. (2014). Trends in Remote Control Warfare in New Ways of War: Is Remote Control Warfare Effective? *The Remote Control Digest.* Retrieved from: http://oxfordresearchgroup.org.uk/sites/default/files/Remote%20Control%20Digest.pdf

US Mission to the UN. (2017). US Opening Statement at CCW Meeting of Group of Governmental Experts on Lethal Autonomous Weapons Systems (LAWS). Retrieved from: https://geneva.usmission.gov/2017/11/15/u-s-opening-statement-at-ccw-meeting-of-group-of-governmental-experts-on-lethal-autonomous-we

INTEGRATING THE LENIENCY PROGRAM IN INDONESIA'S CARTEL ENFORCEMENT SYSTEM*

Rosari Sarasvaty**

Abstract

Cartel is considered as the most serious violations towards competition law due to its adverse impact towards the consumer and efficiency in the market. However, the secretive nature of cartel made it difficult to detected by the competition authority. As a matter of fact, the competition authority often fails to prosecute cartel practices due to lack of evidences in prosecuting cartel activity. On that account, various countries have implemented the leniency program in their cartel enforcement system in order to detect cartel practices effectively. The leniency program is a policy where it offers reduction of penalty in exchange for insider corporation in detecting cartel practices. Through this leniency program, the competition authority is able to find strong evidences to prove the existence of cartel in practice.

Intisari

Perjanjian kartel dinilai sebagai bentuk yang paling berbahaya dari tindakan anti persaingan karena dampaknya yang luar biasa merugikan konsumen dan juga merusak efisiensi dalam pasar ekonomi. Namun, sifat kartel yang rahasia telah berulang kali menjadi hambatan terbesar bagi otoritas persaingan usaha termasuk Komisi Pengawas Persaingan Usaha dalam membuktikan praktik kartel. Tak jarang upaya-upaya yang dilakukan oleh otoritas persaingan usaha kerap kali berujung pada kegagalan untuk mendapatkan bukti-buktinya. Oleh karena itu sejumlah besar yurisdiksi di negara maju seperti Amerika Serikat telah menerapkan leniency program dalam mengungkap praktik kartel. Leniency program merupakan suatu kebijakan yang menawarkan insentif bagi para pelaku kartel untuk melaporkan tindakannya secara sukarela. Maka dari itu penerapan leniency program dapat menghadirkan bukti-bukti yang kuat bagi otoritas persaingan usaha dalam membuktikan praktik kartel.

Keywords: Unfair Business Competition, Cartel, Leniency Program

Kata Kunci: *Persaingan Usaha Tidak Sehat, Kartel, Leniency Program*

* Preferred Citation Format: Sarasvaty, R. (2018). Integrating the Leniency Program in Indonesia's Cartel Enforcement System. J.G.L.R., 6(1), page 36-44.

** 2014; Business Law, Faculty of Law, Universitas Pelita Harapan; Jakarta, Indonesia.

This Article was based on a Legal Research conducted by the Author as a requirement to obtain the degree of Bachelor of Laws (*Sarjana Hukum*) from Universitas Pelita Harapan in 2017. The title, thereof, has been modified from the original work.

A. Introduction

Throughout history, cartels are considered by many as the most egregious offence against competition laws due to its adverse impact towards consumers and state economic development. Cartels eliminate competition among business actor enabling them to charge higher prices while selling lower quality with a narrower choice. This does not only make consumers and small competitors suffer, but also adversely affects the competitiveness of the economy as a whole. On that note, various jurisdictions, including Indonesia strictly prohibits any cartel conduct.

Among others, the prohibition of cartel agreements in Indonesia can be found in Article 11 of Law Number 5 of 1999 regarding Prohibition on Monopolistic Practices and Unfair Business Competition ("**Competition Law**"), which states:

"*Business actors are prohibited to enter into an agreement with his business competitor with the purpose to affect the price by controlling the production and or distribution of goods and or services, that might cause monopolistic practices or unfair business competition.*"

Aside from the above article, the prohibition of cartel can also be found in Article 5 regarding price fixing, Article 7 regarding agreement that aims to fix prices below market price, Article 9 regarding division of territory, Article 10 regarding boycott, Article 12 regarding trust, Article 22 regarding conspiracy in tender, and Article 24 regarding conspiracy in production and/or distribution limitation.

The difficulties in finding strong evidences to prosecute cartels has made the Indonesian Commission for the Supervision of Business Competition or *Komisi Pengawas Persaingan Usaha* ("**KPPU**") realize that a mere prohibition is insufficient to eradicate cartels; there must be an effective enforcement system. The evidentiary process of cartel is complicated due to the confidential nature of cartels. As such, KPPU is facing difficulties in finding sufficient evidence to prosecute cartels.

In particular, the Competition Law requires KPPU to present "hard evidence" to prove the existence of a cartel agreement among business actors that led to an unfair business competition. "Hard evidence" refers to a proof that directly identifies a meeting or communication between the subjects and describes the substance of their agreement. The most common form of hard evidence are: printed documents and/or electronic documents that indicates the existence of the cartel agreement and the parties to it, and oral/or written statements by co-operative cartel participants describing the operation of the cartel.

As cartel operates under the cloak of secrecy, it is impossible to always find hard evidences. However KPPU could not rely on indirect evidence, as its legitimacy is still questioned in Indonesia.

In particular, it is stated in case No. *294/K/PDT.SUS/2012 (KPPU v. PT. Pfizer Indonesia, PT. Dexa Medica, Pfizer Inc., Pfizer Overseas LLC, Pfizer Global Trading, and Pfizer Corporation Panama*) that the value of indirect evidence is not equivalent with the value of the types of evidences listed in Article 42 of the Competition Law, which are:

a. witness testimony
b. expert elucidation
c. indication
d. written document
e. testimony of business actor.

This view is further supported by Sutrisno Iwantono's expert elucidation in stating that:

"*Indirect evidence shall serve as an indicator to foresee the possibility of a cartel conduct. However, indirect evidence could not be used directly as a key evidence to prove the existence of cartel.* "

For that reason, the Indonesian Supreme Court rejected the case and ruled in the favor of the defendant. This is because KPPU only relied on indirect evidence using parallel pricing reasoning to conclude that PT. Pfizer is amounted to cartel without further support from any evidences as required under Article 42.

The United State of America ("**USA**")'s competition authorities – in which under Section 1 of Sherman Act is obliged to provide hard evidences to prove the existence of cartel – also faces the same difficulty. In response, the USA adopted the leniency program in 1987.

As defined by the International Competition Network, leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable, in return for reporting its cartel membership and supplying information or evidence related to the cartel to the competition authorities. The leniency program will significantly increase the effectiveness of competition authorities' performance in the cartel evidentiary process. Through this program, competition authorities will no longer face any difficulties in providing sufficient evidence in prosecuting cartels.

Ever since the USA adopted leniency program in its enforcement system, it has successfully unfolded numerous cartel practices, including the biggest international cartel known as vitamin cartel. The USA's success has encouraged other jurisdictions to adopt a similar leniency program, including Indonesia.

Adopting the leniency program within the Indonesian legal regime will become a huge advantage for Indonesia to prove the existence of cartel. Hence, this Article will try to elaborate and examine the concept of leniency program specifically in the USA, and will also discuss the possibility of implementing the leniency program in Indonesia.

B. The Leniency Program

The leniency program offers reduced penalties to cartel members in exchange for revealing direct evidence and cooperating with the antitrust authority during the prosecution phase. Generally leniency program aims at three main objectives namely:

a. to encourage business actor who commits cartel report his violation to the business competition supervisory commission;
b. in the long run, the implementation of leniency program is expected to be able to give a deterrence effect that prevent the existence of cartel in the future;
c. to gain more sufficient evidence in proving the alleged cartel.

In the USA, there are two types of leniency program provided under the law: corporate leniency policy and leniency policy for individuals. The USA's leniency program applies to criminal violations of Section 1 of the Sherman Act and thus, it does not cover civil anti-trust enforcement. The Department of Justice ("**DOJ**") provides three types of leniency program. *First,* Type A corporate leniency, which is available only for the first applicant before the investigation has begun. *Second,* Type B corporate leniency, which is available only for the first applicant

after the investigation began. *Third,* individual leniency, which is available only for the first individual to report antitrust activity before the investigation began.

The DOJ will reward leniency applicant by providing partial or full immunity from criminal prosecution once such applicant has met all of the conditions and requirement. Nevertheless DOJ may also revoke the applicant's conditional acceptance into the leniency program if such applicant fails to comply with the conditions as already agreed upon beforehand.

Generally, people who sought for leniency in the USA must become the first one to come forward and report the illegal activity to the DOJ, fully cooperate with DOJ during the investigation stage by providing DOJ the requested information and supporting documents, take prompt and effective action to terminate its part in the activity, and provides full, continuing and complete cooperation that advances DOJ investigation. Further, where possible, there might be a requirement to make restitution to the injured parties.

The DOJ holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the DOJ does not publicly disclose the identity of a leniency applicant or information provided by the applicant. Notwithstanding this policy, the DOJ frequently obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. Such waivers are helpful in ensuring that the Division is able to coordinate investigative steps with the other jurisdictions involved.

C. The Possibility to Implement Leniency Program

In light of the Competition Guidelines made by United Nations Conference on Trade and Development in collaboration with Ministry for Foreign Affairs of Sweden, there are three essential prerequisites that must be met in order to successfully implement leniency program.

Firstly, the cartelist must perceive a high risk of detection by competition authorities. This means that the competition authorities must possess integrity that reflects their commitment and perseverance to eradicate cartel offences. This way, the cartelist will have a greater tendency to seek for leniency program before getting caught and be subject to a greater sanction for not reporting it in the first place.

Secondly, the competition law must provide effective sanctions for those who participate in cartel activities. In other words, the sanctions imposed towards the cartelist must be severe and significant enough to the extent that it encourages them to report the wrongdoing voluntarily to competition authorities. With a greater sanction and penalty imposed, the leniency program will be more appealing to cartelists.

Thirdly, it is paramount for competition authorities must implement the leniency program with transparency and certainty. The prospective leniency application must be able to feel secure and know what to expect when they report the cartel activity. Otherwise, cartelists will be hesitant to report to competition authorities. Therefore, the trust shared between cartelists and competition authorities will likely determine the sustainability of the leniency program in the long run.

In Indonesia, the Competition Law is considered to be insufficient in addressing

the current needs. For instance, the sanction imposed for cartel infringement under the Competition Law is considerably low (maximum penalty of Rp 100.000.000.000). In result, it does not provide effective deterrence effects for cartelists.

If Indonesia plans to apply the leniency program within its cartel enforcement, Indonesia must first increase the amount of applicable penalty for cartel infringement in order to make immunity provided under leniency program more attractive.

As a start, it is advisable for the amount of maximum penalty to be increased from from Rp 100.000.000.000 to Rp 1.000.000.000.000.0000. Other than that, the amount of fines may also be set at double the gross amount gained by the defendants or lost by the victim. Consequently, the increasing amount of the applicable penalty must be coupled by strong cartel enforcement by KPPU.

Moreover, the KPPU must maintain its integrity by implementing the law accordingly. Presently, Indonesia does not formally recognize any clemency institution, such as the leniency program. Subsequently, Indonesia must first acknowledge the existence of leniency program and amend its its Competition Law to regulate seven interrelated aspects of the leniency program.

The first amendment should be concerning the subject of the leniency program, which is currently still limited to corporations. Individuals should therefore be included as one of the subjects of the leniency program.

The second amendment should be concerning the granting institution of the leniency program. The KPPU, the authorized body to supervise the implementation of the Competition Law, should be the authority to enforce the leniency program.

The third amendment should be concerning the leniency program. Some of the requirements under the USA's leniency program can used as a reference in formulating the most suitable requirements for Indonesia's leniency program. In this line, there are several crucial requirements that the Indonesian leniency program must have.

The applicant must be able to provide the KPPU with substantive information regarding the alleged cartel activity. In this regard, the information provided by the applicant must be valid, and does not contain any falsehood. Further, the applicant should not be the mastermind of the alleged cartel activity, and should be fully committed in assisting the KPPU at all times; since the beginning up until the issuance of a final and binding decision.

The fourth amendment should be concerning the procedure of the leniency application. In the USA, the application is filed to the deputy assistant of the attorney general for a criminal enforcement. Meanwhile, Indonesia's current procedure does not provide any specific division to handle leniency cases. As such, the KPPU is recommended to establish a division to specifically handle such cases.

As for the procedure, Indonesia is advised to implement the following steps for its leniency program:

1. The leniency applicant should file the request to KPPU's specific division who is responsible for leniency program.
2. The leniency applicant will then receive a receipt upon filling its request. This receipt secures the place of the applicant for the leniency program.
3. After the KPPU confirms the validity of the reported information, KPPU will

then proceed to the investigation stage.
4. In the investigation stage, the leniency applicant shall assist KPPU by providing information that can prove the existence of the alleged cartel conduct.
5. Once KPPU has issued a final and binding decision upon the informed cartel activity, the leniency applicant will receive incentives in return of its corporation.

The fifth amendment should be concerning the incentives of the leniency program. Article 47 of the Competition Law imposes administrative sanction in the form of fines up to Rp. 100.000.000.000, while Article 49 imposes additional criminal punishment that consists of:

a. revocation of business permit;
b. prohibition for the entrepreneurs who are proven to have violated the Competition Law to hold a position as director or commissioner at least within a period of 2 years and at the longest within a period of 5 years;
c. termination of certain activities or actions that cause damage to other parties.

Thus, the first leniency applicant who is able to satisfy all of the requirements might be exempted from the above sanction.

The sixth amendment should be concerning the grounds for the revocation of the leniency program. Noticing the importance of having a fully committed leniency applicant, it is necessary for Indonesia to revoke the offer provided under the leniency program in certain circumstances. This includes when the leniency applicant: fails to cooperate with the KPPU by refusing to provide information regarding the alleged cartel activity, still participates after the filling of the leniency request, or provides false documents to the KPPU. These will ensure the effectiveness of the implementation of the leniency program at all times.

The seventh amendment should be regarding confidentiality. The USA emphasized the importance of upholding confidentiality. The identity of the application must be kept confidential until the authoritative court has issued a final and binding decision upon the relevant cartel case. Similarly, to ensure the safety and security of the leniency applicant, Indonesia must also protect his or her identity until the cartel case has been decided.

Aside from that, the KPPU should also maintain the secrecy of the submitted information. The KPPU should not disclose any information, unless ordered by the court or requested by the leniency applicant. Simply put, the KPPU is obliged to maintain the confidentiality of any document and/or information that was submitted by the leniency applicant.

D. Conclusion

All in all, Indonesia can borrow several elements from the leniency program created by the USA, which is regulated under the corporate leniency policy (1993) and leniency policy for individuals (1994). The enforcement of such policies remains under the prosecutorial discretion of the DOJ's Antitrust Division.

As the USA's leniency program applies to criminal violations, it does not cover civil anti-trust enforcement. The DOJ provides three types of leniency program and will reward the leniency applicant by providing partial or full immunity from criminal prosecution once such applicant has met all of the conditions and requirement.

There is no doubt that the leniency program will significantly advance the cartel enforcement system in Indonesia. However, the leniency program will only

compatible to be applied in Indonesia if there is an acknowledgement of such program within its Competition Law. This in turns requires several amendments, as per discussed earlier in this Article. Additionally, Indonesia should also provide an effective penalty for cartel infringements to invite participation of potential leniency applicants. Collectively, these will keep the possible practice of the leniency program functioning and fruitful in Indonesia.

BIBLIOGRAPHY

Books and Journals

ABA. Antitrust Compliance Perspectives and Resources for Corporate Counselors, Chicago: American Bar Association, 2005.

Amiruddin and H. Zainal Asikin. Pengantar Metode Penelitian Hukum, Jakarta: PT Raja Grafindo, 2004.

Aggaraini, Anna Maria Tri. "Program Leniency dalam Mengungkapkan Kartel Menurut Hukum Persaingan Usaha". Jurnal Persaingan Usaha Vol.6. 2011. Jakarta: Komisi Pengawas Persaingan Usaha.

Asshiddiqie, Jimly. Perekonomian Nasional dan Kesejahteraan Sosial Menurut UUD 1945 serta Mahkamah Konstitusi, Jakarta: Mahkamah Konstitusi, 2005.

Blair, Roger D and D. Daniel Sokol, "Competitive Discounts and Antitrust Policy",
The Oxford Handbook of International Antitrust Economics Vol.2. 2015. London: Oxford.

Beaton-Wells, Caron Y. "Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study". Journal of Antitrust Enforcement Vol.2 No.1. 2014. Sydney: Australian Business Law Review.

Brenner, Steffen. "An Empirical Study of the European Corporate Leniency Program", International Journal of Industrial Organization Vol. 27. 2009. Berlin: Humboldt-University.

Broder, Douglas E. U.S Antitrust Law and Enforcement: A Practice Introduction. New York: Oxford, 2012.

Case, Karl E. and Ray. C. Fair. Prinsip-prinsip ekonomi, Jakarta: Erlangga, 2006.

Connor, John M. Price Fixing Overcharges: Legal and Economic Evidence, Indiana: Purdue University, 2005.

Edilius and Sudarsono. Kamus Uang dan Bank, Jakarta: Rineka Cipta, 1994.

Fuady, Munir. Hukum Anti Monopoli; Menyongsong Era Persaingan Sehat, Bandung: Citra Aditya Bakti, 2003.

Fuady, Munir dkk. Pengantar Bisnis, Jakarta: Gramedia Pustaka Utama, 2000.

Griffin, James M. An Inside Look at a Cartel at Work: Common Characteristics of International Cartels, New York: Review of Industrial Organization, 2001.

Howard, Marshall C. Antitrust Law and Trade Regulation: Selected issues and Case Studies, New Jersey USA: Englewood Cliffs, 1983.

Harahap, M.Yahya. Beberapa Tinjauan Tentang Permasalahan Hukum II, Bandung: Citra Aditya Bakti, 1997.

Hartono, Sri Rejekti. Kamus Hukum Ekonomi, Bogor: Ghalia Indonesia, 2010.

Inoue, Kira. Japanese Antitrust Manual: Law, Cases and Interpretation of the Japanese Antimonopoly Act, Tokyo: Kluwer Law International, 2007.

Case Laws

Case No. *294/K/PDT.SUS/2012 (*KPPU v. PT. Pfizer Indonesia, PT. Dexa Medica, Pfizer Inc., Pfizer Overseas LLC, Pfizer Global Trading, and Pfizer Corporation Panama).

Other Sources

Brown Mayer. "Leniency and Plea

Bargaining in Cartel Investigations in the United States and Europe". Available at: https://www.mayerbrown.com/public_docs/Leniency_PleaBargaining_Cartel.Investigations.pdf

Department of Justice, United States of America. "Corporate Leniency Policy". Available at: http://www.justice.gov/atr/public/guidelines/0091.htm

Department of Justice, United States of America. "Frequently Asked Question About The Antitrust Division's Leniency Program and Model Leniency Letters". Available at: https://www.justice.gov/atr/page/file/926521/download

Global Legal Insights. "USA Cartels 2017". Available at: https://www.globallegalinsights.com/practice-areas/cartels/global-legalinsights---cartels-5th-ed./usa#chaptercontent2

Hammond Scott. "Cornerstones Of An Effective Leniency program". Available at: http://www.justice.gov/atr/public/speeche

Komisi Pengawasan Persaingan Usaha. Guideline of Article 11 of Law No.5 year 1999 on Prohibition of Monopolistic Practice and Unfair Business Competition

United Nations Conference on Trade and Development. "The Use of Leniency Programmes as a tool For the Enforcement of Competition Law Against Hardcore Cartels in Developing Countries". Available at: http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf

Author's Instructions

Who May Submit Articles:

- Any **undergraduate student** and **post-graduate student** from any university may submit articles to the *Juris Gentium Law Review*
- An article may only be authored by a **maximum of two authors**

Format and Substantive Regulations

- Articles must provide indepth analysis on any issues within the area of internatonal law (public or private) or comparative law
- Articles must be written in proper English
- The article must consist of:
  1. Title (max 15 words)
  2. Abstract in English (100-200 words)
  3. 3000-3300 words, excluding titles, abstract, bibliography, inside notes, and "about the author", but including footnotes
- The manuscript shall structures with the heading Introduction, Body (as per topic), Conclusion, Bibliography, A paragraph on "About the Author" (Full Name, Entrance Year, University, Faculty, Major, Special Concentration (if any))
- Articles uses inside notes for citations (**American Psychology Association Referencing System**)
- There should be at least **five references** used, and may only cite reliable sources
- Footnotes are allowed for **non-reference** purposes
- Articles are subject to **reviews and selections**
- Editing Staff may at their discretion request author to revise the article prior to publication
- Send the article to jglr.ugm@gmail.com and/or visit our website at www.jurnal.ugm.ac.id/jurisgentium or www.cimcugm.org/jglr for more information.

9 772302 121011

JURIS GENTIUM LAW REVIEW
Faculty of Law Universitas Gadjah Mada
Jalan Sosio Yustisia Nomor 1 Bulaksumur, Sleman, D.I. Yogyakarta 55281
Email: jglr.ugm@gmail.com
Website: www.jurnal.ugm.ac.id/jurisgentium or www.cimcugm.org/jglr