CHALLENGE OF ARBITRATORS’ NEUTRALITY

NOR SHAM BIN SAFIEE

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To my beloved parents Hj Safiee Bin Sariff and Hjh. Zainon Bte Hj Hambari and to my baby Nabilah Sham Rin.
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ABSTRACT

One of the fundamental principles required by arbitrators is to be able to act impartially and independently. This principle is also embodied in the Arbitration Act 2005 that was modelled from the UNCITRAL Model Law. Impartiality and independence throughout a proceeding is necessary to avoid unwanted challenge in future. Despite the existence of duty to disclose any interests and circumstances which may cause doubts to arbitrators’ neutrality, some arbitrators continuously neglecting this and causing challenges to their neutrality or sometimes to the award rendered. Nonetheless, there is no specific definition of impartiality and independence in the Act nor explanation or assistance provided in the Act to illustrate on the alarming duty to disclose. Fortunately, at international level the International Bar Association (IBA) had worked together to assist arbitrators on the duty to disclose by introducing the IBA Guidelines on Conflict of Interest which is a great help to arbitrators to understand the circumstances that require disclosure in the proceeding. The purpose of this study is to identify the Malaysian courts and arbitrators understanding on impartiality and independence of arbitrators in discharging their duty. Due to confidentiality, arbitrators’ practices and decisions on the challenge are not available. As such, reference to courts cases was used in carrying out this task. Cases concerning challenges due to justifiable doubts to arbitrators’ impartiality and independence were analyzed. The reasons for every challenge made were analyzed critically and match with the IBA Guidelines on Conflicts of Interest in International Arbitration 2014. This IBA guidelines was chosen as it is one of its kind and it provides list of situations according to their seriousness, which may require disclosure or not. It is apparent that despite there were no specific reference made to the IBA Guidelines, our local courts in essence had applied the same principles in dealing with challenge to the arbitrators’ neutrality.
ABSTRAK

TABLE OF CONTENTS

TITLE i
DECLARATION ii
DEDICATION iii
ACKNOWLEDGEMENTS iv
ABSTRACT v
ABSTRAK vi
TABLE OF CONTENTS vii
LIST OF CASES xi
LIST OF TABLES xiii
LIST OF ABBREVIATIONS xiv

1 INTRODUCTION 1
1.1 Background of Research 1
1.2 Problem Statement 5
1.3 Objective of Research 6
1.4 Scope of Research 6
1.5 Significance of Research 6
1.6 Research Methodology 7
1.6.1 1st Stage: Initial Study, Find Research Topic, Objective, Scope and Outline 7
1.6.2 2nd Stage: Data Collection and Research Design 7
1.6.3 3rd Stage: Data Analysis 8
1.6.4 4th Stage: Writing Up 8
1.7 Structure of Research 8
1.7.1 : Chapter 1 9
1.7.2 : Chapter 2 9
1.7.3 : Chapter 3 9
1.7.4 : Chapter 4 9
1.7.5 : Chapter 5 10

2 CHALLENGE OF ARBITRATOR 11
2.1 Introduction 11
2.2 Appointment of Arbitrators 12
   2.2.1 Defining Arbitrator and Arbitral Tribunal 12
   2.2.2 Appointment Under Arbitration Act 2005 14
   2.2.3 Differences With Appointment of Judges 15
2.3 Brief Historical Outline on Challenge of Arbitrators in Malaysia 16
   2.3.1 Arbitration Act 1952 18
      2.3.1.1 Grounds for Removal 19
      2.3.1.1.1 Misconduct 19
      2.3.1.1.2 Impartiality and Fraud 21
   2.3.2 Arbitration Act 2005 22
2.4 Comparison between Arbitration Act 1952 and Arbitration Act 2005 on Challenge of Arbitrators 24
2.5 Grounds for Challenge 26
   2.5.1 Independence 29
   2.5.2 Impartiality 31
2.6 Test to Determine Lack of Impartiality and Independence 35
2.7 Procedure 36
2.8 Conclusion 37
3  INTERNATIONAL BAR ASSOCIATION (IBA) GUIDELINES 39

  3.1  Introduction to IBA Guidelines 2014 39

  3.2  Application of IBA Guidelines 2014 40
  3.2.1  General Standards 41
    3.2.1.1  General Principle 41
    3.2.1.2  Conflict of Interest 42
    3.2.1.3  Disclosure by Arbitrator 42
    3.2.1.4  Waiver by the Parties 43
    3.2.1.5  Scope 44
    3.2.1.6  Relationship 44
    3.2.1.7  Duty of the Parties and Arbitrator 45

  3.2.2  Practical Applications 46
    3.2.2.1  The Red List 46
    3.2.2.2  The Orange List 47
    3.2.2.3  The Green List 47

  3.3  Response Towards IBA Guidelines 2014 48

  3.4  Recognition Towards IBA Guidelines 2014 50
  3.4.1  International Arbitral Institutions 50
  3.4.2  Judicial Recognition 51
    3.4.2.1  England 51
    3.4.2.2  United States of America 54
    3.4.2.3  Switzerland 55
    3.4.2.4  Germany 56
    3.4.2.5  Canada 57
    3.4.2.6  France 58

  3.5  Conclusion 61

4  DATA ANALYSIS 64

  4.1  Introduction 64

  4.2  Summary of Cases 64
5 CONCLUSION AND RECOMMENDATION

5.1 Introduction 85
5.2 Summary of Research Finding 85
5.3 Conclusion 88
5.4 Problems Encountered During Research 89
5.5 Recommendation for Future Research 89

REFERENCES 90
BIBLIOGRAPHY 93
APPENDIX I 96
## LIST OF TABLES

<table>
<thead>
<tr>
<th>TABLE NO.</th>
<th>TITLE</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.1</td>
<td>Comparison between Arbitration Act 1952 and Arbitration Act 2005</td>
<td>24</td>
</tr>
<tr>
<td>1.2</td>
<td>Recognition and Reference by Different National Courts Towards IBA Guidelines</td>
<td>59</td>
</tr>
<tr>
<td>1.3</td>
<td>Division of Stages, Issues and Outcome of Cases</td>
<td>82</td>
</tr>
</tbody>
</table>
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AC</td>
<td>Appeal Cases</td>
</tr>
<tr>
<td>All ER</td>
<td>All England Reports</td>
</tr>
<tr>
<td>CLJ</td>
<td>Current Law Journal</td>
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<tr>
<td>EWHC</td>
<td>High Court of England and Wales</td>
</tr>
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<td>IBA</td>
<td>International BAR Association</td>
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<td>KLRCA</td>
<td>Kuala Lumpur Regional Centre for Arbitration</td>
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<td>LNS</td>
<td>Legal Network System</td>
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<td>MLJ</td>
<td>Malayan Law Journal</td>
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<td>MLJU</td>
<td>Malayan Law Journal Unreported</td>
</tr>
<tr>
<td>QB</td>
<td>Queen’s Bench</td>
</tr>
<tr>
<td>UKSC</td>
<td>United Kingdom Supreme Court</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nation Commission on International Trade Law</td>
</tr>
<tr>
<td>WLR</td>
<td>Weekly Law Reports</td>
</tr>
</tbody>
</table>
## LIST OF APPENDICES

<table>
<thead>
<tr>
<th>APPENDIX</th>
<th>TITLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>IBA Guidelines of Conflict of Interest in International Arbitration</td>
</tr>
</tbody>
</table>
CHAPTER 1

INTRODUCTION

1.1 Background of Research

It is said that arbitration is a unique alternative dispute resolution compared to litigation. This may be due to the fact that in arbitration proceeding, disputing parties have the liberty to tailor their own set of rules and procedures which eventually entitle them to choose their own arbitrator. Arbitrators have always been regarded as extraordinary judges\(^1\) because they are appointed by the disputants, and they are also extraordinary because some arbitrators are not legally trained officers but they are entrusted to decide disputes brought before them and deliver decision or an award that is legally binding and enforceable in the eyes of law.

On the appointment of arbitrator, both parties have equal opportunity to nominate their own candidate until consensus is met. But, that may not be the situation in all arbitration proceeding as it is not easy as it sounds. The process can be very tedious, lengthy and even frustrating when parties are not able to agree on the nominees, but fortunately parties may resort to another appointment mechanism that is appointment by the Director of Kuala Lumpur Regional Centre (KLRCA) or Appointing Authority as designated in the parties’ arbitration agreement.

Based on Arbitration Act 2005, appointment by director can happen in two situations:

(i) when the parties agree on the procedures for appointment but agreement on appointment cannot be reached or either party fails to comply with the rule or an appointing person or institution cannot be able to perform such duty: under this heading, even though parties have agreed on the appointment’s procedures and consensus cannot be met (Section 13(6)(a),(b) & (c)),

(ii) when the parties cannot agree on the procedures and the appointment both in single arbitrator (Section 13(5)(a)&(b)) and three arbitrators (Section 13(3),(4)(a) & (b))

Thus, to avoid stalemate on the appointment, the Act empowered the Director of Kuala Lumpur Regional Centre for Arbitration to make the appointment. Mutual consent or consent by the parties is not a pre-condition under such situation\(^2\), it is sufficient if either one of the parties or the co-arbitrator\(^3\) requests to the Director of KLRCA. Further, if the Director fails or unable to act within 30 days from the date of reference made then any party may apply to High Court to make the appointment\(^4\). The decision by the Director is considered as final and binding as there shall not be any appeal against the decision of the Director or the High Court\(^5\). The Act also provides statutory considerations need to be fulfilled by the Director before appointing any person as an arbitrator\(^6\).

Interestingly, despite such impediment to appeal, the right to challenge the arbitrator can be done at any stage of the arbitration proceeding especially when the party only aware of the existence of ‘justifiable doubts’ at later stage after the

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\(^2\) Sebiro Holdings Sdn Bhd v Bhag Singh & Anor [2015] 4 CLJ 209, COA.  
\(^3\) Sandra Rajoo v Mohamed Abd Majed & Anor [2011] 6 CLJ 923, HC  
\(^4\) Section 13(7) of the Arbitration Act 2005.  
\(^5\) Section 13(9) of the Arbitration Act 2005.  
\(^6\) Section 13(8) of the Arbitration Act 2005
appointment is made\textsuperscript{7}. It is also apparent that the challenge can also be made at very later stage i.e after an award is made, this is made available during the setting aside procedure under section 37(1) (vi) especially if there is a non-disclosure on the part of the arbitrator which would amount not only to the principle of natural justice but also breach of the arbitration agreement that requires impartiality and independence of the arbitrator\textsuperscript{8}.

Upon appointment by the parties, the arbitrator has a duty to disclose any circumstances which may give rise to ‘justifiable doubts’ as to his or hers impartiality and independence. This is as encapsulated in Section 14(1) of the Act that says:

“14. (1) A person who is approached in connection with that person’s possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person’s impartiality or independence”\textsuperscript{9}

Such duty continues throughout the proceeding until and unless parties have been made aware of such circumstances\textsuperscript{10} and upon such knowledge, any party affected with such disclosure may challenge the arbitrator’s appointment. There are only two grounds provided by the Act for such challenge to be successful, they are:

(1) Justifiable doubts to the arbitrator’s impartiality or independence:(Section 14(3)(a)) or

(2) Non-conformity to the agreed qualification by the parties (Section 14(3)(b)).

\textsuperscript{7} Section 15 of the Arbitration Act 2005
\textsuperscript{8}Dato’ Dr. Muhammad Ridzuan Mohd Salleh & Anor v. Syarikat Air Terengganu Sdn Bhd [2012] 6 CLJ 156, HC at. pp.175-176
\textsuperscript{9} Arbitration Act 2005
\textsuperscript{10} 14(2) of the Arbitration Act 2005
There is no specific definition of impartiality or independence in the Act or even illustration provided. As such, the terms may carry broader meaning than it supposed to be. Procedurally, the Act also provide for the challenge procedure. In brief, a challenge may be made either to the arbitrator\textsuperscript{11}, Arbitral Tribunal, Director of KLRCA or to the High Court depending on circumstances.

Even though the Act provides avenue for the party doubting the arbitrator’s impartiality, independence and also qualifications, there is no specific definition or illustration provided in the Act that may assists the parties to understand the terms better. Be that as it may, it has always been the duty of the court to interpret the terms depending on circumstances, facts and evidences brought before the court. Ideally, this challenge proceeding can be avoided if the arbitrator disclose the necessary information to the parties (Windsor, 2009). Thus, it is also pertinent for the arbitrators to understand their duty to disclose to allow efficiency in the whole proceeding.

As stated above, there is no specific provisions enumerating impartial and dependence circumstances that would undermine the arbitration proceeding.

Nonetheless, there has been attempts made by international bodies to fill the hole by providing a guidelines to the arbitrators especially the International Bar Association (IBA) that come out with their own Guidelines on Conflicts on Interest in International Arbitration\textsuperscript{12}. As stated in the introduction section of the guidelines, the 2014 revised edition was made after analysis of developments in case laws and statutes from different jurisdictions of the world. This guidelines even though not legally binding in nature is an important document to reflect the general standards as being practiced by international arbitrators.

\textsuperscript{11} This recognizing the principle of Kompetenz-Kompetenz where arbitrators have the power to rule on their own jurisdiction. It is now specifically embodied in s.15(1) and (2) of the Arbitration Act 2005

\textsuperscript{12} IBA had reviewed their 2004 Guidelines in 2014 to cater criticism and other developments on the subject matter.
1.2 Problem statement

A challenge to the arbitrator’s impartiality and independence may be made either after the appointment made by one of the disputants, appointing authorities or the Director of KLRCA or a High Court Judge. According to Allen & Mallet (2011), the ability to challenge is really important especially to ensure that disputants are always confident throughout the proceeding and it is vital to maintain arbitration relevancy as an alternative dispute resolution process\textsuperscript{13}.

But, there remain uncertainties in this area of arbitration which requires detail study. Since Malaysia is aspiring to become international arbitration and dispute resolution hub, there is a need to ensure that our practice is always in consonant with international standard. The international standard as suggested here is the IBA Guidelines on Conflict of Interest’. The study will show that this IBA Guidelines is an internationally recognized guidelines comprises of theoretical and practical aspects in dealing with the subject matter on conflict of interest and duty of disclosure.

We shall see in this study if our local courts adopt the ‘IBA Guidelines on Conflict of Interest’ or in line with the spirit of the guidelines especially in hearing and deciding application on challenge of arbitrator’s neutrality which indirectly determine if our local courts moving in parallel with international standards and practices. Eventually, we will see the judicial trend in deciding the matter.

Decisions from other jurisdictions will be analyzed especially from the United Kingdom as they do not follow the UNCITRAL Model Law as they have their own Arbitration Act 1996 and we shall see if there is any different between the two.

By conducting this study, we can see if our local courts and arbitration practitioners follow the international standard and can guarantee confidence to our prospect participants.

1.3 Objective of Research

Based on the above issues, the objective of this study is to identify local courts’ decisions concerning challenge of arbitrator’s neutrality and match it with IBA Guidelines 2014.

1.4 Scope of Research

This research will be focusing on cases decided by Malaysian courts particularly after 2005 i.e after implementation of Arbitration Act 2005 and by matching it with the IBA Guidelines and to see if such guidelines will be of assistance to arbitrators to avoid challenge on the ground of bias or conflict of interest.

1.5 Significance of Research

This study is important especially after considering the government’s idea on making Malaysia as a world class Dispute Resolution Hub. It is hope that this study
will enable to assist both judicial bodies and local arbitrators to understand the concept of neutrality, conflict of interest and duty of disclosure of interest better and eventually prepare them to be at par with their international counterparts. Eventually if the local arbitrators understand their duty and the possibility of their appointment being challenged, then they can avoid that proceeding at earliest stage. If the practice of Malaysian courts and arbitrators are in line with the IBA Guidelines, then there is a possibility of utilizing the IBA Guidelines in assisting judges, lawyers, arbitrators and arbitration players on the subject matter.

1.6 Research Methodology

1.6.1 1st Stage: Initial Study, Find Research Topic, Objective, Scope and Outline

This is a crucial stage in the research methodology. Initial study initiated with topic finding which requires reading from various literature and cases. Then once the topic is identified, objective of the research is determine. In focusing to the objective, there is a need to limit the scope of the research to avoid the objective from being unattainable. An outline will also useful to focus on the relevant area only.

1.6.2 2nd Stage: Data Collection and Research Design

The second stage is data collection stage which will be important tool to meet the objective. Data comprises of scholastic materials and judicial decisions by Malaysian Courts and other selected foreign jurisdiction. Since this is a legal research, cases and statutes are being used. Reported cases will be gathered from LexisNexis, CLJLaw Online and when necessary unreported decisions as published at the
Kehakiman (Judiciary) website as well. Other scholastic writings are also gathered to understand the scholars view on the subject matter and for the preparation of the literature review.

1.6.3 3rd Stage: Data Analysis

The third stage is data analysis based on the data collected earlier. Cases will be critically analyze to understand the reasoning of each decisions and for other materials. This stage is crucial on forming the findings of the research. The judgment and reasoning will be matched with the IBA Guidelines to see if the practice matched.

1.6.4 4th Stage: Writing Up

Based on the analysis then opinion is formed and write up is prepared. The analysis is related to the intended objective and determine if it has been achieved. The last stage merely putting all the findings in structural manner which included the findings of the research and suggestion on future research. Then, a conclusion and relevant recommendations (if any) is formed by deducing from the findings of the research.

1.7 Structure of Research

This thesis is presented by dividing five (5) different chapters with designated scope. The intended outline for each chapter are as follows:
1.7.1 Chapter 1

The first chapter comprises of introductory section which covers background of research, problem statement, objective, scope of study, significance of research, research methodology and some brief on the structure of the research.

1.7.2 Chapter 2

The second chapter is basically the literature review on the challenge of arbitrator’s appointment which include brief historical outline on the topic based on Arbitration Act 1952 and Arbitration Act 2005, comparison between the two, discussion on justifiable doubts that may give rise to impartiality and independence of arbitrator and discussion on the qualification. That will include discussion of approach from different jurisdiction based on decided cases and scholastic papers which will cover the prevailing test use in deciding a challenge application.

1.7.3 Chapter 3

The third chapter will be a discussion on the IBA Guidelines 2014 which includes brief history on the guidelines, understanding on the guidelines, appraisal, criticism and its application in arbitration scene both locally and internationally.

1.7.4 Chapter 4

The fourth chapter four will be focusing on case review and comparison with IBA Guidelines 2014, discussion on the court’s decisions, understanding the judicial
trend in deciding cases, compare such decisions with IBA Guidelines 2014 to determine if the local courts’ decisions in tandem with the guidelines.

1.7.5 Chapter 5

The fifth chapter will be discussion on the finding and data interpretation based on the gathered data, conclusion and recommendations (if any).
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