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Redefining Legal Certainty: The Constitutional Court's Rulings on Arbitration Law

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The Constitutional Court of Indonesia ("**Court**") has clarified the definition of international arbitration awards and upheld the procedural fairness of their enforcement, reinforcing the finality of arbitration.

The Court recently ruled on two cases challenging provisions of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution, as amended ("**Arbitration Law**"), through Ruling No. 100/PUU-XXII/2024 and Ruling No. 131/PUU-XXII/2024.

Ruling No. 100/PUU-XXII/2024: Ambiguity in the Definition of International Arbitration Awards

The definition of "international arbitration awards" in Article 1 (9) of the Arbitration Law has long been regarded as ambiguous due to the inclusion of the term "considered" (*dianggap*), which allows for subjective interpretations. The definition is as follows:

"An International Arbitration Award is an award rendered by an arbitral institution or an individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award rendered by an arbitral institution or an individual arbitrator that is ***considered*** *an international arbitration award under the laws of the Republic of Indonesia."*

Many legal scholars and practitioners have argued that the term "considered" creates uncertainty in determining whether an award qualifies as "international". It also allows arbitration awards rendered in Indonesia to be classified as international based on undefined

parameters.

This ambiguity has resulted in inconsistencies in judicial decisions and legal confusion regarding foreign and non-domestic arbitration awards. For example, in the case of Pertamina vs. Lirik Petroleum,[1] questions arose over whether “foreign elements” – like language, currency or the involvement of the International Chamber of Commerce (“**ICC**”) as the arbitration tribunal – made an award international. Although the arbitration was held in Jakarta under ICC rules, the award was classified as international because the ICC is headquartered in Paris and the currency and language used in the award were foreign. However, in several other disputed arbitration enforcement cases, the courts did not consider foreign elements but instead ruled that awards made in Indonesia are domestic.

To resolve the ambiguity, on 3 January 2025, the Court issued Ruling No. 100/PUU-XXII/2024, which removed the term “considered” (“*dianggap*”) from Article 1(9) of the Arbitration Law.

In Ruling No. 100/PUU-XXII/2024, the Court expressed its opinion and explained that:

1. Article 1(9) of the Arbitration Law defines and determines the scope of an international arbitration award using two concepts: the territorial concept and the nationality concept. However, in subsequent regulations, only the territorial concept is regulated and explained, as reflected in the norms of Article 66 and Article 67 of the Arbitration Law.

   Meanwhile, with regard to the concept of nationality, which emphasizes the existence of specific regulations concerning the criteria for an international arbitration award, no further regulations are found in either the main body or the explanatory section of the Arbitration Law.

2. it is important to first understand, grammatically and based on The Great Dictionary of the Indonesian Language (*Kamus Besar Bahasa Indonesia*), the meaning of the word "considered" or "*dianggap*." This word derives from "*anggap*" and has equivalent meanings such as estimating, guessing, or assuming. Therefore, in general, these words imply something that is not yet certain or may still change depending on the evidence and facts that follow. This uncertainty causes one of the principles of good legislative drafting to be unmet, namely the principle of clarity of formulation.

The Court called on lawmakers to revise the Arbitration Law to include clear definitions and parameters for non-domestic arbitration awards, aligning with international best practices. Although the ruling resolves the prior legal uncertainty, it still leaves a gap in defining international arbitration awards until new regulations are introduced.

We believe that clear definitions and parameters for non-domestic arbitration awards are needed to avoid potential hindrances in the enforcement of international arbitration awards by bad faith parties, such as attempts to nullify an award or challenge a request for a writ of execution.

Ruling No. 131/PUU-XXII/2024: Fairness in the Procedure for request for a writ of execution Processes

Articles 67 and 68 of the Arbitration Law provide a procedural framework for the Central Jakarta District Court's authority to process and decide on requests for a writ of execution for the enforcement of international arbitral awards. These provisions serve as the "rules of the game" for determining whether an international arbitral award can be recognized and enforced in Indonesia.

Article 67 states that the Central Jakarta District Court's recognition and implementation of the award by issuing a writ of execution cannot be appealed to the High Court or the Supreme Court.

The legal interpretation of the term "application" (*permohonan*) in Article 67 and "ruling" (*putusan*) in Article 68 is crucial in determining whether the process of obtaining a writ of execution should involve both parties (*inter-partes*) or just one party (*ex-parte*). Many legal observers feel that the prevailing interpretation and practice favor *ex-parte* proceedings, excluding the participation of the opposing party.

In Constitutional Court Ruling No. 131/PUU-XXII/2024, the Court upheld the constitutionality of Articles 67 and 68, finding that they do not violate the principles of legal certainty, equality before the law, or non-discrimination.

The Court affirmed that the current interpretation of *permohonan* (request) and *putusan* (decision), including the non-requirement for *inter-partes* writ of execution proceedings and the non-requirement for an open court session, is lawful and consistent with the essence of arbitration as a final and binding dispute resolution mechanism.

Elaborating, the Court explained that the request for a writ of execution is an administrative step to enforce international arbitral awards and does not necessitate *inter-partes* proceedings, as the substantive issues were already resolved during arbitration. In addition, the Court acknowledged that inviting the respondents to participate in a request for a writ of execution would create a new dispute between the applicant and the respondent, negating the fact that an arbitration body or the arbitral tribunal has already issued a final and binding award, which is inviolable.

The Court emphasized that the fundamental principles of arbitration – autonomy, efficiency, and its non-judicial nature – render arbitral awards that are final and binding. The process of requesting a writ of execution is intended to facilitate enforcement without reopening disputes or introducing unnecessary judicial oversight.

Additionally, the Court found that the appeal mechanism under Article 68 is not discriminatory. This mechanism allows the applicant to appeal if the request for a writ of execution is rejected, while limiting the losing party/respondent's ability to appeal if the request is granted. The Court's stance here aligns with the principle that arbitral awards are final and should not be subject to extensive litigation. The Court further noted that the absence of *inter-partes* hearings or public court sessions during the writ of execution process does not contravene due process, as arbitration is inherently private and distinct from public judicial proceedings.

The ruling maintains the status quo for enforcing international arbitral awards in Indonesia, emphasizing efficiency and finality. It highlights the judiciary's supportive and administrative role in arbitration, ensuring minimal interference with arbitration outcomes.

Conclusion

The Court's rulings in these two cases provide much-needed clarity and certainty in Indonesia's arbitration regime, balancing the need for efficiency with the principles of legal certainty and fairness. The decisions also reinforce the judiciary's limited role in arbitration, supporting the integrity and finality of arbitral awards.

Specifically, Ruling No. 100/PUU-XXII/2024 signals the need for Indonesian lawmakers to revise the Arbitration Law to include clear definitions and parameters for non-domestic arbitration awards. How long this implementation may take will depend on the priorities of the House of Representatives ("**DPR**"). It is worth remembering that while the Constitutional Court can issue rulings on the constitutionality of laws and amend or revoke provisions deemed unconstitutional, it does not have the power to enforce its decisions. The responsibility now lies with the DPR to act on and implement the Court's ruling. Whether this will become a legislative priority remains to be seen.

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[1] Lirik Petroleum sought ICC arbitration in Jakarta after Indonesia's state oil and gas company Pertamina rejected its application for the commercialization of oil and gas fields in Sumatra. In 2009, the ICC Tribunal ruled in favor of Lirik, ordering Pertamina to pay USD34,495,000. Pertamina challenged the ruling, arguing it was domestic, but both Central Jakarta District Court and the Supreme Court upheld the award as international.

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