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Indonesian Constitutional Court Sets a Stricter Definition of International Arbitral Awards

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On 3 January 2025, the Constitutional Court of Indonesia ("Constitutional Court") issued Decision No. 100/PUU-XXII/2024 ("Decision 100") which declared certain wording in Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution ("Arbitration Law") to be unconstitutional. This post examines how Decision 100 reduces ambiguity regarding the nationality of awards and minimizes situations where awards rendered in Indonesia cannot be set aside by the Indonesian courts. This post also discusses steps that can be taken to further lessen the ambiguity and ensure compliance with the Arbitration Law's requirements for domestic awards.

The Legal Vacuum Created Under the Arbitration Law

Indonesia is not a Model Law jurisdiction. Whilst the Arbitration Law contains a generally similar philosophy and some similar provisions, one area where it differs from the Model Law is how it categorises arbitrations as either "domestic" or "international."

The Arbitration Law does not define arbitrations as international or non-international in the way that Articles 1(3) and (4) of the Model Law do. Instead, the Arbitration Law differentiates arbitrations by whether their awards are domestic (*i.e.*, "national") or international. Article 1 point 9 of the Arbitration Law defines "International Arbitration Awards" as awards that are either:

1. "rendered" or "handed down" outside of Indonesia; or
2. "considered" or "deemed" under Indonesian law to be international arbitration awards.

The first limb looks at the place of issuance ("*dijatuhkan*" in Indonesian) of the award, though the Arbitration Law does not define what "rendered" means, *i.e.*, whether it refers to the seat of arbitration, the place where the award is signed, the place where hearings are held, or some other location. According to the elucidation (*i.e.*, explanatory note) of Article 37 (1) of the Arbitration Law, the "place of arbitration" determines the law applicable to the arbitration, though this provision has no bearing on Article 1 point 9.

The second limb, around which Decision 100 revolved, looks at other provisions under Indonesian law where an award is considered to be "international" irrespective of where it is rendered.

As there are no further provisions or court guidelines on how judges should exercise this

discretion, courts sometimes applied tangential "international elements" to change what should have been domestic awards into international awards. Some courts have used Article 1 point 9's second limb as a gateway to reach this conclusion.

In the Supreme Court of Indonesia ("Supreme Court") decision of *PT Pertamina (Persero), PT Pertamina EP v. PT Lirik Petroleum, Case No. 904 K/Pdt.Sus/2009 ("Lirik Petroleum")*, these "international elements" were: the use of English in the contract, US dollars as the currency of payment, and the choice of a foreign arbitral institution (*i.e.*, the International Chamber of Commerce ("ICC")). These factors overrode the fact that the arbitration was Indonesian-seated and that the Supreme Court recognised the award as "rendered" in Indonesia. The Supreme Court did not refer to any laws or guidelines when it considered these international elements – the discretion was assumed by the Supreme Court as a matter of course.

This wide discretion from *Lirik Petroleum* then exacerbated issues under the Arbitration Law. In particular:

1. The Indonesian courts had previously stated that the Arbitration Law only empowers courts to set aside domestic awards rendered in Indonesia. The Supreme Court's conclusion in *PT Indiratex Spindo v. Everseason Enterprises Ltd., Case No. 219 B/Pdt.Sus-Arbt/2016 ("Indiratex")* and *PT Daya Mandiri Resources and PT Dayaindo Resources Internasional Tbk, Case No. 674 B/Pdt.Sus-Arbt/2014* was that Indonesian courts have no authority to set aside international awards. The Supreme Court in *Indiratex* stated that the only court with authority to set an award aside is "*the court in the country where the arbitration award was rendered*." Despite this, whilst the *Lirik Petroleum* award was considered to be "rendered" in Indonesia, the Indonesian courts still had no jurisdiction to set the award aside because it had been classified as an "international" award.
2. For an international award to be enforceable, Article 66 point a. requires that the award be rendered in a country that is bound by an agreement with Indonesia on the recognition and enforcement of arbitral awards (*e.g.*, the New York Convention). Article 67 (2) point c. of the Arbitration Law requires this to be proven by a letter from the Indonesian embassy in the country where the award was rendered. As the award in *Lirik Petroleum* was supposedly international, this would mean that, under Article 67 (2) point c., the award creditor would need to obtain a letter from the Indonesian embassy in Indonesia (which obviously does not exist) to enforce the award.

The Supreme Court in *Lirik Petroleum* did not state that it was a French award but emphasized that the ICC's headquarters are in France. The award debtor, Pertamina, therefore, sought legal advice from a French law firm on setting the award aside in France. Naturally, they were advised that the French courts had no authority to set aside the award because the seat was in Indonesia.

The approach in *Lirik Petroleum*, therefore, highlighted a conundrum whereby some awards rendered in Indonesia could neither be set aside in Indonesia (as they are international awards) nor in other countries (as they are Indonesian-seated). These international awards rendered in Indonesia, therefore, existed in a legal vacuum.

Lirik Petroleum created further uncertainty around what was "considered" to be an international award and therefore which cases fell into the legal vacuum. Awards in other cases soon fell into the same legal vacuum, including in the Jakarta High Court decision of *Fico Corporation v. BANI and PT Prima Multi Mineral, Case No. 175/PDT/2018/PT.DKI*, in which the court considered that an

award rendered in Jakarta was an international award by virtue of one of the parties being a foreign party.

Decision 100 Removes the Discretion from Article 1 point 9's Second Limb

The first author of this post petitioned the Constitutional Court to declare the second limb of Article 1 point 9 to be unconstitutional on the basis that the discretion in Article 1 point 9's second limb caused harm to his constitutional right to legal certainty in his capacity as a lawyer and academic as the uncertainty rendered him unable to accurately advise clients and teach students what the current law is.

The Constitutional Court invited the government and parliament to provide statements and sought opinions from important stakeholders, *i.e.*, the Supreme Court and Indonesia's preeminent arbitral institution, the Indonesia National Board of Arbitration (BANI). The government and the parliament's submissions primarily emphasized party autonomy and Article 1 point 9's consistency with Article I (1) of the New York Convention. Both the Supreme Court and BANI, however, supported the first author's application. The Supreme Court even explicitly stated that the second limb of Article 1 point 9 gave rise to legal uncertainty as there are no provisions under Indonesian law that clarify what is "considered" to be an international award.

The Constitutional Court proceeded to issue Decision 100 and declared part of Article 1 point 9's second limb to be unconstitutional. In particular, the Constitutional Court amended the Arbitration Law by removing the word "considered" or "deemed" from Article 1 point 9. The Constitutional Court acknowledged that lawmakers may enact additional laws or regulations in the future that define what makes an award "international." Until that occurs, international awards are solely classified based on where the award is rendered. The Constitutional Court decided to apply the pure territoriality principle in this respect.

Key Takeaways from Decision 100

Decision 100 has helped to reduce the ambiguity in Article 1 point 9 and the likelihood of awards rendered in Indonesia falling into a legal vacuum. If the amended definition of Article 1 point 9 were applied to the facts of *Lirik Petroleum*, the award would have been considered as domestic because of where it was rendered, and the Indonesian courts would have supervisory jurisdiction and authority to set it aside.

Two additional points are, however, worth considering.

First, it is increasingly urgent to fully redraft Indonesia's arbitration legislation. Whilst the Indonesian legislature may issue additional laws or regulations to rectify the inherent drafting problems in Article 1 point 9's second limb, it would only patch one of several holes in the Arbitration Law. The Arbitration Law contains other provisions that are missing or out of step with international best practice. Examples include the lack of a formal process to apply for the refusal of enforcement of international awards and the limited grounds to set aside awards. These and other drafting problems disappear if the Arbitration Law is replaced with a Model Law-based alternative.

Second, unless and until the Arbitration Law is replaced, it is advisable for parties and/or arbitrators to explicitly state that the award is “issued” or “rendered” in Indonesia. This may be stated in the arbitration agreement, procedural order, or award. It is also advisable for arbitrators to physically travel to Indonesia to sign and hand down the award.

Parties and/or arbitrators should also note that awards rendered in Indonesia must fulfil the 10 requirements of a national award under Article 54 (1) of the Arbitration Law. Chief among these requirements is to include the wording “For Justice Based on an Almighty God” in the award’s heading. Failure to comply with these requirements creates the risk of the award being non-enforceable because of public policy under Article 62 (2) of the Arbitration Law.

Togi Pangaribuan acted as the applicant in Decision 100. Nikki Krisadtyo provided expert testimony in the hearing for Decision 100. Anthony Cheah Nicholls provided comparative research used in the application for Decision 100.

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