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Insight

How the Ongoing Judicial Review Could Change the Enforcement of Foreign Arbitral Award in Indonesia

Agus D. Prasetyo, M. Raihan Pramudya

ADP Counsellors at Law

Plaza Simatupang 6th Floor Kav. IS No. 01, Jl. T.B. Simatupang, RT.2/RW.17, Pd. Pinang, Kec. Kby. Lama, Kota Jakarta Selatan, Daerah Khusus Ibukota Jakarta 12310 | info@adplaws.com

Introduction

Recently, the Indonesian Constitutional Court received two separate petitions for the judicial review on Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("Arbitration Law"). The judicial review petitions were registered under number 100/PUU-XXII/2024 and 131/PUU-XXII/2024 respectively. Such petitions were filed in order to review several legal uncertainties with regard to the enforcement of foreign arbitral awards, which arise from certain provisions under Arbitration Law.

Although the cases are still currently ongoing, it is crucial to take a look on how the above judicial reviews could significantly change the enforcement of international arbitral award in Indonesia.

The Scope of International Arbitration Award

As noted, current Arbitration Law stipulate that the term "International Arbitral Award" means an award rendered by an arbitral institution or individual arbitrator outside the territorial jurisdiction of the Republic of Indonesia, or an award by an arbitral institution or individual arbitrator which, under the provisions of Indonesian law, is deemed to be an international arbitral award. Article 1 Point 9 of the Arbitration Law stipulates the following:

"International Arbitral Award means an award rendered by an arbitral institution or individual arbitrator outside the territorial jurisdiction of the Republic of Indonesia, or an award by an arbitral institution or individual arbitrator which, under the provisions of Indonesian law, is deemed to be an international arbitral award." [Unofficial Translation]

Further, Article 66 of the Arbitration Law also stipulates that International Arbitration Award may only be recognized and enforced in Indonesia if they fulfill certain criteria, such as:

(i) the International Arbitration Award is rendered by an arbitrator or arbitration panel in a country which is bound to a bilateral or multilateral treaty with the Republic of Indonesia;
(ii) the award are limited to awards which included within the scope of commercial law under Indonesian law;
(iii) limited to those which do not conflict with public order;
(iv) may be enforced after obtaining a writ of execution from the Chairman of the Central Jakarta District Court; and
(v) in the event that the State of the Republic of Indonesia is one of the parties to the dispute, the award may only be enforced after obtaining the exequatur from the Supreme Court of the Republic of Indonesia.

Indonesian law does not differentiate foreign arbitral award and international arbitral award. Within the framework of the Arbitration Law, there is no distinction between foreign arbitral awards and international arbitral awards. Instead, Indonesia only recognize International Arbitral Award as defined above.

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Plaza Simatupang 6th Floor Kav. IS No. 01, Jl. T.B. Simatupang, RT.2/RW.17, Pd. Pinang, Kec. Kby. Lama, Kota Jakarta Selatan, Daerah Khusus Ibukota Jakarta 12310 | info@adplaws.com

However, referring to Article 35 paragraph (1) of the UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006 (**"UNCITRAL Model Law"**) stipulates that an arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions Article 35 and Article 36 of the UNCITRAL Model Law. Moreover, Paragraph 50 of the Explanatory Note on the UNCITRAL Model Law further explains that the UNCITRAL Model Law relying on the traditional distinction between the term "foreign" and "domestic" awards rather than between "international" and "non-international" awards instead. The UNCIRAL Model Law view that such usage of term is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases, where the place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State/Country where the arbitration legally takes place.

Nonetheless, Article 36 paragraph (1) letter (b) of the UNCITRAL Model Law stipulates that the recognition or enforcement of an arbitral award, may be refused if the court finds that the recognition or enforcement of the award would be contrary to the public policy of the state where such award shall be enforced. Therefore, in terms of recognition or enforcement of arbitral awards, the UNCITRAL Model Law adheres to the prevailing public policy of the state where such arbitral award shall be recognized or enforced.

In the case No. 100/PUU-XXII/2024, the petitioner seeks to broaden the definition of International Arbitral Award. The petitioner conveys that the provision of Article 1 Point 9 of Arbitration Law regarding the definition of "International Arbitral Award" is unconstitutional due to the legal uncertainty arising from the wording of the paragraph. Referring to such petition, the petitioner requested the Constitutional Court to adopt definition of an "International Arbitral Award" to only mean as: arbitral awards as rendered outside the territory of Indonesia.

Under such petition, the first sentence of Article 1 Point 9 of Arbitration Law is considered as clear and reflected a "narrow-territorial" principle where an arbitral award rendered outside of the territory of Indonesia shall be deemed as "International Arbitral Award" and vice versa. As such the first sentence of the article emphasized that the nature of international arbitral award lies on the domicile (territory) where the award was issued.

However, the second sentence has indeed created some uncertainty in its interpretation and application. The petitioner argued that the second sentence may cause different interpretations and is not aligned with the first sentence. The second sentence adopts a "wide-territorial" principle where all foreign arbitral award (regardless of its domicile or seat of arbitration) may be deemed as an International Arbitral Award. Nonetheless, such concept has brought different interpretations, due to its nature that it may only be implemented in accordance with the judge's assessment due to unclear parameters.

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Plaza Simatupang 6th Floor Kav. IS No. 01, Jl. T.B. Simatupang, RT.2/RW.17, Pd. Pinang, Kec. Kby. Lama, Kota Jakarta Selatan, Daerah Khusus Ibukota Jakarta 12310 | info@adplaws.com

One of the case of such different interpretations was also brought by the petitioner in the Pertamina v. Lirik case (as registered under Supreme Court Decision No. 144K/Pdt/2012), where in 2009, the Indonesian Supreme Court is of the view that an International Chamber of Commerce (ICC) Arbitration which was rendered in Jakarta (as the seat of arbitration) was an international arbitral award. In this regard, the Supreme Court judge reasoned that the ICC is a foreign arbitral institution based in Paris and that the currency in the contract as well as the language used in such arbitration case are all foreign. Such decision has drawn a lot of criticism from academician and practitioners alike, considering its different interpretations. Many believes that such decision is not in line with the narrow-territorial principle as specified under the first sentence of Article 1 Point 9 of Arbitration Law.

In light of the above, should the Constitutional Court uphold the constitutionality of the second paragraph of Article 1 Point 9 of Arbitration Law, the Constitutional Court's interpretation of that part shall be highly anticipated for its practical consequences on the enforcement of foreign arbitral award in Indonesia. Further, following the issuance of this petition, any person would have to take into the consideration the details of the choice of forum clauses and any arbitration agreement entered into by them, particularly with regard to the seat of arbitration choice.

Petition No. 131/PUU-XXII/2024: Contentious Proceedings on the Enforcement of International Arbitral Award

Petition No. 131/PUU-XXII/2024 conveys that Article 67 and 68 of Arbitration Law which regulates the enforcement of international arbitral awards should be interpreted as a contentious proceeding. In this regard, the petitioner requested that the Constitutional Court to revise such provisions and hold that an award debtor shall be given the right to participate and make submissions to challenge the enforcement and that the enforcement of an arbitral award or the exequatur should also be made in public.

The petitioner based its request due to the current practice where the award debtor frequently does not receive any summon or notification upon the petition of exequatur by the award creditor. In this regard, no express or clear mechanism for the award debtor to make any submission challenging the petition and no exequatur is made publicly available. As such, the petitioner is of the view that Article 67 and 68 of Arbitration Law are not in line with Article 28D paragraph (1) paragraph (2) of the Indonesian Constitution which mandates that every person has the right to be treated equally before the law.

On the one hand, if the Court grants this petition, it will reinforce the constitutional rights of award debtors and enhance transparency as well as accountability in the procedure to enforce international arbitral awards in Indonesia. On the other hand, the Court's decision must then grapple with the issue of arbitral award's finality as well as the prevailing tendency such as that apparent in Supreme Court Regulation No. 3 of 2023 to ease the process for exequatur and make Indonesia a more arbitration-supportive jurisdiction.

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Plaza Simatupang 6th Floor Kav. IS No. 01, Jl. T.B. Simatupang, RT.2/RW.17, Pd. Pinang, Kec. Kby. Lama, Kota Jakarta Selatan, Daerah Khusus Ibukota Jakarta 12310 | info@adplaws.com

In the event that the Constitutional Court decides to grant these petitions, it would strengthen the constitutional rights of award debtors and improve transparency and accountability in the enforcement procedures for international arbitral awards in Indonesia. This could lead to a more robust framework that ensures fair treatment for all parties involved in arbitration.

However, the Court's decision will also need to carefully consider the principle of finality associated with arbitral awards. This principle holds that once an award is made, it should generally be respected and enforced without unnecessary delays or complications. Additionally, the Court must consider the prevailing trends, such as those reflected in Supreme Court Regulation No. 3 of 2023, which aim to simplify the exequatur process.

In navigating these complex issues, the Court faces the challenge of balancing the rights of award debtors with the need to uphold the integrity and finality of arbitral decisions. Achieving this balance is crucial for fostering confidence in the arbitration system and ensuring that Indonesia is seen as a viable destination for international arbitration.

Conclusion

Based on the foregoing, the ongoing judicial review of Arbitration Law presents significant implications for the enforcement of international arbitral awards in Indonesia. The Constitutional Court's consideration of the definitions and interpretations surrounding "International Arbitral Award" may lead to enhanced clarity and consistency in how such awards are treated legally. This includes the potential adoption of a more restrictive definition, which could establish clearer parameters and reduce legal uncertainties for award debtors. Additionally, the review of enforcement procedures could promote greater transparency and accountability, ensuring that award debtors have the right to participate in contentious proceedings and challenge enforcement actions, thereby aligning with the Indonesian constitution.

However, the Constitutional Court must also balance such changes with the principle of finality in arbitration, which emphasizes the need for timely enforcement of awards to maintain the integrity of the arbitration process. The recent trends, such as those seen in Supreme Court Regulation No. 3 of 2023, aim to streamline the exequatur procedures and reinforce Indonesia's position as a supportive jurisdiction for arbitration. Ultimately, the Constitutional Court's rulings upon the above petitions may reshape the arbitration landscape in Indonesia, influencing both domestic and international stakeholders and fostering greater confidence in the country's arbitration framework.

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Plaza Simatupang 6th Floor Kav. IS No. 01, Jl. T.B. Simatupang, RT.2/RW.17, Pd. Pinang, Kec. Kby. Lama, Kota Jakarta Selatan, Daerah Khusus Ibukota Jakarta 12310 | info@adplaws.com

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Office
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Email
info@adplaws.com

Tel.
+6221 2270 2291