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Clarity Affirmed by the Constitutional Court: International Arbitral Awards in Indonesia

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On 3 December 2024, the Indonesian Constitutional Court rendered Judgment No. 100/PUU-XXII/2024 ("**MK Judgment**"), which affirmed the territoriality concept adopted in Indonesia to define international arbitral awards. This article provides an overview of international arbitration awards in Indonesia, both before and after the MK Judgment, and presents recommendations for future arbitration legislation.

Concept of International Arbitral Awards Prior to and Post the MK Judgment

Prior to the MK Judgment, Article 1(9) of Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("**Arbitration Law**") defined an international arbitral award as follows:

> *"International Arbitral Award means an award which is rendered by an arbitral institution or individual arbitrator* ***outside the jurisdiction of the Republic of Indonesia*** *or an award which is rendered by an arbitral institution or individual arbitrator, which,* ***according to legal provisions of the Republic of Indonesia, is considered an international arbitral award****."*

It can be understood from the above provision that an arbitral award is categorised as an international arbitral award because: (i) it is rendered outside the jurisdiction of Indonesia ("**First Qualification**"); or (ii) it is legally considered an international arbitral award under Indonesian Law ("**Second Qualification**").

The First Qualification is relatively clear because the determination is solely based on the territorial concept, which determines the status of an arbitral award on the location where the arbitral award is rendered.

Meanwhile, the Second Qualification of an international arbitral award has been a concern since the Arbitration Law does not further explain when and why an award is legally considered to be an international arbitral award.

In practice, this has caused concerns because it may be open to interpretation without clear parameters. For example, there was a case where an arbitral award rendered in Indonesia was considered an international arbitral award by the Court because the arbitration was conducted under an arbitral institution headquartered in Paris, the International Chamber of Commerce (ICC) Court of Arbitration.[1]

With regard to the Second Qualification, the MK Judgment has refined Article 1(9) of the Arbitration Law, as quoted below:

> *"International Arbitral Award means an award which is rendered by an arbitral institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia or an award which is rendered by an arbitral institution or individual arbitrator, which,* ***according to legal provisions of the Republic of Indonesia, is ~~considered~~ an international arbitral award****."*

The refinement by the Constitutional Court has removed the word "considered" and has affirmed the territorial concept in defining international arbitral awards in Indonesia.

By removing the word "considered", this provision is expected to be no longer open to multiple interpretations or to be construed arbitrarily. Hence, rather than merely being "considered", an arbitral award must literally meet the parameters set forth under the statutory provisions to qualify as an international arbitral award.

[1] See Supreme Court Judgment No. 904 K/PDT.SUS/2009 dated 9 June 2020.

Navigating the Implication of the MK Judgment on International Arbitral Awards

Following the MK Judgment, an international arbitral award in Indonesia currently means: (i) an arbitral award rendered outside the jurisdiction of Indonesia ("**Territorial Factor**"); or (ii) an arbitral award that qualifies as an international arbitral award in accordance with the Indonesian statutory provisions ("**Other Factors**").

Nevertheless, while the MK Judgment has provided an opportunity for future legislation to regulate these aspects, Indonesia's statutory provisions have not further specified the parameters of these Other Factors. Hence, greater clarity for legal certainty is essential to clarify these parameters more precisely.

In relation to the above, until statutory provisions have further introduced the Other Factors, the Territorial Factor is currently the sole factor determining whether an arbitral award is an international arbitral award in Indonesia.

To recap, the definition of an international arbitral award will solely refer to the fact that an arbitral award is rendered outside the jurisdiction of Indonesia and, therefore, qualifies as an international arbitral award. However, this criterion has no further explanation, especially what it means by "rendered outside Indonesia".

Awaiting the Regulatory Clarity on the specified 'Other Factors'

As a reference and to enhance clarity, the framework outlined in the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) ("**UNCITRAL Model**") may be taken into account in future legislation to specify the Other Factors in alignment with global arbitration standards.

In this regard, Article 1(3) of the UNCITRAL Model Law provides parameters of international arbitration, which are essentially as follows:[2]

a. The parties' business place is located in different countries;

b. The place of arbitration is in a country different from the one where the parties have their places of business;

c. A substantial part of the contractual obligations is to be performed in a country other than the one where the parties have their places of business;

d. The subject matter of the dispute is most closely connected with a jurisdiction other than the one where the parties have their places of business; or

e. The parties explicitly acknowledge the subject matter of the arbitration agreement relating to more than one country.

Seat of Arbitration: Significance and Need for Clearer Definition in the Arbitration Law

As one of the well-known theories, the determination of the nationality status (in the territorial sense, i.e., a particular country) of an arbitral award is closely linked to the concept of seat of arbitration,[3] which is significant yet still not clearly regulated under the Arbitration Law.

The seat of arbitration (also known as the place of arbitration) is a particular location (country) where an arbitral award is formally made, and it becomes the legal domicile (juridical place) of the arbitral process ("**Seat**"). Seat is determined by: (i) the parties in the arbitration agreement; or (ii) the arbitral institution or the arbitral tribunal if it has not been previously agreed.[4]

Importantly, we need to distinguish Seat from the geographical location of the hearings or the rendering of an award during the arbitration process (commonly known as "**Venue of Arbitration**").[5] Seat refers to the legal concept of where an arbitration process is legally domiciled, while the Venue of Arbitration refers to the physical or actual location of hearings. Thus, it is common for arbitration hearings and award rendering to be held in a different country or geographical location from the Seat.

[2] Article 1(4) of the UNCITRAL Model provides that: (i) If a party has multiple places of business, the one most closely connected to the arbitration agreement applies; or (ii) If a party has no place of business, the reference is to the party's habitual residence.

[3] See Alexander J. Bělohlávek, *Seat of Arbitration and Supporting and Supervising Function of Courts*, Czech and Central European Yearbook of Arbitration, 2015, p. 29. See also James Hope, *Awards: Form, Content, Effect*, The Guide to Challenging and Enforcing Arbitration Awards, 2021, p. 15.

[4] See Gary B. Born, *International Arbitration: Law and Practice*, Kluwer Law International, 2012, p. 36, 120.

[5] Ibid., p. 120.

In addition, Seat is also linked to the competent court with supervisory jurisdiction over arbitral proceedings, including the annulment of an arbitral award, in accordance with Article V of the New York Convention 1958.[6] Consequently, an arbitral award can generally only be annulled by the competent court where the Seat is located.[7]

In relation to the above, Seat is significant as it establishes the legal domicile (nationality) of the arbitration, the arbitral procedural framework (*lex arbitri*), and designates the court authorised to supervise the arbitration process.

For example:

- if the Seat is in London, the *lex arbitri* is English law, and the Court of England holds the supervisory jurisdiction over the arbitration process, including the annulment of the arbitral award.
- Further, the award rendered from the arbitration process would qualify as a domestic arbitral award in the UK, which also becomes the award's nationality status.

Nevertheless, the Arbitration Law does not provide further definition and explanation of Seat and merely mentions that the parties may choose a place of arbitration (*tempat arbitrase*) where arbitration is conducted, or the arbitral tribunal renders the award.[8] This provision does not further clarify whether the term "place of arbitration (*tempat arbitrase*)": (i) refers to the geographical location where arbitral proceedings are conducted or an arbitral award is rendered; or (ii) refers to the juridical place as the concept of Seat, which also determines the rendering location and the nationality status of an arbitral award.

Hence, in addition to the Other Factors, it is advisable for future legislation to provide a clearer definition and explanation of the term "place of arbitration (*tempat arbitrase*)", which should refer to a juridical place where an arbitration process is legally conducted and an arbitral award is deemed to be rendered. This is important to assert that the place of arbitration (*tempat arbitrase*) under the Arbitration Law is explicitly distinguished from the Venue of Arbitration.[9]

Theories to Consider in Future Legislation on the Location Where an Arbitral Award is Rendered

In reviewing the concept of the Territorial Factor adopted in the Arbitration Law, theories widely recognised in international arbitration practice may be considered in future legislation to determine the place (i.e., the country) where an arbitral award is legally deemed to be rendered.

In light of the above, the following 2 (two) theories[10] may be taken into account:

i. Location of the Seat

An arbitral award is always deemed rendered in the country of the Seat, regardless of the geographical location where the award is physically signed.

ii. Location Where the Award is Physically Signed

An arbitral award is deemed to be rendered in the country where the award is physically signed by the arbitral tribunal, regardless of the location of the Seat.

Pertaining to the above, the hypothetical cases below are provided for illustrative purposes:

i. First Case

- The arbitration agreement determines the Seat in Country A.
- The arbitral award is physically signed by the arbitral tribunal in Country B.
- Based on the Location of the Seat Theory, the arbitral award is rendered in Country A.

ii. Second Case

- The arbitration agreement determines the Seat in Country C.
- The arbitral award is physically signed by the arbitral tribunal in Country D.
- Based on the Location Where the Award is Physically Signed Theory, the arbitral award is rendered in Country D.

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[6] See Constitutional Court Judgment No. 100/PUU-XXII/2024 dated 3 December 2024, p. 136.
[7] See Olu Ojedokun and Dominic Obilor Akabuirop, *The Concept of the Seat in International Arbitration: Unlocking the Judicial Challenge of Interpretation of Conflict of Laws*, The International Journal of Arbitration, Mediation and Dispute Management, 2022, p. 655.
[8] Articles 9(3)(d) and 31(3) of the Arbitration Law.
[9] Venue of Arbitration is implicitly recognised in Article 37(2) of the Arbitration Law. However, such an assertion is essential to provide greater clarity on the term "place of arbitration (*tempat arbitrase*)", as mentioned in the Arbitration Law.
[10] See Gary B. Born, *International Commercial Arbitration*, Kluwer Law, 2021, p. 4705 – 4709.

In current global arbitration practice, the location where an arbitral award is rendered typically refers to the Seat's location of the arbitral proceedings rather than the geographical location where the arbitral award is physically signed.[11] This practice is reflected in Article 31(3) of the UNCITRAL Model, providing that an arbitral award is deemed to be rendered at the Seat, as quoted below:

> *"The award shall state its date and the place of arbitration as determined in accordance with article 20(1).* ***The award shall be deemed to have been made at that place****."*

To align with current global arbitration practice, it is recommended that future legislation stipulate that an arbitral award is legally deemed to have been rendered at the designated Seat.

Key Points

- The MK Judgment has reinforced the Territorial Factor as the basis for determining whether an award qualifies as an international arbitral award in Indonesia.
- Until the Other Factors are further introduced, an international arbitral award currently only refers to an arbitral award rendered outside Indonesia.
- The Arbitration Law has not clearly defined the term "place of arbitration (*tempat arbitrase*)" and has not further specified that an arbitral award is deemed to have been rendered at the designated Seat.

Recommendations

- Introduction of the Other Factors in Legislation

  Other Factors relating to the determination of an arbitral award status need to be further incorporated into Indonesia's legislation, as this would provide greater clarity and enhance certainty. As a reference, the framework outlined in the UNCITRAL Model may be considered in incorporating such factors into the Arbitration Law.

- Inclusion of the Clearer Definition of the Place of Arbitration (*Tempat Arbitrase*)

  Any amendment to the Arbitration Law should explicitly address a clearer definition and explanation of the term "place of arbitration (*tempat arbitrase*)", which typically refers to the designated legal domicile (nationality) of arbitration—as the concept of Seat—where an arbitral award is deemed to be rendered.

[11] Ibid.

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