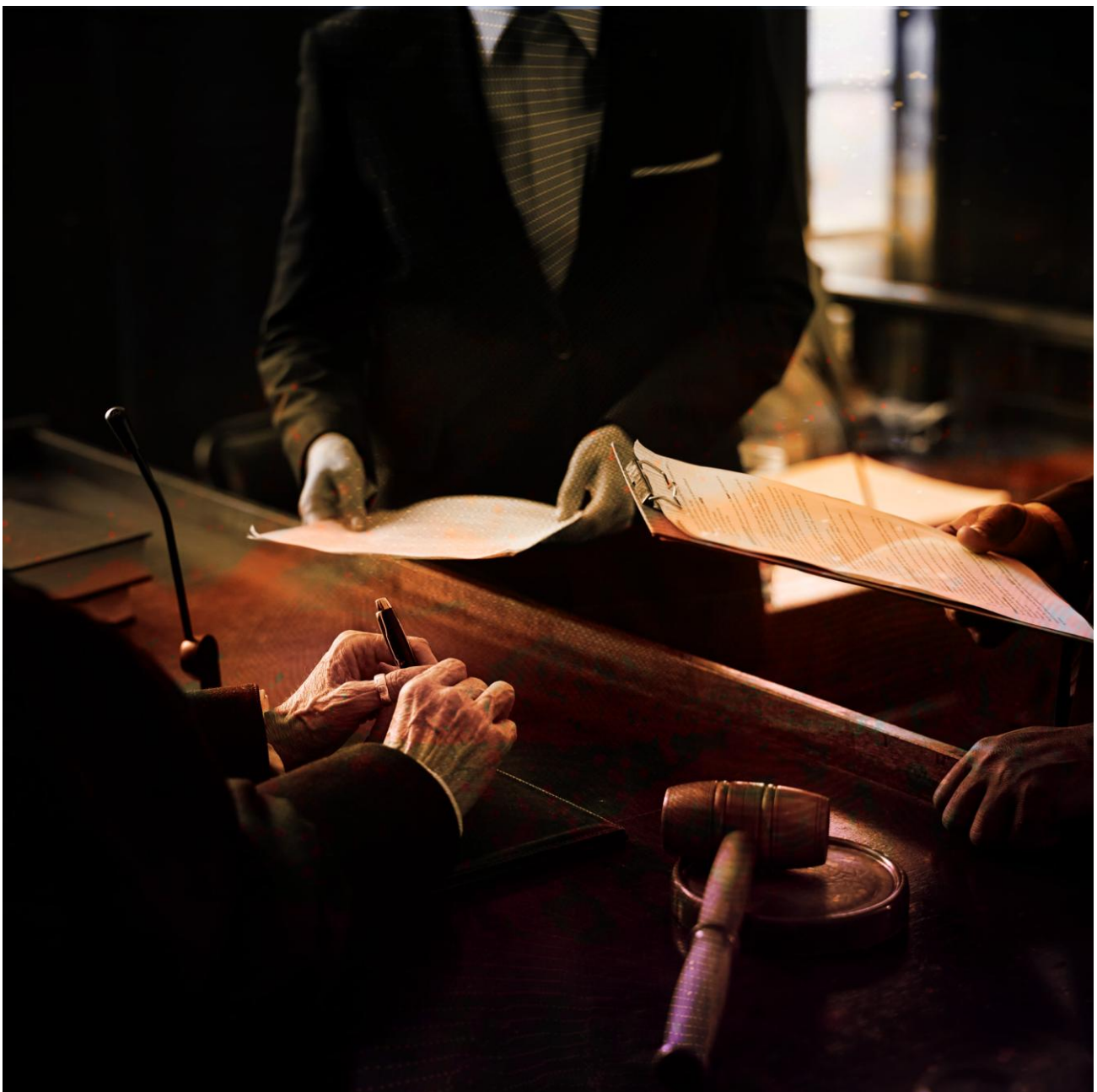


DISPUTE RESOLUTION

## Indonesia's Constitutional Court Clarifies "Foreign Arbitral Award" Definition



In a recent decision,<sup>1</sup> the Constitutional Court clarified what qualifies as a "foreign arbitral award" under Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution ("**Arbitration Law**"). Previously, the definition of a foreign arbitral award in Article 1(9) of the Arbitration Law contained the term, "considered", which created legal uncertainty. The Constitutional Court ruled that this term should be removed to ensure consistency and clarity in defining foreign arbitral awards in Indonesia.

As such, Article 1(9) of the Arbitration Law now reads as follows:

*"A foreign arbitral award is a decision rendered by an arbitral institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or a decision rendered by an arbitral institution or individual arbitrator that, according to the legal provisions of the Republic of Indonesia is ~~considered~~ as a foreign arbitral award."*

This clarification was necessary because different courts had interpreted the previous wording inconsistently, leading to confusion and potentially unfair outcomes in international arbitration cases.

## Conflicting Interpretations in Past Cases

Before this ruling, the ambiguous language of Article 1(9) of the Arbitration Law posed challenges in determining whether an arbitral award is qualified as foreign arbitral awards. Several court cases revealed incoherency in interpretation.

For instance, in 2009, the Supreme Court determined that an arbitral award is considered foreign even if the seat of arbitration is in Indonesia, as long as the institutional rules applied to the arbitration are from an international arbitration body.<sup>2</sup> In this case, the Supreme Court upheld a decision to reject the annulment of an arbitral award. The award was considered a "foreign arbitral award" because it was issued by the ICC Arbitration Court (an international arbitral institution based in Paris), even though the arbitration, including the issuance of the award, took place in Jakarta.

Later in 2016, the Supreme Court reinforced the principle that the territorial location of the award's issuance determines whether it is considered a "foreign arbitral award".<sup>3</sup> Therefore, only the courts in that jurisdiction have the authority to annul the award. This case involved an attempt to annul a foreign arbitral award issued by the London Cotton Association in England in Indonesia. In its legal considerations, the Supreme Court stated that Indonesian courts do not have the jurisdiction to annul foreign arbitral awards. Instead, such authority lies with the courts of the country where the arbitration award was rendered.

However, a 2014 Supreme Court decision presented a different perspective. The Supreme Court found that in determining whether an award is considered a "foreign arbitral award", one must base such determination on the applicable governing law of the arbitration.<sup>4</sup> In this case, the Supreme Court affirmed the decision by the lower court to reject the annulment of an award rendered by the London Court of International Arbitration in Indonesia because the award was rendered under English law. Accordingly, its annulment must be pursued in England, and Indonesian courts do not have jurisdiction.

These cases highlight the inconsistency in how "foreign arbitral awards" were defined, with the Supreme Court focusing on various factors such as the arbitration rules, the location of the award, or even the governing law. These inconsistencies create uncertainty for businesses engaged in international arbitration, highlighting the importance of the Constitutional Court's recent clarification.

<sup>1</sup> Constitutional Court Decision No. 100/PUU-XXII/2024

<sup>2</sup> Supreme Court Decision No. 904 K/Pdt.Sus/2009

<sup>3</sup> Supreme Court Decision No. 219 B/Pdt.Sus-Arbt/2016

<sup>4</sup> Supreme Court Decision No. 674 B/Pdt.Sus-Arbt/2014

## What Does a "Foreign Arbitral Award" Mean Now?

The Constitutional Court removed the ambiguous term "considered" to establish a clearer definition of "foreign arbitral award". The removal serves to reinforce the territorial concept imbued within the phrase "an award rendered by an arbitral institution or an individual arbitrator outside the jurisdiction of the Republic of Indonesia". Therefore, the main factors defining foreign arbitral awards are now the **territory where the award was issued and other factors regulated under the statutory provisions**.

Until further regulations are introduced, the existing provisions in Articles 66 and 67 of the Arbitration Law will continue to guide the recognition and enforcement of foreign arbitral awards. This framework does not, however, preclude the future adoption of additional criteria, such as nationality considerations, to further refine the definition of a "foreign arbitral award".

## Guiding Principles for Future Laws

The Constitutional Court emphasised the need for clear and well-defined parameters in future laws concerning foreign arbitral awards. It highlighted that these parameters should be formulated by considering both national and international legal frameworks. Moreover, the legislative approach should not contravene the values of Pancasila and the 1945 Constitution. The approach should also adhere to the following guiding principles:

- (i) Respecting Indonesia's sovereignty;
- (ii) Protecting the national economic interests;
- (iii) Ensuring efficient and effective dispute resolution mechanisms;
- (iv) Promoting mutually beneficial international cooperation; and
- (v) Harmonising national regulations with international legal standards.

The Court noted that these principles are crucial in ensuring legal certainty, maintaining Indonesia's credibility in the global legal landscape, and facilitating the recognition and enforcement of international arbitration awards across various sectors, including trade, investment, and natural resources. Therefore, it can be expected that future legal instruments in defining foreign arbitral awards in Indonesia will gravitate around the above guiding principles.

## What This Means for Businesses

This decision represents a significant milestone in Indonesia's arbitration landscape. It provides a clearer understanding of what constitutes a "foreign arbitral award," reducing uncertainty and the risk of disputes. While the primary factor is now the location where the award was issued, businesses should keep in mind that future regulations may introduce additional criteria. We will continue to monitor these developments and provide updates as needed.

The Constitutional Court's emphasis on guiding principles, including respect for Indonesia's sovereignty, protection of national economic interests, and harmonisation with international standards, provides a framework for shaping future legislative reforms. This guidance is timely as the Arbitration Law is currently listed in the Indonesian National Legislation Program (Prolegnas). Stakeholders should anticipate further regulatory refinements, which would likely revolve around the guiding principles ruled by the Constitutional Court. We encourage businesses to review their existing arbitration agreements to ensure they are aligned with this clarified definition and the direction of potential future reforms.

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## DISPUTE RESOLUTION



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