CONSTITUTIONAL COURT DECISION NO. 100/PUU-XXII/2024 – IMPLICATIONS FOR PENDING/FUTURE ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS

A. BACKGROUND

1. **Scope of the Memorandum**: This Memorandum addresses the contents and implications of the Constitutional Court Decision No. 100/PUU-XXII/2024 ("**CC Decision 100/2024**"), which concerns the judicial review of Article 1(9) of Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution ("**Arbitration Law**") vis-à-vis Article 28D(1) of the 1945 Constitution ("**Constitution**").

2. **Background of the Petitioner:** The petitioner, Mr. Togi M. P. Pangaribuan, S.H., LL.M., is a lecturer at the Faculty of Law, University of Indonesia, and a practicing advocate and arbitrator. He is represented by three advocates from the law firm Aristo Pangaribuan & Partners, based in Jakarta:

   (a) Aristo Pangaribuan, S.H., LL.M., Ph.D.;

   (b) Muhammad Fauzan, S.H., M.H.; and

   (c) James Juan Pangaribuan, S.H.

3. **Key Arguments and Petition Put Forward by the Petitioner**:

   (a) **Dual Territorial Concepts in Article 1(9)**: According to the Petitioner, the main difference between the narrow territoriality and broad territoriality concepts is that the narrow territoriality concept, as indicated by the phrase "*rendered by an arbitration institution or individual arbitrator outside of the jurisdiction of the Republic of Indonesia*" relies solely on the location where the arbitration award is rendered. In contrast, the broad territoriality concept, as indicated by the phrase "*which, under the provisions of Indonesian law, is deemed an international arbitration award*," can be interpreted in a much broader and varied manner. This interpretation depends on who is applying it, and which specific legal provisions are relevant to the case.

   As a note, The concepts of 'narrow' and 'broad' territoriality are not universally recognized terms. They were introduced by the Petitioner to describe the different interpretation methods found in Article 1(9) of the Arbitration Law. However, both concepts can be said to originate from the provisions of territoriality found in Article 1 of the New York Convention that reads: "*This Convention shall apply to the recognition and enforcement arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal* **(indicating Narrow Territoriality)**. *It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought* **(indicating Broad Territoriality)**."

   (b) **Inconsistency in Interpretation:** The dual territoriality concepts in Article 1(9) create interpretative inconsistencies. These conflations between narrow territoriality

and broad territoriality are misaligned with Articles 66(a) and 67.2(c) of the Arbitration Law, both of which adopt the narrow territoriality concept.

(c) **Case Study:** ***PT Pertamina EP, PT Pertamina (Persero) and PT Lirik Petroleum:*** The Petititoner submits a case involving PT Pertamina EP, PT Pertamina (Persero) (together, "**Pertamina**") and PT Lirik Petroleum ("**Lirik Petroleum**") ("**Pertamina v. Lirik**") that illustrates the issue.

The case concerns a dispute concerning an Enhanced Oil Recovery contract, particularly on the interpretation and fulfilment of contractual obligations. Pertamina argued that Lirik Petroleum failed to meet certain contractual requirements whereas Lirik Petroleum contended that Pertamina did not provide the necessary support and resources as stipulated in the contract. The arbitration, conducted under the auspices of the International Chamber of Commerce ("**ICC**"), had its seat in Jakarta, Indonesia, as specified in the arbitration clause, even though the ICC is domiciled in Paris, France.

The ICC tribunal eventually found that Pertamina had breached certain obligations under the contract, and as a result, Pertamina was ordered to pay damages to Lirik Petroleum. The arbitration proceedings between Pertamina and Lirik Petroleum began with the issuance of a Partial Award on 22 September 2008, followed by a Final Award on 27 February 2009, which required Pertamina to pay USD 34,495,428 in damages to Lirik Petroleum.

The Final Award was registered at the Central Jakarta District Court on 21 April 2009 under Deed No. 02/PDT/ARB-INT/2009/PN.JKT.PST, and the Exequatur Order No. 4571 was issued on 23 April 2009, confirming its enforceability.

Pertamina challenged the arbitration award by filing for annulment in 2009 under Case No. 01/Pembatalan Arbitrase/2009/PN.JKT.PST. The case progressed to the appeal stage on 9 June 2010 with Case No. 904K/PDT/2009 and reached the civil review *(Peninjauan Kembali)* phase on 23 August 2011 under Case No. 56/PK/PDT.SUS/2011. The Supreme Court upheld the Central Jakarta District Court's decision, affirming the arbitration as an international arbitration based on the following factors: (i) the arbitration institution (i.e., the ICC) is domiciled abroad; (ii) , the contract utilized a foreign currency; and (iii) English was the language used in the contract and correspondence (collectively referred to as "**Foreign Elements**"). Consequently, the Supreme Court's decision required Pertamina to honor the arbitration award and pay the specified damages to Lirik Petroleum.

(d) **Implications of Inconsistency:** The lack of clarity stemming from the dual territoriality concepts can lead to several consequences, including:

(i) differing registration timelines for national and international arbitration awards;

(ii) uncertainty over the determining factor of an arbitration award's nature—whether it is the arbitration institution or the arbitration tribunal; and

(iii) confusion regarding authority to register international arbitration awards.

These ambiguities risk undermining legal certainty and efficient enforcement of arbitration awards.

(e) **Petition for Constitutional Review:** For the reasons mentioned in (a) to (d) above, the Petitioner requests the Constitutional Court to declare the second phrase of Article 1(9) of the Arbitration Law—"which, under the provisions of Indonesian law, is deemed an international arbitration award"—unconstitutional.

B. ISSUE

The issue to be answered by the Constitutional Court was:

Does the phrase "*which under the provisions of the law of the Republic of Indonesia is deemed an international arbitration award*" in Article 1(9) of the Arbitration Law conflict with Article 28D paragraph (1) of the Constitution because it creates room for varying interpretations regarding international arbitration, thereby leading to inconsistencies in its implementation?

C. SCOPE OF RESEARCH & INQUIRIES

For the purpose of preparing this Memorandum, we have reviewed and analyzed the following relevant treaties, laws and regulations:

(a) New York Convention;

(b) Constitution;

(c) Arbitration Law; and

(d) Law No. 12 Year 2011 on Formulation of Laws and Regulations as lastly amended by Law No. 13 Year 2022 ("**Law 12/2011**").

D. ANALYSIS & DISCUSSIONS

1. The Ruling Made by the Constitutional Court

1.1 **Removal of the Word "Deemed"**: According to the Constitutional Court in CC Decision 100/2024, conceptually, the main difference between domestic and international arbitration awards lies in the scope of jurisdiction and the mechanism for enforcement of the awards. If there is no clear distinction between domestic and international arbitration, it could be exploited by parties acting in bad faith to annul or delay the enforcement of arbitration awards.

The word "deemed" (*dianggap*) originates from terms such as "assume", "suppose", "estimate", "guess", "predict", or "infer". Its meaning could only be determined by the evidence and facts that follow. However, regulations should meet technical requirements, use clear language, and be easy to understand to avoid multiple interpretations, as stipulated in Article 5(f) of Law 12/2011. Therefore, the Constitutional Court has decided to remove the word "deemed" in Article 1(9) of the Arbitration Law in order to strengthen the territorial concept in the previous phrase: "*an award rendered by an arbitration institution or individual arbitrator outside the jurisdiction of Indonesia*".

1.2 **The Ruling - Revised Definition of International Arbitration Award**: The Constitutional Court revised the definition of an international arbitration award in Article 1(9) of the Arbitration Law becomes as follows:

"*An International Arbitration Award is an award rendered by an arbitration institution or individual arbitrator outside the jurisdiction of the Republic of Indonesia, or an award of an arbitration institution or individual arbitrator which, under the provisions of Indonesian law, is an international arbitration award*."

1.3 **Further Clarifications to be Made**: The Constitutional Court clarified that further parameters regarding what constitutes an international arbitration award should be established by the so-called "lawmakers" (in Indonesian, *Pembentuk Undang-Undang*) which shall refer to the DPR (People's Consultative Assembly), who has the authority to do so.

1.4 In addition, the Constitutional Court also set out several factors to be considered by DPR when setting out the said parameters:

(a) Indonesia's sovereignty;
(b) national economic interests;
(c) efficient and effective dispute resolution;
(d) mutual benefits in international cooperation; and
(e) harmonization of national law with international law to ensure Indonesia's respectability in global legal frameworks, especially in arbitration.

2.1 **Implications of the CC Decision 100/2024 for Pending/Future International Arbitration Awards**: It is important to understand that the CC Decision 100/2024 only modifies the wording of Article 1(9) of the Arbitration Law. This amendment simply clarifies that, unless the DPR amends the Arbitration Law in the future or completely revokes and replaces it with a new law to clarify the second limb of Article 1(9) that now reads, "*or an award of an arbitration institution or individual arbitrator which, under the provisions of Indonesian law, is an international arbitration award,*" the criteria for determining whether an international arbitration award qualifies as international will solely depend on the **first limb** of Article 1(9) of the Arbitration Law that reads, "*An International Arbitration Award is an award rendered by an arbitration institution or individual arbitrator* ***outside the jurisdiction of the Republic of Indonesia***."

2.2 Despite the clarification in Point D2.1, several critical uncertainties persist regarding the classification of an arbitration award as domestic or international moving forward. A key question is whether future cases with similar facts to the Pertamina v. Lirik case, especially pertaining to the Foreign Elements, will yield the same outcome. Without further clarification from the DPR within the Arbitration Law, it is highly likely that numerous legal disputes will arise in future cases, creating substantial uncertainty regarding the enforcement and recognition of international arbitration awards in Indonesia.

2.3 Finally, it would be interesting to see that, until such time that the DPR amends/revoke and promulgate a completely new Arbitration Law, whether future international arbitration awards would be evaluated in line with the parameters established in the Pertamina v. Lirik case. This is in consideration that Indonesia being a civil law country with no strict adherence to precedents, and the fact that the Supreme Court has never formally included

the Pertamina v. Lirik case as a jurisprudential decision that lower courts in Indonesia (District and High Courts) and the Supreme Court itself are bound to follow.

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Please do not hesitate to contact, in the first instance, Christian Teo or Glenn Wijaya of our offices, should you require further clarifications on any of the points above.