



## **MODEL REGULATION OF THIRD-PARTY FUNDING IN INDONESIA: A COMPARATIVE STUDY**

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### **ABSTRACT**

The emerging practice of third-party funding provides an answer for the party whose rights has been breached but are financially constrained to bring forth its claims to an investment arbitration. However, the practice of third-party funding does not always run smoothly according to its optimistic expectations and noble goals. The lack of concrete regulations regarding its practice imposes several issues concerning its involvement in investment arbitration. By using normative legal and case analysis approach, this paper analyses legal doctrines and principles in investment arbitration law and their implementations in the community through comparative cases. The research uses a descriptive analytical method which describes the applicable legal regulations correlated with legal theories and their implementation in the research object. The research was conducted by finding secondary data using primary, secondary, and tertiary legal materials.

The results of the research show that the regulations regarding the practice of third-party funding in addition to provide access to justice for financially constrained parties is also required to provide answers to concerns raised by its involvement in investment arbitration. The action that can be done by the Indonesian government to solve the aforementioned problem is to issue a specific international arbitration law which includes the regulations regarding the practice of third-party funding.

**Keywords:** third-party funding in international investment arbitration; indonesian arbitration law; model implementation of indonesian international arbitration law.

### **I. INTRODUCTION**

In the last few years, entities with an initial aim to ease financial burden of the parties involved in a dispute resolution process, particularly in arbitration, have emerged. The funded party will enter into an agreement with the funding party in which it is usually stipulated that if the funded party successfully wins the case, proceeds of the costs award will be shared between both parties. This practice is hereinafter referred to as third-party funding

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(DeStefano, 2012). Third-party funding is not only commonly used in an arbitration process as it is also quite popular in litigation. In fact, the practice of third-party funding is much earlier found in litigation than in arbitration (Frignati, 2016). Compared to the use of third-party funding in litigation and commercial arbitration, third-party funding in investment arbitration involves a much larger scale of claims and costs. As an illustration, the costs spent in investment arbitration may reach millions of US dollars (Van Harten, 2007). The discussion in this paper will focus on the practice of third-party funding often encountered in an arbitration process, particularly in investment arbitration.

There are several initiatives that have been taken by some countries to regulate third-party funding. Arbitration Ordinance in Hong Kong, for instance, was passed to allow third-party funding for arbitrations seated within the country and its related proceedings as long as they satisfy the requirements set out in the ordinance. Within the Arbitration Ordinance, the duty of disclosure is imposed on the funded party to disclose its funding agreement along with the name of the funder and the expiration date of the funding agreement. It is worth noting that before the new law was passed, third-party funding involvement in Hong Kong was regarded as a tort and criminal offense under the doctrines of maintenance and champerty. In arbitration institutions level, Singapore International Arbitration Centre (SIAC) and Hong Kong International Arbitration Centre (HKIAC) also revised their arbitration rules to grant the power to arbitral tribunal to order the disclosure of third-party funder.

As in Indonesia, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution has not set the rules on third-party funding. However, considering that the use of third-party funding in international arbitration is growing more common, it is interesting to observe the steps that can be taken by Indonesia to regulate third-party funding in an international arbitration conducted in its jurisdiction.

## II. DISCUSSION

### **A. Definition, Types, Advantages and Disadvantages of Third-party Funding.**

Although there is no universally accepted definition of third-party funding, it is usually accepted that third-party funding is a practice carried out by an individual or a legal entity outside of the disputing parties to provide financial assistance to one of the parties in the dispute (Henriques, 2017). Typically, third-party funders will only receive repayments if the funded party successfully wins the claim, however, in the event that the party fails, then it bears no obligation to pay for compensation (Henriques, 2017). Because of the practices

described above which are generally applied in funding agreements, third-party funders will generally have control over the course of the dispute.

There are two types of third-party funding, namely for-profit third party funding and non-profit third party funding. For-profit third party funding only funds cases with the main goal of getting maximum financial benefit by funding the case. On the other hand, non-profit third party funding funds the arbitration process without expecting or receiving compensation from the parties it funds. One example of non-profit third party funding is found in the case of *Philip Morris v. Uruguay*. In this case, the Bloomberg Foundation with its program "Campaign for Tobacco-Free Kids" funded the respondent, which in this case was Uruguay, in a case initiated by a private foreign cigarette company, Philip Morris, without receiving any financial compensation (*Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, 2016).

In for-profit third party funding, a party seeking for financial support has to go through a long and competitive process to obtain a funding arrangement (Shaw, 2017). Third-party funders will only fund cases with more than 70% possibility in winning the claims (ICCA-Queen Mary Task Force Report, 2015). Before entering into a funding agreement, third-party funders will conduct due diligence to consider facts, legal arguments, and probabilities to obtain the expected results (De Brabandere & Lepeltak, 2012). Not much is known regarding the methods adopted by third-party funders in determining whether a case is eligible for funding. As reported from Harbor Litigation Funding, the data shows that several considerations that are generally taken in determining the provision of funding are as follows: (1) the prospect of compensation should the claims succeeded; (2) the level of investment needed to secure the expected realistic claim value; (3) chances of success; and (4) the experience of the legal counsels team in resolving cases (Moseley, 2019). In addition, another factor that becomes a consideration for third-party funders is the estimated duration of dispute resolution process (Frignati, 2016) and the enforcement of the award (Moseley, 2019).

The practice of third-party funding has grown rapidly in line with the costs incurred in an arbitration process and the global economic crisis that has caused investors to be more reluctant on spending their resources in an arbitration process (Khouri, Hurford & Bowman, 2011). The current practice of third-party funding is not limited to providing financial assistance to financially disadvantaged parties (Moseley, 2019) but also extends to financially capable parties seeking funding for their cases in order to manage cash flows and risks

sharing during the legal process (Moseley, 2019). The pattern seen in the current practice is that third-party funders almost always fund the claimant since the final goal to be achieved is the distribution of financial awards. In the context of investment arbitration, this means that the party being funded is multinational companies in a sovereign country (Park & Rogers, 2015).

In the perspective of third-party funders, providing funding in an investment arbitration process is an attractive endeavor. Third-party funding is an investment that is not tied to market financial fluctuations, making it a safe area for third-party funders to invest their capital. Moreover, claims filed in investment arbitration involve large amounts of money (Park & Rogers, 2015) and compensation obtained by third-party funders may range from 30%-50% of the total claims granted (Shaw, 2017). Furthermore, unlike commercial arbitration decisions, award in investment arbitration are generally accessible to the public which makes it easier for third-party funders to predict the success rate of claims during the due diligence stage.

Investment arbitration awards are easily recognized and enforced, especially those carried out under the Article 54(1) ICSID Convention which regulates a large part of the investment arbitration. The grounds for annulment of an award in the ICSID Convention are relatively fewer than the possibilities for a review of an arbitration award by a domestic court under the New York Convention (Baldwin, Kantor & Nolan, 2006). Therefore, from the considerations described above, third-party funders have a great opportunity to reap profits through funding a disputed party. Aside from providing several benefits, third-party funding has several shortcomings. In the course of an arbitration process, the funded party will not only has his personal interests in mind, but must also consider the interests of the third-party funder. In such a situation, it is possible that the legal counsels of the funded party will be affected by the interests of third-party funders who pay the costs of legal counsels services compared to the main interests of the funded parties (Khouri, Hurford & Bowman, 2011).

There are two possibilities that can occur, the presence of third-party funders can extend the arbitration process to be able to maximize the amount of compensation obtained or can actually speed up the arbitration process by urging the funded party to agree on an early settlement (Khouri, Hurford & Bowman, 2011). However, it is possible that the occurrence of one of the foregoing possibilities does not occur on the basis of the interests of the funded party. Furthermore, third-party funding may also increase the number of cases brought to the investment arbitration forum which results in financial expenditure consequences for

developing countries given the large amounts of awards in investment arbitration (de Morpurgo, 2011).

The effectiveness of an arbitration process depends very much on the relationship between the third-party funder and funded the party. If a conflict occurs between a third-party funder and the funded party, then the course of an arbitration process may be disrupted. Termination of a funding agreement in the middle of an arbitration process by third-party funder occurred in the case of *S&T Oil Equipment & Machinery Ltd. v. Romania* which resulted in the discontinuance of the arbitration process (*S&T Oil Equipment and Machinery Ltd. v. Romania*, 2010).

### **B. Regulations of Third-Party Funding in Investment Arbitration in Hong Kong**

The Hong Kong Code of Practice for Third Party Funding of Arbitration came into force on 1 February 2019 after the practice of third-party funding was prohibited under the doctrine of maintenance and champerty. The application of the Hong Kong Code is used in conjunction with the Arbitration Ordinance. On June 14, 2017, the Hong Kong Legislative Council issued regulations which differentiate arbitration, mediation and litigation (Legislative Council of The Hong Kong Special Administrative Region of The People’s Republic of China, 2017). The issuance of this regulation has allowed third-party funding practices to be carried out in Hong Kong. The table below summarizes the regulations implemented by Hong Kong regarding third-party funding.

**Table 1. (Source: Authors)**

<b>Enforceability</b>	<b>Control</b>	<b>Conflicts of Interest</b>	<b>Disclosure</b>
<b>The rules apply to all parties and all types of funding agreements. (Para. 1.2 Hong Kong Code)</b>	The funding agreement must explain in detail that the third-party funder will not influence the funded party or the legal representative of the funded party to control or take over the arbitration process. <b>(Para. 2.9 Hong Kong</b>	Third-party funders are obliged to carry out effective procedures to avoid conflicts of interest. An example of this procedure is reporting conflicts of interest to parties that have been funded or are potentially funded.	Funded parties must disclose to other parties and the arbitration institution regarding the existence of the funding agreement and the name of the funder in writing.

	Code)	(Para. 2.6 dan 2.7 Hong Kong Code)	(Section 98U Arbitration Ordinance)
<b>The rules apply to arbitration conducted in Hong Kong and arbitration conducted outside of Hong Kong as long as the financing for services related to arbitration is provided from Hong Kong and a written agreement regarding the funding is present. (Section 98H dan 98N Arbitration Ordinance)</b>	An exception to this rule states that third-party funders can exercise control if it is legally permissible. (Para. 2.9 Hong Kong Code)	The word "if" is considered to potentially cause problems since it is not explained in detail whether procedures that are not stipulated in the regulations can be carried out if it is deemed necessary and effective to do.	Third-party funders have an obligation to remind the funded parties regarding the duty of disclosure as described above. (Para. 2.10 Hong Kong Code)
<b>Parties from and outside of Hong Kong are required to be aware of the provisions in the Hong Kong Code before entering into a funding agreement.</b>	It is not specifically explained to what extent the controls are legally permitted to be carried out.		

### C. Regulations of Third-Party Funding in Investment Arbitration in Singapore

Similar to the steps taken by Hong Kong, Singapore also amended its Civil Law Act and removed the provisions regarding violations of the law on the basis of the doctrine of champerty and maintenance that had previously been in force (Cap. 43, Sections 5A-5B Singapore Civil Law Act 1999). The abolition of this provision only applies to arbitration proceedings and related legal proceedings, such as court assistance relating to arbitration, mediation, conciliation, or bankruptcy proceedings (Cap. 43, Section 5B (10) Singapore Civil Law Act 1999). Although the legalization of third-party funding is done through an amendment to the Civil Law Act, the rules regarding the disclosure of third-party funding are regulated in the Legal Profession Rules. The table below explains the rules adopted by Singapore regarding third-party funding.

**Table 2. (Source: Authors)**

<b>Enforceability</b>	<b>Control</b>	<b>Conflicts of Interest</b>	<b>Disclosure</b>
<b>The rules apply to agreements where a third-party funder who has met the requirements for financing some or all of the dispute resolution costs involved in a prescribed dispute resolution proceeding. (Section 5B(2) Civil Law Act)</b>	Legal counsel is allowed to advise third-party funders to their clients, provide legal advice, prepare and negotiate funding agreements and represent clients in disputes arising from the funding agreement. <b>(Section 107 (3A)(a)(b)(c) Legal Profession Rules)</b>	Legal counsel and law firms are prohibited from owning shares or ownership interests with third-party funders who are appointed by legal counsel or law firms to their clients or who have funding agreements with their clients. <b>(Section 49(B)(1)(a)(b) Legal Profession Rules)</b>	Legal counsel and law firms are prohibited from owning shares or ownership interests with third-party funders who are appointed by legal counsel or law firms to their clients or who have funding agreements with their clients. <b>(Section 49(A)(1) dan (2) Legal Profession Rules)</b>

<b>Third-party funders who do not meet the requirements set out in the regulations are not entitled to legal protection from this rule. (Section 5B(4) Civil Law Act)</b>	The regulation does not specify whether third-party funders can influence funded party or the legal representatives of the funded party in controlling the conduct of an arbitration.	Legal counsel and law firms are prohibited from receiving commissions, payments, or revenue from third-party funders described above. <b>(Section 49(B)(2) Legal Profession Rules)</b>	The above provisions only apply to legal counsels registered to practice in Singapore. Foreign legal counsels who are not registered to practice in Singapore but represent parties to the arbitration domiciled in Singapore are not bound by this regulation.
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#### **D. Regulation of Third-Party Funding in Investment Arbitration in Indonesia through an Establishment of Indonesia International Arbitration Law**

Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution was created in the midst of the monetary crisis experienced by Indonesia with the aim of resolving trade disputes that occurred due to non-fulfillment of financial obligations (Adolf, 2016). Specifically, Article 5 of the Indonesian Arbitration Law states that only trade disputes can be resolved through arbitration. In this case, trade disputes referred to include investment disputes, leasing, construction, etc (Abdurrasyid, 2001). International arbitration in this law is regulated under Chapter VI. The articles under that chapter regulate the implementation of international arbitration awards in Indonesia. There are several differences between the provisions regarding international arbitration under the Indonesian Arbitration Law and those contained in the UNCITRAL Model Law. As famously known, the arbitration laws of countries in the world generally refer to the UNCITRAL Model Law. As of 2018, as many as 80 countries both developed and developing countries, have adopted this legal model for their domestic arbitration law. Hong Kong and Singapore are two of them, while Indonesia has not adopted the UNCITRAL Model Law in the formation of its arbitration law.

One of the differences that is often highlighted is the definition of an international arbitration award. The international arbitration award according to the Indonesian Arbitration Law adopts a place criterion in its interpretation. The second alternative, namely a decision

which according to Indonesian law is considered as an international arbitration award, does not specify which law is referred to in that article. Meanwhile, the criteria generally adopted by the international community which are listed in the UNCITRAL Model Law are the existence of a foreign element in the overall process of an arbitration in order to be considered as an international arbitration. Compared to the criteria contained in the UNCITRAL Model Law, the criteria adopted by Indonesia tend to lack legal certainty and have the potential to cause multiple interpretations (Soemartono & Lumbantobing, 2018). In one of the cases of arbitration in Indonesia, issues regarding the definition of an international arbitration award raise problems in the enforcement of the arbitration award (*PT. Pertamina EP dan PT. Pertamina (Persero) v. PT. Lirik Petroleum*, 2009).

In the context of international arbitration, complete and definite legal regulations are needed to attract foreign parties to be willing to settle their dispute through arbitration in a particular country. Lack of regulation or uncertainty of an arbitration law can cause distrust of foreign parties towards the enforcement of an arbitration award in that country (Adolf, 2016). In addition, arbitration law must also be constantly updated so that it can follow and accommodate developments and changes that occur. The above considerations are used by the countries like Hong Kong and Singapore when they decided to amend their arbitration law to regulate the practice of third-party funding.

There are some weaknesses in the practice of third party funding which, if this practice is not regulated, could potentially damage the integrity of the investment arbitration system or in more extreme case, could result in an arbitration award not being able to be implemented (Trusz, 2013). The fact that the Indonesian Arbitration Law cannot fully provide a consistent and complete legal framework of implementing international arbitration, causes the rejuvenation of international arbitration practices in Indonesia through the creation of new products of international arbitration law needs to be considered. The use of third-party funding as a developing practice in the world of international arbitration can now be regulated through these legal products. This step is expected to reduce obstacles that could potentially hamper the enforcement of international arbitration awards in Indonesia. At the end of the day, the enforcement of an arbitration award is certainly the most crucial factor of the entire arbitration process itself.

### **E. Definition of Third-Party Funding and Third-Party Funder**

The formulation of the definition of third-party funding and third-party funders is one of the fundamental concerns to create clear limitations on what is considered as third-party funding and third-party funders. In addition, the definition also can minimize the potential for multiple interpretations. However, to date, there is no universally accepted definition of third-party funding or third-party funders. In fact, funders also argue that third-party funders may not be precisely defined (DeStefano, 2012). On the other hand, the definition that has been given so far to describe third-party funding has led to ambiguity with other types of funding.

Third-party funding is generally defined as a practice of providing financial assistance from parties outside of the disputing parties which do not have a direct interest in an arbitration process. The implication of the use of third-party funding is the transfer of financial burden from the disputing party to third-party funders. In line with this understanding, the practice of pro bono has the same implications as the practice of third-party funding, which although it does not involve the direct transfer of financial burdens, the existence of this practice transfers financial burdens in terms of legal representation of a party to his legal counsel (Nieuwveld & Victoria, 2012). In this case, although pro bono is not considered nor intended as a third-party funding practice in the sense that is understood according to the practice in investment arbitration, this practice has fulfilled the elements in the definition generally accepted as third-party funding (Trusz, 2013). In addition, various models and forms of third-party funding make it difficult to create a single understanding that can accommodate these forms of third-party funding.

Referring to national regulations, according to the Singapore Civil Law Act, a third-party funder is defined as an entity that carries out business operations in Singapore or other regions that fund the costs of the dispute process and is not a party to the dispute (Cap. 43, Section 4(1)(a) Singapore Civil Law Act 1999). Third-party funders must also have paid-in capital or assets under management of not less than five million Singapore Dollars or equivalent in other currencies (Cap. 43, Section 4(1)(b) Singapore Civil Law Act 1999). The definition adopted by Singapore is made to ensure that third-party funders who will fund an international arbitration dispute in Singapore are professional third-party funders who can meet the requirements stated in the regulations in force in Singapore (ICCA-Queen Mary Task Force Report, 2015). These requirements must be fulfilled by third-party funders to be able to uphold their rights in a funding agreement in Singapore.

Meanwhile, third-party funder in Hong Kong is defined as individuals who are parties to an arbitration funding agreement with the funded party (Section 98J(1)(a) Arbitration and Mediation Legislation). Furthermore, third-party funders are not legally deemed to have an interest in the arbitration proceedings other than those listed in the funding agreement (Section 98J(1)(b) Arbitration and Mediation Legislation). An important point of the definition of third-party funder in this regulation is that individuals who make funding agreements have no legal interest in the arbitration process that has begun, has not yet begun, or has ended (Section 98J(2)(a) dan (b) Arbitration and Mediation Legislation).

#### **F. Duty of Disclosure**

Transparency regarding the involvement of third-party funders raises the question of whether regulations are needed to regulate it and how, who and what restrictions must be made to enforce it. The potential conflicts of interest between arbitrators and third-party funders in international arbitration are one of the reasons for the need for transparency regarding the involvement of third-party funders. Relevant information related to the involvement and identity of third-party funders can help arbitrators to assess the potential for conflicts of interest, maintain the integrity of the arbitration process, and avoid the rejection of arbitral awards in the country where the award is to be recognized and enforced (Scherer, Goldsmith & Fléchet, 2012).

So far, there are only a few regulations and legislationa that require transparency regarding the involvement of third-party funders in international arbitration. Orders for transparency regarding third-party funders by the arbitral tribunal in various international arbitration cases are diverse. For example, in the case of *EuroGas Inc. and Belmont Resources Inc. v. The Slovak Republic*, the ICSID arbitral tribunal ordered claimants who had revealed that their claims were funded by third-party funders to disclose the identity of the third-party funders (*EuroGas Inc. and Belmont Resources Inc. v. The Slovak Republic*, 2015). The same order was made by the arbitral tribunal in the case of *South American Silver Ltd. v. The Plurinational State of Bolivia* (*South American Silver Ltd. v. The Plurinational State of Bolivia*, 2016).

Further steps were taken by the arbitral tribunal in the case of *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti v. Turkmenistan*, which did not only ordered claimants to disclose that the claims submitted were funded by third-party funders, but also their identity and terms of the funding agreement (*Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd.*

*Sti. v. Turkmenistan*, 2015). Evaluating solely from international arbitration awards, the absence of regulations concerning the transparency of third-party funders does not rule out the possibility of such transparency as long as it is deemed necessary by an arbitral tribunal. However, the application of regulations concerning transparency can set limits on the extent to which the arbitral tribunal can request transparency regarding the involvement of third-party funders. This argument is reinforced by the fact that most funding agreements have a confidentiality clause that could result in a default if the claimant discloses prohibited information within the agreement.

The counter argument regarding the enactment of regulations regarding third-party funder transparency grows out of fears of procedural delays (Fléchet, 2012). Guerilla tactics are very likely to occur in scenarios where one party knows the limitations of the other party's financial resources which results in a debate about how important third-party funder transparency is (Goldsmith & Melchionda, 2012). Debates like this are solely aimed at delaying and extending the arbitration process and draining the other party's financial budget before the case can be resolved (Honlet, 2015). However, if the transparency of third-party funders can prevent delays that take longer, such as delays in replacing arbitrators or even challenging arbitral awards, then the possibility of procedural delays described above is a better option.

### **G. Security for Costs**

Transparency of the involvement of third party funders often results in the application of security for costs from the opposing party at the beginning of the arbitration process arising from concerns that the party being funded by third-party funders may not have sufficient financial resources to settle the case. Security for costs in international arbitration is a form of interim relief. Respondent may ask the arbitral tribunal to order the claimant to pay security for costs in an amount likely to be granted by the arbitral tribunal which function is to protect the respondent from financial loss in the event that the claimant has no intention and/or cannot be held responsible for his financial obligations when the arbitration award is rendered.

The majority of the international arbitral tribunal in its decision argued that the existence of a third-party funder did not justify the granting of a security for costs. In the case of *EuroGas Inc. and Bellmont Resources Inc. v. The Slovak Republic*, a request for security for costs that was submitted after information regarding the involvement of third-party

funders was revealed, was rejected by the arbitral tribunal on the grounds that there were no special circumstances in that case (*EuroGas Inc. and Belmont Resources Inc. v. The Slovak Republic*, 2015). The same opinion can also be found in the case of *South American Silver Ltd. v. The Plurinational State of Bolivia* in which the arbitral tribunal believes that if there are no special circumstances, the involvement of third-party funders does not indicate a risk that the recipient of the fund will not fulfill its financial obligations (*South American Silver Ltd. v. The Plurinational State of Bolivia*, 2013-25).

On the other hand, the granting security for costs in the case of *RSM Production Corporation v. Saint Lucia* was carried out not only because the claim filed by the claimant was funded by a third-party funder. The discovery of the fact that the claimant in this case did not comply with the decision of costs incurred by the arbitral tribunal in previous cases, fulfills the requirement that there are special circumstances in this case which ultimately justifies granting of security for costs (*RSM Production Corporation v. Saint Lucia*, 2014). Furthermore, this is reinforced by the fact that the claimant has not been able to prove its solvency and the funding agreement with third-party funders does not cover payment of the awards on costs (*RSM Production Corporation v. Saint Lucia*, 2014).

The standards that must be met to be able to grant security for costs in investment arbitration are determined by national law and applicable arbitration procedure law. Generally, the arbitral tribunal has the authority to grant security for costs if the arbitration or procedural law in effect allows for an interim relief, although it does not specifically allow the security of costs to be decided (Born, 2012). The basic question related to security for costs in investment arbitration is whether the involvement of third-party funders can be used as a reason for granting security for costs.

The affirmative answer to the above question is based on the assumption that the involvement of third-party funders in the claim submitted by claimant is an indication that the claimant is in a bad financial condition or can even be said to be on the verge of bankruptcy (*RSM Production Corporation v. Saint Lucia*, 2014). However, the practice of third-party funding is not only used by financially constrained parties, but also used by parties with excellent financial resources as a way to maintain their cash flow during the arbitration process (Bogart, 2016). Therefore, it is safe to assume that the involvement of third-party funders alone is not enough to justify the granting of a security for costs.

## **H. Relationship between Clients, Legal Counsels and Third-Party Funders**

Arbitration proceedings that use third-party funding can lead to conflicts of interest between legal counsel, clients, and third-party funders. Funding for cases faced by clients is often obtained on the recommendation of legal counsel. Next, third-party funders will conduct due diligence on the cases they wish to fund in order to be able to measure the probability of success of the case.

Third-party funders certainly have a significant financial interest in the outcome of the arbitration process and generally have influence over the strategies that will be used by legal counsel in dealing with arbitration proceedings, such as the appointment of arbitrators or decision making regarding an early settlement (Landi, 2012). In this situation, the funded party and their legal counsel must be able to make decisions that benefit not only the funded party, but also third-party funders. The over influence of a third-party funder in the case that is feared to alter the functions of legal counsels (Landi, 2012). It is worth highlighting that one of the legitimacy of the international arbitration system is in the professionalism of legal counsels involved.

Presently, there is no a single binding code of ethics for legal counsel dealing with third-party funders in international arbitration proceedings. Steps taken to avoid conflicts of interest between the parties in the arbitration process are usually made through funding agreements that regulate the rights and obligations of the parties in the agreement, funding structure, and cancellation and termination of the funding agreement (von Goeler, 2016). Apart from the things described above, legal counsels must be able to maintain its independence and objectivity in providing advice to clients regardless of the presence of third-party funders (Lamm & Hellbeck, 2013).

## **I. Independence and Impartiality of Arbitrators**

The principle of independence and impartiality of arbitrators is one of the fundamental principles in the arbitration process (Nigel, 2009). Arbitrator independence generally involves issues concerning the arbitrator's relationship with one of the parties in the arbitration process, as well as financial relations. On the other hand, the impartiality of the arbitrator is closely related to the prejudice held by an arbitrator who in this case can support or oppose one of the parties in the arbitration or the problems that arise in the arbitration (Daele, 2012).

The application of the principle of independence and impartiality of arbitrators is needed in investment arbitration where the reappointment of the arbitrator by the same party or law firm in different disputes is a frequent situation (Giraud, 2014). This is strengthened by the fact that disputes resolved in investment arbitration generally involve similar situations and uses the same legal application, so as to cause conflicts of interest between the parties in the arbitration process. The involvement of third-party funders in the arbitration process can cause its own problems related to the independence and/or impartiality of the arbitrators.

As an illustration, a hypothetical case can be taken in circumstances where arbitrator A in case 1 is selected by the claimant funded by a third-party funder. Furthermore, arbitrator A in case 2 is a legal counsel for the same claimant also funded by a third-party funder (Barrington, 2017). Such a relationship can raise doubts regarding the independence of the arbitrators (Barrington, 2017). In addition, third-party funders involved in an arbitration process have an influence on the appointment of arbitrators because the selection of arbitrators can influence the consideration of third-party funders to fund the arbitration process (Ross, 2012). Therefore, the existence and identity of third-party funders is important to be disclosed to the parties and the arbitral tribunal. This should be done with the aim that the arbitrators involved can assess and disclose the potential for conflicts of interest.

Furthermore, arbitrators also have an obligation to disclose the relationship they have with the disputing parties and the law firms representing the parties. Relationships that must be disclosed include relationships that occurred in the past and during the arbitration proceedings. These steps are taken to avoid doubts over the independence and impartiality of the arbitrators and to maintain the legitimacy of the arbitration process (Goldstein, 2011).

#### **J. Recommended Regulatory Model on Third-Party Funding in Investment Arbitration in Indonesia**

The regulation of third-party funding was made in two premises. First, this regulation is designed to understand in depth about third-party funders and issues related to their practice in investment arbitration. Second, the regulation of third-party funding can facilitate consistent decision-making through sufficient information regarding the practice of third-party funding in investment arbitration. Third-party funding can be defined based on the definition generally accepted in international arbitration, which is a practice of generating funds from parties outside of the disputing parties which do not have a direct interest in the arbitration process. The definition of a third-party funder itself should fulfill the following

elements: 1) persons or entities that are not parties to a dispute; 2) aims to provide financial assistance; and 3) the reimbursement mechanism may or may not depend on the outcome of the dispute. Further regulatory models regarding third-party funding in Indonesia will be explained in the table below.

**Table 3. (Source: Authors)**

<b>Enforceability</b>	<b>Control</b>	<b>Conflicts of Interest</b>	<b>Disclosure</b>
<b>The rules apply to all types of funding agreements made by third-party funders who have met the requirements to fund part or all of the costs of disputes of parties involved in international arbitration proceedings.</b>	Legal counsels may advise their client on a third-party funder, provide legal advice, formulate, and negotiate funding agreement and represent their client in the event of a dispute arising from the funding agreement.	Legal counsels and their law firms are not allowed to have shares or financial relationships with third-party funders who are advised to their clients by their legal counsels or law firm or third-party funders who have funding agreements with their client.	Funded parties are obliged to disclose to other parties and arbitration institution regarding the existence of funding agreements, names and addresses of third-party funders in writing. The arbitral tribunal may request the necessary funding agreement details if deemed necessary for the course of the arbitration process.
<b>The rules apply to international arbitrations carried out in Indonesia. Funding agreement must be made in writing.</b>	Third-party funders are not permitted to influence the funded party nor legal counsel of the funded party to control or take over the process of arbitration.	Legal counsels and law firms are prohibited from receiving commissions, payments, or revenue from funding agreements with third-party funders described above.	Disclosure must be made at the beginning of the arbitration process or as soon as possible after the funding agreement is made in the event that the agreement is made after the arbitration process is already conducted.
<b>Legal</b>	Provisions on the	All parties involved in	The existence of a third-

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**protection of** prohibition of third- the funding agreement party funder cannot be  
**this regulation** party funders to must effectively avoid used as the main reason  
**applies only to** control or take over any or potential for filing a request for  
**third-party** the implementation of conflicts of interest. security for costs.  
**funders who** arbitration must be  
**have complied** explained in detail in  
**with the** the funding  
**requirements** agreement.  
**set forth in this**  
**regulation.**

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