

Regulation on Third Party Financing in Indonesian Arbitration (Case Study in Singapore & Hong Kong)

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Abstract

Arbitration is an alternative dispute resolution institution outside of judicial practice. Arbitration Institutions have advantages in dispute resolution, such as arbitration judges are temporary and are neutral parties. Then, the duration of the dispute resolution efforts is faster when compared to the practice in the judiciary and the arbitral award has a permanent and binding legal force. Therefore, arbitration dispute resolution efforts are more desirable in resolving disputes, especially related to disputes in companies both national companies and multinational companies. However, the costs of taking efforts to resolve the dispute through arbitration require a very high initial cost as case registration. Arbitration as in Singapore & Hong Kong has accommodated regulations regarding the use of Third Party Financing in an effort to resolve disputes through arbitration. However, in the current Indonesian laws and regulations, no one has regulated the practice of Third Party financing institutions in arbitration. Based on this, the author will discuss how the regulation regarding the financing institution of the Third party in arbitration via comparative studies in Singapore and Hong Kong. As for in this study the author uses normative juridical legal research methods.

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I. INTRODUCTION

The use of Third-Party Financing in Arbitration practices has increased in some recent years. [1] This is because of disputes resolution in the arbitration is expensive, compared to efforts to resolve disputes in the General Court. Also, the possibility of loss if losing in the arbitration is greater so that the role of Third Party Financing is needed. Some parties are unable to pay fees to be settled in arbitration jurisdictions, so the solution is financially disadvantaged parties to pay for dispute resolution in arbitration choosing to use Third Party Financing. Third-Party Financing is financing originating from parties that are not involved with the parties in the case in court. [2] Third Party Financing is a feature of dispute resolution in arbitration, third party funders can be investors or law firms that will fund parties in resolving arbitration disputes. Third-Party Financing in the arbitration is needed in society. Where the financing process in all disputes will be borne by the Third Party as the funders and if the case handled is won, then the results of the disputed principal matter will be divided based on the agreement of the Third Party Financing between the funder and the Party financed. [3] Viewed from the business point of view to provide funds with the aim of obtaining a percentage of the outcome of the case in a case to be considered, the benefits of financial arrangements with third parties such as to reduce the impact on cash flow (in terms of company finances) and minimize risk if the case was not won so that the percentage of the

results of the case was not obtained. [4] Third-party financing is new knowledge for the development of the Indonesian arbitration law. However, in Indonesia, there are no research studies that discuss the role of Third Party financing practices in arbitration and Indonesian law does not yet have regulations regarding Third-Party Financing in arbitration. In fact, the practices of Third-Party Financing in arbitration in world countries have been implemented such as in Paris, London, and in ASEAN are Singapore & Hong Kong. Based on these, the author is interested in examining how regulations regarding the practice of Third-Party Financing in Arbitration in Indonesia (Cooperative Studies in Singapore & Hong Kong)?

II. PROBLEM STATEMENT

1. What is Third Party Financing in Arbitration?
2. What makes Third Party Financing Arrangements in Legislation Important?
3. How Comparative study with Singapore & Hong Kong in Third Party Financing Arrangements (Third Party Financing)?

III. METHODOLOGY

The type of research used is doctrinal or normative law research, with approaches: conceptual approach, statute approach, case approach, and historical approach, secondary data sources and primary data sources, secondary sources

consisting of primary law materials, secondary law materials and tertiary law materials, data analysis method of normative qualitative, carried out by discussing law norms, doctrines with data obtained from research objects that have been inventoried. Then conclusions will be deductively drawn.

IV. DISCUSSION

1. Third Party Financing in Arbitration

Arbitration is the settlement of a dispute (case) by one or several referees (arbitrators) who are jointly appointed by the parties to the case without being resolved through the Court. [5] Settlement of disputes in Arbitration is based on the existence of a written arbitration clause by the parties to the dispute in the agreement of the parties or the arbitration agreement with the terms of agreement and signed by the parties, [6] where the parties to the dispute are chosen by the parties concerned from people who are not interested in the case in question, these people are called arbitrators who will examine and give decisions on the dispute. [7] Then after knowing the meaning of arbitration, it can be interpreted as Third Party Financing in arbitration.

Third Party Financing in arbitration is when someone who is not involved in the arbitration provides funds to a party in the arbitration in return for a percentage of the proceeds from the agreed principal. Usually, financing will cover the costs and legal costs of the party funded arising in arbitration. [8] The use of Third Party Financing in arbitration has increased in several countries as a global phenomenon in resolving disputes in arbitration using Third Party Financing, as well as the amount and kinds of institutions that exist now as funders in arbitration disputes. Third Party Financing Institutions or institutions are not only carried out by third-party financing institutions specifically, insurance companies, investment banks, hedged funds and law firms have also entered this market.

Based on the results of a study done by the Queen Mary University of London in 2015, the study suggested that Third Party Financing was as follows :

- a. London and Paris are the countries that use the most Third Party Financing in international arbitration. Whereas Singapore & Hong Kong are ranked third and fourth; [9]
- b. 71% (seventy one percent) of research respondents argue that third party financing requires regulations or regulations; [10]
- c. Respondents argue that in practice international arbitration is required to not keep parties using Third Party Financing and funder identity confidential, but the confidentiality of Third Party Financing agreements between funders and recipients of funds remains confidential.

The Hong Kong Legislative Council (LegCo) adopted a new law on Third Party Financing in arbitration in 2016 which is regulated in the Bill 2016 Arbitration, which regulates the provisions of Third Party Financing that resolve arbitrations using arbitration Hong Kong. These provisions will apply equally to domestic and international arbitrations. [11] Whereas in Singapore it has ratified Third Party Financing regulations, namely those that have been ratified by parliament, namely in the regulation of the Civil

Law (Amendment) Bill 2016 on January 10, 2017, [12] which stipulates that the use of Third Party Financing is permitted and valid in Singapore since March 1, 2017 and the Use of Third Party Financing in Singapore only applies to international arbitration proceedings.

In Indonesian law, Third Party Financing in arbitration has not been regulated and the practice of Third Party Financing in arbitration is not yet available. Third Party Financing can be a profitable form of financing business. However, there are no regulations governing Third Party Financing in the practice of arbitration in Indonesia. Arrangements regarding arbitration are needed mainly because Third Parties as funders are more interested in the opportunity to win the case so that they can get the benefits to be gained from the dispute, without needing to pay attention to the justice that should be obtained in a dispute resolution.[13] Provisions regarding the practice of arbitration in Indonesia in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which regulates the provisions regarding the involvement of Third Parties, are limited to the following provisions :

Article 27

All dispute examinations by arbitrators or arbitral tribunals are carried out in private.

Article 30

A third party outside the arbitration agreement can participate in and merge in the dispute resolution process through arbitration, if there is an element of related interest and the agreement is agreed upon by the parties to the dispute and agreed by the arbitral tribunal's arbitrators who examine the dispute in question.

Based on these provisions, regarding Third Party Financing in Indonesia has not been regulated, but in Article 27 of Law No. 30 Number 1999 concerning Arbitration and Alternative Dispute Resolution There are arrangements for third parties to arbitration stating that the involvement of third parties in Indonesian arbitration courts is prohibited for all disputes. But third parties can be involved in the process of disputes in arbitration if a third party has an interest in a dispute with the agreement of both parties in arbitration or arbitrator, based on Article 30 of Law Number 30 Year 1999. Thus, Third Party Financing in Indonesia can be done because there is no use of Third Party Financing. But the term Third Party Financing in Law No. 30 Year 1999 and laws and regulations in Indonesia are still not regulated.

2. The Importance of Third Party Financing Arrangements in Legislation

Alternative and dispute resolution or arbitration in Indonesia needs legitimacy of Third Party Financing in the law, for the following reasons :

a. High Cost

The cost of down payment or registration fees related to arbitration affect the disputing parties by using Third Party Financing to finance the initial costs of arbitration. Often, when an arbitrator demands high fees and one party agrees to pay them, the other party who may not be in a financial position capable of paying the fee is put in a potentially disadvantaged situation. [14] Thus, parties who can in such financial positions can or will use Third Party Financing in the case. then not only is the problem of inability of

financial position which is the reason associated with high costs of dispute resolution through arbitration, but in practice there are parties who have financial positions who are capable but still use Third Party Financing to win or insure cases to prevent loss of settlement in arbitration, the purpose of using Third Party Financing related to insuring the case intends to prevent losses if the losing case will be harmed, but with the Third Party Financing which is bound by the recipient and in arbitration, if the principal case is not reached then there is no user fee. Third Party, in this case it can be stated that the party using Third Party Financing carries out case insurance in arbitration in exchange for a percentage of the principal results of the case. In Indonesia the cost of resolving disputes in litigation in court and arbitration is still under debate in which dispute resolution in court is more expensive, but the reality is that the cost of resolving disputes in arbitration is also more measurable, [15] because the process is faster. [16] In addition, dispute resolution in arbitration will result in a final and binding decision. [17] However, commercial disputes often use dispute resolution in arbitration because the arbitration forum safeguards confidential issues, if dispute resolution from the parties and arbitration is faster than the Indonesian court the reason for the commercial dispute prefers arbitration. Associated with dispute settlement in Arbitration will definitely require high costs with fees such as arbitration registration fees, arbitrator payments and legal counsel.

b. Study and prevent potential disputes in the arbitration process in Indonesia

Third party funders are not allowed to influence or participate in and intervene in the process of dispute resolution in arbitration with the aim of benefiting third party funders. This matter is regulated in Article 30 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution that regulates : "A third party outside the arbitration agreement can participate in and merge in the dispute resolution process through arbitration, if there is an element of related interest and the agreement is agreed upon by the parties to the dispute and agreed by the arbitral tribunal's arbitrators who examine the dispute in question." The provider and because there is no regulation (unregulated situation) can be involved only limited to the parties in the dispute resolution process in arbitration, however, it must be understood by the third party funders will first assess the value of the case before agreeing to finance it cases and agreed to fund this case. The potential of these cases is also seen in terms of jurisdiction and the extent to which the State encourages arbitration within its jurisdiction. Furthermore, legalized Third Party Financing provides an opportunity for parties to assess the potential percentage of their case based on due diligence carried out by third party funders, thereby increasing the percentage bargaining position that will be made on percentage of the results of the subject of the dispute.

3. Comparative study with Singapore & Hong Kong in Third Party Financing Arrangements

a. Hong Kong

Regulations in Hong Kong regarding Third Party Financing are regulated with a legal product namely the Arbitration and Mediation Legislation (Third Party

Financing) Bill 2016, regulating new things in part 10A relating to Third Party Financing in Arbitration (Third Party Financing), an amendment is needed to enhance Hong Kong's competitive position as an international arbitration center.

Based on part 10 of Adivision 1 section 98E which regulates the objectives of the Third Party Financing arrangement in arbitration as, regulates that the purpose of establishing the regulation on Third Party Financing is to ensure that the practice of Third Party Financing is not prohibited in the regulations in force in Singapore and provides a rule which regulates all actions and also safeguards related to third party Financing in the practice of arbitration. This regulation was formed to provide the legality of Third Party Financing and to support the practice of arbitration in Hong Kong in accordance with the practice of arbitration in Singapore. So that Hong Kong passed a law on third party Financing in early 2017. Based on the provisions of Sections 98K and 98L, it is stipulated that violations of public law and violations of acts against illegal agreements in relation to third party Financing cannot be carried out.

Section 98Q stipulates that a code of ethics will be made by the competent body which then before issuing a code of ethics must consult and issue a notice to the public, a code of ethics "may / can" contain provisions regarding, among other things, content for promotion of Third Party Financing Third Party Financing agreement, risks and requirements, minimum capital requirements for funders, complaints procedures, and how to resolve conflicts of interest. [18] Then, section 98S stipulates that failure to comply with any code of practice does not automatically make a person liable for legal or other processes, even though the Code of practice is acceptable and non-compliance with it can be taken into account. Therefore compliance with the code of practice is not mandatory, the view of compliance related to the code of practice is not appropriate, because compliance with the code of ethics must be mandatory in Implementation of Third Party Financing, so that the practice of Third Party Financing can protect recipients of funds and funders from mistakes made if a code of practice is not carried out. Then the section 98T arrangement which stipulates that the party funded must notify the arbitration court and other parties outside the trial regarding the agreement of the Third Party Financing and the identity of the third party or the convict.

b. Singapore

That under Singapore law Section 5A of the Civil Law Act regulates violations of the law by involving unauthorized third parties (maintenance) and illegal agreements made to finance / fund the case with the intent to share the results of the disputed (champrty), which previously limited use of Third Party Financing but in amendments to special regulations relating to third party Financing, is abolished. [19] The category of dispute resolution process that is permitted to use Third Party Financing in Singapore under the Singapore Civil Law Act is a dispute related to the international arbitration process. Third party Financing can only provide funding if they meet the following qualification criteria:

- 1) Third party funders must have a main business, in Singapore or elsewhere, from funding the costs of the dispute resolution process in which third party funders are not parties involved in the dispute; and
- 2) Third party funders must have:
 - 2.1. Paid up capital of no less than \$ 5 million or an equivalent amount in foreign currencies; or
 - 2.2. No less than \$ 5 million, or an equivalent amount in foreign currency in the assets under management.

Entities or governing bodies that do not have qualification criteria as third party Financing will not be able to enforce or obtain protection of their rights under Third Party Financing arrangements. However, third party funders will still be obliged to fulfill their obligations to the plaintiff in connection with the Third Party Financing agreement, including their obligation to fund disputes to pursue a percentage of the proceeds of the principal as a right of the other party as the recipient of funds under the Third Party Financing agreement. The Professional Conduct Law, enforces the provision that there is an obligation for legal practitioners to disclose the existence of a Third Party Financing contract if their client receives Third Party Financing and the identity and address of the third party funder involved in the funding.

- 1) Withholding Third Party Financing in the Arbitration Process Can Cause Losses

There are many things that can cause harm to a party in arbitration regarding the absence of disclosure of the use of Third Party Financing in the arbitration process. The concept of Third Party Financing that influences the arbitration process prior to the regulation that governs it will operate confidentially, the implementation of the use of Third Party Financing in secret makes the presence of funders difficult to know, whether among the parties in the ongoing arbitration using third party funders.

- 2) Confidential information

As long as dispute disputes are still ongoing, third party funders may be able to access sensitive and highly confidential information related to disputes and parties to the dispute. The question that underlies the importance of preventing the use of confidential information is, what will happen when the third party funders use information obtained from the parties in the same process then proceed against the same party in the next arbitration. Whereas at this time third party funders have a financial interest in using their information and there is no legal regulation that prohibits third party funders from doing so (except that the funder is an advocate who later as legal counsel in arbitration based on a power of attorney). Singapore and Hong Kong are related examples of good third party Financing where third party funds must be notified in the arbitration process, requiring disclosure to use Third Party Financing for the continuation of previous funding.

- 3) Prevent third party funders from both sides

Disclosure of the use of Third Party Financing will prevent third party funders from taking advantage of conflicts of interest. Because there is no regulation on third party Financing, there is no regulation related to professional code of ethics in the practice of arbitration. Unlike the Indonesian advocate's code of ethics which

regulates clearly that advocates cannot operate as advocates if there is a conflict of interest. Due to the absence of regulations regarding Third Party Financing in the practice of arbitration, then there is no regulation as a legal umbrella that can provide protection for parties using Third Party Financing. At present, third-party funders in the practice of arbitration can provide funds in the shadows or without the knowledge of both parties and practitioners involved in efforts to resolve disputes in arbitration. If third party funder arrangements are disclosed, the parties and arbitration can better monitor the activities of their funders and protect the legitimacy and integrity of the arbitration process.

V. CONCLUSION

Indonesia needs to legitimize Third Party Financing in the arbitration process in Indonesia by adopting new laws or amendments related to Third Party Financing g, because by forming third party Financing regulations in Indonesia will support a more effective effort to resolve arbitration disputes. Third party Financing arrangements are needed mainly because the practice of third party Financing in arbitration does not violate or does not harm Indonesian law and the regulation can prevent the occurrence of irregularities committed by the parties in dispute using third party Financing such as maintaining confidentiality in the practice of arbitration and Third Party Financing ation.

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