



ARTICLE

A LEGAL FRAMEWORK FOR THIRD PARTY FUNDING

| 27/04/17 | Marie Danis



Third Party Funding is in the limelight today in the context of the Paris Arbitration week, and will be discussed at a conference co-organized by August Debouzy at La Sorbonne. It is therefore the appropriate occasion to present the Resolution that the Paris bar association recently issued.

On February 21, the Paris Bar Association (*Conseil de l'ordre des avocats*) issued a resolution which is a reminder of the expected benefits of third-party litigation funding. It also stresses how important it is for attorneys to comply with the profession's ethical rules^[1]. Thanks to such resolution, clear ethical rules have now been laid down for French attorneys, which grant their clients greater protection.

It is reminded that Third-party funding is a litigation funding system whereby a third party bears the costs of a lawsuit and receives in return a percentage of the awarded damages. This funding system was first created in Australia in the mid-1990s. It has since been used in an increasing number of international arbitration proceedings, generally concerning investments, but also in some lawsuits before the judicial courts.

In a country such as France where litigation is rather inexpensive, arbitration -which is still primarily used to resolve international disputes- is seen as significantly more expensive. Third-party funding in arbitration proceedings restores equality of arms between the parties insofar as it allows a party to take action when it would otherwise have been unable to afford to seek arbitration. In this regard, it is seen as in the litigant's interest.

A business may also not wish that litigation costs burden its cash flow.

As there are no existing regulations at international or even national level, a third-party funder's involvement can raise issues, notably ethical ones as specifically mentioned in the report of the French Bar Association's arbitration Committee (*Commission arbitrage de l'Ordre des Avocats*). Concerning the obligations of French attorneys under their professional ethical rules, two requirements deserve special attention.

I. Only the client enjoys the attorney-client privilege

Attorney-client privilege becomes an issue where the third-party funder has access to privileged information.

In France, the attorney -where his/her client is not the third-party funder- will refrain from any direct communication with the third-party funder on the case. He/she will communicate exclusively with his/her client, who may in turn disclose information to the third-party funder. The situation is different in countries where clients can choose (or be required) to waive their privilege and authorize the direct disclosure of privileged information to the third-party funder.

II. An incentive of disclosure to preserve the award

Concerning international arbitration, certain treaties, arbitration institutions' guidelines and national laws have considered that non-disclosure of a third-party funder's involvement can raise conflict of interest issues. These provisions require to disclose the existence of a third-party funder to the arbitrators so that they can rule on the existence of any conflict of interests. The purpose is to avoid that the arbitral award be disputed on the basis of a conflict that could not be resolved during the arbitration proceedings and is thereafter used as a basis to challenge the award.

The Paris Bar Association's resolution provides that the funded party's attorney is required to "*encourage his/her client to disclose the existence of such funding to the arbitrators*". He/she should also warn his/her client about the possible consequences of not disclosing it.

To conclude, this resolution is stepping up attorneys' obligations in the presence of a third-party funder, and granting protection to their clients by recalling that an attorney is under a number of obligations to his/her clients, not to a third-party funder although it may pay for his/her fees.

[1] Report by the International Arbitration Commission submitted on February 21, 201 before the Paris Bar Association (*Conseil de l'ordre des avocats de Paris*)
