

Paris Bar approves third-party funding

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Pierre Pic, Yasmin Mohammad, Isabelle Michou and Jean-Yves Garaud

The Paris Bar Council has passed a resolution confirming that third-party funding is a positive development for access to justice in international arbitration and does not contravene French law – introduced for the first time at an event at Paris Arbitration Week.

A working committee chaired by Paris-based arbitration specialists **Isabelle Michou** of Quinn Emanuel Urquhart & Sullivan and **Pierre Pic** of Teynier Pic is behind the resolution, which was adopted by the Paris Bar Council in February but only publicised at the event last week.

Other members of the committee included **Louis Degos** of K&L Gates, **Jean-Yves Garaud** of Cleary Gottlieb Steen & Hamilton, **Carine Dupeyron** of Darrois Villey Maillot Brochier and **Jalal El Adhab** of Ginestie Magellan Paley-Vincent. They spent several months considering the practical dimensions of funding in international arbitration and its impact on lawyers' ethical duties to their clients and as members of the Paris Bar.

As well as confirming funding's positive effect and legality under French law, the resolution addresses the two main challenges posed by the presence of a funder – the potential interference by a third party in the relationship between the lawyer and the client and the issue of whether the funding arrangement being disclosed.

A client being financed by a third party risks being relegated to a secondary role, the resolution acknowledges. It recommends measures for lawyers to adopt that will safeguard the sanctity of their relationships with the client and establish clear roles for all participants in the process.

The resolution also recommends that lawyers encourage their clients to disclose their use of outside funding at the outset, in the interest of transparency and to avoid conflicts that may arise later on.

A final recommendation is that parties make use of escrow accounts administered by the Paris Bar to handle funds.

The resolution was introduced at an event organised by the international arbitration committee of the Paris Bar on 27 April, the penultimate day of Paris Arbitration Week. The event also featured a debate between Garaud and **Yasmin Mohammad**, senior counsel at Vannin Capital on the disclosure of funding arrangements and the issues of confidentiality and privilege that arise.

"Safe to say, we were largely in agreement on the issue of disclosure," Mohammad told *GAR*. "Vannin Capital, like other professional funders, favours it in principle as it helps guard against procedural incidents, late arbitrator challenges or – worse – annulment of awards, all of which would have a negative impact on our investment."

Despite that, she argued in the debate that disclosure is not always in the best interest of the claimants. Although it has the potential to positively influence the tribunal – as a reputable funder's backing implies a strong claim – she said many clients feel it is nobody's business but theirs "whether they self-financed the claim, took a bank loan or involved a funder."

"As we now know, the disclosure of funding also almost automatically leads to a security for costs request which, whether it is granted or not, increases the cost of the arbitration for the claimant," she said.

Garaud, for his part, argued that it is "a given" that a respondent will use all tools at its disposal to derail proceedings. Disclosure of funding at the outset therefore makes sense to avoid the late discovery of a conflict of interest with "potentially dire consequences."

He recognised that while an operator like Vannin would never proceed with a conflict of interest that could endanger their investment, not all funders in the market are so professional and have procedures in place to identify and prevent conflicts.

There was more disagreement on the extent to which funding arrangements should be subject to confidentiality and privilege. In France, a criminally-sanctioned rule of "*secret professionnel*" means an *avocat* cannot share information, documentation and opinions with a third party without the client being present – even if the client has given them firm instructions to do so.

To comply with this, the resolution recommends always copying the client in on correspondence with funders and having them present at discussions.

Mohammad argued that in reality this rule is "breached every day" by lawyers working on international arbitrations. She said the French Bar should push for a legislative exception to the rule for this field similar to the exception granted to the strict French rule that lawyers should not discuss testimony with witnesses before they take the stand.

Garaud disagreed, arguing that simple, practical rules could enable communications to take place smoothly and in line with the law. In that respect it would seem highly protective that the funder be represented by a lawyer and that communications between the funded party and the funder be made through their respective lawyers.

One suggestion he made was that funders themselves should be legally represented and that their communications with funded parties should be through lawyers.

Funding was also the subject of a second event held in Paris that day, at the Sorbonne's Grand Amphitheatre. This was organised by Marie Danis of August Debouzy, Mathias Audit of the Sorbonne School of Law and Mohammad and featured a keynote speech by White & Case partner Charles Nairac.

A panel chaired by Danis and Mohammad included Christophe Seraglini of Betto Seraglini, Nicolas Angelet of Liedekerke Wolters Waelbroeck Kirkpatrick, Jeffery Commission of Vannin and Matthias Cazier-Darmois of FTI Consulting. They faced questions on funding from two in-house counsel, Total's Gwen Brooker and Thales's Christine Guerrier.

Mohammad says, "We wanted to put the clients where they deserve to be, at the heart of the debate." She adds that she was particularly gratified by the participation of leading French arbitrator Pierre Mayer, a professor at the Sorbonne.

The focus on funding of international arbitration in France comes after moves by Singapore and Hong Kong to legalise and regulate the practice, which was previously banned. The use of funding has steadily [increased](#) in France, without any legislation or regulation to guide it use.

In light of this, Pic tells *GAR* that the Paris Bar Council resolution has been "unanimously accepted as a very positive development", while Michou describes it as "welcome and timely." Danis believes that other jurisdictions may issue similar resolutions to "reinforce their attractiveness".

The brainchild of Mohammad, Danis and others, Paris Arbitration Week featured the first ICC European Conference and seminars on Brexit, Africa, state support for arbitration and *res judicata*, among other topics.

It also saw the launch of the UNCITRAL secretariat's guide to the New York Convention and the signing of the Equal Representation in Arbitration Pledge by the head of the Paris Bar association.

An opening cocktail party attracted over 700 guests. For young practitioners, there was a cruise down the Seine.