

THIRD PARTY FUNDING: AN OPPORTUNITY TO COOPERATE BETWEEN ELA MEMBERS?



Marco Pistis

Partner, Abbatescianni Studio
Legale e Tributario

In Italy, enterprises, including small and medium sized companies, have responded to the economic crunch by way of internationalization.

With increasing internationalization, of course, comes contracts with international elements and clauses that require resolution of disputes. This may happen in court or through arbitration. Either way, the costs are high.

Arbitration Institutions of a highly global nature, such as the International Chamber of Commerce, may be involved in dealing with such disputes. The obvious advantage of its involvement is its specialist nature and high level of competence and technical expertise. In addition, it is an independent body which works in a speedy and accurate manner. The most important disadvantage is the considerable costs involved in the use of the International Chamber of Commerce. Such high costs are likely to have a significant impact on most companies, even those who have deep pockets.

A possible way of financing the huge costs of litigation or arbitration is: Third Party Finding ("TPF"). TPF originally became popular in English-speaking countries as an alternative way to finance litigation. It later became of interest in other jurisdictions and the international arbitration world.





TPF is an agreement pursuant to which a lender Fund undertakes to pay the client-party's legal fees and expenses of either court or arbitration proceedings in return for a share of the

proceeds of the litigation or arbitration once this is concluded. Payment may be made as a percentage of the proceeds or a multiple of the amount invested. Since it is not a loan, the Fund will bear the risk of losing its money in the event that the client is unsuccessful in either litigation or arbitration.

The advantages of such an arrangement are apparent. Firstly, TPF facilitates access to justice for businesses that cannot or would not otherwise be able to bear the high costs of international arbitration.

In addition, the lender is an expert in financial and operational support, adding value to the arbitration, especially in complex and costly cases requiring the support of consultants and experts.

In the context of economic uncertainty, such as the present, companies are very attracted by the prospect of being able to pursue their legal rights while continuing to maintain cashflow which would otherwise be spent on litigation or arbitration.

The Fund, for its part, is interested in making the most out of its investment. Therefore, it does not accept every request for funding that it receives. Instead, it studies each case with due diligence before it decides whether to grant the funding. The Fund will consider the key factors in the dispute, such as the size of its potential investment, the amount in dispute, the merits of the dispute and the chances of enforcing any final decision.

Not surprisingly, this mechanism, which is constantly evolving, has raised a range of issues.



In Italy, most skeptics have observed that, given there are no Italian rules requiring a party to disclose the existence of TPF, it is difficult to re-

veal any conflicts of interest between the Fund and the arbitrators in the arbitration panel. The Fund, in fact, although not a party to the process, has an economic interest in the outcome.

It is not surprising that the rules of some Italian institutions and arbitration panels have started to require parties to disclose whether there is a TPF agreement in place for the purpose of transparency.

Pending the enforcement of relevant Italian legislation, Italian lawyers have a duty to protect their clients from the disadvantages and dangers generated by this tool. In particular, where a client decides to use TPF, the lawyer will have to assist by drafting the funding agreement which, among other things, will govern: (i) the Fund's right to payment and how it is to be determined, (ii) the specific list of costs to be borne by the Fund, (iii) the procedures and limits of the Fund's intervention in defense strategies and the conduct of the case, (iv) how negotiation of a possible settlement should be conducted, (v) how payment of the Fund's proceeds should be managed and what guarantees payment, (vi) any after-the-event insurance, (vii) the procedures for resolving any disputes between the client and the Fund.

While not wishing to detract from the issues raised, it is undeniable that this tool is an effective support for all SMEs that face daily challenges in the global market and a good example to the world of ordinary litigation in which the assessment of the reasonableness of a claim often comes into play later.

It would be interesting to create an ELA working group on the subject or at least know how the trend is developing in other European countries.

Marco Pistis

Partner, Abbatascianni Studio Legale e Tributario

