Paris Baby Investigation – Episode 5 :
Third party funding of arbitration proceedings,
with Ms. Yasmin Mohammad (English transcript)

[Introduction]

PBA: Welcome to another episode of the Paris Baby Investigation podcast. Today we have the pleasure to discuss with Yasmin Mohammad. Hello!

Yasmin Mohammad: Hello!

PBA: After your university studies, you practiced for 9 years as a lawyer at Freshfields where you represented clients in international matters before various jurisdictions. At the same time, you worked as an independent legal consultant for 2 years and co-founded an NGO on freedom of expression before joining Vannin Capital, a company specialized in financing dispute resolution procedures, in 2014. You will work there for 8 years, thus specializing in Third-Party funding, before joining last November Fortress Investment Group, which acquired in 2019 Vannin Capital, as a director, in the Legal Assets department, which is the department that deals with law-related investments.
You are a speaker on third party funding as well as artificial intelligence among others, you are a mother, motivational speaker, feminist, I will stop here and thank you again Ms. Mohammad for accepting our invitation and for receiving us in your offices for this interview.

PBA: To begin with and to give a precise idea of this mechanism which may still be foreign to some people, what is your definition of third-party funding?

Yasmin Mohammad: First, thank you very much for inviting me to participate today in your podcast. I listen to it regularly and I think it's excellent and I'm honored to have been invited to participate, thank you.

So as far as third-party funding is concerned, it's a mechanism through which a third party (a company or a third person), finances the costs, so the lawyers' fees, the arbitrators' fees, the experts' fees, all the costs related to a case, for a plaintiff in general, in exchange for a percentage of the damages if the case wins. If the case loses, the third party loses everything. So, it's an investment, not a loan. For those who have done some corporate or company law, it's closer to private equity than to a bank loan (it has nothing to do with a bank loan). And so, it's an investment that includes, as you will have understood, the risk of legal uncertainty in its philosophy.

PBA: Okay, and precisely in view of the risk involved in such financing, one might ask what interest structures like yours would find in financing procedures, and in particular when the client is a company in financial difficulty?

Yasmin Mohammad: So, it is not so much the quality of the applicant that could represent a problem for the third-party financer. The fact that the applicant is in financial difficulty, for us, for a financing company, poses very few problems. Unless it is really in judicial liquidation and in this case, our interlocutor is no longer the company but the judicial liquidator or the administrator of the company. But that's really organization, it's contractual.

The difficulty for us would be the situation in which the defendant is in financial difficulties. Because, when we finance a case, we finance a case that has real chances of success, which are strong. And therefore, we hope to be paid thanks to the execution of the decision against the defendant. So, we are more interested in the defendant's finances than in the plaintiff's finances. The fact that a claimant has little money or has financial difficulties, this happens relatively often, it happens very regularly, especially in investment cases. In investment arbitration, in fact, claimants are often companies that have been expropriated, from which the economic tool has been taken away, and therefore they have very little means at their disposal to pay for the arbitration procedures that are relatively expensive. So, the financial difficulties of the plaintiff is something that we are often confronted with and it is not what matters to us. Why is it interesting for us? It is interesting for us in the sense that, if a file has a real good chance of success and the defendant has money, it becomes much more interesting for us.

PBA: And in this respect, can you tell us about a case that has interested you or marked you? And of course, without the details that could violate confidentiality...

Yasmin Mohammad: I am going to talk about a file that I did not fund, which is a public file. I am not going to give you all the details, it is a case that dealt with the rights of a person who had concluded a contract on the use of a frontier land on which there happened to be a lot of oil and the rights holders therefore attacked the state which had taken back its rights, or thought it had taken back its rights, on this land whereas this land belonged to a private person at the base and the state was using it within the framework of a commercial contract, but which went back to a long time. Unfortunately, this case was not financed because the applicable law was an old law that was really subject to interpretation. The language in which the arbitration clause was drafted was an old language, and therefore no longer in use. And once again, the interpretation of the arbitration clause according to this language that was no longer in use, and this law that was no longer in use... All of this became very uncertain, and even though I was fascinated by the history of this country, of this family, and by the questions of interpretation of an arbitration clause in these circumstances, unfortunately, we did not finance it. It turns out that the case was won. It has not been executed for the moment,

but the case has been won. So, we follow the files, we do not finance the files that interest us, necessarily we follow to know what happens.

PBA: Okay, so I understand that you intervene upstream of the procedure in order to evaluate the chances of success of the case you are financing. How do you proceed concretely? Do you call upon lawyers who are experts in arbitration to study the files for example?

Yasmin Mohammad: So, we do intervene upstream, but not only. We can also intervene in the middle of a case. We can even intervene when a case is finished, i.e. when the sentence has been rendered and the applicant is looking for financing to execute his sentence, because that is also long and it can be very expensive, or the applicant would like to be paid at the end of his sentence today, so an advance monetization of his sentence. So these are cases in which we can intervene, but in fact, in the academic definition of third-party financing, the third-party funder would intervene upstream, he would review the elements of the case available, in particular also, for example, a note prepared by the client's lawyers, the applicant, and it would be our role internally to review the case, to make an analysis of the chances of success of the case and to determine if it is an investment that interests us. We also use external lawyers, insofar as we always try to find the best possible specialization, the best specialist to help us determine if it is an investment that interests us.

PBA: Precisely, what are the criteria that determine your decision to finance a procedure?

Yasmin Mohammad: What will surprise you is that the first criteria that we look at, and the criteria that very often cause us not to fund the cases, have nothing to do with the law, with the merits of the dispute. They are purely financial criteria. That is to say that in order to be financeable, a case must have a ratio between the necessary budget, therefore the financing that we are asked to provide, and the reasonable damages that we hope for. This ratio must be high enough for us to be able to finance this case, to hope to have a return on investment, while keeping for the plaintiff more than half of the damages. So that ratio must exist, the academic ratio that we use is a ratio of one to ten. If a case is going to cost one, we look for a case with reasonable damages of ten. Why do I say reasonable? Because very often the damages are inflated, often by the plaintiff and his lawyers at the beginning of the case and we are trying to understand where the reasonable damages really are. Is it the loss of chance quantified in billions or is it the money that the plaintiff will have really paid and invested in a case plus interest. We will really try to reduce the amount requested to what we think is really reasonable, or as conservative as possible, and base our estimate of damages on that and look at that ratio.

Very often, we are confronted with situations where this ratio is not good. The case must cost far too much for what we think it will bring to the client. As a result, it is not a case that is appropriate or that is financeable within the framework of third-party financing. Because

third-party financing is very high-risk financing, the funder really takes the risk of losing or winning in the end. Especially in arbitration, there is no appeal, so the binary risk is very high. As the binary risk is very high, the return on investment of the funder is of course much higher than what you would expect for a bank loan. In a bank loan, the bank does not take a risk on its loan. It takes the risk that its client will not repay the loan, but whatever happens, the loan must be repaid, whether the client loses or wins the case. And so, in those circumstances, we tell the applicant, the clients and their lawyers, that we don't think, at least in our view, that this is an appropriate case for financing, and that other forms of financing should be sought if possible.

PBA: Very well. Now on the mechanism, as you know, the third-party funding is subject to many criticisms, and one of them is the role of the funder in the procedure. So, I would like to know what role you play as a third party in the process. What is your involvement? To what extent did you intervene in the strategy put in place by the client and his counsel?

Yasmin Mohammad: I know that this is a criticism that has been made of third-party financing, but you know that since the very beginning of third-party financing, I have been practicing in this sector of international arbitration for almost 9 or 10 years, and this criticism has been made since the very beginning, even before practice had really seen what was going on in reality. So, it seemed to me that it was a criticism that was made in a very theoretical way. The arbitration community, the lawyers and the arbitrators were saying to themselves "but if we allow a third party to enter into the client-lawyer relationship, if this third party ultimately pays the lawyers' fees, then this third party is necessarily there to take control, to direct, to take over the role of the client".

In practice, however, things are very different. The way it happens is that the third-party financier's job is to finance, i.e., to choose a good investment opportunity and finance it. We are not lawyers, nor quantum experts, nor arbitrators. We may have been lawyers but that is not our role today in these procedures. And so, in fact, in our criteria for choosing a case, one of the very first criteria we look at is: who are the lawyers? Are they good, do they have a good track record, are they able to win the case, are they people to whom we want to entrust the amount we are investing so that they can transform it into an enforceable arbitration award. That's what we do. So, we invest our money in cases in which we have confidence in the legal and technical team, so that they win the case. We're not there to do the job for them. There are not enough of us to do that job. In practice, it doesn't happen because it's not the job of any of the third-party funders to come in and direct the files. We have far too many to fund in our portfolio to go micromanage the files we fund.

I find that this criticism is not so much a criticism of the third-party financing community as it is a criticism of lawyers. Because this criticism implies that lawyers who participate in funded cases forget their code of ethics, forget their role with respect to their client, and let themselves be directed by third parties. And that, I think, is the most serious part of this

criticism. Because it's not very familiar with the third-party funding environment, maybe, it's not a big deal, it's explained. But this criticism is made by people who are themselves lawyers or who know the legal community very well. So, this criticism implies that a lawyer, because a third-party funder is involved in a case and it is not his client who pays his fees but the third-party funder, that would mean that the lawyer has totally forgotten his ethical obligations as a lawyer. Actually, no, this does not happen. The lawyers we work with are very good lawyers, I am not saying that there are only very good lawyers on the world market of international arbitration, but at least those we work with are very good lawyers and they have totally in mind every day their deontological code and the fact that their obligations are towards their clients and that the direction of the decisions comes from the clients and not from the third-party financiers.

PBA: Yes, you talk about ethics, this is also a criticism that is made of third-party funding... Aren't there moral and ethical grievances regarding a profession that consists of speculating on procedures in which people or companies potentially in financial difficulty are judged?

Yasmin Mohammad: So, there are several things in your question. First, the question assumes that the third-party funder is speculating. I could invite you to come and spend a few days with us if you want and observe more closely what third-party funders do, but there is no speculation. It's very thorough, very precise analyses of the law and of the facts that are done before investing in a file. So, it's not speculation. If we are told that it is speculation, it is speculation in the same way that we can invest in a company. Tomorrow, if you invest in a tech start-up that does artificial intelligence, it is as much speculation as what we do. In engineering, it's exactly the same mechanism. That's on the question of speculation.

On the other hand, on the question of investing in potentially troubled companies, does that pose a moral problem? It's a very interesting question because the way I see it is a totally opposite morality. I don't put morality in any financial tool whatsoever, and not even this one, but even if I were to have a more moralistic view, for me third-party financing is a tool for access to justice for plaintiffs or plaintiff companies that would not have access to arbitrators or to a judge when they have been wronged. They would not have access to an arbitrator and a judge because the procedure is expensive, and even if they were injured, because the procedure is expensive, they do not have access to an arbitrator, and precisely the third-party financing is a tool to give access to justice to this type of company. Now, there is a cost, because the third-party financing companies do not do this on a voluntary basis, but the effect on the plaintiff company which has financial difficulties, is precisely to give it access to justice.

You may not know it, but third-party financing as we know it today is an evolution of a technique for financing companies in liquidation in Australia. Third party financing has been around for much longer than that but in modern history, it's in Australia, liquidators who

found themselves with companies in great financial difficulty on hand, looked at the company, it couldn't pay its creditors, couldn't pay its creditors, but these companies had from time to time court cases in arbitration for which it didn't have the money to conduct the proceedings, But these companies had from time to time court cases in arbitration for which they did not have the money to carry out the procedure, so to be able to pay the lawyers or the arbitrators, but the liquidator, having the conviction that these cases were good, went to see the third party financiers and said to them "come and finance the case, if the case wins you will be able to have X per cent of the case but I will keep the remainder so that I can reimburse the creditors of the company that is in difficulty". And so, it was a tool not only for access to justice, but it was also a tool that allowed for the reimbursement of the creditors of companies in difficulty. Because otherwise, the company was going to die with these contentious arbitration files inside, so with this value that was locked inside and the creditors who had no chance to be reimbursed. So that's why I say to you, to put morality on the fact of coming to allow access to justice to companies that otherwise could not have access to this justice, I find the term inappropriate. Now, I've heard this question before, but I think that this criticism comes from a poorly conceived or poorly understood idea of the tool, how it is used, by whom. What this question induces is that this question loses sight once again of the fact that third-party financing is a financial, contractual, negotiated tool. There is no obligation to enter into a financing contract, so if a company does not wish to use third-party financing, there is no obligation, it is a totally negotiated contract, the financial terms are negotiated, the terms of the relationships, what one can say or do are negotiated, and in the extreme majority of cases of files that we finance, we are faced with very sophisticated applicant companies, with very sophisticated lawyers. We are not at all in a David versus Goliath situation, where the big bad financier would come and abuse the avenger or the orphan. Moreover, I don't know if you know it, but in France, legal cases are only very rarely financed. Those that are financed are arbitration cases. We are talking about millions of dollars or euros of damages, of companies that are very sophisticated, in which it is difficult to envisage, when you know the parties, a party that has an advantage, even if it is only intellectual, over the other.

PBA: The question also arises as to the existence of an obligation of disclosure on the part of the parties towards the arbitrator in order to enable the latter to be aware of the existence of such financing. Does such an obligation exist in law? If so, what do you think?

Yasmin Mohammad: It does not exist in French law, but it exists more and more in the rules of the various arbitration centers. So today, as I speak, about half of the arbitration centers in the world have decided that this disclosure is necessary. The other half, like the LCIA in London, have decided that it is not, or that it is too early to tell if this obligation should really be required of practices. As far as I'm concerned, as a representative of a third-party financing company, I think this disclosure is excellent, and I'll tell you why. Because in fact this disclosure protects the arbitration proceedings from any recourse by anyone later on to invoke a conflict of interest against the arbitrator vis-à-vis the third-party financier. And this

is a circumstance that I want to avoid at all costs because when I invest in a case, my investment, in fact, is contained in the award that will come out of the arbitration proceedings. If the award can be attacked for a conflict-of-interest issue afterwards, when I have already invested and my award can be attacked, it puts my investment at risk. This is a situation I want to avoid at all costs. So third-party funders are totally in favor of what will protect their investments. It was one of the things that puzzled me when this debate was launched, that this debate presupposed that the third-party funders certainly did not want to reveal their existence, whereas the opposite is true.

Again, when you understand what third party funding is, when you understand that your money is invested and you're not going to get it back until that award is made and you're able to enforce it, and that any pitfall from the beginning until the moment we recover the money from this award that jeopardizes our arbitration award and therefore the recovery of our investment, is something we want to avoid and the disclosure therefore protects from a late recourse of the other party for any conflict of interest. So no, on the contrary, the third-party financiers are rather in favor of disclosure.

PBA: A question relating to the profession now, what is the profile of the people who work in this field?

Yasmin Mohammad: So, there are two very different profiles, there is a profile of former lawyers, like me, who will work for several years and who came to this profession afterwards. Then there is another profile of people who come from finance with an interest in legal matters but who come from finance and who approach third-party financing as the financial tool that it also is. Third-party financing is really at the margin of law and finance. In practicing it, personally for several years, I can see that I started out as a 100% arbitration lawyer and that today what I do on a daily basis is really a mixture of law and finance on a very daily basis and very very mixed. So, both profiles exist in our profession. I think that this will continue, that we will continue to have both legal and financial profiles that will populate this industry.

PBA: But this implies having a variety of skills, which explains why few people go into the specialty. Without having any figures, we can indeed observe that this is not the first career option envisaged by students, for example.

Yasmin Mohammad: So, I think that we don't see many people going into this specialty because third-party funders in general are looking for legal profiles that are already senior. The junior legal profile is less interesting for a third-party funder. The junior financial profile is more interesting for a third-party funder because the nature of what you will be asked to do as a lawyer is to come and take a critical look at a file and, thanks to your experience and

your knowledge of the law, to determine if you think that it is a winning or a losing file. It's very difficult to do when you're just out of law school and you've just been called to the bar, to take that look at a case. It is much easier to do when you have several years of experience.

On the other hand, when you come out of a top school, HEC, ESSEC, and you have a profile in finance, you can without difficulty run financial models, research analysts on more financial questions or even do some legal research on the profile of certain defendants. Let's say you have a defendant company A, B or C, go and look at its accounts, look at the statements it has made to its shareholders and determine whether or not it is a desirable defendant company. So, I think that's why you don't necessarily see a lot of junior legal profiles going in that direction.

PBA: And finally, what can you say to the people who are listening to us and who would like to go into this specialty?

Yasmin Mohammad: I think it's a specialty that I find very exciting because it's a specialty that forces us every day to question what we think we know, where we also do a lot of law. We do a lot of law with very good lawyers. So, we never stop learning. And it's also a specialty in which you learn a lot of other things about what I call the real world, that is to say the world of business, the way in which companies operate, the financial markets. A lot of things that we don't talk about very much, or at least that I didn't talk about very much during my studies and that I really learned about later in practice, rather since I've been in the finance world.

What I would advise to students coming out of school today who have a rather legal profile is that if it is a profession that interests you, spend some time working in a legal profession, learn the profession, forge an eye, have an experience that will allow you to look at and be able to determine if a file contains an interesting investment opportunity. But I think it is important to have a few years of experience because you must be able to put yourself in the shoes of your client, i.e., an investment company, and say to yourself that what I am interested in here is a file that will win, not a beautiful file. There are plenty of beautiful files that lose. As a lawyer, you can have a lot of very good cases that you are very proud of, that you loved and that you were passionate about, but which ultimately lose. It's less serious when you're a lawyer because you've been paid during the life of the case, but when you're a third-party funder and you lose a case, it means that you've lost your entire investment, and that's much more serious. So that's why I would advise young lawyers to spend a few years in a law firm before going into the third-party financing business. On the other hand, if you are really interested in this profession and you would really like to get into it from the start, you should add a finance course to your studies.

PBA: Thank you very much Mrs. Mohammad for this very instructive exchange and for your advice.

Yasmin Mohammad: It is a great pleasure to welcome you and I hope to see you again very soon.

PBA: We do too, thank you.