

Binding third-party decision

The binding third-party decision has many applications and can be useful, among other things, in anticipating certain unforeseen developments in ongoing contracts. Below you will find an overview of the characteristics of this legal mechanism and the distinction between arbitration and a court expert investigation.

WHAT IS A BINDING THIRD-PARTY DECISION?

A binding third-party decision implies that parties agree that a third party (who is neither a judge nor an arbitrator) will provide a **binding assessment** regarding one or more aspects of their (factual or legal) relationship.

This legal mechanism has **many applications** and is frequently used, for example, in the context of technically complex contracts and international trade contracts which are subject to unforeseen developments (such as inflation, the price of raw materials, changes in profitability, etc.), or to determine rental damage upon termination of a lease, to determine the value of shares, to determine the degree of incapacity to work in the event of an amicable medical expert examination, or to adjust damages after a financial loss. The third party is usually a specialist in the profession or subject in question.

The legal mechanism of the binding third-party decision can therefore also be useful to anticipate certain unforeseen developments in current contracts, or when concluding new contracts in order to help resolve any problems that may arise in their future execution.

WHAT IS THE SCOPE OF A BINDING THIRD-PARTY DECISION?

The binding third-party decision has **the legal force of an agreement**, which implies that the court cannot simply ignore the existence of both the binding third-party decision agreement and the third-party decision itself. In principle, the parties and the court are therefore bound by this (Art. 1134 Belgian Civil Code).

The **judge** retains the option of a **marginal review** of the binding third-party decision. This implies that the judge will only be able to review whether this decision is obviously unreasonable (in terms of content) or if it was established (formally) in violation of the agreed procedure.

The court may therefore not substitute its own opinion for that of the third party decision-maker.

CAN A BINDING THIRD-PARTY DECISION BE ANNULLED?

If a party does not agree with the binding third-party decision, it can request the ordinary court to declare the binding third-party decision **invalid** (as a result of which the parties will no longer be bound by it) if the binding third-party decision:

- Is obviously unreasonable;
- Is incomplete;
- Contains gross material errors; or
- The third party has not observed his/her mission (e.g. violation of the agreed procedure).

The party requesting the "declaration of non-binding effect" clearly bears the burden of proof in this respect.

WHAT IS THE DIFFERENCE WITH ARBITRATION?

In practice, we have seen that discussions may arise between parties as to whether the agreement concluded is a binding third-party decision or an arbitration agreement. The use of the word "arbitrator" for the third party, or the fact that the agreement is named "arbitration agreement", are not decisive in this regard; it is the intention of the parties that prevails.

The important **distinction** here is that in an **arbitration agreement**, the parties agree to have their dispute settled by means of a formal decision of a judicial nature (arbitral sentence). Following these arbitration proceedings, their dispute is definitively settled: the parties must comply with the arbitral sentence and there is generally no possibility of an appeal. This is not so in the case of a binding third-party decision, in which a dispute does not necessarily have to be present. Such a third-party decision can simply relate to a mere factual assessment.

WHAT IS THE DIFFERENCE WITH A COURT EXPERT INVESTIGATION?

A court expert investigation results in a **non-binding** technical advice (in the form of a final report) from the court expert (usually) concerning the cause of a damage incident or the responsibility of the parties involved. This advice only serves as a technical guide to the court to aid in the assessment of the dispute itself.

Unlike the binding third-party decision, the final report of the court expert does not bind the parties or the court and may be subject to further discussion. In practice, however, in 95% of the cases the court does follow the technical advice of the court expert.

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