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THIRD PARTY FUNDING TERMS > IT'S MORE THAN JUST THE PRICE

Across the globe, Third Party Funding (TPF) is becoming more accepted and mainstream. This year, the major dispute resolution hubs of Singapore and Hong Kong have legislated to remove historical barriers to the use of TPF in international arbitration proceedings. Vannin continues to see an increase in the number of large companies who are using TPF to more efficiently manage their involvement in dispute resolution processes.

With increased use of TPF, comes different approaches to obtaining the right product. We have found that many claimants approach TPF in the same way they go about obtaining general finance or other financial products for their business (such as hedging agreements, insurance etc), and seek multiple offers from different funders for a solution. In this regard, the immediate comparator between funding proposals often becomes the premium that is payable to the funder on a successful outcome. Whilst this is clearly an important aspect of any funding arrangement, a narrow focus on price excludes many other features which should be of significant value to a funded claimant.

In this article, based on our years of experience in the global TPF industry, we outline what we consider to be the key additional features that claimants should carefully consider when negotiating any TPF arrangement.





Timothy Webb
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Who is the funder?

In recent years, a number of new participants have arrived on the TPF scene. Whilst some of these funders purport to have track records, they often have corporate structures and are incorporated in jurisdictions which make understanding their business difficult. This can have important consequences for claimants. For example, funders who have external investors (eg, hedge funds or are listed), are likely to have obligations to regularly report on (and achieve) certain results. This may drive the behaviour of those funders in relation to their funded cases and "low ball" settlement offers. Claimants need to ensure their interests align with those of the funder to the greatest extent possible. Vannin is a private investment company. This gives us many advantages, including that we are not sensitive to timing pressures to recognise revenue in the same way that some of our competitors are. Vannin is a patient partner in any case that it funds.

TPF is a difficult business and a prospective funder should be able to satisfy a claimant that they have navigated the ups and downs of TPF and have multiple years of experience in funding cases of the type being litigated by the claimant. When the going gets tough, a claimant needs to be satisfied that their funder will have the resilience to stick by them.

Claimants should also satisfy themselves that their funder has experience funding cases in the jurisdiction where their claim is being litigated. There are many important and significant regulatory differences between relevant jurisdictions where TPF is permissible. For example, in Singapore, TPF arrangements are permissible in the context of international arbitration, but only to the extent that the certain regulatory requirements are met, including that the funder meets the definition of a "Qualifying Third Party Funder."

The financial wherewithal of the funder not only has overall importance, but is particularly relevant to the question of how security for costs will be dealt with in the dispute. Some funders will seek to manage the exposure on balance sheet through a deed poll lodged with the Court, but claimants need to understand how many of these exposures the funder might have and be satisfied that the funder can make good on them when called upon. Vannin insures all of its adverse cost exposures through insurance policies placed with a global "A rated" insurer, which we consider gives claimants additional certainty through a freestanding policy with coverage at whatever amount is required by the claimant.

"The market for TPF has evolved significantly in recent times with Australian funders and international funders with an Australian base, now funding a broader variety and scale of disputes. Funders are increasingly showing interest in a range of meritorious claims falling outside traditional insolvency and class action contexts, such as within the intellectual property sphere. However, given the varying levels of sophistication among funders, it is essential that potential claimants take the time to carefully consider a prospective funder – it could mean the difference between a successful or unsatisfactory outcome. A range of matters should be considered, including what due diligence is required to satisfy the funder's risk and commercial policies in making funding decisions, and whether they have the financial backing to support the case throughout the entire dispute process."





How is the deal structured?

Vannin is a pioneer in the use of innovative pricing structures for TPF transactions. We regularly include a premium in our transactions expressed as either a multiple of the funding provided, a simple interest rate on the funding advanced or a share of recoveries (or a combination of those concepts). It is also important for any pricing structure to recognise that the applicable premium payable to the funder should change with the funder's risk profile across the life of the dispute (which is generally affected by both the effluxion of time and increasing spend). For example, it would be appropriate for a funding structure to recognise a comparatively lower rate for an early settlement or where the funder expended less than a given amount of the funding facility.

Claimants should also clarify with their proposed funder that the headline funding premium represents the only fee that will be payable to the funder, or whether (and in what circumstances) additional costs might be payable. For example, we are aware that in addition to the premium, some funders choose to charge claimants a "project management fee" and charge a further premium amount to the extent that further defendants are joined to a case. Vannin does not charge either of these fees.

In addition, claimants might also wish to consider whether it may be commercially beneficial for them to include the primary claim within a broader portfolio of claims in which they are involved (which may include defendant exposures). Vannin regularly provides portfolio funding solutions which include multiple claims.



Timothy Cooke
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STEPHENSON HARWOOD, SINGAPORE

"For many people, the notion of third party funding is equated with an arrangement for the payment of an impecunious claimant's costs of preparing and arguing a case, in return for a premium if the claimant is awarded damages. Although this description is accurate for many cases, it does not capture the broader and more sophisticated suite of structures available to the market. For example, funding is not the exclusive preserve of the impecunious. Corporates may use funding as a tool to manage the risks inherent in the prosecution of any claim, including the exposure to adverse costs orders which in large claims can be substantial. Claimants may also be involved in multiple claims (in some of which they may be respondents) that involve similar factual or legal issues, and which could be funded on a portfolio basis. These sorts of variables – and there are many others – will also shape how the funder's premium is to be calculated."



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Do we have the same case strategy?

In any TPF arrangement, funders should bring their extensive experience to the table, in both funding (and winning) disputes of the type the claimant seeks funding for. Most leading funders view themselves as partners in the dispute resolution process and provide their expertise as a non-additional cost to their funding (ie, no project management fee), as and when required.

One of the key areas where funders can add value is in relation to the likely cost of running the dispute to final hearing. Based on our years of experience, we can generally assess whether anticipated legal budgets will be adequate or not. Vannin's preference is to pay legal advisors the full amount of their usual rates as the case progresses. Claimants should be wary of potential consequences from funding arrangements where funders insist on risk sharing terms with legal teams in order to reduce the overall amount of funding they need to provide. In our experience, the performance of the legal team can suffer when budgetary caps are reached, and the legal team is required to continue work on the case without payment. Claimants should also understand whether their funding terms change (to become more expensive) if the original budget is exceeded.

Many claimants will have views as to how their case should be conducted, for example, including where the best evidence is likely to be found and how it should be introduced. This might include specific things such as views about what evidence might be relevant, or more generally, how much it might cost to litigate the claim. Claimants should discuss these topics with their legal advisors and prospective funder before entering into a TPF arrangement to ensure there is consensus as to how the claim needs to be conducted. However, most leading funders will be content to follow a case strategy which the claimant has determined in consultation with the legal team.

The strength of the legal team is crucial to obtaining a successful outcome in any case. In jurisdictions where external Counsel from a local bar will be used, it will be important for the team to have worked with this Counsel before and have confidence that they are the right person for the job. Funders often have significant experience working with various Counsel and can provide helpful input on selecting the best person for the job.

"Litigation funders are professional litigants, and they bring to the table enormous practical experience of litigation including timing, costs, key procedural steps and choosing counsel and experts. There is also the immeasurable benefit of having another set of highly qualified "eyes" to consider all aspects of the litigation.

The funder's financial interest as well as their considerable experience enables proactive and considered upfront planning to occur in consultation with the litigant and their legal advisers to optimise the conduct of the litigation including – critically – the approach to the evidence that will be led and the choice of appropriate expert witnesses. Ensuring consensus is reached early regarding the approach to the critical issues in the litigation is clearly for the benefit of both funder and litigant, to maximise the prospects of success and avoid any surprises."

Can we work together?

The resolution of significant commercial litigation or arbitration can take many years. Accordingly, claimants need to be satisfied that they can work together effectively with their funder and that their LFA provides an appropriate framework for this. For example, the LFA should provide for a dispute resolution mechanism in the event that there is disagreement between the parties. Most LFAs contain a mechanism for a senior barrister to determine any dispute between the parties and provide that the determination is to be binding.

However, the funder's track record will be most instructive – can the funder point to circumstances where it has successfully funded similar cases? At Vannin, we hope that our years of experience in the global TPF market will provide claimants with comfort and certainty that we can be a trusted funding partner.

