



GUIDELINES FOR COUNSEL ON VANNIN'S THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION

A party to a dispute ("client") or its counsel may resort to third party funding to finance their arbitration claim when liquidity is insufficient to support the arbitration effort, or simply when the client's business plan has identified investment priorities different from pursuing an arbitration. In these circumstances, the client or counsel interested in initiating an arbitration may resort to third party funding.

The following guidelines set out the steps to identify financially profitable and meritorious claims, and advise on the information that the client and counsel should provide to enable Vannin's timely assessment and response on whether the claim could be funded. The guidelines also identify the information that the client and counsel should provide to help broker an agreement between the client, counsel and Vannin, which will fund the arbitration and create the appropriate financing conditions to obtain a favorable and enforceable award.

I. Non-Disclosure Agreement

To ensure that any confidential information that may be exchanged between Vannin and the client and/or between Vannin and counsel be kept strictly confidential, before receiving any information about the case, the client and Vannin, and/or counsel and Vannin consider and sign a non-disclosure agreement ("NDA"). An NDA draft can be made readily available to the client or counsel by Vannin.

II. First Level Review

Vannin may initiate the first level review process once the client or counsel share relevant information that would permit analyzing and confirming the case's reasonable expected damages, the likelihood of enforcement of a favorable award, an international arbitration tribunal's jurisdiction, and the merits of the case. This first level review is spearheaded by one of the Managing Directors of Vannin's Global Arbitration Team.

Vannin's consideration and analysis of the case is streamlined when counsel provide the following information and objectively assess the following issues in a memorandum – accompanied by the key supporting evidence:

1. The reasonably expected damages,
2. A budget of the arbitration claim up to the point of execution of the award,
3. The likelihood of enforcing a favorable award,
4. The jurisdiction of the international tribunal, and
5. The merits of the case.

Following receipt of an objective assessment of the case, Vannin may have questions for counsel or the client, and may request additional supporting documentation. Normally, the first level review takes between 2 to 4 weeks.

A client or counsel might reach out to Vannin without sharing the complete information listed above and without providing an objective analysis of the aforementioned issues. In those circumstances, Vannin may still consider the case but a decision on whether the arbitration claim may be funded may take considerably longer.

Vannin neither finances counsel's initial analysis of the case nor an assessment of the reasonably expected damages. However, if such analyses are carried out by counsel or a damages expert, respectively, and Vannin commits to funding the case after concluding its vetting process, it will reimburse counsel's and the damages expert's fees related to those preliminary assessments as part of the global funding budget.

The following sections identify the key factors involved in Vannin's assessment of the case.

1. Estimated budget and reasonably expected damages

Relying on information that the client or counsel provide, Vannin analyzes whether the case meets a 1/10 ratio cost of the arbitration to reasonable expected damages. For example, in a dispute in which the expected cost of the arbitration is US\$ 3.5 million, the reasonable expected damages should be no less than US\$ 35 million.

Cost of arbitration/Reasonably expected damages = 1/10

a. Budget

Preparing and providing the budget of the arbitration is key to assessing whether funding a particular case makes financial sense. The budget should include lawyers' fees, experts' fees, arbitrators' fees, and disbursements and administrative fees if an arbitral institution administers the case, as well as any other costs of the arbitration.

The budget will of course vary depending on the complexity of the case, and on whether funding is being sought from the inception of the arbitration, or after certain submissions have been filed.

b. Reasonable quantum assessment

Vannin will undertake a conservative assessment of the quantum claimed. The methods of valuation and the applicable jurisprudence will be examined to determine what methodology is most likely to be preferred by a tribunal. In some instances, a pure sunk cost analysis will be preferred and in others a full discounted cash flow ("DCF") analysis will be used. This decision will depend on the nature of the asset, whether it is or was a going concern with proper and verifiable historical data, the industry concerned and the geographic location.

2. Enforcement of the award

The jurisdiction where the enforcement of the award would be sought will vary depending on the facts of the case and the strategy that counsel foresees, e.g., whether the arbitration is an international commercial arbitration, or an investment arbitration under the ICSID Convention. Thus, to assess the risk of recoverability and enforcement counsel would:

- a. Identify the jurisdiction where the award would be enforced, and
- b. Assess the likelihood of successful enforcement of an award in such jurisdiction.

3. Jurisdiction and merits

If satisfactory, the aforementioned factors would lead to conclude that financing the arbitration claim could be profitable in case the tribunal renders a favorable award. However, counsel's objective analysis of the potential jurisdictional objections and merit defenses, including consideration of prior awards on similar issues of fact and law, would be essential to assess whether an international tribunal would hear the case, and whether the claims are meritorious. Receiving a memorandum or opinion from counsel discussing such issues will be instrumental in Vannin's first level review and is likely to greatly increase the speed at which we are in a position to revert with an expression of interest.

4. Indicative commercial terms

Provided that at the first level review Vannin concludes that the arbitration is more likely than not to succeed, Vannin will propose to the client and counsel indicative commercial terms that will reflect our view of the strengths and weaknesses of the case.

The proposed terms specify the amount of funding that Vannin offers, the timing of the disbursement of the funds during the course of the arbitration, and the expected return on investment sought by Vannin in case the arbitration is successful and the claimant collects money from the respondent. If the arbitration is lost or if no money is collected, nothing will be owed to Vannin. Typically, the terms will envisage more favorable terms for the clients in cases of early settlements.

Agreement on the indicative commercial terms between the client and Vannin, will lead to an exclusivity period of approximately 30 to 40 days during which Vannin will undertake a "Second Level" review on its own dime.

III. Second Level Review

This level of review involves an assessment of the case's issues of jurisdiction and merits by an outside expert arbitrator or seasoned arbitration practitioner with experience on the issues relevant to the case. It also involves an assessment of the reasonable expected damages by a damages expert.

If the case has at minimum a "60%" probability of success according to the outside experts at the second level of review, subject to consideration and approval of its Investment Committee, Vannin confirms the financial terms offered to the client and counsel, and proceeds to the signature of a Funding Agreement.

IV. Vannin during the Arbitration

Once the client, counsel and Vannin agree to the financial terms, and funding begins, counsel is expected to report to Vannin on the relevant developments of the case on a monthly basis.

Considering the aforementioned rigorous review process, once Vannin commits to funding the case, there is full confidence in the merits of the claim and the quality of counsel. We recognize that the fiduciary obligations of counsel remain vis-à-vis the client throughout the arbitration. Consistent with the code of conduct of the Association of Litigation Funders to which Vannin belongs, we do "not seek to influence the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder." Thus, as a matter of principle, control of the arbitration is maintained by counsel as instructed by the client.

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