

VANNIN CAPITAL

14 January 2018

Meg Kinnear
Secretary-General
International Centre for Settlement of Investment Disputes – ICSID
1818 H Street, N.W.
MSN J2-200
Washington, D.C. 20433
U.S.A.

Re: Vannin Capital’s Comments on Proposals for Amendment of the ICSID Rules on Third Party Funding

Vannin Capital is a global expert in legal finance, supporting law firms and corporations in the successful resolution of high-value commercial disputes. We are a member of the Association of Litigation Funders of England and Wales (“ALF”) and conduct our business to the highest ethical standards in line with the ALF code of conduct.

We are pleased to contribute to the discussion on the Proposals for Amendment of the ICSID Rules (“Proposed Amendments”) by submitting Vannin’s comments, which focus on those amendments related to third party funding (“TPF”), in particular proposed ICSID Convention Arbitration Rule 21, Additional Facility Rule 32 and Revised Schedule 2: Declaration of Arbitrator,¹ which read, in relevant part:

ICSID Convention Arbitration Rule 21 and Additional Facility Arbitration Rule 32

“Disclosure of Third-party Funding

(1) “Third-party funding” is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute (“third-party funder”), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided:

- (a) through a donation or grant; or
- (b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding.

(2) A party shall file a written notice disclosing that it has third-party funding and the name of the third-party funder. Such notice shall be sent to the

¹ Proposals for Amendment of the ICSID Rules — Working Paper (2 August 2018), 129, 515, 880.

Secretariat immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration.

(3) Each party shall have a continuing obligation to disclose any changes to the information referred to in paragraph (2) occurring after the initial disclosure, including termination of the funding arrangement.”²

“Revised Schedule 2: Arbitrator Declaration

(...)

4. I understand that I am required to disclose:

a. my professional, business and other significant relationships, within the past five years with:

i. the parties;

ii. counsel for the parties;

iii. other members of the Tribunal (presently known); and

iv. any third-party funder disclosed pursuant to [Rule 21(2) of the Arbitration Rules/ Rule 32(2) of the (Additional Facility) Arbitration Rules]. (...)³
(Emphasis added)

Disclosure of the Existence of Third Party Funding and the Identity of the Funder

We note that these Proposed Amendments require a funded party to disclose the fact of funding and the name of the funder. The purported reason for such disclosure is the avoidance of potential conflicts of interest.

It bears noting at the outset that the issue of avoiding potential conflicts of interest is a theoretical one. Although this issue has sparked tremendous academic debate and concern, the risk in practice is minimal and, to date, remains purely theoretical. Indeed, we are not aware of any case where an arbitrator was disqualified due to a conflict of interest arising out of his or her relationship with a third party funder.

This is unsurprising. Indeed, this issue remains theoretical precisely because professional third party funders have a system of conflict checks in place. Professional funders store information relating to the arbitrators appointed in the various cases which they fund or, where relevant, arbitrators who, in their capacity as counsel, were involved in the funder’s due diligence process.

² Proposals for Amendment of the ICSID Rules — Working Paper (2 August 2018), 129, 515.

³ Proposals for Amendment of the ICSID Rules — Working Paper (2 August 2018), p. 880.

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At the outset of their involvement in a case, even before sending the Non-Disclosure Agreement to the potential client, professional funders run a conflict check to ensure that there is no pre-existing relationship with an arbitrator involved in the given case which could give rise to potential conflicts of interest or the appearance of conflicts of interest.

Vannin Capital, as part of its institutional good practices, runs an internal conflict check every time it considers financing a case and keeps a record of all arbitrators involved in matters financed or reviewed by Vannin.

In a situation where there is a pre-existing relationship with any of the arbitrators in a dispute, professional funders flag this relationship to the potential client and its legal team. Professional funders like Vannin Capital, will in appropriate circumstances request the client to disclose funding to, in turn, enable the arbitrators to disclose their previous relationship with the funder. The funder can go as far as inserting a provision in the Funding Agreement, making disclosure a pre-condition to funding.

The reason for this is because leaving a situation of potential or apparent conflicts of interest undisclosed puts the funder's investment at risk. It is precisely this situation, which could potentially endanger, and ultimately derail the arbitration that they are investing in, that funders are looking to prevent. It is not in the funder's interest to finance arbitrations where the award – and ultimately the chance of recovery – is under threat of challenge.

This is why, as a professional funder, Vannin Capital itself has no objection to the disclosure of its involvement in financing ICSID arbitrations. Indeed, there is nothing in the Non-Disclosure Agreements or Funding Agreements that we enter into with parties that would prevent such disclosure in an arbitration proceeding.

On the contrary, Vannin Capital is in fact in favour of any rules requiring disclosure of TPF. Such disclosure ensures that any potential conflict or appearance of conflict of interest will be aired and dealt with at the outset of the proceedings, which gives an additional guarantee of protection to Vannin Capital's investment.

This being said, as a professional funder we have an obligation to speak up for our client: the funded parties bringing the claims in these proceedings and the ultimate end-users of arbitration. For them, a rule requiring the mandatory disclosure of TPF is not necessarily in their best interest.

First, Respondent states have used the misconception that funding implies a lack of resources to cover the costs of the arbitration to their advantage and have marshalled it as a justification to submit security for costs applications. Respondents regularly apply for such orders immediately after learning of the existence of funding by a third party.

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Such applications increase the cost of funding and consequently, render the arbitration and ultimately the access to justice more costly for the claimants.

Any negative connotations with respect to TPF are misplaced and based on faulty premises. Funding does not necessarily imply that a claimant is suffering from a lack of resources. Quite to the contrary, TPF is increasingly being used by well-capitalised corporations. There has been and continues to be a tremendous growth in the use of such financing by corporations wishing to take litigation/arbitration costs off their balance sheets and to allocate those resources to growing their businesses instead. Moreover, in the context of investor-State arbitrations, a party's suffering from a lack of resources, should it be the case, may well be due to actions attributable to the State.

The existence of funding by a reputable professional funder such as Vannin should in fact send positive signals regarding the viability of the underlying claim. Indeed, prior to being brought before the Tribunal, the relevant claims have already been through several levels of review and analysis, all concluding that the claims being brought are strong and meritorious.

If, however, ICSID is still minded to include a disclosure requirement, it would make sense to include an express provision to the effect that the fact of funding is not sufficient reason to justify a security for costs order.⁴ There should also be an express provision allowing the tribunal to hold the requesting party liable for the costs of posting security in the event that security turns out to be unnecessary.⁵ In addition, Vannin would welcome a provision allowing claimants to claim for funding costs where third party funding is the only means of financing a dispute precisely because the Respondent's actions have rendered it impecunious.

Second, for commercial reasons, including but not limited to protecting its assets, reputation and operations, the party relying on TPF may not want to publicize its reliance in funding. Disclosure of the existence of TPF is a decision that may affect—severely in some cases—the interests of the party relying on funding, and therefore, should be analysed on a case by case basis as opposed to being grouped under the purview of a rule of mandatory disclosure.

Moreover, in the ICSID context, provisions on TPF are not strictly necessary. ICSID tribunals are already well-equipped, by virtue of their inherent discretion, to address issues involving TPF.⁶ This is indeed evidenced by several cases in which tribunals have

⁴ See ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration. Proposed principles provide “ D.1 An application for security for costs should, in the first instance, be determined on the basis of the applicable test, without regard to the existence of any funding arrangement.”

⁵ See ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration. Proposed principle D.3.

⁶ See for example, ICSID Convention Article 44: “Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration

addressed requests for disclosure of the existence of TPF, the identity of the funder, the nature of the funding arrangement, and related requests for security for costs.

In the current unregulated environment, ICSID tribunals and other investment arbitration tribunals have exercised the power to decide requests for disclosure of the identity of the funder, by sometimes ordering such disclosure to yield greater transparency, and ensure that the arbitrators have no conflict of interest.⁷ In this same unregulated environment tribunals have also concluded that TPF does not create an automatic requirement to order disclosure of the funding agreement,⁸ and that the fact that a party's arbitration is funded by a third party does not necessarily mean that security for costs should be ordered.⁹

Finally, another point to flag is that the scope of the new Rules is limited by the proposed definition of third party. As TPF is a fast-moving and quickly-evolving industry, if the purpose is to cover all possible TPF arrangements, it is important that the proposed definition be sufficiently broad to avoid it becoming outdated and insufficient in scope very quickly.

Disclosure of the Funding Agreement

As explained by ICSID, the proposed ICSID rules on TPF do not require disclosure of the actual funding agreement or the terms of funding because such disclosure is “not needed to avoid conflict of interest”.¹⁰ If a party requests disclosure of a funding agreement it will be within the tribunal's discretion to address such request.¹¹ Vannin agrees that if a disclosure requirement is included, this should not extend to the terms of the funding agreement which may well be legally privileged (to the extent they reflect or reveal counsel's views on the strength of the underlying claim) and commercially sensitive.

Rules in effect on the date on which the parties consented to arbitration. **If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.**” (Emphasis added).

⁷ See *South American Silver Limited v. Plurinational State of Bolivia* (“*South American Silver v. Bolivia*”), PCA Case No. 2013-15, Procedural Order No. 10, 11 January 2016, para. 79, 85; *EuroGas Inc and Belmont Resources Inc v. Slovak Republic* (“*EuroGas v. Slovakia*”) (ICSID Case No. ARB/14/14), Transcript of the First Session and Hearing on Provisional Measures (17 March 2015) p. 145; see *Muhammet Çap & Sehil İnşaat Endüstri ve Ticaret Ltd Sti v. Turkmenistan* (ICSID Case No. ARB/12/6) (“*Muhammet v. Turkmenistan*”), Procedural Order No. 3 (12 June 2015), para. 13.

⁸ *South American Silver v. Bolivia*, para. 79, 85;

⁹ *Eskosol S.p.A. in liquidazione v. Italian Republic* (“*Eskosol v. Italy*”), ICSID Case No. ARB/15/50, Procedural Order No. 3 (Decision on Respondent Request on Provisional Measures), 12 April 2017, para. 37-38.

¹⁰ ICSID Rule Amendment Video on Third-Party Funding.

¹¹ ICSID Rule Amendment Video Series Part Five: Third-Party Funding (“ICSID Rule Amendment Video Series Part Five: Third-Party Funding”) (<https://www.youtube.com/watch?v=4NUug7cqEwY&feature=youtu.be>) (1 November 2018).

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Tribunals should consider on a case by case basis the question of disclosure of the funding agreement. The burden to prove that any specific term of the funding agreement is relevant to the dispute must be borne by the Respondent.¹² Not only should disclosure be ordered solely in exceptional circumstances, but tribunals should also consider safeguards that limit such disclosure when appropriate, such as in camera review and redaction of the agreement.

Conclusion

For the reasons set out above, the mandatory disclosures proposed in Rules 21 and 32 should not be adopted. While we as a funder, are in favour of mandatory disclosure, disclosure is not necessarily in our client's favour, for whom we have an obligation to speak out.

With their existing powers under the ICSID Convention and its Additional Facility Rules, ICSID tribunals are well equipped to continue deciding issues of disclosure on a case by case basis, considering, among others, (i) the interest of the disputing party relying on TPF, (ii) potential increases in arbitration costs, and (iii) any ensuing consequences to the funded party's access to justice.

Yours sincerely,

A handwritten signature in blue ink, enclosed in a large, loopy oval shape. The signature appears to be 'J. Rivas'.

José Antonio Rivas, Managing Director

Yasmin Mohammad, Head of Arbitration

Alexandra Dosman, Managing Director

Ania Farren, Managing Director

Anastasia Davis Bondarenko, Associate Director

¹² See ICCA-Queen Mary Task Force Report on Third-Party Funding in International Arbitration. Proposed principles B.2. and B.4 provide "The specific provisions of a funding agreement may be subject to confidentiality obligations between the parties, and may include information that is subject to a legal privilege; as a consequence, production of such provisions should only be ordered in exceptional circumstances...If the funding agreement...is deemed disclosable, the tribunal should permit appropriate redaction, or take other appropriate measures, and limit the purposes for which such information may be used".