

When a Dollar Today May Be Worth More than Two Speculative Dollars Tomorrow: Unlocking the Value of Arbitral Awards Early through Monetization Finance

August 20, 2024

Contact

Viren Mascarenhas, Partner
+1 212.530.5502
vmascarenhas@milbank.com

Kamel Aitelaj, Special Counsel
+1 202.835.7528
kaitelaj@milbank.com

Executive Summary

- Before commencing arbitration or litigation proceedings, claimants should not only consider the merits of their cases and whether they are likely to win, but also whether engaging in these proceedings is worth their time and expense.
- The use of innovative litigation-financing tools should be part of the calculus as to whether to initiate a dispute proceeding.
- One such tool is to “monetize” the arbitral award, which usually means sharing the claimant’s potential entitlement to monetary damages with a third-party buyer, or otherwise outright assigning the award to the third-party buyer, both in exchange for immediate or accelerated payments.
- By monetizing an award, claimants can get monetary payouts sooner rather than waiting for the outcome of the arbitration proceedings (and, potentially, annulment and/or enforcement proceedings if the award-debtors/respondents do not comply voluntarily with the awards). Additionally, claimants shift or at least reduce the risks associated with pursuing enforcement onto a third-party.
- Recently, the UK oil company Rockhopper Exploration plc entered into [an agreement](#) to monetize an investment treaty arbitration award of EUR 247 million against Italy, allowing it to receive a up-front payment; an additional payment in a second tranche contingent on prevailing in the annulment proceedings initiated by Italy; and final payments in the event of monetary recoveries in satisfaction of the award exceeding a threshold amount.
- A cautionary note: while potentially attractive, monetization arrangements are not universally accepted in all jurisdictions. Claimants seeking to monetize their awards should carefully identify the likely jurisdictions where enforcement of those awards will be sought and determine whether monetization arrangements are permissible in each such jurisdiction. Litigation funders and outside counsel can assist with that analysis.

What Is Award Monetization?

Monetization consists of a third-party financier advancing some portion of the expected entitlement of an existing or forthcoming arbitral award to a claimant in exchange for a share of that entitlement. Successful

claimants seeking to collect on damages at the end of a lengthy arbitral process often face additional years of battles in court, without guarantee of full recovery:

- First, the award-debtor could seek to set aside the award under the laws of the juridical seat of arbitration, and such annulment proceedings could run for years.
- Second, claimants may have to trace the award-debtor's assets across jurisdictions and overcome possible defenses to enforcement in each jurisdiction. Additionally, some jurisdictions may stay enforcement proceedings while annulment proceedings are pending before the courts of the seat of arbitration.

Award monetization mitigates a claimant's exposure to these risks by shifting risks to the third-party buyers, who are usually litigation funders or institutional investors. Monetization gives the claimant a partial monetary recovery on the award regardless of the outcome of annulment or enforcement proceedings (and, in some cases, regardless of the outcome of the arbitration proceedings themselves, if award monetization is secured early enough). It can provide much-needed liquidity for claimants seeking capital, either to meet financial targets or to reinvest in the business.

When Can Awards Be Monetized?

Monetization can happen at any stage of the arbitration proceedings. As a general rule, the more procedural hurdles that remain between a claimant and recovery, the more stringent the terms of monetization will be. Such hurdles include: (i) any jurisdictional and/or admissibility objections; (ii) determination of the respondent's legal liability and amount of monetary damages potentially available to a successful claimant (accounting for factors reducing the amount of monetary damages awarded, such as contributory fault, loss foreseeability, and causation); and (iii) availability and duration of possible set-aside/annulment proceedings.

Which Awards May Be Monetized?

Arbitration awards (both commercial and investment arbitration) are of interest to financiers provided the size of the potential recovery is sufficiently significant and the respondent is sufficiently solvent in terms of enforceable assets. In an arbitration between private parties, this entails an assessment of the respondent's solvency and potential ability to evade payment through corporate structuring. If the arbitration is against a sovereign, this entails an assessment of (i) whether the state possesses commercial assets outside of its borders (assets used for a public purpose are generally immune from seizure) and (ii) whether the state has a track record of resisting payment of awards.

How Are Awards Monetized?

The monetization of an award is typically reflected in a "participation agreement" assigning a portion of the entitlement of the assignor (the claimant) to recovery under the award to the assignee (the financier). The deal structure for each monetized award varies:

- It can involve a full transfer or, more commonly, a partial transfer with some of the proceeds to be shared between the claimant and the financier in accordance with an agreed formula.
- Payments to the claimant can be in a lump sum or, more commonly, in multiple tranches based on certain trigger events.

By way of illustration, the UK oil company Rockhopper Exploration plc recently entered into a participation agreement to monetize an investment treaty arbitration award of EUR 247 million against Italy (which Italy currently is seeking to annul). The [agreement](#) is structured as follows:

- Tranche 1: payment to the claimant-assignor of EUR 45 million, with (i) EUR 26 million to pay the original litigation funder that financed the arbitration, (ii) EUR 4 million to pay arbitration counsel as the agreed success fee, and (iii) EUR 15 million that the claimant-assignor collects.
- Tranche 2: EUR 65 million to be paid to the claimant-assignor “upon a successful annulment outcome” but subject to a pro rata reduction in case the award is partially annulled.
- Tranche 3: payment to the claimant-assignor of “20% on recovery of amounts in excess of 200% of the [financier-assignee’s] total investment including costs”.

Claimants that are covered by a litigation risk insurance policy may monetize their award at a lower premium given that the insurer bears some of the risk of reversal or reduction of the award associated with set aside/annulment proceedings.¹

Are There Hurdles to Monetizing Awards?

Monetization is becoming increasingly well received. US federal courts, for example, have accepted the validity of assignment agreements and have allowed assignees to enforce arbitral awards in cases such as *CMS v. Argentina*² and in *Balkan Energy v. Ghana*.³

That said, the extent to which monetization/assignment of arbitral awards will be accepted in various jurisdictions around the world is not always clear. For example, the Ukrainian courts have held that an assignee may not enforce an award for lack of standing.⁴ Furthermore, certain common law jurisdictions do not permit certain forms of litigation funding based on the doctrine of champerty (i.e., when a third-party to a lawsuit aid in or carry on its prosecution or defense in exchange for a share of the matter in suit). Some civil law jurisdictions also have outlawed litigation funding arrangements. Accordingly, it is necessary to assess whether monetization is permitted in jurisdictions where those awards will be enforced, and how the monetization should be structured to comport with local laws.

¹ Davidson, Stephen, “Insurance can reduce litigation-related uncertainty”, *Bloomberg Law*, October 28, 2021; Erwin, Jonathan, “Using insurance to change the paradigm of litigation finance”, *Bloomberg Law*, September 2023.

² See *Blue Ridge Investments, LLC v. Republic of Argentina*, 902 F. Supp. 2d 367 (S.D.N.Y. 2012), paras 381-382.

³ *Balkan Energy Ltd. v. Republic of Ghana*, 302 F. Supp. 3d 144 (D.D.C. 2018), para. 157.

⁴ See Pilkov, Konstantin, “Assignment of Benefits of Arbitral Awards: Problematic Enforcement in Ukraine”, Kluwer Arbitration Blog, June 2, 2014, available at [Assignment of Benefits of Arbitral Awards: Problematic Enforcement in Ukraine - Kluwer Arbitration Blog](#)

Practice/Group Contacts

New York | 55 Hudson Yards New York, NY 10001

Viren Mascarenhas vmascarenhas@milbank.com +1 212.530.5502

Washington, DC | 1850 K Street, NW Washington, DC 20006

Kamel Aitelaj kaitelaj@milbank.com +1 202.835.7528

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our International Arbitration Group.

This Client Alert is a source of general information for clients and friends of Milbank LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel.

© 2024 Milbank LLP

All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome.