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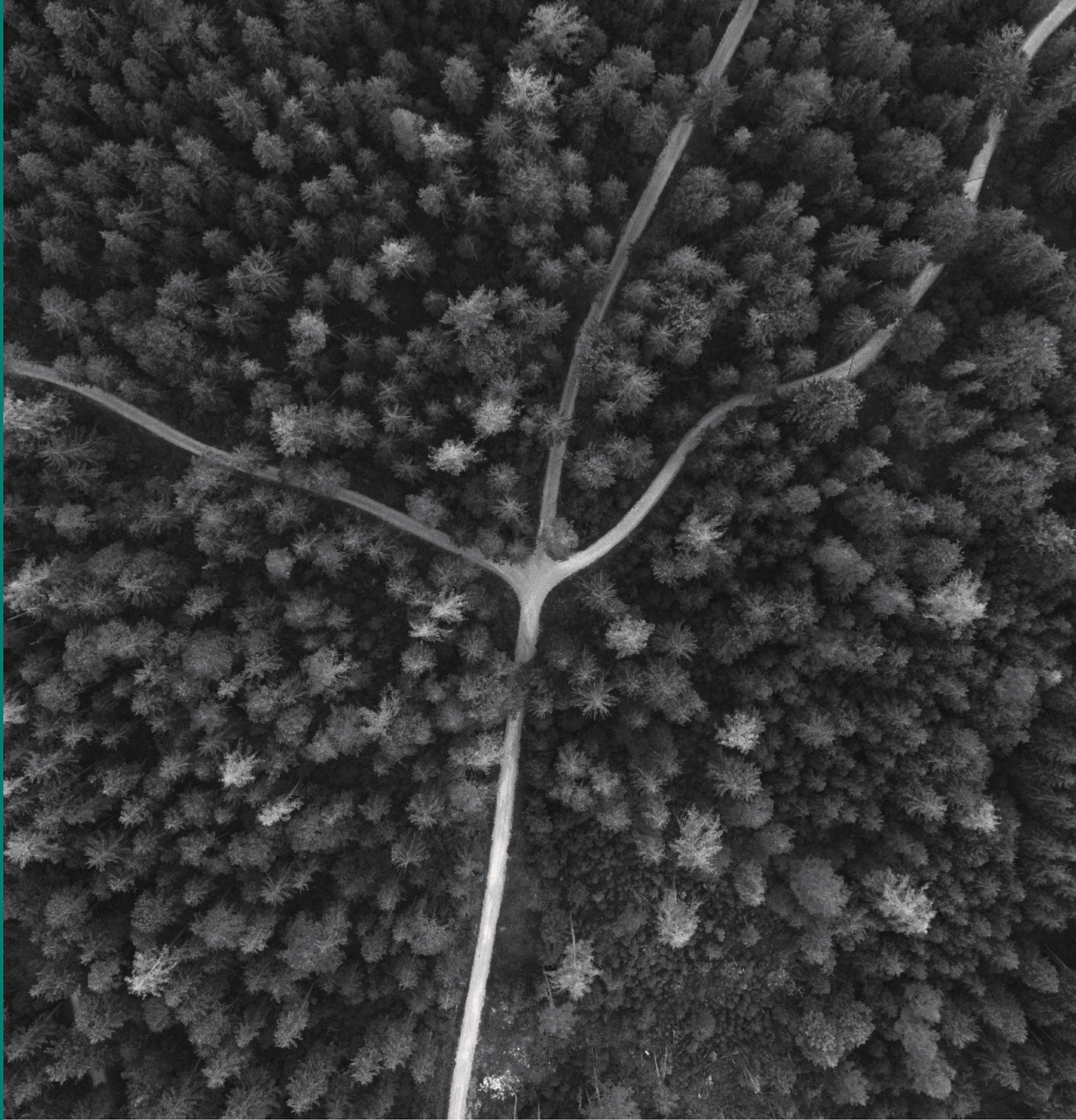

Welcome to the Q2 2026 edition of the HFW International Arbitration Quarterly, which features articles from colleagues across our network of global offices. This edition includes the following articles:

- Funding options in Hong Kong-seated arbitrations
- Third-party funding in international arbitration in France: Legal framework, stakeholder initiatives, and ethical considerations
- Third-party funding in Singapore
- Preliminary discovery and arbitration clauses in Australia: Lessons from *Illawarra Basketball Club Pty Ltd v National Basketball League Pty Ltd* [2025] NSWSC 1111
- Hybrid arbitration clauses: courts uphold "bad choices" – *Downer Utilities Australia Pty Ltd v Murra Warra Asset Co Pty Ltd* [2026] VSC 48
- English court rules it has no power to stay LCIA arbitration during challenge
- Diverging approaches to security for costs across arbitration seats and institutions

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FUNDING OPTIONS IN HONG KONG-SEATED ARBITRATIONS

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Background

While arbitration is widely considered to be more time and cost-effective than litigation, the costs involved in arbitration can still be significant and, in common law jurisdictions, the parties to a dispute need to consider the potential legal fees and outlays that they will incur, the costs (if any) that they may recover from the counter-party and the risk of adverse costs being awarded against them.

Financial considerations and cash flow issues can, therefore, discourage parties from pursuing a meritorious claim (or defence), unless they have access to funding from an alternative source, such as a third-party funder who has no connection to the claim, or their lawyer is willing, and legally permitted, to share the financial risks.

Historically, Hong Kong did not permit disputes to be funded by third-parties or via alternative arrangements due to the prohibition on champerty and maintenance:

- **Maintenance** was prohibited to ensure that an "outsider" to the litigation, someone who has no legal interest in the outcome, could not meddle in the case by, for example, providing funding to one party.
- **Champerty** is a specific form of maintenance in which the outsider provides funding to one of the parties in exchange for a share of their winnings (the proceeds of the litigation).

In recent years, Hong Kong has relaxed its approach to champerty and maintenance in the arbitration context.

While many jurisdictions allow third party funding in arbitration (and more widely), and the arbitral rules adopted in some jurisdictions share certain features, the approach is not uniform. When negotiating a dispute resolution clause in a contract, it is therefore important to understand the funding options in the proposed seat of arbitration. When a dispute arises, it is also prudent to check whether funding rules have changed since the arbitration agreement was entered into.

Third-party funding in Hong Kong-seated arbitrations

The Arbitration Ordinance (Cap. 609) (**Ordinance**) and Code of Practice for Third Party Funding of Arbitration (**Code**) govern Hong Kong's third-party funding regime (together, the **TPF Regime**).

On 1 February 2019, amendments to the Ordinance came into effect which disapplied the common law prohibition against champerty and maintenance in Hong Kong-seated arbitration, including related court proceedings; proceedings before an emergency arbitrator; and mediation proceedings. The TPF Regime extends to arbitrations seated outside Hong Kong where costs are incurred in Hong Kong (e.g. locally prepared and translated evidence).

The Code: The Code which accompanies the Ordinance regulates the way in which funders conduct themselves, seeking to protect funded parties, address the imbalance of bargaining power and prevent the mischief that led to the prohibition against champerty and maintenance (e.g. confidentiality, the risk of privilege inadvertently being waived, conflict of interest between the funder and the funded party and, as noted above, control of the arbitral proceedings).

The funding: The TPF Regime is set out in Part 10A of the Ordinance and allows a third-party funder to provide funding to a party to an arbitration (**Funded Party**) in order to pay for "*any costs*" of the arbitration. Third-party funding can be provided before the arbitration has commenced and can include the fees and expenses of the arbitral institution. The TPF Regime does not limit the sums charged by funders in exchange for providing funding. The Hong Kong legislature left this open to the parties to agree, respecting their contractual autonomy.

The funder: A funder cannot have a legal interest in an arbitration so the law firms, lawyers and barristers who act in the matter are not permitted to provide funding to the parties.

Arbitration funding agreements: Under Hong Kong's TPF Regime, an arbitration funding agreement must be in writing and the Code requires the funder to take "*reasonable steps*" to ensure that the funded party is aware that they have the right to take independent legal advice before entering into the agreement. The Code also requires the parties to set out in the funding agreement that the funded party will retain control of the arbitral proceedings and the funder will not seek to influence matters.

Return on the funder's investment: If the funded party is successful in the arbitration, the funder is permitted to receive a "*financial benefit*" in return for providing the funding. There is no further guidance on what, exactly, that financial benefit can or ought to be. This gives the parties to the funding agreement contractual autonomy to agree terms which suit the circumstances, making Hong Kong's TPF Regime flexible and adaptable. For example, the parties could agree that the funder will be paid in cryptocurrency.

Disclosure: The funded party is required by Hong Kong law to disclose the existence of the funding agreement to the arbitration body and to the other parties to the arbitration. The Ordinance also requires the funded party to disclose the funder's identity and, if the funding agreement terminates prior to the conclusion of the arbitration, the fact that the agreement has come to an end. Other jurisdictions which permit third party funding in arbitration do not require such disclosure and, given the tactical implications of disclosing that funding has been secured (or withdrawn), this aspect of Hong Kong's TPF Regime is noteworthy.

Hong Kong's 'Outcome-related fee structures' Regime

An outcome-related fee structures (**ORFS**) is an agreement between a lawyer and their client under which the lawyer agrees to fund the costs of the dispute in exchange for a share of the sums awarded to the client by the arbitral panel. Hong Kong's **ORFS Regime** is set out in Part 10B of the Ordinance and accompanying rules: the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D) (**ORFS Rules**). Hong Kong's ORFS Regime has been operational since December 2022 and, like the TPF Regime, disapplies the prohibition against champerty and maintenance in limited circumstances.

Under Hong Kong law, an ORFS can be a:

- **conditional fee agreement** (i.e. the lawyer is paid a fee for their work on the arbitration in the event that the client is successful);
- **damages-based agreement** (e.g. the lawyer is paid a percentage of any sums paid to the client by the opposing party); or
- **hybrid damages-based agreement** (i.e. the lawyer is paid fees for the work carried out on the arbitration as the matter progresses (which can be a discounted fee rate) plus a damages-based fee).

The ORFS Regime, which operates in a similar fashion to the TPF Regime, permits ORFS for arbitration matters if the fee structure meets certain general conditions set out in the Ordinance (for example, ORFS are not permitted where the client is seeking damages for personal injuries) and the further conditions and safeguards set out in the ORFS Rules (e.g. the ORFS agreement must be in writing and the lawyer must inform the client of their right to seek independent legal advice on its terms).

The ORFS Rules go on to deal in more detail with how conditional fees, damages-based fees and hybrid damage-based fees should be structured and/or calculated, placing limits on uplifts and percentages etc.

As with Hong Kong's TPF Regime, the funded party must disclose the existence of the ORFS to the other parties to the dispute and to the arbitral institution.

Other options: After-the-event insurance

In addition to the legal fees and disbursements which will be incurred during the life of an arbitration, and which are the focus of third-party funding and ORFS, a party to an arbitration should also be mindful of the risk that the arbitral panel could order them to pay costs to the opposing party (**Adverse Costs**). Adverse Costs can be significant. Generally speaking, "*costs follow success*" in common law jurisdictions and a judge or tribunal will therefore award the costs of the entire case (less any awards made along the way) to the winning side.

After-the-event insurance (**ATE Insurance**) is an insurance policy purchased after a legal dispute arises to cover some or all of the insured party's legal fees and disbursements and the Adverse Costs awarded to the opposing party. ATE Insurance does not involve champerty or maintenance and Hong Kong does not have special rules to regulate the ATE Insurance market (i.e. with safeguards like those seen in the TPF Regime and ORFS Regime). However, ATE Insurance is regulated, like any other insurance product on offer in Hong Kong, including the usual protections for consumers.

Third-party funding provides a '*war chest*': liquid funds which are available to pay for the costs of pursuing (or defending) a claim – everything from legal fees, legal expenses (e.g. expert fees), arbitral institution fees, and arbitrator fees. By contrast, ATE Insurance serves a distinct, and more limited, purpose given that it tends to be restricted to the insured's legal costs and Adverse Costs (albeit some policies can be more generous).

Third-party funding and ATE Insurance are often used together to comprehensively protect the funded party from the financial risks inherent in pursuing (or defending) a claim (as distinct to the risk of being ordered to pay damages etc to the opponent). Indeed, some funders require the funded party to obtain ATE Insurance as a condition of the arbitration funding being provided. Other funders include ATE Insurance in their funding package - with the funded party paying the insurance premium but benefitting from the funder's buying power when negotiating premium costs.

Market reaction in Hong Kong

When compared to certain other common law jurisdictions, Hong Kong was relatively slow to permit third-party funding in arbitration: By 2018, the ICCA-Queen Mary Task Force on Third-party Funding in International Arbitration (a global survey) reported that 39% of the arbitration practitioners surveyed had encountered third-party funding in their work.

Given the widespread use of arbitration funding in other jurisdictions and, in particular, the use of arbitration funding in jurisdictions with equivalent international finance centres (e.g. London, New York, Singapore) and the lessons learned there, one might expect arbitration funding to be quickly adopted in Hong Kong after the TPF Regime and ORFS Regime were introduced in the late 2010's and early 2020's.

Certainly, the introduction of an arbitration funding regime in Hong Kong was eagerly awaited by the arbitration industry. However, data indicates low uptake of arbitration funding in Hong Kong. The Hong Kong International Arbitration Centre (**HKIAC**) reports that in 2025, one third-party funding agreement was disclosed in relation to an arbitration commenced under the 2024 HKIAC Administered Arbitration Rules and seven ORFS agreements were disclosed.

To put this in context, the HKIAC administered 281 new cases in 2025 and, globally, the litigation finance market grew from USD$18.2 billion in 2022 to USD$27.92 billion in 2025. Given the figures discussed above, Hong Kong appears to buck global trends.

It is difficult to assess the use of ATE insurance in Hong Kong-seated arbitrations because there is no reporting obligation. In our experience, this product is also underused in Hong Kong, despite changes in the global insurance market which have made ATE Insurance more widely available and more affordable than was historically the case. It may be that the price point remains an issue. Local attitudes could also play a part. Anecdotally, it appears that if ATE Insurance cover is secured for a Hong Kong-seated arbitration, it is generally provided by insurers outside Hong Kong.

Our expectation is that, as Hong Kong nears the 10th anniversary of the introduction of the TPF Regime in 2032, we will start to see an increased use of alternative funding, as familiarity and confidence with these options grow.

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THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION IN FRANCE: LEGAL FRAMEWORK, STAKEHOLDER INITIATIVES, AND ETHICAL CONSIDERATIONS

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Third-party funding in arbitration, a practice that originated from common law jurisdictions, has experienced significant growth in France in recent years. At its inception, third-party funding was conceived as a mechanism to promote equality between parties. By enabling a financially weaker party to pursue or defend a claim against a better-resourced opponent, it helps to rebalance procedural inequalities and ensure more effective access to justice.

Third-party funding allows third parties to the proceedings, such as investment funds or specialised financing companies, to finance all or part of the costs related to arbitral proceedings, in exchange for a percentage of damages awarded to the funded party. The funder bears alone the financial risks linked to the proceedings: if the funded party does not prevail at the conclusion of the arbitral procedure, the funder receives no remuneration and will not seek reimbursement from its client for the costs it advanced. If the claim succeeds, the funder is usually paid a percentage of the damages recovered.

The increasing use of third-party funding raises several legal and ethical questions. In France, these issues arise in a legal environment that lacks specific legislation, but is shaped by case law, professional rules, and market practices.

The Absence of Dedicated Legislation in France

French law does not contain legislation specifically regulating third-party funding. Instead, courts have treated funding agreements as *sui generis* contracts governed by the general principles of French contract law.

French courts have recognised the validity of such agreements. While this contractual model remains relatively uncommon in many European jurisdictions – apart from Germany – it is considered legally permissible under French law. Since the French Civil Code does not directly address litigation funding, ordinary rules governing contracts and obligations apply.

In particular, Article 1107 of the Civil Code reflects the principle of contractual freedom. Parties are therefore free to structure funding agreements as they see fit, provided the contract respects general legal principles such as legality, good faith, and public policy.

Judicial Control Over Funder Fees

Although parties enjoy contractual freedom, French courts retain the power to review and reduce a funder's remuneration if it is considered excessive in relation to the services provided.

The French Court of Cassation has confirmed that courts may apply rules allowing judicial revision of price in contracts comparable to services contracts, indicating that "*the exclusively borne risk does not prevent the possible reduction of the agreed remuneration*" when it would be "*excessive in relation to the service rendered*".

Stakeholder Initiatives and Professional Rules

In the absence of legislation, professional bodies have played an important role in shaping the framework for third-party funding in France.

National Bar Council Resolution (2015)

On 20 and 21 November 2015, the French National Council of Bars adopted a resolution encouraging the development and implantation of third-party funders in France. The resolution provided practical guidelines for lawyers working with funded clients and highlighted the need to preserve core professional duties such as confidentiality and loyalty.

Paris Bar Council Working Group and Resolution (2016-2017)

In September 2015, the Arbitration Commission of the Paris Bar created a working group to conduct a comprehensive study of third-party funding. The group analysed the development of the funding industry, its economic rationale, and the ethical questions it raises for lawyers. The findings were presented to the Paris Bar Council on 21 February 2017.

In February 2017, the Paris Bar Council adopted a resolution expressly supporting the use of third-party litigation funding for the benefit of both litigants and lawyers, particularly in international arbitration (the **Resolution**). At the same time, it reaffirmed that French lawyers must continue to comply with their legal, ethical and professional duties and obligations when representing funded parties.

Ethical Considerations for French Lawyers

Third-party funding raises several ethical issues for lawyers practising in France, particularly concerning confidentiality, independence, and potential conflicts of interest.

Professional Secrecy

Professional secrecy is a fundamental obligation for French lawyers. It is protected not only by disciplinary rules but also by criminal law under Article 226-13 of the Penal Code.

Given its broad scope and its status as a matter of public policy, this obligation cannot be waived – even at the express request of the client. A French lawyer therefore remains bound by confidentiality in all circumstances.

In practice, any information required by the funder must be provided directly by the client. The lawyer of the funded party is prohibited from communicating directly with the third-party funder, regardless of the terms of the funding agreement or any requests that could otherwise be relayed through the client. Accordingly, any disclosure to the third-party funder of information relating to the proceedings and related facts must originate solely from the client.

Independence and Client Instructions

French lawyers must remain independent and may only receive instructions from their client. Even when a funder pays legal fees, the funded party remains the lawyer's sole client. The lawyer therefore owes duties of loyalty, advice, and representation exclusively to the funded party. The presence of a funder cannot alter this relationship or influence the lawyer's professional judgment.

The Resolution of the Paris Bar Council also recommended, but did not require, disclosure of funding arrangements to arbitral tribunals to prevent potential conflicts of interest with the arbitral tribunals.

Conflicts of Interest

Despite these safeguards, third-party funding can create potential conflicts of interest. Funders sometimes seek to influence key decisions in the proceedings, such as the selection of counsel, litigation strategy, or whether to pursue an appeal. Such influence may diverge from the client's interests. Lawyers must therefore remain vigilant to ensure that the client's objectives prevail and that their professional independence is preserved.

The French funding market is a growth area... several International funders are active in arbitrations seated in Paris, some have established local offices, and French funding companies have begun to emerge.

Current Market Landscape in France

Third-party funding is increasingly seen as a tool for improving access to justice. It allows parties who lack financial resources to pursue legitimate claims that might otherwise remain unaddressed.

In international arbitration, funding may also help correct imbalances between parties with unequal financial resources. In extreme cases, such imbalances have been invoked as grounds for challenging arbitral awards under Articles 1520 paragraphs 4° and 5° of the Code of Civil Procedure for violations of the right of access to justice and the principle of equality between parties.

Although the French funding market remains smaller than those in common law jurisdictions or Germany, it has grown steadily over the past decade. Several international funders are active in arbitrations seated in Paris, some have established local offices, and French funding companies have begun to emerge.

Nevertheless, some practitioners argue that the absence of clear legislation creates legal uncertainty that may hinder the growth and development of third-party funding in France. The current French model relies primarily on professional rules and soft-law guidance, which remain non-binding and relatively limited. While this flexible framework has allowed the practice to develop, debate persists as to whether the introduction of formal regulation would enhance legal certainty and better support the continued expansion of the French third-party funding market.

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THIRD-PARTY FUNDING IN SINGAPORE

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Introduction

Third-party funding (**TPF**) has become an important feature of how commercial disputes are funded and resolved, and Singapore remains at the vanguard when it comes to creating the necessary ecosystem for TPF to thrive.

TPF involves an external funder paying some or all of a party's legal costs in a dispute. In return, the funder typically receives a share of any recovery. This allows funders to invest in legal claims, while giving parties a way to manage the cost, risk and cash-flow pressures that often come with litigation or arbitration.

For businesses in particular, TPF can allow parties to pursue claims that might otherwise be too costly, without having to commit significant capital upfront.

Legal Framework: Evolution and Development of TPF in Singapore

Before 2017, TPF was not permitted in Singapore because it was seen as inconsistent with the common law doctrines of maintenance and champerty, which restricted third parties from supporting litigation in which they had no direct interest.

That position changed with the introduction of the Civil Law (Third Party Funding) Regulations 2017 (the **Regulations**), which set out a statutory framework allowing TPF in both court litigation and arbitration. The Regulations specify the types of proceedings in which funding is permitted, which includes most international arbitrations and related enforcement proceedings, and set out who may act as a third-party funder. Importantly, the framework is designed to strike a balance. It allows parties to access funding, while also putting safeguards in place. These safeguards include eligibility requirements for funders and disclosure obligations for funded parties.

Since the promulgation of the Regulations in 2017, Singapore's approach to TPF has evolved in stages, reflecting a deliberate move towards a more modern and flexible dispute financing framework.

In 2021, the scope of permitted TPF was expanded. The regime was extended to cover domestic arbitration, court proceedings arising out of or connected with domestic arbitration, proceedings before the Singapore International Commercial Court (**SICC**), as well as related mediation and appeal proceedings. This was an important step, as it took TPF beyond its original focus on international arbitration and into the domestic arbitration space, putting Singapore at the forefront of the global rise of TPF.

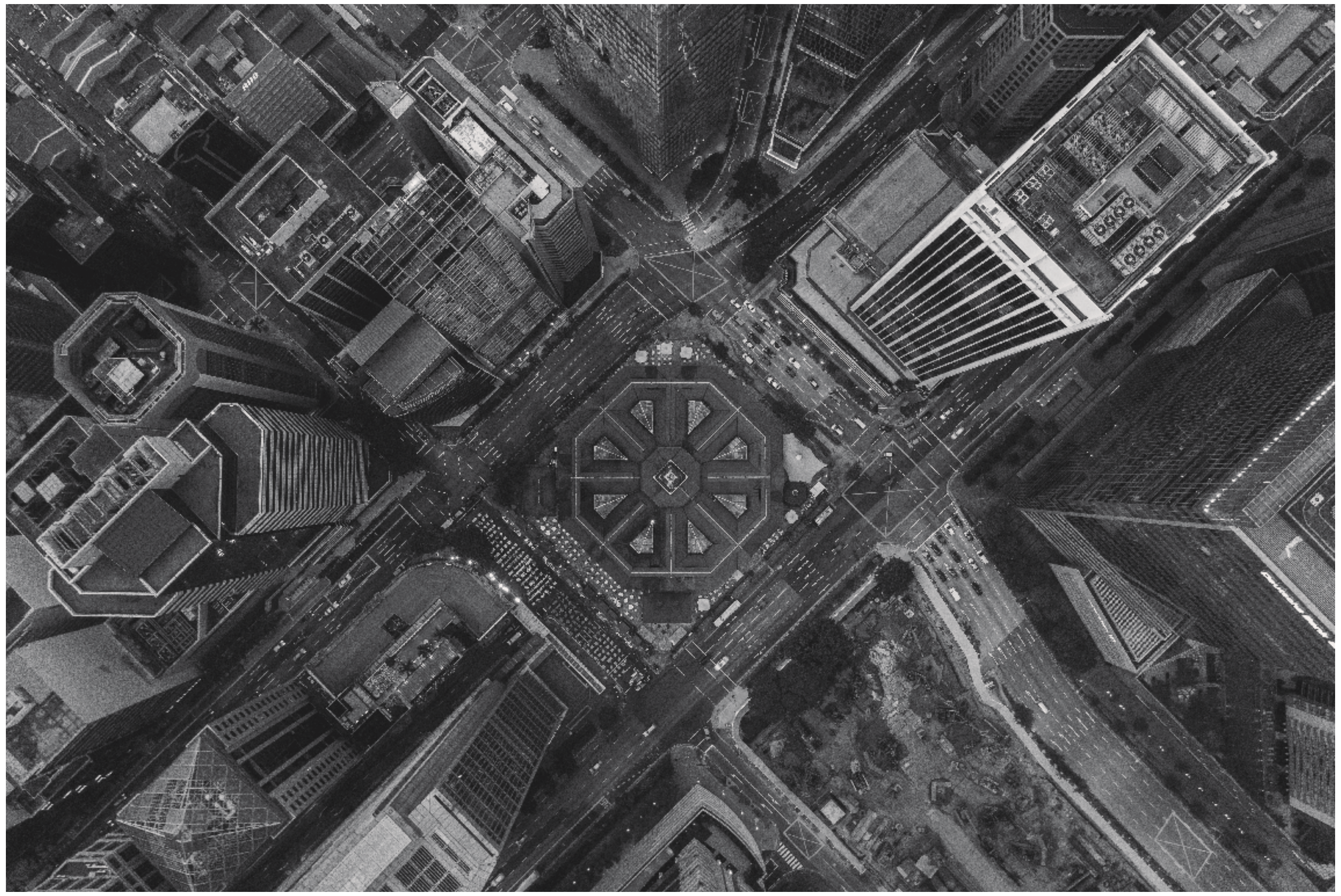
Another key development followed with the introduction of conditional fee arrangements (**CFA**). In 2022, amendments to the Legal Profession Act and the introduction of the Legal Profession (Conditional Fee Agreement) Regulations 2022 allowed lawyers and clients to enter into CFAs in prescribed proceedings. Since then, CFAs have been permitted in international and domestic arbitration, certain SICC proceedings, and related court and mediation proceedings. Under this framework, lawyers may agree to receive part or all of their fees only if specified outcomes are achieved, subject to statutory safeguards. Traditional contingency fee arrangements based on a percentage of recoveries, however, remain prohibited.

Together, these reforms reflect a broader policy of improving access to justice, increasing cost flexibility for parties, and reinforcing Singapore's position as a leading global hub for international arbitration and complex commercial disputes.

Treatment of TPF by Arbitral Institutions

Major arbitral institutions now expressly address TPF in their rules, typically through disclosure obligations aimed at avoiding conflicts of interest.

For instance, the Singapore International Arbitration Centre (**SIAC**) Rules 2025 require parties to disclose the existence of any TPF arrangement and the identity of the funder. Similarly, the International Chamber of Commerce (**ICC**) Arbitration Rules 2021 expressly address TPF as part of their transparency framework. In particular, Article 11(7) requires parties to disclose the existence and identity of any nonparty with an economic interest in the arbitration.



Since the promulgation of the Regulations in 2017, Singapore's approach to TPF has evolved in stages, reflecting a deliberate move towards a more modern and flexible dispute financing framework.

Comparable provisions exist across other arbitral institutions. The common theme is mandatory disclosure rather than regulation of funding terms. The focus is on transparency and the management of conflicts of interest, rather than restricting access to funding.

Practical Implications for Parties

Singapore's approach to TPF contrasts with the position in the United Kingdom following the Supreme Court's decision in *PACCAR Inc v Competition Appeal Tribunal* [2023] UKSC 28. In that case, the court held that certain litigation funding agreements amounted to damages-based agreements and were therefore subject to a restrictive statutory regime. The decision created significant uncertainty in the UK funding market and left many existing arrangements unenforceable unless restructured. By comparison, Singapore addresses TPF directly through legislation and regulation, providing greater certainty around what is permitted.

But, what does this mean in practice?

For parties involved in litigation or arbitration, TPF can offer real practical benefits. It can reduce the financial burden of proceedings, help spread risk, and allow parties to pursue claims without tying up significant capital. In some cases, it can also make the difference between bringing a claim and walking away from it.

That said, parties should be aware of the implications of entering into funding arrangements. These include disclosure obligations, questions around control and confidentiality, and the potential impact funding may have on settlement discussions and overall case strategy.

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PRELIMINARY DISCOVERY AND ARBITRATION CLAUSES IN AUSTRALIA: LESSONS FROM *ILLAWARRA BASKETBALL CLUB PTY LTD V NATIONAL BASKETBALL LEAGUE PTY LTD* [2025] NSWSC 1111

Background

In a case that looks at the interplay between pre-action/preliminary discovery proceedings in arbitration, The Supreme Court of New South Wales stayed preliminary discovery proceedings brought by two National Basketball League (**NBL**) clubs against the league operator. The court did so, not on the basis that preliminary discovery constitutes a "matter capable of settlement by arbitration" under the *International Arbitration Act 1974* (Cth) (**IAA**), the court found it does not, but rather because the application breached a contractual covenant not to sue contained in the parties' licence agreements.

The case clarifies the limits of the mandatory stay regime under s 7(2) of the IAA and the court's inherent power, and the role that a broadly worded contractual non-suit covenant can play in precluding access to court-based procedures, even where those procedures are not available in the agreed arbitral forum.

Background and Facts

The defendant, National Basketball League Pty Ltd (**NBLCO**), oversees the NBL. The plaintiffs, the Illawarra Hawks and South East Melbourne Phoenix basketball clubs, field teams in the NBL.

The clubs each held an almost identical licence agreement with NBLCO.

The clubs were considering claims against NBLCO and its director and ultimate beneficial owner, Larry Kestelman, relating to alleged breaches of their licence agreements. To assist with their consideration of the potential claims, they sought preliminary discovery from NBLCO under r 5.3 of the *Uniform Civil Procedure Rules 2005* (NSW).

However, the licences contained an arbitration clause providing for disputes to be arbitrated by the Court of Arbitration for Sport (**CAS**) in Switzerland. NBLCO sought a stay of the preliminary discovery proceedings under s 7(2) of the IAA, Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (contained in Schedule 2 of the IAA), or the Court's inherent jurisdiction.

Preliminary Discovery in Australia

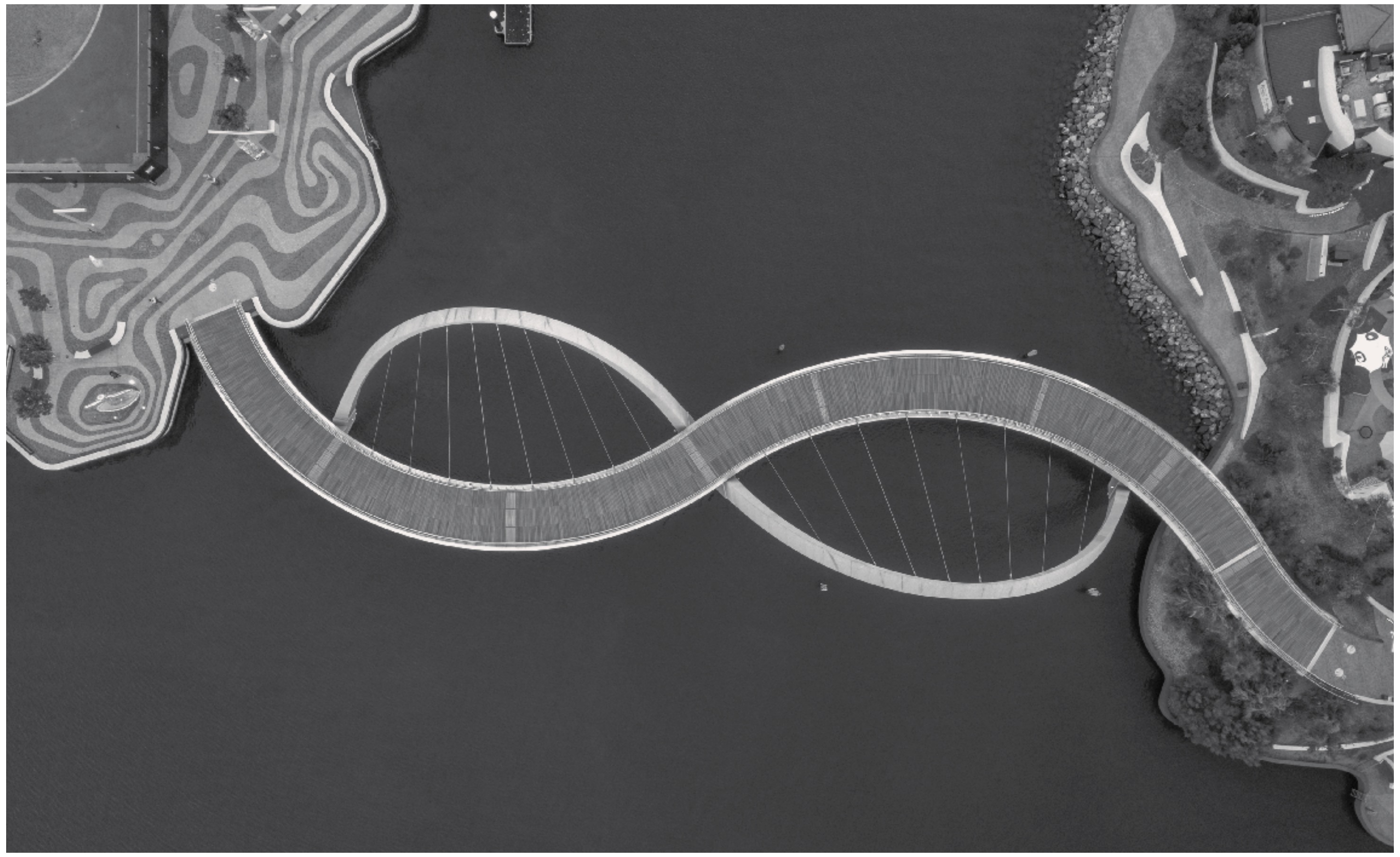
Preliminary discovery in Australia is a procedure by which a potential plaintiff obtains documents from a potential defendant before the commencement of proceedings in circumstances where, despite reasonable enquiries, it has been unable to obtain sufficient information to decide whether to commence proceedings.

In preliminary discovery proceedings, there is no adjudication of substantive rights or liabilities in the application: the court's task is simply to decide whether it appears that the applicant may be entitled to seek relief and that the prospective defendant may possess relevant documents, without the applicant establishing even a prima facie case or specifying the proposed cause of action with precision.

The Arbitration Agreement

Part 14 of the licence agreements contained a "Grievance Procedure", culminating in referral to arbitration by CAS. "Grievance" was defined broadly in cl 2.1 to mean:

- "a dispute arising out of or in relation to the Club's participation in the NBL, including a dispute about the breach, termination, validity, or subject matter of", among other things, the licence "or any other matter".



- Clause 14.2 set out a tiered process "to obtain a resolution to any Grievance or any other matter regarding this Agreement or their participation in the NBL": the parties were to attempt to negotiate a resolution, and if unsuccessful, to mediate, and if unsuccessful then to arbitrate.
- Critically, the parties agreed to follow the Grievance Procedure in cl 14.1 and that the decision of CAS was to be final and binding; it was further agreed that:
- "no party will institute or maintain proceedings regarding a Grievance or any other matter regarding this Agreement or their participation in the NBL in any court or tribunal other than CAS".

Does Preliminary Discovery Fall Within s 7(2) of the IAA?

The Statutory Framework

Section 7(2) of the IAA provides that where "proceedings instituted by a party to an arbitration agreement ... against another party to the agreement are pending in a court" and the "proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration", the court "shall" stay the proceedings on the application of a party and refer the parties to arbitration.

Where the court identifies a "matter" that is the subject of a valid arbitration agreement and is capable of being resolved by arbitration, a stay is mandatory.

Does Preliminary Discovery Fall Within the Arbitration Agreement?

Interpretation of the arbitration agreement was guided by the orthodox principles governing the interpretation of arbitration agreements, including giving "meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration".

Despite the broad definition of "Grievance" in the licence agreements, the court was not persuaded that a contested preliminary discovery application qualifies as a "dispute" because it is a separate interlocutory process that lacks any substantive determination of the parties' rights or liabilities. The wording of the arbitration agreement was framed in terms of a "process to obtain a resolution", intended to capture only those "disputes" which can in fact be resolved by arbitration in CAS. The parties accepted that preliminary discovery is not available in CAS in the way it is under the procedural rules of the court, which told against the parties having intended such a procedure to fall within the arbitration agreement.

Is Preliminary Discovery a "Matter Capable of Settlement by Arbitration"?

Even if preliminary discovery fell within the arbitration agreement, the court held it would still not constitute a "matter capable of settlement by arbitration", which requires "some subject matter, some right or liability in controversy" that is susceptible of settlement "as a discrete controversy" falling within the scope of the arbitration agreement and relating to rights not required to be determined exclusively by the exercise of judicial power.

The term has been construed broadly, but it does not "include every issue which would, or might, arise for decision in the course of the determination of such a claim". Peden J identified four principal reasons why preliminary discovery does not constitute such a "matter":

- An arbitral tribunal cannot be seized of a "dispute" or "matter" unless and until a claimant brings a claim in relation to "some right or liability" under the arbitration agreement. Preliminary discovery operates in circumstances where the applicant has not commenced proceedings and is unsure whether it has a claim at all.
- The very purpose of such an application is to allow a prospective applicant to gather evidence before deciding whether a cause of action or "matter" exists. There is no adjudication of substantive rights or liabilities in the sense contemplated by the term "matter" in s 7(2) of the IAA.
- While statute gives the court jurisdiction to order preliminary discovery, there is no statutory authority for arbitral tribunals to order such relief. The references to "interim measures" in the Model Law presume that a dispute has already been referred to arbitration and have no application to pre-arbitral preliminary discovery.
- It is clear from the experts' joint report that preliminary discovery is not a procedure known to, or available in CAS, which reinforces that the application is not "capable of settlement by arbitration" as required by s 7(2) of the IAA.

Therefore, the preliminary discovery application did not fall within s 7(2) of the IAA and could not be stayed by that route.

Inherent/Statutory Power and the Covenant Not to Sue in the Arbitration Agreement

This issue is the decisive basis for the stay. NBLCO's primary submission was that a stay should be granted because the clubs' application was contrary to the contractual promise to arbitrate and the contractual covenant not to sue in the arbitration agreement, drawing on the power enjoyed by courts of equity to restrain a breach of a negative covenant by issuing an injunction. After the adoption of Judicature legislation, that result is achieved by granting a stay of proceedings.

The court accepted that it "has a broad statutory power to stay any proceedings before it". It then undertook a careful textual analysis of the arbitration agreement:

- It held that, properly construed, the second sentence of cl 14.3 was not merely "the other side of the coin" of the promise to arbitrate. It goes further. Both parties promised not to "institute or maintain proceedings regarding a Grievance or any other matter regarding [the licence agreement] or their participation in the NBL in any court or tribunal other than CAS". The language goes beyond "resolution" of a "Grievance" or "other matter" in the first sentence; the promise is not to institute or maintain proceedings "regarding … any other matter regarding … their participation in the NBL". The reference to the second sentence being a "further" agreement reinforces that it was intended by way of addition and not mere emphasis.
- The court accepted that the preliminary discovery application was "any other matter" regarding the clubs' involvement in the NBL and that such an application amounted to instituting proceedings. Accordingly, the application fell within the scope of the covenant not to sue in the arbitration agreement.
- The court also rejected the clubs' submission that it would not be proper to exercise the stay power where there is no arbitration that could or would resolve the relevant dispute. The absence of arbitral power to order preliminary discovery does not revive or preserve a right that has otherwise been expressly relinquished by a covenant not to sue.
- Accordingly, the court stayed the proceedings pursuant to s 67 of the *Civil Procedure Act 2005* (NSW) because the clubs' application for preliminary discovery was in breach of the promise in cl 14.3.

Key Takeaways and Practical Implications

Preliminary discovery can be a powerful tool for parties subject to an arbitration clause and who are within the jurisdiction of certain Australian courts: because such an application falls outside the mandatory stay regime under s 7(2) of the IAA, it is not defeated at the threshold by the existence of an arbitration clause. However, the Illawarra Basketball Club case makes clear that this is not a general principle that preliminary discovery will always survive an arbitration clause, the outcome turns on the precise wording of the dispute resolution clause.

The key point concerns the drafting of negative covenants. The arbitration clause in the licence agreements went beyond a simple agreement to arbitrate; the second sentence contained an express promise by each party not to "institute or maintain proceedings regarding a Grievance or any other matter regarding [the licence] or their participation in the NBL in any court or tribunal other than CAS". Language that the court construed as extending beyond merely excluding litigation of arbitrable disputes to a comprehensive prohibition on any court proceedings, including preliminary discovery.

Commercial parties and their advisers should be alert to such clauses. As we have observed, a broadly drafted covenant not to sue is routinely included in dispute resolution provisions without full appreciation of its reach. Yet, as this case demonstrates, it can extinguish access to court-based pre-claim procedures that would otherwise be available and that no arbitral tribunal has power to replicate.

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HYBRID ARBITRATION CLAUSES: COURTS UPHOLD "BAD CHOICES" – *DOWNER UTILITIES AUSTRALIA PTY LTD V MURRA WARRA ASSET CO PTY LTD* [2026] VSC 48

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Introduction

The Victorian Supreme Court has determined Australia's first judgment on the validity and proper construction of a "hybrid" arbitration clause.

A hybrid arbitration clause is one that nominates an arbitral institution to conduct or administer the arbitration but directs that institution to apply the rules of an entirely different institution. For example, a Singapore International Arbitration Centre administered arbitration under the International Chamber of Commerce Arbitration Rules.

The case provides guidance for commercial parties that have chosen arbitration as their dispute resolution mechanism and may, whether wittingly or otherwise, find themselves bound by similarly problematically drafted dispute resolution clauses.

Background: The Murra Warra Wind Farm dispute

The dispute arose in connection with Stage 1 of the Murra Warra Wind Farm Project in Victoria, involving the construction of wind turbine generators and associated infrastructure under an EPC Contract dated 21 December 2017.

Following completion of the works on 30 June 2020, a dispute subsequently arose between one of the contractors, Downer, and the principal, Squadron. The immediate question before the court was which of two separately commenced arbitrations had been validly initiated under clause 42.5 of the EPC Contract. Squadron commenced arbitration proceedings with the Resolution Institute (**RI**) on 28 August 2025, while Downer commenced arbitration with the International Chamber of Commerce (**ICC**) the following day.

The hybrid arbitration clause

The relevant clause of the EPC Contract provided that: "*Arbitration pursuant to this clause 42.5 will be conducted by the Resolution Institute in accordance with the ICC Rules of Arbitration current at the time of the reference to arbitration and as otherwise set out in this clause.*"

As Justice Croft noted, hybrid arbitration clauses are agreements which state that the arbitration rules of one arbitral institution are to be administered by another arbitral institution. Such clauses present well-documented practical difficulties, including likely jurisdictional disputes and associated costs; procedural uncertainty from compelling an institution to act within an unfamiliar framework; a "patchwork" of rules reflecting the institution's best efforts rather than the parties' true choice; and dependence on the institution's willingness to act.

Justice Croft quoted a commentator observing that virtually all cases considering hybrid arbitration regard it as a bad idea, creating problems of certainty and litigiousness, though parties remain entitled to make bad choices.

Trends in other jurisdictions

Since this is the first time an Australian court has been asked to opine on the validity and construction of a hybrid arbitration clause, both parties and the judge placed significant weight on a body of case law from other leading arbitral jurisdictions. At the time of the decision, there were "mercifully" (in Justice Croft's words) few cases considering hybrid arbitration clauses globally, and none from Australia. A common theme emerging from the international case law is that such clauses are upheld wherever possible on the basis of party autonomy, coupled with an acknowledgement that they present practical, but not insurmountable, difficulties when a dispute arises. These cases include:

- ***Jay-Tech Marine* (Singapore, 2005)**: A subcontract clause provided for appointment by the Singapore Institute of Architects but arbitration under the SIAC Rules. While noting the drafting was "perhaps not a very wise piece of drafting", the court upheld the clause, emphasising that there is no rule of law preventing parties from making such a choice.
- ***Insigma* (Singapore Court of Appeal, 2009)**: The leading authority. The court upheld a clause providing for arbitration before the SIAC in accordance with ICC Rules, holding that the parties' intention to arbitrate must be given effect wherever possible. A key factor was the SIAC's willingness to adapt the ICC Rules to the hybrid context.
- ***HKL Group* (Singapore, 2013)**: A clause referred disputes to a non-existent "Arbitration Committee at Singapore" under the ICC Rules. The court upheld the clause and, critically, held that Article 1(2) of the ICC Rules – purporting to reserve administration of ICC arbitrations exclusively to the ICC – cannot override the contractual freedom of parties who have agreed to a hybrid mechanism.
- **Badprim *(Svea Court of Appeal, Sweden, 2015)***: A construction contract designated the SCC as administrator but specified ICC Rules. Noting the "contradictory" nature of the clause, the court upheld it on the basis that the parties' overriding intention was to arbitrate in Stockholm, and the SCC's willingness to administer confirmed the agreement was enforceable.
- ***Value Advisory Services* (Delhi High Court, 2017)**: The arbitration clause designated the SIAC as administrator but specified ICC Rules. Value Advisory filed its Request for Arbitration directly with the ICC Secretariat. ZTE challenged enforcement on the basis that the clause required submission to the SIAC. Both institutions declined to participate in a hybrid arrangement (whereas in *Insigma*, the SIAC had been willing to adapt to the ICC Rules): the SIAC confirmed it would not administer under the ICC Rules, and the ICC asserted that only it could administer its own rules. Faced with this impasse, the arbitral tribunal severed the reference to the SIAC, assumed jurisdiction and applied the ICC Rules itself without any institutional administration. The Delhi High Court upheld the tribunal's decision, affirming the court's duty to make a seemingly unworkable clause workable within the limits of the law.

The parties' competing arguments

Downer argued that the arbitration clause embodied two irreconcilable concepts – arbitration conducted by the Resolution Institute and arbitration in accordance with the ICC Rules. Given that the ICC Rules require the exclusive involvement of the ICC in certain respects, Downer contended that the clause could not sensibly require ICC-specific functions to be performed by the Resolution Institute. Critically, Downer pointed out that the Resolution Institute had confirmed it would not undertake those ICC-specific tasks and had confined its role to the nomination and appointment of the arbitral tribunal. This, Downer argued, distinguished the case from the Singapore decision in Insigma, as the ICC Rules had since been amended to provide that only the ICC itself may administer an arbitration under the ICC Rules.

Downer's position was that the reference to the Resolution Institute in clause 42.5(a) should either be read down to refer only to the appointment process, or severed entirely, with the result that a proper ICC arbitration should proceed.

Squadron, by contrast, submitted that the clause was not pathological: an arbitration is commenced by service of an Arbitration Notice on the other party, not by filing a Request for Arbitration with the ICC Secretariat. Squadron's position was that the arbitral tribunal, appointed with the assistance of the Resolution Institute, would then conduct the arbitration utilising the ICC Rules with such modifications as were necessary to remove functions that could only be performed by the ICC itself.

The court's decision

Croft J upheld the hybrid clause and found in favour of Squadron. His Honour held that the terms of clause 42.5(a) made abundantly clear the parties' intention to arbitrate, and that the arbitration agreement lay substantially within the provisions of the arbitration clause of the EPC Contract.

The broader mechanics of the arbitration agreement were significant. Under the arbitration clause, arbitration is commenced by written notice; the Resolution Institute then assists the parties in appointing an arbitrator by providing a list of candidates, ultimately selecting one if necessary; and the Resolution Institute (or the appointed tribunal) then conducts the arbitration in accordance with the ICC Rules – setting aside those rules that require ICC administration, and utilising the procedural steps otherwise set out in clause 42.5.

Croft J rejected the argument that the 2012 amendments to the ICC Rules – particularly the introduction of Articles 1(2) and 6(2), which provide that only the ICC itself may administer an ICC arbitration – were sufficient to override the parties' agreement. Following the reasoning in *HKL Group (No 2)*, his Honour held that the power of arbitral rules to bind the parties emanates from the consent of the parties themselves, and that Articles 1(2) and 6(2) cannot and do not usurp the contractual freedom of the parties to be bound by an arbitration conducted by a non-ICC institution adopting such of the ICC Rules as it can.

Croft J also declined to read down or sever clause 42.5, finding that to do so would be to usurp the parties' autonomy and rewrite their agreement.

Therefore, Squadron's arbitration proceeding with the Resolution Institute was upheld.

Key takeaways for commercial parties

1. Hybrid clauses will be upheld if workable. Australian courts, consistent with courts in other jurisdictions, will endeavour to give effect to a hybrid arbitration clause where the parties' intention to arbitrate is clear, even if aspects of the clause create practical difficulties. The pro-arbitration policy of Australian arbitration legislation weighs heavily in this direction.
2. At least in pro-arbitration jurisdictions such as Australia and Singapore, the ICC's self-exclusive rules do not override party autonomy. The ICC's own rules purporting to limit administration of its rules to the ICC itself do not trump the contractual freedom of parties who have agreed to a hybrid mechanism.
3. The administering institution's willingness is not determinative. Even where the nominated institution confirms it will limit itself to an appointing function, the clause will not necessarily fail. The appointed tribunal may apply such of the ICC Rules as are compatible with a non-ICC administered arbitration.
4. Drafting matters enormously. The inclusion of a hybrid clause – whether deliberate or the result of inattentive drafting – can generate significant litigation before a single line of arbitration evidence is heard. Parties and their advisers should ensure their arbitration clauses clearly identify a single institution and the rules of that same institution. Engaging experienced dispute resolution counsel at the drafting stage – or simply adopting the model clauses published by the relevant arbitral institution – can avoid this problem entirely.
5. The parties remain free to resolve the matter practically, avoiding the "procedural gymnastics" of conducting a hybrid arbitration – for example, by agreeing to submit to a straightforward arbitration before the relevant institution under its own consistent rules.

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ENGLISH COURT RULES IT HAS NO POWER TO STAY LCIA ARBITRATION DURING CHALLENGE

The Commercial Court has confirmed in the case of A v B [2026] EWHC 327 (Comm) that it does not have the power to stay arbitral proceedings pending a challenge under the Civil Procedure Rules (CPR). The decision reinforces the firmly pro-arbitration stance of the English courts.

Background

The dispute arose out of two parallel LCIA arbitrations between Party A (the claimant) and Party B (the first defendant) concerning multiple high-value contracts for the supply of military equipment to Ukraine. Party B alleged that it had paid deposits for goods that were not delivered and sought repayment of those deposits, together with penalties and interest. Party A maintained that all goods had been delivered and claimed breach of contract, seeking payment of the outstanding contract price.

Both contracts provided for LCIA arbitration under the 2020 Rules by a sole arbitrator, on an expedited, documents-only basis.

In December 2025, the arbitrator refused (i) consolidation of the proceedings, and (ii) permission for oral examination of witnesses and experts. Party A then applied under section 24 (which empowers the court to remove an arbitrator) and section 68 (which permits a party to apply to the court challenging an award on the ground of serious irregularity) of the Arbitration Act 1996 (**the Act**) to remove the sole arbitrator on grounds of alleged unfairness and partiality and set aside or declare ineffective the procedural decision refusing an oral hearing.

Separately, Party A applied, under Civil Procedure Rule (**CPR**) 3.1(2)(g), for a stay of the arbitral proceedings pending determination of its section 24 and section 68 applications. Party A argued that it would be unjust for the arbitrations to continue while the court considered whether the arbitrator should be replaced.

Decision

Mr Justice Butcher rejected Party A's application. He held that CPR 3.1(2)(g), applies only to litigation proceedings, not arbitrations. The application was properly characterised as seeking an injunction to restrain the arbitrations pending determination of the section 24 and section 68 applications.

The court then considered whether the Act confers jurisdiction to grant such an injunction addressing sections 24 and 68 separately.

Discussing section 24, the court expressed serious doubt that the Act confers jurisdiction to stay arbitral proceedings pending a removal application but declined to determine the point conclusively.

Even if it had jurisdiction, the court held it would arise only in exceptional circumstances – where continuation of the arbitration would be vexatious, oppressive, or unconscionable – the mere existence of a section 24 application was insufficient.

Party A argued that continuation would waste time and costs and would enable witnesses to prepare for cross-examination in advance. The court rejected those submissions, as falling short of the exceptional circumstances threshold, noting that granting the injunction would itself prejudice Party B through delay.

On section 68, the court was definitive: established authority, including *Elektrim SA v Vivendi Universal SA [2007] EWHC 571 (Comm),* makes clear that the court has no jurisdiction to intervene in the procedural conduct of an arbitration before an award is made.

Finally, the court rejected the argument that the procedural orders amounted to "awards", holding that they were purely procedural and did not determine the parties' substantive.

Comment

The decision clearly affirms that the English courts will not readily interfere with arbitral proceedings, even where serious procedural challenges are pursued. While the court stopped short of a definitive ruling on jurisdiction under section 24, it made clear that only truly exceptional circumstances will justify mid-arbitration intervention.

The judgment also underscores the importance of procedural choices at the contracting stage. Where parties agree to expedited, documents-only procedures, the courts will be slow to intervene in the arbitral process. Challenges to arbitral conduct will ordinarily need to run in parallel with the arbitration, rather than deployed as a mechanism to halt it.

The case sends a strong signal of the English courts' continued commitment to arbitral autonomy, procedural finality, and the efficient resolution of disputes.

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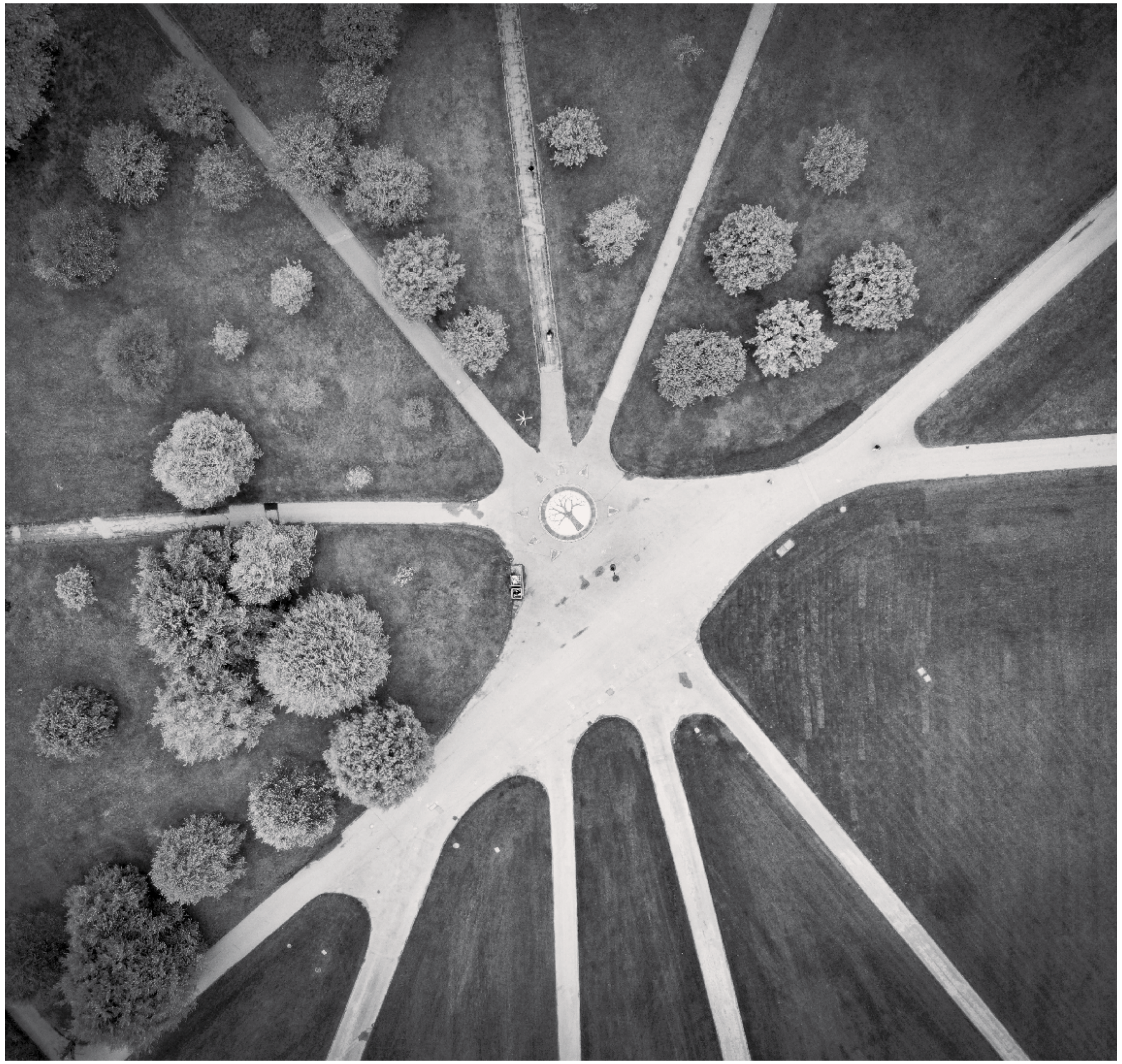

DIVERGING APPROACHES TO SECURITY FOR COSTS ACROSS ARBITRATION SEATS AND INSTITUTIONS

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With the global international arbitration world having seemingly accepted an arbitral tribunal's right to order security for costs, this divergence should no longer be regarded as cause for concern by parties.

Background

Security for costs, long relied upon to protect a party's ability to recover its legal costs should it ultimately prevail, is widely considered an essential procedural tool. Despite such popularity, there is no uniform approach to security for costs in international arbitration, be it in terms of threshold, evidentiary expectations, or appeal of the decision ordering security.

This article outlines critical differences on security for costs across selected seats and institutional frameworks, and the related and growing trends.

Differing Approaches According to the Arbitral Seat

Although arbitral tribunals generally apply a comparable set of considerations when deciding applications for security for costs based on the arbitral seat and Institutional Rules, approaches differ in terms of the weight given to the proof and criteria required.

In brief, security for costs pre-supposes:

i. a credible prospect of a costs award;

ii. a serious risk of nonpayment of costs;

iii. a timely, well-evidenced application; and

iv. whether an order for security is fair in all circumstances

1. The Swiss System: (Chapter 12 PILA)

Swiss-seated tribunals generally treat security for costs as a form of interim or conservatory relief included in their power to order interim measures. As such, an arbitrator's right to order security for costs is derived from Art. 183(1) of the Swiss Private International Law Act (**PILA**).

Considered a provisional measure, orders for security for costs cannot be challenged before the Swiss Federal Supreme Court (**SFSC**) unless the measure would cause irreparable harm to the party ordered to pay. Pecuniary harm would of itself rarely be considered irreparable, and therefore challenges to security for costs in Swiss-seated arbitrations are unlikely to succeed.

In terms of the criteria for an order, Swiss law does not codify a detailed, seat-specific test for security for costs. Instead, it leaves tribunals significant discretion to balance the requesting party's interest in cost protection against due process and access to justice concerns. Jurisprudence and doctrine nonetheless require: i) evidence of a reasonable degree of certainty of a future claim for reimbursement of costs, and ii) an imminent risk to the reimbursement of costs.

As to quantum, parties must limit themselves to the costs estimated at the time of filing.

2. England & Wales (Arbitration Act 1996, 2020, 2025)

In England and Wales, the arbitral tribunal's power to order security for costs is expressly stated in Section 38(3) of the Arbitration Act 1996, which provides that "[t]*he tribunal may order a claimant to provide security for the costs of the arbitration*".

An order for security for costs is a procedural order, not an award. Therefore, a challenge is possible only in exceptional circumstances, notably via Section 68 of the Arbitration Act 1996 (as amended by the Arbitration Act 2025), where the manner in which the order was made constitutes a serious irregularity causing substantial injustice. In addition, and due to the procedural nature of the order, it is not enforceable via the New York Convention 1958, nor is it subject to scrutiny by the Institution, as it would be if it were an award.

Influenced by litigation-style analysis and detailed costs submissions, arbitral tribunals seated in England and Wales commonly require itemised and well-supported budgets, scrutinising whether an order would be fair and proportionate in light of the claimant's ability to pursue the claim.

As opposed to Swiss-seated arbitrations, parties can include all costs from the commencement of the arbitration, as well as costs covering future phases of the proceeding. Section 59(1) Arbitration Act 1996 (as amended) provides that costs can include: the arbitrators' fees and expenses, the arbitral Institution's fees and expenses, and the legal or other costs of the parties.

Differences in Institutional Rules: codification and reliance on interim powers

While there is a clear trend to recognise the right to order security for costs in international commercial arbitration, and a consensus in considering it a provisional measure, arbitral Institutions still differ in how they address the issue.

Owing to its increasing prevalence in proceedings, several Institutions have recently elected to address security for costs expressly in the latest revisions of their rules. For example, Article 38, Stockholm Chamber of Commerce (**SCC**) introduced a specific provision on security for costs in its 2017 Rules, followed by the London Court of International Arbitration (**LCIA**) in Article 25.2 of its 2020 Rules, and last year the Singapore International Arbitration Centre (**SIAC**) included provision in Rule 48 of its 2025 Rules.

Where Institutional rules are silent, arbitral tribunals have authority to order security for costs from their traditional broad interim-measure powers. This is notably the case for arbitrations in the Swiss Arbitration Centre (**SAC**), where Article 29 of the 2021 Rules will be relied upon, as is the case for arbitrations under the International Chamber of Commerce (**ICC**), with arbitrators relying on Article 28 of the 2021 Rules or Article 29 of the 2026 Rules that come into force on 1 June 2026.

The historic discrepancy in a codified approach has meant some jurisdictions were reluctant, if not opposed, to recognising a right to order security for costs. With the global international arbitration world having seemingly accepted an arbitral tribunal's right to order security for costs, this divergence should no longer be regarded as cause for concern by parties.

Security for costs and prejudgment on the merits

An order of interim measures usually implies a successful "*prima facie* case on the merits" test, in which the requesting party must convincingly demonstrate a probability of succeeding on its claim. Arbitrators may shy away from ordering these measures, particularly when they seek a provisional grant of the relief sought in the final award, for fear of casting doubt on their impartiality.

Security for costs, despite being an interim measure, does not appear to trigger the same reticence in arbitrators, at the very least in Switzerland.

This may be explained by the fact that a "*prima facie* case on the merits" was not traditionally part of the criteria for an order of interim measures in Switzerland. Indeed, building on Art. 183(1) PILA's basis, and drawing from Swiss civil procedural law, Swiss doctrine considers that the requirement for an order of security for costs should be a "potential future claim for the reimbursement of costs worthy of protection". Therefore, to succeed respondents must demonstrate with a reasonable degree of certainty that they will be awarded reimbursement of their costs should they win. This requirement does not consider the likelihood of succeeding on the merits but rather focuses on the assessment of cost allocation should – regardless of its actual chances – the respondent win.

Switzerland's approach cuts short any potential pre-judging and assorted threats of bias, ultimately making it far friendlier to security for costs than at the start of the millennium.

In jurisdictions, or under Institutions, requiring a *prima facie* case on the merits, arbitrators should nonetheless not give way to reticence for fear of appearing biased. An increasingly large portion of the literature convincingly argues that prima facie should not be regarded as potentially prejudging the merits of the case as "*it is purely a provisional assessment based upon incomplete submissions and evidence, without preclusive effects*".

Looking Ahead: Trends and Developments

In a number of recently revised Institutional rules, security for costs is at the forefront of developments in International Arbitration. Of note is also the rising importance of third-party funding, already well established in England and often used in arbitration proceedings either for a single funded case or via a portfolio facility to cover multiple claims.

While most practitioners would consider third-party funding as a non-issue, some debate remains as to whether it should nonetheless constitute a *prima facie* case for security for costs.

The initial discomfort around third-party funding appears to have stemmed from the, yet to truly be substantiated, fear that claimants would be unable to comply with adverse cost awards and the funding agreement would not have provided for the funder to be liable for the adverse costs – otherwise referred to as a so-called "arbitral hit and run". Some practitioners and authors have therefore argued that the presence of third-party funding should be treated as *prima facie* evidence of impecuniosity, thereby supporting an order for security for costs. Another position notably shared by Institutions views third-party funding as a "relevant circumstance to be assessed" when security for costs is requested. Authors and practitioners rallying to the former consider that external funding alone should not be interpreted as impecuniosity of a claimant, since financially stable parties may rely on third party funding as a risk-management tool.

There is some anecdotal evidence that where a claimant has obtained funding, respondents will be keen to seek security for costs against them- on the basis that this evidences their lack of funds, unless they have adequate adverse costs (ATE) insurance, which can satisfy any costs award against them. However, that is oversimplistic as claimants may choose to take out funding for reasons other than financial limitations, for example to de-risk or share the risk of the legal costs, or for strategic or tactical reasons e.g. to show that their case is strong enough to secure that level of investment.

Nonetheless, sensitive to the possibility of insolvent claimants being unable to comply with an adverse award on costs when supported by external funders, Institutions and arbitrators alike have been pushing for clarity on the terms of funding agreements.

Initial concerns, mostly regarding impartiality and independence between the arbitrators and external funders, led to rule revisions by Institutions such as the ICC, SIAC, and HKIAC to include an obligation to reveal the existence of a funding agreement and the identity of the funder. Further, in its 2024 updated Rules, the IBA included a requirement for the disclosure of the identity of those who may have "a direct economic interest in the prosecution or defence of the case in dispute, a controlling influence on a party to the arbitration, or influence over the conduct of proceedings, including the selection of arbitrators", which has been deemed to include funding and funders. Finally, the recent CIArb Guidelines on Third Party Funding, recommends early disclosure that there is a funding agreement in place and of the identity of the funder. However, it is interesting to note that in their last Rules update, the LCIA did not include a provision for disclosure of a funding agreement or funder; these Rules are currently under review and so the position may change.

The debate has since shifted to the disclosure of the funding agreement's terms, particularly where the extent of the financial coverage and withdrawal terms are concerned. While this mandatory disclosure has been observed in investment arbitration, commercial arbitration tribunals have – to our current knowledge – yet to order it.

Although the negative bias against third-party funding has been discussed at length within the community, the possible positive bias of arbitrators against externally funded claims has not been the subject of the same level of scrutiny, aside from the impartiality-led disclosure obligations. Considering prospective claimants undergo a stringent vetting process, at the end of which only 5-10% may see their claims funded, there could be a legitimate argument as to whether an arbitrator could be biased towards a claim which has been scrutinised and deemed worthy of financial investment.

To date, no clear consensus has emerged in international practice. Most arbitral tribunals nonetheless appear to be assessing third-party funding on a case-by-case basis, considering it as a factor among others, and rejecting the presumption that funding alone implies an inability to meet an adverse costs order (or even impecuniosity) and justifies an order of security for costs.

As third-party funding rises in popularity, with a growing number of jurisdictions endorsing the practice as being commercially sensible, more guidance will be issued by Institutions.

Commentary

Despite the current wave of codification ensuing from the increased prevalence of security for costs applications, this interim measure remains a very discretionary and fact-sensitive application, with limited possibilities for review.

As considered above, Institutions and arbitral seats (governing the process) offer parties varying degrees of flexibility, especially where the quantification and degree of detail as to costs are concerned. Parties and practitioners alike should nonetheless be cautious of the absence of rigid statutory rules, as granting arbitral tribunals discretionary powers will inevitably cause them to balance interests and fairness, and consequently place a significant evidentiary burden on the parties.

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HFW EVENTS AND SPEAKING ENGAGEMENTS

- As part of the HFW Industry Insights series, our Global Senior Partner Giles Kavanagh interviewed Alexander Fessas, Secretary General at the ICC International Court of Arbitration. The discussion centred on developments in international arbitration, including ICC Arbitration's milestone 30,000th case and the trends shaping disputes globally.
  - Watch the interview here
- We are delighted to share that HFW has again been recognised in the Global Arbitration Review 100 as one of the world's leading international arbitration firms.
- Julien Fouret and Nick Longley continue to lead our International Arbitration group with a clear focus on client service and technical excellence, supported by more than 450 disputes lawyers across our global network.
- Several lawyers from HFW's Paris office have been recognised in the 2027 edition of Best Lawyers.
  - Vincent Bénézech and Jean Baptiste Charles were each awarded "Lawyer of the Year", while numerous colleagues were recognised across key practice areas including international arbitration, litigation, insurance, maritime, and transport law.
  - Julien Fouret and Gaëlle Le Quillec were recognised for their expertise in arbitration and international arbitration. These accolades reflect the firm's continued excellence in disputes work and the breadth of expertise across our international arbitration team.
- We are pleased to welcome two new International Arbitration Partners. Their arrival continues the significant growth of our international arbitration practice, following recent additions in Geneva and Paris. Since the start of FY25, we have welcomed 13 new IA Partners globally, with hires across Europe, Asia, and Australia.
  - Louis-Alexis Bret, Paris. Louis-Alexis brings extensive experience in complex disputes, regulatory investigations, and technology-related matters across sectors including energy, commodities, aerospace, logistics, and financial services.
  - Vanessa Liborio Garrido de Sousa, Geneva. Vanessa is widely recognised as one of Switzerland's top international arbitration specialists, with over 20 years' experience acting as counsel and arbitrator in high-value, complex disputes across a range of sectors including construction, infrastructure, life sciences, and telecoms.
- Max Wieliczko and Arpan Gupta co-hosted a seminar with Accuracy, and the Mumbai Centre for International Arbitration (MCIA), on Friday 5 June on "Legal and Commercial Issues in Energy Transition", a forward-looking discussion on disputes risks, contractual structures and arbitration issues arising from global energy transition projects, with perspectives across developed and emerging markets.
- Vanessa Liborio attended ICC Switzerland's Arbitration Reception with ICC United Kingdom on Thursday 18 June.
- Abdulrahman Al Ohaly, Julien Fouret, Slava Kiryushin, and Nicola Gare have published a briefing looking at the key findings from the recent SCCA report which examined the extent to which Saudi arbitration law and practice aligns with the UNCITRAL Model Law.
  - See the report here.

TEAM NEWS

Our global series on key issues in the IA sector continues over 2026. If you would like to know more about any of the topics covered, please get in touch with Nicola Gare.

PAST

February: Fraud, Scams, and Offshore Disputes – Kevin Warburton, Dan Perera, Scott Cruickshank, and Catriona Hunter

March: Supply Chains in Commodities – Dan Perera, Anastasia Magid, and Christina Whitehead

April: Commercial & M&A – Kevin Warburton, Nick Braganza, Sumarsono (Jacky) Darsono

June: Investment Treaty Arbitration Part 1 – Sean Marriott and Jo Delaney

UPCOMING

July: Construction in International Arbitration – Sean Marriott, Nick Longley, Jo Delaney, Simon Bellas, and Tamara Zakharia

August: Shipping & Maritime in International Arbitration – Nicole Hui, Elizabeth Sloane, and Toby Stephens

September: Investment Treaty Arbitration Part 2: Jurisdiction – Sean Marriott and Jo Delaney

November: Energy Transition, Renewables and Climate Change Disputes – Peter Sadler, Jo Delaney, Sean Marriott, Ruth Dawes and Dan Perera

December: Investment Treaty Arbitration Part 3: Quantum – Sean Marriott and Jo Delaney

January 2027 – Aviation in International Arbitration – James Jordan

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