

# Kluwer Arbitration Blog

## Litigation Funding in International Arbitration: Leveling the Playing Field in a Capital-Driven Game

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The high costs of international arbitration create a playing field where financial strength often determines the outcome rather than legal merit. For claimants facing well-funded corporations or sovereign States, litigation funding has emerged as a key tool to counterbalance these disparities. This article explores how litigation funding is reshaping international arbitration, particularly in investor-State and commercial disputes, and examines key regulatory trends.

### The Structural Imbalance in International Arbitration

Arbitration was designed to be a neutral, efficient, and effective dispute resolution mechanism. However, in practice, its prohibitive costs often place smaller claimants at a disadvantage. According to data from the **United Nations Conference on Trade and Development (UNCTAD)** and the **International Council for Commercial Arbitration (ICCA)**, the average cost of an Investor-State arbitration exceeds **\$8 million**, with legal fees accounting for nearly 80% of expenses. This financial barrier could possibly deter legitimate claims, effectively granting economic power the ability to dictate access to justice.

If the ability to seek redress depends more on financial resources than on the merits of the case, does this not undermine the very foundation of a fair legal system? How can justice be truly impartial if economic constraints prevent individuals from holding powerful entities accountable?

Regulators recognise access to justice as a safeguard against abusive market practices, yet financial barriers often prevent affected individuals—particularly minority and economically disadvantaged groups—from pursuing legitimate claims. The cost of litigation can make challenging global corporations impractical, allowing anti-competitive and illicit behaviors to persist unchallenged. The same holds true for affected foreign investors from pursuing meritorious claims against State wrongdoing.

Litigation funding disrupts this dynamic by enabling claimants with strong legal grounds—but limited financial resources—to access arbitration without upfront costs. In exchange, funders receive a portion of the awarded damages if the case succeeds. This model does not only provide financial support but also enhances claim credibility, as funders conduct rigorous due diligence before committing capital and may even trigger effective settlement.

## Key Trends in Arbitration Funding

### 1. Growth in Investor-State Disputes

Investor-State arbitration, governed by treaties like **ICSID (International Centre for Settlement of Investment Disputes)** and **UNCITRAL**, has become an attractive area for litigation funders. A number of sovereign States often deploy financial resources and prolonged legal strategies, making litigation funding crucial for claimants seeking to challenge unfair expropriations, regulatory changes, or discriminatory measures.

More sophisticated companies are turning to third-party funding as a way to optimise their financial strategy. This approach reshapes risk calculations, allowing businesses to focus their own resources on growth rather than diverting funds to legal claims. By leveraging external funding, companies can transform legal liabilities into financial assets, shifting the burden off their balance sheets and freeing up capital for core operations.

### 2. Corporate Adoption of Litigation Funding

**Recent trends indicate that third-party funding has become a significant feature of international arbitration.** This observation is supported by empirical data: a recent [Queen Mary Survey](#) (via NYU GlobalEx) found that **39% of practitioners** had encountered third-party funding in their cases. Moreover, [the global market for litigation finance](#) expanded from **USD?18.2 ?billion in 2022** to projections approaching **USD?37 ?billion by 2032**, reinforcing the narrative of sustained growth.

A rising trend in litigation finance is the monetisation of awards under a non-recourse model, allowing investors to receive a portion of claims without assuming risk. For investors, this presents a unique opportunity to access free capital without exposure to legal uncertainties. For founders, it's an appealing avenue—once damages and liabilities are quantified, the timeline for financial recovery is significantly shorter compared to cases still in the early stages, where risks remain high.

Funders assess a case not only based on the likelihood of a favorable award but also on its enforceability. A key factor is whether the respondent State will pay voluntarily—[recent statistics](#) show that **66% of ICSID damages awards** are paid voluntarily or reached a post-award settlement. Notably, a growing number of States particularly in Latin America are choosing to comply or negotiate payment to avoid accumulating post-award interests. Where voluntary compliance is uncertain, funders must consider the prospects of Sovereign asset-freezing measures. As States may become more proactive in honoring awards, these dynamics could possibly reshape investment arbitration and the strategies behind legal financing.

### 3. Regulatory Developments and the Debate on Transparency

With the growing prevalence of third-party funding, regulators and arbitral institutions are debating

whether disclosure should be mandatory. The **ICC (International Chamber of Commerce)** and **SIAC (Singapore International Arbitration Centre)** have introduced [soft guidelines](#) and rules on funder disclosure, while **ICSID's 2022 Rule Amendments** now require disclosure of third-party funding arrangements.

Critics argue that forced transparency could give respondents an unfair tactical advantage, while proponents insist it ensures procedural fairness and prevents conflicts of interest.

The **Chartered Institute of Arbitrators (CI Arb)** has issued a [call](#) for comments on its proposed **Third-Party Funding (TPF) guideline**. An interesting question under review is whether arbitration tribunals should have the authority to order respondents to cover litigation funding costs as part of damages—particularly in cases where the respondent's actions left claimants with no choice but to seek external funding, as illustrated in domestic arbitration in the UK. The UNCITRAL's **Working Group III on ISDS Reform** is [reviewing](#) the issue of allocation of third party funding costs in Investor-State arbitration, suggesting an increased transparency and even limiting third party funding in exceptional circumstances. (Draft Provisions 9 and 12).

## Litigation Funding in Action

Infrastructure Disputes (Energy, Mining, Construction) frequently involve Third-Party Funding due to their long timelines, technical complexities, and high costs. Arbitration in these sectors often requires extensive expert testimony, document review, and prolonged proceedings, making external financing a practical solution. Funders assess claims based on their enforceability and potential returns, ensuring that viable disputes receive financial backing. As funding becomes more prevalent, it is reshaping how infrastructure-related arbitration is approached, providing claimants with the resources needed to pursue legal action effectively.

## The Future of Litigation Funding in Arbitration

The role of litigation funding in arbitration is expected to expand further due to:

- **Greater institutional acceptance:** Leading arbitral institutions, including ICSID, ICC, and SIAC, are formally incorporating litigation funding into procedural frameworks. The move towards standardization of funding disclosures, as seen in [ICSID's 2022 amendments](#), indicates increasing acceptance. This trend could extend to national arbitration laws as jurisdictions move towards harmonization, notably in the European Union where a EU Directive is under current discussions.
- **Portfolio financing models:** Funders are diversifying risk by financing multiple claims in structured portfolios rather than single-case investments. This shift allows claimants with smaller or mid-sized cases to secure funding that would traditionally be unavailable under single-case assessments. In addition, it enables claimants to group related claims, leveraging economies of scale in legal strategy and procedural efficiency.
- **Data-driven risk assessment:** The integration of AI and machine learning in litigation funding is refining case selection, valuation, and risk modeling. AI-powered analytics now assess historical arbitration trends, tribunal biases, and enforcement probabilities to improve funding decisions. This innovation is expected to enhance funders' ability to predict outcomes and

optimise investment allocation in arbitration finance.

- **Expansion beyond traditional arbitration hubs:** While litigation funding has been dominant in London, New York, and Paris, emerging arbitration centers in Latin America and Africa are increasingly recognising its value. Institutions like the [Hong Kong International Arbitration Centre \(HKIAC\)](#) have introduced new [rules](#) accommodating third-party funding, which is now permitted in Hong Kong, broadening access to financed arbitration.

## Conclusion

Litigation funding is no longer a marginal phenomenon—it is now a fundamental pillar of international arbitration. By democratizing access to justice and mitigating financial risk, it enables meritorious claims to proceed regardless of the claimant's financial standing. As regulations evolve and funding models mature, litigation finance will continue to shape the future of arbitration, reinforcing its role as a mechanism of legal and economic equilibrium.

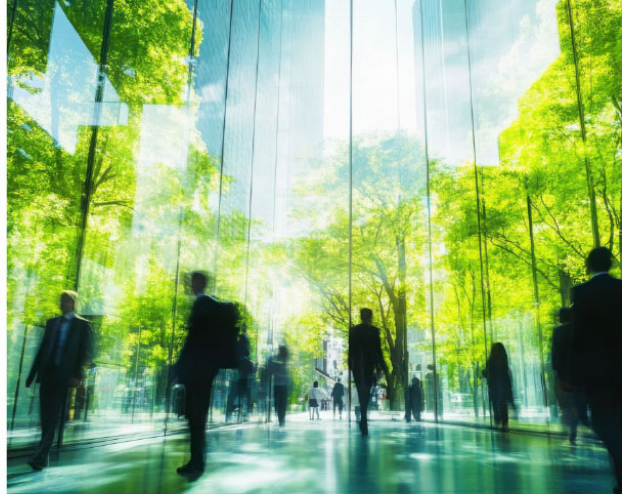
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