



Commercial & Investment Treaty Arbitration



What is arbitration?

Rather than resolving a dispute in the public courts, parties may prefer the confidentiality and speed of arbitration. They will appoint a tribunal of independent and impartial expert arbitrators who will hear the case and provide a confidential, legally binding, and enforceable decision. It is a popular forum for very technical disputes, as arbitrators may have greater industry expertise than a judge.

There are two main types of arbitration:

- Commercial arbitration - between parties to a contract who have opted to resolve any dispute through arbitration rather than litigation.
- Investor state arbitration – between a foreign investor whose commercial interests have been impacted by the action, or inaction, of a host State.

Arbitration can be used instead of litigation in many types of dispute.

Is funding right for your claim?

We need to understand the details of your claim to ascertain whether it could be funded. It is also important for us to know we can rely on your support in bringing the claim to a successful resolution. Answers to the following questions will help us to quickly assess your claim.

Merits	<ul style="list-style-type: none">• Is the dispute genuinely something which can be resolved by arbitration, and if so, what is the arbitration clause which will govern the dispute? (Jurisdiction disputes can be costly and time consuming.)• What seat, rules, and national law are to be used in the arbitration?• Describe the commercial arbitration agreement or instrument/treaty on which you rely.• What actions by the respondent give rise to a breach, and what losses were caused as a result? What amount of money has been lost in the transaction as opposed to the profits you assert you would have made if it had continued?• What evidence substantiates your claim, what form is it in, and where is it located? Will you rely on material to be obtained in document production? How many witnesses will you be relying on?• Are you aware of any counterclaims which may be brought?
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Economics	<ul style="list-style-type: none"> • What amount of funding do you require? • What budget is required for each stage of the arbitration and enforcement? (We can fully fund, share costs, and purchase entitlement to judgments or awards.) • Is bifurcation/trifurcation anticipated, i.e. will liability and quantum be determined separately or at the same hearing? • Is any payment likely to be required for security for costs? • How long do you expect the case will take?
Recoverability	<ul style="list-style-type: none"> • Does the respondent have the means to satisfy an award? What is the strategy for enforcement, and where are the respondent's assets located? Will issues of sovereign immunity apply? • Will parallel proceedings be involved where you are either the claimant or respondent (e.g. proceedings in domestic courts, or proceedings in both commercial <u>and</u> international/investment arbitration)? • Do you want to maintain commercial relations with the respondent?
Experience	<ul style="list-style-type: none"> • What is the legal team's track record in these sorts of cases? • What is the strategy for this case? Have you prepared a draft Procedural Order, Terms of Reference, or a timetable? What are your thoughts on who may sit on the tribunal?



What sets us apart?

Harbour is amongst the largest and most experienced funders in the world, having supported cases in 14 jurisdictions and 6 arbitral forums since 2007. Our experience of reviewing over 4,000 claims means we can quickly review the responses to the questions above and provide an indicative view on pricing, before guiding you through our due diligence process.

We are one of the world's leading and most experienced funders, supporting arbitration proceedings in many forums around the world. We know from over a decade of experience that arbitration can be risky, costly, and complex, particularly as disputes can often arise as a result of poorly worded and inconsistent or vague boilerplate clauses, typically included in contracts during the late stages of commercial negotiations. As a result, our solutions are flexible, and our deep understanding of the risks involved allows us to provide funding and support which would simply be unavailable from banks or other providers of capital.

Our pricing

Harbour provides a flexible and tailored solution to suit your needs. We can cover all or part of your legal fees and disbursements, including potential adverse costs and funding for security for costs.

The pricing of our funding is bespoke and is informed by our view of the specific risks involved. We consider factors such as the claim value, the budget required, the merits, the jurisdiction of your claim, and any potential difficulties with enforcement.

A number of pricing options are available, with non-recourse funding being the most popular, where Harbour only receives a return when proceeds are recovered. Should the claim be unsuccessful, the risk is entirely ours, and you owe Harbour nothing. Pricing is generally structured as a return of capital plus the greater of a percentage of proceeds and a multiple of our capital.

Recourse funding is also available, which allows a claimant to maximise their return and free up capital. This financing is repayable at the end of the process, regardless of the outcome of the case.

We can also acquire interests in claims and judgments, providing immediate cash payments of an agreed percentage of the claim or judgment value, potentially with more to follow upon successful recoveries if the claimant wishes to remain involved.

We seek to agree pricing which fairly rewards the risk you and we are taking.

Pricing is agreed with our investment team at an early stage in our discussions, and before the case is presented to our investment committee you will know what the pricing is and how an agreement will be structured. More information on pricing and our processes is available on our website.

Arbitration case study

Harbour is supporting a listed company which developed a project to explore an oil field in a host State's coastal waters. The company sunk significant costs into surveying the field, as well as obtaining the relevant environmental and regulatory licences. Without warning and in breach of the Energy Charter Treaty, the host government introduced restrictions preventing foreign companies from oil exploration. No compensation was offered to the company for removing its production concession, and the State permitted domestic companies to continue their operations.

The company was prevented from enjoying the benefit of its investment, and knew it had to do something to protect the interests of its shareholders. However, like any business they wanted to focus on core revenue-generating work, rather than have resources diverted by a potentially lengthy and costly investor-state arbitration.

Together with the company we developed a funding arrangement that de-risked them entirely, paying all costs whilst allowing them to retain control over their claim.

Investor-state cases are notoriously uncertain in their progression, but Harbour is well-used to the issues which can arise. In this particular case an early jurisdictional challenge that threatened to end the case was defeated as we provided additional funding for this unexpected additional work. The respondent State then failed to pay its share of the advance arbitration costs, but again, Harbour provided the required funding so the case could proceed.

Enforcement against a sovereign State is challenging, but Harbour is able to take advantage of its experience and extensive network of specialist advisers with long and proven track records of success to identify attachable assets in appropriate jurisdictions and reduce the risk of not recovering damages.

The company have commented to shareholders that without Harbour's support they would have most likely withdrawn the claim when faced with the challenges which arose. Harbour's solutions and experience opened up opportunities for them at a business-critical time and has allowed them to assert their rights.



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