



2026 PAW: Deciding on Arbitration Before the Arbitration

Silvia Lamprinopoulou

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The session “[Law, Facts & Figures: A 360° Approach to Pre-Arbitration Decision Making](#)”, hosted by [Accuracy](#) during [Paris Arbitration Week 2026](#), explored what happens before arbitration truly begins. Bringing together counsel, funders, experts and in-house perspectives, the discussion examined how early-stage legal, financial and operational analysis can shape outcomes long before positions harden— that is, before parties become fixed in their positions and are less willing to compromise or engage in meaningful settlement discussions. The focus was not on reacting, but on pre-arbitration and data-driven decision-making.

The panel featured [Delphine Sztermer](#) and [Anthony Theau-Laurent](#) (Accuracy), [Diora Ziyaeva](#) (Dentons), [Chau Ee Lee](#) (Chancery Law Corporation), [Pascal Grosjean](#) (Equans BeLux) and [Geoff Nicholas](#) (Burford Capital), who shared their respective perspectives.

The Pre-Arbitration Window

Opening the discussion, Sztermer framed the pre-arbitration phase as the last moment in which parties retain genuine flexibility. Once proceedings begin, positions tend to harden; before that point, however, parties still have the ability to influence both process and outcome.

From a counsel’s perspective, Lee emphasised that the starting point is simple: is the aim to initiate arbitration to prepare for negotiation or to assess whether escalation is justified at all? This requires a structured legal assessment. First, parties must determine whether they can and should proceed to arbitration by verifying the existence, scope and validity of the arbitration agreement—particularly critical in multiparty scenarios where risks are increased. Second, the broader dispute resolution framework must be reviewed, including compliance with multi-tier clauses. Jurisdictional and admissibility issues must also be carefully assessed, including risks of premature commencement, applicable limitation periods and governing law considerations. An early and accurate pre-arbitration assessment is therefore not just about identifying claims, but about developing a clear and realistic roadmap that aligns jurisdiction, admissibility and timing with the client’s objectives.

Weighing the Case

From a funder’s perspective, Nicholas framed the decision to initiate arbitration as fundamentally commercial. The central questions are not only legal, but economic: what is the likely recovery, how long is the arbitration process expected to take and how enforceable will the outcome be? Three elements are particularly critical. First, quantum, even if imprecise at an early stage, must be grounded in available evidence and a realistic understanding of what can ultimately be proven. Second, duration—often underestimated in practice—must be analysed carefully, including the different procedural stages and their implications. Third, recoverability requires a forward-looking assessment of enforcement prospects. Nicholas noted that these decisions are increasingly driven by data. Whether to fund a claim or to pursue it at all is ultimately a business decision, informed by cost, risk and expected return.

From an in-house perspective, Grosjean described a parallel internal process. Disputes often emerge gradually during the life of a project, with many issues initially addressed within contractual frameworks. The turning point comes when a dispute remains unresolved and escalation becomes a real option.

At that stage, the first step is internal diagnosis: understanding what actually happened, separating facts from internal narratives and revisiting whether contractual mechanisms were properly followed. This requires looking beyond the legal dimension to consider broader business objectives. Ultimately, the decision to proceed must be grounded in both the strength of the evidence and the quality of the underlying facts.

Bringing Experts in Early

The discussion then turned to the role of experts in the pre-arbitration phase. Ziyaeva emphasised that “the devil is in the details”: early engagement with facts and documents is critical. While experts were historically involved later in proceedings, there is now increasing recognition that early expert input can fundamentally shape the decision whether to proceed at all. In particular, it allows parties to test the commercial viability of a claim, including its recoverability.

From the perspective of a damages expert, Theau-Laurent highlighted three key contributions. First, quantum is central to decision-making: if losses cannot be substantiated, pursuing a claim may not be justified. Second, damages analysis has become increasingly complex, often involving sophisticated methodologies and probabilistic assessments. Without early input, parties risk relying on incomplete or overly optimistic assumptions. Third, experts can contribute beyond quantification, offering strategic insight into the strengths and weaknesses of a case. At the same time, Nicholas noted that while funders may still support cases with limited evidence, this significantly increases risk; and therefore cost. Early expert involvement can reduce that uncertainty and improve decision-making.

However, the panel also highlighted potential risks. Attempting to control expert opinions to maximise claim value may undermine their credibility. There may also be tension between an expert’s advisory role at an early stage and their later role as an independent expert in proceedings. As Nicholas cautioned, parties should consider from the outset whether an expert engaged early is intended to appear in the arbitration. From an in-house perspective, Grosjean identified additional concerns, including losing control of the narrative if experts begin shaping strategy too early and over-reliance on expert opinions leading to a false sense of confidence. Against this background, the panel emphasised that experts should primarily support internal positioning at the pre-arbitration stage. Used effectively, they can provide valuable insight while allowing parties to retain control over strategy and the overall direction of the dispute.

Transitioning to the Negotiation Phase

The move from assessment to negotiation requires internal alignment and realism. Grosjean explained that organisations must first develop a shared understanding of the case, including best-case, worst-case and most likely outcomes. This internal alignment is often challenging, as there is a natural tendency to defend project decisions rather than critically reassess them. Without this internal honesty, meaningful negotiation becomes difficult.

Nicholas added that the effectiveness of negotiation also depends on the rationality of the counterparty. Understanding how and when a dispute might resolve can create opportunities for settlement. From his perspective, proceeding to arbitration often reflects a missed opportunity to resolve the dispute at an earlier stage.

From a legal standpoint, Lee emphasised the importance of structuring claims carefully by tying facts to legal characterisation. Sensitivity to key assumptions, cost considerations and enforceability—particularly under frameworks such as the [New York Convention](#)—are essential in defining realistic negotiation parameters. Ultimately, pursuing a claim must rest on an economically rational basis, including a realistic assessment of cost recovery.

When Arbitration Becomes a One-Way Road

Even where early assessment is thorough, arbitration may ultimately become unavoidable. In such cases, preparation during the pre-arbitration phase becomes critical.

Ziyaeva emphasised the importance of building the strongest possible case based on the evidence available, while remaining flexible as new information emerges. As she noted, not all documents are available at the outset and parties must be prepared to adapt as the record develops. This can be facilitated by an ongoing collaboration with experts and by identifying opportunities for settlement, including mediation, throughout the process. Lee echoed this approach, stressing that clients must be “arbitration-ready.” This means understanding procedural realities—such as the composition of the tribunal—and approaching the process with full awareness of the risks, costs and potential outcomes.

Closing Remarks

Pre-arbitration decision-making is not a preliminary step, but a critical phase that shapes how a dispute unfolds, whether a commercial relationship can be preserved and whether a business loss can be avoided. Legal analysis and preparation—together with financial assessment, expert input and business considerations—enable stakeholders to move from reactive dispute management to a proactive strategy. The emphasis shall remain on making informed decisions before positions harden. Where the primary focus is on protecting the client’s business needs, the most effective arbitration strategies begin long before the first submission is filed.

This post is part of Kluwer Arbitration Blog’s coverage of [Paris Arbitration Week 2026](#).