

# Litigation Funding

*Contributing editors*

Steven Friel and Jonathan Barnes



2017

GETTING THE  
DEAL THROUGH

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# Litigation Funding 2017

*Contributing editors*

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# Preface

## Litigation Funding 2017

First edition

**Getting the Deal Through** is delighted to publish the first edition of *Litigation Funding*, which is available in print, as an e-Book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

**Getting the Deal Through** titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their assistance in devising and editing this volume.

GETTING THE   
DEAL THROUGH 

London  
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# Brazil

## Luiz Olavo Baptista, Adriane Nakagawa and Eduardo Tortorella

Atelier Jurídico

### 1 Is third-party litigation funding permitted?

Third-party funding describes many conducts on the part of the funder and the fundee. Not only hedge funds, but also financial institutions and the lawyers themselves may, under specific circumstances, act as funders of the clients they represent. In either form, third-party funding is not a regulated activity in Brazil per se. Therefore, third-party litigation and arbitration are neither formally prohibited nor legally permitted in Brazil.

Notwithstanding this, if one were to imagine any type of control or rule to be applicable – even indirectly – to third-party funding, a valuable source would be the Statute of the Brazilian Bar Association (EOAB), which rules on the conditions and boundaries of the lawyers with regard to their clients, the Brazilian Code of Civil Procedure (BCCP) and the Brazilian Arbitration Act (BAA).

As explained below, the lack of actual public records on third-party funding makes the task of outlining the rules and problems concerning this practice in Brazil nearly impossible. This is why the answers in this chapter are straightforward and the authors choose not to speculate on abstract or moot cases, with a few exceptions. The spectrum of existing rules that could indirectly come into play offers an infinite array of possibilities.

### 2 Are there limits on the fees and interest funders can charge?

There are no specific statutory limitations for the success owed to the funder or the fees. As previously stated, by and large, this relationship is not subject to any regulation.

However, should a limit apply, the chances are that the court or arbitral tribunal would at least consider the limit of 30 per cent, given a relevant precedent of the Superior Court of Justice REsp No. 1155200 of March 2011. In the above-mentioned case, an ad exitum collection of 50 per cent of the amount in dispute was deemed excessive by the court on the grounds that this rate is not a reasonable proportion between the quota litis agreement and the amount in dispute. Further to that, the court ruled that the lawyer took advantage of the party's despair in solving the conflict and thus such percentage was unacceptable. This case could serve as a good starting point but, given that this issue has not been raised yet, such understanding is still subject to much debate and interpretation.

### 3 Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

At the time of writing, there were no specific legislative or regulatory provisions applicable to third-party litigation or arbitration funding.

### 4 Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

The sole example of a rule pertaining to the relationship between the lawyers advising clients and third-party funding is a recommendation issued by the Brazilian-Canadian Chamber of Commerce (CAM-CCBC Administrative Resolution No. 18; available at [www.ccbc.org.br/Materia/2890/resolucao-administrativa-182016](http://www.ccbc.org.br/Materia/2890/resolucao-administrativa-182016)) that, among other provisions, describes the funding as the situation 'when a natural or legal person who is not party to the arbitration proceedings provides full or partial resources to one party so as to enable or assist the payment of the arbitration costs, receiving in return a portion or percentage of any profits earned from the award or from the agreement' (Section 1 of the Resolution) and establishes a set of commitments by each party involved in arbitration

funding. To avoid conflict of interests, CAM-CCBC recommends full disclosure (ie, full qualification) of the funder in the 'earliest opportunity' possible (section 4 of the Resolution).

### 5 Do any public bodies have any particular interest in or oversight over third-party litigation funding?

No public entities in Brazil have laid down any principles or established any oversight mechanisms to control the funding in Brazil as yet. To our knowledge, neither governmental nor judicial bodies have shown any interest in this.

### 6 May third-party funders insist on their choice of counsel?

Not applicable.

### 7 May funders attend or participate in hearings and settlement proceedings?

Funders' attendance at or participation in arbitration proceedings depends mainly on the parties' consent. In court cases, as long as the cases are not held in camera by the judge, hearings are open to the public as per section 155 of the BCCP.

### 8 Do funders have veto rights in respect of settlements?

Not applicable.

### 9 In what circumstances may a funder terminate funding?

Not applicable.

### 10 In what other ways may funders take an active role in the litigation process?

This depends on the interpretation given to 'active role'. If by active role one means intervening directly in the course of a litigation or arbitration and hence acting as a lawyer (ie, filing submissions and requests to the tribunal on behalf of the lawyers and the party), then according to section 3 of the EOAB, the funder is not permitted to take an active role in the litigation process.

Section 3 of the EOAB proscribes the participation of non-lawyers or lawyers not enrolled as such in the Brazilian Bar Association in any procedure or activity that requires the participation of a lawyer in Brazil (ie, presenting a case before a judicial court). In arbitration, the standard is less strict, as BAA, section 20, paragraph 3 allows parties to resort to forms of representation other than attorneys.

In that sense, it seems that, by the letter of the law, having a third-party funder taking an active role in the arbitral procedure would not necessarily constitute a breach of the BBA or the EOAB, provided that the party acknowledges and accepts it. However, it is too soon to assume that parties, judicial courts and arbitration institutions would easily accept such level of participation without resistance. This view has not yet been tested in a concrete case.

No cases involving this specific issue have been brought to judicial courts.

To verify whether this issue has been discussed in the context of arbitration, we asked some of the most prominent arbitration institutions,

namely the Arbitration Chambers of the CCBC, the CIESP-FIESP, AMCHAM, BM&FBovespa, CBMA and Fundação Getúlio Vargas about their experiences of cases involving third-party funding, and discovered that as at the time of writing, none of the arbitration institutions consulted had ever dealt with such cases. As a result, one cannot yet ascertain for sure the acceptable standard of participation of a funder in an arbitration.

#### 11 May litigation lawyers enter into conditional or contingency fee agreements?

Since the Superior Court of Justice case *REsp No. 805919* of October 2015, contingency or conditional fee agreements have become more accepted in lawsuits dealing with civil law matters. When analysing the above-mentioned case, the reporting Justice stated that it is valid and admissible for an attorney to receive only success fees, to be borne by the losing party. As a result of that recent interpretation, it is permitted for lawyers to be paid on a fixed percentage of the final amount collected by their clients. Nonetheless, this decision has not been confirmed in other Supreme Court cases.

Before that, there were only examples of conditional or contingent fees in labour compensation cases (First Regional Labour Court – TRT1. Appeal No. 0000277-62.2013,5.01.0016).

#### 12 What other funding options are available to litigants?

Aside from contingency or conditional fee arrangements and third-party funding, there are no other funding options available. One might think that assignment of claims is relevant here, however, this does not encompass the idea of third-party funding – rather, the actual transfer of monies and rights in connection with a claim to a third party.

#### 13 How long does a commercial claim usually take to reach a decision at first instance?

This varies considerably from province to province and depends on other factors, such as the complexity of the case, the number of process incidents and events. Every year, the National Council of Justice publishes a report with statistics on national administration of justice in Brazil. The latest indicated that on average, the durations range from three years and four months to seven years and 10 months.

#### 14 What proportion of first-instance judgments are appealed? How long do appeals usually take?

Again, there are many factors influencing this rate. In Rio, for instance, according to the Office of the General Directorate for Support of Jurisdictional Organs, nearly 60 per cent of cases are appealed. The duration of an appeal may vary from a couple of years to decades, depending on the tribunal in question.

#### 15 What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

Not applicable.

#### 16 Are class actions or group actions permitted? May they be funded by third parties?

Group actions are permitted in Brazil in a few areas. There are no cases whatsoever involving third-party funding.

#### 17 May the courts order the unsuccessful party to pay the costs of the successful party in litigation?

Yes, according to section 82, 2º of the BCCP, which entitles judges to order the unsuccessful party to pay the costs that were borne by the successful party.

Aside from that, it is mandatory for the claimant to be responsible for the costs arising from the proceedings whenever possible, except in cases where the state is the counterparty. Therefore, if the claimant handles its case successfully and is proven right, the respondent will have to reimburse the claimant for the initial costs, in addition to any other costs incurred throughout the proceedings.

Yet, as explained by Professor Teresa Arruda Alvim (ARRUDA ALVIM, Teresa. *Primeiros Comentários ao novo Código de Processo Civil: artigo por artigo* – Edição 2016. São Paulo: Editora Revista dos Tribunais,

#### Update and trends

The regulatory movement towards third-party funding has already started with the arbitration institutions. It is only a matter of time before Brazilian legislators start to scrutinise and establish restrictions and other control mechanisms for this practice.

2016, pages 72–73) the attorney's fees will not be encompassed therein. Therefore, the judge can rule the payment of adverse costs (ie, all the judicial costs, expert fees, registration taxes and even monetary penalties fixed throughout proceedings).

The same applies to arbitration. However, CAM-CCBC Administrative Resolution No. 18 section 2 envisioned other examples given by Professor Arruda Alvim and included attorneys' and arbitrators' fees. This means that in respect of arbitration, the costs covered in an award on adverse costs would be even higher.

Furthermore, there are innumerable examples of the application of adverse costs by Brazilian tribunals. The Superior Court of Justice, for example, when analysing the case *EDF Internacional S/A v Endesa Latinoamérica S/A and YPF S/A* (Supreme Court of Justice, SEC 5:782-EX) ordered the unsuccessful party to pay all the costs of the procedure. Another example is the case *Mercovia S/A v Comissão Mista Argentino-Brasileira (COMAB)* (Supreme Court of Justice, SEC 10.432), where, once again, the Supreme Court ordered the unsuccessful party (COMAB) to pay all procedural costs.

In light of the foregoing, the possibility of ordering the unsuccessful party to pay the costs of the successful party is widely recognised.

#### 18 Can a third-party litigation funder be held liable for adverse costs?

Not applicable.

#### 19 May the courts order a claimant or a third party to provide security for costs?

According to section 83 of the BCCP, the courts have the power to order a party to provide security for costs only if the said party is not domiciled in Brazil. The aim of the legislator was to provide for monies securing the payment of costs and legal fees in case of inexistence of assets in the Brazilian territory. There is no fixed rule for the calculation of security for costs and they can be deposited in an account of public financial institutions (ie, Banco do Brasil) or – upon justified request – in an escrow account in a private financial institution.

#### 20 If a claim is funded by a third party, does this influence the court's decision on security for costs?

Not applicable.

#### 21 Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

There is no specific statutory prohibition, however, ATE insurance is not commonly used in Brazil. Usually parties bear the costs of the adverse party themselves if they lose the case.

#### 22 Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

Not applicable.

#### 23 Are communications between litigants or their lawyers and funders protected by privilege?

Parties are not required by law to treat the arbitration as confidential, and in most cases they include an explicit confidentiality provision, either in the original arbitration clause or in the terms of reference. On top of that, many Brazilian arbitration institutions (CAM-CCBC (section 14); CMA FIESP-CIESP (section 10.6); CAMARB (section 12.1); CAM – BM&FBOVESPA (section 9); AMCHAM (sections 18.1 and 18.2); FGV (sections 61 and 62); and CBMA (section 11.2 and 17.1)) have among their rules express

provisions to maintain the proceedings, the documents therein presented and the award under the veil of confidentiality. Therefore, even in proceedings that are not confidential per se, the arbitration rules of the institution imply such characteristic.

Yet, aside from section 7, II of the EOAB expressly recognising that communications between the parties and their attorneys are privileged, as for now there are no guidelines regarding the communications between parties and funders, neither on arbitration nor on court proceedings. Nevertheless, considering the standard approach of deeming most aspects related to arbitration confidential, it would be possible to consider the communications between litigants and funders would most likely be treated as protected by confidentiality, but are not privileged in the meaning provided for in the EOAB.

**24 Have there been any reported disputes between litigants and their funders?**

There have been no reported disputes between litigants and their funders as yet.

**25 Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?**

The fact the arbitration chambers have not yet reported cases in connection with the presence and participation of a funder does not mean third-party funding is not already a reality in Brazil. Most information collected on the practice comes from informal, therefore not publishable, sources. Adding to that, the lack of shared knowledge regarding the legal arrangements, agreements and disputes – possibly because those are subject to arbitration – makes it difficult to provide an overview of third-party funding in Brazil.



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