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WOODSFORD
LITIGATION FUNDING

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PERSPECTIVES

THE STEADY RISE OF LITIGATION FUNDING IN LATIN AMERICA

BY **ZACHARY KRUG**

> WOODSFORD LITIGATION FUNDING

Recent years have witnessed the use of litigation finance expand rapidly across the globe. As practitioners become more familiar with its many advantages, judges and arbiters recognise its positive role in promoting meritorious claims, and claimants realise its potential to hedge risk and manage ever growing legal costs.

Latin America is no exception to this trend. Indeed, the volume of litigation and arbitration across the region is already substantial and the costs to litigate (or arbitrate) a matter can be considerable.

Importantly, Latin American countries do not prohibit third-party funding of a litigant's legal claims. This is because the region's legal systems are largely code-based, civil law regimes and therefore did

not inherit the common law's feudal prohibitions on maintenance and champerty. But, by and large, the practice has not yet been adopted widely and relative to the overall volume of disputes, the use of funding remains in its infancy. This may soon change.

The slow but steady expansion of litigation funding in Latin America may be viewed in four key areas: the growth of international arbitration, the promulgation of guidelines regarding funding, the rise of local litigation funders and the need for education.

Substantial growth in international arbitration

In recent years, there has been remarkable

growth in international arbitration matters related to Latin America. For example, the International Chamber of Commerce (ICC) reported that 2016 saw a 15 percent increase in the number of Latin American parties, with Brazil and Mexico among the top five nationalities.

This is consistent with a longer-term trend for the prior decade, which saw the number of ICC disputes involving Latin American parties increase 131 percent between 2005 and 2015 and the number of arbitrations seated in Latin America increase 230 percent. The pace of investor-state arbitration is similarly brisk, with approximately 30 percent of the International Centre for Settlement of Investment Disputes (ICSID) matters in 2016 involving state parties from South & Central America and the Caribbean.

Given this explosive growth, it is hardly surprising that the ICC recently celebrated the opening of a branch in São Paulo (only its fourth overseas presence) which it deemed necessary as a “direct response to an ever-expanding Latin American arbitration market”. Moreover, if the global economic headwinds – for example, China’s slowing economy, falling commodity prices and increased protectionism – facing some Latin American economies worsen, the region will likely see an uptick in both large disputes and claimants’ desires for outside financing.

This growth in international arbitration in Latin America surely augurs a concomitant increase in the use of third-party funding in Latin America. Indeed, a large portion of claimants in ICC matters and the

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vast majority of claimants in ICSID matters have actively considered using third-party funding. If Latin America sees more international arbitration, it will also see more litigation finance.

Expect increased guidelines from arbitral centres

The last year has witnessed a spate of guidelines issued by a variety of jurisdictions globally – from the Northern District of California to the Dubai International Financial Centre Courts – regarding the use and disclosure of third-party litigation funding. In Latin America, CAM-CCBC, a leading arbitration centre in Brazil, issued guidelines regarding funding. Specifically, the resolution “recommends the parties

to report the existence of third-party funding” and outlines a procedure for conducting potential conflicts checks to ensure an arbitrator’s impartiality.

What is driving this trend? No doubt, this likely reflects an already existing increase in funded matters before these institutions, as well as a recognition that funded matters will become increasingly common in the coming years. But, interestingly, by providing such guidance itself, these regulations may well foster overall litigation funding capital inflows to matters within these jurisdictions, because the provision of clear guidance makes them relatively more attractive to claimants and funders as a venue for disputes.

As such, it would not be surprising to see other Latin American jurisdictions and arbitral centres issue similar guidelines in the coming year, both as a reaction to increased funding as a practical reality and, perhaps, as an effort to stay at the forefront of important and emerging legal issues.

Local expertise and the rise of local funders

Currently, the majority of major litigation funders are based in and invest in predominantly common-law jurisdictions. Indeed, in many respects, the business of contemporary litigation finance has evolved from one common-law jurisdiction to




another, moving from Australia to the UK and then to the US and now to Hong Kong and Singapore. This evolution is hardly surprising because the claims and defences and the basic structure of the legal systems remain similar; thus, familiarity with one system is broadly transferable to another.

As a result, however, some litigation funders may be hesitant to invest in civil law countries or will limit their investments to international arbitration or enforcement of civil law judgments in common law courts. Surely this will change, as funders educate themselves and, crucially, as more locally based funders arise to fill a growing demand. In the interim, funders may partner with local experts.

The education of practitioners

Finally, if the growth of litigation funding in Latin America bears any similarity to its growth in the US, education of practitioners will be one key driver. In its early stages, litigation finance is often driven by exigency – a claimant needs critical financing, a lawyer faces mounting pressure to reduce legal bills – and litigation finance can be the solution to an urgent problem.

But as practitioners, in-house counsel and claimants become more sophisticated about the advantages of litigation finance (e.g., law firm portfolio finance, risk hedging and positive accounting benefits) then the next stage will see litigation finance being used more broadly – not when it is necessary because of some acute need, but when it simply offers the best solution to balance complex issues of financial and legal risk. 



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