

Litigation Funding 2020

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Litigation Funding 2020

Contributing editors**Steven Friel and Jonathan Barnes****Woodsford Litigation Funding**

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Litigation Funding*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Italy and the United States of America.

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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.

Lexology 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 continued assistance with this volume.



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REGULATION

Overview

1 | Is third-party litigation funding permitted? Is it commonly used?

Third-party funding is not a regulated activity in Brazil. Aside from the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) Administrative Resolution No. 18, issued in July 2016, there are no other rules expressly dealing with the subject, and no statutory regulation exists. Despite the lack of regulation, third-party funding activities in Brazil are increasing, especially in arbitrations. The same is not true as far as litigation is concerned.

Since last year's survey, the number of third-party financed arbitrations has increased from four to fifteen. However, it would be an exaggeration to say third-party funding is commonly used. There is no record of court cases involving third-party funding issues and, consequently, there is no common understanding or approach concerning funding by third parties in Brazil.

Restrictions on funding fees

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

There are no specific statutory limitations for the fees or the interest owed to the funder.

However, should a limit apply, the chances are that the court or arbitral tribunal would consider a limit of around 30 per cent, given a relevant precedent by the Superior Court of Justice (REsp No. 1155200) from March 2011. In this case, an ad exitum collection of 50 per cent of the amount in dispute was deemed excessive by the court because this rate was not a reasonable proportion between the quota litis agreement and the amount in dispute. Further to that, the court ruled that the lawyer had taken advantage of their client's need to solve the conflict, thus deeming such percentage unacceptable. This case could provide a good starting point for creating limits on payments to third-party funders, but given this issue has not yet been raised, such understanding is still subject to much debate and interpretation.

Specific rules for litigation funding

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

If one were to imagine any type of control or rule to be applicable – even indirectly – a valuable source would be the Statute of the Brazilian Bar Association (EOAB), which sets forth the conditions and the boundaries of lawyers with regard to their clients. In addition, the Brazilian Code of Civil Procedure (BCCP) and the Brazilian Arbitration Act (BAA) impose upon arbitrators' duties of independence and impartiality. Therefore,

some may say that the duty to disclose the existence of a funder derives from these instruments.

Legal advice

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

At the time of writing, there were no specific ethical rules applicable to third-party litigation funding. As mentioned in question 1, when it comes to arbitration, the only rule regulating client-attorney relationships and third-party funding is CAM-CCBC's Administrative Resolution No. 18. Section 1 of the Resolution establishes a set of guidelines applicable to the parties involved in arbitration funding and describes funding as the situation:

[W]hen 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.

To avoid conflicts of interest, the CAM-CCBC recommends full disclosure (ie, full qualification) of the funder at the 'earliest opportunity' (section 4 of the Resolution). In addition, according to our research, other arbitral institutions, such as the Arbitration and Mediation Center of the American Chamber of Commerce (AMCHAM) and the Business Arbitration Chamber (CAMARB), also seem to be concerned with establishing recommendations regarding third-party funding.

Regulators

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 third-party funding in Brazil yet.

FUNDERS' RIGHTS

Choice of counsel

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

Since there is no regulation regarding third-party funding in Brazil, the parties are free to negotiate the terms of the financing.

Participation in proceedings

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. However, in court cases, so long as the case is not held in legal confidentiality, hearings are public, as stated in section 189 of the BCCP.

Veto of settlements

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

As mentioned in question 6, the parties are free to negotiate the terms of financing.

Termination of funding

9 | In what circumstances may a funder terminate funding?

As the parties are free to negotiate the terms of financing, the provisions of the applicable law chosen by the parties will describe the termination procedure.

Other permitted activities

10 | In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

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. Other than that, surveillance and control of the relationship between funder-party-attorneys is subject to the contractual commitments from one party to the other.

In that sense, it seems that, under the law, having a third-party funder taking an active role in the arbitral procedure would not necessarily constitute a breach of the BAA or the EOAB. However, it is too soon to assume that parties, judicial courts and arbitration institutions would easily accept such level of participation without resistance.

Since there is no provision regarding third-party funding in Brazil, the funder's role in the process shall be bound by the terms of the financing contract. It is interesting to highlight that some funds will only accept financing the litigation or arbitration process if the parties permit them to interfere in the procedure (ie, strategy definition, hiring experts or prohibiting amicable settlement between the parties).

To verify whether this issue has been discussed in the context of arbitration, we asked some of the most prominent arbitration institutions about their experiences with cases involving third-party funding. These institutions were:

- the CAM-CCBC;
- the Chamber of Mediation and Arbitration (CMA CIESP/FIESP);
- AMCHAM;
- the Market Arbitration Chamber (CAM-BOVESPA);
- the Brazilian Centre of Mediation and Arbitration (CBMA);
- the Arbitration and Mediation Chamber of Fundação Getúlio Vargas (FGV);
- the Arbitration and Mediation Chamber of the Federation of Industries of Paraná;
- CAMARB;
- the Arbitration Council of the State of São Paulo;
- the European Court of Arbitration;

- the Chamber of Conciliation, Mediation and Arbitration of the Commercial Association of Bahia; and
- the Brazilian Secretariat of the International Chamber of Commerce – Team 10 (ICC-Brazil)

We found that, as of the time of writing, only five of these arbitration institutions have ever dealt with such cases. As a result, one cannot yet establish with certainty the acceptable standard of participation a funder may have in an arbitration. Most institutions, however, when reporting cases, brought no additional information as to the funder's participation in the proceedings, which leads us to the conclusion – at least without having access to the funding agreements and their obligations – that, in Brazil, most funders do not actively participate in them.

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

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

The Brazilian Bar Association Federal Council is not supportive of conditional fees – as is the case of quota litis, believing this fee arrangement represents a potentially harmful practice that leads to the depreciation of the work of attorneys. Consequently, the Brazilian Bar Association has stated that hourly fees – duly supported by the client throughout the litigation – is the rule, while quota litis remains an exception.

Since Superior Court of Justice case REsp No. 805.919 of October 2015, contingency or conditional fee agreements have become more accepted in lawsuits dealing with civil law matters. In his opinion, 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. According to this 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 yet been confirmed in other Superior Court cases.

Other funding options

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. Although one might think that assignment of claims may provide a choice of funding, it is not encompassed by the idea of third-party funding – rather, it consists in the actual transfer of monies and rights in connection with a claim to a third party.

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

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

The length of time taken to reach a first instance decision depends on the city in which the lawsuit is filed as well as other factors, such as the complexity of the case and the number of procedural issues and events. Every year, the National Council of Justice publishes a report with statistics regarding the national administration of justice in Brazil. The latest report indicates that, on average, the cognisance procedure takes just 1.5 years and the enforcement procedure takes about four years and nine months. It is important to mention that, after 2005, the enforcement procedure became a procedural step in court cases, automatically commencing after the cognisance procedure.

Time frame for appeals

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

The research conducted by the National Council of Justice, *Justice in Numbers 2019*, provides that approximately 11.8 per cent of cases in all jurisdictions (eg, state courts, labour courts, military courts, etc) are subject to appeal. However, the values can greatly vary when analysing the jurisdictions separately. In the state and federal levels, 7.6 per cent and 18.8 per cent of judgments are appealed, respectively, whereas in labour courts the value skyrockets to 50.2 per cent. The research indicates that an appeal may take from three months to two years and two months, depending on the jurisdiction.

Enforcement

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

Not applicable. See question 13.

COLLECTIVE ACTIONS

Funding of collective actions

- 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. Since there is no regulation regarding third-party funding in Brazil, there seems to be no restriction on third parties financing class actions or group actions.

COSTS AND INSURANCE

Award of costs

- 17 | May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The BCCP lays down a distinction between legal fees (section 85) and other procedural costs (ie, translations, transfer, expert's fees, hotel fees, etc; see section 84). The legal fees of the winning party shall be borne by the losing party according to section 85. However, the same rule does not apply to other procedural expenses (section 86, chapeau). Despite the 'loser pays' rule of section 85, court practice shows judges are more prone to embrace a proportional allocation of costs and legal fees. In other words, judges tend to apply the rationale of section 86 to both procedural costs and legal fees.

In addition, claimants are mandatorily responsible for costs arising from 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 initial costs, in addition to any other costs incurred throughout the proceedings.

There are plenty of examples of the application of adverse costs by Brazilian tribunals. The Superior Court of Justice, for instance, in *EDF International SA v Endesa Latinoamerica SA and YPF SA* (Supreme Court of Justice, SEC 5.782-EX), ordered the losing side to pay all the costs of the procedure. Another example is *Eletrônica SA v INACE – Indústria Naval do Ceará SA* (Supreme Court of Justice, SEC 14.679).

Therefore, the judge can rule the payment of adverse costs (ie, all the judicial costs, expert fees, registration taxes and even monetary penalties fixed during proceedings). The same applies to arbitration. However, section 2 of CAM-CCBC Administrative Resolution

No. 18 provides other examples of payment of adverse costs, such as attorneys' and arbitrators' fees. Therefore, arbitration costs covered by the adverse costs' awards may be even higher.

Liability for costs

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

Parties are free to negotiate the terms of the financing (see question 6).

Security for costs

- 19 | May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

According to section 83 of the BCCP, courts may order the claimant to provide 'security for costs' if it is not domiciled in Brazil. The aim of the legislator was to guarantee that the costs and legal fees would be paid if the claimant did not hold assets in Brazil. There is no fixed standard for security for costs and it can be deposited in a public financial institution account (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?

No. Since security for costs may only be provided when the claimant does not live in Brazil, third-party funding will not influence the court's decision on granting it.

Insurance

- 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.

DISCLOSURE AND PRIVILEGE

Disclosure of funding

- 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.

Privileged communications

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

The law does not require parties to treat arbitrations as confidential, but it is reasonable to say this is a customary rule. In most cases, parties prefer to include an explicit confidentiality provision, either in the arbitration clause or in the terms of reference. On top of that, many Brazilian arbitration institutions have, among their rules, express provisions to maintain the confidentiality of proceedings, including the arbitral award and all documents presented therein, for example:

- CAM-CCBC arbitration rules (section 14);
- CMA CIESP/FIESP arbitration rules (section 10.6);
- CAMARB arbitration rules (section 13.1);
- CAM-BOVESPA arbitration rules (section 9.1);

- AMCHAM arbitration rules (section 20);
- FGV arbitration rules (section 46); and
- CBMA arbitration rules (section 11.2 and 17.1).

However, there are no guidelines regarding communications between parties and their funders, neither in arbitration nor in court proceedings. Considering the standard approach of maintaining confidentiality for most aspects related to arbitration, it is possible that communications between litigants and funders would likely be treated as confidential.

DISPUTES AND OTHER ISSUES

Disputes with funders

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

One of the arbitral institutions consulted reported discussions arising from third-party funding regarding the following:

- violation of the procedure confidentiality;
- the funders' commitment to the confidentiality of the arbitral proceedings;
- whether the funder could be liable for any breach of confidentiality;
- whether the financing contract exclusively concerns one particular arbitral procedure;
- whether the financing contract grants the third party the right to interfere in the arbitral procedure (eg, strategy definition, hiring experts, prohibiting amicable settlement between the parties);
- whether the funder was granted a guarantee of some kind; and
- whether the financing contract included the allocation of the costs of loss.

We do not have access to the answers provided.

Other issues

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

Most information collected on the practice comes from informal, therefore not publishable, sources. This information shows that third-party funding is a reality in Brazil, though in a limited way. However, comparing our data with that of last year, we see an increase in the number of cases financed by a third parties and, to us, it is clear that third-party funding is expected to increase in coming years.

UPDATE AND TRENDS

Current developments

26 | Are there any other current developments or emerging trends that should be noted?

Recent events brought up discussions surrounding the use of arbitration as a dispute settlement mechanism in case of large-scale disasters. On 5 November 2015, a dam in Mariana, located in the state of Minas Gerais, collapsed, causing catastrophic damage. Four years have passed and the environmental damage from the disaster remains, with an aftermath of 19 deaths and lawsuits being filed at the state and federal levels. Dozens of public civil actions and more than 50,000 individual lawsuits remain pending before the judiciary awaiting trial. On 25 January 2019, another dam collapsed near Brumadinho, also in the state of Minas Gerais.

Learning from past mistakes (ie, taking all lawsuits of this incident to state courts, consequently jamming the judicial system, which could take decades to settle), scholars began discussing the possibility of



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filing class arbitrations in order to provide individuals with a faster and more efficient dispute settlement mechanism. At the end of 2018, the Court of Justice of the State of São Paulo accepted a collective arbitration. Shareholders of Petrobras (one of Brazil's main state-owned companies) decided to sue the company as a class after Federal Police's Operation Car Wash corruption scandals were revealed. As a defence, Petrobras argued, before the first instance court, that the shareholders signed contracts with arbitration clauses, thus removing the state courts' jurisdiction over their claims. The shareholders replied that they signed the clause as individuals, not as a group. In the decision, the judge ruled that, since all members of the class signed the arbitration clause, the arbitral tribunal had jurisdiction to adjudicate the claim. Yet, it would not be necessary for each individual to file an independent action. Collective arbitration could happen through class representation, reducing costs for the claimants. The Court of Justice thus upheld the decision of the first instance judge.

Despite being a cost-reducing solution to claimants, class arbitrations should be considered an attractive business to funders, as the higher amount in dispute when compared to most arbitration proceedings should lead to better funding deals, as well as a higher success rate, since the damage-causing act is already widespread information.

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