



Litigation and Arbitration Funding in Latin America

Woodsford Litigation Funding Insight

In association with **LESTE**
LITIGATION FINANCE

Litigation and Arbitration Funding in Latin America — What You Need to Know

The use of litigation funding is expanding rapidly across the legal world.

This trend has accelerated as the key actors in dispute resolution proceedings become familiar with litigation funding and its many advantages. Sophisticated claimants appreciate how funding can help them manage costs and offset legal risk; savvy lawyers recognize how third-party funding can help them expand their practice and offer clients flexibility on fees; and forward-thinking Judges and arbitrators acknowledge the positive role that litigation funding plays in promoting meritorious claims and fostering access to justice.

Until recently, use of litigation funding was largely confined to the United Kingdom, Australia and the United States. However, within the last few years there has been rapid expansion in its use, particularly in connection with international disputes, and litigation funding is now increasingly being employed in disputes related to Asia, the Middle East—and Latin America.

Indeed, for many reasons, Latin America is a region that is particularly inviting for litigation funding. It has a sophisticated and well-developed legal services market, regulatory regimes that do not prohibit third party funding, legal systems that are increasingly pro-arbitration and aligned with international legal standards, and the region regularly sees substantial high-value disputes involving capital constrained entities.

As a global litigation funder, Woodsford regularly receives inquiries from parties involved in Latin American-related proceedings and we expect the frequency of these inquiries to grow substantially in the coming years. As such, lawyers and arbitrators involved in high-value litigation and arbitration in the region should begin to familiarize themselves with how litigation funding works in practice and the many advantages offered by partnering with a litigation funder like Woodsford.

The Basics of Litigation Funding

Litigation funding, also known as “litigation finance” or “third party funding,” is simply an alternative means for a claimant to fund the costs of a legal dispute.

Rather than an individual or corporation paying the costs out-of-pocket (which can cause significant strain on a company’s operations) or a lawyer proceeding on contingency (which many firms cannot

accommodate), a commercial litigation funder finances the cost of the proceedings in return for a share of any award.

This kind of funding is typically non-recourse - if the claim is lost, the claimant is not liable to repay the investment of the funder. Thus, in a typical funding arrangement, the outside litigation funder shoulders most of the risk.

The Advantages of Litigation Funding

The advantages of litigation funding for both lawyer and claimant are substantial.

Most fundamentally, litigation funding facilitates access to justice. A capital-constrained claimant who might not otherwise have the resources to prosecute their claim (sometimes as a direct result of the defendant’s wrongful conduct) is given the opportunity to have its day in court. This is particularly true in “David v Goliath” cases where a smaller claimant takes on a bigger, more well-resourced defendant, who may use a strategy of attrition to exhaust the claimant’s appetite and ability to prosecute its claim. Partnering with a well-capitalized funder like Woodsford substantially levels the playing field and allows a claim to survive on its merits.

Even where a claimant has the resources to fund a dispute, litigation funding offers many advantages. Funding allows a claimant to unlock the value of a potential claim and preserve capital for other uses,

while transferring the ongoing costs and contingent liabilities of the claim to a third party. Moreover, funding can have potential accounting benefits, as it takes ongoing litigation expenses off a company’s books.

Ultimately, funding permits a claimant to hedge some of its risk, ensuring that it will be in a better position if the claim is successful, but in no worse position if the claim is not successful. Thus funding transforms litigation from a traditional “win-lose” proposition to a “win-don’t lose” proposition.

Litigation funding can also have substantial strategic benefits and lead to better settlement outcomes. A claimant, knowing that they have the resources to fully prosecute a dispute, will be in a more advantageous position for settlement and will not be forced to accept a low offer merely on account of their capital constraints. Furthermore, the fact that a sophisticated litigation funder like

Woodsford has backed a claimant's position sends a powerful signal to the defendant and court that a third party with substantial expertise believes strongly in the merits of the underlying claim to put their own capital at risk.

From the perspective of law firms, a litigation finance agreement with a funder can boost their financial position. Law firm finance, where a funder provides capital directly to a firm, cross-collateralized against a portfolio of cases that the firm has taken on a contingent basis, can mitigate cash flow challenges, providing a certainty that legal invoices will be paid in a timely manner and provide lawyers a more stable financial position, allowing them to focus on better advocating their clients' positions. Equally, an agreement with a funder may

allow a law firm to take on new clients and offer more flexible arrangements to existing clients.

Finally, it should be emphasized that litigation funders do not control the litigation or arbitration. Although a litigation funder like Woodsford, staffed with expert litigators with decades of international law firm experience, can provide valuable resource to claimants and their lawyers, all decisions regarding the litigation and potential settlement remain firmly in the hands of the lawyer and claimant. Indeed, by relieving some of the financial stresses of litigation, working with a litigation funder like Woodsford allows a lawyer and claimant to focus in on the merits of a dispute.

The Permissibility of Litigation Funding in Latin America

Latin America is, of course, comprised of many distinct legal systems and so caution should be taken when considering the region as a whole. However, broadly speaking, litigation funding is not prohibited in the region. This is not surprising as most Latin American legal systems are code-based, civil law systems. As such, they did not inherit the common law's feudal prohibitions on champerty and maintenance, which, although they have gradually fallen away in most jurisdictions, have somewhat slowed the growth of litigation funding in some common law regions.

Currently, there are few, if any, regulations or guidelines that affirmatively address the permissibility of litigation funding in Latin America. Nevertheless, many civil law codes have long permitted the alienation of litigation rights, and litigation funding

would be permitted under the basic civil law principles of contractual freedom. Indeed, under analogous principles, litigation funding has already found acceptance in Spain and we would expect the same to occur in Latin America. Scholars and practitioners who have begun to study the matter, have predicted that as in Spain, litigation funding will not face substantial obstacles and will be accommodated by the legal and regulatory regimes of most Latin American countries. For example, in Brazil there are currently no specific rules affirmatively prohibiting or permitting litigation funding, however it already appears poised to become an increasingly accepted part of the legal landscape. Woodsford expects that litigation funding will be used more frequently throughout Latin America and that this growth is unlikely to face any major regulatory limitations.

The Climate for Litigation Funding in Latin America

Woodsford is regularly in contact with lawyers in the region and while there is little publicly available data, anecdotally, it appears that there is substantial interest in the potential uses of funding and a number of matters being actively being funded across the region.

This interest will likely remain strong, as the substantial costs of complex litigation and arbitration will continue to grow, putting mounting pressure on even well capitalized claimants' legal budgets. This

pressure may be compounded in several Latin American jurisdictions that regularly require the losing party to pay for adverse costs. Moreover, given the role of foreign investment, the region will likely continue to see complex high-value international arbitration and bilateral investment treaty arbitration. Embracing litigation funding enables both lawyer and client to manage costs and legal risk, without resort to increased debt or at the expense of other strategic priorities.

The Uses of Litigation Funding

Taking account of how litigation funding has expanded in other regions, and the way it has begun to be used in Latin America, we can make some predictions about how and where it will be used in the near and medium term.

It is likely that, in the short term, litigation financing will be used most frequently in international arbitration matters related to Latin America; domestic arbitration will likely follow soon after and finally, funding of domestic litigation will grow more gradually and on a country-by-country basis.

Partly, this prediction is simply a necessary corollary to the remarkable growth of both international and domestic arbitration in Latin America. On the international side, the International Chamber of Commerce (ICC) reported that 2016 saw a 15% increase in the number of Latin American parties, with Brazil and Mexico being among the top five nationalities globally. Indeed, over the prior

decade, the number of ICC disputes involving Latin American parties increased 131% between 2005 and 2015 and the number of arbitrations seated in Latin America increased by 230%. Investor-state arbitration has grown at a similarly brisk pace, with approximately 30% of the International Centre for Settlement of Investment Disputes (ICSID) matters in 2016 involving state parties from South & Central America and the Caribbean. Additionally, the ICC recently celebrated the opening of a branch in São Paulo (its fourth overseas presence) which it deemed necessary as a "direct response" to an ever-expanding Latin American arbitration market, while the UNASUR Arbitration Centre is due to be established soon.

Funding has become an important and readily accepted feature in the international arbitration landscape. Indeed, in Woodsford's experience, a large portion of claimants in ICC matters and the vast majority of claimants in ICSID matters,

have actively considered using third-party funding. It follows that if Latin America continues to see an increase in the number of international arbitration disputes, it will also see increased use of litigation funding in those matters.

Third party funding in domestic arbitration will follow. Already, in many Latin American countries, sophisticated parties prefer to have disputes resolved through arbitration and, underscoring this demand, the region has over 100 local arbitral institutions. The use of arbitration will continue to grow, especially as several countries have enacted pro-arbitration legislation and the perceived advantages of arbitration over litigation are not likely to change any time soon. From a funder's perspective, arbitration matters may be attractive for investment, given their relative speed, predictability, finality and the range of enforcement options as compared to domestic litigation in the region. Moreover, as discussed below, we expect that arbitral centers will eventually play an important role in educating the wider legal community about the role of litigation funding.

Funding of domestic litigation will take more time and the speed of adoption will likely vary on a country-by-country basis. Litigation funding may first come to play domestically in the enforcement of domestic judgments abroad; but the funding of domestic litigation itself often requires a

deep understanding of a particular jurisdiction's legal system and the peculiarities of its local judicial and political structure. Because such investments will require substantial local expertise for due diligence and because many of the highest value cases may already be in arbitration, litigation funding may grow more slowly in the domestic litigation sphere. Indeed, it may be the case that locally based litigation funders will be best suited to address the domestic litigation market. From Woodsford's perspective, this would be a positive development as it would help educate lawyers and the judiciary about the advantages of litigation funding and provide greater access to justice for domestic matters that, due to their relatively low value or unique local character, are unsuited to funding from a global litigation funder like Woodsford.

One area that may eventually be particularly interesting for the use of funding is the collective or group action. While class actions are frequently used in the United States and have some corollary in many other common law jurisdictions, collective actions are a relatively new phenomenon in Latin America. These actions are often time and resource intensive and because several jurisdictions limit or prohibit lawyers from proceeding on contingency, outside litigation funding may provide a critical resource to help such collective actions proceed, thereby fostering access to justice for large groups with meritorious claims.

The Role of Local Arbitral Centers

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. Woodsford expects that similar guidance will issue from local centers in Latin America.

Indeed, consistent with this likely trend, the CAM-CCBC, a leading arbitration center in

Brazil, became the first arbitral center to affirmatively address the use of third party funding, issuing guidelines regarding the disclosure of 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.

Such guidelines are helpful because they give clarity to the status of funding, provide

direction on disclosure to alleviate concerns for conflicts and provide an opportunity for the larger community of practitioners to familiarize themselves with the uses of litigation funding. Woodsford expects that other Latin American jurisdictions and arbitral centers will issue similar guidelines in the coming years to stay at the forefront of emerging legal issues and, perhaps, as a competitive effort to encourage more funded matters within those jurisdictions.

The Need for Local Expertise & The Rise of Local Funders

Currently, the majority of major litigation funders are based in and invest in 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 U.K. and then to the United States and now to Hong Kong and Singapore. This evolution is hardly surprising because the claims and defenses 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.

To that end Woodsford has recently announced a cooperation agreement with Leste Litigation Finance, the first litigation funder in the Brazilian market, which will allow the parties to pool their expertise to fund matters in Latin America and beyond.

Conclusion

Woodsford is a global litigation funder that is committed to access to justice, funding meritorious claims that might otherwise be frustrated by the substantial costs and risks involved in high-value litigation and arbitration. Latin America will be receptive to the use of litigation funding and we expect that the region will see a substantial

increase in the use of litigation funding in the coming years. Woodsford looks forward to working with lawyers and arbitrators in the region and we stand ready, willing and able to contribute to access to justice in the region through the funding of meritorious claims.

About the authors

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About Woodsford Litigation Funding

Founded in 2010, with offices in London and Philadelphia Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford Litigation Funding is a founder member of the Association of Litigation Funders of England and Wales.

Woodsford's role in supporting claimants in David versus Goliath litigation was highlighted in a landmark ruling of the English High Court: Essar Oilfields Services Limited v Norscott Rig Management PVT Limited [2016] EWHC 2361 (Comm)

For further information, visit www.woodsfordlitigationfunding.com or email **Steven Savage** at ssavage@woodsfordlf.com