

Litigation Funding

Contributing editors

Steven Friel and Jonathan Barnes



2018

GETTING THE
DEAL THROUGH

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Litigation Funding 2018

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

Third-party funding is not a regulated activity in Brazil. Aside from the Arbitration and Mediation Centre of the Brazil-Canada Chamber of Commerce (CAM-CCBC) Administrative Resolution No. 18, issued in July 2016, there are no other rules expressly dealing with the subject, not to mention the non-existence of statutory regulation. 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 zero to four. 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 not a common understanding or approach concerning funding by third parties in Brazil.

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 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 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 took advantage of the party's despair in solving the conflict and thus deemed such percentage as unacceptable. This case could provide a good starting point but, given 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?

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 rules 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 the arbitrators' duty of independence and impartiality. Therefore, some may say that the duty to disclose the existence of a funder comes from these instruments.

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 sole rule regulating the client-attorney relationship and third-party funding is 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:

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.

To avoid conflict of interests, the CAM-CCBC recommends full disclosure (ie, full qualification) of the funder at the 'earliest opportunity' (section 4 of the Resolution). Besides, according to our researches, 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.

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 yet.

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.

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

8 Do funders have veto rights in respect of settlements?

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

9 In what circumstances may a funder terminate funding?

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

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.

As previously mentioned, 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, namely 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 and the Chamber of Conciliation, Mediation and Arbitration of the Commercial Association of Bahia about their experiences of cases involving third-party funding, and found that, as at the time of writing, only two of these arbitration institutions had ever dealt with such cases. As a result, one cannot yet establish with certainty the acceptable standard of participation of a funder in an arbitration.

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

The Brazilian Bar Association Federal Council is not supportive of conditional fees – as it is the case with *quota litis*, because, in their view, this fee arrangement represents a potentially harmful practice, leading to the depreciation of the work of attorneys. To that effect, the Brazilian Bar Association stated that hourly fees – duly supported by the client throughout the litigation – is the rule, for which *quota litis* is the exception.

Since the 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. 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. 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 been confirmed.

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?

The length of time taken to reach a decision at first instance depends on the city in which the lawsuit was filed and on other factors, such as the complexity of the case, 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 about 1.3 years and the enforcement procedure takes about four and a half years. It is important to mention that, after 2005, the enforcement procedure became a procedural step in court cases, automatically commencing after the cognisance procedure.

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 Number 2017' (www.cnj.jus.br/files/conteudo/arquivo/2017/09/904f097f215cf19a2838166729516b79.pdf) does not provide a breakdown of the ongoing lawsuits that are subject to appeal, but presents figures on the proportion of the appeals in relation to decisions of superior courts. The research indicates an appeal may take from nine months to two years and 10 months, depending on the province under scrutiny.

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

Not applicable. See question 13.

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.

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) (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 proceed to 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.

Aside from this, the claimant is mandatorily 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.

There are plenty of examples of the application of adverse costs by Brazilian tribunals. The Superior Court of Justice, for example, when analysing the *EDF Internacional SA v Endesa Latinoamerica SA and YPF SA* case (Supreme Court of Justice, SEC 5.782-EX), ordered the unsuccessful party to pay all the costs of the procedure. Another example is the *Electrônica SA v INACE - Indústria Naval do Ceará SA* case (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 throughout proceedings). The same applies to arbitration. However, section 2 of CAM-CCBC Administrative Resolution No. 18 presents other examples of payment of adverse costs, such as attorneys' and arbitrators' fees. Therefore, the arbitration costs covered by the award of adverse costs may be even higher.

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

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

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 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.

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, 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 (eg, 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 (sections 18.1 and 18.2); FGV arbitration rules (sections 61 and 62); and CBMA arbitration rules (section 11.2 and 17.1)).

However, there are no guidelines regarding the 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 could be possible to consider that communications between litigants and funders would most likely be treated as confidential too.

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

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

- violation of the confidentiality of the procedure;
- 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 (ie, strategy definition, hiring experts, prohibiting amicable settlement between the parties, etc);
- 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.

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 last year's, we noted an increase in the number of cases financed by a third party and, to us, it is clear that third-party funding is expected to increase in the coming years.

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