

Kluwer Arbitration Blog

Snapshot on Litigation Finance in Latin America

Zachary Krug, Helena Eatock (Woodsford Litigation Funding) · Monday, September 24th, 2018

Litigation finance continues expand rapidly on a global basis, including in Latin America. The region's code-based civil systems generally permit litigation funding and the continued growth in arbitration make it an attractive market for funding. Brazil, as the region's largest economy, and with a well-developed and sophisticated legal system, is leading the way. Moreover, local practitioners emphasize that third party funding is not only growing, but that it may be developing in a uniquely Latin American way.

Growing Demand for Funding

Practitioners familiar with the legal market report a growing interest in funding. Erika Levin, a partner at a law firm with deep ties to the region notes that “parties in Latin America have been warming up to the idea of litigation finance over the last few years.” Likewise, Marcela Kohlbach de Faria and Marianna Marra, lawyers at Brazil's leading litigation funder, report that interest has “been growing rapidly,” which has been driven by the “well-known advantages of litigation funding, such as access to justice and better control of companies' allocation of costs.”

They report that the bulk of inquiries come from civil engineering and construction matters. That is largely “due to the high costs regarding expert determinations and the (usually long) hearings of expert witnesses.” However, inquiries come from all sectors—from mergers and acquisitions to intellectual property matters—reflecting an increasing demand throughout the legal sector.

An Uptick in Funded Matters

Now, it appears that that interest is beginning to translate into an uptick in actually funded matters—at least for certain types of disputes.

Interestingly, there is an important distinction between arbitration and litigation. Thus far, the demand for funding of arbitration has far outpaced the demand for funding in litigation. Kohlbach de Faria and Marra believe that is not surprising given the relatively low costs of litigation compared to arbitration: “Since tribunal costs are not high, so, compared to arbitration, in most cases the amount of money that must be spent to litigate in the Brazilian judiciary does not justify a funding contract.”

Thus, unlike common law jurisdictions, where the high costs of litigation are one of the main drivers of funding, in Brazil at least for now, funding is primarily being requested for arbitration matters.

While specific details remain elusive and the overall number remains small relative to other jurisdictions with a longer experience using funding, anecdotally, there appears to be a steady uptick in the number of arbitrations involving third party funding. For example, in November 2017, Brazilian law firm [Atelier Jurídico](#) conducted a survey of Brazilian arbitration institutions on their practices with regard to third party funding. Interestingly, the survey reports at least four cases involving third party funding, whereas there were none in the prior year.

Notably, because disclosure of funding is not generally required, this may well underreport the number of arbitrations that are third party funded. To be sure, the numbers remain relatively small, but the trend seems evident.

Disclosure of Funding

Disclosure of funding is, of course, a topic of continued debate globally. As funding remains new, there are few, if any, rules around funding, let alone disclosure. However, in Brazil, the CAM-CCBC (Brazil Canada Chamber of Commerce), a leading arbitral centre, issued [guidelines](#) in July 2016 recommending the disclosure of funding so that any potential conflicts can be considered.

Interestingly, since CAM-CCBC publication of its funding guidelines, other Latin American arbitral institutions have followed with similar rules or recommendations. Perhaps this suggests that concerns over potential conflicts (the main issue generally driving disclosure) are overblown, or simply a cautious approach as the centres evaluate whether the actual number of funded cases warrants promulgations of new rules.

In any event, Kohlbach de Faria and Marra note that the bulk of funding inquiries they receive for arbitration dispute involve arbitration clauses referring to Cam-CCBC (40%), followed by the ICC (16.8%). Thus, as funding grows, the CAM-CCBC's disclosure recommendation will have an impact even if it is not followed by other centres.

Lex Mercatoria of Latin American Funding

From the Calvo doctrine to today, Latin America often goes its own way and litigation funding may be no different.

Kohlbach de Faria and Marra emphasize that this lack of specific rules and regulations should not be seen as a sign of funding's uncertain footing in the region. Indeed, quite the contrary: "In Latin America, for instance, there are only a few guidelines over TPF and the institute lacks governmental regulation, but those who think such fact implements an obstacle for litigation funding may be mistaken." Rather, they note that "the Latin American regional market, in the absence of regulation, tends to stipulate its own application methods and limitations – a kind of *lex mercatoria* – whereas legislation in a market that is still blossoming could undermine its development."

Time for a Brazilian ALF?

Nevertheless, some practitioners predict that with the growth of funding, some type of regulatory body will eventually be desirable. For example, Carlo Verona, a partner at [Demarest](#) focused on international arbitration and cross-border litigation, argues that "self-regulation is key" because a robust "litigation funding market cannot operate without trust, transparency and suitability." Verona notes that the UK's Association of Litigation Funders provides a potential model: "ALF's

Code of Conduct, set of procedural rules and stellar list of funder members is perfect adequate to the expanding Brazilian market, currently boosted by the wide spread use of arbitration for complex disputes and recent amendments regarding enforcement of judgments and awards in the Code of Civil Procedure.”

Looking to the Future

Looking ahead, litigation funding will no doubt continue to grow, particularly in arbitration, as practitioners and claimants become more familiar with its substantial advantages in offsetting risk and leveling the playing field in contentious disputes. Of course, regional economic and political uncertainty may also play a role in the growth of funding.

For example, Brazil’s economic slump and the lingering impacts of the *Lava Jato* revelations likely portend a number of disputes that will eventually find their way into arbitration. Indeed, Kohlbach de Faria and Marra note that *Lava Jato* has had “enormous impacts” and “its unfolding affected the vast bulk of Brazilian construction and engineering companies.” Thus, funding may be particularly attractive now, “especially in the current scenario of economic crisis and difficulties in various branches of Latin America economy, such as the construction field.”

Hermes Marangos, a partner at a disputes-centred law firm in London with a cross-border practice that frequently involves Latin American matters, reflects that “the effect of new regulations to speed up justice, provide opportunities for claims by shareholders, investors in infrastructure, suppliers and consultants and many others who suffered losses in Brazil.” But Marangos notes that because many of the current disputes “involve sensitive claims for the local market and raise potential conflicts,” which provides an “opportunity for local teams which are not conflicted as well as international experts and funders come together to pursue these claims.”

Finally, “while the majority of financing has occurred with respect to arbitrations in Brazil and Mexico,” Erika Levin predicts “a continued rise in its use throughout the region with respect to arbitrations as well as litigations.”

However funding grows in Latin America, it will be particularly interesting to see how it develops differently from the common law jurisdictions where it is more deeply established.

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