

Third-Party Funding for International Arbitration in Latin America

Arbitration analysis: Third party funding (TPF) is a type of litigation funding which has seen an enormous increase in states and is expanding in Latin America. Paloma Castro Hernández, senior legal counsel, Deminor, explores this expansion.

This analysis was first published on Lexis®PSL on 27/01/2023 and can be found [here](#) (subscription required).

Third party funding and its origins

TPF, also known as 'litigation funding' or 'litigation finance' is a mechanism by which a third party (the funder) provides funds to a party in a litigation or arbitration (usually the claimant) in return for a portion of the proceeds recovered in the proceedings. In general, this type of funding is non-recourse, which means that the claimant will only be liable to pay the funder in case the litigation or arbitration is successful.

Litigation funding has experienced an enormous increase in states such as Australia, the UK, Canada and the US. However, litigation funding is not an exclusively Anglo-Saxon phenomenon. Litigation and arbitration funding has long been practised in Continental Europe, and, in recent years, it has been expanding to other countries such as Latin America.

Latin America as a hotspot for TPF

Latin America is a region predisposed to dispute resolution through arbitration and, thus, a natural breeding ground for litigation funding. The statistics published by the International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce (ICC) show that the Latin American arbitration market has experienced increasing growth in previous years. Thus, litigation funders remain interested in expanding their activities in this region.

According to the 2022 issue of the [ICSID Caseload — Statistics](#) which examines case-related trends over the 2022 fiscal year, South America accounted for 20% of the total of registered cases by June 2022, Central America and the Caribbean accounted for 12%, and North America accounted for 6% of total cases.

ICSID registered 50 new cases in FY2022 (1 July 2021–30 June 2022) under its procedural rules for resolving international investment disputes. Arbitrations under the ICSID Convention accounted for the largest share of new cases (with 48 cases), followed by arbitrations applying ICSID Additional Facility Rules (in two cases). The geographic distribution of new cases under the ICSID convention by state parties involved shows that South America was the region that received the most new cases (totalling 11 cases) with the following allocation of cases: (i) Chile-1 case; (ii) Colombia-1 case; (iii) Ecuador-1 case; (iv) El Salvador-1 case; (v) Guyana-1 case; (vi) Peru-5 cases; and (vii) Venezuela-with 1 case. Moreover, Mexico and Guatemala registered 2 cases each, and other regions such as Costa Rica, Dominican Republic and Panama registered one case each.

These figures illustrate that Latin America continues to be at the forefront of the ICSID investment arbitration caseload.

According to the information provided by [ICSID](#), the majority of newly registered cases in FY2022 (56%) asserted ICSID jurisdiction on the basis of a bilateral investment treaty. On the other hand, the latest statistics published by the ICC, dated 2020, show that parties from Latin America and the Caribbean represented approximately 15% of all parties, reaching a peak of 396 parties in 2020. Brazil remained the most represented nationality within the region (38%) with 150 parties (compared to 133 in 2019), rising from third to second place in the worldwide nationality ranking for the first time. Within Latin America, Brazil was followed by Mexico, with 78 parties (compared to 51 in 2019), which ranked 10th in the [worldwide nationality ranking](#).

The profile of the professionals that typically fund cases in Latin America

Professionals that usually finance litigation in the region can be divided into two classes: (i) foreign funds, with a presence in the US and Europe, which have recently disembarked in Latin America; and (ii) local funds.

The profile of these funds has certain similarities: both tend to focus on the search for large commercial or investment arbitration cases. Normally, foreign funds come with large amounts of capital to invest, resulting from their track record and investments in the rest of the world. Local funds, in general, have only been recently established in view of the opportunities offered by the Latin American market, although they employ the advantage of first-hand knowledge of the local market.

Moreover, in general, these stakeholders tend to be made up of lawyers with extensive experience in the world of disputes, which means that they have a perfect understanding of the cases and needs of the clients who use the TPF mechanism.

Conclusion

Certainly, Latin America is a very attractive region for the industry of litigation funding. The sharp increase that the international arbitration market has experienced in the region over the past decades is also expected to impact the development of TPF significantly. Despite being in its early stages in terms of domestic court litigation in different countries, it is showing signs of maturity in the field of both domestic and international arbitration.

The fact that Latin America presents a changing and dynamic panorama notably indicates the presence of business opportunities for funders such as Deminor, since, in this scenario of global financial uncertainty, companies will need financial resources to be able to meet their obligations, as well as to face possible litigation that may arise.

Interviewed by Rebecca Regan Lexis Nexis Arbitration

Paloma Castro is senior legal counsel at Deminor responsible for supervising the Iberian and Latin American markets. Paloma is mainly involved in the commercial litigation and arbitration funding practice at Deminor where he focuses on sourcing and originating funding opportunities in Iberia and Latin America. She specialises in international and domestic arbitration, litigation, intellectual property, recovery claims and securities litigation. Before joining Deminor, Paloma was in-house counsel at a Spanish multinational construction and engineering company, and before that she worked for top tier international and national law firms in Spain.

Want to read more? Sign up for a free trial below.

FREE TRIAL

The Future of Law. Since 1818.