THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

Fourth Edition

Editor
Simon Latham

THE LAWREVIEWS

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PREFACE

As a law graduate whose first steps in the legal profession were encumbered by the impact of the previous global financial crisis, I faced a fairly bleak outlook. By happenstance (sheer bloody-mindedness), I found myself at the doors of the London branch of a US plaintiffs' firm, little known on these shores at the time (I still recall the firm's name was spelled incorrectly by the court on most documents in those days). The firm's proactive, and innovative, culture naturally meant it was an early adopter of third party funding (TPF). As such, I had the great fortune to be inducted into the world of TPF from my very first day as a trainee solicitor. I witnessed, first-hand, how TPF catalysed both the firm's growth and its clients' paths to a healthier balance sheet, notwithstanding the burdens that the financial crisis had left in its wake. A spark was lit.

As an investment manager, now immersed within the TPF sector in the face of what has been described as the worst global economic crisis since the Great Depression, I face the challenge of translating my experience into reasons for optimism. Like many of my industry peers, I understand and appreciate the role that TPF plays in providing access to justice for those who could otherwise not afford to pursue their claims. Similarly, in a time when cash is king, TPF has a role to play in enabling corporates to resolve their disputes without depleting resources that could be invested profitably elsewhere within the business. With ever increasing funds under management both by members of the Association of Litigation Funders (ALF) and by the broader TPF fraternity, there are significant resources available for litigants and law firms to utilise. Yet despite the sector's expansion since the previous global financial crisis, TPF still remains a little-known, or little-understood, solution for businesses. Even among lawyers, there are few who are fully aware of the TPF options available to their own businesses, let alone to their clients.

So what exactly is there for law firms and litigants to know about TPF? Well, just as the list of legal remedies available to litigants varies between jurisdictions, so too does the menu of TPF options. The past year alone has seen both shifts in and endorsements of the various regulatory frameworks that underpin the sector across the globe. In Australia, the industry found itself on the receiving end of stringent new regulations, notably without industry consultation. Partly in response to those developments, a number of funders and finance firms have sought to create a global lobbying voice for the TPF sector, by establishing the International Legal Finance Association, chaired by my editorial predecessor, Leslie Perrin. By contrast, there have been notable judicial endorsements of TPF in other jurisdictions over the past 12 months. The English courts, for example, have endorsed not only TPF, but also the ALF itself.

With government support for businesses during the current crisis coming to an end and legal developments such as the forthcoming EU directive on representative actions on the horizon, could 2021 become a milestone year for TPF? I hope this publication provides a useful guide for litigants, lawyers and investors alike as we take on the challenges the new year brings.

Simon Latham
Augusta Ventures
London
November 2020

Chapter 3

BRAZIL

Rodrigo de Magalhães Carneiro de Oliveira, Eider Avelino Silva and Rafael Curi Savastano[1]

I MARKET OVERVIEW

The year 2020 will be remembered as the year that humanity faced the unfortunate events caused by the covid-19 pandemic. With some countries in lockdown for weeks, and even months, the global economy ground to a halt. The numbers currently available reveal that the world is already experiencing an economic depression.

The impact of covid-19 on third-party funding (TPF), however, cannot be fully determined yet. In attempting to assess the potential impact of this crisis, we have updated the research on TFP published in last year's edition of this chapter[2] and conducted with the major arbitral institutions acting in Brazil: (1) Center for Arbitration and Mediation of the Chamber of Commerce Brazil–Canada (CAM-CCBC); (2) the Market Arbitration Chamber (CAM) of the B3 – Brasil Bolsa Balcão SA; (3) the Business Arbitration Chamber (CAMARB); (4) the Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP (CMA CIESP/FIESP); (5) the Brazilian office of the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (ICC); and (6) the FGV Mediation and Arbitration Chamber (FGV).

Among all these institutions, in 2020, there was only one new (disclosed) case involving TPF. One of the institutions reported that in two proceedings the parties informed the institution of their intention to seek third-party funding, but no formal agreement has been reported at the time of writing.

Even though no firm conclusions may be reached yet regarding the connection between TPF and the covid-19 pandemic, it is already possible to foresee what impact covid-19 may have on the TPF market (see Sections VI and VII).

For clarity, it is important to explain from the outset that all references to TPF throughout this article refer to the traditional method of TPF. In this type of funding, the funder pays the litigation costs of a non-related party involved in a specific dispute, and receives in consideration a stake of the final amount to be awarded to that party[3] (in contrast to a loan, this method imposes no obligation on the funded party to repay the money received if it does not succeed in the litigation).

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1 Rodrigo de Magalhães Carneiro de Oliveira and Eider Avelino Silva are partners and Rafael Curi Savastano is a senior associate at Pinheiro Neto Advogados.

2 Last year's edition of this chapter is available at: https://thelawreviews.co.uk/edition/the-third-party-litigation-funding-law-review-edition-3/1212000/brazil (accessed on 22 September 2020).

3 For a full review of the main types of funding available, see Cardoso, Marcel Carvalho Engholm. Arbitragem e financiamento por terceiros. São Paulo. Ed. Almedina. 2020. pp. 53–76.

Therefore, unless otherwise mentioned, references in this chapter to TPF do not include other methods of funding (funding by lawyers, funding to law firms, funding by parent companies, funding of multiple cases, etc.).

In general, with regard to the Brazilian TPF market, the comments and conclusions presented in last year's edition remain applicable in 2020. Brazil is fertile ground for TPF, with considerable potential for growth in the coming years, especially in light of the significant amount of ongoing litigation in Brazil or involving Brazilian parties.

For example, in 2019, the ICC reported that, in terms of the number of parties involved in ICC arbitration proceedings by country, Brazil ranked third (only behind the United States and India and ahead of France).[4]

The Center for Arbitration and Mediation of the Chamber of Commerce Brazil–Canada (CAM-CCBC), one of the main arbitral institutions in Brazil, reported that in 2019 it administered 413 arbitral proceedings, 97 of which were initiated that year. The total value of the cases lodged with the CAM-CCBC in 2019 amounted to approx. US$1.57 billion.[5]

When it comes to litigation before judicial courts (as opposed to litigation before arbitral tribunals), Brazil also has huge potential for TFP since it has a significant number of lawsuits ongoing before federal and state courts (in 2019, there were 77.1 million ongoing lawsuits)[6].

Notwithstanding this potential, to date there is no record of TPF having been provided to a party involved in litigation before judicial courts. As was explained by one of the major participants in Brazil's TPF market, the lack of predictability regarding the duration of lawsuits in the Brazilian courts is the biggest challenge to overcome when making a decision about whether to fund a case in the county.[7]

Therefore, in the absence of any information about the use of TPF in disputes in the judicial courts, this chapter concentrates on TPF in disputes heard by arbitral tribunals, since this seems to be the principal arena for TPF in Brazil.

In this context, the major participants in the Brazilian market remain those reported last year: Leste Investimentos, the first investment fund specialised in providing this type of service in Brazil;[8] and LexFinance, a Peruvian-based investment fund specialising in investments in Latin America, Portugal and Spain.[9]

It is also important to mention that in recent years we have seen a number of new market participants arriving and investing in disputes within the Brazilian territory, such as the British firm Harbour Litigation Funding, which has already invested in two disputes in arbitration in Brazil.[10]

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4 Information from the 2019 ICC Dispute Resolution Statistics report, available at: https://iccwbo.org/publication/icc-dispute-resolution-statistics/ (accessed on 20 September 2020).

5 Information available at: https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/arbitragem-estatisticas/ (accessed on 22 September 2020).

6 Information available at: https://www.cnj.jus.br/wp-content/uploads/2020/08/WEB_V2_SUMARIO_EXECUTIVO_CNJ_JN2020.pdf (accessed on 20 September 2020).

7 As explained in a webinar held on 18 August 2020, and available at: https://www.youtube.com/watch?v=E_cwDGjm8SU.

8 http://www.leste.com/pt/leste-litigation-finance/ (accessed on 22 September 2020).

9 https://www.lex-finance.com/BR/#our-products (accessed on 22 September 2020).

10 Information available at: https://valor.globo.com/legislacao/noticia/2019/10/20/fundos-nacionais-e-estrangeiros-decidem-apostar-em-arbitragem.ghtml (accessed on 22 September 2020). See also: https://www.harbourlitigationfunding.com/ (accessed on 22 September 2020).

In short, the significant position occupied by Brazil in the international arbitration landscape, the arrival of new market participants and the consolidation of traditional actors in this area confirm the country's potential to attract TPF and develop here an industry that is already well established in other countries.

II LEGAL AND REGULATORY FRAMEWORK

Brazil does not have any statutes or regulations dealing specifically with TPF and there is no case law discussing its use in Brazilian litigation practice. As mentioned above, in Brazil, TPF is mostly used to fund arbitration disputes. As such, the existing TPF legal regime is based on guidelines and international soft law issued by arbitral institutions and international bodies.

The guidelines and soft law applicable to TPF in Brazil are mainly concerned with the disclosure of the existence of a third-party funder to allow the members of the arbitral tribunal to assess any conflicts of interest with the funder.

For instance, Administrative Resolution No. 18/2016 of CAM-CCBC recommends the disclosure of TPF at the first opportunity.[11] Resolution No. 6/2019 issued by the CMA CIESP/FIESP, updating the CAM CIESP/FIESP Code of Ethics, provides a similar recommendation.[12] Also, CAMARB recently published Administrative Resolution No. 14/20 to the same effect.

Although the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration (the ICC Note) does not make express reference to TPF, it provides that arbitrators (or prospective arbitrators) when assessing their duty to disclose should consider 'relationships with non-parties having an interest in the outcome of the arbitration'. The ICC Note also states that the ICC Secretariat is available to assist in identifying the relevant individuals or entities, which can be a useful tool, since the ICC Secretariat has access to the information on who is paying the costs of the arbitration.[13]

11 'Article 4 – In order to avoid potential conflicts of interest, CAM-CCBC recommends the parties to report the existence of third-party funding to CAM-CCBC at the earliest opportunity. The complete qualification of the funder should be included in this communication.' Available at: https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ar-18-2016-recommendations-regarding-the-existence-of-third-party-funding-in-arbitrations-administered-by-cam-ccbc/ (accessed on 22 September 2020).

12 The new Article 3-A.1 of the CMA CIESP/FIESP Code of Ethics states: 'The presence of a third-party funder may be relevant to an assessment of the arbitrator's independence and impartiality, especially if there is any previous or current relationship between the arbitrator and the third-party funder. Therefore, it is recommended that the party to the arbitration being funded by a third party reveals, in writing and at the first opportunity, the existence of the funding and complete qualifying information about the third-party funder' (free translation). Original Portuguese version available at: http://www.camaradearbitragemsp.com.br/pt/res/docs/Resolucao_n_6.2019.pdf (accessed on 22 September 2020).

13 '24. In assessing whether a disclosure should be made, an arbitrator or prospective arbitrator should consider relationships with non-parties having an interest in the outcome of the arbitration. The Secretariat may in this respect assist prospective arbitrators by identifying relevant entities and individuals in the arbitration. Such an indication does not release an arbitrator or prospective arbitrator from his or her duty to disclose with respect to other relevant entities and individuals he or she may be aware of. In case of doubt with respect to such an indication made by the Secretariat, an arbitrator or prospective arbitrator is encouraged to consult the Secretariat.' Available at: https://iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf (accessed on 22 September 2020).

Although the applicability of international soft law to domestic arbitration is questionable (if it is not expressly referred to in the parties' agreement), it is worth mentioning that the IBA Guidelines on Conflicts of Interest in International Arbitration provide that third-party funders should be put in a position of equivalence with the party to the arbitration when assessing any potential conflicts of interest with the arbitral tribunal.[14]

The discussion about the duty to disclose the existence of a funder is relevant in the Brazilian context, since the lack of disclosure in a timely manner may, in some cases, jeopardise the integrity of the arbitral award. The Brazilian Arbitral Act (BAA) provides that individuals should not act as arbitrators if their involvement with either the dispute or the parties to the dispute would disqualify them from acting as a judge.[15] The standards for disqualification, or to cause the recusal, of a judge are provided in the Brazilian Code of Civil Procedure (BCCP).[16]

Specifically, Article 145, items II and IV, of the BCCP provide that the recusal of a judge may occur when 'she or he provides funds to bear the litigation expenses' or 'she or he has an interest in adjudication of the case in favour of any of the parties'. As such, if a judge has invested in a litigation fund, for instance, and this fund is funding a dispute that is to be adjudicated by that judge, a conflict of interest can be inferred and the judge should not be allowed to hear that case.

Although TPF (as defined above) is not commonly used to fund cases in federal and state courts in Brazil, it should be noted that contingency fees (or *honorarium quota litis*) are well established and widely used in Brazil's litigation practice. In this type of agreement, the lawyer usually agrees to receive its legal fees (in total or in part) as a share of the economic benefit to be received by the client at the end of the proceeding. Thus, the lawyer shares the risk with the client, since the lawyer will not be paid if the client does not ultimately receive any economic benefit.

The Superior Court of Justice (STJ), Brazil's highest court for non-constitutional matters, has confirmed the validity of contingency fees contracted by lawyers.[17]

Resolution No. 02/2015 of the Federal Council of the Brazilian Bar Association of 19 October 2015 (the Brazilian Bar Association Code of Ethics) authorises the existence of *quota litis* fees but establishes that (1) the fees should be paid in cash (goods or assets are only admissible as payment in exceptional circumstances), and (2) when there is a contingency fee,

14 'Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms "third-party funder" and "insurer" refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.' Available at: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (accessed on 22 September 2020).

15 Article 14 of the BAA: 'The persons in any way related to the litigants or to the litigation itself in such a way as to fall within the applicable disqualification or recusation criteria shall be disqualified from acting as arbitrators, and shall be subject – to the extent applicable – to the same duties and responsibilities as set out in the Code of Civil Procedure' (free translation).

16 Article 144 and 145 of the BCCP.

17 See Special Appeal No. 805,919/MG, Reporting Justice for the decision: Justice Raul Araújo, Fourth Panel of the SCJ, judgment dated 13 October 2015.

and the lawyer also receives the 'loss of suit' fees from the opposing party (i.e., an award of legal fees for the prevailing party, determined by the court and paid by the losing party), the amount received by the lawyer should not be greater than the amount received by the client.[18]

The matter of the award of legal fees for the prevailing party is peculiar to Brazil's legal system. At the end of the proceeding, the judge orders the defeated party to pay an amount to the lawyer for the prevailing party as legal fees. The judge will determine the amount to be paid, but it should not exceed 20 per cent of the value of the judgement, the economic benefit or the value of the dispute ascertained in the complaint.[19]

In this context, given that (1) the award of legal fees for the prevailing party should not exceed 20 per cent; and (2) Article 50 of Brazilian Bar Association Code of Ethics provides that the lawyer should not receive a greater amount than the client, taking into account any contingency fee and the award of legal fees for the prevailing party, it is possible to conclude that the contingency fee should usually be limited to 30 per cent of the amount in dispute (i.e., a 30 per cent contingency fee plus a 20 per cent award of legal fees for the prevailing party equals a value of 50 per cent in legal fees to the lawyer).

Of course, a contingency fee of 30 per cent should not be interpreted as a cap since in some situations the legal fees of the prevailing party may be awarded as a percentage smaller than 20 per cent or may not be awarded at all (in arbitration, for instance, there is no legal obligation for the arbitral tribunal to make an award of legal fees for the prevailing party, and the parties are free to contract otherwise).

However, a 30 per cent contingency fee probably serves as a reasonable standard, since the STJ has stated that a *quota litis* of 50 per cent would be excessive and reduced a fee of this amount to a percentage of 30 per cent in a specific case.[20]

Finally, from a business perspective, it should be noted that a contingency fee of 30 per cent may also sound reasonable, since the funders usually want the party to the arbitration to remain with a larger sum of the economic benefit, so the party would remain engaged in the litigation.

III STRUCTURING THE AGREEMENT

As reported, Brazilian law does not have any regulation concerning TPF. In the absence of specific legislation, the parties are free to choose their own binding contractual provisions, as long the general principles of Brazilian law are observed, together with the requirements established in Article 104 of the Brazilian Civil Code (BCC)[21] for the validity of legal transactions.

In this context, as discussed by legal scholars, the TPF can be interpreted as either an atypical contract (i.e., *sui generis*) or it can fit into a pre-existing contractual type under

18 Article 50 of the Brazilian Bar Association Code of Ethics.

19 Article 85, Paragraph 2 of the BCCP.

20 See Special Appeal No. 1.155.200/DF, Reporting Justice for the decision: Justice Nancy Andrighi, Third Panel of the SCJ, judgment dated 22 February 2011.

21 Brazilian Civil Code: Article 104. A valid legal transaction requires: I – a person with legal capacity; II – a lawful, possible, determined and determinable subject matter; III – a form prescribed or not proscribed by law.

Brazilian law (such as an assignment of credit or partnership contract).[22] We are not aware of any case law discussing or interpreting the legal contractual framework applicable for TPF under Brazilian law.

Although not legally required, it is recommended that TPF agreements are made in writing, so the parties have no doubts regarding the terms. Furthermore, it is important to preserve written evidence of the TPF agreement (if not in writing itself), in the event that it is necessary to prove the contractual relationship before a court of law. This precaution would avoid any debate on whether the TPF agreement could be proved through oral evidence alone.

Generally, the negotiation of the provisions of a TPF agreement will be within parties' discretion and may vary from case to case. It is recommended that the main terms (i.e., total amount funded, how the funds should be applied, the share or amount to be received by the funder, payment events, and dispute resolution methods) are thoroughly negotiated by the parties and written in a clear manner. Some additional best practices regarding TPF agreements are detailed below.

Confidentiality

It is advisable that, before disclosing information to a potential funder, the parties enter into a non-disclosure agreement (NDA). This is important because almost all arbitration proceedings in Brazil are confidential. Here, it is important to note that although the BAA does not impose a specific and express duty of confidentiality in relation to the proceedings, the parties are free to contract otherwise. An agreement on confidentiality is usually made in the arbitration agreement (directly or by reference to arbitral rules providing for confidentiality).

Therefore, considering that the majority of the parties agree to maintain the confidentiality of the proceedings, the potential funder should execute an NDA to have access to the relevant documents. The duty of confidentiality should be reinforced in the funding agreement itself. An arbitral institution reported to us that, in one case, the funder was expressly asked to sign an NDA before being granted access to the documents.

Independent counsel

It is also recommended that the party seeking funding is advised by independent counsel during the negotiations with the funder. Depending on the context of the case, it may even be advisable for this independent counsel to be different from the one handling the litigation, to avoid any conflicts of interest between the litigation counsel and the client.

Award of legal fees for the prevailing party

The agreement should also clearly establish entitlement to the award of legal fees for the prevailing party (if any). That is, the parties should expressly agree that these fees are to be awarded to the lawyer handling the dispute, and should agree on whether this amount is to be taken into consideration when calculating the funder's share in the dispute. This is crucial, because under Article 23 of Federal Law No. 8,906 of 4 July 1994 the lawyer for the prevailing party is entitled to the award of legal fees for the prevailing party and has the autonomous right to claim these fees in court from the convicted party, without needing the client's authorisation.

22 Cardoso, Marcel Carvalho Engholm. Arbitragem e financiamento por terceiros. São Paulo. Ed. Almedina. 2020. pp. 91–102.

Additional funding sources

Parties interested in obtaining TPF should disclose any other sources of funding that they may be receiving at the time of concluding the agreement. For instance, if the party's lawyer is to receive any amount as a contingency fee, the funder should be informed of this arrangement and potentially it should be referred to in the funding agreement.

IV DISCLOSURE

As mentioned in Section II, disclosure of the existence of TPF is recommend, since the lack of disclosure may, in some cases, jeopardise the enforceability of an arbitral award and compromise the integrity of the proceedings. It is precisely for that reason that Brazil's main arbitral institutions have issued administrative resolutions recommending disclosure of third-party funders.

However, there is no obligation under Brazilian law to disclose the funding agreement in litigation. In this context, an arbitral institution reported to us an instance where the opposing party requested the disclosure of the financing agreement, but the arbitral tribunal denied the request. Conversely, it was reported that in another case, before a different arbitral institution, the financed party voluntarily presented the financing agreement.

Given that the main purpose of disclosure of TPF appears to be to check for possible conflicts of interest, production of the agreement may appear irrelevant at first glance. It is, however, within the judge's or arbitrator's discretion to determine whether production is needed based on the case before them.

In relation to confidentiality, as most arbitration proceedings in Brazil are confidential (not by law but by agreement of the parties), it is important to sign a NDA to have access to the arbitration documents and information (in one case, reportedly, the signing of a confidentiality clause was needed to allow access to the documents).

Finally, it is important to mention that under Brazilian law, communications between lawyers and their clients are protected by professional secrecy, pursuant to Articles 35 and 36 of the Brazilian Bar Association Code of Ethics. Disclosure of certain confidential information between the lawyer handling the litigation and the funder, however, would probably not be viewed as a violation of professional secrecy – especially after the execution of an NDA – since assisting the client in the process of obtaining TPF can be seen as part of the lawyer's role in providing legal services to the client.

V COSTS

As a general rule in Brazilian litigation practice, the defeated party should bear the costs of the litigation by reimbursing the prevailing party for the costs it incurred. In cases of partial victory, reimbursement should be proportional to the degree of success. Further, it has been decided by the STJ that the legal fees paid by the party for its attorneys are not reimbursable.[23]

23 See EREsp No. 1.507.864/RS, Reporting Justice Laurita Vaz, Special Court of the SCJ, judgment dated 20 April 2016.

The general term 'litigation practice' is used here because this rule, established in Articles 82 and 86 of the BCCP, is applicable to all civil and commercial cases, in both state and federal courts. Considering that most lawyers working in arbitration come from a litigation background, this practice is also reflected in some arbitration proceedings.

Nevertheless, it should be pointed out that neither the BAA nor the majority of the arbitration rules have any provision determining how costs should be awarded by arbitral tribunals. This is left primarily to the will of the parties or otherwise to the discretion of the arbitral tribunal. The parties are free to agree, for example, that no reimbursement shall occur, regardless of the final result. The parties may also agree that the defeated party shall reimburse the winning party for the legal fees charged by its lawyers.

We are not aware of any case law discussing potential liability of funders for adverse costs (if any).

Finally, in the interviews we conducted with Brazil's major arbitral institutions, we were informed that in 2020 there were no requests for security for costs or discussions on the matter arising from the involvement of a funder in the dispute.

VI THE YEAR IN REVIEW

It is still early to assess the impact of covid-19 on the global economy, on litigation practices and, more specifically, on TPF practices. However, it is likely that some of the changes imposed during the covid-19 period may remain in place even after the pandemic.

For instance, almost all Brazilian arbitral institutions moved to 100 per cent electronic-based proceedings, which is more efficient and tends to reduce costs. Of course, when it comes to arbitration, freedom of contract shall prevail; however, these wholly electronic-based proceedings are likely to remain in place in future, putting an end to the common practice of sending hard copies of the main submissions and attached documents to the parties and members of the arbitral tribunal (entailing significant costs for the preparation and review of these copies).

Even before the onset of the pandemic, wholly electronic-based proceedings were already the reality in state and federal courts.

Another innovation that also may stay in place after the pandemic is virtual hearings. Again, it will require case-by-case analysis to determine whether a virtual hearing is appropriate. Nevertheless, virtual hearings can be a good option to reduce costs otherwise incurred for travel, hotels, transportation and food, for example. Also, in some cases, virtual hearings may help streamline proceedings, since the arbitrators and the parties are not going to spend any time in transit, making it easier to coordinate and align the schedules of those involved.

During covid-19, virtual hearings were also held very successfully before federal and state courts, courts of appeals and superior courts. There is an ongoing project to incentivise and continue the use of this technology for hearings and other judicial activities even after the pandemic.[24]

These potential reductions in costs may also affect the TPF market positively, since, in theory, the amount spent in each case would be reduced, allowing more cases to be funded.

24 As discussed by National Council of Justice: https://www.cnj.jus.br/servicos-por-videoconferencia-serao-mantidos-no-judiciario-apos-a-pandemia/ (accessed on 3 October 2020).

VII CONCLUSIONS AND OUTLOOK

In conclusion, TFP is still a recent phenomenon in Brazil, but undoubtedly the country has a huge market to develop, especially in light of the volume of ongoing litigation. To date, TPF has mostly been used in arbitration by sophisticated market participants. Perhaps for this reason (and because there are no specific laws on the practice) there are no publicly available cases discussing, for example, the use of TPF, its limits or the funding agreements.

With TPF expected to grow considerably in the years to come, it is likely that new rules, cases and regulations will arise, providing more guidance on the use of this important mechanism.

As mentioned in the opening section of this chapter, although it is still too early to assess the impact of covid-19 on TPF, if any, an exercise imagining potential consequences and scenarios is already possible. For example, a reasonable assumption is that more parties may be classed as impecunious in the coming months and years as a direct consequence of the economic challenges wrought by the crisis. Those parties, which before the pandemic were not looking to be funded, may prove to be in need of TPF to move their claims forward.

Modifications to proceedings imposed by the onset of covid-19 may also impact funders' assessment of cases. Virtual hearings and exclusively electronic-based proceedings may bring a reduction in the direct and indirect costs involved in certain disputes.

In contrast, with increased numbers of companies and people in financial difficulty, it is likely that creditors will have a harder time collecting monies awarded by judicial and arbitral tribunals. These factors may produce modifications to or even restrictions on funders' approach to potential cases, despite the scope for the initiative of stress funds.

It is thus difficult to predict the future effects of the pandemic, but the examples above show that, as for almost every kind of business on the planet, TPF may be profoundly affected by the pandemic. We are optimistic, though, that TPF will consolidate its position in Brazil, given its still unexplored potential in the field. Just how this potential will be developed is a question that will be answered definitively in the years to come.

Appendix 1

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