

“The financial aspects of third-party funding are becoming more sophisticated”



Interview with

JOÃO SAÚDE

Partner, **SÉRVULO & ASSOCIADOS**

“Some funders play a more active role in proceedings, participating in the definition of the strategy”

Third-party funding in arbitration has significantly increased in the past few years, says Servulo’s partner João Saúde – and it’s no longer just distressed entities that are requesting funding.

leaders league. What sort of risk analysis do funders make prior to entering into a funding agreement?

João Saúde. Funding of a claim is always preceded by rigorous due diligence by the funder, conducted by its own legal team. The due diligence will address, inter alia, the chances of success of the claim, the foreseeable costs of the arbitration and the enforceability of an award.

What is the extent of information that needs to be shared with the funder for due diligence purposes?

The funder usually requests to be provided with all documents concerning the claim in order to be able to make a complete assessment of its chances of success. Moreover, the funder typically requests from the funding applicant the main arguments that may be raised by the counterparty in the proceedings. Whereas a significant part of this information may be confidential, it is common that the funder and the applicants to funding enter into a non-disclosure agreement to protect the confidentiality of the information shared.

Typically, how is the funder’s return determined?

The funder’s return normally corresponds either to a multiple of the financing, a percentage of the claim, proceeds or a combination of these. Furthermore, the funding agreement usually provides that the funder is entitled to the agreed return if a settlement agreement is entered into. In some cases, the funding agreement may establish a link between the funder’s return and the duration of the proceedings – so the earlier the case is settled, the lower the funder’s return will be.

What is the common content of a funding agreement?

Although the terms of a funding agreement may vary, these agreements will usually set forth, inter alia, the content and extent of the funding; the terms concerning the funder’s return; and the level of control the

funder shall have over the development of the arbitration proceedings and other decisions relevant to the claim, such as the decision on whether or not to settle.

What is the level of involvement of funders in the proceedings?

Normally, funded entities maintain complete control over the proceedings and the funder is merely entitled to receive regular reports on the progress of the proceedings and to control the payment of expenses. Although it is less frequent, in some cases the funder may play a more active role in the proceedings, participating in the definition of the strategy to be adopted and attending meetings concerning the proceedings and the hearings.

Does the funding agreement need to be disclosed in the arbitration proceedings?

The existence of a funding agreement raises an issue concerning the independence and impartiality of the arbitrators. Since there is a new entity with an interest in the arbitration – in addition to the parties and their legal counsels – a possible connection between the funder and the arbitrators is relevant for the assessment of independence and impartiality. In light of the foregoing, some arbitration rules – for example, the ICC rules – provide that each party must disclose the existence of any funding arrangements and the identity of the funder. However, the majority of arbitration rules do not contain any provision concerning the disclosure of funding arrangements.

What is the role of law firms in third-party funding?

The role of law firms in third-party funding is crucial. On the one hand, law firms often have a deep insight into the third-party funding market and are able to direct clients to suitable funders and assist them with the negotiation of the financing agreement. On the other hand, law firms also play an important role in the assistance of funders, notably undertaking the due diligence that necessarily precedes a decision to fund a claim. ♦

 Top Advisors Directory
LAW FIRMS

 Country
PORTUGAL



Sérvulo & Associados | Sociedade de Advogados, SP, RL

 Rua Garrett, 64
1200-204 Lisboa
Phone: (+351) 210 933 000
Fax: (+351) 210 933 001/2
geral@servulo.com
www.servulo.com



António Teles



João Saúde



Mafalda Ferreira Santos

POSITIONING

Sérvulo: A highly specialised business partner

SÉRVULO is a Portuguese full-service law firm with more than 20 years of existence, which occupies a leading position in the Portuguese legal market. Recognized for the quality of its legal services in all relevant areas of law and strategic sectors, SÉRVULO has a highly competent multidisciplinary team of more than 100 lawyers, motivated by a single purpose: to transform academic research and accumulated knowledge in the design of sound legal solutions, thus creating added-value for its clients. SÉRVULO is trusted by a vast number of the main private and public entities, both domestic and international, in the Portuguese-speaking legal markets and in all the most significant economic sectors. It houses a roster of lawyers that are fully capable of facing all of the challenges that may arise at any time and in any field of the Law.

Litigation

SÉRVULO draws on its comprehensive knowledge of all areas of business and economic activity to provide clients with specialised counsel in dispute resolution cases, be they in the public or private sector, or at the national or international level.

The firm prides itself on acting with thoroughness and rigour, to which end the disputes team works in constant consultation with lawyers who are specialised in the specific sectors of the case. SÉRVULO prioritises litigation prevention by identifying risk and implementing protection strategies, but always defends the client's interests whenever litigation cases arise.

Arbitration

Arbitration has a number of clear advantages as a means of dispute resolution and it is a growing area of importance at the national and international level. For these reasons, SÉRVULO has invested significantly in the area in recent years. The firm's partners and associates are regularly invited to participate in arbitrations, as counsel or as arbitrator, and take part in industry-wide initiatives aimed at promoting arbitration in general.

The firm has handled numerous important commercial arbitrations, domestic and international, as well as several foreign investment arbitrations.

BUSINESS

- Public Law
- Finance and Governance
- Litigation
- Arbitration
- Restructuring and Insolvency
- Corporate, Commercial and M&A
- Employment Law
- Tax
- Corporate Crime and Regulatory Compliance
- European and Competition Law
- Real Estate, Tourism and Urban Planning
- Intellectual Property
- Life Sciences
- TMT
- Privacy and Personal Data Protection
- Sports Law

CONTACTS

António Teles, Equity Partner: at@servulo.com

João Saúde, Equity Partner: js@servulo.com

Mafalda Ferreira Santos, Equity Partner: mfs@servulo.com