



•ALERT•

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# Litigation Funding

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*Trem-bala*, the “bullet train”, was supposed to be a high-speed train connecting Sao Paulo to Rio de Janeiro. This project was launched in 2009, and it was supposed to be concluded by the time of the 20th FIFA World Cup, in 2014. However, for lack of funds, it never came into existence. This event seriously affected commuters, but the Italian engineering company “Italplan” was also seriously prejudiced by this fact, since it was in charge of the feasibility study for the *Trem-bala* project and its agreed consideration was approximately 250 million euros. Nonetheless, the state of Brazil did not settle its debts, and Italplan became insolvent and went bankrupt, with many repercussions for its creditors. Although the state of Brazil refused to pay, the Italian Court of Arezzo recognised the legitimacy of the Italplan’s request. With regard to this episode, Luciano Castelli, partner at LCA Law Firm, tells us that for companies it is a widespread problem to obtain the enforcement of the judgment when there are foreign countries involved, and it is hard for medium-small enterprises to bear the huge legal costs of these proceedings, particularly considering US and UK justice systems.

The Brazilian case represents the ideal situation for litigation funding. This concept originated in Australia in the 90s, and it played a fundamental role in the promotion of class actions in the country. The idea behind these litigation funds is that litigants can finance their litigation or other legal costs through a third-party funding company in exchange for a percentage share of the judgment or settlement. This phenomenon also spread out in the United Kingdom and the United States, which are both countries where the class actions are frequently filed. Litigation funds offer two main advantages.



Firstly, these investments are disconnected from the market evolution, and therefore they can be profitable even in a period of crisis. Secondly, these litigation funds offer very attractive profit margins. For instance, in 2017, Burford Capital more than doubled its profits (260 million dollars, *i.e.* +130%), registering a return of 75% on the invested capital. An example of a dispute financed by Burford Capital is the litigation between the Argentinian government and a former shareholder of the energy company Ypf. Another dispute supported by Burford is the enforcement of the judgment which held that the ex-wife of the Russian oligarch Farkhad Akhmedov had the right to receive one-third of the husband’s heritage, equivalent to half billion euros.

The founder of Elliott Management, Paul Singer, was also attracted by the concept of litigation funding. Thus, through Bentham Europe, he decided to finance the class action filed by some shareholders against Volkswagen in relation to the emissions scandal. In case of a positive outcome for the shareholders, Bentham Europe and consequently Elliott will earn 30% of the two billion euros request.



These results highly impressed Marco Imperiale, innovation officer at LCA Law Firm. He started to analyse deeply the functioning of these international litigation funds, and he observed a growing interest towards the Italian market. As underlined by Luciano Castelli, partner at LCA, the Italian market of litigation funds still has to be started, although companies feel pressed by burdensome legal costs, especially after the crisis. It is frequent that small-medium enterprises cannot afford to activate international arbitration proceedings and they decide to give up their claims rather than start complicated and costly litigations. *"All these problems could, therefore, be solved if a third investor would finance the litigation, eliminating any risk of loss. This system could also benefit multinational companies, which sometimes decide not to pursue their claims when the amount at stake does not justify the legal costs"*, Castelli said.

For all these reasons, it looks like Italy has the best premises for the establishment of litigation finance, especially in the fields of insolvency proceedings and international arbitrations. Burford, Bentham and other relevant funds might start new operations in the Italian market very soon.

In light of these new trends, the first Italian litigation fund is about to be constituted. Companies should be therefore notified and informed about the existence of litigation finance and its functioning. As expressed by Luciano Castelli, LCA Law Firm deeply knows the market, and it is ready to play the role of intermediary between Italian companies and international funds. In order to do this, it is very important to identify the appropriate litigation fund for the specific dispute, since some of them are specialised in international enforcement and others are more focused on arbitrations. Secondly, the Funds' shares must be agreed upon.

Some funds might ask a fee proportional to the value of the dispute (20/30/40%), and others might request a specific minimum amount and then a variable percentage of the excess. Finally, an accurate due diligence on the case will be conducted because, Castelli concludes, *"these funds spend million of dollars and need to have a clear idea about the chances of success"*.

#### CONTACTS

**Gian Paolo Coppola**  
gianpaolo.coppola@lcalex.it

**Luciano Castelli**  
luciano.castelli@lcalex.it

**Marco Imperiale**  
marco.imperiale@lcalex.it