THIRD-PARTY FUNDERS TARGETING €1BN DISPUTES IN IBERIA

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Funders from around the world have limitless finance available for cases with merit, though

lawyers warn that sound funding agreements are needed to ensure clients retain strategic control

There has been an increase in the number of third-party funders from around the world that are looking to finance disputes in Spain and Portugal, with some specifically targeting insolvency cases valued at more than €1 billion. Indeed, lawyers indicate that there is a limitless amount of third-party funding available for cases in Iberia that investors deem to have merit.

Third-party funding generally refers to a scenario where an investor provides funding for the legal fees associated with a case, often in return for a share in the final award. Although most third-party funders are based in the US or the UK, there are others from elsewhere in Europe, as well as South America, that are also showing an interest in the Iberian market leading third-party funders include Burford Capital, Augusta and Harbour Litigation Funding. “There is a lot of appetite in the market, both for the funding of arbitration cases and the purchase of claims and arbitration awards,” says Antonio Vázquez-Guillén, co-managing partner of Allen & Overy in Spain. He adds that there are several ways of investing in arbitration proceedings. “Direct funding is where investors will cover legal fees in exchange for a share of the award, or funding via the acquisition of a share in the company bringing the claim, which is a formula often used in expropriation cases where the nominal value of the company may be low but the potential court award very substantial.”

Fortune 500 driving demand

While third-party funding is often used by companies experiencing financial difficulties, demand for such funding is not driven purely by companies with little money. According to Vázquez-Guillén, corporates often choose to delegate certain disputes for strategic reasons. “Many clients seeking third-party funding are Fortune 500 companies, which certainly do not lack funds,” he says. “However, they prefer to invest in other projects, and delegate disputes for this reason.”

The difficulties in pursuing legal action and executing court decisions mean that companies may not always take steps to pursue ‘doubtful assets’ (a type of non-performing asset) for example. However, the resources brought by third-party funders – both financial and non-financial – can enable clients to bring cases. “Many corporates have doubtful assets but fail to start recovery action,” says Ramón Fernández-Aceytuno, partner at Ramón y Cajal Abogados. “Third-party funders are less hesitant, as they rely on extensive networks of legal advisers which make a successful outcome more likely.” In such circumstances, investors typically seek 30-35 per cent of any award made by the court.

It appears that the availability of finance from third-party funders is limitless, if the case in question has merit. The perception in the market is that money is not an issue, lawyers say. “Third-party funders are concerned about potential returns, the complexity of the case and the chances of success, but not about finances,” says Fernández-Aceytuno.

In addition to significant interest from US and UK third-party funders, there is also appetite among funders based elsewhere in Europe, as well as in Latin America, for potential cases in Portugal. “We have been approached by international funds based in France, and also by a Brazilian firm and a group incorporated in Portugal, although its funds originated in the UK,” says Nuno Líbano Monteiro, partner at PLMJ. He acknowledges that companies in financial distress, which lack the funds to pursue claims, may be the more obvious beneficiaries of this type of funding. “Typically, the insolvency administrator does not have the necessary funds to continue or start proceedings against the debtor, and access to third-party funding is a means of overcoming this obstacle," says Líbano Monteiro.

However, the returns sought by third-party funders mean that only a very small proportion of insolvencies are eligible, according to Líbano Monteiro. "Our firm has been approached by investors interested in funding large insolvencies in excess of €1 billion, which are rare in the Portuguese market," he says. Instead, some third-party funders are turning to banking litigation cases against financial institutions, where there is a strong chance of obtaining payment in the event a case is successful. In addition, investors are showing a lot of interest in investment arbitration cases, which can bring considerable returns. Rita Gouveia, partner at Cuatrecasas in Portugal, echoes the view that third-party funding is not only of interest to companies that are low on funds. "There are solid companies that use third-party funding not due to financial difficulties, but as a management strategy," says Gouveia. She adds that, for third-party funders, the main challenge is finding suitable cases. "As third-party funders usually do not invest in cases below a certain threshold, the challenge is to find litigation cases sufficiently attractive to be funded," Gouveia explains.

Limited by costSimilar to the scenario in Spain, the potential for third-party funding in Portugal is massive if funders believe the case in question has a good chance of success. "I don't have access to exact figures, but the idea that I got from my contact with funders is that there is always enough capital to finance litigation that makes sense," remarks Líbano Monteiro. However, from the perspective of the party bringing a case, a lack of direct control over the legal strategy can be an issue. "Funds want to have control over the litigation strategy, so we're less free to choose," says Líbano Monteiro. However, he adds: "If we're limited on funds, putting a strategy in place is difficult and sometimes it's not possible to follow through due to cost. But if we're funded by professionals who understand the plan, the chances of success are higher." According to Vázquez Guillén, having a sound funding agreement in place is crucial in addressing this issue: "Funding agreements regulate the control of investors over strategic decisions, and it is vital that lawyers ensure that the client doesn't lose control of the process. Funds understand this, and very rarely put pressure on us."