

Litigation Funds Ready to Help India Inc Fight it Out

Entities that fund the litigation costs of cos see good biz opportunity here

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Many Indian businessmen discover the travails of joint ventures with foreign partners when they find themselves in international courts of law, writing out fat cheques to men in black and Queens Counsels in wigs. Such expenses can burn a hole in balance sheets, and more and more Indian companies will have to shell it out as cross-border litigations surge. But a breed of specialised financiers is sensing this as a new business opportunity. These are the litigation funds, which bet on the outcome of high-stakes court battles. Organised like private equity houses, they don't invest in stocks that traditional asset managers do, but instead fund the litigation costs of a company in return for a share of the proceeds. If a client loses, the fund receives nothing like a bet that has gone sour. Leading litigation funds like Burford, Harbour and Fulbrook are exploring the possibility of doing business with Indian companies and some have discussed the subject with local law firms. Litigation funding as a concept is very attractive to Indian clients and their lawyers. We know this from a recent visit to Mumbai during which we met with 10 law firms where we had an overwhelmingly positive response to our funding solution, said Susan Dunn, head of litigation funding at the London-based Harbour, one of the most experienced financiers. The attraction largely stems from the fact that the budget is agreed and payments are made every month throughout the life of a case a structure that minimises cash flow uncertainty. People who run a fund like this know that in seven out of out ten cases they bankroll may generate nothing, but the other three they win could more than compensate the loss. There are different ways that a fund can capture the upside. For instance, a fund backing a company involved in a patent fight, may structure the agreement in a way where it receives 10% of the royalty income if the court gives a favourable verdict. If the dispute follows a breach of contract after a crash in share price or an exit by the foreign private equity investor, a litigation fund may get a share of the damages claimed by its client. Or, if one party is suing someone for a parcel of land, the financier may be given 5% right on the property title if the client wins the case. Litigation funds from the UK and the US are eyeing Indian market considering the spurt in number of international disputes involving Indian parties. A litigation fund will be a new asset class for India, and hence, for funding Indian parties innovative structures need to be devised that are not only legally and ethically permissible, but also tax efficient from an Indian law perspective, said Nishchal Joshipura, co-head, Fund Formation Practice at Nishith Desai Associates, a law firm that has been in touch with some of the funds. According to his colleague Prateek Bagaria, who is a member of the International Dispute Resolution Practice at the firm, the Indian market is ready to be flooded with funding products, which enable a third party funder to fund Indian parties in their disputes, thereby reducing the stress on their balance sheets. Indian companies are involved in 18% of the arbitration cases filed in Singapore last year. It may take a while for litigation funds to be registered in India (the way foreign venture capital funds are); and, given the restriction on capital transactions, such cross-border funding has to be approved by local regulators. But indications are that at an offshore level, a few such funding deals have already happened. Said a spokesperson for Burford: We have not studied the Indian domestic market in detail. However, we have previously financed Indian businesses conducting litigation in the US. And we would certainly consider, subject to due diligence, financing an Indian company in any reasonable case in an international arbitration court. Burford, a leading player in litigation finance, operates a \$300-million fund and is publicly traded. A string of disputes following the market downturn, terms of exit of the foreign partner, refusal to redeem convertible papers, failure of companies to list their shares and achieve milestones laid down by a private equity player have triggered arbitration proceedings in courts in Singapore, London and Paris. Harbour, said Dunn, is reviewing a number of enquiries from India and may be in position to fund an Indian case in the very near future. While litigation finance is not a loan, it can also cover expenses that have to be paid to court by way of security, amounts payable to the defendant for interlocutory hearings, institutional fees and those of the arbitration panel. Like a land or a stock, a litigation fund evaluates a claim, which to it is like asset. Besides funds, such assets also interest some of the large global banks. We are aware of the interest of such players in India. The number of instances where claims do not get pursued or get abandoned is very high. More often than not, advantage of lack of staying power is taken and, in fact, it is standard strategy to wear out the claimant. Having recourse to lines of finance will have a significant impact, including the quantum at which claims get settled, said H Jayesh, founder partner at the Mumbai-based law firm JurisCorp. sugata.ghosh@timesgroup.com