

THE THIRD PARTY  
LITIGATION  
FUNDING LAW  
REVIEW

Editor  
Leslie Perrin

THE LAWREVIEWS

THE THIRD PARTY  
LITIGATION  
FUNDING LAW  
REVIEW

SECOND EDITION

Reproduced with permission from Law Business Research Ltd  
This article was first published in December 2018  
For further information please contact [Nick.Barette@thelawreviews.co.uk](mailto:Nick.Barette@thelawreviews.co.uk)

**Editor**  
Leslie Perrin

THE LAWREVIEWS

PUBLISHER

Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER

Nick Barette

BUSINESS DEVELOPMENT MANAGERS

Thomas Lee, Joel Woods

SENIOR ACCOUNT MANAGERS

Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS

Sophie Emberson, Katie Hodgetts

PRODUCT MARKETING EXECUTIVE

Rebecca Mogridge

RESEARCH LEAD

Kieran Hansen

EDITORIAL COORDINATOR

Thomas Lawson

HEAD OF PRODUCTION

Adam Myers

PRODUCTION EDITOR

Janina Godowska

SUBEDITOR

Tessa Brummitt

CHIEF EXECUTIVE OFFICER

Paul Howarth

Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
© 2018 Law Business Research Ltd  
[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2018, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above.

Enquiries concerning editorial content should be directed  
to the Publisher – [tom.barnes@lbresearch.com](mailto:tom.barnes@lbresearch.com)

ISBN 978-1-912228-69-0

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ADINA THORN LAWYERS

ARNTZEN DE BESCHE ADVOKATFIRMA AS

ATELIER JURÍDICO

BCH LAWYERS

BERNET ARBITRATION / DISPUTE MANAGEMENT

BORDEN LADNER GERVAIS LLP

CALUNIUS CAPITAL LLP

DLA PIPER UK LLP

INCE & CO MIDDLE EAST LLP

LINKLATERS C WIŚNIEWSKI I WSPÓLNICY SPÓŁKA KOMANDYTOWA

MAURICE BLACKBURN LAWYERS

NIVALION AG

OSBORNE CLARKE

PARABELLUM CAPITAL LLC

REDBREAST ASSOCIATES NV

ROSCHIER ADVOKATBYRÅ AB

SAYENKO KHARENKO

SCHELLENBERG WITTMER LTD

UCHE NWOKEDI & CO

WHITE & CASE

# CONTENTS

PREFACE.....	v
<i>Leslie Perrin</i>	
Chapter 1 AUSTRALIA.....	1
<i>Jason Geisker and Jenny Tallis</i>	
Chapter 2 AUSTRIA.....	17
<i>Marcel Wegmüller and Mirdin Gnägi</i>	
Chapter 3 BRAZIL.....	26
<i>Luiz Olavo Baptista and Adriane Nakagawa Baptista</i>	
Chapter 4 CANADA.....	35
<i>Hugh A Meighen</i>	
Chapter 5 ENGLAND AND WALES.....	48
<i>Leslie Perrin</i>	
Chapter 6 GERMANY.....	59
<i>Daniel Sharma</i>	
Chapter 7 HONG KONG.....	76
<i>Melody Chan</i>	
Chapter 8 ITALY.....	86
<i>Federico Banti and Eva de Götzen</i>	
Chapter 9 NETHERLANDS.....	94
<i>Rein Philips</i>	
Chapter 10 NEW ZEALAND.....	101
<i>Adina Thorn and Rohan Havelock</i>	

## Contents

---

Chapter 11	NIGERIA.....	112
	<i>Justina Ibebunjo, Ibeanyichukwu Dick and Pascal Ememonu</i>	
Chapter 12	NORWAY.....	121
	<i>Eivind Tandrevold and Jan Olav Aabo</i>	
Chapter 13	POLAND.....	129
	<i>Zbigniew Kruczkowski</i>	
Chapter 14	PORTUGAL.....	136
	<i>Duarte G Henriques and Joana Albuquerque</i>	
Chapter 15	SINGAPORE.....	149
	<i>Matthew Secomb and Adam Wallin</i>	
Chapter 16	SPAIN.....	159
	<i>Antonio Wesolowski</i>	
Chapter 17	SWEDEN.....	168
	<i>Johan Sidkev and Carl Persson</i>	
Chapter 18	SWITZERLAND.....	178
	<i>Martin Bernet and Urs Hoffmann-Nowotny</i>	
Chapter 19	UKRAINE.....	189
	<i>Olexander Droug</i>	
Chapter 20	UNITED ARAB EMIRATES: DUBAI INTERNATIONAL FINANCIAL CENTRE.....	191
	<i>Mohamed El Hawawy, Pavlo Samothrakis, Anna Fomina and Monika Humphreys-Davies</i>	
Chapter 21	UNITED STATES.....	196
	<i>Sean Thompson, Dai Wai Chin Feman and Aaron Katz</i>	
Appendix 1	ABOUT THE AUTHORS.....	211
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	225

# PREFACE

Just as you start to think it might be safe to assume that everyone who needs to understand third party funding of litigation and arbitration really does understand it, you stand, as I did the other day, in one of London's finest clubs chatting socially to a Circuit Judge, who asks what you are doing these days and you reply that you invest capital in the costs of litigation in return for a share of the proceeds contingent on success. He looks you magisterially in the eye and asks, as if you would never have thought of it, 'isn't that unlawful?'

The task of proselytising third party funding, as anyone directly involved in it will tell you, goes on. Right across the global reach of third party funding, every meeting or conference, with lawyers or with potential claimants, can be expected to require a run through of the basics of how it is done. The process is not assisted by the silo mentality of most major law firms, where it is absolutely not possible to make the assumption that, having spoken to one, or even several partners, you have spoken to the firm.

This past year has also meant for most funders, a merry-go-round of encounters with investors, as blue-chip pension funds, family offices, endowments and seemingly all known fund management vehicles have realised that it might be possible to invest in an asset that is not only non-correlated with other asset classes, but also, where concentrations are properly managed, one where the individual assets in a portfolio are not internally correlated. Eye-catching returns are being reported by the listed funders, while rumours of similar performance circulate around the private funders.

Individual managers and underwriters of litigation risk with a track record of success are rarer than the proverbial hens' teeth though. Some observers estimate that in the entire world there are no more than about 35 people with a 10-year investment management record delivering the sort of results that investors are seeking. This has led to an aggressive global hiring spree by funders in an attempt to remedy this shortage, aimed at the cream of senior associates (and occasionally partners) from all types of firm, including the very largest.

As the pipeline to equity narrows at all law firms, but especially at the largest and most profitable, and that pathway comes to depend on ever greater commitments of time to the firm, over all else, many lawyers outside law firm equity have begun to be tempted by the stories they hear of the opportunities to earn an equity stake at a litigation funder where hard work and dedication are, of course, an absolute requirement, but where an 18-hour-day time commitment is not expected.

All this has led to a debate within funders as to what ingredients make up the ideal senior recruit from a law firm. Does it have to be a litigator? Not really. Third party funding can be seen as a corporate finance transaction where competitive advantage for a funder may lie in being able to field top-class transactional input to the way a deal is negotiated from the outset. Does it have to be a lawyer? No. Experienced finance professionals should play a role

in case assessment, not just in the process of understanding the true quantum of a claim but in establishing the return that will be required by the investors in given time and quantum outcomes.

Interesting business pressures are also mounting in consequence of the global nature of third party funding. Although the Association of Litigation Funders of England & Wales (of which I remain the chairman) continues to provide voluntary regulation to the third party funding sector that seems to be respected and understood in the senior ranks of the judiciary and beyond in the Ministry of Justice and in other government circles, it is becoming clear that some form of international trade association is now required, to give a collective global voice (albeit, not as a regulator) to the interests of the third party funding industry. It would not surprise me if such a body were to be launched in the coming months, possibly in the wake of the inquiry currently being run by the Australian Law Reform Commission (ALRC), which might only directly affect the Australian market but will achieve global significance because so many non-Australian funders are active in that market. The ALRC's final report is likely to be highly influential on what happens next, not only in the regulation of third party funding in Australia but also how the entire third party funding industry will organise its approach to marketing and opinion forming in the global market.

This all adds up to a remarkable 12 months since the first edition of the *Third Party Litigation Funding Law Review* was published. Awareness of the industry has spread, not just in the context of the funding of the legal costs of a single case from its inception through to resolution (what might be called Litigation Funding 101) but in the monetisation of judgments and awards. In civil law jurisdictions, monetisation of claims can also be achieved. In the common law countries, by and large, monetisation of a claim would still, even in these enlightened times, offend against maintenance and champerty.

Businesses have learned that there is a way out of the accounting bind that contingent claims against you must (as a matter of principle) be accounted for as a debit in your balance sheet but contingent assets can be ascribed no value until they are turned into cash. This fact of business life, combined with what could be described as 'litigation fatigue' (which requires no explanation!), means that monetisation transactions are very much on the rise.

A modest extension of the market in monetisations takes you squarely into consideration of secondary markets, where funders might sell their interest in an investment to (say) a hedge fund at a price that appeals to both sides of the transaction. The development of monetisations and the development of secondary markets might well be major themes for the year ahead.

**Leslie Perrin**

Chairman

Calunius Capital LLP and Association of Litigation Funders of England and Wales

November 2018

# UKRAINE

*Olexander Droug*<sup>1</sup>

## I OVERVIEW

Third party funding is not regulated in Ukraine. Accordingly, there are no limitations or prohibitions on funding the claims in the civil and commercial proceedings before the Ukrainian courts and in arbitration proceedings seated in Ukraine.

At the same time, third party funding is not known on the market and in practice it is not used in proceedings before the Ukrainian courts and in arbitration proceedings seated in Ukraine.

Some Ukrainian parties resort to third party funding from non-Ukrainian funders to pursue their claims in foreign jurisdictions, including the United Kingdom, and in arbitrations seated outside Ukraine.

In the event that a party nevertheless wishes to use third party funding in Ukraine, the Rules of Professional Conduct contain a requirement that an attorney practising in Ukraine, when representing a client, may not take into account instructions from other parties. Furthermore, an attorney intending to share any privileged documents or information with a third party (i.e., funder) shall obtain the client's consent.

Although strictly not third party funding, there is a rather common practice in Ukraine for lawyers to handle cases under conditional fee agreements. The Rules of Professional Conduct expressly allow such way of structuring the payment to an attorney.

However, recently the Supreme Court stated that a provision of a contract between a client and an attorney allowing a conditional fee is void. In the view of the Supreme Court, the outcome of a litigation may not be the subject of the legal services contract.<sup>2</sup>

Not all judges of the Supreme Court agreed with such position and there is a dissenting opinion that a conditional fee agreement does not in fact breach any mandatory rule of Ukraine.<sup>3</sup> Therefore, further developments in Ukrainian court practice on conditional fee agreements may be expected.

Ukrainian procedural rules for civil and commercial litigation, as well as the Arbitration Rules of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, provide for the standard rule of 'costs follow the event', which can help reduce financial burden suffered by the party to the dispute.

---

1 Olexander Droug is a partner at Sayenko Kharenko.

2 Resolution of the Supreme Court dated 12 June 2018 in case No. 462/9002/14-ц.

3 Dissenting opinion of Vasyl Krat, judge of the Supreme Court, dated 12 June 2018 in case No. 462/9002/14-ц.

There is also a market in Ukraine for acquisition of non-performing loans and distressed debt in general. Factoring companies, debt collection companies and other financial companies frequently purchase claims from corporates and banks and then enforce them in their own name. However, we do not consider this to constitute third party funding.

We continue to follow the development in Ukraine in this sphere.

## ABOUT THE AUTHORS

### **OLEXANDER DROUG**

*Sayenko Kharenko*

Olexander Droug is a partner at Sayenko Kharenko, with more than 10 years of experience, who specialises in dispute resolution and restructuring with a special focus on arbitration and commercial litigation.

Olexander Droug advises local and foreign clients on all stages of dispute resolution proceedings, including in complex multi-jurisdictional proceedings involving Ukraine, the UK, Cyprus, the BVI, Switzerland, the Netherlands and other fora, as well as arbitration under arbitration rules of all major international arbitral institutions (LCIA, ICC, SCC), CIS-based arbitral institutions, ICSID Arbitration Rules and UNCITRAL Arbitration Rules. Mr Droug also advises clients on obtaining and implementing interim relief, including in support of arbitration proceedings and litigation, as well as on recognition and enforcement in Ukraine of arbitral awards and foreign court judgments. Mr Droug has represented the clients in the proceedings relating to banking, financial, securities, M&A, shareholders, trade, telecommunication, construction, aviation, product liability, as well as sports-related disputes. He also has significant experience in representing both lenders and borrowers in financial restructurings and related disputes.

### **SAYENKO KHARENKO**

10 Muzeyny Provulok

Kiev 01001

Ukraine

Tel: +380 44 499 6000

Fax: +380 44 499 6250

odroug@sk.ua

www.sk.ua



ISBN 978-1-912228-69-0