

THE THIRD PARTY
LITIGATION
FUNDING LAW
REVIEW

Editor
Leslie Perrin

THE LAWREVIEWS

THE
THIRD-PARTY
LITIGATION
FUNDING LAW
REVIEW

FIRST EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2017
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Leslie Perrin

THE LAWREVIEWS

PUBLISHER
Gideon Robertson

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITORS
Claire Ancell, Anne Borthwick, Tessa Brummitt,
Robbie Kelly and Gina Mete

SUBEDITOR
Hilary Scott

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2017 Law Business Research Ltd
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 2017, 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 – gideon.roberton@lbresearch.com

ISBN 978-1-912228-03-4

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

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW
THE AVIATION LAW REVIEW
THE FOREIGN INVESTMENT REGULATION REVIEW
THE ASSET TRACING AND RECOVERY REVIEW
THE INSOLVENCY REVIEW
THE OIL AND GAS LAW REVIEW
THE FRANCHISE LAW REVIEW
THE PRODUCT REGULATION AND LIABILITY REVIEW
THE SHIPPING LAW REVIEW
THE ACQUISITION AND LEVERAGED FINANCE REVIEW
THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW
THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW
THE TRANSPORT FINANCE LAW REVIEW
THE SECURITIES LITIGATION REVIEW
THE LENDING AND SECURED FINANCE REVIEW
THE INTERNATIONAL TRADE LAW REVIEW
THE SPORTS LAW REVIEW
THE INVESTMENT TREATY ARBITRATION REVIEW
THE GAMBLING LAW REVIEW
THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW
THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW
THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW
THE ISLAMIC FINANCE AND MARKETS LAW REVIEW
THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW
THE CONSUMER FINANCE LAW REVIEW
THE INITIAL PUBLIC OFFERINGS REVIEW
THE CLASS ACTIONS LAW REVIEW
THE TRANSFER PRICING LAW REVIEW
THE BANKING LITIGATION LAW REVIEW
THE HEALTHCARE LAW REVIEW
THE PATENT LITIGATION LAW REVIEW
THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

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

ALTER LITIGATION

ATELIER JURÍDICO

BCH LAWYERS

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

NORTON ROSE FULBRIGHT US LLP

OSBORNE CLARKE STUDIO

ROSCHIER ADVOKATBYRÅ AB

SAYENKO KHARENKO

SCHELLENBERG WITTMER LTD

UCHE NWOKEDI & CO

WECLAIM

WESOŁOWSKI ABOGADOS SLP

WHITE & CASE

CONTENTS

PREFACE.....	v
<i>Leslie Perrin</i>	
Chapter 1 AUSTRALIA.....	1
<i>Jason Geisker and Jenny Tallis</i>	
Chapter 2 AUSTRIA.....	12
<i>Marcel Wegmüller and Mirdin Gnägi</i>	
Chapter 3 BRAZIL.....	21
<i>Luiz Olavo Baptista and Adriane Nakagawa Baptista</i>	
Chapter 4 CANADA.....	30
<i>Hugh A Meighen</i>	
Chapter 5 ENGLAND AND WALES.....	41
<i>Leslie Perrin</i>	
Chapter 6 FRANCE.....	51
<i>Frédéric A Pelouze</i>	
Chapter 7 GERMANY.....	61
<i>Daniel Sharma</i>	
Chapter 8 HONG KONG.....	78
<i>Melody Chan</i>	
Chapter 9 ITALY.....	87
<i>Federico Banti and Eva de Götzen</i>	
Chapter 10 NIGERIA.....	96
<i>Justina Ibejunjo, Iheanyichukwu Dick and Pascal Ememonu</i>	

Chapter 11	POLAND.....	105
	<i>Zbigniew Kruczkowski</i>	
Chapter 12	PORTUGAL.....	112
	<i>Duarte G Henriques and Joana Albuquerque</i>	
Chapter 13	SINGAPORE.....	125
	<i>Matthew Secomb and Adam Wallin</i>	
Chapter 14	SPAIN.....	135
	<i>Antonio Wesolowski</i>	
Chapter 15	SWEDEN.....	145
	<i>Johan Sidklev and Carl Persson</i>	
Chapter 16	SWITZERLAND	154
	<i>Martin Bernet and Urs Hoffmann-Nowotny</i>	
Chapter 17	UKRAINE.....	164
	<i>Olexander Droug</i>	
Chapter 18	UNITED ARAB EMIRATES: DUBAI INTERNATIONAL FINANCIAL CENTRE.....	165
	<i>Mohamed El Hawawy, Pavlo Samothrakis, Anna Fomina and Monika Humphreys-Davies</i>	
Chapter 19	UNITED STATES	171
	<i>Anne M Rodgers, M Scott Incerto and Alex E Cummings</i>	
Appendix 1	ABOUT THE AUTHORS.....	183
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	195

PREFACE

One afternoon in February 2008, my phone rang. It was a partner from a major New York law firm asking if I would like to be a non-executive director on the listing on the Alternative Investment Market in London of a ‘third party funder’. I feel now that I was speaking then for (effectively) the entire London lawyer community when I asked my first question: ‘What is third party funding?’

Well, now we know! Or do we? The decision by The Law Reviews to publish its inaugural *Third Party Litigation Funding Law Review* is certainly a sign of a substantial build-up of interest in the subject, but the contents of the *Review* itself show that it is perfectly possible for experienced practitioners who are well versed in the subject to differ when it comes to outlining their answers to what is essentially the same question that I asked back in February 2008 – once again, what is third party funding?

Even the naming of third party funding (TPF) can cause difficulties, as besides TPF we have litigation funding, arbitration funding, litigation finance, settlement funding, claims purchase, monetisation (of awards and judgments), law firm funding and in-house legal department finance – the list grows as awareness spreads. Perhaps the best way of describing what TPF has become is ‘legal capital’.

The essence of TPF is the deployment of legal capital to fund the realisation of assets that are contingent on the resolution of some form of legal process. If the assets are sufficiently attractive, other things besides (or instead of) legal costs can be funded, including corporate expenses.

Legal capital is (almost) invariably invested on the basis that the investor is without recourse, other than to the proceeds of the legal asset whose realisation is being pursued. The investor’s recovery is therefore limited to what can be realised in cash or kind from the legal asset itself. Absent breach, the funded party is not personally liable to the funder and therefore it would almost always be a major solecism to describe a TPF investment as a loan.

There are, of course, fundamental differences in approach between jurisdictions following the common law and those where civil law principles rule, but even within those two broadly distinct systems, there are a host of differences. In the United States alone, there are 50 states with 50 different approaches to describing TPF and how it should (if at all) be regulated.

In general, all common law jurisdictions have various degrees of survival of the ancient doctrines of maintenance and champerty, which historically prevented third parties from intervening in litigation in which they were not already directly involved as parties, although, having said that, maintenance and champerty have been abolished in Australia. On the other wing of opinion, TPF is absolutely forbidden in Ireland, following the Supreme Court ruling

in the *Persona Digital* case. It seems that in Ireland TPF must wait for the legislature to permit it. The civil law, on the other hand, has never held any significant reservations about TPF.

In some common law jurisdictions, there is a difference of approach depending on whether the legal process is arbitration or litigation. In Hong Kong until recently, only insolvency office holders were permitted to access TPF because claims farming remains such a severe problem in personal injury litigation. Now a regulatory framework has been approved in Hong Kong for TPF to operate in commercial arbitration seated there. Singapore immediately followed suit.

Then there are a variety of controversies facing TPF that are generally resolved by individual jurisdictions in individual ways that suit them, thus defying any attempt to identify general principles that apply globally. Currently, those issues tend to revolve around three topics regarding the regulation of TPF providers; whether (and if so, in what circumstances and by what principles) a provider of TPF should be liable in unsuccessful cases to pay the costs of a victorious defendant or to give security for costs; whether disclosure to the court or the arbitral tribunal is required of the fact of TPF being used by a party; and the issue of privilege and confidentiality with reference to documents that are disclosed to a funder by a party to funded litigation or arbitration.

TPF provides access to justice for those who could otherwise not afford to fight their claims, and it brings access to rational commercial risk management for eminently solvent entities who do not wish to expose themselves to the significant costs of resolving their disputes from the own resources. TPF thus serves both those who are unable and those who are unwilling to fund the resolution of their disputes.

Demand grows as acceptance of TPF spreads. Acceptance spreads as law firms increasingly perceive that unless TPF becomes part of their offering, they will become less able to compete for valuable work from every kind of client.

This is a global phenomenon, but the resolution of every dispute by the principal international dispute resolution mechanisms, litigation and arbitration, will be rooted in the law of a particular jurisdiction. The choice of jurisdiction is not always made with wisdom or foresight, and providers and users of TPF sometimes have to reflect that, as the proverb goes, 'as you make your bed so you must lie in it'. This book, covering as it does all the principal TPF centres, should, in the best possible way, help users and providers of TPF to a good night's rest!

Leslie Perrin

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

London

November 2017

UKRAINE

*Olexander Droug*¹

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.

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.

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.

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

¹ Olexander Droug is counsel at Sayenko Kharenko.

SAYENKO KHARENKO

10 Muzeyny Provulok
Kiev 01001
Ukraine
Tel: +380 44 499 6000
Fax: +380 44 499 6250
odroug@sk.ua
www.sk.ua

OLEXANDER DROUG

Sayenko Kharenko

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

Olexander Droug advises local and foreign clients at all stages of dispute resolution proceedings, including in complex multi-jurisdictional proceedings involving Ukraine, the United Kingdom, Cyprus, the British Virgin Islands, Switzerland, Netherlands and other fora, as well as arbitration under the arbitration rules of all major international arbitral institutions (LCIA, ICC, SCC), CIS-based arbitral institutions 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 clients in proceedings relating to banking, financial, securities, M&A, shareholder, trade, telecommunication, construction, aviation, product liability and sports-related disputes. He also has significant experience in representing both lenders and borrowers in financial restructurings and related disputes.



Strategic Research Sponsor of the
ABA Section of International Law



ISBN 978-1-912228-03-4