

THE THIRD PARTY
LITIGATION
FUNDING LAW
REVIEW

Editor
Leslie Perrin

THE LAWREVIEWS

THE
THIRD-PARTY
LITIGATION
FUNDING LAW
REVIEW

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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>	

Contents

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
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LESLIE PERRIN

Calunius Capital LLP

Leslie Perrin is the chairman of Calunius Capital LLP, an office he has held since January 2009.

Since its establishment in November 2011, Leslie has also been the chairman of the Association of Litigation Funders of England and Wales, and in that capacity is deeply involved in the development of litigation funding as an international phenomenon. At around the time of this appointment, Leslie was named by *The Times* as one of 'those lawyers we believe to be the most influential in society right now'.

Leslie has more than 30 years' experience of litigation markets, having been successively head of litigation, managing partner and senior partner at international law firm Osborne Clarke. One of his cases still holds the record for a UK jury award of defamation damages against an insured defendant. In other cases, he became recognised as one of the pioneers of group actions in the UK.

For nine years until 2015, Leslie was also the senior independent director of DAS, the UK market leader in legal expenses insurance.

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