Third Party Funding in Russia
The history of Third Party Funding

Third party funding (also known as commercial funding or litigation funding) involves a third party which has no connection to a dispute putting up funds to run a dispute in exchange for a share of the damages. It is typically non-recourse which means that unless the recipient is successful in its claim, it is under no obligation to repay the funder.

In addition, a party can fund part of a dispute or just the insurance premium against an adverse costs order (known as ATE or after the event insurance). As a result, in many cases third party funding can remove the costs of disputes completely, including through the use of ATE, any adverse costs of a case should it not be successful. Naturally funding is only usually available to claimants or counter-claimants as they are the ones that stand to benefit from damages upon a successful claim.

On 15 January 2012 Federal Law N 324-FZ 'On Free Legal Aid in the Russian Federation' came into force. This law guarantees free legal aid to qualifying citizens. While Russia has never had specific legislation or laws regulating the funding of disputes, the uptake of third party funding is only just starting, through services such as Platforma which links claimants, funders and lawyers to help them advance funded cases together.

Since it is a nascent market in Russia, most funding has been carried out in the UK and the US. We look at the history of funding in the UK to see how this may impact Russian parties seeking funding.

The History of Third Party Funding in the UK
Previously there was a criminal offence known as ‘maintenance’. Maintenance involved supporting litigation without having a legitimate concern in it – and therefore in the eyes of the law at the time – having no just cause to do so. Champerty was an aggravated form of maintenance which also involved taking a share in the proceeds. Both of these were criminal offences since 1275. The Criminal Law Act 1967 abolished the crimes of maintenance and champerty. Even so after this time commercial contracts for funding were unenforceable until the early 2000s when in the case of Factortame (No. 8) the Court of Appeal explained that only funding arrangements that aimed to ‘undermine the ends of justice’ should be caught under the heading of maintenance or champerty, thereby validating all professional funding arrangements that respect judicial process. This was developed further in the decision of Arkin in 2005 where it was held that a professional litigation funder can be potentially liable for the opposing party’s costs of litigation. The development of this case law culminated in Excalibur v Texas Keystone [2016] with Tomlinson LJ labelling third party funding ‘a feature of modern litigation’.

So while there has been a long history of third party funding as a social enterprise for example through Legal Aid, union funding and crowd funding, commercial funding in the UK has only recently become more common place. However the industry has taken off exponentially in the UK with the legal funding market increasing by 743% last year and with £1.5 billion worth of assets now under management.
Where previously there had been questions as to whether a funder would be able to see through the support of claims to the end, now there are multiple providers who are well financed and can offer their expertise in support of claims. This helps to offload the risk of litigation from claimants and Shepherd and Wedderburn is the first top 100 UK law firm to set up a joint fund with a funder.

The types of claims that can be funded include shareholder, contractual and insolvency disputes, the enforcement of judgments and arbitration. This is open to Russian as well as English companies and has been made use of by FTSE 100 companies wanting to take the liability of actions off of their balance sheets and even through the receipt of funds monetize them into assets.

Russian claimants wishing to find out more about funding will want to consider carefully both the funder and the law firm they would like to use to advance their claims. It will be important to instruct firms which understand the nature of disputes originating from Russia so that they are best placed to help in a practical and proactive way.

In addition Russian claimants will need to keep in mind whether their claims may fall foul of sanctions for example where:

i. brought by persons specified within the US or EU sanctions;

ii. in relation to the export or import of arms, energy related equipment or technology for military use; or

iii. relate to the buying or selling of equity or bonds in specified entities.

It will also be important to consider the nuances of claiming through an offshore company (such as a BVI or Panama registered entity) or where enforcement may be required against a Russian company which may be a concern where that entity does not have assets situated in other more accessible jurisdictions.

Should you wish to find out more about third party funding, please click here.

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