

# The Litigation Funding Agreements (Enforceability) Bill 2024

## Memorandum on the European Convention on Human Rights

### Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Litigation Funding Agreements (Enforceability) Bill (“the Bill”). It considers the Bill’s provisions as introduced in the House of Lords. On introduction in the House of Lords, Lord Stewart of Dirleton KC made a statement under section 19(1)(a) of the Human Rights Act 1998 that in his view the provisions of the Bill are compatible with Convention rights.
2. Only clause 1 is discussed. The Department considers that clause 2 does not give rise to any substantive ECHR issues.

### Summary of the Bill

3. The Bill was announced by the Lord Chancellor on 4 March 2024 in a Written Ministerial Statement. The Bill has two clauses.
4. Clause 1 amends section 58AA of the Courts and Legal Services Act 1990<sup>1</sup> (CSLA 1990), to provide that litigation funding agreements (“LFAs”), as defined by the amendment, are not damages based agreements (“DBAs”), so reversing the Supreme Court’s finding in *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)*<sup>2</sup> (“PACCAR”). Clause 1 also provides that the amendments made to Section 58AA of the CLSA 1990 in order to achieve this shall be treated as always having had effect.
5. Clause 2 makes the necessary legal provision for the extent, commencement and short title of the Bill.

---

<sup>1</sup> 1990 c. 41.

<sup>2</sup> [2023] UKSC 28.

## Convention Analysis

### Clause 1

#### Background

6. On 26 July 2023, the Supreme Court held that litigation funders provided claims management services and, accordingly, held that LFAs in which the litigation funders' fee is calculated by reference to a share of the damages recovered in the litigation were DBAs. This overturned the finding of the Competition Appeal Tribunal ("CAT") and Divisional Court, and the commonly held view that LFAs were not DBAs. LFAs involve a third-party funder, typically an independent financial institution, which finances all or part of the legal costs of a claim in return for a share of any damages awarded. LFAs support a wide range of cases, particularly higher value commercial cases and arbitration. By way of example, it is understood that there are currently multiple third party-funded claims in the CAT, with a likely claim size in excess of £10 billion.
  
7. Before the Supreme Court judgment, LFAs were unregulated and not considered in scope of either the CLSA 1990 or the Damages-Based Agreement Regulations 2013<sup>3</sup> ("DBA Regulations"). LFAs do not generally comply with the DBA Regulations and are therefore made unenforceable by the PACCAR judgment. As such they will be unenforceable between the litigation funder and the funded party, which means, in turn, that the payment of costs to a successful funded party will not be enforceable against a losing party. Moreover, in opt-out<sup>4</sup> proceedings in the CAT, the use of DBAs is prohibited, and, without funding in place to meet not only the claimant's own costs but also any adverse costs order made against them, the claim will not be allowed to proceed.
  
8. Beyond the particular concerns for "opt-out" proceedings in the CAT, the justification for retrospective effect in this instance is two-fold. First, any LFA entered into before PACCAR will in most cases be unenforceable by the litigation funder against the funded party. As such, where the funded party's claim is successful, no costs will be recoverable from the losing party (so undermining the

---

<sup>3</sup> S.I. 2013/609.

<sup>4</sup> The procedure by which a party brings a claim on behalf of an entire class of claimant, without the express mandate, or even knowledge, of each member of that class.

general rule that the “loser pays” the costs of the proceedings). In cases where proceedings have been ongoing for an extended period, even if it is possible to provide litigation funding based on a different model going forward, historical legal spend may prove difficult to recover, and returns on that spend harder still. This could leave some funders to suffer significant losses. However, litigation funders consider that the greatest risk relates to their investments in closed cases as a result of the relevant agreements now being unenforceable. While it is understood that funders continue to provide litigation funding on a different model, the risk to previous investments in turn creates risk for future investments, as funders may have less capital to commit to claims and less motivation to do so in a market that is judged unpredictable and unfavourable to litigation funders. That has its own impact for access to justice going forward.

Article 1 Protocol 1 ECHR

9. In so far as retrospective effect is concerned, Article 1 Protocol 1 may be engaged. In several cases, a court order to pay the costs of another party has been examined by the ECtHR as an interference with the right to the peaceful enjoyment of possessions which falls within the general rule set out in Article 1 of Protocol 1.
10. In this instance the effect of the amendments made by clause 1 will be to return LFAs to their pre-PACCAR status, so allowing contractual rights and obligations already agreed and crystallised to continue to have effect as intended. As such, retrospective effect places no greater or lesser burden on any party (and defendants in particular) than had the Supreme Court found that such funding agreements were not damages based agreements. Defendants to such claims will not lose any substantive defence previously available to them. Moreover, the entitlement to costs and the amount that might be recoverable by a successful party will remain subject to judicial discretion.
11. Accordingly, while Article 1 Protocol 1 might be engaged in this instance, the retrospective effect is justified and, in any event, it will not impact on any property rights for the purposes of Article 1 Protocol 1.

**Ministry of Justice**

**19 March 2024**