

Litigation Funding Agreements (Enforceability) Bill – Fact Sheet

What are we doing?

- Third-party litigation funding can be used in most types of cases, such as commercial or group claims brought in either the High Court or the Competition Appeal Tribunal, where legal costs are expected to be higher than claimants can usually afford themselves. Claimants access this funding via a litigation funding agreement (LFA).
- However, the UK Supreme Court judgment in PACCAR¹ has rendered many third-party LFAs unenforceable, making them unavailable to those who may need them most. To address these issues, the government has decided to legislate to restore the enforceability of LFAs affected by the PACCAR judgment.
- The Bill amends section 58AA of the Courts and Legal Services Act 1990 (“CLSA”) to provide that LFAs, as defined in the amendment, are not Damages Based Agreements (DBAs). It also provides that the amendment will have retrospective effect. This will restore the position to that which prevailed before the decision of the Supreme Court - namely that LFAs are not DBAs and, as such, remain enforceable.

Why are we doing it?

- The uncertainty around litigation funding resulting from the judgment risks a detrimental impact on the attractiveness of the England and Wales jurisdiction as a global hub for commercial litigation and arbitration, and on access to justice more broadly.
- This Bill restores the pre-judgment funding regime, enabling individuals and small and medium sized businesses to obtain funding to bring large and complex claims against bigger, better resourced corporations, which they could not otherwise afford.
- The new legislation will also enhance the attractiveness of the thriving UK legal sector, which contributes over £34 billion per annum to the UK economy. Due to the confidentiality of many LFAs, we cannot be certain of the size of the UK market for litigation funding, but industry sources estimate the size for 2023 to be between £1.5bn to £4.5bn.

Background

¹ R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28. The judgment concerned a claim against truck manufacturers regarding anti-competitive behaviour.

- Most 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 if the case is won.
- Third party litigation funding is a niche market, which typically operates in high value commercial, arbitration or group litigation claims, including the types of claims brought in the Competition Appeal Tribunal (“CAT”). A recent example where this type of funding is used is the Post Office Horizon case (Alan Bates vs. The Post Office²), which had the backing of a litigation funder. Other examples where LFAs have been used include equal pay cases; the motorists bringing claims against car manufacturers over false diesel emissions; and consumers bringing claims against multinational companies regarding data breaches and data misuse.
- DBAs are a type of ‘contingency fee’ arrangement between a client and their lawyer or claims management company, who is not paid if the client loses the case but may take a percentage of the damages awarded to their client as their fee if the case is successful.
- Prior to the Supreme Court judgment in PACCAR, LFAs worked generally well and enabled individuals, groups of individuals, and small and medium sized corporations to obtain funding to bring claims against well-resourced corporations and others which they could not otherwise afford.
- Before the Supreme Court judgment, LFAs were unregulated and not considered in scope of the DBA Regulations 2013 or the CLSA.
- The Supreme Court judgment, however, in finding that LFAs are DBAs, rendered many LFAs unenforceable because they do not tend to comply with the DBA Regulations 2013 and the CLSA. Uncertainty around litigation funding risks a detrimental impact on the attractiveness of the England and Wales jurisdiction as a global hub for commercial litigation and arbitration, and on access to justice more broadly.
- The Government announced by way of a Written Ministerial Statement on Monday 4 March 2023³ that it would introduce new legislation that would restore the position that existed before the Supreme Court ruling and therefore ensure cases can continue being funded via LFA.

How much will these measures cost?

- The impact assessment published alongside the Bill indicates there are no costs associated with the approach.

² *Bates and others v Post Office Ltd [2019] EWHC 3408 (QB) (Judgment (No 6) “Horizon Issues”*

³ [Written statements - Written questions, answers and statements - UK Parliament](#)

- The key benefit of the legislation is removing uncertainty in relation to the viability of the market, which will result in positive impacts across the stakeholder groups. Litigation funders can invest in cases with confidence, access to justice is protected for claimants by ensuring a robust funding market, and legal professionals can have confidence in legal fees being paid where cases involve litigation funding. The retrospective effect and early commencement of the legislation will also ensure that previous cases are unaffected, which will reduce the risk of burdening the court system.

Will these measures apply across the United Kingdom?

- The Litigation Funding Agreements (Enforceability) Bill will extend and apply to England and Wales only.