

LITIGATION FUNDING AGREEMENTS (ENFORCEABILITY) BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Litigation Funding Agreements (Enforceability) Bill [HL] as introduced in the House of Lords on 19 March 2024 (HL Bill 56).

- These Explanatory Notes have been drafted by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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These Explanatory Notes relate to the Litigation Funding Agreements (Enforceability) Bill [HL] as introduced in the House of Lords on 19 March 2024 (HL Bill 56).

Overview of the Bill

- 1 This Bill addresses the impacts of the UK Supreme Court judgment in PACCAR¹, which held that litigation funding agreements (“LFAs”), as defined below, were in fact damages-based agreements (“DBAs”), as defined below, therefore making LFAs unenforceable. The Bill will restore the position to that which prevailed before the decision of the Supreme Court, that LFAs are not DBAs and hence are enforceable, by amending the definition of a DBA in section 58AA(3)(a) of the Courts and Legal Service Act 1990 (“CLSA 1990”).

Policy background

- 2 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. 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. Some other examples of cases where LFAs have been used include equal pay cases; motorists bringing claims against car manufacturers over false diesel emissions; and consumers bringing claims against multinational companies regarding data breaches and data misuse.
- 3 DBAs are a type of ‘contingency fee’ arrangement between a client and their lawyer or claims management company (CMC) whereby the lawyer or CMC is not paid if they lose a case but may take a percentage of the damages awarded to their client as their fee if the case is successful.
- 4 Prior to the Supreme Court judgment in PACCAR, LFAs worked 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.
- 5 However, on 26 July 2023, the Supreme Court held that litigation funders provided claims management services as defined in section 419A of the Financial Services and Management Act 2000 (c. 8), which includes the provision of financial services or assistance under section 419A(2)(a). Accordingly, it further 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 as defined in Section 58AA(3)(a) of the CLSA 1990 (c. 41) which defines a DBA as an “agreement between a person providing advocacy services, litigation services, or claims management services and the recipient of those services”. This reversed the finding of the CAT and the Divisional Court, and the commonly held view that LFAs were not DBAs.
- 6 Before the Supreme Court judgment, LFAs were unregulated and not considered in scope of either section 58AA CLSA 1990 or the Damages-Based Agreement Regulations 2013 (“DBA Regulations”) made under that section. 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 proceedings in the CAT, the use of DBAs is prohibited,

¹ Case: 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.

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

and, without adequate funding in place that is sufficient 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.

- 7 The Supreme Court judgment rendered LFAs unenforceable. 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.
- 8 The Government announced by way of a Written Ministerial Statement on Monday 4 March 2023 it will introduce new legislation that will restore the position that existed before the Supreme Court ruling and ensure cases can continue being funded via LFAs.

Legal background

- 9 The relevant legal issues have been raised in the policy background section above.

Territorial extent and application

- 10 The provisions in the Bill extend and apply to England and Wales only as expressed in Clause 2. Litigation funding, which LFAs are an example of, is reserved for Wales and therefore a Legislative Consent Motion is not required.
- 11 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions.

Commentary on provisions of Bill

Clause 1: Enforceability of litigation funding agreements

- 12 This clause amends section 58AA of the CLSA 1990. Subsection (2) amends the definition of a DBA to provide that that an agreement, to the extent that it is an LFA, is not a DBA. Subsection (3) defines an LFA for the purposes of section 58AA. Subsection (4) provides that the amendments are to be treated as always having had effect. The amendment only addresses the Supreme Court's finding that LFAs are DBAs and does not seek to reverse the finding that litigation funders provide claims management services.

Clause 2: Extent, commencement and short title

- 13 Clause 2 explains the extent, commencement and short title of the Bill.
- 14 Subsection (1) provides the territorial extent of the Bill, expressing that the Bill extends to England and Wales only.
- 15 Subsection (2) provides the commencement provision for the Bill. The Bill will be commenced upon the day of its passing.
- 16 Subsection (3) gives the shortened title by which the Bill can be referred as upon passing. This is described as the Litigation Funding Agreements (Enforceability) Act 2024.

Commencement

- 17 Clause 2 of the Bill states the commencement of the legislation. The Bill will be commenced on the day on which it achieves Royal Assent.

Financial implications of the Bill

- 18 There are no direct financial implications arising from the Bill.

Parliamentary approval for financial costs or for charges imposed

- 19 There are no provisions in the Bill that give rise to or create powers that could be used so as to give rise to new charges on the public revenue (broadly speaking public expenditure), therefore this Bill does not require a money resolution. Nor does this Bill create or confer power to create new charges on the people (broadly speaking, new taxation or similar charges). Therefore, this Bill does not require a ways and means resolution. Further details of the costs and benefits of provisions are set out in the impact assessment published alongside the Bill.

Compatibility with the European Convention on Human Rights

- 20 The government considers that the Bill is compatible with the European Convention on Human Rights. Accordingly, a statement under section 19(1)(a) of the Human Rights Act 1998 has been made to this effect by Lord Stewart of Dirleton KC. Issues arising as to the compatibility of the Bill with the Convention rights are dealt with in a separate memorandum published alongside the Bill.

Environment Act 2021 section 20 statement

- 21 Lord Stewart of Dirleton KC, the Advocate General for Scotland, is of the view that the Bill as introduced into the House of Lords does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

European Union (Withdrawal) Act 2018 section 13C statement

- 22 Lord Stewart of Dirleton KC, the Advocate General for Scotland is of the view that the Bill as published does not contain provision which, if enacted, would have an effect on trade between Northern Ireland and the rest of the United Kingdom. Accordingly, no statement has been made under section 13C(2) of the European Union Withdrawal Act 2018.

Related documents

23 The following documents are relevant to the Bill and can be read at the stated locations:

- Written Ministerial Statement by the Lord Chancellor and Secretary of State for Justice, Alex Chalk MP KC, available here:
<https://questions-statements.parliament.uk/written-statements/detail/2024-03-04/hcws306>

Annex A – Territorial extent and application in the United Kingdom

24 The substantive provisions in the Bill extend and apply to England and Wales only, as expressed in Clause 2.

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland?	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 1: Enforceability of litigation funding agreements	Yes	Yes	No	No	No	No	No
Clause 2: Extent, commencement and short title	Yes	Yes	No	No	No	No	No

Subject matter and legislative competence of devolved legislatures

25 The content of this Bill is reserved for Wales and therefore a Legislative Consent Motion is not required. Litigation funding is devolved to Scotland and is a transferred matter in Northern Ireland.

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