

Ensuring Access to Justice: The Litigation Funding Agreements (Enforceability) Bill and the Path Forward Post-PACCAR

by Joseph Lewin

Following the second reading of the Litigation Funding Agreements (Enforceability) Bill in the House of Lords on April 15th, there is a shared acknowledgment among the House of the significance of maintaining and protecting access to the courts, in the light of the Supreme Court's decision in *R (on the application of PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, which deemed many Litigation Funding Agreements to be Damages Based Agreements, thereby rendering them unenforceable.

When introducing the bill, Lord Stewart (Keith Stewart KC), the advocate general for Scotland, emphasised the urgent need to revert to the funding position prior to the Supreme Court's ruling in PACCAR. He stated that *"By rendering many existing litigation funding agreements unenforceable, the position post-judgement risks undesirable satellite litigation, an increased burden on the courts, and creating an unfavourable market for litigation funding, which, in turn, threatens access to justice."*

Many, including litigators and those seeking litigation funding assistance, hope that the new bill will ultimately assist in advancing access to justice for all and that it will enhance the attractiveness of the UK as a global hub for commercial litigation and arbitration.

PACCAR and the new bill

Last July, the litigation funding industry faced significant upheaval following the Supreme Court's ruling in *PACCAR*. The Supreme Court decided that Litigation Funding Agreements, under which funders are entitled to recover a percentage of damages, amount to Damages Based Agreements within section 58AA of the Courts and Legal Services Act 1990 (CLSA). This classification arises from the court's interpretation of litigation funders as providers of *"claims management services"* within the context of that section. Consequently, Litigation Funding Agreements of this nature must adhere to the Damages Based Regulations 2013, and a failure to comply with those regulations renders them unenforceable.

Earlier this year, during the spotlight on the Post Office's Horizon scandal, Alan Bates,

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the former sub-postmaster leading the Justice for Sub-postmasters Alliance, emphasised the significance of litigation funding in his battle against the Post Office. Following this, Justice Secretary Alex Chalk MP pledged to prioritise addressing the funding issue, aiming to reverse the "*damaging effects*" of the Supreme Court ruling at the earliest legislative opportunity. Chalk mentioned that the new legislation would simplify the process for individuals to obtain funding for their legal battles against influential corporations, such as those implicated in the Horizon scandal, a case that underscored the importance of litigation funding in levelling the legal playing field.

The Litigation Funding Agreements (Enforceability) Bill aims to rectify the fallout from the PACCAR case by clarifying that Litigation Funding Agreements are not Damage Based Agreements, thus making them enforceable. It proposes amendments to the definition of Damages Based Agreements in the Courts and Legal Services Act 1990, specifically in Section 58AA(3)(a). With two clauses, Clause 1 modifies the Damages Based Agreement definition, while clause 2 outlines the bill's scope, commencement, and title. The bill retroactively ensures Litigation Funding Agreements' enforceability, as pre-PACCAR, safeguarding contractual rights and reducing uncertainty. Additionally, it initiates a review of the third-party litigation funding market by the Civil Justice Council, focusing on regulation, claimant protections, and potential funder return caps.

These measures aim to safeguard access to justice, particularly for individuals and small to medium-sized enterprises confronted with adversaries with much greater financial resources. It ensures claimants can access litigation funding, enabling them to pursue complex cases against financially robust corporations that would otherwise be out of reach.

The bill will now continue to progress through the Committee stage in the House of Lords.