INTERNATIONAL DECISIONS

EDITED BY OLABISI D. AKINKUGBE

Supreme Court of the United Kingdom—litigation funding agreements—competition law—damages-based agreements—statutory interpretation—collective proceedings—international arbitration

R (ON THE APPLICATION OF PACCAR INC. AND OTHERS) V. COMPETITION APPEAL TRIBUNAL AND OTHERS, [2023] UKSC 28. *At* https://www.supremecourt.uk/cases/uksc-2021-0078.html.
Supreme Court of the United Kingdom, July 26, 2023.

In the landmark ruling of *PACCAR Inc. and Others v. Competition Appeal Tribunal and Others* (*PACCAR*),[1] the United Kingdom Supreme Court (UKSC) has introduced a significant shift in the regulatory landscape governing third-party funding (TPF) in all proceedings. The UKSC addressed the question whether litigation funding agreements (LFAs), through which funders receive a percentage of the damages recovered, constitute damages-based agreements (DBAs). The UKSC considered this question by reference to an express definition of DBAs under Section 58AA(3) of the Courts and Legal Services Act 1990 (CLSA 1990) and Section 419A of the Financial Services and Markets Act 2000 (FSMA). This determination is significant because it changes the classification of LFAs to DBAs, subjecting the non-regulated LFAs to DBA regulations. The UKSC examined whether LFAs encompass "claims management services,"[2] including the "provision of financial services or assistance."[3] If these LFAs qualify as DBAs, they are unenforceable due to the statutory prohibition of DBAs for opt-out collective proceedings.[4] The UKSC held that the LFAs in question are DBAs, rendering them unenforceable. This decision may invalidate many LFAs that were presumed not to qualify as DBAs when adopted; it has the potential to impact funding agreements for international arbitration cases and cases before the courts of other jurisdictions where English law is applicable.

* * * *

[1] R (on the Application of PACCAR Inc. and Others) v. Competition Appeal Tribunal and Others, [2023] UKSC 28 (UK) [hereinafter *PACCAR* (UKSC)].

[2] Compensation Act 2006, Sec. 4 (UK) [hereinafter 2006 Act], incorporated under FSMA, Section 419A.

[3] *Id.*, Sec. 4(3).

[4] Competition Act 1998, Sec. 47C(8) (UK) [hereinafter Competition Act]. Opt-out collective proceedings refer to proceedings brought on behalf of all class members who are automatically included except those who opt out by a set deadline. *Id.*, Sec. 47A(11).

The proceedings originated from the application of two class representatives to the Competition Appeal Tribunal (CAT) seeking permission to bring collective proceedings for breaches of Section 47B of the Competition Act. A certified class representative can bring collective proceedings before CAT for claims covered by Section 47B of the Competition Act, which can be permitted upon meeting certain statutory requirements.[5] These current proceedings were initiated as "follow-on" proceedings, where claimants pursue damages resulting from a violation already established by a regulator.[6] Here, claimants are seeking damages resulting from a decision of the European Commission on July 19, 2016, in which it was held that truck manufacturing groups infringed the EU Competition Law.[7] To secure a collective proceeding order from CAT, applicants had to demonstrate sufficient funding arrangements to cover their costs and any potential adverse cost orders.[8] Thus, the class representatives secured LFAs to cover these costs. The LFAs in question stipulate the funder's compensation as a percentage of damages, termed damages-based funding, different from investment-based funding, which yields multiples of the advanced amount.[9] The contentious issue lies in whether these LFAs are DBAs pursuant to CLSA 1990 Section 58AA.[10] If these LFAs are considered DBAs, CAT may not authorize the proceedings because DBAs are prohibited for opt-out collective proceedings.[11]

Initially, CAT addressed the issue as a preliminary matter, later becoming the subject of an appeal. In its determination, it referred to DBA definition under CLSA 1990 Section 58AA, which defines DBAs as:

> An agreement between a person providing advocacy services, litigation services or *claims management services* and the recipient of those services which provides that—(i) the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained.[12]

CAT acknowledge that the key issue is the meaning of "claims management services,"[13] which is defined under FSMA Section 419A as "advice or *other services* in relation to the making of a claim." Other services here include: "(a) *financial services or assistance*, (b) legal representation, (c) referring or introducing one person to another, and (d) making

[5] *Id.*, Sec. 47B.

[6] *Id.*, Sec. 47A.

[7] Case AT.39824 – Trucks, Decision (Eur. Comm'n July 19, 2016), *at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39824/39824_8750_4.pdf.

[8] Competition Appeal Tribunal Rules 2015, Rule 78(2)(d), 3(c)(iii) (UK).

[9] These are the disputed LFAs.

[10] Courts and Legal Services Act 1990 (UK) [hereinafter CLSA 1990]. The key reference to DBAs is under Section 58AA(3).

[11] Competition Act, *supra* note 4, Sec. 47C(8). Opt-out collective proceedings refer to proceedings brought on behalf of all class members except those who opt out by a set deadline and non-UK domiciled members. who do not opt in by a specified time. *Id.*, Sec. 47A(11).

[12] CLSA 1990, *supra* note 10 (emphasis added).

[13] UK Trucks Claim Ltd. v. Stellantis N.V. and Ors. & Road Haulage Association Ltd v. Man SE and Ors., [2019] CAT 26, [12] (UK).

inquiries . . .” (emphasis added).[14] CAT concluded that these LFAs are not DBAs within the meaning of CLSA 1990 Section 58AA because providing “financial services or assistance” “in relation to the making of a claim” “is to be interpreted as applying in the context of the management of a claim,” not funding of a claim.[15] Thus, the LFAs in question were lawful and enforceable. The case was then appealed to the Court of Appeal, acting as a Divisional Court, and subsequently to the UKSC.

The Divisional Court agreed with CAT. It examined the legal, social, and historical context of Section 4 of the 2006 Act that defines DBAs.[16] The Divisional Court examined Section 4 of the 2006 Act because prior to the incorporation of Section 58AA into CLSA 1990, the 2006 Act provided a definition of DBAs, which was later incorporated under Section 58AA upon its introduction.[17] The Divisional Court accepted CAT’s determination and the submission of the parties that the critical issue was the meaning of “claims management services.” The appellants argue that funders are providers of “claims management service” because they provide “financial services or assistance.”[18] The Divisional Court held that these LFAs do not constitute DBAs because they do not form any part of the mischief that Section 4 of the 2006 Act was intended to remedy.[19] In reaching this conclusion, the Divisional Court referred to the Explanatory Notes that accompanied the 2006 Act and the Explanatory Memorandum for the Scope Order, noting that the introduction of this Section aimed to bolster consumer protection in domains where the actions of “claims intermediaries” had sparked extensive public concern.[20]

The UKSC disagreed with the Divisional Court and determined that these LFAs are DBAs and are therefore unenforceable under Section 58AA. Lord Sales, supported by Lords Reed, Leggatt, and Stephens, first identified the principles for interpreting the 2006 Act. He stressed that interpreting words based on their natural meaning may not be sufficient, since the purpose of an Act of Parliament is also relevant to its interpretation. Lord Sales then examined the context within which Part 2 of the 2006 Act was introduced. He observed that it was introduced in the context of a progressive expansion of litigant financial support to enhance access to justice due to reduced legal aid. This resulted in the introduction of CLSA 1990 Sections 58, 58A, and 58B, which allowed conditional fee agreements (CFA), permitted the recoverability of costs and provided pending regulations on LFAs.[21] The regulation on LFAs was to come into force upon a date designated by the relevant minister, yet no date has been specified. In considering the purpose of Part 2 of the 2006 Act, Lord Sales highlighted that the Explanatory Notes stressed that the regulation applies exclusively to claims management services designated by the Secretary of State for targeted consumer protection. Lord

[14] Financial Services and Markets Act 2000, Sec. 419A (UK) [hereinafter FSMA].

[15] *UK Trucks Claim Ltd. v. Stellantis*, *supra* note 13, at 41.

[16] The appellants appealed to the Court of Appeal and sought a judicial review in case the former lacked jurisdiction. The Court of Appeal, acting as a Divisional Court if needed, found no jurisdiction to the former and proceeded accordingly. PACCAR Inc & Ors. v. Road Haulage Association Ltd & Ors., [2021] EWCA Civ. 299, 69–79 (UK) [hereinafter *PACCAR* (EWCA)].

[17] *PACCAR* (UKSC), *supra* note 1, at 14.

[18] CLSA 1990, *supra* note 10, Sec. 58AA(3).

[19] *PACCAR* (EWCA), *supra* note 16, at 74–78.

[20] *Id.* at 78.

[21] *PACCAR* (UKSC), *supra* note 1, at 52–53.

Sales further observed that there is no need to identify implied limitations on the definition's terms given that its broad language does not suggest such limitations.

Applying these principles, Lord Sales argued that the phrase "claims management service" lacks a well-established legal or commonly accepted meaning. Lord Sales stressed that CFAs and similar arrangements revolve around offering legal advice and representation on credit, so it is understandable that Parliament would want to encompass within the regulatory framework of Part 2 a range of credit provision methods, including TPF.[22] Interestingly, Lord Sales further noted that it is not unreasonable that the regulatory authority granted by Section 4 also encompasses standard lending by reputable banks when provided for making a claim. He further argued that Section 58B has restrictively allowed such funding only when the funder's compensation is investment-based, as stipulated by Section 58B(3)(e).[23]

The appeal produced an elaborate dissent by Lady Rose. She agreed with the lower courts that the LFAs in question are not DBAs. She argued that the purposive approach to construction, the presumption against absurdity, and the potency of the term defined should be the driving principles for interpreting the 2006 Act. In considering the purpose of Part 2 of the 2006 Act, she argued that the purposive construction does not strongly favor any specific interpretation. However, considering the "state of affairs" at the time, which allowed and encouraged TPF, it can be understood that litigation funding is not included within the definition of DBA. She asserted that it is expected that the Parliament would consider the "state of affairs" at the time. Further, the presumption against absurdity requires a narrower construction of the term "claims management services" because it cannot be argued that the Parliament meant to include a bank lending money within the meaning of the term. She further acknowledged that the potency of the term remains intact despite the unclear boundary of the term, as most English words exhibit ambiguous or vague boundaries.[24] She stressed that while these LFAs are not subject to Section 58B, this does not imply their inclusion under Section 58AA because that provision remains inoperative. Thus, this leaves TPF unregulated.

* * * *

Until the decision of *PACCAR*, TPF had been receiving acceptance and endorsement by the judiciary and the government in the UK.[25] While this decision concerns opt-out collective proceedings before CAT, it affects all TPF agreements the return of which is damages-based, including potentially English seated arbitration and international arbitration proceedings where the funding agreement is subject to English law. This ruling renders many LFAs unenforceable pursuant to Section 58AA. Internationally, this decision raises concerns regarding the suitability of UK law for funding agreements and the UK as a seat of arbitration. While the decision may favorably curb the proliferation of class action cases and safeguard against unethical practices in collective proceedings, it overlooks the importance of accessing justice amidst dwindling public legal aid and the lack of funding avenues for opt-out collective proceedings.

[22] *Id.* at 85.
[23] *Id.* at 86.
[24] *Id.* at 209.
[25] *See, e.g.*, Excalibur Ventures LLC v. Texas Keystone Inc & Ors., [2013] EWHC 2767 (UK).

It is expected that the government and the relevant authorities will reverse the "damaging effect" of this decision.[26]

The UKSC's decision in *PACCAR* has significant implications. It renders the vast majority of funding agreements since the inception of litigation funding in violation of Section 58AA and non-compliant with the Damages-Based Agreement Regulations 2013 (DBA Regulations 2013).[27] This decision might allow for claims against funders to reclaim payments made for resolved cases, under the now-unenforceable agreements. As a corrective measure, funders can restructure and renegotiate their current LFAs by relying on investment-based rather than damages-based LFAs to escape the application of DBA regulations—a view endorsed by CAT in a subsequent decision.[28] Another more complex approach would be to restructure LFAs so that they comply with DBA regulations. Yet, subjecting LFA to DBA Regulations 2013 would render LFAs less appealing in large collective proceedings given that DBA Regulations 2013 set some limitations on the amount paid to representatives.[29]

From the perspectives of international law and arbitration, the situation is unclear, and judicial guidance is needed. In instances where an English court adjudicates a case governed by foreign law, the court will most likely resort to expert witnesses, potentially incorporating foreign legal stances on LFAs into its decision making. Yet, if foreign law is silent on the issue, English law under *PACCAR* could dictate the court's determination. Conversely, a non-English court applying English law will most likely invoke *PACCAR* as a basis for its decision. Similarly, *PACCAR* may arguably apply to arbitration funding agreements subject to English law where the dispute is tried in an English-seated arbitration given that Section 58AA covers "any sort of proceedings for resolving disputes."[30] As a potential remedy to escape the ramification of *PACCAR* in arbitration, parties may amend the governing law of the funding agreement to escape the application of English law.

However, there is a risk that some funded parties may refuse to renegotiate their funding agreement, leaving the advanced amounts potentially unrecoverable. Even with such a restructuring, it is still arguably possible for opposing parties to assert that such agreements are DBAs as they are dependent on the damages obtained even if the calculation method is investment-based, given that TPF is a non-recourse financing.[31] This is a more viable argument in cases where compensation is capped or structured based on the amount of the damages awarded.

The UKSC's decision is criticized as TPF has been accepted and endorsed as a distinct mechanism from DBA. Sir Rupert Jackson in his reports on the Review of Civil Litigation Costs

[26] Lucy Fisher, Rafe Uddin & Alistair Gray, *UK Government Vows to Protect Litigation Funding That Helped Sub-Postmasters*, FIN. TIMES (Jan. 14, 2024), *at* https://www.ft.com/content/3d089314-eb97-4e21-9101-962876c7d480.

[27] *PACCAR* (UKSC), *supra* note 1, at 243.

[28] Alex Neill Class Representative Ltd. v. Sony Interactive Entertainment Europe Ltd, [2024] CAT 1 (UK).

[29] The Damages-Based Agreements Regulations 2013, Arts. 4(2)b, (3) (UK) [hereinafter DBA Regulations 2013].

[30] CLSA 1990, *supra* note 10, Sec. 58AA(7A); *see also* Diag Human SE and Mr. Josef Stava v. Volterra Fietta, [2022] EWHC 2054 (QB) (UK) (where English law was applied for a conditional fee arrangement in connection with an English-seated investment treaty case).

[31] Recourse-based funding allows the lender to lay claim to any of the borrower's assets while non-recourse-based funding only allows the lender to lay claim to the revenue generated from a certain asset, which in the context of TPF is the case itself. Emily Samra, *The Business of Defense: Defense-Side Litigation Financing*, 83 U. CHI. L. REV. 2299, 2302 (2016).

endorsed TPF as a mechanism quite distinct from DBA.[32] The literature agrees, Neil Andrews described DBAs as an agreement where "a legal representative can agree with the client that professional remuneration will be waived unless the case is won."[33] Thus, it is established that DBAs are typically concluded with attorneys while LFAs are concluded with non-attorney funders. For all these reasons, *PACCAR* raises questions about the suitability of UK law for funding agreements and its role as a venue for commercial litigation and arbitration. This decision introduces uncertainty into the legal landscape, leading parties to favor jurisdictions with clearer regulatory frameworks and more consistent judicial interpretations concerning funding agreements.

At the same time, this decision may decrease the proliferation of class action cases and safeguard against unethical practices in funded collective proceedings. The majority in this decision may have been concerned that the proliferation of such litigation brings the risk of both procedural abuse and extravagant claims for inflaming damages as well as an increase in frivolous claims. While not explicitly expressed, the decision in *PACCAR* may have aimed to address the increasing prevalence of class action cases. In 2022, UK competition class-action values soared to over £26 billion following the *Merricks v. Mastercard Inc.* ruling,[34] up significantly from £4 billion in 2021.[35] This is more than a sixfold rise in a single year. In *Merricks v. Mastercard Inc.*,[36] Lord Sales and Lord Leggatt JJSC, who both sat in *PACCAR*,[37] have expressed reservations about the prevalence of class action cases in their dissent.[38] The court in this case lowered the standard for bringing opt-out collective proceedings,[39] which led to an increase in the number of opt-out collective proceedings. Lords Sales and Leggatt JJSC emphasized their view by citing an American judgment which asserted that: "The realistic alternative to a class action is not 17 m individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[40] Responding to the surge in class action cases, other governments have taken similar steps, as seen in Australia in 2020,[41] where licensing requirements on funders were introduced, which was reversed in 2022.[42] Criticism mounts against this approach, which restricts access to justice in opt-out collective proceedings. A more sensible approach would involve implementing targeted regulations to address the rise in class action cases.

[32] Sir Rupert Jackson, *Review of Civil Litigation Costs: Preliminary Report, Vol. 1*, at 160 (May 2009); *see also* Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report*, 121 (Jan. 2010).

[33] Neil Andrews, Andrews on Civil Process Court Proceedings, Arbitration & Mediation, para. 20.44 (2d ed. 2019).

[34] Merricks v. Mastercard Inc., Judgment, [2020] UKSC 51, para. 84 (Dec. 11, 2020) (UK).

[35] Jonathan Ames, *Banks Face More Than 100 Class Action Lawsuits*, Times (Jan. 9, 2023), *at* https://www.thetimes.co.uk/article/banks-face-more-than-100-class-action-lawsuits-9vxzwn0qx.

[36] *Merricks v. Mastercard*, *supra* note 34.

[37] *PACCAR* (UKSC), *supra* note 1, at 129.

[38] *Merricks v. Mastercard*, *supra* note 34, para. 84.

[39] *Id.* at 98, 118.

[40] Carnegie v. Household Int'l, 376 F.3d 656, 661 (7th Cir. 2004).

[41] In May 2020, the Australian government imposed a requirement that funders of class action cases to be subject to further regulations. Hon Josh Frydenberg, *Litigation Funders to Be Regulated Under the Corporations Act*, Ministers Treasury Portfolio (May 22, 2020), *at* https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/litigation-funders-be-regulated-under-corporations#:~:text=The%20Morrison%20Government%20is%20ensuring,the%20managed%20investment%20scheme%20regime.

[42] Corporations Amendment (Litigation Funding) Regulations 2022 (Austl.)

Furthermore, this decision jeopardizes the already insufficiently funded public's access to justice. CAT faces a void in viable funding arrangements for these proceedings, an essential requirement for obtaining permission to proceed as a collective proceeding. Given that costs in opt-out collective proceedings can be millions of pounds and require years to be resolved,[43] it is foreseeable that well-endowed multinational corporations will wield an unjust advantage over small corporations and consumers due to lack of funding. This deficiency persists even if an LFA had conformed to the regulations governing DBAs, as they would remain unenforceable in opt-out collective proceedings due to the statutory prohibition of DBAs for such proceedings.

The government has reacted to this decision. Justice Secretary Alex Chalk has announced his intention to rectify the "damaging effects" of the UKSC ruling during the "earliest legislative opportunity."[44] This undertaken was materialized on March 19, 2024 when the government introduced the Litigation Funding Agreements Bill. This legislation was meant to amend CLSA 1990 Section 58AA and clarify that LFAs are not DBAs, applying these changes retroactively.[45] However, the bill has lapsed due to the call for a snap general election by the UK government which led to the prorogation of Parliament.[46] The new government will decide whether to reintroduce the bill. This action followed earlier proposed amendments to the Digital Markets, Competition, and Consumers Bill to allow DBAs for opt-out claims in CAT. These amendments were rejected due to the introduction of Litigation Funding Agreements Bill, which has also been dropped.[47] The Department for Business and Trade has released a statement that it is considering all available options to clarify the situation.[48]

In conclusion, the full scope of *PACCAR*'s national and international implications has yet to unfold. Particularly intriguing is the potential impact of any government regulations. This remains to be seen.

Ibrahim A. Alturki*
University of Cambridge
doi:10.1017/ajil.2024.30

[43] Note 35 *supra*.

[44] *Alex Neill v. Sony*, *supra* note 28.

[45] UK Parliament, Explanatory Notes to the Litigation Funding Agreements (Enforceability) Bill [HL], HL Bill 56—EN (Mar. 19, 2024), *at* https://bills.parliament.uk/publications/54762/documents/4593.

[46] UK Parliament Press Release, Litigation Funding Agreements (Enforceability) Bill Completes Lords Line by Line Scrutiny (Apr. 30, 2024), *at* https://www.parliament.uk/business/news/2024/april/lords-consider-litigation-funding-agreements-enforceability-bill-at-committee-stage.

[47] UK House of Lords, Digital Markets, Competition and Consumers Bill, Debate, Vol. 836 (Mar. 11, 2024), *at* https://hansard.parliament.uk/lords/2024-03-11/debates/D981BFC6-FDBE-4936-9609-5CDD75CAEB54/DigitalMarketsCompetitionAndConsumersBill.

[48] UK Department for Business and Trade Press Release, Department for Business and Trade Statement on Recent Supreme Court Decision on Litigation Funding (Aug. 31, 2023), *at* https://www.gov.uk/government/news/department-for-business-and-trade-statement-on-recent-supreme-court-decision-on-litigation-funding.

* Lecturer in commercial law at the Department of Law, College of Sharia and Islamic Studies, Qassim University, Almulida, Buraydah 52571, Saudi Arabia.