

Reforms Abroad For Litigation Funders Raise Questions In UK

By **Paige Long**

Law360, London (July 6, 2020, 12:58 PM BST) -- Australia's recent decision to introduce a licensing regime for its litigation funders has stirred up attention across the industry, but experts say it appears unlikely that the U.K. will move beyond its current combination of light-touch regulation and court oversight.

As litigation funders have grown in importance in the U.K. system, the country has left funders to regulate themselves under the auspices of Association of Litigation Funders.

The group, which requires funders to show they have at least £5 million (\$6.3 million) in available funding and the ability to meet their liabilities for the next three years, oversees a code of conduct and has dealt with a handful of misconduct complaints since its launch in 2011.

Most lawyers are confident that Britain's current approach is here to stay, at least for now. But others are keeping an eye on possible regulatory movements, as the market establishes itself as a part of the justice system and faces greater scrutiny.

"If a funder is a member of the ALF, then they're hallmarked as being a 'good player' in the marketplace," Charlotte Raynor, an associate at Covington & Burling LLP, said.

But Raynor pointed to growing concerns about how litigation funders run their business, including the sources of their funds.

"How transparent are their accounting practices? Who is sitting behind them? And how stable and profitable are litigation funders, including those who are listed on a stock exchange?" she said. "These kinds of questions are starting to crop up more and more as the market continues to develop."

Many of those countries that have accepted the use of third party-financing for litigation have done so as they attempt to position themselves as global arbitration and litigation hubs. It is a way to drive business and boost activity in their courts, lawyers say. Their intentions may be similar, but their approaches to regulation differ widely.

Singapore and Hong Kong, for example, run a "light touch" regulatory model. Both countries have passed legislation allowing professional litigation funders to operate, although they must hold a specified amount of capital in their respective jurisdictions. In other territories such as in Ireland the use of third-party funding is still not permitted.

Robin Ganguly, counsel at Burford Capital, said the use of funding in the U.K. is becoming increasingly more mainstream, particularly as judges have recognized it as a tool to help secure access to justice.

"People have learnt that funders perform a valuable role within the legal ecosystem," said Ganguly, who practiced at Linklaters LLP and Bryan Cave Leighton Paisner LLP before joining Burford last year.

"Particularly in a jurisdiction like ours, where it is so expensive to bring a claim and we have the adverse costs risk if you lose."

The market continues to develop. Some claimants turn to litigation funding even when they have enough money to fund a case themselves but would prefer not to strain their balance sheet or cash flow.

The litigation-funding market in the U.K. could become particularly appealing as litigants look to bring a wave of cases stemming from the COVID-19 pandemic in the coming year.

Funders have also been waiting for rulings on class actions from the Supreme Court, which is due to hand down its decision in a consumer lawsuit against Mastercard over its merchant fees and will probably trigger the release of stays that have been put on several competition cases.

"Given how widely litigation funding has been used by clients it's definitely something that's here to stay, and in the next 10 years it's something that will evolve a lot more," Shivani Sanghi, an associate and solicitor-advocate at Covington & Burling LLP, said.

Susan Dunn, co-founder of Harbour Litigation Funding and chairwoman of the Association of Litigation Funders in the U.K., said she anticipates an increase beyond its eight existing members as more genuine funders realize the benefits of membership when engaging with law firms and parties seeking funding.

Dunn was one of the first lawyers to develop litigation funding in Britain in the early 2000s. It was developed in Australia, where the model was adopted in 1999, and is now set to be regulated through a licensing regime handled by the Australian Securities and Investments Commission.

Patrick Moloney, chief executive of Litigation Capital Management Finance, said his company had anticipated some kind of regulation in Australia, driven by its class action regime. LCM already holds a financial services license in Australia and is regulated via its public listing on the London Stock Exchange's AIM market.

"We've been happy to embrace regulation," Moloney said. "We think it's good for the industry as it adds a layer of transparency and credibility."

One challenge for the U.K. is that it has many regulators that could take more responsibility in this sector, Nick Rowles-Davies, executive vice-chairman at LCM, pointed out. But nobody has yet done so.

If funders go beyond their financing role, such as by giving instructions on a case, their conduct could fall under the remit of the Law Society, the Solicitors Regulation Authority or indeed the courts.

It could move into the Financial Conduct Authority's territory if a funder is charging excessively high rates, being unreasonable with a consumer or misrepresenting what their funding is going to be.

"The stark difference between Australia and the U.K. is that there is no authority that has jumped up and said: let's do it," Rowles-Davies, who is based in London, said. "It's probably why the status quo will remain unchanged for some time."

Regulators will probably require strong indications of wrongdoing or an industry-wide pattern of abuse before they step in. Simon Davis, president of the Law Society, said that any decision by the authorities on alleged misconduct by litigation-funders should be based on evidence.

"I think you will find that the regulators will always be watching this area, but at the moment I am not aware of abuse that would justify anything other than self-regulation," Davis said.

Other participants in the process, such as providers of after-the-event insurance — which covers the legal costs and expenses of litigation — and law firms offering conditional fee agreements, are already regulated. The four funders that are listed globally — LCM, Burford, Manolete and Omni Bridgeway — are also already subject to some level of regulation.

"The kind of people, by and large, who are going to be taking this funding are represented by law firms that know what they're doing," Davis added.

Burford's Ganguly said that the standards required to join ALF are important and offer reassurance to the courts and law firms whose clients are using the funding.

"We already have something of a regulator in the court," he added. "If we do something that the court doesn't like then it has the power to do something about it. It's a case-by-case, funder-by-funder basis, and we think it works quite well."

For example, the Court of Appeal recently stepped in to relax a previously fixed cap limiting how much funders have to pay if they bet on a losing case.

Before that ruling, it was understood that a funder would be liable for the other side's costs only up to what it contributed in running the case in the first place. The court has now made clear that the funder could — depending on the circumstances — be at risk of having to pay all the costs of a litigation.

But, in another case, a judge recently cast doubt over the weight to be afforded to ALF membership.

Judge Christopher Nugee ordered Therium Litigation Finance in a February ruling to pay almost £4 million in security in a case accusing HSBC and a film company of operating a fraudulent tax scheme, even though the claimants held insurance.

The judge said there was a risk the insurers could not cover the entire legal tab, and even the funder's membership with the association did not give him enough confidence that money would be forthcoming if there was a large liability for costs.

The ALF's code of conduct is simply a minimum level, setting out the standards of practice and behavior expected by members. It does not set out accountancy standards for valuing assets or stipulate how businesses should be run.

"There is limited information on how litigant-funders work, generally, as a business," Raynor of Covington & Burling said. "This raises trust and confidence concerns."

LCM's Rowles-Davies said that he would welcome a licensing regime to help "separate the wheat from the chaff" but added that the U.K. is likely to keep relying on the courts to highlight inappropriate practices or agreements.

"That said, Australia had the same approach, and it's now decided to go a bit further," he added.

The move toward a licensing regime was made more interesting as it followed a government-commission report advising against the regulation of litigation-funders, and the Australian Securities and Investments Commission publicly stating it was not the right regulator to oversee the market.

Dunn, of Harbour Litigation Funding, maintains that no regulatory moves are expected in the U.K. She spoke to the Civil Justice Council, an advisory body to the judiciary, this year about the funding landscape, and the council indicated it was content to leave the self-regulatory position as it is.

ALF's focus in the short to medium-term is to continue to focus on educating the market on what funders actually do and to recruit more members, Dunn said.

"People need to be equipped to understand how funding cases work," Dunn said. "People think funding is a lot more complicated than it actually is. And it's incumbent on us to make sure people are equipped to know what the key elements of a funding agreement are and what makes a case suitable for funding."

--Editing by Ed Harris.