

David Smeeton Esq  
Ministry of Justice  
102 Petty France  
London  
SW1H 9AJ

David.Smeeton@justice.gov.uk

15 August 2018

Dear Mr Smeeton

***Damages-Based Agreements***

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This letter is written on behalf of the Litigation Committee of the City of London Law Society in response to the Ministry of Justice's *Post-Implementation Review of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*. The purpose of this letter is to urge the Government to reconsider its policy of prohibiting solicitors from entering into hybrid DBAs in relation to commercial disputes, whether in the English courts or in an arbitration with its seat in England and Wales.

Under the Damages-Based Agreements Regulations 2013, DBAs can only provide for solicitors to be paid a proportion (up to 50%) of any sum recovered by the claimant; solicitors may not receive any other remuneration under the DBA. As a result, hybrid DBAs (ie DBAs under which solicitors are paid a retainer as the case proceeds plus a share of any damages recovered should the action prove successful) are not permitted. The effect of the Regulations is, in practice, to prevent solicitors and their clients from entering into DBAs in commercial cases because the duration and uncertainty of commercial cases commonly makes solicitors unwilling to accept the risks that the Regulations impose upon them. This effective ban on DBAs is contrary to previous Governmental policy, which accepted Sir Rupert Jackson's recommendation that DBAs, including hybrid DBAs, should be permitted.

There may be consumer protection or other reasons that make the policy of banning hybrid DBAs appropriate where individuals, particularly with regard to personal injuries,

are concerned, but we can see no reason why arrangements of this sort should not be allowed for commercial disputes. The Civil Justice Council set out many of the arguments regarding this area in chapter 21 of its paper entitled *The Damages-Based Agreements Reform Project: Drafting and Policy Issues* (August 2015) and we will not repeat them here. We would, however, draw particular attention to the following points:

- A hybrid DBA can, it seems, be replicated lawfully through the involvement of a third party. In particular, a client and a solicitor can enter into a DBA, and the solicitor can then enter into a limited recourse funding agreement with a third party funder under which the funder pays the solicitor certain sums as the action proceeds in return for the solicitor remitting to the funder a share of the amount received by the solicitor from the client under the DBA. In our view, there is no commercial or legal logic in banning solicitors and their clients from entering into a hybrid DBA directly but allowing them to do so in substance if they involve a third party. The intervention of a third party in this way can only increase the cost of the arrangement, to the disadvantage of both parties, as well as distorting competition in the market. It is also hard to see why a professional litigation funder, who is not subject to obligations to the court or other professional obligations, should be permitted to enter into DBAs in these circumstances but solicitors should not.
- The inflexibility of the fee arrangements that solicitors are able to offer their clients is a restraining factor in the promotion of England and Wales as an international centre for commercial dispute resolution, whether in the courts or arbitration. International clients, who have a choice of where to litigate or arbitrate, expect their lawyers to be innovative, including with regard to fee structures. The artificial restrictions on what solicitors are permitted to agree under DBAs (and, indeed, under conditional fee agreements) creates a disincentive to those who might be thinking of resolving their disputes in England and Wales.

In these circumstances, we urge the Government to permit solicitors to enter into hybrid DBAs with commercial clients by amending the Regulations regarding DBAs.

We are obviously happy to discuss this further if it would be helpful.

Yours sincerely



Simon James  
Chairman, Litigation Committee  
The City of London Law Society

## SCHEDULE

### THE CITY OF LONDON LAW SOCIETY LITIGATION COMMITTEE

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The CLLS responds to consultations and other issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee.

Individuals and firms represented on the Litigation Committee are as follows:

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