
10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE



*Financing Constructions
Disputes – An EMEA
Perspective*

*Prateek Bagaria
Partner, Singularity Legal*

Winds of Change



10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

Table of Contents

1. Introduction.....	3
2. The Process of Litigation Financing.....	4
3. Litigation Finance: Interdependent Modularity.....	5
4. Structuring and Taxation: Evaluation of Funding Options.....	6
5. Construction Industry – A regional heavyweight.....	7
6. Genesis of Litigation Financing in the EMEA region.....	8
7. Emergence of Litigation Finance.....	9
8. Challenges and Ethical considerations.....	10
9. Consequences and Implications of PACCAR on the Litigation Finance Industry in the EMEA region.....	11
10. Future of Financing Construction Disputes.....	12



10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

Introduction

1. The construction industry is renowned for being one of the most cost-intensive industries around the world. A common mechanism in construction contracts is back-ended payments, i.e., the contractor undertakes the cost of construction upfront, and receives payments for the same upon achieving certain pre-defined milestones.
2. The Europe, Middle East and Africa (“EMEA”) region, like any other region, undertakes a diverse set of construction activities.
3. It has also been seen that construction projects have a tendency to end up in a dispute, owing to a variety of reasons.
4. Challenges associated with increasing costs associated with litigations, have resulted in significant developments in the field of third-party funding arrangements or litigation finance (as it is commonly known) which has swiftly gained traction, particularly in the EMEA region.



10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

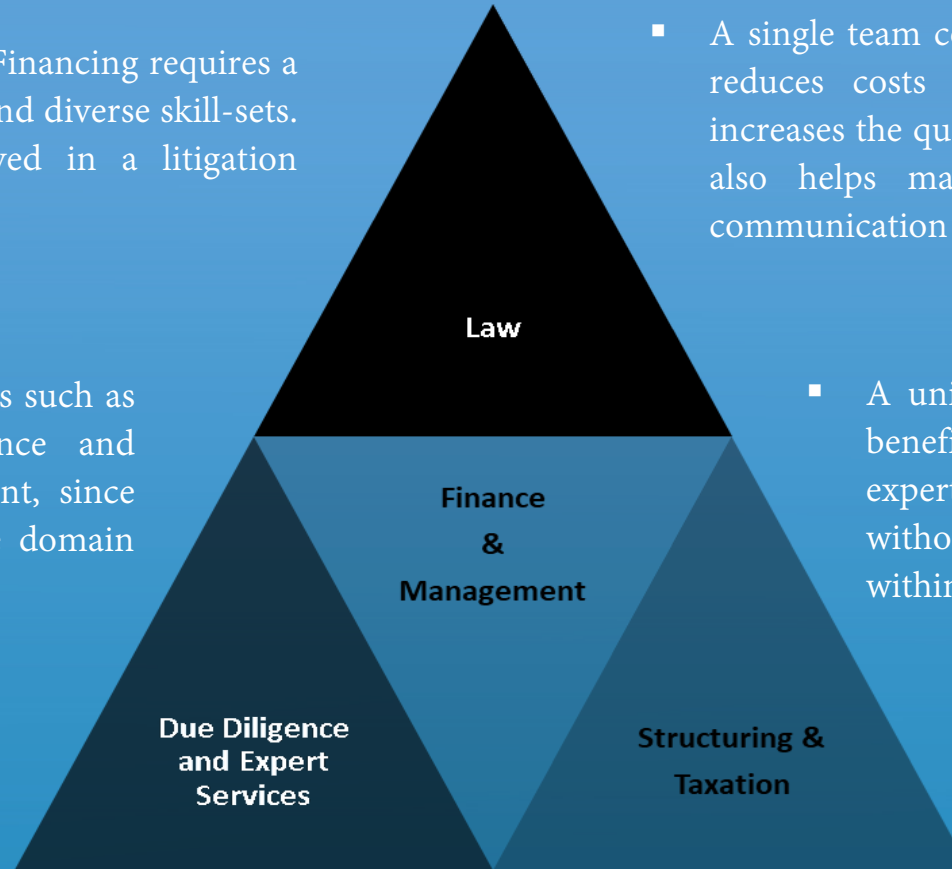
The Process of Litigation Financing



Litigation Finance: Interdependent Modularity

- The process of Litigation Financing requires a multi-pronged approach and diverse skill-sets. Several teams are involved in a litigation financing arrangement.

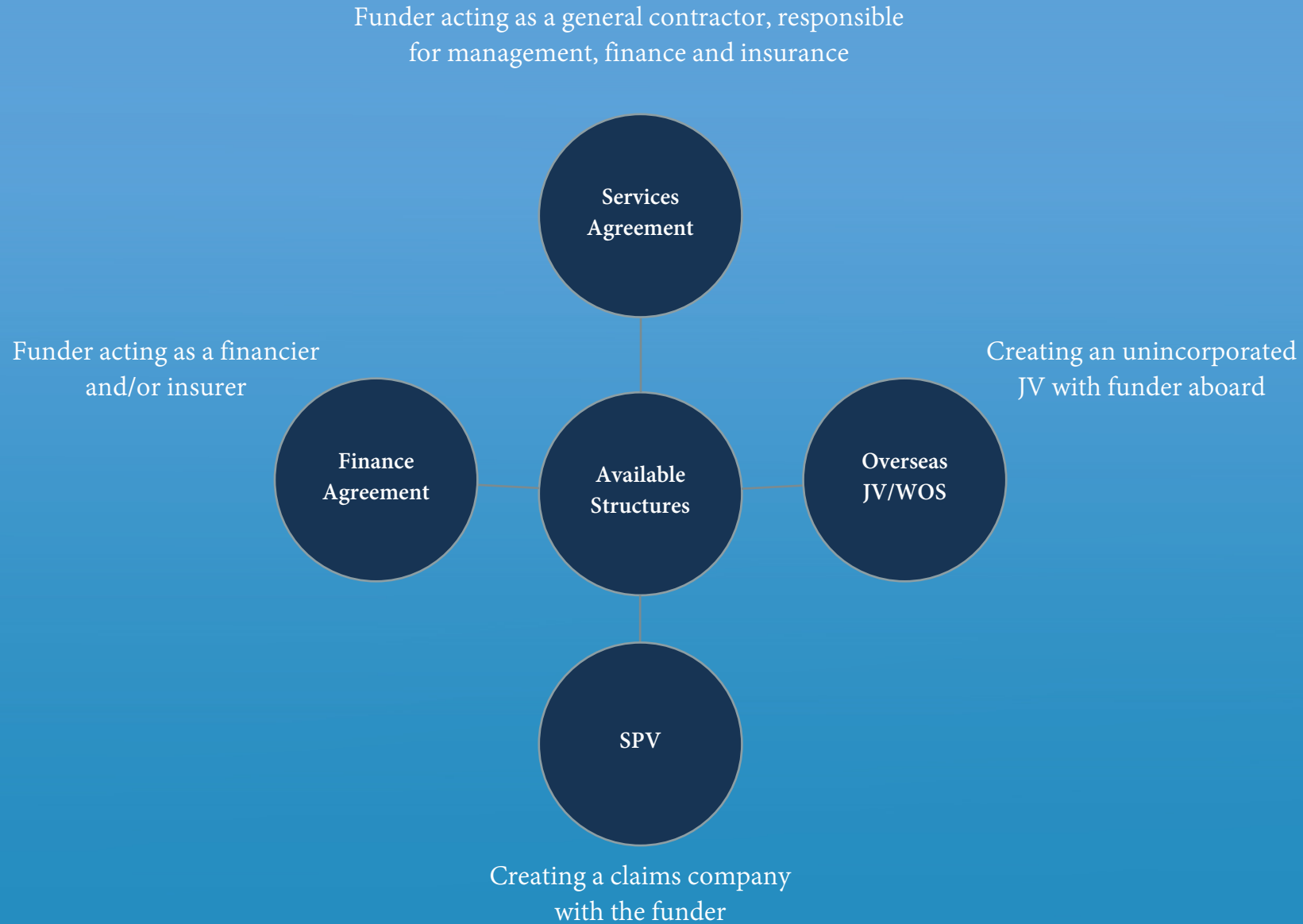
- Experts from different fields such as law, finance, due diligence and taxation are inter-dependent, since they possess different core domain expertise.



- A single team consisting of all required experts reduces costs and time of the client and increases the quality of the team's product. This also helps maintain legal privilege on all communication relating to the project.

- A unified team also helps the client benefit from the best domain expertise from across the board, without any duplication of work within the team of different experts.

It is thus essential to deploy experts in an interdependent but modular team





10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

Construction Industry – A regional heavyweight

The construction industry has been a major contributor to the economy for countries in the EMEA region. The economic performance of the GCC countries is closely linked to the performance of the construction industry.

GCC projects have significantly been impacted due to the COVID-19 pandemic, with a rebound post pandemic:

- US\$ 106 billion in 2019
- US\$ 71 billion in 2020
- US\$ 116 billion in 2021

The Kingdom of Saudi Arabia contributed US\$ 54 billion worth of contract awards leading the way amongst the GCC countries.

Qatar has also represented long-term plans in place for development with the implementation of the National Vision 2030. Meanwhile, UAE is another key driving factor with several luxury and commercial construction projects underway.



10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

Genesis of Litigation Finance in the EMEA region

1. Litigation funding is a primary tool for not only impecunious parties but also a viable tool for financially stable entities but is also being increasingly looked at as an alternative model for such entities to facilitate smooth cashflow management.
2. Several globally recognized arbitral institutions have addressed third party funding in their institutional rules, ushering in a new era of litigation support. The SIAC and CIETAC Rules were the first to address third party funding in 2017 followed by HKIAC in 2018, BAC in 2019, CAM in 2020 and the ICC and VIAC in 2021. The ICSID has also approved a comprehensive reform of their rules and regulations.
3. Third party funding provisions have been considered to overhaul the DNA of international arbitration, having been found in several 'new generation' bilateral treaties.
4. The European Parliament also proposed a far stricter regime in the EU by issuance of a Draft Directive.
5. Several regional powerhouse institutions like DIAC, ADGM and SCCA have also introduced third party funding within their rules, thus creating a paradigm shift towards becoming a global arbitration hub.



10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

Emergence of Litigation Finance

Third party funding has gained significant traction and become a support mechanism for construction companies, acting as a necessary enabler allowing companies to remain afloat. These key attributes are as follows:

- Liquidity Boost
- Risk Sharing
- Flexibility
- Expanding Growth Opportunities
- Restructuring Debt
- Buffer against Economic Downturns
- Stakeholder Confidence
- Expertise and Networking
- Bridging Gaps in Traditional Financing

Third party funding this plays an essential role in modern business ecosystems, offering both financial support and strategic advantages for companies navigating challenging periods.



10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

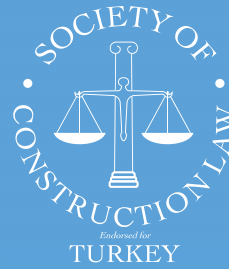
Challenges and Ethical considerations

Historically, the doctrines of champerty and maintenance were established to prevent meddling in litigation by unrelated third parties. In modern times, the landscape of litigation has shifted significantly, leading to the dawn of litigation funding, which provides unique reasons: (a) Access to Justice; (b) Risk Spreading; (c) Counsel on Merits; and (d) Shift in Perception.

Litigation finance is sometimes confused with usury laws. However, Courts have held otherwise. On the contrary, litigation finance almost always is a non-recourse payment to a litigant.

Further, there are several key factors, which are required to be considered by litigation funders, these include privilege, control, disclosure.

The litigation finance industry has grown in prominence and has seen establishment of several specialized associations and organizations like, ELFA, ILFA, ALF. These provide best practices and code of ethics ensuring transparent dealings.



10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

Consequences and Implications of PACCAR on the Litigation Finance Industry in the EMEA region

The landmark judgment delivered by the Supreme Court of the United Kingdom in PACCAR has held that litigation finance agreements (“LFAs”) which entitle funders to payment based on the amount of damages recovered are ‘damages-based agreements’ (“DBAs”) and thus unenforceable unless they comply with the regulatory regime for DBAs.

While these may be worrying times for litigation funders, since all funding arrangements will now be under scanner.

However, skeptics view that PACCAR will not be generally expected to impact the economics of litigation finance and is considered a self inflicted injury by English Courts. Meanwhile, litigation funders will definitely consider any changes in the post-PACCAR era.

This has presented an increasingly lucrative opportunity for litigation funders based in the EMEA region to capitalize on the vacuum left behind. The EMEA region has seen a growing increase and interest in litigation funding which has managed to weather the shockwaves created by PACCAR.



10TH INTERNATIONAL SOCIETY OF CONSTRUCTION LAW CONFERENCE

Future of Financing Construction Disputes

Over the years, the litigation finance industry has weathered many a storm positioning itself for incremental growth notwithstanding an economic downturn.

Litigation funding is uncorrelated with the market and while the economy may have witnessed a downturn, the litigation finance industry is witnessing an uptick in growth.

Significant global milestones during which litigation funders have powered through:

- Russia and Ukraine conflict
- 2022 FIFA World Cup, Qatar and post event complications
- Environment commitments at COP26 and potential situations arising out of COP28
- Sea change post-PACCAR verdict
- Use of insurance market for disputes i.e. after-event insurance products.

In conclusion, third-party funding has been the talk within all boardrooms and legal circles as an attractive yet nascent avenue and market in which parties are looking to explore.



Thank You

Prateek Bagaria
Partner, Singularity Legal