THE FUTURE OF CONTINGENT FEE IN THAILAND: A COMPARATIVE ANALYSIS

BY

NA-CAN SERMSOOK

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)
FACULTY OF LAW
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ABSTRACT

A contingency fee agreement is one of the fee structure types that has been used over the world. Although contingency fee agreement is principally allowed in some countries, there are still other countries such as Thailand in which the issue on contingency fee agreement remains challenging.

In Thailand, the contingency fee agreement has been prohibited for decades due to the court's view that such agreement contradicts with Thai public policy and good moral as it allows an attorney to share interests in the outcome of a lawsuit. Moreover, there is no law related to the contingency fee nor there is a Supreme Court precedent that can be used at this instant. The Supreme Court precedent regarding contingency fee is self-contradictory, one precedent is inconsistent with another. However, a recent development on a class action lawsuit suggests that Thai court is inclining to allow a contingency fee agreement as the lawyer in such class action lawsuit was permitted to receive a contingent fee as an award. As such, there is no unanimous direction for contingent fee in Thailand since there is no guidance to the meaning and the scope of contingency fee agreement.

Similarly to Thailand, Singapore, Germany and France also strictly prohibits the contingent fee although the laws in the latter countries are more relaxed in terms of having exceptions. The prohibition of contingent fee can be exempted in the aforementioned countries if the requirements set out in each country are met. In

addition, Singapore recognizes another fee structure called a conditional fee whereby the said fee is allowed to be applied instead of a contingent fee.

On the contrary, English law clearly establishes its position on this issue, it accepts a contingency fee agreement. Under English legal system, the contingent fee is classified into three different types, i.e. Normal Success Fee, Uplift Success Fee, Damages-Based Success Fee, whereby each type has its own specific laws and regulations.

In light of this, as the debate concerning the advantages and disadvantages of contingent fee has been continuously discussed, the author finds that, comparing to foreign jurisdiction, the current Thai legal system is now developing but the issues of contingent fee has not yet been properly regulated. Therefore, the author proposes that the contingent fee should be permitted in Thailand and should be regulated by a specific regulation in order to minimize concerns regarding the application of contingent fee.

Keywords: contingent fee, contingency fee agreement, champerty, maintenance fees

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Na-can Sermsook

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Abbreviations	Terms
Normal Success Fee	A reward where the attorney will only recover his normal fees upon the completion of the conditions
Uplift Success Fee	A reward where the attorney will recover his normal fees plus a success uplift
Damages-Based Success Fee	A reward where the attorney will recover some of the clients' winnings

CHAPTER 1
INTRODUCTION

Legal fee is one of the crucial factors which always be taken into account before a party decides whether to pursue a case. A client and a lawyer may create and agree on a fee structure prior to proceeding further.In most cases, lawyers usually collect their professional fee in advance, so they do not have to bear the risk whether a client will be in default of such fee or not. However, in some cases, a client may not be able to afford to pay the legal professional fee in advance, even though such client actually suffered the damages.

A contingent fee may be a solution to the above issue. However, it has been prohibited and considered as unenforceable in Thailand. This thesis will study the historical development of a contingent fee concept and analyze the current global position and trend of the society. In this chapter, the following issues will be discussed respectively, Background and Significance of the Study, Objective of the Study, Hypothesis, Scope of the Study, Methodology, and Expected results.

1.1 Background and Significance of the Study

A contingent fee or a contingency fee agreement is one of the fee structure types that lawyers may apply to their client. Generally, a contingent fee is recognized worldwide and the nature of such fee structure is for a lawyer to enter into an agreement with his or her client resulting the client is not required to pay legal professional fee unless the lawsuit is successful or is settled out of court in favor of the client. While the concept of contingency fee agreement seems to be globally recognized, there are some discrepancies in the details of such concept. For instance, what is the definition of a contingent fee? Which fee structure fall under the scope of contingency fee agreement? Whether contingent fee should be prohibited or permitted to apply?

Regarding the definition of contingent fee, it is usually described as “no win no fee”. Nevertheless, in some countries such as Singapore where it is known that contingent fee has been prohibited, [1] it recently allows “no win no fee” concept to be applied as a “conditional fee agreement”. [2] On the contrary, some countries consider a “no win no fee” concept as a concept where a lawyer representing a client in a lawsuit share some interests in the result of the lawsuit and such concept falls under the scope of contingent fee. Hence, a problem concerning discrepancies on the definition of contingent fee between different countries has arisen.

In addition to the above issue, it is still controversial whether a contingency fee agreement should be permitted to apply. In some countries such as Australia, the United States of America, Brazil, France, and Japan, a contingency fee agreement is permitted. This is because the contingency fee agreement is considered as one of the mechanisms to help an injured party in a dispute who does not involve in the action that causes damage but could not afford legal assistance from lawyers.[3] In contrast, the contingency fee agreement is still prohibited in countries like Thailand and Singapore as the said countries view that the contingency fee agreement’s objective is against public policy because such agreement allows lawyers, who in principle have a duty of care to protect the client’s interest with their best effort, to share interests with the dispute’s outcome. The lawyers are, therefore, in a situation in which they have to choose between their interest and the client’s interest.[4] Thus, another main issue concerning contingent fee is that whether it should be allowed to be applied as one of the legal professional fee structures?

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[1] Legal Professional Act 1996, s 107(1)(b).

[2] Legal Professional Act 1996, s 115B.

[3] Virginia G. Maurer, Robert E. Thomas, Pamela A. DeBooth, ‘Attorney Fee Arrangements: The U.S. and Western Perspectives’, (1999) 19(2) Nw. J. Int'l L. & Bus. 272, 305.

[4] Max Radin, ‘Maintenance by Champerty’ (1935) 24 California L Rev 48, 69-70

In Thailand, there were regulations prohibiting contingency fee agreement and there are numerous Supreme Court judgments ruled that an objective of contingency fee agreement contradicts to Thai public policy and good moral. [5] The Supreme Court of Thailand usually rules that a contingent fee structure is considered as null and void due to the fact that a lawyer will receive his or her legal professional fee if the client wins the case. To elaborate, a contingent fee structure allows lawyers to share some interest from the properties that their client may receive from winning the case. Additionally, it is considered as a lawsuit trading in which it contradicts to Thai public policy and good moral as well. Moreover, the Supreme Court further views that if a lawyer involves or shares some interest in the result of the case, it may cause an adverse effect to the efficiency of the lawyer as the lawyer may put his or her interest over the client's interest. The aforementioned reasoning is a long-standing precedent of the Supreme Court of Thailand concerning contingent fee.

Nevertheless, in 2015, there was an amendment to the Thai Civil Procedure Code, i.e., the provisions concerning class action was introduced to Thai legal system. For class action proceeding, by virtue of Section 222/37, [6] a lawyer who is a plaintiff's counsel in a class action lawsuit may be able to receive certain amount of the award if the case is successful. Furthermore, a recent Supreme Court judgment allows a lawyer to charge his or her professional fee on a contingent fee basis. [7] Although the lawyer was successful in claiming the professional fee from the client, there are numbers of questionable issues of the said Supreme Court judgment. For instance, the Supreme Court states that since the Civil Procedure Code Section 222/37 already allows the contingent fee, the contingency fee agreement is therefore enforceable. Even though the case involving the plaintiff (a lawyer) represented the defendant (a client) was not a class action lawsuit, but the Supreme Court still mentioned Section 222/37 of the Civil and Procedure Code in its reasoning. Therefore, it is still debatable

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[5] Supreme Court Judgment No. 6919/2544.

[6] Civil Procedure Code, s 222/37.

[7] Supreme Court Judgment No. 5162/2563.

whether a contingency fee agreement is allowed in Thailand. Plus, the Supreme Court did not mention anything regarding *"Thai public policy and good moral"*, which is the main reason that a contingency fee agreement has been prohibited in Thailand.

As a result, there are three main issues concerning contingent fee, namely: (i) What is a definition of contingent fee?; (ii) Whether a contingent fee should be allowed to apply?; and (iii) To what extend a contingent fee should be allowed? The solid answers to these issues are essential because if a contingent fee is allowed, the Thai legal system shall be considered as marching to a new era. Individuals will have more alternatives in engaging competent lawyers and a chance for such individuals to acquire a better lawyer without any limitation on their budget as a more competent lawyer typically comes with a higher fee. Additionally, lawyers themselves will have more incentive to represent cases where a client cannot afford the advance payment for legal professional fee.

1.2 Objective of the Study

The objectives of this thesis are:

1. To study the legal concept and the reasoning of the definition of contingent fee, including relevant laws and regulations that govern the issue of contingent fee in Thailand in comparison with the United Kingdom, Singapore, France, and Germany in order to analyze their general rule and exceptions of applying a contingent fee agreement.

2. To study and analyze the legal effect of applying a contingent fee structure to a legal case in Thailand for reviewing the applicability of Thai current laws and regulations.

1.3 Hypothesis

Under Thai jurisdiction, the main reason for prohibiting a contingency fee agreement is based on Thai public policy and good moral. Given that such concept

and principle has been established for decades, there has been great crucial developments of Thai society over time. Thai public policy and good moral in which are dynamic has gradually evolved. Therefore, Thai current laws and regulations that has been used for decades and remained unchanged are not suitable for applying to the current status quo of Thai society.

Thus, the author hypothesizes that the granting of a contingency fee agreement to be applied between a lawyer and a client under some limitation or requirement, will be more applicable for Thai society nowadays, and a contingency fee agreement will create more advantages to both a client and a lawyer. However, there should be criteria for considering and applying such contingency fee agreement.

1.4 Scope of the Study

The scope of this thesis covers the definition of contingent fee in various jurisdictions, i.e., Thailand, the United Kingdom, Singapore, France, and Germany, under each national law. This thesis also studies the general rule of applying a contingency fee agreement and its exception, including criteria for the exceptions under each country, then the difference between general rules and exceptions is analyzed. Moreover, this thesis discusses cases that a contingency fee agreement is allowed or prohibited in each country pursuant to each national law.

1.5 Methodology

This thesis will mainly be based on documentary of studying and analyzing textbooks, articles, journals, academic opinions, national court judgments and related Thai and foreign laws, especially the laws of the United Kingdom, Singapore, France, and Germany. Subsequently, all of the information is analyzed in a comparative study in order to conclude this thesis.

1.6 Expected Results

1. To understand the definition of contingent fee, general concept of applying a contingency fee agreement and an exception from such application in each jurisdiction.

2. To recognize the current position of Thai jurisdiction on contingency fee agreement and to realize whether Thai current law and regulation is applicable to nowadays Thai society.

3. To provide a suggestion on new law or regulation for governing the contingent fee matter.

CHAPTER 2

CONTINGENT FEE FROM GENERAL AND THAI PERSPECTIVE

2.1 Introduction

The contingent fee is one of the most popular fee schemes used between a client and an attorney. In order to understand the concept and controversies concerning the contingent fee, it shall first be noted that a relationship between the client and the attorney has always been a contractual relationship, i.e., a contract to provide legal service especially in the court of law. In general area of law, a contract between the parties should be made in compliance with and reflect their true intention pursuant to a well-recognized legal concept, party autonomy. However, for the particular contract to provide legal service between a client and an attorney, it has been regulated in every jurisdiction over the world and controlled by each national competent authority(s). Behind such regulation and control, there are numerous reasons and factors that are brought for discussion.[8] For instance, an attorney may have power in entering and concluding a legal service agreement over the client, especially when such agreement is a contingency fee agreement as such attorney may pursue his or her interest over the client's interest. In order to prevent such abuse of power, a legal service agreement shall be regulated.[9]

Taken the above and the balancing of interest between a client and an attorney into account, it has been controversial whether a contingency fee agreement should be prohibited, despite the fact that it is a long-established concept and recognized all over the world. Nonetheless, apart from the aforementioned issue, there is another major misunderstanding about the definition of the term "Contingent Fee" as well. To elaborate, most people usually label "no win, no fee" agreement as one

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[8] Maurer (n 3) 282.

[9] *Arden v Patterson* 5 Johns Ch 44 (NY Ch 1821) (noting that the judgment mentioned champerty offense instead of using the term contingency fee agreement).

of the “Contingent Fee” schemes, this is because a legal fee under “no win, no fee” agreement is payable upon a contingent. However, in some jurisdictions, “no win, no fee” agreement is considered as a conditional fee agreement rather than a contingency fee agreement, and it is treated and regulated differently.

In addition to the above, the concept of contingent fee and conditional fee have always been picked up for debates. To illustrate, both concepts involve a payment of a client paying for an attorney on a certain contingent, namely a lawsuit is successful or a favorably settlement. Nonetheless, the calculation of such payment is significantly different where on one side a payment shall be calculated as a percentage from the amount awarded while another is a payment that is completely irrelevant to an adjudicated amount. Although they have a clear distinction, their interpretation and application are still disputable.

On a separate issue, under the concept of contingency fee agreement, i.e., a legal fee is payable upon some contingent, on the one hand, it claims that a contingent fee can provide numerous advantages to both lawyers and their clients. On the other hand, there are still some concerns and disadvantages on a contingency fee agreement whereby lawyers may be tempted to put their interest over the client’s interest. Therefore, it is a double-edged sword that must be carefully used.

In this chapter, the definition of contingent fee from the general perspective is thoroughly discussed, following with the general historical development of contingent fee concept and its current global position on its application and interpretation. Then, the advantages and disadvantages of contingent fee will be specified. Lastly, the concept of contingent fee in Thailand will be addressed, particularly on its historical development and its current position.

2.2 Definition of “Contingent Fee”

“Contingent Fee” is a kind of payment that a client pays to his or her attorney upon certain contingent, i.e., when a lawsuit that is represented by the attorney is successful or favorably settled to the client’s benefits. Therefore, when the

contingency fee agreement is made and executed between the attorney and the client, it is usually known that the client is obliged to pay the professional fee only when he or she wins the case.

However, as previously mentioned, there is a significant misunderstanding on the definition "Contingent Fee" as in some jurisdictions such as Singapore, "no win, no fee" agreement is distinctly separated from contingency fee agreement, and "no win, no fee" agreement is considered as a conditional fee instead. Thus, to truly understand the definition of "Contingent Fee", its definition must be thoroughly reviewed and discussed. Below are some examples of the definitions of the term "Contingent Fee".

Black's Law Dictionary: "*A fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. Contingent fees are usually calculated as a percentage of the client's net recovery.*[10]

Cambridge Dictionary: "[*A*] *method of paying someone such as a lawyer in which no money is paid until a particular aim is achieved, for example getting a sale or contract or a successful result in a court of law."*[11]

Oxford Dictionary: "[*A*]*n amount of money that is paid to a lawyer only if the person they are advising wins in court*"[12]

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[10] 'Contingency Fee', *Black's Law Dictionary* (11th edn, 2019)

The Black's Law Dictionary also mentions about reverse definition of contingent fee as "A fee in which a defense lawyer's compensation depends in whole or in part on how much money the lawyer saves the client, given the client's potential liability."

[11] 'Contingency Fee', *Cambridge Business English Dictionary Online* (CUP) <https://dictionary.cambridge.org/us/dictionary/english/contingency-fee> accessed 12 December 2022.

[12] 'Contingency Fee', *Oxford Advanced American Dictionary* (OUP) <https://www.oxfordlearnersdictionaries.com/definition/american_english/contingency-fee> accessed 12 December 2022.

United State Office of Government Ethics: "*The term "contingency fee" refers to a type of fee arrangement in a case in which an attorney or firm agrees that the payment of legal fees will be contingent upon the successful outcome of the case. Frequently, a contingency fee will be a portion of the proceeds obtained by the client due to the litigation or settlement, or it may be the amount of attorney fees accrued but not billed to the client until the successful conclusion of the case."*[13]

From the above definitions, there are some common elements that can be clearly extracted for determining the definition of "Contingent Fee". To simplify, it can be summarized that the essential elements of a contingent fee are:

1) There must be a contingency fee agreement between a client and an attorney;
2) The attorney must represent the client in the court of laws; and
3) The attorney shall receive the fee payment upon the success of the lawsuit.

Resulting from the above, it is settled that a contingent fee is a money to be paid to an attorney on the condition that the case in which the attorney represented has won. But, from the above definitions, the issue on the contingent fee's calculation is not concordant and inconcludable. Expressly, most of the definitions address that a contingent fee shall be calculated as a percentage of the client's net recovery or the awarded amount, although it is disputable whether an uplift money which its calculation is not tied to an adjudicated amount is also considered as a contingent fee.

By only reviewing the general definition from common source, dictionary, the above issue is inconclusive. Thus, a more specific and narrow definition of the term "Contingent Fee" shall be provided by national laws and regulations and/or court's judgments. For example, in Europe an agreement that undertakes a client to pay an

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[13] United States Office of Government Ethics, 'Contingency Fee', *Public Financial Disclosure Guide* <https://www.oge.gov/Web/278eGuide.nsf/Content/Definitions~Contingency+Fee> accessed 21 January 2023.

attorney a share of the property that the client received from winning the case, which is considered as *pactum de quota litis*, is strictly prohibited,[14] while an agreement that undertakes the client to pay an amount of money as a bonus payment or success fee, which is not tied to an adjudicated amount provided that the lawsuit is successful, is enforceable. [15] However, in some jurisdictions such as Thailand, both types of fees may seem to be prohibited.[16]

As a result, by considering only the definition of the term "Contingent Fee", especially when comparing the understanding of such term in each jurisdiction, it can cause some confusion whether what really is the "Contingent Fee". For the purpose of this thesis, a contingent fee shall mean an amount of money that an attorney is entitled to receive upon winning a lawsuit and the amount of such money shall be tied to an awarded amount, while a conditional fee shall mean a bonus payment that a client undertakes to pay an attorney provided that the case is successful, regardless of the adjudicated amount.

2.3 General overview of Contingent Fee

As mentioned in the preceding topic, a contingent fee and a conditional fee can get confused easily. On the one hand, a contingent fee has been commonly used in the United States of America, on the other hand it has been prohibited in Europe although a conditional fee is allowed to be applied instead.

Even though a contingent fee and a conditional fee are not identical, they share some common elements as they both payable to an attorney on a condition that a lawsuit is successful. When reviewing the historical development of both, a

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[14] Code of Conduct for Lawyers in the European Union, art 3.3.

[15] Winand Emons, 'Conditional Versus Contingent Fees' (2007) 59(1) Oxford Economic Papers 89.

[16] Supreme Court Judgment No 2869/2562; Supreme Court Judgment No 1584/2555; Supreme Court Judgment No 810/2554.

contingent fee seems to be longer-established as there is evidence that contingent fee had been prohibited since the thirteenth century in England. Consequently, a contingent fee has been recognized worldwide and its concept has been developed ever since, though the perspective of each jurisdiction against the concept of contingent fee may be different. The most controversial issue concerning contingent fee is that whether it should be prohibited or not. In this regard, the advantages and disadvantages of contingent fee become vital for discussion.

This topic will thus discuss the global historical development of contingency fee agreement together with its current global position. Then, the advantages and disadvantages of contingent fee will be discussed, respectively.

2.3.1 Historical development of Contingent Fee from a general perspective

The origin of a concept of contingent fee has been found in the history for centuries. Back then, the closet concept compared to nowadays concept of contingent fee was the crime of champerty and maintenance. The House of Lords of United Kingdom (Lord Mustill) once stated that the origin of champerty and maintenance can no longer be traced as they are so old.[17] Nonetheless, there was evidence that during the thirteenth century, England had issued a specific statutory to criminalize a crime of champerty.[18]

A crime of champerty means an action where someone who shares no interest in and unrelated to a dispute helps a litigant or a plaintiff to pursue his or her lawsuit and such person receives a shared or part of awarded money in return.[19]

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[17] *Giles v Thompson* [1993] UKHL 2 (Lord Mustill).

[18] Stephan Landsman, 'The History of Contingency and the Contingency of History' (1998) 47(2) DePaul L Rev 261, 262.

[19] 'Champerty', *Black's Law Dictionary* (11th edn, 2019). See also 'Champerty', Cornell Law School, *Legal Information Institute* <https://www.law.cornell.edu/wex/champerty> accessed 21 February 2023.

According to the record, there was a specific legislation against the champerty, namely the Statue of Westminster, The First (1275) Chapter 15. Thereby, considering the nature of a champerty offence, a lawyer who offers to represent the fee on his or her own cost, then receive the legal fee after winning the case, expressly, get paid when the lawsuit succeeds, such action shall be considered as committing a champerty offense. Since the nature of champerty offense is similar to concept of contingent fee, it can be deemed that such enactment under England legal system was the first written regulation that prohibits the concept of contingent fee. The main objective of such enactment was to prohibit both individual and state official in gaining more money from taking other properties through lawsuits, the violation of such enactment was imprisonment for the term of three years and a fine.[20] Thus, during the middle age, attorneys in England was prohibited from entering into a contingency fee agreement with their clients. The English High Court followed such direction and maintained its position for centuries until the seventeenth century in which champerty (and maintenance) was eliminated from being a crime.[21] Nonetheless, it is worth noting that even such offense was excoriated, a contingency fee agreement was still prohibited and unenforceable according to the court's precedent as the High Court of England continued to keep the same standard during the eighteenth and nineteenth centuries.[22]

Later on, the Criminal Law Act of 1967 was issued to abolish several felonies and misdemeanor, including a crime of champerty and maintenance. Nevertheless, a contingency fee agreement, which had been prohibited as it was considered as committing a champerty offence, still continued to be unenforceable on the grounds that such agreement was contrary to the public policy and there was

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[20] Peter Karsten, 'Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940' (1998) 47(2) DePaul L Rev 231, 232.

[21] Landsman (n 18) 262.

[22] *Box v Barnaby* [1617] 80 ER 266, 266. See also *Kennedy v Broun* [1862] 175 ER 1292, 1294.

a need to protect the honor of the professionals and to avoid conflict of interest.[23] A prohibition of contingency fee agreement's concept was reaffirmed in 1974 when the Solicitors Act was issued, and it clearly states that a contingency fee agreement has no validity.[24]

Consequently in 1990, the English Parliament issued the Courts and Legal Services Act 1990 authorizing the Lord Chancellor to prescribe requirements and information for application of conditional fee agreement.[25] Thus, since 1990 onwards, a conditional fee agreement has been recognized by the English legal system, while a contingency fee agreement continued to be prohibited. Later, in 1995, the Conditional Fee Agreements Order 1995 (S.I. 1995, No. 1674) and Conditional Fee Agreements Regulations 1995 (S.I. 1995, No. 1675) were issued. By virtue of aforesaid laws and regulations, the extend of application of a conditional fee became wider. Furthermore, the practice of an attorney in England became clear as Rule 8 of the Solicitors' Practice Rules of 1996 was proposed for revision to fully allow a practitioner to forgo his or her fixed or hourly fee provided that the lawsuit was unsuccessful. The said proposed was later affirmed by the court decision in *Thai Trading Co. v. Taylor*.[26] This approach on contingent fee by English law has influenced multiple countries like Singapore to adopt the same approach.[27]

Regarding the historical development in Europe (Continental), the conduct and ethics of lawyer were regulated in 1988 where the Common Code of Conduct for lawyers was adopted by the European Community (EC) whereby the Code

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[23] Criminal Law Act 1967, s 14(2). See also *Aratra Potato Co Ltd v Taylor Joynson Garrett* [1995] 4 All ER 695 (criminalizing reverse champerty) and *Wallerstein v Moir (No 2)* [1975] 1 All ER 849, 860.

[24] Solicitors Act 1974, s 59(2).

[25] Courts and Legal Services Act 1990, s 58.

[26] [1998] EWCA Civ 370.

[27] Adrian Yeo, 'Access to Justice: A Case for Contingency Fees in Singapore' (2004) 16 SAcLJ 76, 89.

prohibits a lawyer from entering into *a pactum de quota litis*.[28] As *pactum de quota litis* includes an agreement where a client agrees to pay a lawyer some part of the properties received, it therefore can be concluded that a contingency fee agreement is prohibited and unenforceable in Europe as well. Additionally, separately from the adoption of the EC in 1988, each country also adopted such code for its national professional rules. Thus, the members of the Bars and Law Societies of the European Community and other European countries that were not then members of the EC, i.e., Austria, Cyprus, Finland, Norway, Sweden, and Switzerland are subject to such code as well.[29]

In other parts of the world, it was believed that a contingent fee was introduced to the United States of America in 1813,[30] but it was held unenforceable on the grounds that such agreement was considered a crime of champerty.[31] Later in the nineteenth century, the concept of contingency fee agreement had been developing along with the development of the United States of America tort law system where Americans were having problems accessing to justice.[32] In this regard, it must first be learnt that under the legal system of the United States of America, the concept of "free access to court and the counsel" is strongly accepted and recognized, i.e., 'court' and 'counsel' are considered as important resources for the citizens.[33] As a result, with the contingent fee, the right to have free access to court and counsel was recognized in the legal system in 1915 by legitimizing the contingency

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[28] Code of Conduct for Lawyers in the European Union, art 3.3.

[29] Maurer (n 3) 317.

[30] Karsten (n 20) 234.

[31] *Holloway v Lowe* 7 Port 488 (Ala 1838), 490-92. See also *Scobey v Ross* 13 Ind 117 (1859), 124.

[32] Landsman (n 18) 261.

[33] *Lytle v State* 17 Ark 608 (1857), 677.

fee agreement through an Act of Congress, and it was reaffirmed by the court decision in 1916.[34]

Therefore, since the thirteenth century the acceptance of contingent fee had changed throughout time and being treat differently in each jurisdiction and time period. Nonetheless, it cannot be concluded from the historical development whether the acceptance of contingent fee contributes more advantages than disadvantages, or *vice versa*.

2.3.2 Current global position of Contingent Fee

As already learnt in previous topic that a perspective of each jurisdiction against contingent fee is different. A unanimous direction for contingent fee is therefore unable to conclude. A current situation with respect to general rules and exception of contingent fee shall be separately discussed. Below are some examples of a current legislation of contingent fee in each jurisdiction.

2.3.2.1 United Kingdom

The main governing laws and regulation concerning contingency fee agreement in England jurisdiction is the Solicitors Act 1974 which it regulates a contentious business agreement. Section 59 of the said act lays out general concept of an agreement between a client and a solicitor as follows:

"*Section 59 Contentious business agreements*

(1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.

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[34] *Ralston v Dunaway* 184 SW 425 (Ark 1916), 425.

(2) Nothing in this section or in sections 60 to 63 shall give validity to

(a) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or

(b) any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding, stipulates for payment only in the event of success in that action, suit or proceeding; or

(c) any disposition, contract, settlement, conveyance, delivery, dealing or transfer which under the law relating to bankruptcy is invalid against a trustee or creditor in any bankruptcy or composition."

Resulting from the above, it could be said that in English jurisdiction, the current position of contingency fee agreement is that such kind of agreement is invalid. On the contrary, during the past few decades, a conditional fee agreement has played an important role in the legal business instead (as thoroughly discussed in 2.3.1)

However, in April 2013, there was a major development on perspective of England and Wales against contingency agreement, i.e., the Courts and Legal Services Act 1990 Section 58AA, as amended by Legal Aid, Sentencing and Punishment of Offenders Act 2012 Section 45, allows a "Damages-Based Agreement" to be applied and enforceable, [35] provided that it can satisfy all conditions and

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[35] Section 58AA (3) of the Court and Legal Service Act 1990 reads "For the purposes of this section—

(a) a damages-based agreement is 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

requirements set out in the said section itself and in the Damages-Based Agreements Regulations 2013.[36]

Briefly,[37] the Damages-Based Agreement shall be made in writing and shall specify all of the details concerning a claim and a payment that such agreement it relates, including a required condition or circumstances which the client shall be obliged to make a payment. More importantly, the Damages-Based Agreement shall be made only after the service provider under the agreement completed all of the requirements.[38]

As a result, in United Kingdom, even though there is a legislation, namely the Solicitors Act 1974, prohibits a contingency agreement. Its legal system however establishes a concept of the Damages-Based Agreement, in which has quite similar nature to a contingency agreement, to be applied under some certain conditions and requirements.

2.3.2.2 European Continental

Since 1988, the European Lawyers have a solid direction on contingent fee, as it is known as "*pactum de quota litis*"[39] under the Code of Conduct for European Lawyers Article 3.3. Their strong position on prohibition of *pactum de quota litis* has continued to maintain. The relevant article stipulates as follows.

(ii) the amount of that payment is to be determined by reference to the amount of the financial benefit obtained".

[36] Court and Legal Service Act 1990, s 58AA(4); Damages-Based Agreements Regulations 2013, s 3 & 4.

[37] The details of general rules and exceptions of contingent fee in the United Kingdom will be discussed in Chapter 3.

[38] *Tonstate Group Ltd & Ors v Wojakovski & Ors* [2021] EWHC 1122 (Ch), para 44.

[39] Francisco JI Ruiz and Francisco O Blázquez, 'Contracts Contrary to Fundamental Principles and Mandatory Rules of European Contract Law' (2022) 2 InDret <https://indret.com/wp-content/uploads/2022/04/1708.pdf> accessed 7 July 2023, 25.

"3.3. Pactum de Quota Litis

3.3.1. A lawyer shall not be entitled to make a pactum de quota litis.

3.3.2. By "pactum de quota litis" is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.

3.3.3. "Pactum de quota litis" does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer."

Therefore, it can simply be concluded that the European Lawyers are generally prohibited to enter into a contingency fee agreement pursuant to the abovementioned code of conduct. The main reason used for supporting the prohibition of *pactum de quota litis* is that a contingency fee agreement (*pactum de quota litis*) is contrary to the public moral and the correct administration of justice.[40]

Nevertheless, as it has been a debate that a contingency fee agreement could be assist individual in accessing to the justice, hence, in some jurisdiction such as Denmark (via a revision of the Code of Conduct for the Danish Bar

[40] ibid 26.

and Law Society)[41] and Spain (via court's case law)[42] has now already endorsed a contingency fee agreement.

2.3.2.3 United States of America

For United States of America, it is well-known that a contingency fee agreement is fully allowed, and it has gained their popularity under U.S. jurisdiction for decades. Nevertheless, it is notable that even it is allowed there are certain laws and regulations governing and regulating a contingency fee agreement. Below are the details of the Laws and Regulations, Contingent fee in practice and Court's perspective in U.S. jurisdiction.

The Model Rules of Professional Conduct of the American Bar Association Rule 1.5 (d) provides a provision governing a contingent fee. It reads as follows:

"*Rule 1.5: Fees*

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case."

Thus, it can be interpreted from the Model Rules that a contingent fee is allowed, but also prohibited in some certain type of cases, namely

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[41] Council of Bars and Law Societies of Europe, 'CCBE Contribution for the 2023 Rule of Law Report' [2023] <https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/ROL/RoL_Position_papers/EN_ROL_20230216_CCBE-Contribution-for-the-2023-Rule-of-law-Report.pdf> accessed on 20 February 2023, 37.

[42] Ruiz (n 39) 26.

a domestic relation matter and criminal cases. The reason that a contingency fee agreement is prohibited from applying to the two mentioned cases are as follows:

1) For domestic relation: the rationale behind the prohibition is that because applying a contingent fee to domestic relation is contradict to U.S. public policy as it does not want such contingent fee structure to be discouraged the parties to amicable settle the case (where the lawyer who charge a contingent fee would be more likely to win the case rather than settle the case).[43]

2) For criminal case: the main reason for the prohibition is that a contingent fee led to conflict of interest in which the American Bar Association referred to the principle that a lawyer should not have a monetary interest in the context of corruption in litigation. Moreover, a contingent fee is calculated based on money award to the successful parties, a criminal case, however, have no monetary resolution. Thereby, it is impossible to calculate such contingent fee. And in order to prevent a self-interest decision made by the lawyer in plea bargaining from the prosecutor.[44]

To conclude this part, pursuant to the U.S. perspective, a contingent fee creates more positive result to the society more than the negative. Therefore, it is enforceable. Nonetheless, in order to prevent unwanted damage such contingent fee is banned in some certain scenarios.

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[43] Unknown, 'A lawyer may not charge contingent fee in domestic relations matter– prohibition also applies to representation concerning antenuptial agreement which is inseparable from divorce proceedings' (Alabama State Bar, 29 February 1996) https://www.alabar.org/office-of-general-counsel/formal-opinions/1996-01/ accessed on 30 May 2022.

[44] Peter Lushing, 'The Fall and Rise of the Criminal Contingent Fee' (1991) 82(3) Journal of Criminal Law and Criminology 498, 515.

2.3.2.4 Singapore

Singapore was one of the countries that has been influenced by the concept of champerty and maintenance under English Law. As such, a contingency fee agreement has been banned in this jurisdiction for decades. The governing law of this issue is the Legal Professional Act 1966 Section 107 (1), it states as follows.

"*Section 107 (1) A solicitor must not ----*

(b) enter into any agreement by which he or she is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding."

Thus, the current position of Singapore jurisdiction is clear that a contingency fee agreement is prohibited. Although, as Singapore previously amended the Legal Professional Act 1966 on 12 January 2022, in which it enacted Part 8A Conditional Fee Agreement as a new part to the Act and a conditional fee agreement is allowed to be applied, it must note that such conditional fee agreement is not a contingency fee agreement. To elaborate, a conditional fee agreement is an arrangement for a payment to a solicitor upon certain conditions, which can be "no win, no fee", "no win, less fee", or "win, more fee" etc. However, such amount of payment shall not be calculated in relation to an awarded amount.

As a result, it can be concluded that currently contingency fee agreement is banned continuously and a solicitor in Singapore is still prohibited from receiving fee on an agreed percentage of the damages awarded.

2.3.2.5 Summary

To sum up this part, the acceptance of contingent fee is still controversial in each country, some jurisdiction may now accept and endorse a contingency fee agreement while other jurisdiction may continue to follow an ancient concept, a champerty and maintenance, thereby a contingency fee agreement is prohibited. Below are three difference positions between jurisdiction over the world.

1) Countries that accept and allow contingent fee such as United Kingdom, United States of America, and Denmark.

2) Countries that prohibit contingent fee such as countries in Europe, Germany and Austria[45] for instance.

3) Countries that half-recognized contingent fee such as Spain (where the there is no written legislation allowing contingent fee, but the contingent fee is enforced by the court).

Since there is no unanimous professional opinion or court's direction in which can be relied on, the current position of the contingent fee is therefore debatable. Nonetheless, as some countries that prohibited the contingent fee have changed to partially accept the contingent fee. It is not exaggerated that the trend on this matter seems to be on the acceptance of the contingent fee's side.

2.3.3 Advantages and disadvantages of the Contingent Fee

As previously illustrated the perspective of each jurisdiction against the Contingent Fee, it is uncontested that each jurisdiction provides either pros or cons of the Contingent Fee as their supporting reasons. In this regard, in order to discuss whether the Contingent Fee creates and provides more pros or cons to relevant parties, this thesis will use (i) the client's interest; (ii) the attorney's interest and (iii) the public interest as factors for such analysis and discussion.

2.3.3.1 Advantages

Having considered all of the aforesaid factors, below are the advantages that the Contingent Fee could contribute to the relevant parties.

Considering from the client's perspective, by allowing contingent fee to apply, the client as an injured party will be able to access to judicial system even, he or she cannot afford an advance lawyer's professional fee, i.e., have free access to the court and counsel. The barrier on the client's budget will be eliminated as the

[45] Ruiz (n 39) 26.

client will not have to pay a lawyer's fee in advance, but rather pay such fee only the case is successful.[46] More importantly, by applying a contingent fee scheme, the risk of relevant loss of the client's will be shifted to the attorney because under the contingency fee agreement the client is required to pay nothing unless the case is successful,[47] the client will therefore be encouraged to pursue the case in court as he or she will have nothing to lose even he or she losses the case (no win no fee).

From the attorney perspective, the attorney will have an incentive in using their best effort to make and win the case, as the higher the compensation the client's is entitled to receive, the higher their fee. To elaborate, under the contingency agreement, the attorney shall first bear the cost of the proceeding, and such cost will be reimbursed or compensated after they win the case. Thus, it is convinced that the attorney will, surely, work harder with more diligent, in order to receive a contingent fee as a return.[48]

Lastly, if the contingent agreement is to be applied, the attorneys will not only play their role as the client's representative in court of laws, but the attorneys will also play an important part in reviewing dispute before it is to be submit to the court. Expressly, not every dispute has solid grounds, some of them may be considered as a frivolous lawsuit. In this regard, should the contingency fee agreement is allowed, the attorneys will be likely not to support such frivolous lawsuit as it has low chances of success, in other words, the attorneys will have lower chance to receive their contingent fee. On the contrary, if a lawsuit tends to have a solid ground, and the attorney decides to submit the lawsuit and represent a client in the court, once the lawsuit is successful, the legal fee which the client has to pay an attorney will be considered a reasonable legal fee, comparing to the compensation that the client is entitled to received, as it is calculated based on the adjudicated amount.

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[46] Philip H Corboy, 'Contingency Fees: The Individual's Key to the Courthouse Door' (1976) 2(4) the Economics of Litigation 27, 29.

[47] Maurer (n 3) 293.

[48] ibid 294.

2.3.3.2 Disadvantages

For the disadvantages, it could be preliminary said that they are the opposite side of the said advantages above, the criticism against the contingent fee has been a debate over centuries, below are the details of each factor.

From the client's perspective, the contingency fee agreement will create a situation where his or her attorney has to choose between the client's interest and the attorney's interest. To demonstrate, as the attorney will receive a contingent fee on upon contingent that the case is won or favorably settled out of court, in this scenario, if there was an earlier poor settlement offer from the adverse party, the attorneys may incline to accept such offer in order to secure their contingent fee notwithstanding the chance of success to get higher settlement offer of the client.[49] Furthermore, with the contingent fee structure, where a lawyer receives a percentage of awarded money when the case is won. Such contingent fee, in some case, may be greater than a normal hourly rate.[50] To elaborate if a lawyer's hourly rate is THB 20,000 per hour, if he works 25 hours to settle the case it means that it will cost the client the total amount of THB 500,000 (20,000 x 25). On the other hand, if the contingent fee for 30% of the adjudicated amount is to be applied to the very same case, if the awarded amount is THB 3,000,000. The contingent fee will be equivalent to THB 900,000.

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In light of the attorney's perspective, as they shall advance the cost incurred first and shall be compensated only after the case is successful. Since,

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[49] ibid.

[50] Richard W Painter, 'Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty' (1995) 71 Chi-Kent L Rev 625, 649. See also Corboy (n 46) 32.

they bear a risk of loss the attorney may decide not to accept or represent the case that has low chance of winning as it is foreseeable that they would have small chance to get a contingent fee in return. Additionally, a contingency fee agreement could create a negative image to such attorney, i.e., as a successful legal service provider, especially for a practitioner who represents the clients in the court of law, should be recognized as hard working lawyers who could provide a solution with outstanding strategies for those high-profile and high steak cases. However, the contingent fee case which usually has very low steak and is not complex, therefore, the contingent fee attorney may not be successful in becoming a long-term renowned legal practice service provider.[51]

As for the perspective of the public interest, by allowing a contingent fee, it is unavoidable that a lawsuit trading or litigation funding cases may arise. In principle, the attorney would do not want to support a frivolous lawsuit, although, in some cases where the dispute is groundless, e.g., a plaintiff does not have sufficient evidence, but there is some valid defense which such plaintiff can be alleged in court. In this scenario, the attorney may be tempted to support such lawsuit in order to gamble whether they can win a contingent fee, resulting that an unnecessary lawsuit may be presented to the court.[52] Furthermore, as an attorney shall receive a contingent fee in return only when the case is successful, thus, the attorney may decide to act dishonestly, e.g., fabrication of evidence, in order to win a lawsuit as well, meaning that a used of contingency fee agreement might induce an attorney to act in violation of the lawyer's ethics.

To conclude this part, the contingency fee agreement can have both benefit and drawback to all relevant party and judicial system. It depends on each jurisdiction whether which factors is valued the most between the right to pursue

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[51] Patricia M Danzon, 'Contingent Fees for Personal Injury Litigation' (1983) 14(1) the Bell Journal of Economics 213, 215.

[52] Painter (n 50) 32.

a case of individual (free access to the court and counsel), or the good practice of the lawyer and judicial system (ethics of lawyers).

2.4 Contingent Fee under Thai laws

The contingent fee has been acknowledged in Thailand for decades. There is a long-standing Supreme Court's precedent that the Contingent Fee is prohibited under Thai legal system as it contradicts to the public policy and good moral. Nevertheless, there are some recent changes leading to an uncertainty of Thai legal system position against the Contingent Fee. This topic will discuss the development of the contingent fee in Thailand, following with the current position of the contingent fee. Subsequently, the topic will conclude with the evaluation of the problems that arose from the current laws, regulations, and recent Supreme Court Judgment.

2.4.1 Historical development of Contingent Fee in Thailand

The concept of contingent fee has first appeared in 1914 where Section 9 of Thailand Lawyer Act B.E. 2457 (1914) clearly mentioned that any attorney who entered into a contingency fee agreement shall be subject to punishments ordered by the Appeal Court (the competent official at the time). The punishment was either (i) probation; (ii) prohibition of practicing law for a term of three years or more; or (iii) revocation of the lawyer license.

Later in 1925, the concept of contingent fee appears in the Supreme Court judgment under the concept of champerty, this is shown in the judgment of the Supreme Court of Thailand No. 510/2468. The Supreme Court ruled that the agreement between the plaintiff and the defendant was in the manner of champerty offense which was against public policy. Although at the time of the judgment there was no statutory law prohibiting individuals from entering into the champerty agreement, such agreement was still considered as against public policy. In this regard,

the Supreme Court referred an English case law, *Neville v. London Express*,[53] in supporting its reasoning prohibiting such agreement.

Even though the Thailand Lawyer Act B.E. 2457 (1914) was later replaced by the Thailand Lawyer Act B.E. 2477 (1934), the principle of contingent fee had continued to exist as Section 12 of the 1934 Act mirrored Section 9 of the 1914 Act. During the enforcement of the Thailand Lawyer Act B.E. 2477 (1934), the Supreme Court held that since a contingency fee agreement was an agreement in which allowed a lawyer who did not have a direct interest to the dispute, to seek and receive advantage of other's dispute, such agreement shall therefore be nulled and void as it contradicted to public policy and good moral.[54]

Nevertheless, during 1950s to 1960s the Supreme Court established a significant development to a position of Thai legal system against the contingent fee, i.e., the prohibition of the contingency fee agreement shall only be applicable to practice in the court of law only. On the contrary, if attorneys are hired for providing other legal services such as debt collection or render legal opinion, a contingency fee agreement is therefore enforceable.[55]

In 1965, the Thailand Lawyer Act B.E. 2477 (1934) was replaced by the Thailand Lawyer Act B.E. 2508 (1965) whereby the latter did not explicitly prohibit the contingency fee agreement. However, it provides that the attorneys shall conduct themselves in accordance with a regulation concerning code of conduct and ethics for attorneys (which to be issued accordingly),[56] and while waiting for the Thai Bar Association, the former law concerning code of conduct and ethics for lawyers, i.e., Section 12 of the 1934 Act, should be used as an interim.[57] As a result, even after 1965, there was no statutory law directly prohibited the contingency fee agreement, the

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[53] *Neville v London Express Newspaper* [1919] AC 368, 369.

[54] Supreme Court Judgment No 690/2492.

[55] Supreme Court Judgment No 1887/2500; Supreme Court Judgment No 1454/2510.

[56] Lawyer Act BE 2508 (1965), s 17.

[57] Lawyer Act BE 2508 (1965), s 41.

attorneys were still prohibited to enter into such agreement, the reasoning behind the prohibition was the same as the one prior to the enactment of 1965 Act.[58]

Subsequently, the Thailand Lawyer Act B.E. 2528 (1985) was enacted. The provision concerning the prohibition of the contingent fee are now completely excoriated. Furthermore, this act also established the Lawyers Council of Thailand whereby its duties include supervising the conduct of attorney and issuing a regulation concerning lawyer's ethics. However, the regulation concerning the lawyer's ethics does not address the prohibition of the contingency fee agreement. Thereby, theoretically, the attorneys are not prohibited by any statutory law to enter into a contingency fee agreement. Nevertheless, there were series of Supreme Court judgments rule that even though there is no statutory law prohibiting the contingency fee agreement, the only result of not having the said prohibition is the lawyers who enter into a contingency fee agreement shall not be considered as violating to the lawyer's ethics, but the contingency fee agreement still shall be deemed as violating the lawyer's moral values and against the public policy and therefore nulled and void.[59]

In addition to the above, the Supreme Court emphasized that the attorney shall be considered as court's clerks. Therefore, to duly serve the justice, an attorney shall not directly tie their interest with the result of the lawsuit in which may resulting in effect to the good conducting of the lawyer's duties i.e., represent the client, consequently, the contingency fee agreement shall be null and void.[60]

The Supreme Court precedent from the past illustrated that the contingency fee agreement contradicts to public policy and good moral, especially contradicts to the goof conducting of the lawyers. Thus, it is long-standing position of Thailand that a contingency fee agreement shall be prohibited and unenforceable.

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[58] Supreme Court Judgment No 5622/2530; Supreme Court Judgment No 1047/2533.

[59] Supreme Court Judgment No 1443/2545; Supreme Court Judgment No 1584/2555; Supreme Court Judgment No 810/2554.

[60] Supreme Court Judgment No 1260/2546 (Convention).

2.4.2 Contingent Fee in current Thai laws

As thoroughly discussed in previous topic that the contingency fee agreement shall be deemed nulled and void. But in 2015, there was an amendment to the Civil Procedure Code concerning legal fee of the class action's lawyer, following with the Supreme Court judgment in 2020 that ruled on the contingency fee agreement issued. The existence of both rises a significant debate on the contingency fee agreement. Below is the current position of Thai laws against the contingency fee agreement.

2.4.2.1 Civil Procedure Code

In general, the lawyer's fee is discussed in the table 6 of the Civil Procedure Code where the court has broad discretion to determine an appropriate lawyer's fee in which a defendant shall pay to a plaintiff. However, the table clearly shows that the lawyer's fee shall be calculated from the disputed amount, not the adjudicated amount. Plus, it does not concern an agreement between a client and an attorney. Thus, it can be said that even though lawyer's fee is mentioned in the Civil Procedure Code, the contingent fee has not yet recognized for a general civil and criminal case.

Nonetheless, as the Civil Procedure Code was amended in 2015, and the attorneys seem to be entitled to a contingent fee under certain conditions and requirement in class action lawsuit, by virtue of Section 222/37 of the Civil Procedure Code with its amendments. To elaborate, according to the said Section, in a class action lawsuit where the plaintiff and the class win the case, the Court shall determine an amount of the award that the defendant must pay to the plaintiff's attorney as the Court's deems appropriate.[61] Furthermore, in determining the awarded

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[61] Civil Procedure Code, s 222/37, paragraph one reads "In a case where the Court rules for the defendant to act or to omit to act, or to deliver property, the Court shall determine the amount of award that the defendant must pay to the counsel of the plaintiff as the Court deems appropriate, taking into account the difficulties of the case

amount, the provision allows the court to determine an awarded amount by calculating from the percentage of the amount of money that the plaintiff and the class has the right to receive provided that the thirty per cent is the maximum that the attorney is entitled to receive.

In light of this, considering only the concept of such awarded amount to the attorney, it is similar to the concept of contingent fee, i.e., an attorney shall receive an awarded money (contingent fee) only when the case is successful, plus, a calculation of the awarded money can be fixed by a percentage from the amount that the plaintiff and the class are entitled to receive. The main difference between the concept of contingent fee and the awarded money under the class action lawsuit is that the contingent fee shall be based on an agreement between the parties, an attorney and a client. But the award money under Section 222/37 of the Civil Procedure Code is determined by the Court. In other word, even though, there was no agreement between the client and his or her attorney, the attorney is still entitled to receive the awarded money provided the class action lawsuit succeeds. Additionally, under Section 222/37, the award money payable to the class's lawyer is paid by the defendant as a losing party, while the contingent fee under the contingency fee agreement will be paid by the plaintiff, as a contractual parties instead.

The main reason behind such permission to the contingent fee is that since the plaintiff's attorney is considered as an important person who plays huge roles for the class action proceeding. More importantly, as the end result of the class action lawsuit creates major impact to public and the lawsuit usually be spotlighted and focus by the society, an attorney may choose not to participate or support this kind of lawsuit. Therefore, the awarded money was introduced to the

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together with the period of time and the work of counsel for the plaintiff, including the expenses relating to the class action which is not the Court fees that the counsel for the plaintiff has paid. For the benefit of this matter, once the proceeding has finished, the counsel for the plaintiff shall submit an account of expenses to the Court and send a copy to the defendant."

class action proceeding in order to be used as a legal mechanism for increasing an incentive for plaintiff's lawyer.[62]

It is worth noting that even the attorneys may have a chance to receive the contingent fee pursuant to the Civil Procedure Code, it however cannot be concluded that the contingent fee does not contradict to public policy under the Thai legal system's perspective. In fact, if detailly consider the abovementioned reasoning, it appears that not only public policy has not changed, but the public policy itself was taken into account as one of the factors for permitting the contingent fee. To elaborate, since the nature of the class action lawsuits always involves with certain amount of individuals, and the result of the class action lawsuits always affects a society, hence, when taking into an account the interest and advantages that the society may receive from permitting a contingent fee (e.g. increasing incentive for competent lawyer to pursue the case) with its drawbacks, it is concluded that the society shall receive more advantages than the disadvantages. Not to mention that the drawbacks of the contingent fee can be mitigated and controlled with other legal mechanism. Thereby, the contingent fee is applicable to the class action lawsuits. In this regard, it shows that the long-standing precedent can be changed overtime and could be disrupted for a better outcome.

Resulting from the above, it can be summarized that the position of Thai legal system against the contingent fee seems to be more relaxed comparing to former position. The concept of the contingent fee seems to be accepted more in Thailand. Nevertheless, in general, there is still no statutory legislation that fully accepts and endorses the contingency fee agreement, it is rather allows with limitations and used as an exception for some certain scenarios as specified only.

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[62] Sada Wongchotewattana, 'Attorney's Role and Attorney Fee Award in Class Action' [2016] Thammasat University Graduate Law Journal 196.

2.4.2.2 Regulations of Lawyer Council

At present, the Regulations of Lawyer Council on Lawyers' Ethics B.E. 2529 (1986) is the most recent version of regulations which governs and regulates the ethic of lawyers. Unlike the Thailand Lawyer Act B.E. 2477 (1934), the 1986 regulation does not explicitly address the prohibition of the contingent fee. Particularly in the etiquette towards client part, it silences on the ethic of lawyers in relation to legal fee schemes.[63]

On a separate part, it only provides a broad concept for lawyers that they shall not conduct a profession against the good moral or diminish the dignity and pride of lawyers.[64] As there is no provision in writing prohibits the contingent fee, and it could not be interpreted that entering into a contingency fee agreement is considered as an action against the good moral or pride of lawyers. Thereby, it can be concluded that entering into a contingency fee agreement shall now do not be deemed as violation of the lawyer's ethics.

Despite the fact that the 1986 Regulation is silent on the prohibition of the contingent fee and entering into the contingency fee agreement is not considered as violation of the lawyer's ethic, the Supreme Court still ruled that a contingency fee agreement contradicts to moral of the legal profession, and thus shall be deemed nulled and void pursuant to the Civil and Commercial Code Section 150.[65]

To conclude this part, currently, there is no certain regulation stating that the contingent fee is prohibited. Though, the Supreme Court still ruled against the contingency fee agreement as it is contrary to the public policy under the court's perspective.

2.4.2.3 Supreme Court Decisions

Regarding the Supreme Court precedent, it is extremely challenging to conclude the current position of the Supreme Court, given the fact that

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[63] Lawyer Council Regulations on Lawyers' Ethics BE 2529, c 3.

[64] Lawyer Council Regulations on Lawyers' Ethics BE 2529, s 18.

[65] Supreme Court Judgment No 1443/2545.

for the past decades the Supreme Court has ruled in diverse direction against the contingent fee. Below are some examples of the Supreme Court judgments that seems to have conflict to one another.

(1) The Supreme Court judgment No. 921/2542 and the Supreme Court Judgment No. 5229/2544 (enforceability of no win, no fee agreement)

For the Supreme Court judgment No. 921/2542, the nature of the fee agreement in question illustrated that the attorney shall receive a part of the land in dispute as a legal fee. The Supreme Court was of the view that such agreement allows the attorney, who originally does not have any interest with the disputed land, to share a direct interest with the land. This is because the Supreme Court viewed that if the lawsuit was not successful, i.e., the client shall not be entitled to obtain a land from the adverse party, the attorney shall therefore not be entitled to a land in return for legal fee, as such, the attorney's interest was directly tied to the land.

Regarding the Supreme Court judgment No. 5229/2544, the nature of the fee agreement in disputed provided that the attorney shall receive 20 per cent of the disputed amount, and it is payable when the client can enforce the court judgment, additionally, in case that the client could partially enforce the judgment, the legal fee shall be *pro rata* reduced. The Supreme Court ruled that there was no statutory legislation prohibiting an agreement to be made in such manner, plus the fee scheme in dispute was only a mean for fee calculation only, it shall therefore not be deemed unenforceable.

From the author's point of view, it is questionable whether the fee agreement that (deemed to) have or include "a no win, no fee" condition, plus the calculation of the legal fee is tied to the adjudicated amount or net recovery is enforceable. To elaborate, it appears to the author that the attorneys in both judgments shall not be entitled to receive a legal fee if the case is unsuccessful. Furthermore, the legal fee that the attorneys may receive provided that the case is successful were tied to the property that the clients were entitled to receive in both

cases. Hence, it is peculiar that the in one case such agreement could not be enforceable while the another can.

(2) The Supreme Court judgment No. 1458/2511 and the Supreme Court Judgment No. 191/2539 (enforceability of an agreement that legal fee is payable under certain contingent)

According to the Supreme Court judgment No. 1458/2511, the fee agreement between the client and the attorney stated that the professional fee was THB 750,000 payable upon the successful of the case, if there are any expenses incurred the expenses can be deducted from the legal fee, in other word, the attorney shall be responsible for such expenses. In this regard, the Supreme Court viewed that this fee agreement is enforceable, a mere fact that the attorney agreed to bear case's expenses shall made the agreement being nulled and void on a ground that the attorney shared some interest in the case outcome. Beside such agreement created advantages for the client, thus, such agreement was not in violation of the Thailand Lawyer Act B.E. 2477 (1934) Section 12 (2).

As for the Supreme Court judgment No. 191/2539, the client in this case agreed to pay THB 250,000 as a legal fee, provided that the case must be final and successful. They further agreed that the attorney shall advance any expenses incurred, should the case be unsuccessful, the attorney shall not be able to receive such fee. The Supreme Court was of the view that such disputed fee agreement contradicted to public policy and shall be nulled and void under the Section 150 of the Civil and Commercial Code on the ground that the agreement was made in a manner that the attorney supports other to pursue the case.

Resulting from the above, the discrepancies can be clearly noticed, i.e., in the first cases, the attorney agreed to bear the expenses incurred and shall be entitled to receive the legal fee when the case is successful. This evidently showed that the attorney supports the client to pursue the lawsuit (which was the violation of the Thailand Lawyer Act B.E. 2477 (1934)). The Supreme Court even stated that the client was benefited from this agreement, thus, to the author's point of view,

the fee agreement should be nulled and void according to the said reason. On the contrary, in the second case, the attorney did not agree to bear the legal expenses incurred, but only agreed to advance such expenses and such expenses shall be reimbursed upon the final and successful of the case. The author views that this fee agreement is even less explicit that the attorney supports the client to pursue the case comparing to the fee agreement in the first case. Confusingly, the Supreme Court ruled that the fee agreement in the second case was unenforceable. Though, it should be noted that the main disputed issues of both cases were not related to contingent fee, but both Supreme Court judgments could not provide a clear direction when the legal fee, which an attorney is entitled to receive, ties to and involves with the outcome of the case.

(3) The Supreme Court judgment No. 1443/2545 and the Supreme Court Judgment No. 5162/2563 (enforceability of contingency agremeent)

The Supreme Court judgment No. 1443/2545 ruled that it since the legal fee under the agreement in disputed was calculated at the rate of three per cent of the recoverable property, and shall be payable upon the actual recovery, therefore, such agreement allow the attorney to share some interest in the properties the client is entitled to receive. It thus shall be considered contingency fee agreement and shall be nulled and void.

For the Supreme Court judgment No. 5162/2563, in this case, the fee agreement provided that the attorney shall receive a legal fee in a certain amount calculated at a certain percentage of the properties recoverable, same as the previous case. However, the Supreme Court ruled that the fee agreement in question is enforceable based on following reasons: (i) the legal fee was certain and not exceeding the amount in dispute; (ii) The lawyer could not arbitrarily determine the legal fee; and (iii) The Civil Procedure Code Section 222/37 already allows the contingency fee agreement to be applied.

As a result, the issue concerning the enforceability of the contingency fee agreement arose. Additionally, it is debatable whether the Supreme

Court judgment No. 5162/2563 could be used as a new precedent, notwithstanding the debatable issues with respect to the reasoning part of the said judgment. To the author's opinion, the recent Supreme Court judgment No. 5162/2563 seems to be the most questionable decision, as it overturns the precedent of the previous Supreme Court decisions.

Regardless of the above, it seems that the Supreme Court used two factors in determining whether the legal fee agreement in question in considered contingency fee agreement and shall be held nulled and void, i.e., (i) whether the attorney shall be entitled to receive a legal fee upon contingent and (ii) whether an amount of the money is tied to an adjudicated amount or net recovery.[66]

To conclude this part, the current position of the Supreme Court precedent is uncertain, the Supreme Court judgments for the past few decades has numerous discrepancies. Although there is no united direction for the contingent fee, the most recent Supreme Court judgment ruled that the contingency fee agreement is enforceable, without mentioning that the contingency fee agreement is still considered to be in contrary to the public policy or lawyers' ethic.

2.5 Problem and Summary

In this Chapter, the definition of the contingent fee, historical development of the concept of the contingent fee, including the current position against the contingent fee in each jurisdiction were discussed thoroughly.

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[66] It is worth noting that from the Supreme Court's point of view, the factor two (ii) seems to be a more decisive factor as every case that the amount of legal fee is tied to an adjudicated amount would be held contrary to the public policy, while in a case where the only factor one is present, the Supreme Court in some case rules that a fee schemes in question is enforceable and not contrary to the public policy, such as Thai Supreme Court Judgment No 10707/2550.

In conclusion, as the issue on contingent fee remains unclear under Thai law as the relevant laws and regulations, including the Supreme Court Judgment has not yet been reliable, plus the Supreme Court Decision No. 5162/2563 is ambiguous and does not provide a clear ruling and reasoning. Furthermore, in such decision, the Supreme Court used a provision for class action lawsuit as a supporting reason in an ordinary lawsuit. [67] Therefore, it is plausible that this Supreme Court Judgment may be overturned in the future. As a result, it is difficult to conclude the issues concerning the contingent fee. There are several unsolved issues, it however can be noticed that the following are major debate concerning the contingent fee:

i. What is the true meaning of the term "Contingent Fee"?
ii. How should the concept of the contingent fee be treated? (Whether it should be fully accepted and endorsed as it is a key to justice for individuals, or it should be strictly prohibited in order to prevent potential draw backs such as abuse of the attorney's power?)
iii. If the contingent fee was to be allowed, what is the exception that a contingent fee will not be prohibited to apply? Or if the contingent fee was to be strictly prohibited, what is the exception that a contingent fee should be allowed to use?

In the next chapter, the foreign laws and regulations will be addressed and discussed, especially on the abovementioned three areas, in order to study them in a comparative analysis manner comparing their perspective with Thailand.

[67] It must be noted that the lawsuit which the lawyer represented his client in the previous case was not a class action lawsuit. Therefore, Section 222/37 of the Civil Procedure Code should, theoretically, not be able to apply to this case.

CHAPTER 3
CONTINGENT FEE IN FOREIGN JURISDICTIONS

As preliminary discussed about the current global position of the contingent fee in the previous chapter whereby the foreign laws and regulations was one of elements for the discussion. In this chapter, the concept of contingent fee in foreign jurisdictions will be discussed in detail. The selected jurisdictions will comprise of both Civil Law and Common Law system. Hence, the perspective from both legal systems could be studied.

Continually from the previous chapter, it is learnt that the main issues concerning the contingent fee are (i) the definition of contingent fee; (ii) general rule governing the enforceability of the contingent fee; and (iii) the exception for such enforceability. Thereby, the main content in this chapter will involve the definition of the contingent fee and the general rules and exceptions that govern the contingent fee in each jurisdiction. The said issued will be discussed jurisdictions-by-jurisdiction, starting with the United Kingdom, then Singapore, Germany, and France respectively.

3.1 United Kingdom

The United Kingdom could be considered as an origin of the concept of the contingent fee whereby it was strictly prohibited under the concept of champerty and maintenance. The said concept has influenced the world's perspective to the concept of the contingent fee for centuries, numerous laws and regulations adopt such concept and ban the concept of the contingent fee from being applied.

The concept of the contingency agreement has been developing under the legal system of the United Kingdom. Expressly, the contingency agreement was originally banned and criminalized, its position had maintained for centuries until the concept of the "conditional agreement" and the "Damages-Based Agreement" has been introduced to the United Kingdom legal system. Hence, it seems that the perspective of the United Kingdom on the concept of the contingent fee has slightly

changed, and it has relaxed the prohibition of the contingency agreement under some certain scenarios. Additionally, since the legal system of the United Kingdom is the Common Law system whereby most of the laws are case law. Therefore, the legal system of the United Kingdom shall greatly illustrate the difference perspective of the contingency agreement comparing to the Thai legal system.

As a result, by studying the legal concept of the contingent fee of the United Kingdom, we will be able to review the main factors and the reasoning of the change of the perspective against the United Kingdom.

3.1.1 Definition

As mentioned earlier that the legal system of the United Kingdom is the Common Law system whereby the laws can be found and located in case laws. However, for this particular issue, as the concept of contingent fee has developed in the legal system of the United Kingdom for centuries, it is inevitable that several statutory laws and regulations have been issued and enacted for governing and regulating the concept of the contingent fee. As such, the definition and explanation of contingent fee could be therefore studied and analyze from both case law and statutory laws simultaneously, despite the fact that the United Kingdom is the Common Law system country.

Generally, there were no case law that directly states the definition of the term "contingent fee". Rather, the case law provides explanation and interpretation of each agreement in dispute whether the nature of such agreement is considered a contingency fee agreement or not. In *Geraghty & Co v Awwad & Anor*,[68] LORD JUSTICE SCHIEMANN classified a legal fee that an attorney shall receive as a reward for success into three categories, i.e., a reward where (i) the attorney will recover some of the clients' winnings; (ii) where the attorney will recover his normal fees plus a success uplift; and (iii) where the attorney will only recover his normal fees.

In the past, it appears that all of the aforesaid three categories were regarded as "contingent fee" since the courts' judgment provided that a contingency

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[68] [1999] EWCA Civ 3036.

fee agreement is an agreement where contingency fee agreement the legal fee payable to the attorney in the event of the litigant's success, but not if the litigant loses.[69] The directions of the courts were in compliance with the Solicitors Practice Rules 1990 Rule (18) (2) (c) where the term "contingency fee" was defined as follows:

"[*A*]*ny sum (whether fixed or calculated either as a percentage of the proceeds or otherwise howsoever) payable only in the event of success in the prosecution of any action, suit or other contentious proceeding*."[70]

Therefore, it could be summarized that the contingent fee under the legal system of the United Kingdom, formerly, was a legal fee that payable to an attorney upon a successful of a lawsuit, regardless of its calculation whether such legal fee is a fixed amount or calculated as either a percentage of the proceeds or otherwise howsoever.

Since the definition of the term contingent fee pursuant to the courts' judgment and the statutory law was quite broad, all of the different types of fee schemes (as classified above) shall fall into the scope of the contingent fee notwithstanding the difference nature of each the three type rewards and potential disadvantages that each type of rewards tends to create in which resulting that the three type rewards should be treated differently. The unclear distinction between the difference types of reward had continued to maintain until the concept of the "conditional agreement" and the "Damages-Based agreement" have been introduced to the United Kingdom legal system.

According to the Courts and Legal Services Act 1990, The conditional fee agreement is allowed and enforceable between an attorney and a client in certain proceedings. The conditional fee agreement is an agreement where an attorney agree that the legal fee is payable upon specified circumstances whereby the money payable under the conditional fee agreement is called a "success fee". And such success fee

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[69] *Wallersteiner* (n 23) 869.

[70] Solicitors Practice Rules 1990 was amended several times, last amended was in 12 January 2007. But, the definition of "contingency fee" as defined in Rule 18(2)(c) remains the same.

could be increased in specified circumstances (upon an agreement between the parties) as well.[71] Thus, according to this concept, it can be easily concluded that a conditional fee shall cover two type of reward,[72] (i) a reward where the attorney will only recover his normal fees upon the completion of the conditions (for the purpose of this thesis, this type of reward will be referred to as the "**Normal Success Fee**"); and (ii) a reward where the attorney will recover his normal fees plus a success uplift (for the purpose of this thesis, this type of reward will be referred to as the "**Uplift Success Fee**"). The maximum amount of the Uplift Success Fee could be increased up to 100% of the normal fee.[73] It is worth noting that a conditional fee could not be enforceable to the following proceeding: (i) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and family proceedings.[74]

Regarding the Damaged-Based agreement under the Courts and Legal Services Act 1990, it is a new legal concept added into the 1990 Act in 2013 whereby the Damaged-Based agreement is allowed and enforceable provided that the agreement satisfies the required conditions under the laws. In this regard, the Damaged-Based agreement is an agreement which a client is obliged to make a payment to an attorney upon contingent that the client obtains a specified financial benefit in connection with the case represented by the attorney, and the amount of payment shall be determined by reference to the amount of the financial benefit obtained. [75] Hence, comparing the said money to LORD JUSTICE SCHIEMANN's classification of reward, the money that payable under the concept of the Damaged-Based agreement shall mean a reward where the attorney will recover some of the clients' winnings (for the purpose of this thesis, this type of reward will be referred to as the "**Damages-Based Success Fee**"). The concept of the Damages-Based Success

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[71] Courts and Legal Services Act 1990, s 58.

[72] This was classified by Lord Justice Schiemann.

[73] Conditional Fee Agreement Order 2013, art 5.

[74] Courts and Legal Services Act 1990, s 58A.

[75] ibid, s 58AA(3).

Fee is similar to the concept of contingent fee where an attorney shall be entitled receive a payment upon the case's success and the amount of money shall be tied to the adjudicated amount.

Additionally, in *Bolt Burdon Solicitors v Tariq and others*, the High Court of Justice Queen's Bench Division, provided a clear example between the contingency fee agreement and the conditional fee agreement. To elaborate, it illustrated that in the conditional fee agreement, costs (legal fee) that the client is obliged to pay are always tied to the work done. And that if the case is won (i.e., the work has been done), the client shall be responsible to pay the legal fee in the equal amount regardless of recovery amount. On the contrary, in the contingency fee agreement, costs (legal fee) are always proportionate to recovery, hence, the legal fee that the client is responsible to pay shall be fluctuated upon the amount recovery.[76]

As a result, it is concluded that, for the United Kingdom, even the Solicitors Practice Rules 1990 and its amendments only provides that a contingency fee shall mean any sum of money payable only in the event of success, such definition is only broad definition of the term "contingency fee". The contingency fee, in fact, can be classified into three types. The money payable to the attorney upon conditions and such money is not related to the amount recovery shall be fallen into the concept of the conditional fee instead, and the money payable under this concept could be considered as the Normal Success Fee or the Uplifted Success Fee (as the case may be) while the agreement that the success fee is tied to the amount recovery or adjudicated amount and payable under the successful of the case is fallen into the concept of the Damages-Based agreement where the success fee is called the Damages-Based Success Fee. As such, this Damages-Based Success Fee shall be the narrowed definition of the contingency fee since its concepts is similar to the commonly known U.S. contingency fee concept.

3.1.2 General Rule

As thoroughly discussed in the preceding topic that the contingent fee under the United Kingdom legal system has both broad and narrowed definition.

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[76] *Bolt Burdon Solicitors v Tariq and others* [2016] EWCA Civ 845.

In this topic the general rule governing the applicability and enforceability, including the requirement for each type of the success fees will be discussed.

3.1.2.1 The broad definition: The Conditional Agreeement

For the broad definition, all of the success fee, namely the Normal Success Fee, the Uplift Success Fee, and the Damages-Based Success Fee, will be regarded as the contingent fee. Nonetheless, only the general rules for the Normal Success Fee and the Uplift Success Fee will be discussed in this topic as the Damages-Based Success Fee will be thoroughly discussed in the next topic.

According to the Courts and Legal Services Act 1990 Section 58, the Normal Success Fee and the Uplift Success Fee are both considered as the Conditional Fee, and they are subject to similar laws and regulations. In this regard, Section 58 (1) stipulates as follows:

"*A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable*".

In this regard, by considering the said provision, it can be said that the conditional fee agreement shall be unenforceable, unless such conditional fee agreement could satisfy all of the conditions required by the laws or it is considered enforceable by virtue of the Section 58 (5). This is because the provision is stipulated in a manner that the broad general rules concerning the conditional fee shall be unenforceable, and only those agreement which can satisfy the conditions required by the laws shall be enforceable.

As a result, even though, there is a statutory legislation allowing conditional fee agreement, such permission is applied as an exception only. The main general rules concerning the conditional agreement is that this type of agreement shall be unenforceable unless, it satisfies the requirements under the laws. Nevertheless, even with this approach, the costs and expenses barrier in pursuing a lawsuit seems to be eliminated as those injured party and the attorneys will have more alternatives in approaching each other. The details of the exception will be discussed in 3.1.3.1 accordingly.

3.1.2.2 The narrowed definition: The Damages-Based Agreement

By way of background, the Damages-Based Agreement was introduced to the legal system because since the contingency fee has been permitted in tribunals, but there may be lack of clarity and understanding in entering into the Damages-Based Agreement, especially when the agreement is to be discussed on the fee arrangement and costs that the client will be liable to pay. Furthermore, there was a concern that the solicitors may fail to advise the client alternative methods of funding their claims. Hence, the government of the United Kingdom proposed to have laws and regulations with respect to these issues.[77] The Sir Rupert Jackson proposed that regulations will introduce requirements in respect of the following elements:

"*(i) The provision of clear and transparent advice and information provided to consumers, on (a) costs; (b) other expenses (such as VAT, counsel's fees, expert reports etc); and (c) other methods of funding available.*

(ii) The maximum percentage of the damages that can be recovered in fees from the award.

(iii) Controlling the use of unfair terms and conditions (such as penalty and settlement clauses)"

Thus, it can notice that the Damages-Based Agreement is now being promoted for general use and provide an alternative to relevant parties in pursuing the lawsuit. For instance, an injured party who does not have sufficient budget for initiating a lawsuit or consulting with the competent lawyers, he however has a very solid and strong defends. In this situation, if the Damages-Based Agreement could not be applied, an injured party shall need to tolerate and bear its legal costs and expenses.

In light of the narrowed definition, the Damages-Based Success Fee is the only type of success fee that falls into the scope of the definition. The Courts and Legal Services Act 1990 is the governing law on this issue. The main provision with respect to the issue is Section 58AA (1) and (2). It reads as follows.

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[77] LJ Rupert Jackson, 'Review of Civil Litigation Costs: Final Report' (United Kingdom for The Stationery Office, 2009), ch 12, para 3.2.

"*(1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.*

(2) But (subject to subsection (9)) a damages-based agreement which does not satisfy those conditions is unenforceable."

Thus, the Damages-Based Agreement is, in general, enforceable provided that it can satisfy the conditions provided in the Section 58AA (4) of the said act. And those Damages-Based Agreement which could not satisfy the conditions required is unenforceable.

The conditions addressed in the Section 58AA (4) are as follows.

(1) The Damages-Based Agreement must be made in writing.

(2) Such agreement must not relate to the proceeding that is prohibited to apply the conditional fee by virtue of Section 58A (1) and (2).[78]

(3) The amount of the Damages-Based Success Fee shall not be prescribed or be calculated in a prescribed manner.

(4) The agreement must comply with other requirements as to its terms and conditions are prescribed.

(5) The agreement must be made only after the attorney has complied with such requirements (if any) as may be prescribed as to the provision of information.

Moreover, the required conditions of the Damages-Based Agreement are also mentioned in the Damages-Based Agreement Regulations 2013 as well, it provides as follows.[79]

(1) The said agreement must specify the claim or proceedings or parts of them to which the agreement concerns.

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[78] To clarify, the proceedings must not relate to the Section 82 of the Environmental Protection Act 1990 and family proceedings.

[79] Damages-Based Agreement Regulations 2013, art 3.

(2) The circumstances that the payment, expenses, and costs of the client is payable to the attorneys shall also be addressed.

(3) The reason for fixing the amount of the payment at such level shall be mentioned. Particularly in an employment matter, it shall include, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.

Apart from the above, Section 58AA (8) also provides a transitional provision whereby an agreement maned in a manner of the Damages-Based Agreement before the enforcement of the Section 58AA (4) shall not be applied to the concept of the Damages-Based Agreement under Section 58AA (4). In other word, it will be regarded as invalid under the Section 59 of the Solicitors Act 1974, as earlier discussed, and the invalid agreement at the time of its execution shall not become valid by virtue of the latest amendment of the Courts and Legal Services Act 1990 Section 58AA.

Recently, the Court of Appeal has ruled an importance case on the interpretation of the Damages-Based Agreement, i.e., in *Zuberi v Lexlaw Ltd*,[80] where Zuberi, the client, filed a case against Lexlaw, a law firm, in attempt terminate the Damages-Based Agrerment and refuse to made a termination payment as agreed under the Damages-Based Agreement. By way of background, Lexlaw and Zuberi entered into a damages-based agreement where (i) Lexlaw would be entitled to 12 per cent of the damages Zuberi would receive in the event of success plus any disbursements; or (ii) in case that the claim was unsuccessful, Lawlax would only be entitled to disbursements incurred; or (iii) if the Damages-Based Agreement was terminated early, Lexlaw would be entitled to both legal fees and disbursements. In this regard, Zuberi was offered the settlement which she later accepted such offer, she therefore tried to terminate the Damages-Based Agreement and argued that the agreement was unenforceable as Article 8 of the Damages-Based Agreement

[80] [2021] EWCA Civ 16.

Regulations 2013 provides that the solicitors shall not charge the client anything but the solicitor's actual costs and expenses.[81] Nevertheless, the Court of Appeal unanimously held that the early termination payments of legal fee are not prevent by virtue of the Damages-Based Agreement and the fee agreement in disputed is enforceable. The Court of Appeal was of the view that the fee agreement in disputed is a hybrid Damages-Based Agreement where a solicitor and a client agreed that the solicitors shall receive a percentage of the recover amount provided that the lawsuit succeeds, however, in the event of failure, the solicitors will be entitled to his or her full-time costs instead, such part only the parts of the agreement enabling the solicitor to obtain a percentage of damages comprise the Damages-Based Agreement. Thereby, with this approach, the Damages-Based Agreement are now opened for a wider use as the hybrid Damages-Based Agreement lower the risk of the solicitors in receiving no legal fee in the event of failure.

Therefore, considering the preceding paragraphs, it is clear that, unlike the conditional fee agreement, the Damages-Based Agreement is generally allowed and enforceable provided that the agreement can meet all of the requirements and conditions.

3.1.3 Exception

As the conditional fee agreement is generally prohibited while the Damages-Based Agreement is permitted. This topic concerning exception shall therefore address the opposite side of each fee agreements, i.e., for the conditional free agreement, the exception for the conditional fee agreement in which it will be permitted and enforceable shall be discussed. In contrast, the exception for the Damages-Based Agreement whereby it will be considered unenforceable will be mentioned instead.

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[81] Damages-Based Agreement Regulations, art 8(2) reads "If the agreement is terminated, the representatives may not charge the client more than the representative's costs and expenses for the work undertaken in respect of the client's claim or proceedings."

3.1.3.1 The broad definition: The Conditional Agreeement

Under section 58 of the Courts and Legal Services Act 1990 provided that the conditional fee agreement that satisfies the conditions required by law shall not be enforceable. In other words, such conditional fee agreement which satisfies the conditions shall be therefore enforceable.

On a separate issue, Section 58 further provides that the enforceability of the conditional fee agreement shall be subject to Section 58 (5) as well. Therefore, it is concluded that there are two exceptions which allow the conditional fee agreement, namely, (i) exception under Section 58 itself (satisfaction of the conditions required by laws); and (ii) exception pursuant to Section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client). Below are the details of each concept.

(1) Exception under Section 5 8 of the Courts abd Legal Services Act 1990 (Satisfaction of the conditions required by laws)

According to the Section 58, the following conditions is required for every conditional fee agreement (i.e., both the Normal Success Fee and the Uplift Success Fee), otherwise such conditional agreement shall not be enforceable.

1. A conditional agreement (both the) must be in writing (Section 58 (3) (a)).
2. A conditional agreement must not relate to criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990, and family proceedings. (Section 58 (3) (b) and Section 58A (1)).

In addition to the above, if the conditional agreement provides the Uplift Success Fee, the following conditions are additionally required for the enforceability of the conditional agreement.

(1) Apart from the proceeding mentioned in Section 58 (3) (b), the said conditional agreement could be a claim for personal injuries as well (The Conditional Fee Agreement Order 2013 Rule 3 and 4).

(2) The conditional agreement must address the percentage of the legal fee agreed (as a base for calculation) that is to be increased (Section 58 (4) (b)).

(3) The percentage shall be subject to a maximum limited, expresses as a percentage of the descriptions of damages awarded, but not exceed the percentage specified by order made by the Lord Chancellor the (Section 58 (4B) (a) - (c)).

(4) The said percentage in (2) and (3) shall not exceed the percentage specified in the Conditional Fee Agreement Orders, i.e., 100% for all proceeding, except only 25% for proceeding at first instance (Section 58 (4) (c))

As a result, it can be summarized that, for the contingent fee in the manner of the Normal Success Fee and the Uplift Success Fee, is accepted and enforceable under certain exceptions. The main concept of the governing concerning the exception is that the success fees and the conditional agreement are allowed to be applied and enforceable provided that the fee agreement could meet all of the conditions required by the laws.

Since, the concept of the conditional fee is allowed, and the attorneys are permitted to enter into a conditional agreement with their clients, therefore, a legal cost barrier is now eliminated, except for the type of proceeding that the conditional agreement cannot be applied, especially for injured parties who does not be able to afford a legal cost in advance can now pursue their case in court.

(2) Exception under Section 5 7 of the Solicitors Act 1974 (Non-Contentious Business Agreements between solicitor and client)

Under the Section 58 of the Courts and Legal Services Act 1990, it provided that an enforceability of the conditional fee agreement shall be subject to the subsection (5) of the same section as well. In this regard, pursuant to subsection (5), it refers to the Section 57 (1) of the Solicitors Act 1974 in which reads as follows:

"(1) *Whether or not any order is in force under section 56, a solicitor and his client may, before or after or in the course of the transaction of any non–contentious business by the solicitor, make an agreement as to his remuneration in respect of that business."*

By way of explanation, even though, a non-contentious business between the solicitors and the client which they agreed to the lawyer's remuneration in respect of the transaction has elements of the conditional fee. Therefore, it should be generally considered invalid. However, by virtue of the abovementioned section, such non-contentious business that falls into the Section 57 shall not be considered as unenforceable.

It should be noted that a conditional fee agreement in question shall be a non-contentious business agreement, expressly, the transaction or business between the solicitors and the client is not related to the litigation or arbitration. Moreover, it is notable that only is regeared as a non-contentious business agreement under Section 57 (1) of the Solicitors Act 1974, such conditional agreement shall be enforceable, regardless of whether such conditional agreement satisfies the conditions required by Section 58 of the Courts and Legal Services Act 1990, as they are separate exceptions and do not relate to one another.

3.1.3.2 The narrowed definition: The Damages-Based Agreement

Regarding the exception of the Damages-Based Agreement, since it is learnt that the Damages-Based Agreement is generally enforceable. Therefore, these exceptions for the Damages-Based Agreement are an exception that the Damages-Based Agreement would be regarded as unenforceable. They are mainly addressed in the Solicitors Act 1974. Details of each exception are discussed below.

(1) Exception under Section 58AA (2) of the Solicitors Act 1974 (Disatisfaction of the conditions required by laws)

For the first exception, it is mentioned in Section 58AA (2) of the Solicitors Act 1974 itself,[82] i.e., any damages-based agreement that could not satisfy conditions, such agreement is unenforceable. It appears to the author that even there is no provision stating this type of exception, the understanding on this matter shall remain the same as the Damages-Based Agreement. This is because since the Damages-Based agreement is enforceable upon the satisfaction of the conditions required by laws. Therefore, should such agreement not comply with the requirements and conditions, it will undoubtedly be unenforceable. Nevertheless, by having the exception as a statutory law, it could pre-settle any potential disputes that may arise from the interpretation of the general rules concerning the Damages-Based Agreement in the future.

(2) Exception under Article 4 of the Damages-Based Agreeement Regulation 2013 (Proceedings concerning an emploeyment matter)

Pursuant to Article 4 of the Damages-Based Agreement Regulations 2013,[83] the proceeding concerns an employment matter[84] shall not be able to apply the Damages-Based Agreement. Nevertheless, if further provides an exception for this exception. To elaborate, the Damages-Based Agreement on the employment matter is generally prohibited and unenforceable, unless it could satisfy

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[82] Courts and Legal Services Act 1990, s 58AA reads *"(2) But (subject to subsection (9)) a damages-based agreement which does not satisfy those conditions is unenforceable."*

[83] Damages-Based Agreement Regulations 2013, art 4 states that *"(1) In respect of any claim or proceedings, other than an employment matter, to which these Regulations apply, a damages-based agreement must not require an amount to be paid by the client other than—..."*

[84] Damages-Based Agreements Regulations 2013, art 10 provides that a damages-based agreement relates to an employment matter is when the matter in question is, or could become, the subject of proceedings before an employment tribunal.

the requirements and conditions provided in Article 5 of the 2013 Regulations.[85] In short, there are other additional information that must be addressed in the agreement, it is mostly related to costs and expenses of the case, such as the circumstances in which the client may seek for a review of cost and expenses, the point the expenses become payable etc.

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[85] Damages-Based Agreements Regulations 2013, art 5 states

"Information required to be given before an agreement is made in an employment matter

5.—(1) In an employment matter, the requirements prescribed for the purposes of section 58AA (4) (d) of the Act are to provide—

(a) information to the client in writing about the matters in paragraph (2); and

(b) such further explanation, advice or other information about any of those matters as the client may request.

(2) Those matters are—

(a) the circumstances in which the client may seek a review of costs and expenses of the representative and the procedure for doing so;

(b) the dispute resolution service provided by the Advisory, Conciliation and Arbitration Service (ACAS) in regard to actual and potential claims;

(c) whether other methods of pursuing the claim or financing the proceedings, including—

(i) advice under the Community Legal Service,

(ii) legal expenses insurance,

(iii) pro bono representation, or

(iv) trade union representation,

are available, and, if so, how they apply to the client and the claim or proceedings in question; and

(d) the point at which expenses become payable; and

(e) a reasonable estimate of the amount that is likely to be spent upon expenses, inclusive of VAT."

On a separate matter, the Damages-Based Agreement in an employment matter not only be controlled on the requirements and conditions, any amendment to such agreement and the payment in the employment matter also be regulated by the Article 6 and 7 of the 2013 regulations, i.e., any amendment to the Damages-Based Agreement in an employment matter shall be made in writing and signed by the client and the representative.[86] And the maximum amount, including VAT, of the payment which the representative could be entitled is 35 per cent of the sums ultimately recovered by the client in the claim or proceedings.[87]

Therefore, to conclude this topic, the Damages-Based Agreement in an employment matter shall be generally prohibited and considered unenforceable. Although, it could be enforceable if such agreement could satisfy the additional requirements and conditions, it is not treated under the same laws and regulations for the normal Damages-Based Agreement as it has its own other restriction and limitation.

(3) Exception under Section 57 of the Solicitors Act 1974 (Non-Contentious Business Agreements between solicitor and client)

Under the Section 58AA (2) of the Courts and Legal Services Act 1990, it provided that an enforceability of the Damages-Based Agreement shall be subject to the subsection (9) of the same section as well. In this regard, pursuant to subsection (9), it refers to the Section 57 of the Solicitors Act 1974. In this regard, it is similar to the exception two mentioned in topic 3.1.3.1. To clarify, if a non-contentious business agreement is regarded as a damages-based agreement, the normal general rules and exception of the Damages-Based Agreement shall not be applied to the agreement. And thus, such non-contentious business agreement will be enforceable, even it could not satisfy the requirement and conditions for a damages-based agreement. This is because when it becomes the matter of a non-contentious business agreement, the subsection (1) and (2) of the Section 58AA of the 1990 Act shall not

[86] Damages-Based Agreements Regulations 2013, art 6.

[87] Damages-Based Agreements Regulations 2013, art 7.

apply.[88] The enforceable agreement, in question, shall therefore be treated and considered under the laws and regulations concerning a non-contentious business agreement instead.

(4) Exception under Section 47C (8) of the Competition Act 1998 (Collective proceedings)

Lastly, this exception is provided in the Section 58AA (11) of the 1990 Act. This exception refers to the section 47C (8) of the Competition Act 1998 where it relates to Collective proceedings: damages and costs. The claim that subject to this exception shall be the claim before the tribunal (of the Competition Act 1998) whereby the damages and costs of the proceedings could be agreed upon a damages-based agreement. However, it should be note that the Damages-Based Agreement concerning this matter is generally enforceable, unless such agreement related to opt-out collective proceedings.[89]

In light of this, in order to understand the reason behind such exception of the exception mentioned above, it must first understand that the collective proceeding in this matter shall mean a proceeding that may be brought before the tribunal (of the Competition Act 1998) combining two or more claims.[90] In this regard, such collective proceeding shall consist of class member where the tribunal may specify that the collective proceeding as opt-in or opt-out collective proceeding. The main difference between these two proceeding is that for the opt-out collective proceeding any person could become a litigant in such collective

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[88] Courts and Legal Services Act 1990, s 58AA(9) reads *"Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable."*

[89] Competition Act 1998, s 47C(8) provides that *"A damages-based agreement is unenforceable if it relates to opt-out collective proceedings."*

[90] ibid, s 47B(1).

proceedings potentially without knowing such existence of the collective proceeding.[91] Therefore, the author is of the view that the Damages-Based Agreement is prohibited and unenforceable provided that it relates to opt-out collective proceedings because under the opt-out approach, any person that falls into the scope of class shall be considered a claimant, therefore, it would be peculiar that such person will be automatically bound by the damages-based agreement agreed between the main claimant and the class's solicitors without taking any affirmative action that he or she wishes to be bound by such damages-based agreement. In contrast, for the opt-in approach, a person(s) shall need to take an affirmative action in order to join as a class member of the collective proceedings. Therefore, it is uncontested that the opted-in member agreed to be bound by a damages-based agreement. As a result, to prevent any future dispute that may be arose by the unwanted damages-based agreement of the class member in opt-out collective proceeding. It is better to prohibit such damages-based agreement from applying to the opt-out collective proceeding in the first place.

Thereby, it could be summarized that the exception to the enforceability of the Damages-Based Agreement is that if the nature of such proceeding is the opt-out collective proceeding, the Damages-Based Agreement shall be unenforceable pursuant to Section 47C (8) of the Competition Act 1998.

3.2 Singapore

Singapore was one of the countries that has been influenced by the United Kingdom. The contingency agreement therefore has been prohibited, the concept of champerty and maintenance remain its position in the statutory laws and regulation of Singapore since it has been addressed as core ethics for lawyers in Singapore. Despite the enactment of the Damages-Based Agreement in the United Kingdom, the Supreme Court Judgment of Singapore continues to maintain its long-standing precedent that the contingency fee agreement shall be prohibited.

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[91] *Paccar Inc v Road Haulage Association Ltd* [2021] EWCA Civ 299, para 16.

Singapore legal system is the Common Law system, same as the United Kingdom. However, as the concept of champerty and maintenance has existed in the legal system for a quite long period, therefore, there are some statutory laws and regulations concerning the contingent fee under the Singapore legal system as well. Hence, both Singapore Supreme Court precedents and statutory legislation shall be considered and reviewed.

Additionally, the Supreme Court judgments of Singapore could assist in providing some interpretation and examples related to the concept of the contingent fee, particularly with respect to solid reasons for prohibition of the contingency fee agreement. Furthermore, it shall demonstrate the priority of relevant factor with respect to the judicial system from the Singapore legal system's perspective as well.

3.2.1 Definition

As previously mentioned, the Singapore legal system has been influenced by the United Kingdom legal system. However, the position of the definition of the contingent fee that was clearly classified in *Geraghty & Co v Awwad & Anor*[92] may not be able to directly apply in the Singapore jurisdiction. This is because there is no case law nor statutory legislation confirm this classification. Thereby, it is peculiar to apply the classification created by the Judge in English case law to the entire Singapore jurisdiction.

Nevertheless, it does mean that the issue concerning the definition of the contingent fee under Singapore jurisdiction will not be able to settle. To elaborate, even though, there is no provision, under the laws of Singapore, defines the term "contingent fee", there are some regulations and Supreme Court's judgments that explain and illustrate some scenarios of an action that is prohibited under the champerty and maintenance offences (which quite similar to the general concept of the contingent fee from the general global perspective). Thereby, the definition of the term "contingent fee" could be analyzed from such explanation and illustration.

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[92] *Geraghty* (n 68).

Starting with the Supreme Court judgment, in *Law Society of Singapore. v. Lau See Jin Jeffrey*, where the Supreme Court viewed that the parties to the dispute entered to the contingency fee agreement, i.e., an agreement to which the damages awarded to the litigant (a client) will be also paid to the respondent (an attorney). Furthermore, the Supreme Court also refer that the contingent fee could also be analogized to the concept of the champerty offense as well whereby the definition of champerty as '*a particular form of maintenance 'where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action'*.[93]

Apart from the above, the explanation for the contingent fee could be also found in two legislation concerning conduct of the lawyers in Singapore, namely, the Legal Professional Act 1966 and the Legal Profession (Professional Conduct) Rules 2015. The relevant sections are stated below:

(1) The Legal Professional Act 1966 Section 107 (1) (b) reads:

"***Prohibition of certain stipulations***

107.—(1) A solicitor must not —

...

(b) enter into any agreement by which he or she is retained or employed to prosecute any suit or action or other contentious proceeding which stipulates for or contemplates payment only in the event of success in that suit, action or proceeding."

(2) The Legal Profession (Professional Conduct) Rules 2015 Article 18 reads:

"***Contingency fees prohibited***

18. A legal practitioner or law practice must not enter into any negotiations with a client of the legal practitioner or law practice —

(a) for an interest in the subject matter of litigation or of any other contentious proceedings; or

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[93] *Law Society of Singapore v Lau See Jin Jeffrey* [2017] SGHC 30, para 22.

(b) except to the extent permitted by any applicable scale of costs, for remuneration proportionate to the amount which may be recovered by the client in the proceedings."

Therefore, with the lack of the direct definition for the term contingent fee, it is understandable from the Supreme Court's interpretation and the statutory law that in the Singapore jurisdiction the contingency agreement shall mean that an agreement where an attorney will be entitled to the awarded amount or net amount to the client, either by the fixed amount or calculated as a percentage of such amount. Hence, the contingent fee shall mean an amount of money that the attorney shall be entitled to receive from such agreement.

For the avoidance of doubt, comparing to the definition of the United Kingdom, the Normal Success Fee and the Uplift Success Fee will not be considered as a contingent fee under Singapore jurisdiction and only the Damages-Based Success Fee is fallen into the scope of the contingent fee. This is because the nature of the Normal Success Fee and the Uplift Success Fee are not tied to the adjudicated amount, the only conditions that related to such successes fee is that the lawsuit which related to the fee agreement shall be successful. In other words, regardless of the amount that the litigant could recovery or be entitled to, the attorney shall receive the same amount of the Normal Success Fee or the Uplift Success Fee provided that the case is successful.

In conclusion, unlike the United Kingdom, Singapore jurisdiction does not provide any classification to the definition of the contingent fee. The Supreme Court judgment and the and the statutory laws provide only the explanation of such term. Nonetheless, from such explanation, should the attorney and the client entered into an agreement to which the attorney shall be entitled to or be able to share an interest from the awarded amount to the client, shall be considered that the parties enter into a contingency agreement.

3.2.2 General Rule

The concept of champerty and maintenance has been acknowledged and enforced as one of the core ethics for lawyer in Singapore, a fee agreement between the attorney and the client that falls into the scope of champerty

offense shall be considered as unenforceable as it is an agreement that directly contradicts to the laws.

In this regard, the main provisions concerning the contingency fee agreement are addressed the Legal Professional Act 1966 Section 107 (1) (b) and the Legal Profession (Professional Conduct) Rules 2015 Article 18, as mentioned in the preceding topic. In addition to the above, the Legal Professional Act 1966 Section 107 (3) makes it even clearer that the contingency fee agreement is still be prohibited under Singapore jurisdiction. It stipulates as follows.

"Section 107 (3) *A solicitor is, despite any provision of this Act, subject to the law of maintenance and champerty like any other person*."

Despite an absence of the definition of the term contingency fee agreement, it is undoubtedly that the contingent fee could not be applied and used in the Singapore jurisdiction. This is because the abovementioned provision has made it clear that every lawyer shall be subject to an ancient offence, champerty and maintenance which is considered as offences under the law. The main reason behind such prohibition is a strong intention to protect the interests of the honorable profession to which the solicitor belongs. Moreover, the public, including the court, shall be able to depend on the honesty and integrity of all lawyers in order to duly serve the justice to the society. Thereby, the lawyers shall maintain their highest standard of honesty and integrity.[94] As a result, there was no room for a slight chance to risk for a potential violation of the honorable and integrity of the lawyers under Singapore jurisdiction.

Although, the said legislations could govern and provide some general rule of the contingency fee agreement matter, it does not specify any result of the executed contingency fee agreement. It rather stipulates that the lawyers in Singapore are prohibited from entering into the contingency fee agreement and subject to some punishment as it is considered violation of the lawyer's professional conduct. Thus, if a lawyer enters into a contingency agreement, the case will be referred to be the matter of lawyer's ethics.

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[94] *Law Society of Singapore v Ravindra Samuel* [1999] 1 SLR(R) 266, para 12.

The lawyers who violate the abovementioned provisions shall therefore be considered as committing a wrongful act against the code of conduct for lawyers and ethics. Thus, he or she shall be subject to punishments such as suspension from practicing the law for certain period.

In *Law Society of Singapore. v. Lau See Jin Jeffrey*, the Supreme Court provides four factors for the consideration in determining an appropriate sanction for the lawyer who violates the abovementioned code of conduct. The said factors are addressed below.[95]

(1) Whether the violation of the lawyers directly and entirely related to the legal practice in Singapore

If the offence was directly and entirely concerned with the legal practice in Singapore, the closer to Singapore, the higher the punishment. In *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju*, the offence was not directly related to the Singapore jurisdiction, it rather related to a foreign jurisdiction. Therefore, as the offences had limited impact to Singapore, it was suggested that the lowest range of the period of suspension shall be sufficient.[96]

(2) Whether the lawyer is fully aware that the contingency fee agreement was prohibited.[97]

(3) Whether there is an element of misappropriation of the lawyers

To elaborate, first, it must be noted that a client would be most likely to have less experience in legal field that a lawyer. Thus, if such lawyer has

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[95] *Law Society of Singapore v Lau See Jin Jeffrey* [2017] SGHC 30, para 30.

[96] *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] SGHC 135, para 79.

[97] It appears to the author that this factor seems to be very peculiar since the professional conduct clearly provides that lawyers in Singapore jurisdiction is prohibited from entering into a contingency fee agreement. Although it is disputable that some of local lawyer or small law firm may not know about such prohibitions, it is inexplicable that why a trained legal professional is not aware of the long-standing position on the prohibition of the contingency fee agreement.

successful entered into a contingency fee agreement with such client because of an enticement(s) he or she gives to the client. The punishment will be higher.

(4) Whether the lawyer, as an offender, has shown any penitence.

This factor is a usual factor in determining a punishment for the offender. If the offender demonstrates any remorse, the court will probably be merciful to the offender.

It is worth noting that the Supreme Court of Singapore takes a strong position against violation of code of conduct concerning the contingency fee. Such principle can be mirrored in *Law Society of Singapore. v. Lau See Jin Jeffrey* where the Supreme Court rejected the lawyer's argument that the violation was inchoate as the fee agreement had been terminated promptly after its execution. The Supreme Court further stated that even there was no damage arising out of or caused by the contingency fee agreement, the offence was already committed, and absence of damage cannot be regarded as a mitigating.

To conclude this part, the contingency agreement is evidently prohibited in Singapore jurisdiction. The lawyers who entered into a contingency fee agreement shall be deemed as conducting a wrongful act against professional conduct and lawyer's ethics in which subject to the punishment such as suspension from practicing the law for six months to twelve months depending on the gravity of the lawyers' misconduct.

3.2.3 Exception

As discussed in the previous topic that Singapore maintains its strong position against prohibition of the contingency fee agreement. Hence, it has very limited exception for entering into the contingency fee agreement or in arranging a fee scheme that may fall into the scope of contingency fee agreement. In this topic, the exception will be classified into two types, i.e., exception provided by the statutory laws; and (ii) exceptions provided by the interpretation or explanation of the Supreme Court.

3.2.3.1 Exception under the statutory law

The only exception for the lawyers in Singapore jurisdiction whereby they will be permitted to entered into a contingency fee agreement is that

the lawyers could enter to a contingency fee agreement with the client to the extent permitted by any applicable scale of costs, pursuant to Article 18 (b) of the Legal Profession (Professional Conduct) Rules 2015.

Considering the nature of such exception, it can be preliminary understand that such permitted contingency fee agreement shall be in accordance with the scale of cost of such disputed. However, it is uncertain that what is the 'applicable scale of costs' in this article since there is no statutory legislation not case law concerning this issue. The only rule with respect to the assessment of costs payable to the solicitors is mentioned in the Rules of Court 2021 Article 23. Nevertheless, the said Rule does not provide a solid percentage or and direction on the scale of cost, it merely provides that in assessing the costs payable to the lawyers it must be assessed on the indemnity basis where it will be subject to the Registrar of the Supreme Court or the Registrar of the State Courts (as the case may be), when the costs incurred seems to be unreasonable.[98] Since, there is not Supreme Court judgments on this matter, therefore, this matter concerning the assessment of costs could be debatable and remained unsettle.

Apart from the above, earlier last year in January 2022, there was an amendment to the Legal Professional Act 1966, expressly, Part8A Conditional Fee Agreements was added to the act. The main idea of the conditional fee agreement is that the lawyers in Singapore to enter into a conditional fee agreement, i.e., an agreement where the remuneration and costs or any part of them to be payable only in specified circumstances and may provide for an uplift fee.[99] This is because

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[98] Rules of Court 2021, art 22(3) reads that "*On an assessment on the indemnity basis, all costs are to be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred, and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount are to be resolved in favour of the receiving party; and in these Rules, the term "the indemnity basis", in relation to the assessment of costs, is to be construed accordingly.*"

[99] Legal Profession Act 1966, s 115A(1).

Singapore which to maintain and strengthen its position as an international legal and dispute resolution hub. Thereby, the amened provisions include a foreign lawyer or a law practice entity that they may be entitled to the remuneration or an uplifted fee upon specified circumstances as well.

However, as discussed in the topic 3.2.1 that a fee agreement where the lawyers entitle to a success fee upon contingent, but such success fee was not tied to the adjudicated amount will not fall into the scope of the contingent fee under Singapore jurisdiction. Hence, the permission to this conditional fee agreement under the recent amendment shall not be able to be considered as one of the exceptions for the contingency fee agreement, although, it is worth noting that the fee arrangement under Singapore jurisdiction tends to be more relaxed and the lawyer may have more involvement to the outcome of the case compared to the long-standing strong position of Singapore on this matter.

3.2.3.2 Exception under the Supreme Court judment

Regarding the exception under the Supreme Court judgments, in *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju*, the Supreme Court clarified that, from the Supreme Court's point of view, the contingency fee agreement may be used for an *impecunious* client. In other words, the Supreme Court viewed that, generally, the contingency fee agreement in prohibited as it may create a risk for violation to the honorable and integrity of the lawyers, however, when it comes to an *impecunious* client, the Supreme Court viewed that a lawyer may be entered into a fee agreement where such lawyer shall be able to recover an appropriate fees, from the amount recovery, upon the successful of the claim.

Furthermore, the Supreme Court explained that such agreement will not be caught by Section 107 of the Legal Professional Act 1966 and Article 37 of Legal Profession (Professional Conduct) Rules 2015 as from the nature of the agreement and the client, it is convinced that a lawyer must have prioritized his or her interest (entitlement of legal fee) under the client rights and opportunity to seek

justice, this kind of agreement should be therefore permissible and it is honorable for those lawyers who agreed to act for an *impecunious* client.[100]

To elaborate, in normal practice, a lawyer knows that he or she would be entitled to professional fee, regardless of whether the case is successful. However, for the case of an *impecunious* client, the lawyer who choose to act for such client will, from the beginning, understand that he will definitely not be able to claim for a professional fee unless the case is successful. Thereby, in the former case, (it is believed that) the lawyers enter into a contingency fee agreement with an intention to seek for a reward for themselves as the first priority, while in the latter case, the lawyers entered into a contingency fee agreement with an intention to assist the *impecunious* client to seek the justice and set aside their interest in obtaining a professional fee. Hence, the contingency fee agreement should be enforceable in the case concerning an *impecunious* client.

In conclusion, there are two exceptions for the contingency fee under Singapore jurisdiction. First, the exception under the statutory law where it will be subject to the discretion of the Registrar (as the case may be), and another is an exception under the Supreme Court judgment where the Supreme Court views that the contingency fee agreement should be permissible in the case of an *impecunious* client as in this case it is proven that the lawyers shall need to prioritize the client's interest in seeking the justice over the entitlement of a professional fee as discussed above.

3.3 Germany

Germany is one of the European continental countries where it has developed its own legal system over hundreds of years. The very first German Civil Code (Bürgerliches Gesetzbuch – BGB) has entered into force on 1 January 1900. Such Civil Code governs the matter of the legal transaction as well. Although there is the Code of Conduct for European Lawyers, Germany has its national legislation to

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[100] *Kurubalan* (n 96), para 83.

regulates their lawyers as well, namely Federal Code for Lawyers (Bundesrechtsanwaltsordnung – BRAO) and Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz - RVG).

Since German position against the contingent fee shall follow the Code of Conduct for European Lawyers, the contingent fee shall therefore be recognized as *Pactum de Quota Litis* and be generally prohibited. Nonetheless, as earlier mentioned that Germany has its own national law concerning this matter as well. Thus, the direct perspective of Germany with respect to this issue, especially the exception for the contingency fee agreement will be discussed and address in this topic.

Differently from the two previous countries, the United Kingdom and Singapore, the legal system of Germany is Civil law. Hence, the German source of law shall be the statutory legislation. Hence, with the historical development of Germany legislation together with the similarity on the legal system with Thailand, by studying and analyzing the German legislation, it will provide an illustration for the jurisdiction that has generally prohibited the contingency fee agreement, but it has some exception which can be used as an example for Thailand.

3.3.1 Definition

Under the German law, there is no direct provision that provides the definition of the term "Contingent Fee", however, in the Federal Code for Lawyers (Bundesrechtsanwaltsordnung – BRAO) Section 49b (2) it provides a classification and explanations for types of remuneration for lawyers (in which include the matter of the contingent fee) as follows, [101]

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[101] Federal Code for Lawyers (Bundesrechtsanwaltsordnung – BRAO), s 49b(2) reads

"*Agreements on the basis of which remuneration or its amount is made dependent on the outcome of the case or the lawyer's success, or based on which a lawyer is paid part of the amount recovered (contingency fee) are not permissible unless otherwise provided under the Lawyers' Remuneration Act. Agreements on the basis of which a lawyer undertakes to bear the court fees, administrative fees or costs of other parties are only permissible where a contingency fee has been agreed in the*

(1) A remuneration that depends on the outcome of the case;
(2) A remuneration that depends on the lawyer's success; and
(3) A remuneration that is based on the adjudicated amount or payable by the recovery amount.

Under the above classification, only the remuneration in the item (3) is addressed as the contingency fee or it is known as *Quota litis (Streitanteilsvergütung)*.[102] This classification is also in compliance with the definition of *Pactum de Quota Litis* addressed in the Code of Conduct for European Lawyers where an agreement is described as an agreement that executed between the lawyer and client prior to finalization of the matter in disputed, and the client is obliged by such agreement to pay the lawyers share (monetary or other benefits) of the adjudicated amount. On a separate note, it is worth mentioning that under the Code of Conduct for European Lawyers, the *Pactum de Quota Litis* includes not only monetary reward but also any kind of benefits as well and it seems to provide broad explanation for the term *Pactum de Quota Litis*, although, an agreement that a legal fees is calculated and charged in proportion to the disputed value and in accordance with an officially approved fee scale or under the control of the Competent Authority shall not be included in the definition of *Pactum de Quota Litis*, and therefore shall not be regarded as a contingency fee agreement. [103]

Moreover, the Federal Code for Lawyers (BRAO) also provides further clarification that a contingency fee agreement shall not include an agreement where the lawyer and the client agreed to a fixed amount fee in which is to be increased without further conditions being imposed.[104]

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matter in accordance with section 4a (1) sentence 1 no. 2 of the Lawyers' Remuneration Act. A contingency fee within the meaning of sentence 1 does not exist where it has merely been agreed that the statutory fees are to be increased without further conditions being imposed."

[102] Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz - RVG), s 4a.

[103] Code of Conduct for European Lawyers, art 3.3

[104] BRAO (n 101).

Hence, under the German jurisdiction, the contingency fee agreement shall mean an agreement to which it allows the lawyers to receive a reward or benefits from the amount that the client may recover from the outcome of the case, and such reward that the attorney could receive from this kind of agreement shall be regarded as contingent fee regardless of whether such reward is a monetary reward or other kind of benefits. For the avoidance of doubt, an agreement to which the client undertake to pay a statutory success fee or uplift success fee upon specified conditions, but such success fee is not tied to the adjudicated amount shall not considered as contingency fee agreement and the said success fee will not be regarded as contingent fee.

Comparing to the previous jurisdictions, the definition of the contingent fee is similar to the definition of Singapore jurisdiction and the Damages-Based Agreement under the United Kingdom jurisdiction, while the conditional fee under the Singapore jurisdiction and the Normal Success Fee and the Uplift Success Fee of the United Kingdom will not be regarded as the contingent fee under the German jurisdiction.

To conclude this part, under the German jurisdiction, there is no specific definition for the term "Contingent Fee". However, from the Federal Code for Lawyers (BRAO) and the Code of Conduct for the European Lawyers, it is understandable that the contingent fee shall mean the monetary reward or other kind of benefit which the lawyer entitled to receive from the adjudicated amount or the recovery.

3.3.2 General Rule

The main principle for the general rule of the contingency fee agreement under the German jurisdiction is prescribed in the German Civil Code (Bürgerliches Gesetzbuch – BGB) Section 138. It states that:

"Section 138 Legal transaction offending common decency; usury

(1) A legal transaction that ***offends common decency is void****.*

(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment or considerable

weakness of will of another, causes a promise to be made to them or to a third party, in exchange for an act of performance, ***for pecuniary advantages*** *that are clearly disproportionate to the performance, or causes such pecuniary advantages to be granted."*

From the above Section, it can be clearly noticed that German jurisdiction prioritizes and aims to protect the common decency for the public as it lays down a general rule that the legal transaction which contradicts to the common decency is void. Other main reason for such prohibition is in order to prevent incompetency lawyers in providing bad service to the client by undercut other lawyers. Plus, by the prohibition of the contingency fee agreement, German lawyers shall not be influenced by undue incentives in attempt for winning the case at all costs regardless of whether such action is considered a crime such as witness tampering.[105]

Despite the fact that it is questionable whether what can be considered of the common decency pursuant to the German jurisdiction, for some transactions, without having any trouble for the debates, are clearly specified as a transaction that offences the common decency. It includes a transaction for monetary advantages which is a result of the exploitation of inexperience. In this regard, such concept can be analogized to the concept of the contingency fee agreement as the nature of the contingency fee agreement is an agreement where the client who has less experience in executing a legal transaction undertakes to pay a legal fee (monetary advantages) to a lawyer.

The abovementioned principle is confirmed in Judgment of Reichsgericht of 17 December 1926 (RGZ 115, 141, 142),[106] where the court stated that the contingency fee agreement in contrary to the common decency and is considered

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[105] Bernhard Schmeilzl, 'No Win No Fee Agreements are Void in Germany', Cross Channel Lawyer (Cross Channel Lawyer, 26 July 2016) <https://www.cross channellawyers.co.uk/no-win-no-fee-agreements-are-void-in-germany/> accessed on 20 March 2023.

[106] Ruiz (n 39) 25.

serious offences. Therefore, it is undisputable that, in general, the contingency fee agreement is void and considered a crime under the German jurisdiction.

In additional to the above, the German position against the contingency fee agreement is emphasized, in 1994, where the Federal Code for Lawyers (BRAO) Section 49b (2) was introduced to the German legal system and it clearly mentions that the contingency fee agreement is not permissible. In fact, not only the contingency fee agreement is impermissible, but the said provision extends the prohibition to any agreements which the remuneration is tied to the outcome of the case or the lawyers' success as well. In other word, pursuant to this provision, the German lawyers will not be able to enter into an agreement that provide any success fee, this is because a fee agreement where the client undertakes to pay a success provided that the case is successful (in which the lawyers' fee seems to have the lowest connection to the case's outcome compared to other types of the success fee) shall fall into the scope of the term "[*a]greements on the basis of which remuneration or its amount is made dependent on the outcome of the case*" as well.

Furthermore, in 2014, the German Federal Court of Justice highlighted such principle once again when the Courts ruled that a lawyer may commit a crime, i.e., fraud, it such lawyers fail to advise his or her client that there is more favorable fee scheme for the case. In this particular case, [107] the lawyer agreed to enter into a contingency fee agreement (pursuant to certain exceptions which will be discussed accordingly) in which differed from the statutory fee schedule. More importantly, such lawyer failed to advise the client that the fee pursuant to the statutory fee schedule will be lower than the fee under the executed contingency fee agreement. In this regard, the Federal Court of Justice found that the lawyer is obliged to advise such fact to the client but fail to do so, hence, the violation to such ethical code of conduct shall constitutes a crime under fraud offence pursuant to Section 263 of the Germany Criminal Code.[108]

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[107] Rechtsprechung BGH, 25.09.2014 - 4 StR 586/13.

[108] StGB, s 263(1) reads "*(1) Whoever, with the intention of obtaining an unlawful pecuniary benefit for themselves or a third party, damages the assets of another by*

Thereby, considering its intention to protect the common decency and public interest, it is understandable that even a normal conditional fee agreement is prohibited, therefore, the contingency agreement (in which not only the contingent to pay the fee is tied to the case outcome, but also its amount) should also be prohibited and shall be void pursuant to *argumentum a fortiori*.

In conclusion, under the German jurisdiction, the contingency fee agreement will, in general be prohibited. The prohibition shall include all types of the agreement that allow a lawyer to share part of the amount recovery or shall be entitled to receive any advantages either monetary or in any other form from the case's outcome.

3.3.3 Exception

As thoroughly discussed, the German jurisdiction prioritizes the interest of the public and the contingency fee agreement is strictly prohibited. However, there are some exceptions under the statutory laws where the German lawyers may enter into a contingency fee agreement. The exceptions are addressed in two German legislation, i.e., Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz - RVG); and (ii) Act on Out-of-Court Legal Services (Rechtsdienstleistungsgesetz – RDG). Below are the details of each exception.

3.3.3.1 Exception under Act on the Remuneration of Lawyers (RVG)

Under the Act on the Remuneration of Lawyers (RVG), the German lawyers shall have to meet all of the required conditions in execution of the contingency agreement. There are two steps in completing the exception for the contingency fee agreement under the German jurisdiction. The said to steps are discussed below.

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causing or maintaining an error under false pretenses or distorting or suppressing true facts incurs a penalty of imprisonment for a term not exceeding five years or a fine."

(1) Whether the lawsuit is eligible for the contingency fee agreement

Starting with the sub paragraph (1) of the Section 4a of the said act, it provides factors for an eligible lawsuit which can apply a contingency agreement. Firstly, the lawsuit in dispute must be an individual case, and secondly, the client's economic situation is a crucial barrier, under reasonable consideration, for the client in accessing the justice through the legal proceedings provided that the client could not enter into a contingency fee agreement. Hence, if both factors are not meet, such lawsuit shall not be eligible to apply the contingency fee agreement.

In short, the contingency fee agreement shall only be applied to individuals' cases who has difficulties in accessing to the justice because of his or her economic status.

(2) Requirements for the contingency fee agreement

In general, the requirements and conditions for the contingency fee is addressed in sub paragraph (2) of Section 4a, it requires the contingency fee agreement to contain the following.

(1) The estimate statutory remuneration, and the contractual remuneration that is not tied to the case's outcome in which the lawyer would be willing to accept, if relevant;

(2) Details of the conditions to which the remuneration is payable upon the completion of the said specification; and

(3) The reasons for the estimation of such contingent fee (*quota litis*)

It is required that the agreement shall have no influence on any court costs or administrative costs that the client may be required to meet, or on the costs of other participants that the client is required to reimburse.

In addition to the above, if the contingency fee agreement was to be entered for the in court proceedings, Section 4a (1) provides that the lawyer and the client may be enter into a fee agreement with the conditions that the lawyer shall be entitled to nothing provided that the case is failure, or they can agree that in

case of the failure, the lawyer shall be entitled to a lower fee than the statutory remuneration. And together with the said conditions, the parties to the fee agreement shall include a condition that an appropriate reward is to be paid on the statutory remuneration in case of success. Having considered all of the above required conditions, it is recommended that the contingency agreement is made in writing, notwithstanding the fact that no laws nor regulations requires the parties to make a contingency fee agreement in writing.

In summary, the details of the statutory remuneration and the specification where such remuneration is payable shall be addressed in the contingency fee agreement, moreover, the parties to the contingency fee agreement shall provide appropriate reasons for such estimation and shall make it clear on the objective of the contingency fee agreement that it has nothing related to any court costs or administrative costs.

3.3.3.2 Act on Out-of-Court Legal Services (RDG)

This exception is provided for remuneration agreements for collection services and legal services under foreign law. In other word, the German lawyers under this agreement does not provide legal services in relation to the court proceeding. Thus, it shall be noted that the nature of the legal services under this exception is not the practicing the law in court.

The Act on Out-of-Court Legal Services (RDG) Section 13c provides that for the collection services and legal services under foreign law, the contingency fee agreement shall be applicable to such services provided that the said contingency fee agreement includes the following:

(1) information on the amount of the remuneration;

(2) information concerning the conditions that must be completed in order to make the payment for the remuneration;

(3) information regarding the influence of the agreement to any court fees or administrative fees in which the client as a consumer may have to pay, or to the adverse parties' costs to be recovered by the client;

(4) the crucial reasons which are decisive when determining the contingency fee, especially on the lawyer as the collection service provider's effort together with the the possibility of having the costs for the collection service reimbursed by the obligor; and

(5) information regarding whether remuneration is payable in the event of early contract termination.

Furthermore, in 2021, the Legal Tech Debt Collection Act (Legal-Tech-Inkasso-Gesetz) has been issued for promoting the use of contingency fee agreement for the German lawyers in the area of collection service. In this regard, the maximum disputed amount which the lawyer may apply the contingency fee agreement is €2,000, and the lawyer shall be obliged to advise the client concerning the alternatives for enforcing their claims (apart from using the services of the lawyers) in order to ensure that the transparency and clarity of the collection services under the contingency fee agreement remains.[109]

3.4 France

France is recognized as one of the renowned countries for studying the laws, as France has developed its own legal system and has established a civil code or the so-called the Napoleon Code in since 1804. The legal system of France is Civil Law, similar to Germany and Thailand. Therefore, the main elements for the study of this matter shall be the statutory legislation.

Since France is one of the European continental countries, therefore the Code of Conduct for European Lawyers shall be recognized in France as well. For the issue of contingent fee, same as the continental countries, France prohibits the contingency fee agreement as it is considered as *Pactum de Quota Litis* pursuant to

[109] Unknown, 'Germany passes reform of lawyers' fees and litigation funding', (Pinsent Masons, 22 June 2021) < https://www.pinsentmasons.com/out-law/news/reform-erfolgshonorare-prozessfinanzierung> accessed on 29 March 2023.

the Code of Conduct for the European Lawyers and the French national regulation. However, France has its own general rules and exceptions concerning the application of the contingency fee agreements, such as the permission to apply contingency fee agreement in the international arbitration proceeding.

Thus, by studying the French laws and regulations, the other perspective of the general rules and exception against the concept of the contingency fee shall be discussed accordingly.

3.4.1 Definition

As earlier mentioned, the Code of Conduct for European Lawyers shall be applied to the French jurisdiction as well, therefore, the definition of the term "contingent fee" under the French jurisdiction shall following the explanation in such code of conduct. In this regard, France has adopted such definition as its internal legislation, i.e., the Article 11.3 and 21.3.3 of the National Internal Regulations of the legal profession (Règlement Intérieur National de la profession d'avocat - RIN) provides the same explanation for the term *pactum de quota litis*, expressly, a contingency fee agreement shall mean an agreement where a lawyer and a client agreed before the finalization of the matter that the lawyer shall share part of the recovery amount either in form of monetary reward or other kind of benefit.[110]

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[110] National Internal Regulations of the legal profession (RIN)

Article 11.3 Modes prohibés de rémunération

"Il est interdit à l'avocat de fixer ses honoraires par un pacte de quota litis.

Le pacte de quota litis est une convention passée entre l'avocat et son client avant décision judiciaire définitive, qui fixe exclusivement l'intégralité de ses honoraires en fonction du résultat judiciaire de l'affaire, que ces honoraires consistent en une somme d'argent ou en tout autre bien ou valeur.

L'avocat ne peut percevoir d'honoraires que de son client ou d'un mandataire de celui-ci.

La rémunération d'apports d'affaires est interdite."

Article 21.3.3 Pacte de quota litis

The nature of the definition under the French jurisdiction is similar to German and Singapore jurisdiction, to clarify, under theses jurisdictions the crucial element which makes a payment being regarded as contingent fee is that the lawyer must share part of the adjudicated amount or the amount recovery. A mere fact that the lawyer's fee is tied to the case outcome (i.e., winning or losing) is insufficient to make a contingency fee agreement, it is rather considered as a conditional fee only.

Therefore, it can be easily concluded that the contingency fee agreement under the French jurisdiction shall mean exactly the same as the Code of Conduct for the European Lawyers. In this regard, the elements which constitutes the contingency fee agreement of the so-called *pactum de quota liti* are listed below.

(1) There must be an agreement between a lawyer and a client;
(2) The abovementioned agreement shall be entered into between the parties prior to the conclusion of the matter;
(3) The client undertakes to pay the lawyer a share of the results of the case pursuant to such agreement;
(4) Such payment shall be in any form such as monetary reward or other kind of benefits; and
(5) The payment is payable upon the conclusion of the matter.

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*"**21.3.3.1** L'avocat ne peut pas fixer ses honoraires sur la base d'un pacte « de quota litis ».*

***21.3.3.2** Le pacte « de quota litis » est une convention passée entre l'avocat et son client, avant la conclusion définitive d'une affaire intéressant ce client, par laquelle le client s'engage à verser à l'avocat une part du résultat de l'affaire, que celle-ci consiste en une somme d'argent ou en tout autre bien ou valeur.*

***21.3.3.3** Ne constitue pas un tel pacte la convention qui prévoit la détermination de l'honoraire en fonction de la valeur du litige dont est chargé l'avocat si celle-ci est conforme à un tarif officiel ou si elle est autorisée par l'autorité compétente dont dépend l'avocat."*

As result from the above, if an agreement between the attorney and the client meets all of the abovementioned requirements and conditions, it shall be regarded as *pactum de quota litis* where it shall be prohibited and unenforceable.

3.4.2 General Rule

Under the French jurisdiction, the general rules against the contingency fee agreement are well-established that the contingency fee agreement is prohibited. Apart from the Code of Conduct for European Lawyers, France has also adopted such principle into its national statutory laws, namely Law No. 71-1130 of 31 December 1971 reforming certain judicial and legal professions and the National Internal Regulations of the legal profession.

For the Law No. 71-1130 of 31 December 1971, Section 10 of the said laws prohibits any fixing of fees that would only be fixed according to the judicial result. This concept is recognized as the "full contingent fee prohibition". Regarding the National Internal Regulations of the legal profession Article 21.3.3.1, it also stipulates that the lawyer cannot set his fees on the basis of a "*quota litis*".

Hence, to elaborate the abovementioned principle, the French lawyers shall be prohibited from entering into an agreement that his or her remuneration solely depend on the outcome of the case. In this regard, the provisions do not specify that the fixing of fees shall mean only the fixed fee amount, or it shall include a determining of a legal fee as a percentage of the adjudicated amount as well. Nonetheless, from the author's point of view, it is understandable that by the term "fixing of fees" shall include both fixed fee and percentage-based fee. Since the result of the determination of a legal fee as a percentage-based fee is the net amount of legal fee which the lawyers will be entitled to receive. Therefore, such determination shall fall into the meaning of the "fixing of fees" under the law No. 71-1130 of 31 December 1971 Section 10. Furthermore, as the determination of the legal fee as a percentage of the adjudicated amount is included in the term *quota litis* pursuant to the National Internal Regulations of the legal profession Article 21.3.3.1 adopts the concept of the. Thus, it is settled that such determination is prohibited under the French jurisdiction.

Moreover, it must be noted that under the concept of the full contingent fee, “no win, no fee” agreement shall be prohibited as well because the “no win, no fee” agreement is an agreement where a lawyer shall receive his or her legal fee only the case is successful, the fixed legal fee in this case is therefore solely depends on the case outcome. So, when the Section 10 of the law No. 71-1130 of 31 December 1971 only provided that the fixing of fee that is fixed in accordance with the judicial result (case outcome) shall be prohibited, not the adjudicated amount, the concept of “no win, no fee” shall be included under the said concept as well.

To summarize this part, the contingency fee agreement is generally prohibited provided that such prohibition shall include only the full contingent fee agreement where the amount of the legal fee that a lawyer is entitled to receive is solely depended on and tied to the case outcome.

3.4.3 Exception

Under the French jurisdiction, it provides some limited exception for the French lawyers to entered into the contingency fee agreement. The first exception is stated in the law No. 71-1130 of 31 December 1971 itself under the concept of the “partial contingent fee agreement”, and another exception is the use of the contingency fee agreement for the international arbitration proceeding. Details of each exception are discussed below.

3.4.3.1 Exception under the concept of the "partial contingent fee"

As discussed in the preceding topic that the general rule concerning the prohibition of the contingency fee agreement under French jurisdiction is recognized as the “full contingent fee prohibition”. In this regard, the Section 10 of the law No. 71-1130 of 31 December 1971 stipulates an exception for contingency fee that a contingency fee agreement shall be lawful provided that the agreement only determining an additional fee in accordance with the result obtained or the service rendered.

To elaborate, in order to make the contingency fee agreement lawful and enforceable under the French jurisdiction, such agreement shall meet the following requirements and conditions.

(1) The lawyer and the client must have a fee arrangement concerning the normal remuneration; and

(2) The lawyer and the client further agree that the client undertakes to pay additional remuneration in addition to the above said remuneration provided that the specification agreed between the parties is completed.

Hence, this concept of exception is similar to the Uplift Success Fee under the United Kingdom jurisdiction where the lawyer shall receive its normal legal fee notwithstanding the outcome of the case. And the lawyer shall be entitled to the Uplift Success Fee upon the completion of the agreed conditions. Under this exception, the remuneration shall not solely depend on the outcome of the case, this is because the lawyer shall be entitled to the normal remuneration regardless of the judicial result of the case.

In summary, the exception for the French lawyers in entering into the contingency fee agreement is recognized under the concept of the "partial contingent fee" where a lawyer shall be entitled to receive its normal remuneration as agreed and another success fee (additional remuneration) provided that the conditions and specifications are complete and such remuneration is payable as agreed.

3.4.3.1 Exception for the international arbitration

Regarding this exception, it is provided by the Paris Court of Appeal where it was held that the lawyer and the client can agree to use a contingency fee agreement in the international arbitration proceeding. The reason behind this exception is the Paris Court of Appeal viewed that entering into the contingency fee agreement for international arbitration does not contradict to the French definition of international public policy.[111]

Furthermore, in 2017, The National Council of the French Bars has issued a status report concerning the development of the contingency fee

[111] Paris Court of Appeal (1er Ch B), 10 July 1992, D 1992, 459.

agreement and the possible end of the prohibition of the contingency fee agreement.[112]

In conclusion, the French lawyer could enter into the contingency fee agreement for the international arbitration proceeding. This is because the French Court was of the view that such agreement is not considered as a contradiction to the definition of the international public policy.

As a conclusion for this Chapter, the definition of the Contingent fee, including the general rules and exception applicable to the contingency agreement, in each foreign jurisdiction were thoroughly discussed. It could be evidently noticed that there are several differences across the jurisdictions. Nonetheless, even each jurisdiction has its own reason behind its legislation and concept of the contingent fee, they are all related to weighting between the public interest and interest of an individuals, namely a client. In the next Chapter, the legal concept of each jurisdiction will be analyzed by comparing to Thai laws and considering current Thai Society. Hence, both Theoretical and Practical aspect of the Contingent Fee concept will be mentioned and discussed.

[112] Resolution of the National Council of the French Bars dated 6-7 October 2017

CHAPTER 4
RESULTS AND DISCUSSION

Given that the general perspective on contingent fee was discussed in detail in Chapter 2, in which the authors has raised three major debates concerning the contingent fee, i.e., (i) What is the true meaning of the term “Contingent Fee”? (ii) How should the concept of the contingent fee be treated? And What is the exception of such concept. Subsequently, the said debates were intensively studied from the foreign jurisdictions in Chapter 3.

For this chapter, the author would focus on the analysis of the said debates, and the perspective against the contingent fee in each jurisdiction will be comparatively analyzed with current Thai position in order to provide an appropriate answer to the raised debates. Therefore, this chapter would start with the analysis of the theoretical aspect where the definition, general rules and exception of the contingent fee in Thailand are discussed, followed by the problems and concerns which may arise from the academic point of view. Thereafter, an appropriate means for determining a contingent fee is mentioned. Subsequently, the chapter is concluded by the author’s recommendations.

4.1 Theoretical Aspect

As the concept of contingent fee, including laws and regulations of Thailand and foreign jurisdictions, were explained and discussed in depth. Therefore, in this topic, the author attempts to resolve and provide an answer to the abovementioned debates concerning contingent fee based on the current Thai legislation and relevant authorities, i.e., judgment of the Thai Supreme Court.

4.1.1 Definition of "Contingent Fee"

In Thailand, as a civil law country, there is no direct laws or regulations that provides a definition of the term “contingent fee”, even though it was

evidently prohibited under the Lawyer Act B.E. 2457 (1914) and the Lawyer Act B.E. 2477 (1934). This is because both acts only stipulated that an attorney is prohibited from entering into a contract which allows the attorney to share part of money or any property that is recoverable by the client.

In light of this, if the said sections were not eliminated, it will be easily for Thai jurisdiction to conclude that only a fee agreement where an attorney entitles to a success fee upon contingent will be considered as a contingency fee agreement provided that such success fee is tied to the adjudicated amount that a client could recover. In other words, the amount of fee that the attorney will be entitled to receive will depend on, not only the case result (winning or losing the case), but also the amount that the client could recover from winning such case. Hence, should the lawsuit be successful, but the client could not be able to enforce a judgment against a losing party, and could not recover any monetary compensation or properties from the losing party, the attorney will not receive any legal fee in return. Nevertheless, as learnt that the Lawyer Act B.E. 2457 (1914) and the Lawyer Act B.E. 2477 (1934) were repealed, and now the Thailand Lawyer Ac B.E. 2528 (1985) with its amendments, including the Regulations of Lawyer Council (of Thailand) regarding the ethic of lawyers B.E. 2529 (1986), are the current version of the laws concerning the contingent fee. Hence, the definition of contingent fee should be discussed based on these laws and regulations, although, there is no direct provision that provides an appropriate explanation for the term “contingent fee”.

Considering the decisions of the Supreme Court, it appears that the Supreme Court does not provide any guidelines for determining or classifying the types of legal fee structure as well. On the contrary, the Supreme Court seems to focus on the nature of a fee agreement in question whether it allows an attorney to share some interest from the lawsuit he or she represents or not. This is because, unlike the United Kingdom and Singapore, a conditional fee agreement and a contingent fee agreement has not yet been completely separated under the Thai Supreme Court’s perspective. The Thai Supreme Court only emphasizes that a lawyer who is considered as court’s clerk shall act in compliance with the ethics for lawyer and shall not enter into a contract that allows he or she to directly share an interest in a manner that it may

affect his or her duty, according to the decision of the Thai Supreme Court No. 1260/2543 (convention), and such principle is taken as precedent for other judgments.

Having studied the laws and regulations of other foreign jurisdiction, the author agrees with the United Kingdom and Singapore position on this matter. To elaborate, the author views that in order to properly define the term "contingent fee", it should be noted that a conditional fee and a contingent fee is a two separate matters, although, it shares some common elements, i.e., either a fee agreement is a conditional fee or a contingent fee, a lawyer shall receive a legal profession fee upon some contingent (which is a successful of the lawsuit). Thereby, when interpreting such concept with Thai legislations, the author is of the opinion that a contract shall be classify as a contingency fee agreement provided that such contract have all of the following requirements:

a. There must be an agreement between a client and an attorney;
b. The attorney shall receive legal professional fee upon some contingent;
c. The contract shall be a contract for providing a legal service in the court of laws; and
d. The professional fee receivable under the contract shall be tied to an adjudicated amount or net amount that the client could recover from a losing party.

Resulting from the above, the money that an attorney is entitled to receive upon winning a lawsuit and the amount of such money shall be tied to an awarded amount shall be classified as "contingent fee". On the contrary, even if a contract between a client and an attorney has a "no win, no fee" condition, but a fee receivable under the said contract is a fixed fee or calculated based on a dispute amount, from the author's point of view, such contract will be classified as a conditional fee agreement instead. This is because a conditional fee agreement has only the first three (out of four) elements listed above. Hence, it should not be considered as a contingency fee agreement.

Additionally, it appears to the author that a conditional fee agreement has two major differences compared to a contingency fee agreement.

Firstly, under a conditional fee agreement, the amount of a success fee receivable is settled, notwithstanding the means of fee determination, meaning that a client and an attorney shall know the exact amount of potential success fee in advance. On the other hand, under a contingency fee agreement, a client and an attorney shall not be disclosed of the exact amount of a success fee as the amount will solely depend on an adjudicated amount or net amount recoverable from a losing party. As for another difference, the author views that a conditional fee agreement only allows an attorney to share some interests upon the overall result of the case, expressly winning or losing, but a contingency fee agreement allows an attorney to directly share his or her interest with the client's properties recoverable under the lawsuit. Thus, a contingency fee agreement shall significantly create more incentive for an attorney in trying to win the case, compared to a conditional fee agreement, as the more the client receive, the more the success fee. Thereby, the author agrees with the United Kingdom and Singapore position, rather than Germany and France position, that a conditional fee agreement and contingency fee agreement should be separately classified.

To conclude this part, the author proposes that the following is an appropriate definition for the terms "contingency fee agreement" and "contingent fee".

"Contingency Fee Agreement" shall mean a contract where an attorney agrees to represent a client in a court proceeding, and the client agrees to pay a legal fee in return, provided that the lawsuit is successful or favorable settled for the client's interest. And such receivable legal fee shall be calculated based on an adjudicated amount or a net amount that a client could recover from the lawsuit, as the case may be.

"Contingent fee" shall mean an amount of money or properties which is receivable under the Contingency Fee Agreement.

With the above definition, the issue of uncertainty with the true meaning of the term "contingent fee" will be resolved. Plus, it will be more explicit for both a client and an attorney to understand that their contract is considered a contingency fee agreement or not.

4.1.2 General Rule for "Contingent Fee"

Despite the fact that current Thai laws and regulations are silent on this matter, it evidently appears that the effect of the contingent fee has been discussed in Thai legal system, in which it seems that a contingency fee agreement seems to be prohibited as it contradicts to Thai public police and good moral, hence, it shall be nulled and void pursuant to Section 150 of the Thai Civil and Commercial Code.

In light of this, by thoroughly considering the position of foreign jurisdiction against this matter in Chapter 3, it could not be unanimously concluded whether a contingency fee agreement should generally be allowed or prohibited. Nonetheless, taking into account of the advantages and disadvantages of the contingency fee agreement, previously mentioned in topic 2.3.3.1, together with the study of foreign law, the author is of the opinion that the concept of contingency fee agreement should be recognized and enforceable under the Thai legal system. If the contingency fee agreement is allowed, it will clearly provide numbers of advantages to every related party, including the Thai society as well. To illustrate, a contingency fee agreement will be used as a legal mechanism for assisting a client in accessing justice and judicial system. The economic barrier where an attorney usually requests for an advance payment will be eliminated implicitly. In addition to the said advantages, by the nature of a contingency fee agreement, an attorney shall be the one who bears the risk of losing since a client is required to pay noting, unless the case is successful. Thus, an individual, especially those who have an inferior economic status compared to a counterparty, will be encouraged to pursue the case in court as he or she will have nothing to lose even though he or she losses the case.

Furthermore, the author concurs that an attorney who enters into a contingency fee agreement would be likely to essentially have more incentive to present the case with his or her best effort, as now the attorney’s interest is already connected to the client’s interest, i.e., the higher the adjudicated amount or the net recoverable amount, the higher the legal professional fee. Among other things, since the attorney shall be the one who preliminary bears the cost of the proceeding, and such cost will be reimbursed or compensated after the case is successful, hence, the

attorney will surely work with their best effort in order to receive a contingent fee in return.

On the contrary, the author has different views on the disadvantages of the contingency fee agreement. To demonstrate, for the arguments where it is arguable whether the contingency fee agreement will create a situation where an attorney may have to choose between a client's interest and the attorney's interest, e.g., a case where there is a poor earlier settlement from the counterparty, the author views that such scenario rarely happens. This is because if it is considered as a poor settlement, the contingent fee that the attorney shall be entitled to receive will be lower. In other words, the author believes that it is a very exceptional case where a proposed settlement is considered a poor settlement from the client's perspective, but it is considered a good settlement for the attorney, considering the contingent fee he or she may secure. On the other hand, the author further views that this kind of scenario, a scenario where the legal fee may not be considered as a reasonable fee, could be simply prevented by adding another clause to either: (i) enable the client and the attorney to further negotiate on the legal fee in case of settlement; or (ii) specify another mean of fee calculation or another rate of fee. Therefore, the author views that this argument should not be a reason for prohibiting the use of a contingency fee agreement.

Moreover, for another argument where the nature of a contingency fee agreement shifts a risk of loss to an attorney, hence, the attorney may decide not to accept the case in which could be considered as a restriction for individual in accessing to justice and judicial system. Nevertheless, the author views that it should be considered as one legal mechanism in screening a frivolous lawsuit by an attorney instead, i.e., if a case does not have a solid ground which it has low chance of success, on one hand it could mean that such lawsuit is groundless and should not be submitted to the court. With the application of the contingency fee agreement, an attorney would be a key player who helps stopping the frivolous lawsuit, as the attorney would surely not support and pursue a case that he or she might have a very low chance to receive a contingent fee.

Furthermore, the author believes that it would be better for the Thai society if a contingency fee agreement (in which it has been used between a client and an attorney without any supervision from a competent authority) is duly regulated by a statutory law or legislation. This is because since it is undisputed that a contingency fee agreement could create and provide benefits to every related party, plus, almost every debate of disadvantages of contingency fee agreement could be prevented by several means and legal mechanisms as discussed above, hence, by bringing the concept of contingency fee agreement to the competent authority's supervision, the interest of a client and Thai society will unquestionably be more protected.

On the contrary, the authors views that the position of Singapore, Germany, or France in this matter, i.e., generally prohibits a contingency fee agreement will significantly decrease potential advantages that the Thai society, a client, and an attorney could be able to access and receive from enforcing the contingency fee agreement. With this approach, a contingency fee agreement may not be able to serve its purpose, up to the maximum, in assisting individuals access to justice and judicial system.

It is worth noting that even though, the author mainly discusses on the application and enforceability of contingency fee agreement, and the contingent fee in this thesis shall refer to only receivable legal fee upon the successful of the case, provided that such legal fee is calculated based on an adjudicated amount or a net amount that a client receives from the enforcement of the judgment. But it does not mean that a conditional fee agreement should not be allowed or unenforceable, in fact, the author is of the opinion that a conditional fee agreement should be enforceable as well. Having studied the nature of both types of fee agreement, a conditional fee agreement, in the author's opinion, seems to have less exposure in creating disadvantages to related parties. This is because, a conditional fee agreement only binds a client to pay legal fee provided that the case is successful, regardless of the adjudicated amount or net recovery. Thus, should a contingency fee agreement, in which allows an attorney to share his or her interest from an adjudicated amount

or net recovery, is enforceable, a conditional fee should therefore be enforceable as well, pursuant to *argumentum a fortiori*.[113]

Resulting from the above, the author suggests that the contingency fee agreement should generally be allowed and enforceable since a contingency fee agreement could be considered a key to judicial system for individuals.

However, since this matter is unclear because there is no statutory law or legislation directly prohibits a contingency fee agreement, but there is no statutory law or legislation that clearly states that the contingency fee agreement is enforceable as well. Therefore, the author views that it will be more appropriate to have a specific legislation governing the issues of contingency fee agreement, especially on the following issues: (i) form of contingency fee agreement; (ii) maximum rate of contingent fee; and (iii) requirements and conditions for executing the contingency fee agreement.

With the abovementioned approach and suggestion, it is believed that the interest of the client and Thai society will be protected to a certain level, moreover, the relevant parties shall have a clearer guideline in drafting and executing the contingency fee agreement. When there is a dispute arising out of the legally binding contingency fee agreement, the court's discretion would be limited to such statutory laws or legislations, meaning that the discrepancies of judgments will automatically be reduced as well.

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[113] The author notes that even though a conditional fee agreement should be allowed, it shall be separately regulated from contingency fee agreement. The reason is that a conditional fee agreement is an ordinary hire of work contract with a conditional clause only. In other words, the provision concerning hire of work and juristic act under Thai laws, namely the Civil and Commercial Code, should be able to apply. Unlike a contingency fee agreement whereby its nature significantly affects the duties of an attorney, plus it allows an attorney to have a direct interest with a lawsuit and the client's interest. Hence, from the author's perspective, these two matters should be separately regulated in order to maximize the potential benefits to the utmost level of each type of fee agreement.

4.1.3 Exception for "Contingent Fee"

As thoroughly discussed in the previous topic, the contingency fee agreement should, in general, be valid and enforceable under the author's perspective. Thus, it must be noted that the contingency fee agreement should be able to be used with any type of lawsuit. However, as the contingent fee must always be tied to an adjudicated amount or a net recovery, a client and an attorney may not be able to use a contingency fee agreement with some types of lawsuits. Additionally, the nature of a dispute of some lawsuits may involve sensitive or personal issues which an attorney's interest should not be linked or connected to the interest of the client, thereby, a contingency fee agreement should not be used with this kind of lawsuit as well.

To elaborate, the author views that a contingency fee agreement should not be used in the following lawsuits.

1) Criminal lawsuit

As previously mentioned, in order to calculate a contingent fee, there must be a monetary award or any properties in which a client as a winning party is entitled to receive from the success of the lawsuit. Therefore, when the matter in question is a criminal case, there will be no monetary award for the winning party, as the result of the criminal case is whether the defendant is found guilty or not guilty. Hence, there will be no adjudicated amount or net recovery to be used as a base for calculating the legal fee, therefore, a contingency fee agreement could not be enforceable.

2) Family lawsuit

In light of the family lawsuit, the author is of the opinion that it would be inappropriate to use a contingency fee agreement in family lawsuit by the reason that, in case of a contingency fee agreement, an attorney's interest would be tied to a client interest in case. Nonetheless, in a family lawsuit, the interest of the client will not be limited to only compensation or monetary award, but some sensitive and personal issues could be involved in this kind of case as well, such as an issue of child custody. Given that the interest of the client in a family lawsuit is not a common interest, unlike an ordinary commercial lawsuit where it includes only monetary

compensation, the concept of contingency fee agreement shall not be able to use in family lawsuit. The same approach appears in the Courts and Legal Services Act 1990 of United Kingdom where a Damages-Based Agreement shall not be used in a family proceeding as well.

3) Bankruptcy and Rehabilitation lawsuit

The author is of the view that a contingency fee agreement shall not be used in a bankruptcy and rehabilitation lawsuit due to the same reason as the criminal lawsuit. Expressly, the main purpose of bankruptcy and rehabilitation lawsuit is to deal with a gross amount of the debtor's debt, therefore, the case result will usually be whether the debtor is declared bankruptcy, or such debtor would enter into a rehabilitation proceeding or not. Thus, generally, there will be no adjudicated amount or net recovery for the winning party.[114]

Apart from the mentioned three types of lawsuits, the author views that a contingency fee agreement can generally be used. Thus, it could be said that, from the author's perspective, a criminal lawsuit, a family lawsuit, and a bankruptcy and rehabilitation lawsuit are an exception of this matter, and the contingency fee agreement shall be unenforceable and considered invalid if it is used in these lawsuits.[115]

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[114] Nonetheless, it must be noted that for the process of filing a debt repayment application, including the process of appealing a official receiver's order to the Bankruptcy court, the author view that even though the aforesaid process may involve determination of a net debt amount of a creditor, however, the main purpose of such cases is not a lawsuit where a creditor tries to demand a compensation or any properties from a debtor (as the repayment process shall be handled separately), rather such lawsuit is brought to the court in order to clarify the right to debt repayment of a creditor. Thus, with this special purpose, the author views that a contingency fee agreement will not be able to use in any kind of lawsuit in relation to Bankruptcy proceeding.

[115] The author would like to further note that the author does not agree with the United Kingdom position in which a contingency fee agreement is prohibited in labor

Lastly, as discussed Chapter in 4.1.2 that there should be statutory laws or regulation that governs and regulates the matter of a contingency fee agreement, including requirements and conditions for the enforceability of a contingency fee agreement as well. Hence, those requirements and conditions could be considered as a restriction for a contingency fee agreement, meaning that if requirements and conditions are not met, the general rules against the contingency fee agreement, i.e., enforceable and valid, shall not be applied to such particular agreement, it rather be considered as invalid instead.

4.1.4 Problems and Concerns

Having discussed all the major issues concerning the concept of the contingent fee, i.e., the definition of the term "contingent fee", general rules and exception of the contingent fee. The author is of the view that there might be some problem against the concept of contingent fee.

To illustrate, the author views that a contingency fee agreement should be enforceable as there are no direct laws or regulations that prohibits the enforcement of contingency fee agreement. Furthermore, since a contingency fee agreement is an ordinary agreement between private parties where its enforceability is not contradicted to any statutory law, thus it should not be considered invalid according to Section 151 of the Civil and Commercial Code. However, except for the recent decision of the Supreme Court No. 5162/2563, as the Thai Supreme Court has a long-standing precedent that the nature of a contingency fee agreement is contradicted to the public policy and good moral, e.g., the decision of the Supreme Court No. 1584/2555.

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lawsuit. Particularly for Thai jurisdiction, as most cases in Thai Central Labor Court is a case where individuals submit a lawsuit against their former employer, demanding for either severance pay or compensation arising from unfair termination. Thus, the author views that if a contingency fee agreement could be used in a labor lawsuit, it will be considered as a great legal mechanism assistance for those labor who already suffered from losing their job.

Resulting that, even though the author finds that a contingency fee agreement should not generally be considered invalid, it still be prohibited and unenforceable under the Supreme Court perspective. Thereby, during the period that there is no statutory law concerning the contingency fee agreement, a future decision of the Supreme Court may overrule the decision of the Supreme Court No. 5162/2563 and confirm the long-established precedent once again that a concept of a contingency fee agreement is contradict to public policy and shall be nulled and void pursuant to the Civil and Commercial Code Section 150.

4.2 Practical Aspect

For the analysis of practical aspect, first, the author would like to highlight that individuals and an attorney are likely to understand the basic concept of a contingency fee agreement. Additionally, as mentioned that a contingency fee agreement is an agreement between private parties, therefore, the party autonomy in negotiating and executing such contract such be recognized and enforceable as long as it does not directly contradict to laws or legislation. However, as an attorney shall have more experience in execution of a legal service agreement comparing to a client, and it is one of professions that works in a judicial system, hence, the legal profession is regulated several laws and regulations, e.g., Penal Code, Lawyers Act, and Regulation of the Lawyers Council etc.

Therefore, in the matter of a contingency fee agreement, it should have some restriction in order to regulate and provide a good practice guideline for an attorney in executing a contingency fee as well. In this topic, the author would focus on an appropriate means for the determination of a contingent fee in practice.

4.2.1 Appropriate means of determining a contingent fee

In light of the determination of percentage for contingent fee, the author views that since an attorney himself or herself should not be the one who wish to initiate a lawsuit against counterparty, otherwise it will be considered as a violation

of the lawyer's ethic.[116] Therefore, the client should be entitled to receive most part of the adjudicated amount of the net recovery, as the right to demand damages or compensation originally belong to client.

Considering the percentage of foreign jurisdiction, under the concept of the Damages-Based Agreement of United Kingdom, the fee in personal injury claim can be up to 25 percent of the money recovery from the losing party, while in other matter it can be up to 50 percent, except for the employment claim where the fee payable to an attorney is limited to around 35 percent of the net recovery.[117] In light of this, Thailand seems to set a standard percentage around 30 percent as well, since the Civil Procedure Code on the class action Section 222/37 allows a class's lawyer to receive a contingent fee at the maximum rate of 30 percent of the adjudicated amount.

Resulting from the above, the author is of the view that the maximum percentage that an attorney can recover in fee from the adjudicated amount of the net recovery is around 30 to 35 percentage in which could be deemed appropriate considering the duties and all risks that the attorney shall bear by entering into the contingency fee agreement. Additionally, with this approach, 65 to 70 percent of the adjudicated amount or the net recovery would surely be recovered by the client.[118] Thereby, the author concludes that the maximum percentage of a contingent fee that payable to an attorney should not exceed 35 percent as mentioned above.

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[116] Lawyer Council Regulations on Lawyers' Ethics BE 2529, s 9.

[117] Unknown, 'Conditional fee agreements and damages based agreements' (OUT-LAW GUIDE, 3 February 2023) https://www.pinsentmasons.com/out-law/guides/conditional-fee-agreements accessed on 30 June 2023.

[118] The author notes that the money that a client uses for settling a contingent fee does not need to be the exact money that recovered from the lawsuit. For the avoidance of doubt, if an attorney is entitled to a contingent fee in the amount of THB 500,000 (which equivalent to 10% of the adjudicated amount), the client may pay such contingent fee to the attorney immediately after the client knows the case result without a necessity to wait for a recovery of the adjudicated amount.

4.2.2 Problems and Concerns

The author views that, with a clear legislation and guideline for an attorney, the contingency fee agreement will be correctly used in order to achieve its best purposes, although, in some certain case there might be problems and concerns that could occurs from the used to contingency fee agreement as well.

To elaborate, an agreement to provide a legal service between a client and an attorney shall be considered as a consumer agreement,[119] whereby the attorney is considered as a service provider in this scenario. Thus, it is possible that a client who really needs to use the legal services from an attorney may not have any knowledge or experience in a legal service agreement, meaning that he or she may have known that how the fee structure for a legal service usually works, or there are several types of fee structure, e.g., fixed fee, capped fee, or hourly rate basis fee etc. Hence, if there are no clear regulations on this matter, an attorney may, with bad faith, exercise his or her influence on an innocent client in order to induce or persuade the client to enter into an unfair contingency fee agreement. For instance, the attorney advises the client that the lawsuit in dispute is very complex, and the damage occurred may escalate to a certain level, but in fact it is simple dispute, the attorney therefore proposes to enter into a contingency fee agreement with a very high percentage of contingent fee.

In this regard, the author is of the view that, during the period that there is no specific regulation for this matter, the Unfair Contract Term Act B.E. 2540 (1997) may be applied to abovementioned scenario. Since the contingency fee agreement is a consumer agreement as well, thus, if a percentage for the fee calculation is excessively higher, when such contingency fee agreement is brought to the court's consideration, the court may use its discretion to decrease such percentage due to the fact that the unreasonable excessive percentage agreed under the disputed contingency fee agreement provides advantages to an attorney over the client, and it

[119] Ruling of the President of the Appellate Court No 145/2551.

should be considered an unfair contract term and shall be enforceable only insofar as it is fair and reasonable in a particular case. [120]

Nevertheless, as the aforesaid approach allows the court to solely use its discretion to decrease and determine an appropriate rate for contingent fee. Therefore, it is possible that there will be discrepancies between court judgments as usual, in which it may cause a confusion for the practice, i.e., which court judgment should be taken as a precedent for future use of contingency fee agreement.

4.3 Recommendations

Having discussed the concept of contingency fee agreement in dept throughout previous topics, the author avers that nowadays there is no statutory laws or legislation that prohibits the used contingency fee agreement and is of the opinion that a contingency fee agreement should be valid and enforceable as it does not contradict to any laws related to public policy, pursuant to Civil and Commercial Code Section 151. Therefore, the author preliminary views that the contingency fee agreement only needs some regulations to be used as a guidance for the preparation of a contingency fee agreement.

However, as most of the Supreme Court decision prohibits the used of contingency fee agreement, since its nature allows an attorney to share a direct interest with the lawsuit in which is contradict to public policy and shall be nulled and void according to Civil and Commercial Code Section 150.

Therefore, the author recommends that there should be an amendment of the current the Lawyer Act B.E. 2528 (1985). This is because if there is no clear

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[120] Unfair Contract Term Act B.E. 2540, s 4 reads "*A term in a contract as between a consumer and a trader or a professional or in a standard-form contract or in a sale with the right of redemption which renders the trader or professional or the party who prepare the standard form contract or the buyer to have an unreasonably excessive advantage over the other party is an unfair contract term and shall be enforceable only insofar as it is fair and reasonable in a particular case*."

statutory law allows the use of contingency fee agreement, the court may continue to use its discretion and interpretation to rule that a contingency fee agreement is contradicted to public policy and shall be nulled and void. On the contrary, if there is a legislation in the level of act, the debate whether the contingency fee agreement is allowed or prohibited would come to an end.

As a result, the author opines that it is necessary to issue a specific regulation for this matter. This proposal is in compliance with the Constitution of Thailand where it provides that the State should introduce laws only to the extent of necessity.[121] The states may introduce a law concerning the legal fee rate in general, which could other types of fee structures, such as a conditional fee agreement, to the amendment as well. Hence, Thailand would have a clear and solid position against the legal fee matter.

The United Kingdom position could be used as an example for this matter. To elaborate, the Courts and Legal Services Act 1990 specifically stipulates the condition and requirements for the Damages-Based Agreement (similar concept to the contingency fee agreement). With such position, should a client and an attorney wish to enter into a Damages-Based Agreement, they could easily follow all of the requirements and conditions addressed in the said Act. Additionally, if there was to be a dispute arising out of the Damages-Based Agreement, it will be clearer for the court in considering and deciding the case, provided that there is already statutory law governs and regulates this matter. As a result, the author recommends the following issues to be add to the Lawyer Act B.E. 2528 (1985) Act.

1) the definition of the term “contingency agreement” and “contingent fee” (please see proposed definition in topic 4.1.1)
2) a provision that directly allow the use of contingency fee agreement.
3) requirements and conditions in execution of a contingency fee agreement, especially on the following issues: (i) form; (ii) time period for entering to a contingency fee agreement; and (iii) maximum percentage of a contingent fee that recoverable.

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[121] Constitutional of the Kingdom of Thailand, s 77.

4) exception of the prohibition of the used of contingency fee agreement.

In light of this, particularly for the use of contingency fee agreement, the author proposes to add the following provision into the Lawyer Act B.E. 2528 (1985).

"*Section ..... Pursuant to paragraph two of this section, a contingency fee agreement shall be made in writing between the contractual parties. And it shall be made and duly executed before the court has rendered its judgment or before the recovery of monies receivable from the lawsuit (as the case may be), otherwise, it shall be nulled and void.*

A contingency fee agreement shall satisfy the following requirements and conditions:

(1) The attorney shall advise the client of alternative methods of funding their claims before the execution of the contingency fee agreement.

(2) The maximum percentage of recoverable contingent fee shall not be higher than 35 percent of the adjudicated amount or the net recovery.

(3) The contingency fee agreement shall specifically address whether the recoverable contingent fee is inclusive of other expense or not.

The contingency fee agreement shall be unenforceable in the following cases:

(1) If the contingency fee agreement were executed by the undue inducement of the attorney.

(2) If the lawsuit related to a contingency fee agreement is a criminal lawsuit, family lawsuit, and bankruptcy lawsuit.

(3) If the lawsuit related to a contingency fee agreement is initiated by the instigation of the attorney who will receive a contingent fee from the relevant contingency fee agreement.

(4) Other cases as stipulated in the regulation."

In addition to the above, Lawyers Council as a regulator for legal profession may also issues a guidance, as a soft law, in order to provide and set standard for

determining the appropriate percentage for the contingent fee. Hence, a client as a consumer shall have some guidance for entering and executing a contingency fee agreement.

4.4 Summary

The contingency fee agreement shall mean a legal service agreement where the legal fee under such contract is payable upon contingent, in which the receivable legal fee shall be calculated based on an adjudicated amount or a net amount that a client could recover from the lawsuit. Even though, there is no statutory law directly prohibits the use of contingency fee agreement, however, if the contingency fee agreement could be generally used without any regulations from the competent authority, it may cause some drawback to a client in some scenarios.

Therefore, the author views that it will be more appropriate to introduce specific laws for the matter of the contingency fee agreement. Additionally, with the clear statutory laws and regulations, the court's discretion will be limited to such legislation only, resulting that the court judgment will be aligned and reliable.

CHAPTER 5
CONCLUSIONS

Nowadays, Thailand no longer has laws prohibiting the use of contingent fee regardless of its past whereby a contingency fee agreement was considered as a violation of the lawyer's ethics. According to the Supreme Court judgment on contingency fee, the Supreme Court ruled that although entering into a contingency fee agreement is no longer considered as violating the lawyer's ethics, the effect of such is merely for the attorney to not be subject to such violation, it does not mean that the attorney could enter into the said agreement. The Supreme Court further viewed that the content of a contingency fee agreement allows an attorney to directly share interest in the case, such agreement will be deemed as an agreement with an objective to contradict public policy and good moral and, therefore, shall be nulled and void pursuant to Civil and Commercial Code Section 150. With that being said, the line of Supreme Court judgments on this matter is still inconclusive as there are some Supreme Court judgments that ruled differently from the precedent, thereby it would be challenging to conclude that to what extent does an agreement will be considered as a contingency fee agreement.

From studying the development, benefits and drawbacks, and foreign laws on contingent fee, each country has its own positions on this matter and their positions may differ from each other. There are two main approaches for the definitions of contingency fee agreement: firstly, a broad definition whereby having a clause that requires the client to pay the fee upon contingent, fee payable under this clause may be considered as a contingent fee, this approach is taken by Germany and France. In contrast, this type of clause may be viewed as conditional fee agreement in some countries, e.g., United Kingdom and Singapore. On the other hand, the narrow definition of a contingent fee refers to a clause that a fee payable to an attorney is tied to an adjudicated amount or net recovery, the United Kingdom and France applies this definition. As for the general rule that each country applies against contingent fee, there are countries that principally permitted contingent fee such as the United

Kingdom, and countries that principally prohibited it such as Singapore, Germany and France. Each country has its own reasoning in having such general rule. Despite the diverse position of each country, in determining its position on contingent fee, every country seems to consider the benefits and effects that may incur to client, attorney and public interest.

In Thailand, there is no law directly related to this matter. However, the instance of the Civil Procedure Code on class action lawsuit and the latest Supreme Court judgment on contingent fee demonstrate that there has been a development in Thai law, i.e., Thailand has begun to allow the use of contingent fee. Thus, to make this matter becomes clear, the author proposes to insert the definition of contingent fee in the Lawyers Act B.E. 2528 (1985), specify the requirements and conditions for the execution of a contingency fee agreement between a client and an attorney as well as explicitly state that an attorney is allowed to enter into a contingency fee agreement under the requirements and conditions. The author also suggests the said Act to stipulate exceptions for the enforcement of contingent fee in certain cases as well.

In addition to the above, in order to set a standard percentage of contingent fee and to have a clear guideline on prescribing the percentage for every attorney, the author recommends the Lawyers Council, as the competent authority, to issue a regulation regarding the maximum percentage that an attorney may agree with its client in a contingency fee agreement.

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