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Conditional Fee Agreements in Singapore vs Contingency Fee Agreements in Japan Similarities and Differences

Introduction

Since 4 May 2022, Singapore qualified lawyers and certain registered foreign lawyers ("**Singapore Lawyers**") are permitted to enter into conditional fee agreements ("**CFA**") with their clients in relation to the legal fees for certain dispute related proceedings in or outside of Singapore. However, contingency fee agreements (also known as damage based agreements or "**DBA**") remain strictly prohibited in Singapore. This is contrast with Japan, where contingency fee agreements have historically been used in litigation proceedings.

This article looks at the parameters of CFA in Singapore, in comparison to the contingency fee agreements commonly used in Japan.

What is Conditional Fee Agreement?

CFA is defined in section 115A(1) of the Legal Profession Act 1966 ("**LPA**") as "an agreement relating to the whole or any part of the remuneration and costs in respect of contentious proceedings conducted by a solicitor, a foreign lawyer, or a law practice entity, which provides for the remuneration and costs or any part of them to be payable only in specified circumstances, and may provide for an uplift fee."

In essence, CFA is an agreement between a law firm and its client in relation to the lawyers' legal fees and costs (for example out of pocket expenses), in which both

parties would mutually agree on "specified circumstances" that would trigger the client's payment obligation and the amount payable.

CFAs are only allowed in respect of legal services rendered in "contentions proceedings", which refers to arbitration and its related court and mediation proceedings within and outside of Singapore as set out in table A below. Singapore law does not define nor confine the scope of "specified circumstances" and such event can be, for example, reaching an amicable settlement, obtaining an injunction order, obtaining an award allowing the claim, or obtaining certain costs orders.

To illustrate, the following are 2 examples of CFA that are permissible in Singapore:

No Win No Fee

<i>Benchmark Fee</i>	<i>Specified Circumstance</i>	<i>Win</i>	<i>Lose</i>
<i>SGD1,000 per hour</i>	<i>counter party's claim is dismissed</i>	<i>50% + Benchmark Fee</i>	<i>0</i>

- *If the specified circumstance materializes (ie a 'win'), the lawyer will be entitled to charge the Benchmark Fee of SGD1,000 per hour plus an uplift fee of SGD500 per hour.*
- *If the specified circumstance does not materialize (ie, a 'lose'), then the lawyer does not get paid any legal fees for the services rendered.*
- *The lawyer bears the litigation risk and only get paid his legal fee (if any) at the end when there is a "win".*

No Win Less Fee

<i>Benchmark Fee</i>	<i>Specified Circumstance</i>	<i>Win</i>	<i>Lose</i>
<i>SGD1,000 per hour</i>	<i>counter party's claim is dismissed</i>	<i>30% + Benchmark Fee</i>	<i>70% of Benchmark Fee</i>

- If the specified circumstance materializes (ie a 'win'), the lawyer will be entitled to charge the Benchmark Fee of SGD1,000 per hour plus an uplift fee of SGD300 per hour.
- If the specified circumstance does not materialize (ie, a 'lose'), the lawyer will be entitled to charge only SGD700 as his hourly rate.
- The lawyer bears part of litigation risk and will get his discounted legal fee during the course of the proceeding and the uplift fee (if any) at the end when there is a "win".

The key feature of the Singapore CFA is that the amount of legal fee is related to the outcome of the case as agreed by the parties, but must not be calculated based on, or contingent upon the sum or amount recovered by the client, which is otherwise known as 'contingency fee' as discussed below.

It is also helpful to note that:¹

- (a) CFAs are not intended to replace traditional fee structures, but to provide additional funding option between a lawyer and his client.
- (b) Parties can agree on a traditional fee structure in one area of work and a CFA in another, depending on the circumstances.
- (c) Parties may agree to include or exclude the payment of disbursements from the CFA.

Contingency Fee Agreements In Japan

Contingency fee agreements are not prohibited in many other civil law jurisdictions including Mainland China, South Korea, and Japan, and common law jurisdictions including United States, England and Wales. Most recently, Hong Kong passed legislation allowing CFA and contingency fee agreements (in particular, known as DBA and hybrid DBA) as part of its effort to bolster Hong Kong's status as a leading arbitration hub.

In Japan, contingency fee agreements were the norm in litigation proceedings during the old regime before the law standardizing the attorneys' fee was abolished in April 2004. Under the old regime, lawyers' fees consist of an initial fee and a success fee. The initial fee is calculated based on the amount in dispute, and paid when the lawyers are engaged regardless of the outcome of the case, whereas the success fee is calculated based on the amount recovered by the client from the litigation proceeding.

¹ <https://www.mlaw.gov.sg/news/parliamentary-speeches/2022-01-12-second-reading-speech-by-second-minister-for-law-edwin-tong-on-legal-profession-amendment-bill> (para.35)

After the law standardizing the attorneys' fee was abolished in April 2004, legal fee based on hourly rate was introduced but contingency fee agreements remain popular for domestic litigation proceedings in Japan. This is in contrast with Singapore, where hourly rate has been and still is the norm in litigation proceedings, whereas CFAs are still new and yet to gain popularity.

Conclusion

The new law permitting CFA is undoubtedly a welcoming development for Singapore Lawyers, as it allows them to offer more attractive fee arrangement for their clients as compared to the conventional fees structure based on hourly rate, fixed costs, or capped fees that are payable regardless of the outcome of the case. CFA can also be used as an alternative funding option for the clients, whereby the lawyers will bear either all or part the litigation risk depending on the terms of the CFA. However, in comparison with other major jurisdictions such as US, UK, Hong Kong and Japan that allows DBA as an alternative fee arrangement with minimum or no legal restrictions, the regime in Singapore remains relatively restrictive and less competitive as compared to its counterparts.

Although the new law created some buzz in the legal community when it was enacted, its popularity in practice is yet to be seen. It is anticipated that Singapore will take incremental steps to liberalise the laws in this area², similar to its approach in allowing third party funding in international arbitration proceedings in 2017. This is necessary in order for Singapore to align itself with the development and practice on the international front, and also to give Singapore Lawyers the same leverage in negotiating legal fees as compared to its counterparts in other major jurisdictions.

Table A

"Contentious Proceedings"

- (a) Arbitration proceedings in or outside of Singapore;
- (b) Court proceeding in or outside Singapore connected with arbitrations, including application for stay of proceedings in favour of arbitration, application for enforcement of an arbitration agreement or awards;

² <https://www.mlaw.gov.sg/news/parliamentary-speeches/2022-01-12-second-reading-speech-by-second-minister-for-law-edwin-tong-on-legal-profession-amendment-bill> (para.30)

- (c) proceedings commenced and remained in the Singapore International Commercial Court including related appeals;
- (d) mediation proceedings arising out of, or in any way connected to the above.
- (e) preliminary and preparatory advice, and other legal services before the commencement of any of the above proceedings, or
- (f) negotiations and settlement of a claim or dispute

** Mori Hamada & Matsumoto (Singapore) LLP is licensed to operate as a foreign law practice in Singapore. Where advice on Singapore law is required, we will refer the matter to and work with licensed Singapore law practices where necessary.*

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