

THE FUTURE OF CONTINGENT FEES IN THAILAND:
A COMPARATIVE ANALYSIS*

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Received 2 July 23

Revised 15 October 23

Accepted 9 November 23

Abstract

A contingency agreement is one of the fee structure types that has been used over the world. However, in Thai jurisdiction, it has been prohibited for decades as the court views that such agreement is contradictory to Thai public policy and good morals. This is because it allows an attorney to share some interests with the outcome of the lawsuit. However, Supreme Court precedent does not provide any guidance as to the meaning and scope of a contingency agreement. Moreover, since there is an amendment of the Civil Procedure Code on the class action lawsuit where the class's lawyer is allowed to receive a contingent fee as an award, there is no unanimous direction for the contingent fee in Thailand. On the contrary, in the United Kingdom, there is a very clear position on this issue, i.e., the contingent fee is classified into three types, and each type has its own specific laws and regulations. By contrast, in Singapore, the contingent fee is strictly prohibited, but it allows a conditional fee to be applied instead. In light of this, as the debate concerning the advantages and disadvantages of contingent fee has been continuously discussed, this article finds that, compared to foreign jurisdictions, the current Thai legal system is still developing and the issues of contingent fees have not been properly regulated. Therefore, this article proposes that the contingent fee should be allowed and regulated by specific regulation in order to minimize concerns about application of the contingent fee.

Keywords: Contingent fee, Contingency agreement, Champerty, Maintenance, Fees

* This article is summarised and rearranged from the thesis "The Future of Contingent Fee in Thailand: A Comparative Analysis", Faculty of Law, Thammasat University, 2022.

1. Introduction

The contingent fee is one of the most popular fee schemes used between a client and an attorney. In light of this, 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 areas 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, some types of contract, including a contract to provide legal services has, are restricted and regulated by the competent authority(s), so such contract may not completely reflect the contractual parties' true intention. In other words, the contract may not be fully made in accordance with the parties' intention and desires. For instance, in Thailand, even though both the client and the attorney agree to enter into and execute a contingency agreement, such agreement cannot be recognized under the Thai legal system, and will be deemed unenforceable as it contradicts Thai public policy.

Behind such regulation and control, there are numerous reasons and factors.¹ 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 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.² Taken the above and the balancing of interests between a client and an attorney, it has been controversial whether a contingency agreement should be prohibited, given the fact that it is a long-established concept and recognized all over the world. This is because it is undisputable that the contingency agreement can provide both advantages and disadvantages. Therefore, it is a double-edged sword that must be carefully used.

Apart from the aforementioned issues, there is another major misunderstanding about the definition of the term "Contingent Fee" as well. To elaborate, most people usually label a "no win, no fee" agreement as one of the "Contingent Fee" schemes because a legal fee under "no win, no fee" agreement is payable upon a contingency. However, in some jurisdictions, a "no win, no fee" agreement is considered as a conditional fee agreement rather than a contingency agreement, and it is treated and regulated differently. Both concepts involve a payment of a client paying for an attorney on a certain contingency, namely if a lawsuit is successful or a favorable settlement obtained. Nonetheless, the calculation of such payment is significantly different where, on one side, a payment shall be calculated as a

¹ Virginia G. Maurer, Robert E. Thomas, Pamela A. DeBooth, 'Attorney Fee Arrangements: The U.S. and Western Perspectives', 19 Nw. J. Int'l L. & Bus. 272 (1998-1999), 282-283.

² Arden v. Patterson, 5 Johns. Ch. 44 (N.Y. Ch. 1821) (noting that the judgment mentioned champerty offense instead of using the term contingency agreement).

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.

To conclude this part, there are three main issues concerning contingent fees, i.e., (i) what is the meaning of the contingent fee; (ii) whether the contingent fee should be allowed or prohibited; and (iii) what are the exceptions to the general rules of contingent fees.

2. Contingent fee in Thailand

The concept of contingent fee first appeared in 1914 where Section 9 of the Thailand Lawyer Act B.E. 2457 (1914) clearly mentioned that any attorney who entered into a contingency 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 Supreme Court judgment No. 510/2468 ruled that the agreement between the plaintiff and the defendant was in the manner of a champerty offense which was against public policy. In this regard, the Supreme Court referred to English case law, *Neville v. London Express*,³ in supporting its reasoning prohibiting such agreement.

Even though the Thailand Lawyer Act B.E. 2457 (1914) was replaced by the Thailand Lawyer Act B.E. 2477 (1934), the same principle continued to exist as Section 12 of the 1934 Act mirrored Section 9 of the 1914 Act. However, 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 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 rendering legal opinions, a contingency agreement is therefore enforceable.⁴ 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 agreement. However, it provided that the attorneys shall conduct themselves in accordance with a regulation concerning the code of conduct and ethics for attorneys (which was to be issued accordingly),⁵ 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 in the interim.⁶

Subsequently, the Thailand Lawyer Act B.E. 2528 (1985) was enacted. The provision concerning the prohibition of the contingent fee was now completely excoriated. Furthermore, this act also established the Lawyers Council of Thailand whereby its duties

³ *Neville v. London Express* (1919) A.C. 369.

⁴ Thai Supreme Court Judgment No. 1887/2500 and Thai Supreme Court Judgment No. 1454/2510.

⁵ The Thailand Lawyer Act B.E. 2508 (1965), Section 17.

⁶ *Ibid*, Section 41.

include supervising the conduct of attorneys and issuing a regulation concerning lawyers' ethics in which it does not address the prohibition of the contingency agreement. Nevertheless, there were a series of Supreme Court judgments that even though there was no statutory law prohibiting the contingency agreement, the only result of not having the said prohibition is that the lawyers who enter into a contingency agreement shall not be considered as violating lawyer's ethics, but the contingency agreement still shall be deemed as violating the lawyer's moral values and against the public policy and therefore null and void.⁷

Therefore, there are three legal authorities under Thai laws that discussed the contingent fee, namely, the Civil Procedure Code, Regulations of Lawyer Council, and the Supreme Court decision.

2.1 The 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 to a lawyer. However, the table clearly shows that the lawyer's fee shall be calculated from the disputed amount, not the adjudicated amount. Thus, it can be said that the contingent fee has not been recognized yet.

Nonetheless, as the Civil Procedure Code was amended in 2015, the attorneys seem to be entitled to a contingent fee under certain conditions and requirements in class action lawsuits, pursuant to section 222/37 of the Civil Procedure Code. To elaborate, the court shall determine an amount of the award that the defendant must pay to the plaintiff's attorney as the court deems appropriate.⁸

The said concept in class action lawsuits is similar to the concept of contingent fees, i.e., an attorney shall receive an award of 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 only 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.

The main reason behind such permission to the contingent fee is that the plaintiff's attorney is considered as an important person who plays a huge role for the class action

⁷ Thai Supreme Court Judgment No. 1443/2545, Thai Supreme Court Judgment No. 1584/2555, Thai Supreme Court Judgment No. 810/2554.

⁸ The Civil Procedure Code B.E. 2477 (1934), Section 222/37 paragraph one.

proceeding. Therefore, the awarded money was introduced to the class action proceeding in order to be used as a legal mechanism for increasing the incentive for a plaintiff's lawyer.⁹

2.2 Regulations of Lawyer Council

At present, the Regulations of the Lawyer Council (of Thailand) regarding the ethics of lawyers B.E. 2529 (1986) is the most recent version of regulations which governs and regulates the ethics 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 is silent on the ethics of lawyers in relation to legal fee schemes.¹⁰

In a separate part, it only provides a broad concept for lawyers that they shall not conduct their profession against the good morals or diminish the dignity and pride of lawyers.¹¹ As there is no provision in writing that prohibits the contingent fee, and it could not be interpreted that entering into a contingency agreement is considered as an action against the good morals or pride of lawyers, thereby, it can be concluded that entering into a contingency agreement shall now not be deemed as a 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 agreement is not considered as violation of the lawyer's ethics, the Supreme Court still ruled that a contingency agreement contradicts the morals of the legal profession, and thus the agreement shall be deemed null and void pursuant to the Civil and Commercial Code Section 150.¹²

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 agreement as being contrary to public policy.

2.3 Supreme Court decisions

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

The Supreme Court emphasized that attorneys shall be considered as the court's clerks. Therefore, to duly serve justice, attorneys shall not directly tie their interests to the case. To elaborate, if attorneys tie their interest with the case, particularly with the case's outcome, it may affect the good conduct of the lawyer as the lawyer shall have a duty to represent the client, and attorneys' action in relation to a lawsuit should be for the best

⁹ Sada Wongchotewattana, 'Attorney's Role and Attorney Fee Award in Class Action', Thammasat University (2016).

¹⁰ The Regulations of Lawyer Council (of Thailand) regarding the ethics of lawyers B.E. 2529 (1986) Chapter 3.

¹¹ Ibid, Section 18.

¹² Thai Supreme Court Judgment No. 1443/2545.

interest of the client. However, when the interest of attorneys is tied to the case, the attorneys' action may have effect to both the client's interest and the attorneys' interest, and it is possible that attorneys may choose their interest over the client. Consequently, the contingency agreement shall be null and void.¹³

However, it is extremely challenging to conclude the current position of the Supreme Court, given the fact that for the past decades the Supreme Court has ruled in diverse directions against the contingent fee. Below are some examples of the Supreme Court judgments that seem to have conflict with one another. For instance, The Supreme Court Judgment No. 1443/2545 ruled that since the legal fee under the agreement in dispute was calculated at the rate of three per cent of the recoverable property, and shall be payable upon the actual recovery, therefore, such agreement allowed the attorney to share some interest in the properties the client was entitled to receive. It thus should be considered a contingency agreement and shall be null and void. On the contrary, the Supreme Court judgment No. 5162/2563 ruled that even though the fee agreement in question stipulated that the attorney shall receive a legal fee in a certain amount calculated at a certain percentage of the properties recoverable, the fee agreement is enforceable based on the following reasons: (i) the legal fee was certain and did not exceed 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 agreement to be applied.

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

3. Contingent fee in foreign jurisdictions

As discussed earlier, the concept of contingent fee is recognized worldwide. With that being said, each jurisdiction has a different approach regarding the concept of contingent fee. To illustrate, the contingency agreement is allowed and enforceable in some jurisdictions such as the United Kingdom (under the concept of the damages-based agreement), while it is prohibited and considered null and void in some jurisdiction, e.g., continental European countries.

¹³ Thai Supreme Court Judgment No. 1260/2543 (Convention).

3.1 United Kingdom

For the United Kingdom, the contingent fee was originally banned and criminalized as it was considered a champerty and maintenance offense until the concept of “conditional fee agreement” and “damages-based agreement” was established.

According to the Courts and Legal Services Act 1990, the conditional fee agreement is allowed and enforceable between an attorney and a client. The conditional fee agreement is an agreement where an attorney agrees that the legal fee is payable upon specified circumstances and the money payable under this conditional fee agreement is called a “**success fee**”. And such success fee can be increased in specified circumstances (upon an agreement between the parties) as well. Thus, according to this concept, it can be easily concluded that a conditional fee shall cover two types of reward: (i) a reward where the attorney will only recover his normal fees upon the completion of the conditions (“**Normal Success Fee**”); and (ii) a reward where the attorney will recover his normal fees plus a success uplift (“**Uplift Success Fee**”). The maximum amount of the Uplift Success Fee could be increased up to 100% of the normal fee. It is worth noting that a conditional fee could not be enforceable in the following proceedings: (i) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and (ii) family proceedings.¹⁴

For 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 law.¹⁵ The Damaged-Based agreement is an agreement which a client is obliged to make a payment to an attorney upon the contingency 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 (“**Damages-Based Success Fee**”). The concept of the Damages-Based Success 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.

In summary, the contingency fee, can be classified into three types, i.e., Normal Success Fee, Uplift Success Fee, and Damages-Based Success Fee. If the fee payable to the attorney upon condition and such fee is not related to the amount of recovery, it shall fall into the concept of the conditional fee instead. 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 falls into the concept of the Damages-Based agreement.

¹⁴ The United Kingdom Courts and Legal Services Act 1990, Section 58A.

¹⁵ Ibid, Section 58 AA (4).

3.2 Singapore

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* may not be able to directly apply in the Singapore jurisdiction.¹⁶ This is because there is no case law nor statutory legislation to confirm this classification. Thereby, it is peculiar to apply the classification created by the Judge in the English case law to the entire Singapore jurisdiction.

Nevertheless, it is understandable from the Supreme Court's interpretation and the statutory law that in Singapore 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.¹⁷

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

However, there are two exceptions for the contingency fee in Singapore. First, the exception under the statutory law where it will be subject to the discretion of the Registrar (as the case may be) provided that it is in compliance with applicable scale of costs, pursuant to Article 18 (b) of the Legal Profession (Professional Conduct) Rules 2015. 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 justice over the entitlement of a professional fee.¹⁸

3.3 Germany

Under German law, the position against the contingent fee shall follow the Code of Conduct for European Lawyers, i.e., the contingent fee shall therefore be recognized as *Pactum de Quota Litis* and be generally prohibited. Nonetheless, Germany has its national legislation to regulate their lawyers as well, namely the Federal Code for Lawyers (Bundesrechtsanwaltsordnung – BRAO) and the Act on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz – RVG).

¹⁶ *Geraghty & Co v Awwad & Anor* (1999) EWCA Civ 3036.

¹⁷ *Law Society of Singapore. v. Lau See Jin Jeffrey*, (2017) SGHC 30, 22; The Legal Professional Act 1966 Section 107 (1) (b); and The Legal Profession (Professional Conduct) Rules 2015 Article 18.

¹⁸ *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju*, (2013) SGHC 135, 83.

Under German law, 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 a contingent fee regardless of whether such reward is a monetary reward or other kinds of benefits.

German jurisdiction prioritizes the interest of the public, thereby, the contingency fee agreement is generally prohibited. However, there are some exceptions under the statutory laws where German lawyers may enter into a contingency fee agreement. The exceptions are addressed in two German legislations. The first one is an exception under the Act on the Remuneration of Lawyers (RVG) in which it is allowed to apply an individual who has difficulty in accessing to the justice system because of his or her economic status provided that the contingency agreement meets all the requirements.¹⁹ The another exception is an exception under the Act on Out-of-Court Legal Services (Rechtsdienstleistungsgesetz – RDG) where the contingency fee agreement is allowed for German lawyers in the area of collection service.

3.4 France

Since France is one of the European countries, therefore, France prohibits the contingency fee agreement as it is considered as *Pactum de Quota Litis* pursuant to the Code of Conduct for the European Lawyers and the French national regulation. Under French jurisdiction, 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.²⁰

Moreover, 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 where Section 10 of the said law prohibits any fixing of fees that would only be fixed according to the judicial result. As a result, the contingency fee agreement, under French law, 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.

However, French law, provides some limited exception for French lawyers to enter 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” in which 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

¹⁹ The German Act on the Remuneration of Lawyers (RVG) 2004, Section 4(a).

²⁰ The French National Internal Regulations of the Legal Profession (RIN) 1971, Article 11.3 and Article 21.3.3.

and such remuneration is payable as agreed. And another exception is the use of the contingency fee agreement for an international arbitration proceeding.²¹

4. Conclusion

In conclusion, it is unsettled which approach is the most suitable for the concept of contingent fee. Despite the discrepancies on the definition and approaches against the concept of contingent fee in each country, it is undisputed that the contingent fee could provide some advantages to every related party, i.e., a court, a client, and a lawyer. This is because even though the concept of contingent fee is generally prohibited (in some jurisdictions), those countries still have an exception(s) for the application of the contingent fee.

For Thailand, there is no statutory law stipulating that a lawyer is prohibited from entering into a contingency agreement, nor that a contingency agreement is contradicted to Thai good morals and public policy. Moreover, the concept of contingent fee is half-recognized and allowed in a class action lawsuit proceeding, as it does not directly allow a client and a lawyer to execute a contingency agreement themselves, but the contingent fee shall be determined by the court. Hence, it appears to the author that the concept of contingent fee has been recognized more over the past few years.

With that being said, the author views that if the contingent fee is generally allowed in which a lawyer and a client could enter into a contingency agreement freely without any legal mechanism that helps protect the clients' interest, it would not create much benefit. Rather, it may create a chance for lawyers to take advantages from the "non-knowledgeable" client instead, e.g., a lawyer misleadingly advises a client to take an unreasonable settlement with the counter party in order for the lawyer to secure his high-rate contingent fee.

As a result, the author views that, nowadays, the contingency agreement should be allowed and enforceable. However, the Lawyer Council, as the competent authority, should issue a regulation governing the contingent fee. Hence, the contingent fee could be used as one of the legal mechanisms that helps access to justice. In light of this, the author views that the regulations should, at least, govern the following issues:

1. Definition of a contingent fee and nature of a contingency agreement
2. Form of a contingency agreement, with a writing agreement preferred
3. Maximum rate of a contingent fee
4. Other requirement and conditions
 - 4.1. A contingency agreement must be made with or before an agreement to provide a legal service
5. Exception

²¹ Paris Court of Appeal (1er Ch. B), 10 July 1992, D. 1992, 459.