Contingency Fee Agreements - Valid in arbitrations?

By John B Molloy, LLB (Hons), BSc (Hons), FHKIS, FRICS, ACIArb Managing Director, James R Knowles (Hong Kong) Limited

A few weeks ago I went to see the film 'A Civil Action?' starring John Travolta. Not a great film by any means, but nonetheless interesting because it concerned a lawyer in the USA (Travolta) who went bankrupt attempting to sue two large corporations for polluting the water supply of a local town which had in turn caused the deaths of a number of children. The reason why the lawyer went bankrupt was because he conducted the proceedings on the basis that he would be paid a percentage of any monies he was able to recover for his clients. In other words he had entered into a contingency fee agreement.

Contingency fee agreements fall into two categories:

- Conditional fee agreements whereby the solicitor or consultant is entitled to his normal fees (with or without a percentage uplift) if successful in the matter, but no fee if unsuccessful.
- Bonus fee arrangements whereby a solicitor or consultant is entitled to a percentage of the monies recovered in the action by his client, but again no fee if unsuccessful.

In the United Kingdom contingency fee agreements, were for long held to be unlawful and unenforceable because they were caught by the law of champerty. The attitude of the courts towards such agreements can be seen by the words of Lord Denning MR in Re Trepca Mines Ltd where he said:

"(Champerty) occurs when the person maintaining another stipulates for a share of the proceeds.... The reason why the common law condemns champerty is because of the abuser to which it may give rise. The common law fears that the champertous maintainer might be tempted, for this own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law."

There were many critics of this state of affairs. Contingency fee agreements had been for a long time not only permissible but the norm in the United States for the prosecution of speculative monetary claims. Further the rising cost of litigation and its effect in depriving citizens who fall outside the financial limits of legal aid eligibility of access to the civil courts led to an increasing demand for some form of contingency fee agreements to be available. These pressures led to legislative inroads into the common law of champerty and in 1990 in the United Kingdom, Section 58 of the Courts and Legal Services Act made conditional (but not percentage of proceeds) fee agreements lawful.

Whilst this made the position in court clear, what is the position in arbitration proceedings?

In Hong Kong in the case of Canonway Consultants Ltd v Kenworth Engineering Ltd, Kaplan J held that whilst the English law of champerty applied in Hong Kong its boundaries excluded arbitration proceedings. In the course of his decision he said *if [champerty] were to apply in the present case, it would be extending champerty from the public justice system to the private consensual system which is arbitration.*

Therefore the position in Hong Kong is currently that contingency fee agreements (both conditional and percentage of proceeds) do not apply to arbitration proceedings. However, a recent decision in the United Kingdom may well change this

position if the matter comes before the Hong Kong courts again.

The case is Bevan Ashford (a firm) v Geoff Yeandle (Contractors) Ltd (in Liquidation). Bevan Ashford are a firm of solicitors. They had entered into an agreement with a contractor called Geoff Yeandle Ltd for the conduct of an arbitration. The agreement incorporated a conditional fee arrangement whereby Bevan Ashford would be paid their normal disbursements and normal fees if the arbitration was successful and nothing apart from disbursements if it was not. This action sought a ruling from the court as to the legality the agreement.

Clearly if the case referred to court proceedings the agreement would have been valid in accordance with Section 58 of the Courts and Legal Services Act. However the judge concluded that Section 58 does not apply to advocacy services or litigation services in relation to proceedings that are not proceedings in court and therefore that it does apply arbitration.

Accordingly, the question that remained was that whilst the agreement would be a lawful enforceable agreement if entered into for the purpose of court proceedings, was it lawful for the purpose of the arbitration proceedings?

The judge firstly considered the question as to whether the law of champerty applied to arbitrations. The case of Canonway Consultants Ltd v Kenworth Engineering Ltd was considered but the judge did not agree with Kaplan J's decision that the law of champerty did not apply to arbitrations. He considered that if it is contrary to public policy for a lawyer to agree that if the claim fails he will be paid nothing but that if the claim succeeds he will receive a higher fee than normal it makes no difference whether the claim is prosecuted in court or in an arbitration.

However whilst the judge concluded that the law of champerty does apply to arbitration, he nonetheless considered that the agreement was lawful.

In making this decision the judge recognised that the law against champerty was based upon public policy. However he considered that public policy must change with the passage of time and an arrangement or agreement held in the past to be champertous and consequently unlawful and void need not necessarily be so held today. He considered that if Parliament has declared that conditional fee agreements are valid and enforceable for the purpose of certain types of litigation then these conditional fee agreements are not only no longer contrary to public policy but are expressly sanctioned under Parliamentary authority.

On this basis he concluded that it would be quite impossible to argue that use of that same conditional fee agreement in arbitration proceedings would be contrary to public policy if it were not so for litigation.

The effect of this judgment in Hong Kong is interesting. Whilst it is quite possible that a Hong Kong Court may follow the decision that the law of champerty does apply to arbitration, the Courts and Legal Services Act does not apply here. Therefore would a Hong Kong court still consider that a conditional fee agreement was no longer contrary to public policy? I suspect not.

(Adopted from the HKIS Newsletter 8(6) June 1999)