

Conditional Fee Agreements

Introduction

- Conditional fee agreements ("CFAs") offer an alternative way to fund litigation.
- CFAs can be used in all commercial claims.

What is a CFA?

- It is an agreement whereby a lawyer and a client can agree to share the risk of the litigation by coming to a financial arrangement on the fees payable based on the outcome of the litigation.
- "No win, no fee" – in the event of losing, the client will not be liable to pay any fees to his lawyer, but if the case is won "normal" costs are payable (although a proportion of these may be paid by the other party).
- "Shared risk" – in the event of losing, the client pays a reduced fee to his lawyer, but in the event of winning the lawyer will be entitled to "normal" costs (again contributed to by the other party).
- In both instances, a success fee can be charged in addition to the "normal" costs. The success fee should be payable by the other party if the client wins.
- For the financially challenged with a good case, these arrangements work well but it must be recognised that the lawyer's investment is reflected by seizure of significant control of the litigation.

What level of success fee will be included in a CFA and when is it payable?

- The success fee can be as high as 100% of the time charge ("normal") costs.
- The lawyer will calculate the success fee percentage after he has carried out a "risk analysis" of the case. This will involve the lawyer investigating a number of factors, including the merits and value of the claim, the likelihood of settlement; an estimate of costs involved; and the likelihood of recovery of normal costs and the success fee from the other party.

- The success fee cannot be a percentage of the level of damages awarded/agreed in settlement.

Who pays the success fee?

- The client is responsible for paying the success fee. However, it may be recoverable in full or in part from the losing party who has costs awarded against them.
- However a "paying" party (ie the other side) is entitled to have the success fee "assessed" by the court. The court will reduce the success fee if it is not reasonable having regard to the circumstances surrounding the case when the CFA was entered into.
- The court is also entitled to allow different success fee percentages for different items of costs or for different periods during which costs were incurred.
- If the court reduces the success fee to be paid by the paying party, the shortfall is not recoverable from the client unless the lawyer obtains a court order to the contrary.
- Note – part of the success fee may comprise the cost to the lawyer of funding the litigation on a conditional fee basis, e.g. the cost of funding disbursements. This element of the success fee is payable by the client in any event.

What is payable if the case is lost?

- The client will either pay no costs or a reduced cost to your lawyer under the CFA if the case is "lost";
- However, the losing party will normally be obliged to make a contribution to the winning party's costs. If the winning party has the benefit of a CFA and/or after the event legal expense insurance ("ATE"), such costs may include the success fee and/or insurance premium.

Can you protect against this potential cost exposure?

- Yes, by purchasing ATE – ask for our separate Advice Note about this.

What are the advantages of entering into a CFA?

- Costs are linked to the outcome of the case with the possibility that no or reduced costs are payable by the client if the case is unsuccessful.
- Disclosure of a CFA to the other party may encourage earlier settlement because the other party's cost exposure will increase in line with the level of the success fee.
- As the success fee will, in most cases, be payable by the paying party, any damages awarded to the client will not be eaten up by the success fee.

What are the disadvantages of entering into a CFA?

- The existence of the CFA must be disclosed to the other party at the outset of the litigation and the risk assessment has to be disclosed to the court and, if necessary, to the other party when costs are assessed – there is no privilege, nor privacy, attached to the funding arrangement in place.
- A CFA gives the lawyer a financial interest in the litigation and to take control of the strategy and resolution of the litigation.
- Unless the client buys ATE to cover the winning party's costs, the client is still at risk to pay those costs – see separate Advice Note "Legal Costs Insurance".

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Should you have any questions please contact [Julie Herriott \(julie.herriott@pinsentmasons.com\)](mailto:julie.herriott@pinsentmasons.com) or your usual Pinsent Masons adviser who will be able to assist you further.

This note does not constitute legal advice. Specific legal advice should be taken before acting on any of the topics covered.

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