The Hong Kong Bar Association's Position Paper on Conditional Fees: A Response to the Law Reform Commission's Consultation Paper

---

A. INTRODUCTION

1. In May 2003, the Secretary for Justice and the Chief Justice directed the Law Reform Commission of Hong Kong to consider the feasibility of implementing conditional fees arrangements in Hong Kong. As a result, the Sub-committee on Conditional Fees ("Sub-committee")[1] was appointed in July 2003 to consider and advise on the present state of the law and to make proposals for reform. In September 2005, the Sub-committee published the Consultation Paper on Conditional Fees ("Consultation Paper"). This Position Paper sets out the views of the Hong Kong Bar Association ("HKBA") on the recommendations put forward in the Consultation Paper.

2. This Position Paper adopts the terminology used in the Consultation Paper. The term "contingency fee" refers to a fee arrangement whereby the lawyer's fee is calculated as a percentage of the amount awarded by the court[2]. On the other hand, the term "conditional fee" is used here to mean a fee arrangement whereby, in the event of success, the lawyer charges his usual fee plus an agreed flat amount or percentage "uplift" on the usual fee[3]. The additional fee charged in this kind of fee arrangement will be referred to as "uplift fee" or "success fee".

B. THE APPROACH

3. Before dealing with the recommendations contained in the Consultation Paper, we believe it is important to consider the approach adopted by the Sub-committee and the structure of the Consultation Paper.

---

1 The composition of the Sub-committee can be seen from paragraph 2 of the Consultation Paper.
2 See para. 6 of the Consultation Paper.
3 See para. 7 of the Consultation Paper.

4. The Sub-committee's terms of reference are set as follows[4]:

"To consider whether in the circumstances of Hong Kong conditional fee arrangements are feasible and should be permitted for civil cases and if so, to what extent (including for what types of cases and the features and limitations of any such arrangements) and to recommend such changes in the law as may be thought appropriate."

5. Working under these terms of reference, the Sub-committee studies the event-triggered fees arrangements in various jurisdictions and recommends the implementation of CFA in Hong Kong in respect of eight types of civil disputes[5]. Although the Sub-committee recommends an expansion of the Supplementary Legal Aid Scheme ("SLAS")[6] and has also considered the alternative of setting up a privately-run contingency legal aid fund[7], the coverage given to them are far less than the coverage accorded to CFA. Most importantly, the question of whether an expansion of the SLAS can obviate the need for implementing CFA has not been considered by the Sub-committee.

6. We appreciate that the Sub-committee is bound by its terms of reference. However, we do not believe the approach adopted by the Sub-committee is the correct one. The question of whether it is feasible to implement CFA in Hong Kong should not and cannot be considered in isolation. Instead, it is necessary to consider: (1) whether there are any other means, apart from implementing CFA, to achieve the aim of widening access to justice; (2) if there are, what are the pros and cons of the other means and which one or ones should be implemented in Hong Kong.

7. In addition to asking the right questions, it is equally important to set out the yardstick against which the possible options of reform should be measured. For the present purpose, we believe it is appropriate to analyze the proposal to implement CFA and the other alternatives by considering the following

4 See para. 1 of the Preface of the Consultation Paper.
5 See para. 7.1 to 7.9 of the Consultation Paper.
6 See para. 7.44 and 7.45 of the Consultation Paper.
7 See para. 7.46 to 7.52 of the Consultation Paper.

aspects[8], namely, the public interest in:

(1) broadening access to justice and to legal services;

(2) the integrity of the judicial process; guaranteeing fairness and sufficient standard of lawyers' competence and conduct;

(3) judicial economy, ensuring the efficiency of the judicial system.

8. With these considerations in mind, this Position Paper will first examine the desirability or otherwise of implementing CFA in Hong Kong and then proceed to consider the other alternatives including the expansion of the SLAS. For the reasons set out below, the HKBA takes the view that it is undesirable to implement CFA in Hong Kong. Instead, we believe that widening the availability of legal aid and/or expanding the SLAS is the best available way to broaden access to justice.

C. WHETHER TO IMPLEMENT CFA

9. This section deals with the key matters considered and addressed by the Sub-committee and the other matters that the HKBA considers relevant. Insofar as there are any points covered in the Consultation Paper which are not specifically addressed below, it is not because the HKBA has not taken them into account. Instead, it is because the HKBA does not believe those points are material or will affect our consideration in any significant way.

C.1 Considerations against implementing CFA

10. The HKBA takes the view that there are strong considerations that militate against implementing CFA in Hong Kong. The following are the key considerations.

C.1.1 Public Policy Considerations

11. Putting aside the law of maintenance and champerty, it has generally been

[8] See Peter Kunzlik, "Conditional Fees: The Ethical and Organisational Impact on the Bar", (1999) 62 MLR 850, at p. 852 and the materials referred to in footnote 16 thereof.

accepted contingency fee or conditional fee is against public policy. In the well-known decision of *Wallersteiner v Moir (No. 2)*[9], Lord Denning M.R. expounded as follows[10]:

" English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a "contingency fee", that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. In its origin champerty was a division of the proceeds (campi partitio). An agreement by which a lawyer, if he won, was to receive a share of the proceeds was pure champerty. Even if he was not to receive an actual share, but payment of a commission on a sum proportioned to the amount recovered --- only if he won --- it was also regarded as champerty ..... Even if the sum was not a proportion of the amount recovered, but a specific sum or advantage which was to be received if he won but not if he lost, that too, was unlawful ..... It mattered not whether the sum to be received was to be his sole remuneration, or to be an added remuneration (above his normal fee), ***in any case it was unlawful if it was to be paid only if he won, and not if he lost***. .....

" It was suggested to us that the only reason why "contingency fees" were not allowed in England was because they offended against the criminal law as to champerty: and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. ***The reason why contingency fees are in general unlawful is that they are contrary to public policy*** as we understand it in England. That appears from the judgment of Lord Esher M.R. in *Pittman v Prudential Deposit Bank Ltd.*, 13 T.L.R. 110, 111:

"In order to preserve the honour and honesty of the profession it was a rule of law which the court had laid down and would always insist upon that a solicitor could not make an arrangement of any kind with his client during the litigation he was conducting so as to give him any advantage in respect of the result of that litigation." .

....."

[emphasis added]

---

9 [1975] 1 Q.B. 373.

10 [1975] 1 Q.B. 373, at p. 393C-394C.

12. After referring to the situation in the United States and Canada where contingency fees are allowed, Lord Denning M.R. added as follows[11]:

"In most of the United States and Canada, an agreement for a contingency fee is permissible, not only in derivative actions, but in all cases where the client is poor and his chances of success uncertain. This is seen as a way in which justice can be done. Otherwise a poor man would be without redress in the courts. ..... It is realised that the contingency fee has its disadvantages. It may stimulate lawyers to take on unworthy claims, or to use unfair means to achieve success. But these disadvantages are believed to be outweighed by the advantage that legitimate claims are enforced which would otherwise have to be abandoned by reason of the poverty of the claimant. The courts themselves are in a position to control any abuses. They can limit the amount of the fee which the lawyer is allowed to charge.

These are powerful arguments, but I do not think they can or should prevail in England, at any rate, not in most cases. We have the legal aid system in which, I am glad to say, a poor man who has a reasonable case can always have recourse to the courts. His lawyer will be paid by the state, win or lose. If the client can afford it, he may have to make a contribution to the costs. Even if he loses, he will not have to pay the costs of the other side beyond what is reasonable --- and this is often nothing. So the general rule is, and should remain in England, that a contingency fee is unlawful as being contrary to public policy."

13. On the question of contingency fee and public policy, Buckley L.J. observed as follows[12]:

"It may, however, be worthwhile to indicate briefly the nature of the public policy question. It can, I think, be summarized in two statements. First, in litigation a professional lawyer's role is to advise his client with a clear eye and unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client's case, which he must, of

[11] [1975] 1 Q.B. 373, at pp. 394G-395C.
[12] [1975] 1 Q.B. 373, at p. 402G-H.

course, present and conduct with the utmost care of his client's interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations ....."

14. The above observations made in *Wallersteiner*, especially those by Lord Denning M.R., are highly pertinent in the case of Hong Kong. *Wallersteiner* was decided by the English Court of Appeal after the criminal and tortious liability for maintenance and champerty had already been abolished by the Criminal Law Act 1967. Nevertheless, the Court of Appeal ruled that contingency fee is contrary to public policy. In Hong Kong, the common law rules in respect of maintenance and champerty remain applicable and the legislature has not seen fit to abolish them[13]. More importantly, after considering the position in the United States, Lord Denning M.R. observed that the arguments in favour of implementing CFA should not prevail in England as there was then the presence of legal aid system in England. Putting aside the public policy considerations, Lord Denning M.R.'s observations show that the presence of a legal aid system (provided it is working properly, which is the case in Hong Kong) is in general a good answer to the arguments in favour of implementing CFA.

15. There was, for a short while thereafter, a change of judicial attitude in England regarding the question of whether contingency fee or conditional fee is contrary to public policy. Examples include the cases of *Thai Trading Co. v Taylor*[14] and *Bevan Ashford v Yeandle Ltd.*[15]. However, as can be seen from the English Court of Appeal decision in *Awwad v Geraghty & Co.*[16] and as is accepted by the Sub-committee[17], the present position under common law remains that in all contentious proceedings no CFA is permissible unless specifically allowed by statute.

---

13 For a recent discussion of the law of maintenance and champerty in Hong Kong, see: Eric T.M. Cheung, "The Modern Application of the Medieval Law of Maintenance and Champerty", (2005) *Law Lectures for Practitioners*, 83.

14 [1998] Q.B. 781. It should be noted that Millett L.J., however, observed that modern public policy condemns champerty in a lawyer whenever he seeks to recover --- not only his proper costs --- but also a portion of the damages for himself: or when he conducts a case on the basis that he is to be paid if he wins but not if he loses (p. 654). (See para. 4.73 of the Consultation Paper)

15 [1998] 3 All ER 238.

16 [2000] 3 W.L.R. 1041 (decided on 25th November 1999).

17 See para. 4.91 and 4.114 to 4.117 of the Consultation Paper.

16. The common law in this regard is based on public policy. The key concern is the intrinsic conflict of interests involved if lawyers are to have a financial interest in the outcome of the litigation. As Schiemann L.J. said in *Awwad*'s case, the "public interest in the highest quality of justice outranks the private interests of the two litigants. This renders it particularly important that lawyers should not be exposed to avoidable temptations not to behave in accordance with their best traditions"[18].

17. The problems that can arise this intrinsic conflict of interest is recognized by the Sub-committee[19]. The Sub-committee's answers are two-fold: (1) there is no evidence that to justify the assumption that the financial interests introduced by event-triggered fees would override the normal professional standards[20]; and (2) the problems relating to unethical conduct can be avoided if the conditional fee regime is properly structured[21]. Neither of these answers is satisfactory.

18. In England, although CFA has been implemented since 1995, the concerns over the intrinsic conflict of interests remains a live one. The following extracts from a recent study of the civil justice system in England encapsulates this concern vividly as follows[22]:

"*(ii) Conflicts of interest and duty*

35.52 This is not a peril which can be ignored:
..... however strong the regulation of the legal professions may be, the new statutory framework will provide new and greater temptations and inducements to lawyers to allow their own financial interests to prevail over the interests of their clients and to the court.

35.53 The lawyer is expected to place his client's interests ahead of his

---

18 [2000] 3 W.L.R. 1041, at p. 1057F-G.
19 See, e.g., para. 6.3(i), 6.5(iii), 6.30, 6.71(a) of the Consultation Paper.
20 See para. 6.3(i), 6.5(iii), 6.28(5) and 6.27(b) of the Consultation Paper.
21 See para. 7.1 of the Consultation Paper.
22 See Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System*, (OUP), para. 35.52 to 35.54 (pp. 812-813) and the references cited in footnotes 97 to 102 therein. See also the observation of Michael Zander quoted in para. 6.30 of the Consultation Paper.

> own, and to be objective in assessment of his client's position, at the same time he must respect the overriding interests of justice itself. But the question arises whether a litigation lawyer's wish to secure a conditional fee might seduce him into placing his interests ahead of his client's and the wider interests of justice. Some judges have tried to play down this factor, perhaps because the system of conditional fees has been introduced by Parliament and it would be both undiplomatic and unseemly for the courts to bemoan its introduction. Some judges also feel that such agreements, even if imperfect, improve access to justice.
>
> But one Chancery judge[23], in a lecture to fellow lawyers, has expressed grave anxiety whether the conflicts of interest engendered by the new system have been properly thought through by policy-makers. ....."

19. The position in Ireland is also worth noting. Paragraph 5.38 of the Consultation Paper suggests that speculative fees have been in use in Ireland for over 30 years. It also suggests that it is generally accepted in Ireland that conditional fee arrangements have the effect of culling the frivolous or hopeless action. We have reservations as to whether this paragraph in the Consultation Paper accurately states the position in Ireland. We recently have an opportunity of discussing this matter with the Irish Bar. We are given to understand that the position in Ireland is as follows:
    (1) Although paragraph 12.1 of the Code of Conduct of the Irish Bar allows their barristers to charge fees on any basis permitted by the law, the common law of maintenance and champerty still applies in Ireland and paragraph 3.12(a) of their Code of Conduct expressly prevents any barristers from appearing as counsel in any matter in which they have a significant pecuniary interests.
    (2) Furthermore, paragraph 12.1(e) of their Code of Conduct stipulates that barristers "may not accept instructions on condition that payment will be subsequently fixed as a percentage or other proportion of the amount awarded".
    (3) Although barristers and solicitors in Ireland very often take up works on *pro bono* basis and are subsequently paid, they do not operate on

[23] See Lightman J., "Civil Litigation in the Twenty-First Century" (1998) 17 *CJQ* 373.

conditional fee or contingency fee basis.

20. In *R (Factortame Ltd.) v Secretary of State for Transport, Local Government and the Regions (No. 8)*[24], the English Court of Appeal expressed strong and convincing concern over allowing expert witness to be retained on a contingency fee basis. Expert witnesses are normally professionals. No valid distinction can be drawn between the legal profession and the other professions.

21. Problems that may arise as a result of this conflict of interests can take many different forms. Apart from the temptation to overstep the line so as to enhance the chance of victory, there may also be the zeal to settle a case as quickly as possible even when the settlement offer is less favourable than what the lay client deserves. As acknowledged in the Consultation Paper[25], a lawyer can receive his fee without expending much time on the case by settling his case quickly.

22. It has been argued that there is no empirical evidence which supports the existence or extent of the problems arising from this inherent conflict of interest in jurisdictions where CFA is allowed. Such an argument should be viewed with caution. The presence or absence of such evidence depends on whether the relevant jurisdiction has conducted proper studies into the problem. It also depends on whether the litigants are well-informed enough to be in a position to appreciate the problem and to lodge the complaint (without which the problems might simply go undetected). In our experience, the last factor is of particular relevance in Hong Kong. Judging from the activities of recovery agents, it is likely that victims of personal injuries cases are most likely to be those opting for CFA if it were allowed in Hong Kong. Construction site accidents or work-related accidents take up a major part of personal injury or fatal accident litigation in Hong Kong. Most of the victims in those cases are not well educated and they are unlikely to be in a position to detect any untoward conduct on the part of their lawyers. For this reason, cases involving breach of ethical rules do not necessarily come to light and hence cannot be policed by the professional bodies (even if they have the necessary resources to do so).

---

24 [2002] 3 W.L.R. 1104 (which is considered in para. 4.100 to 4.103 of the Consultation Paper).
25 See para. 2.7 of the Consultation Paper (at p. 19).

23. The intrinsic conflict of interests involved in any form of CFA is not solely a question of integrity. It also concerns the question of judicial economy, which is another aspect of public interest relevant to the present consideration. In this regard, the following observations are relevant[26]:

"The public interest in the efficiency of the judicial process is also affected by the extension of CFA litigation. This is because, if judges come to feel that they cannot trust barristers (or other advocates) appearing before them in CFA cases, if satellite arguments break out as to whether counsel for a CFA client has improperly sought to improve his case, and if CFA litigants need protection against the potential dishonesty of his own counsel, there will indeed be an adverse effect in terms of judicial economy."

24. Conflict of interests aside, public policy also raises the question of responsibility. Under the present system, litigation costs are mainly financed by three sources, namely, the litigants, the insurance companies, the Government through the provision of legal aid. The litigants have to pay because they are the users of the litigation system. Insurance companies finance litigation as that is part of their business. The Government has to fund legal aid since it is part of its public, if not constitutional, duty under Article 35 of the Basic Law to facilitate access to court[27].

25. Once CFA is implemented, the legal profession has to assume the commercial risk and will become a new source of financing for litigation. As accepted by the Sub-committee, the "financial burden of allowing wide access to the courts would be shared by legal practitioners, insurance companies, litigants and the Government"[28]. The question here is: why should the legal profession be made to shoulder this responsibility? The Consultation Paper has not considered this fundamental question in any detail (if at all), let alone

---

26 Peter Kunzlik, *op. cit.,* at p. 871.

27 In the recent Court of Final Appeal decision of *The Stock Exchange of Hong Kong Ltd. v New World Development Co. Ltd.,* unrep., FACV No. 22 of 2005 (6/4/2006), Ribeiro PJ observed (at para. 50) that Article 35 is concerned with ensuring access to the court and such access is buttressed by provisions aimed at making such access effective. See also the discussion on similar provisions in the European Convention on Human Rights and Article 6(1) of the Human Right Act 1998: Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System*, (Oxford), para. 35.01; Hill & Pannick (ed), *Human Rights Law and Practice*, para. 4.6.16 to 4.6.19; *Airey v Ireland* (1979) 2 EHRR 305, ECHR; and *McVicar v UK* (Application No. 46311/99) (7th May 2002) ECHR.

28 See para. 1.5 and 6.72(e) of the Consultation Paper.

providing an answer[29]. The changes in the other jurisdictions *per se* cannot, in our view, be used as an ground for justifying the implementation of CFA. It cannot be gainsaid that the reforms in England regarding CFA is a "Treasury driven" attempt to cut the legal aid budget[30]. There is no suggestion that Hong Kong is facing the same situation that was faced by the British Government which led to the implementation of CFA. The HKBA simply cannot see any valid grounds that can justify the Government in passing this responsibility to the legal profession in the name of widening access to justice.

C.1.2 Increase in Unmeritorious Litigation

26. The other concern about implementing CFA is that it may lead to an increase of unmeritorious or frivolous litigation[31]. The counter-argument is that lawyers acting on CFA basis will make a rigorous assessment of the likely chance of success before they take on the case and thus will help to screen out the unmeritorious cases[32]. The Consultation Paper also points out that in Canada, contingency fees had not led to a huge increase in litigation and that statistics referred to by the Law Society of British Columbia showed that contingency fees had actually helped to weed out bad law-suits[33].

27. There is considerable force in the argument that lawyers working on CFA basis will first assess the merits of the cases before taking them on. However, one possible scenario that ought to be taken into account is this. A firm of solicitors works on CFA basis. In order to maximize its profits and to spread

---

29 In England, the justification put forward is that "the risks are managed by those who are in the best position to know what the risk are --- the lawyers". See: *Access to Justice with Conditional Fees*, para. 2.1. As the Consultation Paper has not specifically dealt with this, it is not clear whether the Sub-committee subscribes to the same line of reasoning. In any event, it is difficult to see how this line of argument can be correct. Uncertainty is a fact of life in every litigation, especially in cases where the court has a discretion or where the result will turn on resolution of factual disputes and thus the performance of witnesses. Besides, whether an early assessment of risk is accurate depends on how much the lay client informs the solicitors and his barrister.

30 See D. Bindman, "Irvine Reforms Slash Legal Aid Budget", *Law Society Gazette* (22/10/1997) 1; Neil Andrews, *op. cit.*, para. 35.39 (p. 808); and Eric T.M. Cheung, *op. cit.,* at p. 104. For the relevant figures that support this observation and a further discussion thereon, see Neil Rickman & Alastair Gray, "The Role of Legal Expenses Insurance in Securing Access to the Market for Legal Services", contained in Zuckerman & Cranston (ed.) *Reform of Civil Procedure: Essays on 'Access to Justice'* (Oxford), 305, at pp. 316-319.

31 See para. 6.3(iii), 6.5(iii) and 6.71(b) of the Consultation Paper.

32 See para. 6.3(iii), 6.5(iii) and 6.71(c) of the Consultation Paper.

33 See para. 6.5(ii) of the Consultation Paper.

the risk as much as possible, this firm of solicitors simply takes up as many cases as possible regardless of their merits. Once cases are taken on, all the works are effectively passed on to junior counsel. Of course not every junior counsel will be willing to take on CFA cases. But given the growing size of the junior Bar, there are bound to be barristers who may be either attracted (for one reason or another) to take up CFA cases or simply because (for financial reason or otherwise) they do not have any real choice. By adopting this mode of operation, the running costs of the solicitors firm is kept at the minimal as most of the work will be done by junior barristers. On the other hand, they will make profit even if a minority of their cases become successful or are settled. In other words, there are ways that solicitors firms can still be able to operate profitably on CFA basis without having to screen out the weak cases before taking them on. This scenario is not purely hypothetical. There is anecdotal evidence that solicitors firms having close association with recovery agents are operating more or less along this line.

28. As a form of safeguard against nuisance claim, the Sub-committee, in Recommendation 6, suggests that a claimant utilizing conditional fees should be required by law to notify the defendant of this fact and that the court should have discretionary power to require security for costs in appropriate cases[34]. It is not entirely clear from the Consultation Paper whether implementation of CFA is only recommended for plaintiff litigants or to both plaintiff and defendant litigants. However, it appears that Recommendation 6 is only made in respect of plaintiff and not defendant.

29. On the basis that only a plaintiff opting for CFA will be required to disclose this fact to the defendant, the question remains whether Recommendation 6 will be effective. Under the present system, insolvency or poverty is no ground for ordering security for costs against individual plaintiff under Order 23[35]. Further, no security for costs will be ordered if it will have the effect of stifling the plaintiff's claim[36]. It is suggested that CFA can enable the middle-income group to have greater access to justice. Assuming if this is correct, this will also mean that they are also the group of people who will be most unlikely to be able to provide security for costs. This in turn will mean

34 See para. 7.27, 7.28 and Recommendation 6 of the Consultation Paper.
35 *Hong Kong Civil Procedure 2006*, Vol. I, para. 23/3/13 (pp. 412-413). The position is, however, different in cases of corporate plaintiff: see section 357 of the Companies Ordinance (Cap. 32).
36 *Hong Kong Civil Procedure 2006*, Vol. I, para. 23/3/14, at p. 414.

that the court is unlikely to order them to provide security since such an order will stifle their claims. Indeed, Recommendation 6 would effectively mean that the court would be asked to screen cases that are suitable for CFA. What threshold should then be adopted by the court? What yardstick should be used to set the threshold? If the threshold is a high one, that would negate the usefulness of CFA. If it is a low one, the system may be open to abuse.

30. As noted above, it is not clear whether both plaintiff and defendant can opt for CFA. If defendants are also allowed to opt for CFA, there is a risk that CFA will encourage defendants to resist rightful claims even when they know they have no defence. One may argue that no lawyer will agree to defend a client on the basis of CFA if the defence is unmeritorious. True though this may be as a matter of common sense, any litigation practitioner will know that it is not always possible to accurately ascertain the merits of a defence at an early stage, especially a defendant may, either deliberately or otherwise, fail to disclose all relevant facts. In other words, allowing defendant to opt for CFA will run the risk of encouraging unmeritorious defence and thereby bring about adverse impacts on the administration of justice including waste of judicial resources.

31. Further, Recommendation 6 cannot be modified so as to be used in cases where litigants defend on the basis of CFA. At the moment, only a defendant can ask for security for costs from the plaintiff and not the other way round[37]. The rationale is that the defendant is being dragged into the litigation whereas the plaintiff has the option to decide whether to sue a defendant when there is indication that the defendant may not be able to satisfy the judgment or pay the plaintiff's legal costs. We do not see why implementation of CFA can or should justify a change of this rationale. Besides, under the present system, where a plaintiff fails to provide security for costs pursuant to a court order, his claim may either be stayed or dismissed. If Recommendation 6 is implemented to a defendant using CFA, the next question is what will happen if a CFA defendant cannot provide security for costs as ordered. Will the defendant's defence be struck out and judgment be entered in favour of the plaintiff? If yes, that will effectively mean that judgment is entered against the defendant because of his inability to provide security for costs instead of on the merits. That cannot be right as a matter of

37 See Order 23, rule 1 of the R.H.C. (Cap. 1) and section 357 of the Companies Ordinance (Cap. 32).

principle. On the other hand, if the defendant's case will not be dismissed even if he fails to provide security for costs in such a scenario, Recommendation 6 will not be an effective measure to prevent an unmeritorious defendant opting for CFA in order to resist a claim against him.

C.1.3 *Excessive Fees*

32. The question of whether lawyers will be end up being paid more for their work is also a live one in the CFA debate[38]. In addition to the materials cited in the Consultation Paper, it is pertinent to note the following observations[39]:

"The fundamental difference between the contingency fee and the conditional fee is that the latter relies on its calculation on the hourly rate uplifted. Logically, the consequence of uplifting this rate by any percentage is to magnify the phenomenon described --- in terms of the effect being to promote over-work from the lawyer. With lawyers setting the percentage that they feel rewards them for the risk they have taken in acting in the matter, they are also stimulating the undesirable effect of inducing a "working up" of the case in terms of hours expended. An economic analysis has, therefore, proven that one of the criticisms of any fee structure based on the hourly rate is to spin the matter out longer than is legitimate has, prima facie, a foundation to it. What the uplifted rate does is simply increase the motivation for a lawyer to do this. One cannot escape the conclusion that, without delving into the policy reasons for the change to CFAs, from a client's perspective the change is not beneficial."

33. There is of course no basis to suggest that every lawyer or the majority of the lawyers in Hong Kong will have a tendency to churn fees by unethical or undue means. However, the risk is definitely there and cannot be lightly ignored[40]. The Sub-committee believes that this question of excessive fee can be avoided if the conditional fee regime is properly structured[41]. We are afraid that we cannot share this optimism, at least at this stage when the particulars of the CFA regime is yet to be hammered out.

---

38 See para. 6.15 to 6.20, 6.24 to 6.26 and 6.29(2) of the Consultation Paper.
39 Glen Marshall, "The Economics of Speculative Fee Arrangements", (2002) 21 *CJQ* 326, at p.337.
40 See Peter Kunzlik, *op. cit.*, pp. 865-866.
41 See para. 7.1 of the Consultation Paper.

C.1.4 Adverse Impact on Settlement

34. Under our present civil justice system, settlement of litigations is perceived as a good thing. The rules and the courts both encourage settlement. The implementation of CFA will add a new element to settlement negotiations[42]. The litigant may be less risk averse where there is no costs exposure. This will have an adverse impact on judicial economy. In addition, there is also the risk of driving a wedge between the lawyer and client (and possibly the insurer involved) in circumstances where the merits of the case are revised downwards from an initial optimistic view, and the other side then makes a reduced settlement offer which the lawyer recommends but the client feels is inadequate.

C.2 Pre-requisites for implementing CFA

35. The Sub-committee acknowledges that: (1) the availability of insurance is a key factor in making the conditional fee system work; (2) whether the market in Hong Kong is large enough to allow a number of insurance companies to compete and survive should be investigated and considered[43]. When the availability of insurance, which is acknowledged to be a key factor, is yet to be investigated, it is simply too hasty to recommend implementation of CFA in Hong Kong.

36. In addition to insurance, the other pre-requisite for implementing CFA in Hong Kong is the availability of financing arrangements for the legal profession. Unless the major part of a barrister's or a solicitors firm's practice is carried out on a traditional basis (so that he or the firm can fund lost CFA cases from other income), the need for financing is obvious[44]. Even if the practice on the whole is profitable, a barrister or a solicitors firm may need to have financing to overcome any cash-flow problem that may arise from lost CFA cases. In addition, in order to take up CFA cases, there will be a need to incur costs in preliminary investigative works so as to assess the merits of the clients' cases. Such costs will not be insignificant and will have to be provided

---

42 See: *The Woolf Reforms In Practice* (Butterworths) (1998), p. 34.
43 See: para. 6.38 of the Consultation Paper.
44 See: Peter Kunzlik, *op. cit.,* at pp. 859-861; and para. 6.35(i) of the Consultation Paper.

for[45].

37. At the moment, it is totally unknown as to whether the financial institutions in Hong Kong are ready and willing to provide this kind of finance (especially to junior barristers or small-size solicitors firms who may not be able to provide any form of security). This is yet another area which should be investigated before one can safely conclude that CFA should or can be implemented in Hong Kong.

38. Unless proper financing is available to the entire legal profession at a reasonable cost, the implementation of CFA in Hong Kong may have undesirable effects. In the absence of appropriate financing, big solicitors firms will be in a far better position to take up CFA cases than small to medium firms of solicitors. This will further enhance the competitive edge of bigger solicitors firm over the small size solicitors firm when the former already enjoy, by reason of their size, a certain degree of advantage. Putting aside the argument that there should be fair competition, this type of development is certainly not healthy for the overall development of the legal services market in Hong Kong.

C.3 Other issues arising from CFA

39. The implementation of CFA in Hong Kong will also raise issues concerning the relationship amongst the lay client, the instructing solicitors and the barrister.

40. Following the tradition in England, the Hong Kong position remains that there is no contract between the barrister and his lay or professional clients[46]. In England, this rule has been abolished[47]. The Consultation Paper has not expressly considered the issue of whether similar change should be made in Hong Kong. Nor has it considered whether the contract, if there is to be one, should be made by the barrister with the lay client direct or with the instructing solicitors.

---

45 *The Woolf Reforms in Practice* (Butterworths) (1998), p. 33.

46 See *Moor v Row* (1629-30) 1 Chan Rep 38; *Kennedy v Brown* (1863) 13 CBNS 677 and *Rondel v Worsley* [1969] 1 AC 191.

47 See section 61(1) and (2) of the Courts and Legal Services Act 1990.

41. Assuming Hong Kong is to follow the footsteps of England and will similarly abolish the rule, that will not be the end of the matter. Instead, new problems will arise especially when a barrister wants to withdraw from the case on the ground that the lay client and/or his instructing solicitor has made misrepresentation which affects his assessment of the merits of the case. In his detailed analysis on the impact of conditional fee on the Bar, Peter Kunzlik illustrates the problem as follows (in a scenario which assumes that the contract is made between the barrister and his solicitor, not the lay client)[48]:

"The very possibility of having enforceable solicitor-barrister CFAs raises significant ethical questions. We have seen that under a CFA the barrister's chance of being remunerated depends substantially upon the accuracy of his initial assessment of his client's prospects of success. This in turn depends upon disclosure of all material facts within the knowledge of the client and solicitor. If a barrister takes a CFA case and later discovers that either his client or instructing solicitor has failed to disclose material information then he may require, as a matter of risk management, to withdraw from the case. The CFA will no doubt make provision allowing him to do so and the [Bar Code] should also be amended to recognise this. Furthermore, if by the time he becomes aware of the client's failure to make full disclosure the barrister has already carried out extensive work he will wish to be remunerated for it. This too will be covered by the CFA and ought also to be deal with by the [Bar Code].

Such issues, in the context of enforceable agreements, are fraught with difficulty. Assume for example, that a CFA barrister withdraws on the grounds of material non-disclosure and demands payment from his instructing solicitor for his work in progress. Assume that the solicitor and client each deny having failed to disclose any material fact. The barrister sues the solicitor for his fees. The solicitor counterclaims on the basis that the barrister's withdrawal from the case was unjustified, caused the client to terminate the case, and thereby denied the solicitor his opportunity to earn his own fees. The barrister wishing to pursue his case, and to defend the solicitor's counterclaim, would then be put into the unenviable position of having to disclose to the court details of his communications both with his

48 See Peter Kunzlik, *op. cit.*, p. 867.

instructing solicitor and with his client. The question would then arise as to the barrister's obligation of confidentiality to his client and the circumstances in which it should yield to his own interest in proving his case; a question of particular difficulty because the client himself owes no contractual obligation to the barrister there being no barrister-client contract.

Similarly, an instructing solicitor might accept that the client has failed to disclose a material fact and that counsel is entitled to withdraw and be paid his normal fee. He may therefore pay the barrister and sue the client under the solicitor-client CFA ..... to recover his own fees and this disbursement. He wishes to adduce evidence from the barrister to establish that the client had been properly advised as to the need for disclosure, that the undisclosed fact was material to the barrister's risk assessment, and that non-disclosure had indeed prompted the barrister's withdrawal from the case pursuant to the solicitor-barrister CFA. What precisely are the professional obligations of the barrister in such a situation? How does his obligation to maintain client confidentiality apply? What, if any, professional duty does he owe to his instructing solicitor? ...."

42. Questions involving the insurance company are no less significant. In this regard, Peter Kunzlik observed as follows[49]:

"The barrister-client relationship will also be affected by the interests of the client's after-the-event insurer. The latter will typically require the insured's lawyers to undertake to disclose information about the case to the insurer; to notify the insurer, or seek the insurer's consent, before taking certain specified steps in the action, and to notify the insurer if the insured fails to take the lawyer's advice. For the barrister, this puts into question both the extent of his obligation of client confidentiality and his duty to act independently. ....."

43. The impact of CFA on the legal practitioners' potential responsibility for the successful parties' costs is another area which also requires careful consideration. Under section 52A(1) of the High Court Ordinance (Cap. 4), the court has "full power to determine by whom and to what extent the costs are to be paid". This is similar to sections 51(1) and (3) of the Supreme Court

49 Peter Kunzlik, *op. cit.,* at p. 868.

Act 1981 (as substituted by section 4 of the Courts and Legal Services Act 1990). It is true that there are cases in Hong Kong which suggest that section 52A(2) of the High Court Ordinance renders the position in Hong Kong different from that in England[50]. Despite the differences in these statutory provisions, the recent English Court of Appeal decision in *Arkin v Borchard Lines Ltd.*[51] naturally and understandably raises serious concern in the legal profession.

44. In *Arkin*'s case, the claimant sought substantial damages against the defendants and financed the costs of expert evidence by a non-champertous agreement with a professional funding company known as MPC. The claimant's claim failed and the defendants sought costs against MPC. The first instance judge dismissed the defendants' costs application against MPC but the decision was reversed by the Court of Appeal. At the end, MPC was ordered to pay the successful defendants' costs to the extent of the funding provided. The following paragraphs in the judgment of the court, delivered by Lord Phillips of Worth Matravers M.R., are of particular concern:

> "38. While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event. ..... In our judgment, the existence of this rule, and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. .....
>
> 41. We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided. .....
>
> 43. In the present appeal we are concerned only with a professional

[50] See, e.g., *Hong Kong Housing Authority v Hsin Yieh Architects & Associates Ltd.* [2005] 2 HKC 201 and *Best Consultants Ltd. v Aurasound Speakders Ltd.* [2005] 4 HKC 357. However, in the recent decision in *World Fuel Services (Singapore) Pte Ltd. t/a Trans-Tec Asia v The Owners of the Ship or Vessel "M.V. Liberty Container"*, unrep., CACV No. 327 of 2005 (26/4/2006), the Court of Appeal left open the question of what effect, if any, section 52A(2) of the High Court Ordinance has on the court's jurisdiction to award costs against so-called non-party.

[51] [2005] 1 WLR 3055.

funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action. .....

44. While we have confined our comments to professional funders, it does not follow that it will never be appropriate to order that those who, for motives other than profit, have contributed to the costs of unsuccessful litigation, should contribute to the successful party's costs on a similar basis."

45. It is true in *Hamilton v Al Fayed (No. 2)*[52], Brown LJ had observed that barristers and solicitors working on the basis of CFA are not liable for the other side's costs[53] and that the first instance judge, Colman J., in *Arkin* placed great reliance on Brown LJ's remark. However, since Colman J.'s approach was reversed by the English Court of Appeal and given the observations quoted in the preceding paragraph, the legal profession is legitimately concerned as to whether one day the approach in *Arkin* will be extended to cover legal practitioners working on CFA basis on the ground that they also in effect purchase a stake in the litigations.

46. All these questions call for careful consideration. Unless and until they are satisfactorily dealt with, the implementation of CFA in Hong Kong may turn out to be a recipe for disaster.

47. Lastly in this regard, there is also, as acknowledged in the Consultation Paper, the question involving claims intermediaries or recovery agents in Hong Kong[54]. The HKBA has issued a report on recovery agents[55] and it maintains its stance. It is the HKBA's view that implementation of CFA will add fuel to the already heated problems concerning the operation of recovery agents in Hong Kong.

---

52 [2003] QB 1175.
53 At para. 45.
54 See para. 6.42 to 6.56 of the Consultation Paper.
55 See the HKBA's Report on Recovery Agent (1/4/2005).

C.4 Considerations in favour of implementing CFA

48. The Consultation Paper has set out various arguments in favour of implementing CFA. Two key questions arise from those arguments, namely: (1) to what extent are those arguments valid; and (2) if valid, whether they prevail over the risks and uncertainties inherent in CFA and thus are sufficient to justify the implementation of CFA in Hong Kong.

C.4.1 Access to Justice

49. The main advantage of CFA being put forward by the Sub-committee and in other literature is that it can broaden access to justice. Shortly put, it is suggested that CFA enables those litigants who do not qualify for legal aid but who have insufficient means to finance the full costs of litigation the opportunity of bringing their meritorious claims to court[56].

50. In dealing with this access to justice argument, the Sub-committee cites the increase in unrepresented litigants as one of the major problems confronting the civil justice system in Hong Kong and attributes the increase of unrepresented litigants to their inability to engage lawyers[57].

51. We do not dispute that CFA may have the effect of broadening access to justice. However, we believe the following matters should also be considered.

52. First, in so far as it is suggested that the increase in unrepresented litigations demonstrates that there is a serious problem in the current system and thus justifies the introduction of CFA, the HKBA has reservation both as to the basis and the logic of this reasoning.

53. Purely as a matter of statistics, it is true that the number of unrepresented litigants in Hong Kong has increased in recent years. It is also true that this phenomenon has caused difficulties in the civil justice system in Hong Kong. However, we do not see on what basis can the Sub-committee conclude that the growing number of unrepresented litigants suggests that there is a significant proportion of the community who are not eligible for legal aid but

---

56 See, e.g., para. 6.4(i), 6.5(i), 6.72(a), 6.73, 7.1 and 7.2 of the Consultation Paper.
57 See para. 6.62 to 6.70 of the Consultation Paper.

cannot afford the high costs of litigation[58].

54. Apart from citing statistics supporting the increase in the number of unrepresented litigants[59], the Sub-committee has neither conducted study nor put forward evidence on the reasons contributing to this increase. The Sub-committee only quotes a passage from the 1996 Background Paper prepared by the Australian Law Reform Commission[60] ("1996 ALRC Paper") to suggest that litigants appeared in court without legal representation because they cannot afford it and do not qualify for legal aid. Regardless of whether it was correct or otherwise, the 1996 ALRC Paper was obviously referring to the situation prevailing in Australia at the time. One surely cannot borrow the observation made in the 1996 ALRC Paper and apply it in Hong Kong as if it would equally be correct without conducting any studies on why there is an increase in unrepresented litigants in Hong Kong.

55. No doubt some litigants chose to represent themselves because they could neither obtain legal aid nor afford private lawyers. However, the pertinent question is how serious is this a problem in Hong Kong. In addition, apart from financial reasons, there are other reasons as to why litigants may choose to represent themselves. The fact that litigants are now permitted to conduct proceedings in Chinese is certainly one factor. Tactical considerations[61] is another. In this regard, we echo the views expressed in paragraphs 2.2 to 2.10 of the "Response to the Consultation Paper of the Law Reform Commission on Conditional Fees" published by the Law Society's Working Party on Conditional Fees (2/2006).

56. In any event, even if the growth of unrepresented litigants is due to the reason put forward by the Sub-committee, the expansion of the SLAS as will be discussed in Section D below is a better solution.

57. Second, even though we accept that CFA may help to broaden access to

---

58 See the last sentence in para. 6.62 of the Consultation Paper.

59 See para. 6.63 of the Consultation Paper.

60 See para. 6.64 of the Consultation Paper.

61 In our experience, some litigants can well afford to retain lawyers but chose to appear in person for tactical reasons. This is particularly the case when they were facing interlocutory applications and when they want to gain the sympathy of the court by playing victim. On other occasions, litigants appear in person and ask for time to engage lawyers so as to buy time. Besides, there is anecdotal evidence, which was apparent from the documents they submitted to the court, that some unrepresented litigants had legal advice behind the scene.

justice, this perceived advantage is not without limit. Indeed, the extent of this perceived advantage remains uncertain and it is too early (if not erroneous) to suggest that the English experience on CFA is a success. Our main reasons are as follows:

(1) Under the present system, barristers are subject to the cab-rank rule[62]. This cab-rank rule has the effect of facilitating access to court since it obliges a barrister to accept instructions in any field in which he professes to practise in relation to work appropriate to his experience and seniority and irrespective of the nature of the case or any belief or opinion which he may have formed as to the character reputation cause conduct of the client. Once CFA is implemented, this cab-rank cannot be applied. Thus, at least to this extent, implementation of CFA may not necessarily broaden access to justice.

(2) The mere fact that litigants in jurisdictions like England opt for CFA does not mean, and cannot be used as a ground to suggest, that implementation of CFA in those jurisdictions have successfully broadened access to justice. The fact is that litigants in those jurisdictions have no real choice but to turn to CFA after the cutback in the availability of legal aid[63].

(3) The willingness of the legal profession to act on the basis of CFA may depend on the state of economy. It will not be surprising if the legal profession is generally unwilling to accept CFA when the economy is good.

58. Third, regardless of the extent to which CFA may help to broaden access to justice, we do not see CFA as the only, if at all the proper, means to broaden access to justice. As demonstrated above, implementing CFA will carry with it considerable risks and uncertainties. However, as will be dealt with below[64], expanding the SLAS will achieve the aim of broadening access to justice without incurring the risks involved.

---

62 See para. 21 of the Code of Conduct of the Bar of the Hong Kong SAR ("Bar Code").
63 See para. 3.77 of the Consultation Paper.
64 See Section D.1 below.

C.4.2 Allowing Consumers to Choose

59. It is suggested that implementing CFA will provide the consumers with an additional choice. In the Lord Chancellor's Department's Green Paper on Contingency Fees 1989 ("1989 Green Paper")[65] which precipitated England's move toward CFA, it is argued that CFA would allow the litigants/consumers an additional choice and that this freedom of choice could, on its own, be regarded as a ground for implementing CFA[66].

60. Purely as a matter of principle, we do not dispute that an additional choice is a good thing. However, one has to consider whether the introduction of an additional choice will bring about adverse consequences such as the "cherry-picking" issue and those discussed above. For the reasons explained herein, we do not believe the advantages brought about by an added freedom of choice can off-set the risks involved in implementing CFA.

C.4.3 Enhancing Efficiency

61. The 1989 Green Paper suggests that the introduction of CFA will encourage a greater level of commitment on the part of the lawyers as they would have a stake in the outcome of the proceedings. This, it is suggested, will encourage lawyers to operate efficiently[67]. The logic of this argument is difficult to follow. If one trusts the professional integrity of lawyers, the presence or absence of a stake in the outcome of the proceedings should not affect the performance of the lawyers. On the other hand, if one does not trust the professional integrity of lawyers, the fact that the lawyers have a stake in the outcome of the proceedings will only lead to concerns such as conflict of interests and excessive fees discussed above[68]. In any event, CFA has been implemented in England since 1995. There is apparently no suggestion in the post-1995 review literature that the 1989 Green Paper's optimism has been proven right.

C.4.4 Harmonization with other Jurisdictions

---

65 See para. 6.2 of the Consultation Paper.
66 See para. 6.4(ii) of the Consultation Paper.
67 See para. 6.4(ii) of the Consultation Paper.
68 See Section C.1.1 above.

62. Another advantage put forward is that by allowing CFA, the fee structure in Hong Kong will be harmonized with other jurisdictions which allow some form of event-triggered fees[69]. We fail to see how this can be an advantage or why such harmonization will bring benefit to the general public in Hong Kong. In any event, when the implementation of CFA involves both risks and uncertainties, harmonization with other jurisdictions definitely cannot be a weighty consideration.

D. THE VIABLE ALTERNATIVE: EXPANDING SLAS

D.1 Broadening Access to Justice as the Sole Aim

63. It is pertinent to note that the Consultation Paper has not expressly stated why it is thought necessary to consider the feasibility of implementing CFA in Hong Kong. In particular, the Consultation Paper has not stated whether the need to consider the feasibility of implementing CFA arising purely as a result of perceived problems in the present civil justice system, or whether there are other policy or fiscal reasons.

64. On the face of it, the purpose of the study made by the Sub-committee is to consider facilitating the public, especially the middle-income group, to have greater access to justice since the Consultation Paper states as follows[70]:

> "It is important to ensure that making a civil claim should not be the preserve of the wealthy (who can afford to fund legal proceedings by their own resources) or the poor (who are eligible for legal aid), but open to all with good cause. If conditional fees are allowed to be used in appropriate types of civil litigation, the middle-income group in Hong Kong --- people whose means are outside the limits of legal aid and the Supplementary Legal Aid Scheme --- can bring a claim without worrying too much about legal costs, provided they have a strong case."

65. No one will dispute the desirability to broaden access to justice. However, if the sole aim of implementing CFA is to broaden access to justice, the HKBA believes that the appropriate way forward is to expand the current SLAS

---

69 See para. 6.72(f) of the Consultation Paper.
70 See para. 7.1 of the Consultation Paper.

rather than to implement CFA in Hong Kong. At the very least, CFA should not be implemented without conducting a study on the feasibility of expanding the SLAS.

66. The SLAS was introduced in 1984 to assist members of the so-called "sandwich class" who would otherwise be outside the means test for the Ordinary Legal Aid Scheme[71]. Apart from being self-financing, the SLAS is in effective operated on a contingency fee basis and is running successfully. This is unqualifiedly accepted by the Sub-committee as it observes as follows[72]:

"SLAS is a self-financing scheme funded by contributions paid by the applicant upon acceptance of legal aid, as well as contributions deducted from any compensation recovered in the court proceedings. SLAS is operated effectively on a contingency fee basis by the Legal Aid Department and is free from the problems of contingency fees administered by private practitioners in American jurisdictions. SLAS is supported by litigants and legal practitioners, and is generally considered as a success."

67. From the administrative and practical perspective, an expansion of the SLAS is unlikely to be complex. The expansion will involve mainly three aspects.

Types of Cases

(1) The first aspect involves an expansion of the type of cases to be covered by the SLAS. In Recommendation 2, the Sub-committee recommends CFA be allowed in respect of: (a) personal injury cases; (b) family cases, except where the welfare of children is involved; (c) commercial cases in which an award of damages is the primary remedy sought; (d) product liability cases; (e) probate cases involving an estate; (f) insolvency cases; (g) employees' compensation cases; and (h) professional negligence cases. Part of the types of proceedings are covered by the present SLAS[73]. In principle, there should not be any difficulty in expanding the scope of SLAS to cover the types of

71 See para. 1.30 to 1.33 of the Consultation Paper.
72 See para. 7.44 of the Consultation Paper.
73 The SLAS currently covers cases of: (a) personal injury or death, medical, dental or legal professional negligence where the damage is likely to exceed HK$60,000; and (b) cases under the Employees Compensation Ordinance irrespective of the amount of damages.

cases listed out in Recommendation 2 made by the Sub-committee[74].

Adjustment of Eligibility Test

(2) The second aspect involves an upward adjustment of the applicable means test for SLAS applicants. The SLAS is currently available for applicants whose financial resources exceed HK$155,800 but do not exceed HK$432,900. We believe this maximum limit of HK$432,900 should be revised to an appropriate limit of, say, HK$2,000,000[75]. By making this upward adjustment, the middle-income group should be adequately covered. For those whose financial resources exceed HK$2,000,000, we do not see why they should not be funding his own litigation as they would be in a position to do so.

Supporting Staff & Facilities

(3) Admittedly, an expansion of the SLAS will require additional supporting staff and facilities so as to enable smooth and proper operation of the expanded scheme. With proper budgeting and administrative planning, we believe this can be achieved as the Legal Aid Department has the experience of running the SLAS successfully since 1984.

68. Whilst the SLAS is in effective operating on CFA basis, it is free from the above-discussed concerns that one may legitimately have in respect of allowing solicitors and barristers to operate on CFA basis. This is accepted by the Sub-committee[76] and there is neither suggestion nor evidence to the contrary. Further, as the Sub-committee acknowledges[77], CFA is generally used in relatively straightforward claims. If a claim involves significant works

---

74 Recommendation 2 suggest that family cases (except where the welfare of children is involved) should be included if CFA is to be implemented in Hong Kong. The HKBA has strong reservation about this suggestion. It is noted that other jurisdictions have exclude matrimonial disputes from CFA: see para. 2.3, 3.47(b), 5.5, 5.15, 5.47 and 7.6 of the Consultation Paper. However, currently, the Ordinary Legal Aid covers matrimonial disputes and it will be far more desirable to have that covered by the SLAS.

75 This limit is a provisional one put forward by the HKBA as a platform for future discussion. The idea is that if a litigant has financial resources beyond a certain limit, it is not against public interest to oblige him to fund his own litigation.

76 See para. 7.44 of the Consultation Paper.

77 See para. 3.78 of the Consultation.

to assess its merits, a CFA is not normally obtainable. If that is the case, there cannot be any real doubt that an expanded SLAS will be able to achieve what CFA can do. Hence, by expanding the SLAS, we can efficiently achieve the aim of broadening access to justice while at the same time avoid the risk involved in implementing CFA in Hong Kong (however small the risk is perceived to be).

69. Lastly, as pointed out above, the SLAS is a self-financing scheme. So far, it has been operated so successfully that it makes a profit. There is no reason, let alone evidence, to suggest that this state of affairs will be dramatically changed if the SLAS is to be expanded as proposed above. This means that there will not be any additional financial burden on the Government whilst at the same time access to justice by the middle-income group can be achieved without any perceived disadvantages.

70. For these reasons, Recommendation 12 is the only recommendation in the Consultation Paper that the HKBA supports. Instead of implementing CFA, the relevant authorities including the Legal Aid Department should be asked to map out and implement the expansion of the SLAS as soon as possible.

D.2 Other Purposes?

71. The discussion in Section D.2 above obviously proceeds on the assumption that the intended implementation of CFA in Hong Kong is not due to fiscal or other unknown reasons. In this regard, we note that the Consultation Paper spells out the Sub-committee's own limitation arising from its restricted terms of reference:

"Although conditional fees were introduced in England to replace legal aid for certain types of cases, the Sub-committee, ***as directed by its terms of reference, has not considered the issue whether conditional fees should or could replace legal aid***. Therefore, our proposals are intended to operate in parallel with, and to supplement legal aid, rather than to replace it or justify any reduction in funding." [emphasis added]

72. In England, the implementation of CFA has led to the virtual abolition of legal aid for civil claims. This is, in the view of the HKBA, regrettable. Given

the development and experience in England, the HKBA is naturally concerned that the implementation of CFA in Hong Kong will also be eventually used as a justification for reducing or even abolishing legal aid for all civil proceedings. Despite the observation in the Consultation Paper as quoted in the preceding paragraph, the intention is that of the Sub-committee. Nowhere in the Consultation Paper has it been stated that the Government endorses the intention of the Sub-committee. More importantly, despite this concern has been voiced out ever since the publication of the Consultation Paper, the Government so far has not come out to address this question.

73. It is of paramount importance that CFA should not be implemented solely or primarily for the purpose of relieving the Government of its obligation to provide legal aid. Any possibility of the development in England being repeated in Hong Kong should be vigorously guarded. The right of access to court is guaranteed under Article 35 of the Basic Law. The Government has a public, if not constitutional, duty to ensure that appropriate legal aid is provided. Any attempt by the Government to relinquish its constitutional duty by shifting the financial burden to the legal profession or the insurance industry is wrong in principle.

74. Principles aside, the situation faced by the British Government before the implementation of CFA is very different from the situation currently faced by our Government. The British Government's decision to develop the CFA system was manifestly a response to the rise in the amount of expenditure upon civil legal aid, which had risen by 8 per cent above inflation[78]. Hong Kong is not facing such a situation. On the contrary, as discussed above, a properly planned expansion of the SLAS will not impose additional financial burden on the Government.

E. OTHER ALTERNATIVES

75. In addition to expanding the SLAS, there are at least two other alternatives that should be considered before implementing CFA in Hong Kong.

76. The first is the Sub-committee's Recommendation 13, namely, the setting up

[78] See, Neil Andrews, *op. cit.*, para. 35.39 and the materials cited in footnote 39 therein.

of an independent body to screen applications for the use of CFA, to brief out cases to private lawyers, to finance the litigation and to pay the opponent's legal costs should the litigation prove unsuccessful[79]. The HKBA takes the view that since the SLAS has been successfully operated by the Legal Aid Department and that it can be expanded to achieve the aim of broadening access to justice, there is no apparent justification for setting up such a independent body. Besides, instead of setting up such a body from scratch, it will be practically and administratively more desirable to rely on the experience of the Legal Aid Department in running the SLAS, which has a proven track record of success.

77. The second alternative is legal expenses insurance ("LEI") (or what may be called before-the-event insurance against legal costs), which has been used as a means to facilitate access to justice in other jurisdictions with varying degrees of success[80]. In Hong Kong, LEI is not popular (save, perhaps, in some cases of corporate litigants). However, it is certainly an area which deserves an in-depth study. In any event, since the Sub-committee recommends a study of the commercial viability of ATE insurance in Hong Kong, it will be appropriate to expand the study to include LEI so as to see how access to justice can best be achieved in Hong Kong.

F. CONCLUSION

78. It is self-evident from the above discussion that implementation of CFA carries considerable risks and can be problematic. The English experience in implementing CFA, which is a response to a social and political crisis[81], bespeaks this point. Besides, as the English experience of conditional fees is still limited[82], whether all long-term adverse problems relating to the implementation of CFA have surfaced remains to be seen. On the other hand, it is clear that there is a much better alternative, namely, to expand the SLAS. This alternative does not carry with it the risks and uncertainties inherent in implementing CFA. Nor will it impose additional financial burden on the

---

79 See para. 7.46 to 7.52 of the Consultation Paper.

80 See, e.g., Vivien Prais, "Legal Expenses Insurance", contained in Zuckerman & Cranston (ed.), *op. cit.,* 431. In *Murphy v Young & Co.'s Brewery plc* [1997] 1 WLR 1591, Phillips LJ took the view that legal expenses insurance is in the public interest in that it not only provides desirable protection to the assured, but a potential source of meeting the costs of adverse party.

81 Neil Andrews, *op. cit.*, para. 35.63 (p. 815).

82 Neil Andrews, *op. cit.*, para. 35.47 (p. 811).

Hong Kong Government. In the circumstances, there is no reason not to opt for the expansion of the SLAS instead of taking the blatantly more risky path of implementing CFA in Hong Kong.

The Hong Kong Bar Association
28th April 2006