

December 2023

Arbitration – Contingency Fee – Champerty and Maintenance – Enforceability – Public Policy**BB v KO [2023] HKCFI 2661**

While Hong Kong has recently enacted legislation to allow outcome related fee structures in relation to arbitration, and despite the fact that contingency fee arrangements are common in many jurisdictions around the world, such arrangements remain illegal in respect of Hong Kong litigation. In *BB v KO* the Hong Kong court was asked to consider the validity of an arbitration award entered pursuant to an arbitration agreement in a lawyer's retainer agreement. The engagement in question contained 1) a contingency fee arrangement and 2) concerned multiple pieces of cross-border litigation and included reference to litigation in Hong Kong.

The application before the court was an application to set aside the arbitration award made in Chicago under Illinois law awarding the law firm USD50m in fees pursuant to a contingency fee arrangement. One of the grounds for set aside was the fact that, although the principal litigation to be dealt with under the engagement was in the Nevada courts, there was reference to strategic advice in relation to Hong Kong litigation. In exercising her discretion not to extend time the Hon Mimmie Chan J concluded that in examining whether or not a relationship offended the rules of champerty the totality of the facts must be examined to ask whether they pose a genuine risk to the court's processes.

What are the practical implications of this case?

In cross-border litigation, it is not unusual where the outcome of a litigation in a jurisdiction where contingency fee is legal is related to the outcome of another set of litigation in another jurisdiction where contingency fee is illegal.

When a firm decides to act in multiple jurisdictions and opt for a contingency fee arrangement, extra care must be taken to ensure that the principles of champerty and maintenance will not be offended. Nevertheless, just because an arrangement has the "savours" of champerty, does not mean that it will not be enforceable in Hong Kong.

The Hong Kong court might find an engagement agreement champertous if it might tempt lawyers to conduct the Hong Kong litigation in a manner for their own personal gain, to inflame the damages, suppress evidence, suborn witnesses or otherwise undermine the ends of justice and the integrity of Hong Kong court process.

Therefore, if a firm adopts a contingency fee arrangement in a cross-border dispute involving Hong Kong careful consideration will need to be given to the manner in which the Hong Kong litigation is dealt with, and whether instructing a separate local counsel avoiding a contingency fee for the Hong Kong dispute.

What was the background?

The contract in dispute is an engagement agreement entered into between BB (a US law firm) and KO (a businessman) (the "**Agreement**") under which BB would represent KO in a litigation in the State of Nevada (the "**Nevada Litigation**"). The Agreement also provided that:

- 1 BB was not retained as lead counsel to represent KO in a connected litigation in Hong Kong but BB might provide "strategic advice" regarding that matter;
- 2 BB was to charge a flat monthly fee of US \$600,000, a trial fee of US \$75,000 per day and a contingency fee which is one-third of: a) total amount recovered by all the defendants (the other two defendants being companies connected to KO) in the Nevada Litigation minus b) the value of a promissory note, the whole fee being capped at US\$50 million.

The other two defendants in the Nevada Litigation eventually recovered US \$2.63 billion by way of settlement but KO refused to pay any fees. BB then commenced arbitration against KO in Chicago to recover fees.

The tribunal issued an award (the "**Award**"), finding that BB was entitled to the contingency fee of US \$50 million. BB then obtained leave in Hong Kong court to enforce the Award (the "**Enforcement Order**"), entered judgment (the "**Judgment**"), obtained a charging order absolute and a garnishee order nisi against KO.

KO applied to set aside the Enforcement Order and the Judgment.

What did the court decide?

The main point taken by KO was that the contingency fee arrangement under the Agreement related partly to litigation in Hong Kong such that the Arrangement was champertous and hence it would be contrary to public policy in Hong Kong to enforce the Award which was made on the basis of the arrangement.

Counsel for BB put forward the argument that the contingency fee hinged not upon the Hong Kong litigation, if any, but was based on the outcome of the Nevada Litigation. Therefore the arrangement was not champertous. The Hong Kong Court was not required to make any decision on this argument as KO had never adduced clear evidence as to what Hong Kong litigation was being conducted in connection with this agreement. It was also not clear whether such litigation was only being contemplated or was actually in place and conducted by with BB's input. Without the necessary facts as to the Hong Kong litigation and the interaction (if any) between the Hong Kong litigation and Nevada Litigation, the Court simply could not

evaluate whether "there was a genuine risk to the integrity of the process of the Court in Hong Kong", being the test laid down in *Unruh v Seeberger* (2007) 10 HKCFAR 31.

Despite the decision that the particular arrangement was not champertous, the Hong Kong Court left open the continuing possibility that if an arbitration award is made giving effect to a contingency fee arrangement, there may be room to challenge the enforcement if fees are directly or indirectly dependent on the outcome of Hong Kong litigation and if, on examining the totality of the facts, there is a genuine risk to the integrity of the court's processes.

Case details

- Court: High Court of HK
- Judge: Mimmie Chan
- Date of judgment: 17/10/2023

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