What can happen when a Conditional Fee Agreement goes wrong?

In this article Professor Suzanne Rab and Nigel Puddicombe (solicitor) reflect on recent experience from alternative dispute resolution over Conditional Fee Agreements

Many of us have worked under or are at least broadly familiar with a Conditional Fee Agreement ("CFA"). The intention of the CFA regime is to improve access to justice but what can happen if a CFA relationship between solicitor and barrister breaks down? Accepting that litigation is likely to destroy the prospects of any relationship preservation, what are the prospects of resolving disputes arising from CFAs using alternative dispute resolution, particularly arbitration, given that many CFAs provide for that mechanism?

CFAs can take many forms, including full 'no win no fee' arrangements and discounted CFAs. A discounted conditional fee agreement is so called because it allows for a discounted hourly rate so that only part of the professional fees are conditional.

Hopefully, common sense can still prevail and in the event of a dispute the relationship can be recovered, recognising each party's vested interests. However sometimes, especially if the essential underlying basis of mutual trust and confidence has been damaged, rigid positions can be taken and even a formal notice of termination may be served by one party. Our purpose is to explore some of the implications that may then follow and to suggest some possible solutions, drawing on our recent experience as barrister mediator-arbitrator and solicitor mediator-arbitrator respectively.

Much may turn on whether a CFA agreement incorporates the Chancery Bar Association's Conditional Fee Conditions ("the Conditions") (last updated in 2019). If it does, then both parties need to appreciate the possible consequences.

The Conditions specify that one of the parties must refer any dispute arising out of a CFA to arbitration by a panel of at least 2 arbitrators, one a barrister nominated by the Chairman of the Bar Council and the other a solicitor nominated by the President of the Law Society. While the balance and fairness of such a panel is commendable, inevitably the cost to the parties of the effective operation of a panel, no matter how streamlined the panel is able to make the process, is substantially higher than that of a single arbitrator.

The Conditions empower the panel to appoint an Umpire. Given the polarity of the parties to a CFA dispute, the inherent potential polarity of the panel appointed under the Conditions and the provisions of s.21 of the Arbitration Act 1996 ("the Act"), it is highly likely that the panel will choose to exercise their power and appoint an Umpire at the outset. This will save more time and greater cost at any later stage should the panel not be able to agree. However, the appointment of an Umpire at any point would increase the complexity of the administration of the arbitration and therefore the cost to

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the parties. These are factors that the parties should take account of before any dispute hardens.

The Conditions expressly remove the panel's power to make any order in respect of the costs of the parties within the arbitration. So, unless the parties agree subsequently to reinstate that power, in line with s.61 of the Act, or otherwise agree upon their respective costs, the parties face the prospect of not being able to recover their costs of the arbitration in any event.

Further, the Conditions require that the right of either party to refer a CFA dispute must be exercised promptly, by either the solicitor or counsel, similar to the rule in judicial review cases. However, the Conditions go further and state that in the event of termination of a CFA that right must be exercised within 3 months of receipt of notice of termination or of the fee note under challenge. If either 3 months deadline is not met then the right of challenge becomes irrevocably barred.

Against this background, it is easy to see that a preliminary issue or issues regarding jurisdiction might be taken by one of the parties. These issues might include what action constitutes the exercise of the right, whether the right has to be exercised simultaneously with both appointing bodies, whether the right was exercised promptly, whether either or both of the 3 months periods has been exceeded or whether the test of promptness also applies in the case of termination. There is no directly applicable case law on such issues. Therefore again these issues can delay, deflect or complicate the arbitration, in the process adding to the uncertainty and to cost.

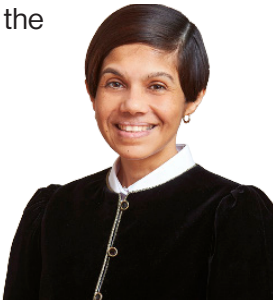
The documents lodged or required to be lodged by the party applying for arbitration with each of the appointing bodies may not be common nor complete. As a result time can be taken and cost incurred by the panel having to compare the documents that each member has received and to require the parties to fill in any obvious gaps at an early stage.

One of the possible grounds for termination of a CFA under the Conditions is that a solicitor has failed to comply with Normal Litigation Practice in performing any task in the underlying court action normally conducted by a solicitor. Normal Litigation Practice is not usefully further defined in the Conditions and so, without a formal admission, the panel may have to consider the need for expert input on this point if raised.

A further complication may arise over the panel's permitted practice to require that the parties provide initial and ongoing security for their fees. While a solicitor arbitrator can hold the parties' money as security, a barrister arbitrator cannot usually do so in their individual capacity. So, without a mutual willingness by the panel to accept the cost and loss of control involved in a specialist third party holding the security (and/or the disputing parties agreeing to meet those costs), the parties are likely to have to accept the solicitor arbitrator holding security for the fees of both panel members and possibly of the Umpire. The alternative would be different security arrangements operating within the panel.

However, despite these factors the panel will be alive to the needs of the parties and to their mutual interest to achieve an early, cost-effective resolution of the dispute. If the parties enable the panel to pursue such an outcome, hopefully the underlying working relationship between solicitor and barrister can be swiftly restored.

In addition, we suggest some practical steps that solicitors and barristers can take to try to avoid a technical dispute under a CFA arising or to mitigate the impact if one does arise. First, revisit standard forms, retainer documents and precedents in this area to ensure that these remain up to date and incorporate the latest law, practice and Conditions (where applicable). Second, just because other parties to a CFA have signed it, don't rely on them having necessarily read it or checked that it reflects what they have agreed or need to be included nor assume that it therefore will work as drafted for any other party. Third, consider the parties' respective appetites for risk, which may not be aligned. For example, in a discounted fee arrangement a party may want to maximise the discounted and guaranteed fee against the more uncertain prospects of an uplift in the event that the success contingency is satisfied.



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