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Liability proceedings 2008

Dualistic liability concept, success fees and litigation financing, direct right to claim, victim assistance and cantonal questions of responsibility

Contributions to the meeting of 8 May 2008



Schulthess ^ 2008

The ban on success fees: preventing access to justice?

1. Examining the question of constitutionality

Through the commercialisation and the globalisation of the legal profession, the trade is increasingly seen as another provision of services. Therefore, it is subject to economic freedom under Art. 27 of the Swiss Constitution. It can only be regulated by (public) employment law if the criteria under Art. 36 of the Constitution are met: Regulatory interventions must have a legal basis, be justified by a public interest or a need to protect a third parties’ fundamental rights, and they should be proportionate. In an exemplary fashion, after the BGFA came into force, has the Federal Supreme Court of Switzerland leant towards the constitutionally compliant interpretation of the requirements expected of lawyers for their entry into the lawyer’s registry? And, in doing so, has the Court laid down the foundations for a modern classification of legal work within the current economic order and legal system? The interpretation of employment law, which is based on matters of constitutionality, is the standard for assessing regulatory restrictions on the legal profession. This standard has acted as a guide for recommendations on cantonal decisions regarding admission into the legal profession. It must also act as a guide when examining the question of whether arrangements concerning success fees are permissible in the legal field.

1. Success fees in Switzerland and Germany
2. Switzerland: Allowing success fees with a ban reservation

The relationship between the lawyer and the client, alongside any remuneration for the lawyer's work, are primarily determined by contract law. An agreement concerning the lawyer's fees shall be subject to freedom of contract, but will be restricted by the following two provisions: «BGFA Art. 12 Employment regulations

The following employment regulations shall apply to lawyers:

[...] e. Before the conclusion of any litigation proceedings, lawyers are not permitted to enter into an agreement with their clients concerning fees for a successfully won case; nor should they be obliged to waive the fee in the event of an unfavourable conclusion at the end of the proceedings.

[...]

i. Lawyers shall, on the mandate, communicate the fee to their clients in the principles of invoicing, and shall inform their clients periodically or upon request the total amount owed.

According to Article 12 of the BGFA, agreements between the lawyer and the client concerning a success fee are permissible, either with the exception of agreements made prior to the termination of a legal dispute, or where - in the case of an unfavourable conclusion to the proceedings - the fee is waived. Any breach of the prohibition stated under Article 12 of the BGFA means that the conclusion of an illegal fee agreement has already happened. Professional legal services, due payment or performance relating to the fee are not required.

The acquisition of disputed claims ("pactum de redimenda lite") does not fall under the prohibition of success fee agreements within the terms of Article 12 of the BGFA. On a case-by-case basis, however, there is a need to carefully check whether acquiring the object of dispute would lead to a conflict of interests pursuant to Article 12 of the BGFA. The Federal Supreme Court of Switzerland does not consider it inadmissible to allow the lawyer to surrender a claim from the client in order to secure a fee, but recognises a breach of the ban on conflicts of interest within the following context: The lawyer, Mr Hess, twice ceded claims from his client's case for sick-pay against the sick-pay insurers, for the purpose of securing his fee. The plaintiff's claims for sick-pay against the insurer was the client’s only income. The Federal Supreme Court decided that, the cession of these claims, which served to cover the client’s emergency needs, meant that the lawyer had placed his own personal interests before those of his client. Therefore, there was a violation of the ban on conflicts of interests according to Art. 12 of the BGFA.

1. Germany: Prohibition of success fees subject to approval

In a resolution passed on the December 12, 2006, the Federal Constitutional Court of Germany decided that the intended, unrestricted prohibition of lawyers charging success fees, introduced in the German Lawyers’ Regulations, contravened the ideas of professional freedom that are enshrined in Article 12 of the Basic Law. Exceptions would be made if there were special circumstances regarding the client’s lawyer, if they were to prevent clients from pursuing their rights unless they agreed to pay success fees. To adopt a new, constitutionally established provision, the Federal Constitutional Court set a deadline for the legislature until June 30, 2008, with the condition that the prohibition on lawyer’s charging success fees would remain in force without exception until the new regulation came into effect.

The Federal Constitutional Court’s decision was based on a complaint raised by a lawyer who had been fined a sum of 5,000 EUR. The complaint arose when a destitute client had intended to make claims for a family property in Dresden that had been confiscated by the Nazis. The client, who was living in the USA, offered the lawyer a share of the profit amounting to 52,000 EUR, corresponding to one third of the amount in dispute.

The Federal Constitutional Court considered that the strict prohibition of success-based remuneration not only affects the lawyer’s freedom of contract and that of the client, but it could also affect their claim of validity, as well as having negative effects on the perception and enforcement of an individual's rights. The prohibition of success fees would hinder access to justice where an individual, by virtue of their economic circumstances, is unable to afford, or at least not fully able to bear both the risk of failure in the courts and the cost of a qualified lawyer, in order to pursue his or her rights. However, there is no convincing reason for excluding agreements relating to a success fee in the form of a dispute-centred conditional fee (pactum de quota litis).

The Federal Constitutional Court has given the legislature until the 30th of June, 2008, to make a new constitutional regulation. According to the draft bill from the German Federal Ministry of Justice for a revision of the new regulations concerning the prohibition of success fees, from October 18, 2007, a success fee can only be agreed to for the individual case and only if the client would be prevented by the prosecution from pursuing justice, by virtue of their economic circumstances, without having to agree to a success fee. It provides that the prohibition shall be integral to the forensic and advisory activity of the lawyer and that agreements concerning success fees for the protection of the contracting parties shall be concluded in writing. On the December 19, 2007, the German Federal Government introduced the “Law concerning the Revision of the Prohibition on Success Fee Agreements” to the parliamentary consultation stage. The German Lawyers' Association and the Federal Law Society have both adopted a critical stance on the government's draft.

1. Success fees according to Contract Law

The legal profession is subject to Contract Law. Pursuant to Art. 398, Subsection 2, of the Swiss Code of Obligations, the authorised representative must faithfully (and carefully) carry out the task required of him or her. The fiduciary duty of the authorised representative is of fundamental importance for the high level of trust between the lawyer and the client and imposes an obligation on the lawyer to clarify and inform the client.

The agreement concerning a lawyer’s remuneration is subject to freedom of contract - subject to restrictions regarding professional limitations pursuant to Art. 12, clauses e and i of the BGFA. Under civil law, a fee agreement can be reviewed for unconscionable conduct and failure of intent.

A. The restriction of success fees in legal proceedings

The prohibition of success fees pursuant to Article 12, clause E of the BGFA applies only to the legal profession and to legal activities concerning administrative procedures. It is limited to the formal process, and therefore to legally arranged proceedings held before a civil or criminal court, a criminal investigation, an enforcement authority or an administrative authority. If a contentious matter is not expected to result in legal proceedings, but ultimately does lead to such events, the prohibition of success fees must be observed and a new fee agreement must be reached. Any division of the mandate into a "pre-procedural clarification phase" and a "procedural implementation phase” shall be rejected.

The prohibition of success fees is not applicable to activities outside of the scope of forensic activity, especially those concerning the provision of legal counsel.Accordingly, it is permissible, for example, to make the remuneration of any legal services rendered in an M&A transaction solely dependent on the success of an acquisition.

B. Temporal limitation of success fees in pre-procedural agreements

According to the wording of Article 12, clause e of the BGFA, agreements for a success fee (as a substitute to the standard fee) are proscribed only if they are concluded between the client and the lawyer before the termination of a legal dispute. After the legal proceedings are over, the parties are free to reach an agreement regarding success fees. Legal proceedings are deemed to be finalised once a final judgement has been given. It is permissible, for example, for the client to arrange a reward (a success fee) for the lawyer following a legal case that has been in the client’s favour.

1. The prohibition of (pure) success fees in litigation matters

1. The administration of justice

Art. 12, clause e of the BGFA prohibits any agreements concerning success fees as a substitute for the standard fee. Agreements where the lawyer’s fee is based on their success before the courts are proscribed. Article 19 of the regulations of the Swiss Bar Association mentions the prohibition of pactum de quota litis. There is also a ban on the expression of pure success fees, which is intended to distinguish this from the "impure", success-independent and success-dependent components.

The agreement concerning the lawyer’s payment for procedural work must not depend solely on a successful outcome. The lawyer must, regardless of the outcome of the proceedings, be paid a fee which not only covers his or her own expenses, but which also grants him or her a reasonable profit. The facts were lacking as to a reasonable basic fee might look like. This was to be assessed by the Federal Supreme Court in the case of Dieter Behring. In this case, Lawyer X had offered his services in coded advertisements. The advertisements were written over with the question "Lost financial investment?” The advertisements also promised a "discreet contribution by law firm in BS". The advertisements contained the following information concerning the cost of the service: “Registration fee CHF 1,000. Lawyer’s fees only in successful cases, according to agreement”. According to his statements, Lawyer X was unable to acquire any cases through his advertisements. Alongside the cantonal supervisory committee and the lower court, the federal court assumed that most of the clients sought out by the lawyer had lost large amounts of money in dispute, which vis-à-vis the high amounts in dispute must have led to considerable fees. To that effect, according to the federal court's observations, the registration fee of CHF 1,000 was only a fraction of the normally attributable lawyer's fee, which is why the calculation of Layer X’s fee largely depended on the outcome of the proceedings.

According to the opinion of the Federal Court, the part of the lawyer’s fee relating to the performance was considerably greater than the non-performance part. Therefore, it was much more appropriate to what is required under Article 12, clause e of the BGFA.

Given the compelling nature of a legal professional’s duties, a waiver for the prohibition on success fees is excluded in accordance with Article 12, clause e of the BGFA.

2. Justification

The reason for including the prohibition on success fees in the BGFA’s professional guidelines is that the cantonal lawyers' regulations provided for the prohibition in one form or another by enacting the BGFA. The justification for the prohibition is usually described using the following key words: Risk of losing the lawyer’s independence, conflict with the lawyer's own interests, risk of having an unfair advantage over the client and the strengthening of public confidence in the lawyer’s integrity.

If the lawyer's own interests prevail, then the prohibition on conflicts of interests laid down in Article 12, clause C of the BGFA is breached. In this case, Article 12, clause E of the BGFA concerning the prohibition of success fees, specifies what is already apparent from the prohibition of conflicts of interests in Article 12 clause E of the same.

Justifying the ban on pure success fees, pursuant to the BGFA, is not easy. The argument that it allows clients, who may not have the means, to access to the law does not hold water because a poor client can still claim the right to a trial, free of charge. It is far more likely to argue in favour of the (pure) prohibition of the success fees, expressed in the BGFA, where only representation in legal proceedings, based on successful outcomes, would be prompted by the lawyer's own self-interests. The Zurich-based supervisory committee for lawyers sees the meaning behind Article 12, clause e of the BGFA, to mean that a lawyer is neither financially nor otherwise personally involved in the legal case and is thus able to work on the task at hand. In the Behring judgement, the Federal Court determined that the ban should have prevented the lawyer from losing his independence, because he was, on a personal level, interested in the successful outcome of a case.

In addition to the success fees, other economic factors are also taken into account. BONER is of the opinion that, by agreeing to success fees, an additional response to an even better lawyer's performance could be placed in favour of the client. According to SCHENKER, the system itself calls for success fees, where lawyers are directly interested in their client’s success and so, have the right incentive to help the client get a successful outcome.

1. The admissibility of success fee agreements in litigation matters

According to a decision made by the Supervisory Committee for the Canton of Zurich, Art. 12, clause e of the BGFA prohibits only agreements to pure success fees in the form of pure participation in successful legal proceedings (pactum de quota litis). On the other hand, the Committee considers agreements concerning (additional) prize money / success fees (pactum de palmario) to be permissible. An hourly rate of CHF 200 and the following success fees were agreed upon according to the outcome of the legal proceedings: 15% for a payment of up to CHF 10,000; for higher payments, an additional 10% for amounts over CHF 100,000. This agreement was deemed acceptable by the Zurich Supervisory Committee when provided with plausible explanations.

What is considered to be deemed a success can be very different. Whether this is in the form of a percentage of the fees / amount in dispute / value of the interest, in the form of an increased hourly rate, depending on the legal fees or in the form of a different fee setting (higher remuneration for cases instead of hourly expenses). It should be emphasised that the lawyer should be entitled to a fee that covers costs and which includes an appropriate profit share, regardless of the outcome of the proceedings. An hourly rate of CHF 200, which is the usual estimate for official cases (official defence, non-remunerated representation), is, according to the Zurich decision - and in any case for Zurich's conditions - an appropriate basic fee, generally speaking.

An upper limit for a validly agreed success fees concerning legal proceedings is not provided for in Article 12 clause e of the BGFA. If the basic fee contains a reasonable profit share, the parties should, taking into consideration the limits within civil law concerning unconscionable conduct and misconduct, ensure that the success fees are fixed. When examining the suitability of basic fees, the cantonal fee regulations may be used as a guide. In any case, this ensures that the prohibition of (pure) success fees is not undermined by low performance-unrelated remuneration." Can this be reversed by an overly high success rate, which is only questionable if there is a public interest in declaring a success fee agreement inadequate, in spite of the fact that there is an appropriate basic fee? According to the author, this is to be avoided. It must, for example, be permissible for the defendant to promise his defence lawyer, in the event of an acquittal, a success fee corresponding to the amount of the judicially attributed fees, thus the defence lawyer is paid double fees.

1. The admissibility of flat rate fees

The agreement of a flat fee does not constitute unacceptable involvement with regards to a successful case. The flat rate fee is not a share in the success of a legal case. The Federal Court considered the limitation of the prohibited (pure) success fees and flat rate fees in the Behring case, where in the case of a flat rate, the remuneration to be paid shall be settled in advance. Whereas in the case of (pure) success fees, the remuneration due shall be neither determined nor determinable because it is dependent on the outcome of the proceedings[[1]](#footnote-1).

Article 19, Section 1, of the Swiss Professional Ethics SAV (SSR) expressly permits lawyers to agree on flat rate fees, but the parties’ autonomy is restricted in the final sentence: They (the flat rate fees) should correspond to their foreseeable performance. What is meant by this is that no flat rate fees can be agreed upon. However, issue of excess fees is already covered by the prohibition of unconscionable conduct in civil law and by the prohibition of conflicts of interest in professional law, which is why sentence 2 in Article 19 (1) of the Swiss Professional Ethics is, in reality, redundant.

1. Obligations to clarify and inform clients

1. In essence

Lawyers are not only required to observe their contractual obligations to clarify and notify; pursuant to Article 12, clause i of the BGFA, lawyers are also obliged to clarify to their clientèle, upon acceptance of the mandate, and later, upon request, the basic principles of their invoicing and to inform clients of the amount owed. The obligation arising from the duty of care and conscientious professionalism, according to Article 12, clause A of the BGFA, is of particular importance in the context of calculating the fee, in order to establish clear conditions. Transparency is needed, throughout the duration of the mandate.

Within the framework of the pre-contractual obligations to provide clarification, the lawyer is required to advise the potential client about the expected costs. In the case of clients who are unfamiliar with the process, the mere provision of advice is not sufficient and so, a full consultation is required. The more unfamiliar a client is with the process, the higher the requirements are to be imposed on lawyers in their duties of providing clarification.

In this day and age, every lawyer should be advised to go through a basic pre-trial chat with the client, and to record the outcome in an order letter, «letter of appointment» or at least in a memorandum. This record serves not only for defensive purposes, for example with regards to the fee process, but also for the establishment of clear conditions. The following should be stated in the order letter, depending on the mandate: Initial situation / circumstances; the instruction; stages of appeal; time relations; costs and fees. It may be appropriate to identify legal parameters, for example, to refer to certain judgements. In the pre-procedural phase of client contact, the focus is on creating trust, the basis for all co-operation between the lawyer and the client.

The clientele nowadays expects lawyers to speak openly about fees. Most clients want to have an idea or an estimate regarding the costs of legal services. Transparency ensures trust and flexibility.

2. Increased requirements in litigation cases

Special attention and due care are required when agreeing on a success fee in litigation cases. The client should be told about the court costs, without agreeing to a success fee. The success fee should be calculated, or in any case determined in a form that is easily understood by the client. It is preferable to use numbers.

When clarifying costs to clients, it is recommended that lawyers focus on the trial costs provided in the cantonal schedule of fees. On the basis of this, they can make an estimate as to the fees and costs, whereby, if necessary, they can differentiate between whole and partial win or reduction. Clients, who are familiar with the process, are often better served when the lawyer gives them a budget, for example, amount X for the written procedure. Clients, who are unfamiliar with the process, should be asked to make an advance payment.

An example from the everyday life of a liability lawyer: Attorney A represents a road accident victim and agrees with the client, for the phase of the negotiations with the liability insurer, on a minimum price of CHF 20,000, plus expenses and VAT, and, alternatively, in the case of an agreement with the tortfeasor’s liability insurer, a success fee of 15% on the CHF 500,000 from the above compensation. Within the scope of the lawyer’s obligations to provide clarification, the lawyer is required to provide an estimate as to the presumed amount of compensation or at least the expected amount of compensation. The lawyer should also disclose to the client that the insurance company might only cover the standard fee, which is calculated accordingly. In the event that the anticipated pre-procedural agreement is not achieved, the original agreement regarding the success fee shall be rendered void. If the parties wish to maintain a procedural effort with regards to a performance-related fee, then they must enter into a new agreement, which is limited to a success fee that is enough to compensate for the basic fee. Included among the lawyer's obligation to provide clarification, is the provision of information regarding the costs which the client would have to take on without entering a success fee agreement.

Pursuant to Article 12, clause i of the BGFA, the Federal Court rightly receives the lawyer's obligation to inform. In an appeal before the administrative recourse commission, in the canton of St. Gallen, where an order concerning a forced deprivation of liberty was the matter for proceedings, a lawyer agreed with the client to be paid CHF 300 per hour. The attorney violated the cantonal legal obligation by not informing the client, whose sole income came from welfare allowance, about the procedural rate applicable in accordance with the law of the canton of St. Gallen or the average estimate of CHF 200 per hour. The Supervision Commission considered this omission to be an infringement of Article 12, clause i of the BGFA and the Federal Court dismissed the complaint raised against it. The Federal Court only criticised the lack of clarification surrounding cantonal standards and did not object to the agreed compensation of CHF 300.

The client must be informed about the possibility of free legal proceedings and the payment of the lawyer's fees according to the Swiss Victim Assistance Act.

1. The outcome

Swiss professional law allows the arrangement of success fee between lawyers and clients, with the exception of agreements made before the termination of a legal trial, which either involves a share in the court awarded damages as a substitute for the standard fee or a success fee. Only agreements concerning litigation mandates, which make the lawyer's influence dependent on the outcome of the trial, are proscribed. Pure success fees, which are dependent solely on success in a trial, are therefore not permissible. On the other hand, the agreement of a success fee in combination with an appropriate basic fee is allowed, if agreed upon before the end of a legal dispute. As a rule of thumb, the basic or standard fee is considered appropriate if it corresponds to the cantonal amount set for an official defence.

Article 12, clause e of the BGFA does not apply to agreements concerning success fees for clients outside the scope of legal activities. Agreements concerning success fees, in particular on advisory mandates, are therefore fully permissible, taking into account the lawyer's obligation to clarify and notify the client, in accordance with Article 12, clause i of the BGFA.

The liberal regulation with regard to success fees according to the BGFA has its price in the form of comprehensive information and explanation requirements according to Article 12, clause i of the BGFA. There is a connexion between the agreement of a success fee and the obligation on lawyers regarding clarifying and notifying clients. Particular attention should be paid to aspects of consumer protection, in that the requirements regarding the obligations to clarify and notify clients are to be set at a higher level, particularly when the clientele is less familiar with proceedings.

The provocative question posed in the title of this essay, as to whether the prohibition of the success fees, in accordance with BGFA, prevents access to justice, is clear. The opposite is the case: Within the possibility of permitting success fees, the success fee ban is limited to cases where the interests of the lawyer conflict with those of the client. Clients of limited means find access to the right to the possibility of no court fees and no official defence fees. The client, who is slightly better off, but who cannot fully contribute to the fees, has the possibility to agree on a lawyer's fee which is a mix both of a basic fee and a success fee. This is likely to provide a solution that satisfies the socio-economic conditions of Switzerland.

1. [↑](#footnote-ref-1)