Contingent Fees: Beyond the intuitive threat

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INTRODUCTION

Contingent fee financing of litigation is a crucial aspect of the United States' system of adjudication. Under current Belgian law, however, the contingent fee system is explicitly forbidden. In the present article, the authors would like to deepen the knowledge of that system, by providing an adequate definition, a brief overview of its history and a more general perspective on how the system works in the United States, while focusing on its possible merits. Having considered the merits of the system as well as its concrete application in the United States, the authors will try to shed some light upon the degree of compatibility of the contingent fee system with the Belgian legal context and, on a more profound level, with the general principles that underlie Belgian law. The potential flaws of the system will be discussed in that section as well, given that those perceived disadvantages can be regarded as reflecting the historical bases of the Belgian ban. Thereafter, the authors will conclude this article with a personal point of view with regard to the desirability of the implementation of this controversial litigation financing system. By means of writing this article, the authors want to flutter the dovecotes, in order to revitalize the academic interest in this matter, because 'the matter of fees' is important, as the quote by Abraham Lincoln illustrates: *"The matter of fees is important, far beyond the mere question of bread and butter involved. Properly attended to, fuller justice is done to both lawyer and client."*

1. THE CONTINGENT FEE IN GENERAL

1.1. DEFINITION OF THE CONTINGENT FEE CONTRACT

The contingent fee contract is often seen as a pro-plaintiff innovation and can be defined as the agreement between a plaintiff[1] and a lawyer, wherein the

[1] Representation under the contingent fee system is limited almost entirely to plaintiffs. Contingent fee lawyers will therefore almost always be opposed by defense lawyers paid on an hourly basis. Consequently, it is very rare that lawyers on both sides of the litigation are representing their clients on a contingent fee basis. *Cf.* C. W. Wolfram, *Modern Legal Ethics*, Saint Paul, West Publishing, 1986, 526, footnote 3.

latter offers to represent the plaintiff free of virtually all charges, up until the settlement or judgment has been obtained, at which time the lawyer receives a stated percentage of the award.[2] That percentage varies[3], depending on the type of action, the likelihood of a recovery and the anticipated preparation costs and labour[4].

The fee does not need to be measured by a percentage in order to be contingent, although this is typical.[5] However, if it is measured by a percentage, it can be a fixed or flat percentage, or a variable percentage[6], e.g. a different contingent fee rate at different stages of a case[7], or in relation to the amount recovered by the client[8]. What is required, is that there is some chance the lawyer will not receive the fee for reason that the representation ends with an unwanted result for his client.[9] Consequently, there has to be an element of risk involved: notwithstanding its size, the fee will accrue only on the happening of a future event of which the occurrence is not readily predictable.[10] If courts have to determine whether a fee is contingent or not[11], they try to identify whether the fee is importantly conditioned on favourable future events.[12] The court might also deem portions of the total fee conditional, e.g. when the plaintiff pays a portion in advance which is not conditional, while the other portions of the total fee remain conditional (and therefore contingent).[13]

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[2] P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.* 1998, (231) 231.

[3] But if one should pick a 'standard' percentage, it would be 30 or 33 %, *cf.* L. BRICKMAN, "Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?", *UCLA L.Rev.*1989, (29) 30; H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 286; D.W. NEUBAUER and S.S. MEINHOLD, *Judicial Process. Law, Courts, and Politics in the United States*, Belmont, Thompson-Wadsworth, 2007, 160.

[4] An important article in that respect is L. BRICKMAN, "Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?", *UCLA L.Rev.* 1989, (29) 30. He criticizes that a lot of lawyers work with a standard contingent fee, without taking into account factual differences and different risks. In his opinion, this leads to the fact that many contingent fees are invalid as a matter of ethics, policy or law, when there is no real contingency or when the contingent fee exceeds the legitimate risk premium for the anticipated effort by far.

[5] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 267, footnote 1.

[6] *Ibidem*, 286.

[7] E.g. 25 % for an early settlement, 33 % for a judgment in first instance and 50 % for a confirmation in appeal.

[8] R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 125.

[9] C. W. WOLFRAM, *Modern Legal Ethics*, Saint Paul, West Publishing, 1986, 526.

[10] *Ibidem.*

[11] Which might be relevant, given that there are explicit prohibitions against contingent fee agreements in certain matters, *cf. infra*.

[12] C. W. WOLFRAM, *Modern Legal Ethics*, Saint Paul, West Publishing, 1986, 526, footnote 4. For an example, *cf.* Shanks v. Kilgore, 589 S.W.2d 318, 321-322 (Mo.App. 1979).

[13] C. W. WOLFRAM, *Modern Legal Ethics*, Saint Paul, West Publishing, 1986, 526, footnote 4. For an example, *cf.* Singleton v. Foreman, 435 F.2d 962, 969-970 (5th Circ.1970).

With respect to the method of calculation, the contingent fee differs from the hourly fee, whereby the specific amount of the fee is based on the number of hours spent on the case, and the flat fee, whereby the specific amount of the fee is a fixed amount for performing a specific legal service.[14] Under the hourly fee or flat fee, the lawyer often requires an advance payment and bills the client regardless of outcome.[15]

Given that the payment of the contingent fee is contingent, it is said that the client of a lawyer applying that calculation method also purchases additional services that are not procured if, in contrast, the hourly fee or the flat fee were to be taken recourse to, namely a financing service and, according to certain authors, a form of insurance.[16] The lawyer provides financing, because the contingent fee will, by its own nature, almost never be collected until the matter is closed: the lawyer finances the litigation for the client while a case is pending.[17] The alleged insurance service results from the fact that the lawyer only gets paid when the happening of a future event occurs, the payment therefore being conditional. As a result, the lawyer is said to insure the client for the expenses that are associated with pursuing his claim, both the out-of-pocket expenses and the value of his or her time.[18] The lawyer may still obtain some fee after the litigation process to cover some of the expenses made, but that fee will not cover the opportunity costs of the lawyer's time.[19] The lawyer bears the risk of not being paid for the time he invested in the case, which is time that he could have devoted more productively by working on another case in regard of which he can count on it that some fee will be obtained, either hourly or contingent. It is thus stated that the economic risks related to the litigation process are shifted from the client to the lawyer.[20] However, the contingent fee agreement should not be regarded to entail an insurance service in our opinion, because an insurance agreement requires payment of a premium. Consequently, the service cannot be considered as that of a real insurance, but rather as an even more valuable service rendered to the client at the expense of the attorney in the case of the undesired outcome.

[14] D.W. NEUBAUER and S.S. MEINHOLD, *Judicial Process. Law, Courts, and Politics in the United States*, Belmont, Thompson-Wadsworth, 2007, 160.
[15] *Ibidem.*
[16] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 270.
[17] *Ibidem.*
[18] *Ibidem.*
[19] *Ibidem.*
[20] D.W. NEUBAUER and S.S. MEINHOLD, *Judicial Process. Law, Courts, and Politics in the United States*, Belmont, Thompson-Wadsworth, 2007, 160.

1.2. GENERAL OVERVIEW OF THE SYSTEM IN THE UNITED STATES

It is important to note that the American Bar Association (hereafter: "**ABA**") has laid down some principles governing contingent fees in the Model Rules of Professional Conduct (hereafter: "**Model Rules**")[21], which are adopted by the District of Columbia and all States except for California[22]. As regards the latter State, however, the Model Rules can nevertheless be cited there as evidence of the law.[23]

The Model Rules require that the contingent fee is in writing.[24] If the agreement is not in writing, the court will not enforce the contingent fee agreement.[25] However, some courts will give the lawyer a *quantum meruit* recovery in the event he has acted properly in other respects and performed competently for the client. Nonetheless, other courts refuse any recovery at all.[26] The agreement should clearly notify the client of which expenses he will be liable for, in case he would turn out to be the prevailing party as well as in case that, by contrast, would not occur.[27] The Model Rules have also explicitly forbidden a contingent fee agreement in matters concerning domestic relations[28] and in criminal cases[29]. Note that the contingent fee agreement can be forbidden by another type of law (e.g. State law) as well.[30]

[21] Which can be consulted online here: www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html, last accessed on 05.03.2013.

[22] www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html, last accessed on 05.03.2013.

[23] R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 7.

[24] Rule 1.5(c) ABA Model Rules of Professional Conduct.

[25] R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 116.

[26] *Ibidem.*

[27] Rule 1.5(c) ABA Model Rules of Professional Conduct.

[28] Contingent fees in domestic relations are 'rarely' justified and even flatly forbidden in divorce matters upon the securing of a divorce or upon the amount of alimony or support or property settlement, *cf.* Rule 1.5(d)(1) ABA Model Rules of Professional Conduct. A possible rationale behind that prohibition is that public policy does not encourage divorce and that a contingent fee could encourage the attorney to prevent a possible reconciliation of the parties involved, *cf.* R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 121-123.

[29] The rationale usually given in support of this prohibition is that there is no *res* out of which the contingent fee is to be paid and that the law will provide free appointed counsel when the client is unable to pay a lawyer. Note that the state cannot hire a prosecutor on a contingent fee basis, which would only yield the prosecutor income if he secures a criminal conviction, given that the duty of a prosecutor is to do justice, not *per se* to convict. *Cf.* R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 121.

[30] Rule 1.5(c) *jo.* 1.5(d) ABA Model Rules of Professional Conduct.

The Model Rules state that the lawyer has no right to impose a contingent fee on a client who desires an alternative arrangement and that the lawyer should even volunteer those alternative arrangements if they are in the client's best interest.[31] The contingent fee should accordingly be for the benefit of clients who wish to choose that arrangement, not for the benefit of the lawyer.[32] However, the ethical rules do not limit the contingent fee arrangement to poor litigants. Furthermore, the ABA has advised that, even when liability may be clear and the client can afford alternatives, such a situation does not render the contingent fee inappropriate or unethical[33], as long as the lawyer fulfils the ethical obligation to offer alternatives and explain their implications, when they are in the client's best interest.[34]

Contingent fees for legal services are widespread as a general fixture of client-lawyer contractual relationships in American law, among others in the fields of personal injury[35] and collection cases. By contrast, in most other legal systems, lawyers are prohibited from charging a contingent fee to their clients.[36] A similar prohibitive rule existed in the United States as well and does still exist in criminal cases and most domestic relation cases[37], yet the fee has gradually gained a modicum of general acceptance[38]. The contingent fee so has become one of the defining characteristics of civil litigation in the United States nowadays[39].

1.3. A SHORT HISTORY OF THE CONTINGENT FEE

KARSTEN suggests that the contingent fee system has been a part of the United States of America's legal system longer than most scholars had thought, and that its widespread use is the result of fundamental concerns about the right to counsel and access to the courts.[40] According to KARSTEN, contingent fee

[31] Rule 1.5, Comment 3 ABA Model Rules of Professional Conduct.
[32] R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 116.
[33] ABA Formal Opinion 94-389 (Dec. 5, 1994), which can be consulted here: www.americanbar.org/content/dam/aba/publications/YourABA/201203_94-389.authcheckdam.pdf, last consulted on 05.03.2013; R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 124.
[34] Rule 1.5, Comment 3 ABA Model Rules of Professional Conduct.
[35] Virtually all plaintiffs pay their lawyers on a contingency basis here.
[36] C. W. WOLFRAM, *Modern Legal Ethics*, Saint Paul, West Publishing, 1986, 526-527. As aforementioned, the contingent fee system is prohibited in Belgium as well.
[37] Rule 1.5(d) ABA Model Rules of Professional Conduct; D. MELLINKOFF, *Lawyers and the System of Justice: Cases and Notes on the Profession of the Law*, Saint-Paul, West Publishing Co., 1976, 296.
[38] C. W. WOLFRAM, *Modern Legal Ethics*, Saint Paul, West Publishing, 1986, 527.
[39] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 267.
[40] P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.* 1998, (231) 237-244.

contracts were already created and sanctioned mid-nineteenth century[41] and not in the late nineteenth century as many other scholars had suggested before his article was published[42]. According to LANDSMAN, moving the date of the rise of the contingent fee back at least half a century undercuts much of the historical challenges to it. He argues that such assertion would suggest that contingency strategies are to be situated within the American legal system already at the time it was taking on its identity and that it has been a concern from earliest times on that both rich and poor would have guaranteed access to the courts.[43]

The history of the contingent fee traces back all the way to the Middle Ages in England. Ever since the Middle Ages, the common law doctrine of 'champerty'[44] and even penal statutes barred men from offering to plead the legal claim of a stranger and finance the litigation by settling for a share in the recovery[45]. LANDSMAN finds at least a part of the explanation in the fact that solicitors seldom occupied positions in Parliament or the High Court bench, because those places were reserved for barristers, whose fees were tendered in advance and only in rare occasions had contact with clients or responsibility for the initiation of litigation. He finds it no surprise that the high-placed lawyers frowned upon the practices of those who were lower-placed.[46] Two other possible explanations were provided by LANDSMAN: on the one hand, the theme of curtailing access to court which allegedly echoes through English legal history (*cf.* also the 'loser pays'-rule that was adopted) and, on the other hand, the allegation that these contingent fee arrangements were dangerous because they could encourage feudal lords to abuse the system in furtherance of the pursuit of power and property.[47] Consequently, contingent fee agreements were unavailable in the United Kingdom.

[41] P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.* 1998, (231) 237-244.
[42] L.M. FRIEDMAN, *A History of American Law*, New York, Simon and Schuster, 1985, 482; E.A. PURCELL, *Litigation and Inequality*, Oxford, Oxford University Press, 1992, 150; C. W. WOLFRAM, *Modern Legal Ethics*, Saint Paul, West Publishing, 1986, 527.
[43] S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 261-262.
[44] Champerty as defined by B.A. GARNER, *Black's Law Dictionary*, Saint Paul, West Publishing Co., 2009, 262: "*An agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specif., an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim*". This word has its etymological roots in French, *champs parti*, which means 'split field'.
[45] P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.* 1998, (231) 232; S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 262.
[46] S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 262.
[47] *Ibidem*, 263.

In colonial America, there was a reception of English common law, including the champerty doctrine. However, already early in the nineteenth century, more and more states held those contingent fee agreements to be enforceable, while other states thought of those agreements as useful and convenient, but they regarded themselves bound by common law precedent and principles until the state legislature changed the law.[48] That is a strange and intriguing evolution: the practice was suspiciously regarded at first, while, by the 1850s, it was increasingly deemed acceptable.[49] LANDSMAN points to the fact that American attitudes towards litigation were quite different from those in England.[50] KARSTEN provides us with other possible answers to the question how the evolution was even remotely possible.[51] First of all, legislation of the people's assemblies enabled greater contractual freedom to lawyers regarding fee arrangements with their clients, which substantially narrowed the scope (e.g. Virginia) or even banned the rule (e.g. New York) of the champerty doctrine in certain states.[52] Secondly, the state's Supreme Court allowed contingent fee agreements in certain non-code or pre-code states, because they were apparently more impressed by utilitarian arguments[53] than precedent.[54] The last reason provided by KARSTEN boils down to a bottom-up argument: the American public had been putting those contingent fee agreements to increasing numbers of use, even before some of their supreme courts had sanctioned them or their state's legislative body had permitted them. [55]

In 1875, the validity of contingent fee arrangements seemed sealed now that United States Supreme Court Chief Justice WAITE called one of these arrangements a *'legitimate and honorable professional assistance'*.[56] However,

[48] For a good overview of those developments, including a lot of examples from then leading scholars and relevant case law, *cf.* P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.* 1998, (231) 234-239.
[49] *Ibidem*, 240.
[50] S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 263. He states that the American tradition bespeaks both receptivity to litigation and facilitation of access, unlike the mother country. Americans also rejected the English reticence about the right to counsel in his opinion and the 'loser pays' principle.
[51] P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.* 1998, (231) 240-248.
[52] *Ibidem*, 240.
[53] Those utilitarian arguments were, among others, that the lawyer would work harder if he was to receive payment only if he was successful, that he would not take up a case without merit (he functions as a first judge, like he ought to in Belgium) and that the lawyer would help a poor man to sue for his right. As a result of this contingent fee system, a poor litigant could now afford skilled legal services. The system was regarded a pro-plaintiff innovation, opening the doors of justice. *Cf.* P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.* 1998, (231) 242-243.
[54] *Ibidem*, 242.
[55] *Ibidem*, 248.
[56] U.S. Supreme Court, October 1875, *Wright v. Tebbitts*, 91 U.S. 1875, 252. The U.S. Supreme Court had already indicated it deemed such agreements valid in U.S. Supreme Court, 1874, *Trist v. Child*, 88 U.S. 1874, 441.

the contracts were never sanctioned when their purposes were deemed to be contrary to good public policy, e.g. in family related matters or in criminal cases.[57] It is however a generally accepted arrangement nowadays in debt, tax or promissory note collection, land title or inheritance cases and especially personal injury litigation.[58]

1.4. PERCEIVED MERITS OF THE SYSTEM

Before we dive into the merits of the system that are most often pointed to, we feel obliged to stress out that we agree with KRITZER's statement that the most available sources of information that should help us understanding the realities of contingency fees present a distorted image.[59] The press only reports on events that are news and therefore not ordinary day-to-day events: jury verdicts that are reported tend to represent only the extreme outliers. Consequently, the average award of the reported cases is allegedly ten times or more the average award of all cases.[60] The findings of KRITZER's empirical research have been kept in mind throughout the discussion of the perceived merits and flaws of the contingent fee system, given that he rightly claims that only carefully designed and systematic research can provide an accurate picture of the typical contingency fee practice and that anecdotes or patterns reflected in news reporting should in that regard not be relied on.

1.4.1. Accessibility

Reference has already been made to the fact that the lawyer provides his client with additional services when he is being paid on a contingent fee basis, namely a financing service and a service equivalent to insurance[61]. Those are unquestionably pro-plaintiff services, which are of a considerable value.

As KARSTEN has chosen to place emphasis on, by choosing it as the title for one of his articles on contingent fees, the contingent fee contract enables the poor to have their day in court[62]. CORBOY has used a likewise metaphor and stated that contingent fees are the average person's key to the courthouse.[63] A person without the necessary means to hire a lawyer otherwise finds himself capable of finding legal assistance, without the risk of not being able to pay the

[57] P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.* 1998, (231) 249.
[58] *Ibidem*, 250.
[59] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 268.
[60] *Ibidem*, 269.
[61] *Cf. supra*: the nuance made in regard to the alleged 'insurance' kind of service the lawyer provides in the event he is remunerated on a contingent fee basis.
[62] P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L.Rev.*, 231-260.
[63] As referred to in H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.*1998, (267) 267.

legal costs. Given that legal representation is a privilege and not a right in civil procedures, unlike in criminal procedures, contingent fees allow the poor and the not-so-poor to obtain that legal representation.[64] The system gives them the chance to pursue the compensation to which they are entitled[65]: given that the client owes the lawyer a fee only upon receiving judgment proceedings or a settlement outside of court, there is neither insolvency risk, nor a liquidity problem when the client receives a monetary compensation. Justice would be practically denied to the poorer citizens, if the law prohibited lawyers from engaging in contingent fee agreements.[66] That is clearly an argument from a humane perspective[67] and as a result, a poor man can sue a rich corporation[68]. That wish to give 'every man his day in court' contrasts with the theme of curtailing access to the judicial system that echoes through English legal history[69], since the contingent fee system assures that citizens can pursue their claims in and outside of court[70].

1.4.2. Lawyer – Client Relation

Under the contingent fee system, the lawyer will – more than under an hourly fee system in which he gets compensated for the time he invested in the case – function as a first judge. Rational lawyers will screen out cases with a low probability of recovery.[71] Others are more sceptical and think a lawyer might take up a case of which the outcome is very uncertain or a case in which he will have to invest a lot, both out-of-pocket expenses and time. This might[72] be factored in when he negotiates on the percentage he will be entitled to.[73] If a lawyer will in fact, and not just in theory, act as the first judge, the risk of a flood of litigation will be lower, since unlawful claims will be screened out by the lawyer who is not likely to receive any fee under the contingent fee system and therefore functions as a gatekeeper.[74] This does not entail the client will have no access to the courts if he really wants to litigate: he can still try to find

[64] D.W. NEUBAUER and S.S. MEINHOLD, *Judicial Process. Law, Courts, and Politics in the United States*, Belmont, Thompson-Wadsworth, 2007, 159.
[65] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.*, (267) 268.
[66] G.L. ARCHER, *Ethical Obligations of the Lawyer*, Cambridge, University Press, 1910, 191.
[67] P. KARSTEN, "Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940", *DePaul L Rev.* 1998, (231) 259.
[68] L.M. FRIEDMAN, *A History of American Law*, New York, Simon and Schuster, 1985, 482.
[69] S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 263.
[70] *Ibidem*, 265.
[71] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 270.
[72] A lawyer who works on a contingent fee can be said to in principle internalize the cost of additional time, without internalizing extra resulting benefit. *Cf.* R. COOTER and T. ULEN (eds.), *Law & Economics (fifth edition)*, Reading, Addison-Wesley, 2008, 432.
[73] *Ibidem.*
[74] R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 120.

a lawyer that will take up his case on a (high) contingent fee or on an hourly or flat fee.

The contingent fee provides a strong inducement for lawyers to provide high-quality service, because it creates a bond between the lawyer's self-interest and the client's wellbeing, given that performance is rewarded and failure is punished.[75] It is attractive to clients who cannot evaluate the quality of lawyers' efforts easily and for whom the burden of monitoring what level of expenditure is necessary would be overwhelming: they just pay a premium now for quality service whenever they are the prevailing party.[76] On the other hand, the contingent fee can raise potential conflicts of interest between the lawyer and the client, because one of them might want to settle, while the other wants to press on.[77] The lawyer might want to settle quickly so that he assures income before much work has been done, while this may not be in the best interest of the client.[78] The Model Rules have provided us with some specific provisions dealing with those conflicts of interest and they forbid lawyers from acquiring a proprietary interest, except for a reasonable contingent fee in a civil case.[79] In addition, a lawyer cannot require a client to give up his right to settle litigation[80] or to fire his lawyer[81].

Contingent fee arrangements also minimize the need for courts to evaluate the reasonableness of lawyers' efforts *ex post* when discussion may rise, which is difficult and time consuming.[82] Neither does the contingent fee system require the lawyer to use timesheets and maintain an overview of expenses made in pursuing the client's claim, which alleviates the administrative burden. He is simply entitled to an agreed portion of the monetary recovery, unless otherwise determined in the contingent fee agreement. It is also more convenient for the client, now that he faces an easier task to budget his legal expenses.[83]

[75] American Law Institute, *Principles of the Law: Aggregate Litigation*, Philadelphia, American Law Institute, 2010, 73.
[76] *Ibidem.*
[77] R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 117.
[78] *Ibidem*, 120.
[79] Rule 1.8(j) ABA Model Rules of Professional Conduct; *ibidem*, 117.
[80] Rule 1.2, Comment 5 ABA Model Rules of Professional Conduct.
[81] Rule 1.16(a)(3) ABA Model Rules of Professional Conduct.
[82] American Law Institute, *Principles of the Law: Aggregate Litigation*, Philadelphia, American Law Institute, 2010, 73.
[83] R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 120.

2. BELGIAN CONTEXT

It is particularly intriguing to notice that there is only little debate going on about the possible use of contingent fees[84] in the Belgian context, especially because the topic is far more discussed in the Netherlands. In respect of methodology, we found it therefore very useful to include some Dutch sources as well with regard to contingent fees as the historical and legal context of the prohibition in the Netherlands is quite similar to the Belgian one. In the following paragraphs we would like to address the origins and boundaries of the explicit ban as well as the principles motivating it in order to see whether, in a third step, there might be any possibility of implementing a broader notion of contingent fees in the Belgian legal practice. Finally, we would like to share some reflections on the legal and deontological requirement of independence as a general principle of law.

2.1. LEGISLATIVE HISTORY AND CONFINES OF THE BELGIAN PROHIBITION

In respect of the Belgian legal setting regarding lawyer remuneration, the Belgian Code of Civil Procedure (hereafter: "**Code of Civil Procedure**") contains an explicit prohibition on actual contingent fees in the first paragraph of Article 446*ter*.

'De advocaten begroten hun ereloon met de bescheidenheid die van hun functie moet worden verwacht. Een beding daaromtrent dat uitsluitend verbonden is aan de uitslag van het geschil, is verboden.'

Lawyers determine their honorary fee with modesty of the kind expected on account of their profession. A contractual provision in that respect, exclusively related to the result of the proceedings, is prohibited.[85]

It is important to note that a legislative evolution precedes the second sentence of this Article. The current prohibition on the use of contingent fees – often addressed with the Latin term *pactum de quota litis* – can indeed be traced back to the period of French domination by Napoleon. On 14 December 1810 the Imperial Decree *contenant réglement sur l'exercise de la profession d'avocat et la discipline du Barreau*[86] was ordained, which included a provision in Article 36 prohibiting all contractual arrangements on honorary

[84] In respect of the discussion regarding the Belgian context, the term 'contingent fee' should in principle be construed *sensu stricto*, *i.e.* referring to a situation in which the lawyer is purely remunerated on a contingent fee basis. It will indeed follow from the analysis that success fees do not fall under the Belgian ban, *cf. infra*.

[85] Free translation.

[86] Free translation: regarding the regulation of the profession of attorney and the discipline of the bar.

pay concluded before pleadings had come to an end.[87] The notion 'honorarium'[88] is in this respect particularly important since the legal profession was deemed a *nobile officium*, a noble service to the community.[89] Making arrangements about payment would go against the ideals behind the legal profession and reduce it to a vile commercial nature.

It was only until the introduction of the current Code of Civil Procedure in 1967 that the catch all-prohibition[90] was mitigated into the more limited ban on *pacta de quota litis* enshrined in Article 459.[91] Although it was rather generally accepted by legal scholars in accordance with preparatory works[92] that the former article did not constitute an impediment for the use of so called success fees[93], legal clarification was thought useful.[94] Hence, the Amendment Act of

[87] Article 36 Décret 14 Décembre 1810 contenant réglement sur l'exercice de la profession d'avocat et la discipline du barreau, *cf. Pas.* 1810-1811, p. 239: *'leur faisons pareillement défenses de faire des traites pour leurs honoraires, ou de forcer les parties à reconnaître leurs soins avant les plaidoiries'*; Report VAN REEPINGHEN, *Hand.* Senaat 1963-64, 10 December 1963, nrs. 60, 118 and 121; M. BIAR and B. VAN DEN DAELE, "Honoraires et indemnisation du préjudice corporel" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 56, footnote 1; G. DUCHAINE and E. PICARD, *Manuel Pratique de la profession d'avocat en Belgique*, Brussel, Claassen, 1869, 314-315; E. GUTT and A.-M. STRANART-THILLY, "Examen de Jurisprudence (1965 à 1970). Droit judiciaire privé", *RCJB* 1973, 148, nr. 42; P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 75; P. LAMBERT, *Règles et usages de la profession d'avocat du barreau de Bruxelles*, Brussel, Bruylant, 1994, 543; P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 460; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 39-40, and 531, nr. 727; J. STEVENS, "Deontologie: van statica naar dynamica. Over de krachten die ontwikkelingen in de advocatendeontologie teweeg brengen", *D&T* 2011, iss. 1, 9-10; B. VAN DORPE, "De juridische aard van het ereloon naar Belgisch recht" in J. STEVENS (ed.), *Advocatenerelonen*, Brugge, die Keure, 2006, 19; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, 10 and 310, nr. 2162.

[88] The lawyer does not charge a fee for his services; he gets rewarded out of gratitude for his representation.

[89] H. LAMON, *Een advocaat in de spiegel. Beschouwingen over balie en advocatuur*, Brugge, die Keure, 2004, 39; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 520-521, nrs. 712-713; J. STEVENS, "Deontologie: van statica naar dynamica. Over de krachten die ontwikkelingen in de advocatendeontologie teweeg brengen", *D&T* 2011, iss. 1, 5-6, nrs.1-2, 8, nrs. 5 and 10-12, nrs. 8-9; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, 302, nrs. 2104-2105.

[90] Although the wording does not appear to give any leeway for exceptions, the catch-all prohibition was, however, applied less rigorously in practice. Arrangements regarding advance payment, for example, were deemed admissible. *Cf. inter alia* P. LAMBERT, *Règles et usages de la profession d'avocat du barreau de Bruxelles*, Brussel, Bruylant, 1994, 543; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 534, nr. 729 ; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, 310, nr. 2163.

[91] E. GUTT and A.-M. STRANART-THILLY, "Examen de Jurisprudence (1965 à 1970). Droit judiciaire privé", *RCJB* 1973, 149, nr. 42.

[92] Report VAN REEPHINGEN, *Hand.* Senaat 1963-64, 10 December 1963, nrs. 60 and 121: the new provision targets the *'eigenlijke pact de quota litis' – 'pacte de quota litis proprement dit'.*

[93] H. LAMON, "Enkel ereloon wanneer de advocaat de zaak wint: geen debat in Vlaanderen?", *Ad Rem* 2004, iss. 1, 14, nr. 3; H. LAMON, *Een advocaat in de spiegel. Beschouwingen over balie en*

2006[95] added the adverb 'exclusively'[96] to the prohibition, which thereafter was laid down in the current Article 446*ter* of the Code of Civil Procedure. The legislative text now stresses the necessary exclusive connection between fee and result in order for an agreement regarding honorary payment to fall under the prohibition.[97] It is noteworthy that, in France, that legislative clarification process in regard to a similar total ban provision enshrined in Article 10 of the law *portant réforme de certaines professions judiciares et juridiques*[98] had been carried out via an amendment act in 1991[99] already.[100] By virtue of the latter, the possibility of agreeing to success fees was explicitly laid down therein.

Traditionally, the prohibition on *pacta de quota litis* is also linked to Article 1597 of the Belgian Civil Code (hereafter: "**Civil Code**") that for lawyers as well as other legal services forbids the taking over of contested rights and claims belonging to the competence of the court in which jurisdiction they exercise their profession.[101]

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advocatuur, Brugge, die Keure, 2004, 101, footnote 265; P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 462; F. MOEYKENS, "Hoe begroten van het ereloon van de advocaat, betwistingen, procedures en recente rechtspraak" in F. MOEYKENS (ed.), *De Praktijkjurist*, Gent, Academia, 2001, 55-56; P. NEUVILLE, "Pacte de quota litis – success fee", Congrès général de la Fédération des Barreaux d'Europe Zürich – 19 and 20 May 2006, 1; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 533, nr. 728.2; B. VAN DORPE, "De juridische aard van het ereloon naar Belgisch recht" in J. STEVENS (ed.), *Advocatenerelonen*, Brugge, die Keure, 2006, 22; *contra*: B. DE MEULENAERE, "Advocatenhonoraria, een consumentvriendelijk perspectief", *TPR* 1988, iss. 1, 4 (although the author recognizes that the more moderate forms of result-oriented pay are commonly accepted in practice, see 7, nr.16).

[94] In that respect, HENRY made express reference to the French legislator who, according to his opinion, perfectly grasped the evolutions of the time and thus explicitly included the option of 'success fees' as an exception to the prohibition on actual *pacta de quota litis*.

[95] Article 4 Act of 21 June 2006 tot wijziging van een aantal bepalingen van het Gerechtelijk Wetboek met betrekking tot de balie en de tuchtprocedure voor haar leden, *Belgian State Gazette* 20 June 2006, 36.166.

[96] *Cf.* the term 'uitsluitend' in the legislative provision.

[97] P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 462; P. NEUVILLE, "Pacte de quota litis – success fee", Congrès général de la Fédération des Barreaux d'Europe Zürich – 19 and 20 May 2006, 1 ; J. STEVENS and I. VANDEVELDE, "Art. 439 Ger.W. - Art. 446ter Ger.W" in X., *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, 13, footnote 1.

[98] Free translation: relating to the reform on certain judicial professions.

[99] Law nr. 91-647 of 10 July 1991.

[100] Article 10(3) of Law nr. 71-1130 du 31 Décembre 1971 portant réforme de certaines professions judiciaires et juridiques.

[101] Court of First Instance Liège, 10 October 2001, *JLMB* 2002, iss. 3, (120) 121; G. DUCHAINE and E. PICARD, *Manuel Pratique de la profession d'avocat en Belgique*, Brussel, Claassen, 1869, 314; P. LAMBERT, *Règles et usages de la profession d'avocat du barreau de Bruxelles*, Brussel, Bruylant, 1994, 544 (wrongly mentions Article 1797 instead of Article 1597 Civil Code); B. VAN DORPE, "De juridische aard van het ereloon naar Belgisch recht" in J. STEVENS (ed.), *Advocatenerelonen*, Brugge, die Keure, 2006, 26; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, 310, nr. 2165.

Pacta de quota litis are sanctioned with absolute invalidity for incompatibility with public order[102]. In that event, the contract is indeed deemed to have an illicit object for which the annulment penalty applies.[103] However, once the illicit arrangement has been quashed, the lawyer still maintains a claim for payment in accordance with the regular standards of professional conduct.[104]

As pointed out in the short historical overview with regard to the evolutions of the legislative provision, success fees[105] did not give rise to any worries before the change in wording of 2006. As said, their use was already generally accepted in practice and is now, after the clarification measure, clearly admitted under the current text.[106] In contrast to the contingent fee arrangement that constitutes the focus of this article, namely the *pactum de quota litis*, success fees only relate to a limited part of the payment for legal representation, supplementary to the agreed upon base fee. More in particular, a success fee implies that the agreed upon base fee will either be multiplied by

[102] Court of First Instance Liège, 10 October 2001, *JLMB* 2002, iss. 3, (120) 121-122; B. DE MEULENAERE, "Advocatenhonoraria, een consumentvriendelijk perspectief", *TPR* 1988, iss. 1, 4, nr. 6; P. LAMBERT, *Règles et usages de la profession d'avocat du barreau de Bruxelles*, Brussel, Bruylant, 1994, 544; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 533, nr. 728.2; J. STEVENS and I. VANDEVELDE, "Art. 439 Ger.W. - Art. 446ter Ger.W" in X., *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, loose-leaf, 13; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, nr. 2171; P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 457-458: though he agrees with the penalty of absolute invalidity, the author, however, criticizes the common reference to public order in the literature and jurisprudence as motivation behind the interdiction of a *pactum de quota litis*. According to him, the prohibition in Article 446*ter* Code of Civil Procedure is rather inspired by the concept of public morality because of its more changing nature and because of its stronger connection with the principles underpinning the legal profession. According to our view, this is a rather subtle academic distinction without much practical effect. After all, absolute invalidity stems from Article 6 of the Civil Code, including both public order and public morality as grounds for annulment. There is thus no difference following the concept used as legal basis to quash the prohibited arrangement.

[103] Article 1133 of the Civil Code.

[104] J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 533, nr. 728.2; J. STEVENS and I. VANDEVELDE, "Art. 439 Ger.W. - Art. 446ter Ger.W" in X., *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, loose-leaf, 13; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, nr. 2172. Note that this was also deemed appropriate by some judges in the US whenever the contingent fee agreement was considered invalid, *cf. supra*.

[105] The notion 'success fee' is also frequently addressed with the Latin term *pactum de palmario* or *palmarium*.

[106] H. DE WULF, "Aandeelhoudersvorderingen met het oog op schadevergoeding - of waarom elke aandeelhouder vergoeding van reflexschade kan vorderen, België class actions moet invoeren en de minderheidsvordering moet hervormen", in X., *10 jaar Wetboek Vennootschappen in werking*, Mechelen, Kluwer, 2011, 507; P. HOFSTRÖSSLER, "Waarom een 'class action' in België? Krijtlijnen van het voorstel van de Orde van Vlaamse Balies", *Orde van de dag* 2011, 102, footnote 24; P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 462; M. PIERS, "Class actions. Verenigde Staten v. Europa. Rechtsvergelijkende beschouwingen naar aanleiding van de Wal-Martzaak", *NJW* 2007, 835, nr. 28; B. VAN DORPE, "Het ereloon van de advocaat: een speciaal geval", *P&B* 2009, 129, nr. 7.

a certain factor, or increased with a percentage of the final outcome or even an additional fixed amount.[107]

It is clear that a too restrictive reading of the prohibition on *pacta de quota litis* can lead to abuse. Not every arrangement of a base fee will exclude the application of the ban. Therefore, the base fee cannot be merely symbolic, as the contract should, then, be dealt with in the same way as *pacta de quota litis*.[108] Consequently, the base fee needs to be in some reasonable proportion to the 'input' the lawyer delivered. Whereas LEGROS appears to consider the mere recovery of costs sufficient for this purpose[109], HENRY requires at least some reward for the lawyer's actual work.[110] Although there might be some evolution in jurisprudence coming up accepting a broader notion of success fees leaning towards real *pacta de quota litis*, thereby interpreting the current wording of Article 446*ter* of the Code of Civil Procedure quite strictly[111], we believe that *de lege lata* HENRY's perspective should still prevail. As will follow from our discussion in relation to the principles underlying the current prohibition in Article 446*ter*, independence as regards clients constitutes the main *ratio legis*. Taking into account the importance of the principle, the mere recovery of costs can, in our view, not render the arrangement compatible with Article 446*ter*. This is even all the more clear with respect to cases in which the amount of costs remains fairly low. In that event, it evidently follows that the risk element particularly stems from the time input and opportunity costs rather than from the actual expenses. Under the present state of the law, it

[107] P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 78; P. NEUVILLE, "Pacte de quota litis – success fee", Congrès général de la Fédération des Barreaux d'Europe Zürich – 19 and 20 May 2006**,** 2**.**

[108] Court of First Instance Liège, 10 October 2001, *JLMB* 2002, iss. 3, 120 as interpreted in P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 79-82: though it is not actually clear whether the court construed the old provision of Article 459 in a strict manner excluding result-oriented pay to a full extent, or in a manner allowing for success fees, but not accepting the concrete success fee determined in the case at issue because of its disproportionate nature, HENRY is rather convinced that the court was of the latter opinion. In his view, the court did, in fact, accept the principle of success fees, yet not the concrete application in the case. *"C'est donc la démesure qui a été condamnée, et non le principe."* ; in the same sense: B. VAN DORPE, "De juridische aard van het ereloon naar Belgisch recht" in J. STEVENS (ed.), *Advocatenerelonen*, Brugge, die Keure, 2006, 26; P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 462: *"Depuis le 21 juin 2006, le pacte non "exclusivement" lié au résultat de la contestation est donc autorisé, c'est-à-dire, le pacte qui n'est pas "uniquement" ou "essentiellement" fondé sur le résultat de la contestation mais qui prend en compte d'autres paramètres."* (own underlining).

[109] P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 464-466: he notices, as it were, a shift to a reasonable acknowledgement of the *pactum de quota litis* (*"une reconnaisance 'raisonnable'"*).

[110] P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 79.

[111] Court of Appeal Ghent, 28 February 2008, *P&B* 2009, iss. 4, 138.

should, however, in our opinion, not form a problem for the agreed upon success fee to constitute a larger amount than the actual base fee.[112]

It already follows from the admissibility of success fees that the outcome of a case – let it be loss or success – certainly plays a role in the determination of a lawyer's honorarium. Even if no contractual arrangement is made beforehand, it is certainly one of the factors that can lawfully be taken into account when calculating the fee. Other factors comprise *inter alia* the client's financial position, the lawyer's talent and efforts, and the stakes of the case.[113] Of course, the determination of the fee is ultimately subject to review by the Bar and the judiciary[114] that will see to enforce the modesty requirement included in the first sentence of Article 446*ter* of the Code of Civil Procedure.

2.2. UNDERPINNINGS OF THE LEGAL BAN

In order to incite the academic debate in relation to the admissibility of contingent fees within the Belgian setting, it is necessary to reveal the principles underpinning the current explicit ban. Professional independence of a lawyer *vis-à-vis* his client appears to be the overarching principle. In this section we will limit ourselves to the discussion of those underpinnings as such. In the next section we will then provide for nuanced perspectives on those motivations for the Belgian ban.

In the Imperial Decree of 1810, the importance of a lawyer's professional independence was already highlighted in its preamble[115] and further developed in Article 37. That provision required from lawyers to exercise their profession at liberty with a view to justice and truth and, in addition, to abstain from using

[112] HENRY touched upon this aspect of monetary difference by referring to cases of the French '*Court de Cassation*' in P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 80.

[113] J. BIGWOOD, "La détermination des honoraires de l'avocat", *JT* 1999, 459**,** nr. 2.4; J. STEVENS and I. VANDEVELDE, "Art. 439 Ger.W. - Art. 446ter Ger.W" in X., *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, loose-leaf, 8-10, nr. 5.

[114] Art. 446*ter*, paragraph 2 of the Code of Civil Procedure; Vrederechter Sint-Jans-Molenbeek 14 March 1989, *JT* 1989, 384; J. STEVENS and I. VANDEVELDE, "Art. 439 Ger.W. - Art. 446ter Ger.W" in X., *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, loose-leaf,10-12, nrs. 6-7; B. VAN DORPE, "Het ereloon van de advocaat: een speciaal geval", *P&B* 2009, 129-130, nrs. 8 and 9.

[115] *"Lorsque nous nous occupions de l'organisation de l'ordre judiciaire, et des moyens d'assurer à nos cours la haute considération qui leur est due, une profession dont l'exercice influe puissamment sur la distribution de la justice a fixé nos regards; nous avons en conséquence ordonné, par la loi du 22 ventôse an 12, le rétablissement du tableau des avocats, comme un des moyens les plus propres à maintenir la probité, la délicatesse, le désintéressement, le désir de la conciliation, l'amour de la vérité et de la justice, un zèle éclairé pour les faibles et les opprimés, bases essentielles de leur état."*

illicit or vexatious means.[116] The image of the lawyer as *auxiliaire de la justice*[117] is here evoked, meaning that a lawyer should not act as a parasite of the system using any loophole possible to lodge any case possible. Instead, he should contribute to the preservation of the legal system throughout his pursuit for truth. He should thus only accept cases that he believes to be just.[118] In preparing and conducting proceedings, he should only take recourse to proper means justified in view of the legal context in which the issue is embedded.[119] Until today, that idea of a necessary honourable attitude remains enshrined in Article 444 of the Code of Civil Procedure. Moreover, it is part of the oath undertaken and sworn by any beginning lawyer in Belgium.[120]

Inspired by the omnipresence of the independence principle in the Belgian system, the risk of an over-identification with clients' interests ensuing from result-oriented pay is the primary concern for critics of contingent fee practices.[121] In their view, a lawyer would be too caught up by what is at stake, since losing the case will not render him any benefit at all while a possible generous fee awaits him in the event of triumph. Fear stems from the

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[116] *"Les avocats exerceront librement leur ministère pour la défense de la justice et de la vérité; nous voulons en même temps qu'ils s'abstiennent de toute supposition dans les faits, de toute surprise dans les citations, et autres mauvaises voies, même de tous discours inutiles et superflus."*

[117] E. DEGROOTE, "Professionele onafhankelijkheid in de advocatuur", *Ad Rem* 2004, iss. 1, 18, nr. 10; P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 75; P. NEUVILLE, "Pacte de quota litis – success fee", Congrès général de la Fédération des Barreaux d'Europe Zürich – 19 and 20 May 2006, 1.

[118] G. DUCHAINE and E. PICARD, *Manuel Pratique de la profession d'avocat en Belgique*, Brussel, Claassen, 1869, 292; H. LAMON, *Een advocaat in de spiegel. Beschouwingen over balie en advocatuur*, Brugge, die Keure, 2004, 39, nrs. 32, 35 and 41-42; J. STEVENS, "Deontologie: van statica naar dynamica. Over de krachten die ontwikkelingen in de advocatendeontologie teweeg brengen", *D&T* 2011, iss. 1, 10, nr. 8; M.-E. STORME, "Déontologie professionnelle et conduite loyale du procès" in X., *Rôle et organisation de magistrats et avocats dans les sociétés contemporaines*, Antwerpen, Kluwer, 1992, 21, nr. 13; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, 283, nr. 1963.

[119] G. DUCHAINE and E. PICARD, *Manuel Pratique de la profession d'avocat en Belgique*, Brussel, Claassen, 1869, 288; H. LAMON, *Een advocaat in de spiegel. Beschouwingen over balie en advocatuur*, Brugge, die Keure, 2004, 43, nr. 36; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, 284, nr. 1966.

[120] Article 429 of the Code of Civil Procedure.

[121] M. BIAR and B. VAN DEN DAELE, "Honoraires et indemnisation du préjudice corporel" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 56-57; B. DE MEULENAERE, "Advocatenhonoraria, een consumentvriendelijk perspectief", *TPR* 1988, iss. 1, 10; P. LAMBERT, *Règles et usages de la profession d'avocat du barreau de Bruxelles*, Brussel, Bruylant, 1994, 544; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 22; J. STEVENS and I. VANDEVELDE, "Art. 439 Ger.W. - Art. 446ter Ger.W" in X., *Gerechtelijk recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Antwerpen, Kluwer, loose-leaf, 13; M.-E. STORME, "Déontologie professionnelle et conduite loyale du procès" in X., *Rôle et organisation de magistrats et avocats dans les sociétés contemporaines*, Antwerpen, Kluwer, 1992, 23, nr. 16; B. VAN DORPE, "De juridische aard van het ereloon naar Belgisch recht" in J. STEVENS (ed.), *Advocatenerelonen*, Brugge, die Keure, 2006, 26; P. VERMEYLEN, *Règles et usages de l'ordre des avocats en Belgique*, Brussel, Larcier, 1940, 310, nr. 2164.

consequent conceivable lack of adequate judgment in respect of the merits of the case.[122] Therefore, a lawyer's assessment is said to be disturbed by the expectation of future gain, not only in relation to the acceptance of the case, but also with regard to the means employed during the course of action. Contingent fees would instigate a lawyer to resort to trickery and deceit, hence causing him to depart from the solemn oath he once undertook.[123] In conclusion, contingent fees would harm the honour and dignity of the legal profession.

For the sake of completeness, reference can also be made to the *Code of Conduct for European Lawyers* (hereafter: "**Code of Conduct**") of the *Council of Bars and Law Societies of Europe* (hereafter: "**CCBE**"). Independence clearly stands among the core values of the legal profession in the European Union.

"Advice given by a lawyer to the client has no value if the lawyer gives it only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure."[124]

In that respect, *pacta de quota litis* are explicit forbidden practice as follows from Article 3.3.1. CCBE Code. It should, however, be noted that the CCBE Code of Conduct only constitutes a binding text with regard to cross-border activities within the European Union and European Economic Area.[125] Nonetheless, even for purely internal matters, it remains an important reference guide, as it indicates fairly common principles of legal practice in the European context.[126]

Some other related concerns come to mind as well as regards the possible implementation of contingent fees. Result-oriented pay may for example trigger a lawyer to make abuse of the vulnerable position an injured client finds himself in.[127] A client's vision might be clouded due to the damage he has undergone leading to feelings of anger and vengeance encouraging a litigation spirit at the expense of reasonableness. Where a lawyer is normally

[122] G. DUCHAINE and E. PICARD, *Manuel Pratique de la profession d'avocat en Belgique*, Brussel, Claassen, 1869, 315; H. SMEYERS, "De juridische dienstverlening en juridische beroepen reguleren", *Ad Rem* 2008, iss. 4, 26.
[123] H. LAMON, *Een advocaat in de spiegel. Beschouwingen over balie en advocatuur*, Brugge, die Keure, 2004, 43.
[124] Article 2.1.2. CCBE Code of Conduct, www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf, last accessed on 05.03.2013 (last version of 2006).
[125] Article 1.5 CCBE Code of Conduct.
[126] Article 1.3.2 CCBE Code of Conduct. For a more general discussion of the CCBE Code of Conduct, see J. STEVENS, "De Europese advocaten: een deontologie?", *Ad Rem* 2006, 24-33.
[127] P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 75.

expected to advise in a moderate fashion, his voice will now resolutely speak in favour of launching proceedings instead of weighing and considering options. Similarly, he might also be triggered to not give up, to continue proceedings out of a mere hope for success though actually futile, merely because his own interest is at stake and because he may have already invested a lot of money and effort into it.[128] According to many, the increase in frivolous lawsuits and nuisance claims is in this manner likely to bring about a litigation society, which from a social efficiency perspective is highly undesirable.[129]

It is key to see that litigation is, however, not always the most favourable option for the contingent fee lawyer as he is in fact playing a zero-sum game. He might eventually choose for a more modest but secure profit in the form of a settlement. Benefits of this practice are quite obvious. Early settlement will evidently make the lawyer avoid costs of long-lasting proceedings. In addition, risk of losing will be fully reduced. In contrast, the client is not exposed to the costs and time-consuming nature of the proceedings in a contingency fee system. A client will therefore not consider litigation costs in deciding over settlement, but he will of course be inclined to follow the misbelieved honest advice of his lawyer for whom the costs do make a difference. Rather than a genuine alternative to litigation for the *client*[130], settlement can thus become a misleading strategy in view of immediate gain for the *lawyer*.[131]

Another abuse of a client's weak position might occur as to the arrangement of the actual fee. As the average client is not acquainted with the rules of the legal game, he is not in the position to properly assess the strengths and weaknesses of his own case. Consequently, a lawyer might falsely postulate that there is only a slight chance of winning, resulting in the arrangement of a proportionately higher percentage of the final outcome to compensate for the alleged riskiness of the undertaking. Indeed, if the outcome was almost certain, contrary to the lawyer's statements, the client will be the victim of cunning

[128] Article 446ter (2) of the Code of Civil Procedure.

[129] B. DE MEULENAERE, "Advocatenhonoraria, een consumentvriendelijk perspectief", *TPR* 1988, iss. 1, 9, nr. 22; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 534, nr. 728.3.

[130] Which should be the aim as also described in Article 3.7.1. CCBE Code of Conduct: *"The lawyer should at all times strive to achieve the most cost-effective resolution of the client's dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution."*

[131] B. DE MEULENAERE, "Advocatenhonoraria, een consumentvriendelijk perspectief", *TPR* 1988, iss. 1, 8, nr. 20; H. DE WULF, "Aandeelhoudersvorderingen met het oog op schadevergoeding - of waarom elke aandeelhouder vergoeding van reflexschade kan vorderen, België class actions moet invoeren en de minderheidsvordering moet hervormen", in X., *10 jaar Wetboek Vennootschappen in werking*, Mechelen, Kluwer, 2011, 506; M. PIERS, "Class actions. Verenigde Staten v. Europa. Rechtsvergelijkende beschouwingen naar aanleiding van de Wal-Martzaak", *NJW* 2007, 831, nr. 22.

deception. The lawyer will thence receive an unjust fee in excess proportion to the risks and efforts of lodging the claim.[132]

2.3. CONTINGENT FEES REVISITED

It follows from the above discussion on the history and underpinnings of current article 446*ter* of the Code of Civil Procedure that the ban on *pacta de quota litis* is quite firmly embedded in the Belgian legal setting. Nevertheless, it is our endeavour to question whether this prohibition should effectively be maintained in present day context. Evolutions in the sphere of competition law with regard to price setting may incite this discussion on sustainability even further[133], yet that is not the aim of the article. Our approach here is more directed towards the underlying principles of the prohibition, the inherent merits and flaws. We already addressed the main merits of enhancing access to courts[134] and inspiring the lawyer to a qualitatively good and efficient handling of the case[135] in the section on the American implementation. In this section, we would now like to nuance the flaws so commonly addressed by contingent fee critics. In performing that nuancing exercise, we will bear in mind the valid stance of CHASE that transporting disputing procedures from one society to

[132] Especially in relation to class actions: M. PIERS, "Class actions. Verenigde Staten v. Europa. Rechtsvergelijkende beschouwingen naar aanleiding van de Wal-Martzaak", *NJW* 2007, 831, nr. 22; M. PIERS and E. DE BAERE, "Collectief slachtofferschap in rechtsvergelijkend perspectief", *Orde van de dag* 2011, iss. 54, 20; HENRY mentions the term *"retirement cases"* to stress the possible lucrativeness of working with contingent fees in P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005, 75.

[133] Useful insights from a competition law perspective can be found in H. LAMON, "Enkel ereloon wanneer de advocaat de zaak wint: geen debat in Vlaanderen?", *Ad Rem* 2004, iss. 1, 14-15, nr. 3; S. TACK, "Relatie advocaat-cliënt", *NJW* 2005, iss. 118, 846-850, nrs. 100-119; A.-M. VAN DEN BOSSCHE, "Ereloonafspraken: heerlijk, helder, geheid verboden?" in J. STEVENS (ed.), *Advocatenerelonen*, Brugge, die Keure, 2006, 250-279, nrs. 63-86; Particularly in the Netherlands, the legitimacy of the prohibition on *pacta de quota* seen through a competition law lens has received plenty attention after the national competition authority sanctioned the deontological rule as an unlawful price arrangement, e.g. M.B.W. BIESHEUVEL, "No cure no pay en quota pars litis in discussie", *NJB* 1999, iss. 7, 295-296; J.C.A. HOUDIJK, "Vrije beroepen, deontologie en het mededingingsrecht – hoeveel ruimte blijft er over voor beroepsregulering in advocatuur en notariaat?", *RM Themis* 2005, iss. 5, 260-261; F. TEN HAVE and J. MULDER, "Het Nederlandse verbod op *no cure no pay* en *quota pars litis*: een mededingingsrechtelijk perspectief, *AA(Ned.)* 2007, iss. 5, 438-447.

[134] B. DE MEULENAERE, "Advocatenhonoraria, een consumentvriendelijk perspectief", *TPR* 1988, iss. 1, 7-8, nrs. 17-18; P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 457-464; M. PIERS, "Class actions. Verenigde Staten v. Europa. Rechtsvergelijkende beschouwingen naar aanleiding van de Wal-Martzaak", *NJW* 2007, 831, nr. 22; O. SLUSNY, "L'Accès à la justice pour les justiciables défavorisés", *Journal des Proces* 28 December 2001, iss. 427, 9; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 534, 728.3.

[135] B. VAN DORPE, "De juridische aard van het ereloon naar Belgisch recht" in J. STEVENS (ed.), *Advocatenerelonen*, Brugge, die Keure, 2006, 26.

another however entails inherent problems[136] and that therefore a legal transplant does not always constitute a perfect fit.

As mentioned above, one of the most common critiques is that the use of contingent fee contracts can cause a flood of litigation[137] and the stirring up of groundless and dubious claims[138]. The possibility of winning big, e.g. by earning windfalls, may indeed lead lawyers to engaging in techniques to funnel business their way and some of the methods utilized balance on the ethical borderline.[139] This is particularly true in personal injury litigation.[140] However, when a lawyer works on a contingent fee basis, he only receives compensation for his services when there is monetary recovery. As a result, he might actually be more likely to function as a first judge and turn away cases that are not likely to yield him any profit, unless he agrees on taking up the case for a high contingent fee or on an hourly basis.[141] Furthermore, a higher number of cases is not necessarily a bad thing, considering that access to the courts is important and a fundamental right.[142] One should only view a higher number of cases as a problem, when social repose is preferred over litigiousness.[143] Empirical research[144] has actually also pointed out that contingency fee lawyers do not benefit so much more financially than lawyers that charge their clients on an hourly basis and that they do turn away plenty of cases, so the suggestion that lawyers take frivolous lawsuits in the hope of winning big may be unfounded[145]. It should be noted as well that a client might also risk to be

[136] O. CHASE, "Legal processes and national culture", *Cardozo J.Int'l & Comp.L*. 1 (1997), 18. *Cf.* the references to literature in footnote 100 of CHASE's article.
[137] S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 264.
[138] D. MELLINKOFF, *Lawyers and the System of Justice: Cases and Notes on the Profession of the Law*, Saint-Paul, West Publishing Co., 1976, 296.
[139] D.W. NEUBAUER and S.S. MEINHOLD, *Judicial Process. Law, Courts, and Politics in the United States*, Belmont, Thompson-Wadsworth, 2007, 160.
[140] In the US, personal injury lawyers are therefore often called 'ambulance chasers'.
[141] J. DE MOT, "Burgerlijk procesrecht en empirisch onderzoek", *NJW* 2005, iss. 108, 474, nr. 12; P. HENRY, "Erin Brockovich contre l'ordre de Cicéron (de la licéité de l'honoraire de résultat)" in X., *Déontologie. Les honoraires. Le devoir de conseil*, Luik, Editions du Jeune Barreau de Liège, 2005; P. LEGROS, "L'interdiction du pacte "*de quota litis*". *Quousque tandem*…?" in X., *Liber Amicorum Jo Stevens*, Brugge, die Keure, 2011, 464; M. PIERS, "Class actions. Verenigde Staten v. Europa. Rechtsvergelijkende beschouwingen naar aanleiding van de Wal-Martzaak", *NJW* 2007, 831, nr. 22; O. SLUSNY, "L'Accès à la justice pour les justiciables défavorisés", Journal des Proces 28 December 2001, iss. 427, 9.
[142] H. DE WULF, "Aandeelhoudersvorderingen met het oog op schadevergoeding - of waarom elke aandeelhouder vergoeding van reflexschade kan vorderen, België class actions moet invoeren en de minderheidsvordering moet hervormen", in X., *10 jaar Wetboek Vennootschappen in werking*, Mechelen, Kluwer, 2011, 508.
[143] S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 264.
[144] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, 267.
[145] D.W. NEUBAUER and S.S. MEINHOLD, *Judicial Process. Law, Courts, and Politics in the United States*, Belmont, Thompson-Wadsworth, 2007, 160.

confronted with a counterclaim for vexatious and reckless proceedings in the event the case clearly is without any merits.[146]

We discussed the risk of inducement towards early settlements in view of immediate gain. That danger is indeed present, yet a similar risk of deceptive practices is attached to the use of hourly fees. Attorneys billing by the hour are indeed incentivized to stretch out proceedings, to use every possible procedural tool to prolong litigation as to reach out to the bottom of every case, even though no favourable outcome can be found there. The longer the lawyer is instructed onto the case, the more he earns.[147] In the present day Belgian context, we believe this risk can be sufficiently curtailed to reasonable proportions both by virtue of the lawyer's stimulus to uphold reputation and the enforcement of disciplinary rules. The same risk prevention can be expected to ensue from those two factors in relation to an eventual admission of *pacta de quota litis*. Most probably, a lawyer will not seek to jeopardize his sincere status in the eyes of his clients, because it might have an impact on future solicitations. In the event a lawyer's sincerity would not weigh up against the greed provoked by his commercial instinct, causing him to mislead, a client can always raise a claim for violation of the disciplinary rules. An effective deterrent result can, however, only be attained on the condition that clients are properly informed of this possibility and enforcement is adequate.

Another critique is that the system can lead to the lawyer receiving an unconscionable large fee.[148] In the United States, this has led to the increase of verdicts taken by juries in medical malpractice, because they felt that the client did not receive sufficient compensation as a result of the contingency fee agreement.[149] However, a fee that looks large in retrospect may not appear as large if one takes into consideration that the fee was contingent and that the lawyer thus risked receiving nothing.[150] As mentioned above, the empirical research by KRITZER also points out that the average effective hourly rate is not significantly higher than when the attorney is being paid on an hourly or

[146] H. DE WULF, "Aandeelhoudersvorderingen met het oog op schadevergoeding - of waarom elke aandeelhouder vergoeding van reflexschade kan vorderen, België class actions moet invoeren en de minderheidsvordering moet hervormen", in X., *10 jaar Wetboek Vennootschappen in werking*, Mechelen, Kluwer, 2011, 507.

[147] *Ibidem*; B. DE MEULENAERE, "Advocatenhonoraria, een consumentvriendelijk perspectief", *TPR* 1988, iss. 1, 9, nr. 21.

[148] S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 264.

[149] D. MELLINKOFF, *Lawyers and the System of Justice: Cases and Notes on the Profession of the Law*, Saint-Paul, West Publishing Co., 1976, 296.

[150] R.D. ROTUNDA, *Legal Ethics. The Lawyer's Deskbook on Professional Responsibility*, St. Paul, West Group, 2002-2003, 109. As regards class actions for example, a big win may follow at the end of the procedure, yet *a priori*, such profit is never certain. That is why it occurs that contingent fee lawyers lend with the bank in order to finance the procedure and accordingly will be exposed to severe risks upon failure.

flat fee, they are in the same ballpark.[151] Very large effective hourly rates are indeed possible and can be a windfall, far out of proportion to the actual time invested or skills utilized[152], but they are certainly not typical[153]. Furthermore, we should also keep in mind that the lawyer provides additional services[154], so a larger fee could be justified to a certain extent. In a certain sense, a higher effective hourly rate could be seen as a premium for eased access to the civil justice system.[155] Besides that, the risk of getting no fee at all has to be taken into account as well: the cases in which the lawyer does receive a fee have to offset the free service he has provided in unsuccessful cases. Some lawyers in the US have a mixed strategy and take up contingent fee cases and hourly fee work, to make sure 'the lights keep burning'.[156] It is also not that uncommon for US lawyers to collect a fee that is less than what he or she is actually entitled to under the agreement, because it could facilitate a settlement outside court if the attorney agrees to a smaller portion of the settlement, or to generate goodwill.[157]

More focused onto the Belgian context, the so-called *American circumstances* of litigation flood, settlement seeking, and over-remuneration are actually not very likely to occur. After all, what typifies the American setting is that expectancies of gain are incited by the astronomical amounts of damages possibly - but actually very often - awarded to plaintiffs.[158] In that respect the existence of punitive in addition to compensatory damages has an enormous impact in civil cases, yet Belgium as most other European countries does not know that form of penalty. Moreover, Belgium does not have a jury system in civil matters, as a result of which compensation is more carefully awarded than in the US. Hence, it follows that in the Belgian setting comparatively more weight shall accrue to the expected chance of winning, strongly inducing the lawyer to accept a case only in the event of a reasonable prospect of success. The slight likelihood of unreasonably high recovery also tempers the acceptance of cases merely to force opposing party to settlement. This is even more so the case since Belgium, in contrast to the US[159], has adopted the *loser pays*-rule as a result of which the winning party does not have to bear (all) the procedural costs of going into litigation. Consequently, opposing party will not

[151] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 273.
[152] D.W. NEUBAUER and S.S. MEINHOLD, *Judicial Process. Law, Courts, and Politics in the United States*, Belmont, Thompson-Wadsworth, 2007, 160.
[153] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 273.
[154] *I.e.* a financing service and an insurance service (although there is no premium here), *cf. supra*.
[155] H.M. KRITZER, "The Wages of Risk: The Returns of Contingency Fee Legal Practice", *DePaul L.Rev.* 1998, (267) 307.
[156] *Ibidem*, 304.
[157] *Ibidem*, 289.
[158] J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 534, nr. 728.3.
[159] In the US each party bears his own costs, which is often called the *"each man for himself"* rule.

so easily be inclined to conclude to settlement out of fear for disproportionate damages and high costs. It should also be noted that procedural costs do not amount to the same levels as in the United States so that, even in the event of losing, opposing party only risks to pay relatively little costs in comparison to the losing party in the US. That will also make him less eager to agree to settlement.

Another element that needs to be taken into account is the Belgian system of legal aid, which does not have its equivalent in the US. As the Belgian client thus has another system in the form of legal aid to fall back on to lodge his claim, he will probably consider more diligently the pros and cons of instructing a contingent fee lawyer. A contingent fee system should thus be understood more in the sense of adding a possibility for the economically deprived in Belgium. More in particular, it could also provide the welcome opportunity for those types of clients to instruct a more experienced or qualified lawyer whose expertise normally goes far beyond their financial state can afford.[160]

It is clear that most concerns as regard the use of contingent fees stem from the very nature of the relationship between client and lawyer. A lawyer is instructed to act as agent according to the best possible strategy in furtherance to his client's interests, yet a typical client does not have the necessary skills to assess the lawyer's advice. A principal-agent problem therefore characterizes the lawyer-client relationship. The practice of contingent fees is in that respect said to provide for disincentives to the lawyer since he will be more inclined to bring his own interests into the picture and consequently become too much of a party concerned or even mislead the client. Whereas result-oriented pay is encouraged in the business atmosphere to actually tackle the principal-agent problem between shareholders and managers[161], in the Belgian setting of lawyer remuneration the possible positive benefits of quality and efficiency ensuing from this alignment of interests[162] are overshadowed and outweighed by the negative perspectives on the matter. A contingent fee practice remains seen as an element that would corrupt the lawyer's advising voice and disturb his vision on the matter. Independence as a principle, therefore, is the alleged main hurdle to overcome in view of a possible Belgian approval of *pacta de quota litis*.

In that respect, we would like to address the more fundamental question whether a lawyer's professional independence is still to be regarded as a bedrock principle firmly anchored in the Belgian legal system? Does this

[160] B. DE MEULENAERE, "Advocatenhonoraria, een consumentvriendelijk perspectief", *TPR* 1988, iss. 1, 7, nr. 118; J. STEVENS, *Regels en gebruiken van de advocatuur te Antwerpen*, Antwerpen, Kluwer, 1997, 534, nr. 728.3.
[161] Managers' incentives are for example aligned via bonuses, stock and option plans.
[162] H.O. KERKMEESTER, "Over de wenselijkheid van Amerikaanse toestanden", *NJB* 1999, iss. 7, 300.

underpinning prevail to the same extent as in the past or have matters evolved? The picture of a lawyer as loyal servant and protector of the judicial system has effectively undergone some changes over time. More and more, it is recognized that a lawyer should not be regarded as the *auxiliaire de la justice* once so nobly portrayed.[163] All those tendencies denote a shift in thinking about how independence should nowadays still govern the conduct of a lawyer. In our opinion, a lawyer, in essence, is just another commercial player providing services for which there exists a demand on the market. Taking that perspective, we do not underestimate the role a lawyer can play as first judge, yet we do not fear to acknowledge that this scrutiny is *de facto* inspired by an economic rationale of reputational and quality concerns rather than a moral obligation following an oath once sworn. If a lawyer seeks to become or maintain an interesting commercial party, he will naturally need to live up to those quality standards. And, as already stated, in the event a lawyer would nevertheless be triggered to act wrongly, the disciplinary authorities can still sanction him for his conduct.

Why is this shift in thinking about independence important? When considering the possible admissibility of contingency fees, one should pay attention to whether society can be deemed susceptible for such a change.[164] As a legislative change in favour of *pacta de quota litis* ultimately needs to be implemented by the legal profession and judiciary, it is advisable to examine whether the judicial society is indeed ready for such a revolution. Although the effect of general principles of law, in principle[165], can be altered by a legislative text, it is by no means desirable that a legislative admission of *pacta de quota litis* would, for example, remain idle by a too rigid judicial interpretation of the modesty requirement in 446*ter* Code of Civil Procedure. The importance of this societal acceptability was already recognized during the preparations of the current Code of Civil procedure. Commentator DE BAECK then stated: *"It did not escape from your commissions' attention that the further success of the wonderful construction the Code of Civil Procedure is will heavily depend on the good intentions of those who need to implement it and on their human conditions."*[166]

[163] H. DE WULF, "Aandeelhoudersvorderingen met het oog op schadevergoeding - of waarom elke aandeelhouder vergoeding van reflexschade kan vorderen, België class actions moet invoeren en de minderheidsvordering moet hervormen", in X., *10 jaar Wetboek Vennootschappen in werking*, Mechelen, Kluwer, 2011, 506, in particular footnote 64; H. LAMON, *Een advocaat in de spiegel. Beschouwingen over balie en advocatuur*, Brugge, die Keure, 2004, 39, nrs. 32-33.
[164] *Cf. supra* CHASE.
[165] The legislative text needs to be of a higher standing in the hierarchy of norms in order for the general principle of law to lose its effect. A general principle of constitutional value can for example not be altered by a regular act.
[166] Free translation, *cf.* report DE BAECK, *Hand.* Senaat 1964-1965, 9 March 1965, nr. 170, 9.

CONCLUSION

The contingent fee system has its merits and flaws, but if proper methods can be developed that help to discourage lawyer overreaching, both with regard to remuneration and control, this system preserves a great opportunity to enable access to the courts for everyone[167]. We believe the contingent fee system can be of considerable value to the economically deprived that nevertheless cannot benefit from free legal aid because they are not poor enough and fall in between. Hence, we do not see the contingent fee as a substitute for free legal services, but as an additional measure to guarantee access to the courts to all citizens. In that respect, the widely accepted practice of the contingent fee in the United States can be regarded as the implicit admission of the legal profession's failure there to guarantee universal access to the courts without such result-oriented remuneration method[168]. In our view as well, such wide accessibility should indeed be an imperative of a modern welfare state. It is therefore our hope a possible implementation of contingent fees would at least receive more attention and form subject of a more lively debate.

[167] S. LANDSMAN, "The History of Contingency and the Contingency of History", *Geo.Wash.L.Rev.* 1998, (261) 265.
[168] A. GERSON, *Lawyers' Ethics. Contemporary Dilemmas,* New Brunswick, Transaction Books, 1980, 268.