



# New Hong Kong Legislation on outcome-related fee structures for arbitration

On 30 June 2022,<sup>1</sup> Hong Kong enacted framework legislation which introduces legislative amendments aimed at allowing outcome-related fee structures (**ORFS**) in arbitration and related proceedings (the **Amendments**). The Amendments are expected to bolster Hong Kong’s status as a key hub for arbitration since, once fully operational, they will offer increased flexibility for end users of arbitration to adopt conditional fee agreements and damages-based agreements in arbitrations. Further details of the new OFRS regime will be fleshed out by subsidiary legislation.

Following our previous update on similar reforms in Singapore,<sup>2</sup> this bulletin sets out an overview of the key features of Hong Kong’s ORFS reforms by considering the following questions:

1. What are ORFS?
2. Is there a cap on “uplift fees”?
3. Can “uplift fees” be recovered from the unsuccessful party?
4. What are the requirements for an ORFS agreement?
5. How does Hong Kong’s ORFS regime compare with the ORFS regimes in other jurisdictions?

<sup>1</sup> Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022 – Ordinance No. 6 of 2022, issued on 30 June 2022 (the **Amendment Ordinance**), available at <https://www.gld.gov.hk/egazette/pdf/20222626/es1202226266.pdf>.

<sup>2</sup> See our update on the Singapore reforms here: <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/singapore-allows-no-win-no-fee-and-no-win-less-fee-arrangements-for-arbitration-and-sicc-proceedings-from-4-may-2022>.



## 1. What are ORFS?

Under ORFS, the fees payable to a lawyer may vary depending on the outcome. The Amendments are aimed at legalising the following types of ORFS for arbitration (including proceedings before an emergency arbitrator) and related court and mediation proceedings:

### (i) Conditional fee agreement or CFA:

A CFA is an agreement under which the lawyer is paid a success fee in the event of a successful outcome for the client, either as a “No-Win, No-Fee” or “No-Win, Low-Fee” arrangement.<sup>3</sup>

The success fee is calculated by reference to the fee that a lawyer would have charged the client for the matter if no ORFS agreement has been made.

As to what a “successful outcome” is, this depends on what is agreed between the client and the lawyer, and includes any financial benefit obtained by the client in the matter.

### (ii) Damages-based agreement or DBA:

A DBA is an agreement under which a lawyer receives payment only if the client recovers a financial benefit in the matter and, unlike a CFA, the payment is calculated by reference to the financial benefit obtained by the client in the matter (**damages-based agreement** or **DBA**).<sup>4</sup>

### (iii) Hybrid DBA:

A hybrid DBA is an arrangement under which a lawyer receives a payment pursuant to a DBA, in addition to fees (which may or may not be discounted) for legal services rendered during the course of the matter (**Hybrid DBA**).<sup>5</sup>

## 2. Is there a cap on “uplift fees”?

While the Amendments themselves do not address the issue, it is envisaged that subsidiary legislation would provide for caps on the “uplift fees”, ie the fees payable to the lawyers in the event of a success. The latest responses of the Government suggest the following caps:<sup>6</sup>

(a) in the case of a **CFA**, the amount of uplift should not exceed 100% of the benchmark costs (ie what would normally be payable by the parties if there were no CFA);

(b) in the case of a **DBA**, the DBA payment should not exceed 50% of the financial benefit recovered by the client; and

(c) in the case of a **Hybrid DBA**:

(i) in the event of an unsuccessful case where no financial benefit is obtained, lawyers are permitted to be paid up to 50% of the benchmark costs incurred in pursuing the unsuccessful claim; and

(ii) in the event of a successful case, the DBA payment (on top of recoverable costs) is subject to a cap of 50% of the financial benefit recovered by the client.<sup>7</sup>

## 3. Can “uplift fees” be recovered from the unsuccessful party?

The Amendments provide that the “uplift fees” are not recoverable from the unsuccessful party unless there are “*exceptional circumstances justifying the order*”.<sup>8</sup> While the arbitral tribunal therefore has the discretion to depart from the general rule, such departures are likely to be rare and the Law Reform Commission of Hong Kong (the **LRC**) has stressed that the discretion should be exercised in “*genuinely exceptional circumstances*”. An example of “*exceptional circumstances*” identified by the LRC is the English case of *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited* [2016] EWHC 2361, where the claimant was allowed to recover the costs of third party funding given the respondent had deliberately tried to hurt the claimant financially, with the aim of preventing the claimant from being able to pursue a legitimate claim.

<sup>3</sup> *Ibid*, Part 10B, Section 98ZC.

<sup>4</sup> *Ibid*, Part 10B, Section 98ZD.

<sup>5</sup> *Ibid*, Part 10B, Section 98ZE.

<sup>6</sup> “Recommendation 3”, “Recommendation 7” and “Recommendation 10” of the Annex to the Legislative Council Panel on Administration of Justice and Legal Services paper on Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022, 28 March 2022 (**LC Paper**), available at: <https://www.legco.gov.hk/yr2022/english/panels/ajls/papers/ajls20220328cb4-192-2-e.pdf>.

<sup>7</sup> The LRC also addresses the situation where the case is successful, but the awarded amount is very small, such that the lawyer’s DBA payment is much less than anticipated. The LRC recognises that an anomaly may arise: (a) where a lawyer could recover more of its costs (from the client) if the client received no financial benefit from its case (i.e., the case is unsuccessful); than (b) if the client received only a small financial benefit (i.e., the case is successful, and the lawyer can recover its costs from the losing party). Thus, in a situation where: (a) the DBA payment plus the costs recoverable from the losing party (i.e., in a successful case) is less than (b) 50% of the costs the lawyer would incur in pursuing an unsuccessful claim (and which it could not recover from the losing party); then the lawyer is entitled to be paid the latter (i.e., b) from the client (on the basis that the lawyer cannot recover it from the losing party). See The Law Reform Commission of Hong Kong report on “Outcome Related Fee Structures for Arbitration”, December 2021, available at [https://www.hkreform.gov.hk/en/docs/rorfa\\_e.pdf](https://www.hkreform.gov.hk/en/docs/rorfa_e.pdf), para. 11.35.

<sup>8</sup> The Amendment Ordinance, Part 10B, Section 98ZU.

## 4. What are the requirements for an ORFS agreement?

The Amendments provide that the entry into or termination of an ORFS agreement must be disclosed to the other party and the arbitration body (if any).<sup>9</sup>

The detailed regulatory framework for ORFS, including as to the requirements for an ORFS agreement, is expected to be prescribed by way of subsidiary legislation that would complement the Amendments. Some of the key requirements for an ORFS agreement envisaged by the LRC include the following:<sup>10</sup>

- (a) The agreement must be in writing and signed by the client;
- (b) The agreement must comply with certain requirements, including that all relevant information relating to the ORFS is provided to the client in a clear and accessible form;
- (c) The agreement must include a cooling off period (with a minimum period being seven days) during which either party may terminate the agreement by giving written notice;
- (d) The agreement should provide for the circumstances in which a lawyer's fees and expenses, or part of them, will be payable and the circumstances in which the lawyer's payment, expenses and costs, or part of them, are payable by the client in the event that the ORFS is terminated by either party;
- (e) The agreement should provide for whether disbursements are to be paid irrespective of the outcome of the matter; and
- (f) Lawyers must inform clients of their right to take independent legal advice and the agreement should include a corresponding statement that the client has been informed of this right.

## 5. How does Hong Kong's ORFS regime compare with the ORFS regimes in other jurisdictions?

Like Hong Kong, Singapore, another major arbitral hub in the Asia-Pacific region, has recently legalised ORFS for arbitration and related proceedings and the proceedings before the Singapore International Commercial Court (the **SICC**).

Our previous update on the Singapore reforms can be found at: <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/singapore-allows-no-win-no-fee-and-no-win-less-fee-arrangements-for-arbitration-and-sicc-proceedings-from-4-may-2022>). In summary, the major differences between the two regimes are as follows:

- While the Hong Kong regime legalises CFAs, DBAs and Hybrid DBAs (see **Question 1**), the Singapore regime only legalises CFAs. The wider coverage in Hong Kong reflects LRC's view that allowing DBAs and Hybrid DBAs would not encourage frivolous litigation, since lawyers would not choose to "invest" in weak cases.<sup>11</sup>
- While the Hong Kong regime imposes certain caps on "uplift fees" (see **Question 2**), the Singapore regime does not impose any equivalent limitation on the amount of "uplift fees".
- While the Hong Kong regime provides that the "uplift fees" may be recovered from an unsuccessful party where there are "exceptional circumstances justifying the order" (see **Question 3**), the Singapore regime adopts a blanket prohibition against the recoverability of uplift fees.

Unlike Hong Kong and Singapore, where the ORFS regimes are currently limited to arbitration and related proceedings (and in the case of Singapore, the SICC proceedings), England and Wales and Australia allow the use of ORFS arrangements in all proceedings, except criminal and family proceedings.<sup>12</sup>

## Conclusion

The ORFS reforms in Hong Kong increase the funding options available to the parties as the end users of arbitration, thereby complementing the third party funding regime which has been in place in Hong Kong since 2017. Together with other major developments in the recent years, such as the *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and HKSAR* (see our article at <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/supplemental-arrangement-concerning-mutual-enforcement-of-arbitral-awards-between-hong-kong-and-the-mainland>) and the *Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of HKSAR* (see our article at <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/mainland-hong-kong-interim-measures-arrangement-now-in-effect>), the ORFS reforms are expected to strengthen Hong Kong's appeal of as one of the leading arbitration hubs globally.

<sup>9</sup> The Amendment Ordinance, Part 10B, Sections 98ZQ and 98ZR.

<sup>10</sup> "Recommendation 13" of the LC Paper.

<sup>11</sup> The Law Reform Commission of Hong Kong report on "Outcome Related Fee Structures for Arbitration", December 2021, available at [https://www.hkreform.gov.hk/en/docs/rorfsa\\_e.pdf](https://www.hkreform.gov.hk/en/docs/rorfsa_e.pdf), para.11.16.

<sup>12</sup> The Conditional Fee Agreements Order 2013, Explanatory note; see also the Courts and Legal Services Act 1990, sections 58 and 58AA.



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