

# Singapore allows “No-Win, No-Fee” and “No-Win, Less-Fee” arrangements for arbitration and SICC proceedings from 4 May 2022

Historically, Singaporean law prohibited third party funding arrangements and outcome-related fee structures (**ORFS**) such as “No-Win, No-Fee” or “No-Win, Less-Fee” arrangements. However, other common law jurisdictions, such as England and Wales and Australia, have relaxed their equivalent laws and now permit some third party funding and ORFS to some extent. Singapore took its first steps towards levelling the playing field when it legalised third party funding for arbitration and the Singapore International Commercial Court (**SICC**) proceedings in 2017 and 2021 respectively. However, the prohibitions on ORFS remained.

This is now set to change. With effect from 4 May 2022,<sup>1</sup> Singapore-based lawyers may enter into conditional fee arrangements (which are a form of ORFS), for arbitrations, certain proceedings in the SICC, and related court and mediation proceedings. These reforms are expected to boost Singapore’s competitiveness as a leading hub for arbitration and cross-border dispute resolution.

This bulletin provides an overview of the key features of Singapore’s ORFS reforms by considering the following questions:

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

<sup>1</sup> *Legal Profession (Amendment) Act 2022 (Commencement) Notification 2022*, available at: <https://sso.agc.gov.sg/SL-Supp/S332-2022/Published/20220428?DocDate=20220428>.



## 1. What are ORFS?

Under ORFS, the fees payable to a lawyer may vary depending on the outcome. ORFS can come in different forms, as follows:<sup>2</sup>

- (i) an arrangement pursuant to which a 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, Less-Fee” arrangement (**conditional fee arrangements** or **CFA**);
- (ii) an arrangement pursuant to which a lawyer receives payment only if the client recovers a financial benefit in the matter and the payment is calculated as a percentage of the financial benefit obtained (**damages-based arrangements** or **DBA**); and
- (iii) an arrangement pursuant to which a lawyer receives a payment under a DBA in addition to fees (typically discounted) for legal services rendered during the course of the matter (**Hybrid DBA**).

## 2. Which forms of ORFS are legal?

The *Legal Profession (Amendment) Act* (the **Singapore Amendment Act**) provides that a solicitor, foreign lawyer or law practice entity in Singapore may enter into a CFA in relation to “prescribed proceedings”.<sup>3</sup> The categories of “prescribed proceedings” mirror that of the third party funding framework and are set out in the *Legal Profession (Conditional Fee Agreement) Regulations 2022* (the **Regulations**), namely: (i) international and domestic arbitration proceedings; (ii) certain proceedings in the SICC; and (iii) related court and mediation proceedings.<sup>4</sup>

Significantly, the reforms set out in the Singapore Amendment Act legalise only CFAs; other forms of ORFS, such as DBA and Hybrid DBAs, remain prohibited.<sup>5</sup> This is due to the Singapore Government’s concern that payments under such arrangements do not have a direct correlation with the work done by the lawyer and could give rise to additional risks of conflict of interests.<sup>6</sup>

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

Singapore’s ORFS regime does not impose a cap on the “uplift fees” (or the success fees) payable under a CFA (being the amount that is higher than the legal fees or costs that would otherwise be payable in the absence of ORFS).<sup>7</sup> This reflects the Singapore Government’s view that arbitration proceedings typically concern sophisticated parties who are in a position to negotiate fee arrangements,<sup>8</sup> and what constitutes a reasonable amount of uplift must be considered by reference to the circumstances of the case.<sup>9</sup>

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

The Singapore Amendment Act provides that “uplift fees” are not recoverable from the unsuccessful party.<sup>10</sup> The Singapore Government was concerned that permitting the recoverability of uplift fees could result in an explosion of satellite litigation, where the unsuccessful party seeks to contest the validity and application of the ORFS.<sup>11</sup> The experience of England and Wales is a cautionary tale – historically, the ORFS regime had permitted uplift fees to be recovered from the unsuccessful party, but this feature was subject to significant criticism and eventually abolished in the 2013 reforms.<sup>12</sup>

2 Refer to the definitions of “CFA”, “DBA” and “Hybrid DBA” in 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).

3 Section 115(B)(1) of the *Legal Profession (Amendment) Act 2022*, available at:

<https://sso.agc.gov.sg/Acts-Supp/8-2022/Published/20220222?DocDate=20220222>.

4 Paras 29-30 of the Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the *Legal Profession (Amendment) Bill*, 12 January 2022, available at: <https://www.mlaw.gov.sg/news/parliamentary-speeches/2022-01-12-second-reading-speech-by-second-minister-for-law-edwin-tong-on-legal-profession-amendment-bill>; Para 3 of the *Legal Profession (Conditional Fee Agreement) Regulations 2022*, available at: <https://sso.agc.gov.sg/SL-Supp/S333-2022/Published/20220428?DocDate=20220428>.

5 Section 115B(4) of the *Legal Profession (Amendment) Act 2022*, available at: <https://sso.agc.gov.sg/Acts-Supp/8-2022/Published/20220222?DocDate=20220222>.

6 Para 37 of the Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the *Legal Profession (Amendment) Bill*, 12 January 2022, available at: <https://www.mlaw.gov.sg/news/parliamentary-speeches/2022-01-12-second-reading-speech-by-second-minister-for-law-edwin-tong-on-legal-profession-amendment-bill>.

7 Response by Second Minister for Law, Mr Edwin Tong, to a query raised by Mr Zhulkarnain Abdul Rahim (Chua Chu Kang), on the *Legal Profession (Amendment) Bill*, 12 January 2022, available at: <https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-565>.

8 Ibid.

9 Ibid.

10 Section 115C(2) of the *Legal Profession (Amendment) Act 2022*, available at: <https://sso.agc.gov.sg/Acts-Supp/8-2022/Published/20220222?DocDate=20220222>.

11 Para 44 of the Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the *Legal Profession (Amendment) Bill*, 12 January 2022, available at: <https://www.mlaw.gov.sg/news/parliamentary-speeches/2022-01-12-second-reading-speech-by-second-minister-for-law-edwin-tong-on-legal-profession-amendment-bill>.

12 Para 3.11 of 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).

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

An ORFS agreement must comply with certain requirements, which are set out in the Singapore Amendment Act and the Regulations. Some of the key safeguards are as follows:

- (i) The agreement must be in writing and signed by the client;<sup>13</sup>
- (ii) The agreement must provide certain specified information to the client in plain language and the client must sign and date an acknowledgment that this information has been received and understood.<sup>14</sup> This includes the following information:<sup>15</sup>
  - (a) The nature and operation of the ORFS, including but not limited to the terms of the agreement;
  - (b) The client's right to seek independent legal advice;
  - (c) That the uplift fee is not recoverable from an unsuccessful party; and
  - (d) That despite the existence of the ORFS, the client continues to be liable for costs orders that may be made against the client by a court of justice or an arbitral tribunal (whichever is relevant);
- (iii) The agreement must include the particulars of the basis of calculation and an estimate or range of estimates of the resulting quantum of an uplift fee (if any);<sup>16</sup> and
- (iv) The agreement must include a cooling off period of five days during which either party may terminate the agreement by giving written notice, and a further cooling off period of three days immediately after the date the parties enter into any variation of the agreement that relates to the issue of costs.<sup>17</sup>

Additionally, parties should ensure that the agreement specifies:

- (i) whether disbursements are to be paid irrespective of the outcome of the matter; and
- (ii) 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.<sup>18</sup>

## 6. How does Singapore's ORFS regime compare with the ORFS regimes in other jurisdictions?

Singapore's ORFS reforms have also accelerated the implementation of similar reforms in Hong Kong, another key arbitration hub that historically prohibited ORFS. In December 2021, the Law Reform Commission of Hong Kong (**LRC**) issued a report recommending the legalisation of ORFS for arbitration.<sup>19</sup> These recommendations were accepted by the Hong Kong Government, which noted that all other major arbitral seats (including Singapore) permit some form of ORFS, and Hong Kong is a notable outlier in that respect.<sup>20</sup> The *Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill* was tabled in March 2022,<sup>21</sup> and the reforms are expected to be finalised in the coming months.

The main differences between Singapore's ORFS regime and the proposed reforms in Hong Kong are as follows:

- While the Singapore Amendment Act only legalises CFAs (see **Question 2**), the Hong Kong reforms have a broader scope and seek to legalise DBAs and Hybrid DBAs in addition to CFAs. The Hong Kong Government accepted the LRC's findings that the legalisation of DBAs would increase access to justice by providing claimants with more funding options.<sup>22</sup> Furthermore, the Hong Kong Government agreed with the LRC's view that legalising such arrangements would not increase the risk of frivolous litigation, as lawyers would not choose to "invest" in weak cases.<sup>23</sup>
- While the Singapore Amendment Act does not impose any caps on "uplift fees" (see **Question 3**), Hong Kong intends to follow the position in England and Wales by capping "uplift fees" under a CFA at 100% of the benchmark costs (i.e. what would normally be payable by the parties in the absence of a CFA).<sup>24</sup> Similarly, payments under a DBA are

13 Section 115B(4)(a) of the *Legal Profession (Amendment) Act 2022*, available at: <https://sso.agc.gov.sg/Acts-Supp/8-2022/Published/20220222?DocDate=20220222>.

14 Para 37 of the Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the *Legal Profession (Amendment) Bill*, 12 January 2022, available at: <https://www.mlaw.gov.sg/news/parliamentary-speeches/2022-01-12-second-reading-speech-by-second-minister-for-law-edwin-tong-on-legal-profession-amendment-bill>; Para 4 of the *Legal Profession (Conditional Fee Agreement) Regulations 2022*, available at: <https://sso.agc.gov.sg/SL-Supp/S333-2022/Published/20220428?DocDate=20220428>.

15 Ibid.

16 Para 5 of the *Legal Profession (Conditional Fee Agreement) Regulations 2022*, available at: <https://sso.agc.gov.sg/SL-Supp/S333-2022/Published/20220428?DocDate=20220428>.

17 Ibid.

18 Para 35 of the Second Reading Speech by Second Minister for Law, Mr Edwin Tong, on the *Legal Profession (Amendment) Bill*, 12 January 2022, available at: <https://www.mlaw.gov.sg/news/parliamentary-speeches/2022-01-12-second-reading-speech-by-second-minister-for-law-edwin-tong-on-legal-profession-amendment-bill>.

19 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).

20 Para 3 of the Legislative Council Panel on Administrative of Justice and Legal Services paper on *Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022*, 28 March 2022, available at: <https://www.legco.gov.hk/yr2022/english/panels/ajls/papers/ajls20220328cb4-192-2-e.pdf>.

21 The *Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022* is available at: <https://www.elegislation.gov.hk/hk/2022/03/25/supp3/1!en>.

22 Para 11.16 of 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).

23 Ibid.

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

capped at 50% of the financial benefit recovered by the client.<sup>25</sup> Thus, Singapore-based lawyers could potentially take on greater risk by providing steeper fee discounts in exchange for larger uplifts.

– While the Singapore Amendment Act provides that “uplift fees” are not recoverable from the unsuccessful party (see **Question 4**), the Hong Kong reforms take a more nuanced approach and provide the arbitral tribunal with the discretion to order “uplift fees” to be recoverable in exceptional circumstances.<sup>26</sup> The LRC noted that the case of *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited* [2016] EWHC 2361 (Comm) (a third party funding case) is an example of “exceptional circumstances” where such an order may be warranted. In that case, the respondent had deliberately tried to hurt the claimant financially, with the aim of preventing the claimant from being able to pursue its legitimate claim.<sup>27</sup> Nevertheless, parties should note that such cases are likely to be rare. The LRC had stressed that an exception should only be made in “genuinely exceptional circumstances”.<sup>28</sup>

In contrast to jurisdictions like England and Wales and Australia, which have expanded the use of ORFS to all proceedings (with the exception of criminal and family

proceedings), Singapore and Hong Kong are restricting the use of ORFS to arbitration and arbitration-related proceedings for now (and in the case of Singapore, to certain SICC and related proceedings; see **Question 1**). This distinction is explained by the fact that the reforms in Singapore and Hong Kong are primarily motivated by the desire to boost the competitiveness of arbitration and dispute resolution lawyers based in Singapore and Hong Kong, who compete internationally with lawyers from other jurisdictions who can offer more attractive funding arrangements. The Governments of Singapore and Hong Kong are both of the view that further expansion of the ORFS regime to other proceedings would require a careful study.

## Conclusion

The ORFS reforms in Singapore complement the existing third party funding framework by increasing the funding options available to the users of arbitration and the SICC. They are a welcome development that would further strengthen Singapore’s appeal as a leading dispute resolution hub and level the playing field for the lawyers based in Singapore.

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

26 Section 98ZU of the *Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022*, available at: <https://www.elegislation.gov.hk/hk/2022/03/25/supp3/1!en>; the Annex “Recommendation 2” of the Legislative Council Panel on Administrative of Justice and Legal Services paper on *Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022*, 28 March 2022, available at: <https://www.legco.gov.hk/yr2022/english/panels/ajls/papers/ajls20220328cb4-192-2-e.pdf>.

27 Paras 3.15 – 3.19 of 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).

28 Ibid.

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