

Hong Kong's New Regime for Outcome Related Fee Structures in Arbitration Comes into Force

16 December 2022

Introduction. On 16 December 2022, Hong Kong's new regime permitting outcome related fee structures ("ORFS") in arbitration came into force. The new regime permits three types of alternative fee structures, namely conditional fee agreements ("CFAs"), damages-based agreements ("DBAs"), and hybrid damages-based agreements ("Hybrid DBAs").

The ORFS regime comes after Hong Kong's successful implementation of third-party funding for arbitration (see our [earlier client update](#)). Under the third-party funding regime, a funder is permitted to provide ongoing funding of the party's legal costs in return for a pre-agreed portion of the proceeds in the event that the party is successful.

By contrast, under the ORFS regime, the relevant parties to an arrangement are the client and their lawyers: there is no third-party funder involved. As a result, clients and their lawyers have additional flexibility to decide how to fund arbitration claims, particularly in cases where more traditional fee arrangements or third-party funding is unavailable or unviable.

Outcome Related Fee Structures. ORFS is an umbrella term for various fee arrangements made between lawyers and their clients. Broadly, under the arrangements, legal fees and expenses are payable only in specified circumstances, generally where the client prevails in its claims. Hong Kong's ORFS regime permits three types of arrangements:

- **Conditional fee agreements:** CFAs typically provide that a lawyer's fees will only be payable in the event of a successful claim. What constitutes success is set out in the CFA itself. CFAs might take two forms. The first is a "no win, no fee" type arrangement, where no legal fees are payable unless the client is successful, in which case a success fee is payable. The success fee is an uplift on the standard or "benchmark" fees that would otherwise be payable. The other form is a "no win, low fee" arrangement, where legal fees are payable at a set rate (normally a discounted rate) during the proceedings, with a success fee payable if the client succeeds.

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- **Damages-based agreements:** DBAs are a form of “no win, no fee” arrangement, but the legal fees payable are calculated by reference to the outcome of the proceedings. These are generally calculated as a percentage of the amount awarded or recovered.
 - **Hybrid damages-based agreements:** Hybrid DBAs are a form of “no win, low fee” arrangement where the lawyer is paid at a specified rate during the proceedings (typically a discounted hourly rate) and receives a further payment calculated by reference to the outcome of the proceedings. As with DBAs, this further payment is generally calculated with reference to a percentage of the amount awarded or recovered.

While CFAs and DBAs are similar, they differ in how the success fee is calculated. CFAs tend to fix a fee to be paid in the event of success, whereas DBAs tend to have the success fee set at a percentage of recovery, which the fees generally are paid out from. DBAs are therefore sensitive to the degree of recovery, whereas CFAs are not.

The New OFRS Regime. The Hong Kong government introduced the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022 to the Legislative Council on 30 March 2022. Subsequently, the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022 (the “Ordinance”) was passed on 22 June 2022. Most recently, the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (the “Rules”) were gazetted on 11 November 2022 and come into operation today (16 December 2022), together with the Ordinance, for the full implementation of the new ORFS regime.

The Rules were prepared based on the recommendations in the Report on Outcome Related Fee Structures for Arbitration published by the Law Reform Commission of Hong Kong in December 2021 following a three-month public consultation. The Rules set out the detailed regulatory framework of ORFS with the general and specific conditions required for the related lawyer-client agreements.

The Rules contain specific conditions for each type of ORFS agreement. Specific conditions for CFAs include that the uplift element must not exceed 100% of the benchmark fee, and the agreement must state the circumstances that constitute a successful outcome of the matter.

Specific conditions for DBAs and Hybrid DBAs include that the payment to the lawyer when the client obtains a financial benefit in the matter must not exceed 50% of the financial benefit, and the agreement must state the financial benefit to which it relates. For Hybrid DBAs, additional specific conditions include that if no financial benefit is

obtained by the client, the client is not required to pay to the lawyer more than 50% of the irrecoverable costs.

Conclusion. Hong Kong's new ORFS regime enables arbitration users to benefit from the flexibility of being able to choose the type of fee arrangement that best suits their funding ability. Moreover, by capping the maximum CFA uplift fee at 100% of hourly fees and the maximum DBA payments at 50% of the financial benefit obtained by the client, the new regime provides safeguards to clients to avoid abuse of the opportunities it creates. Overall, Hong Kong's new ORFS regime is a welcome development for parties arbitrating in Hong Kong, and we expect to see parties benefitting from the financial opportunities it creates. Debevoise has the capacity to enter into a range of success fee and funding arrangements tailored to the needs of particular clients and cases.

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Please do not hesitate to contact us with any questions.

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