Top 20 FAQs on Outcome Related Fee Structures for Arbitration

Q1. What are outcome related fee structures ("ORFS") agreements for arbitration?

Q2. In what types of proceedings can ORFS be adopted?

Q3: What is a conditional fee agreement ("CFA") for arbitration?

Q4: How are legal fees calculated in a CFA?

Q5: What is a damages-based agreement ("DBA") for arbitration?

Q6: How is financial benefit in a DBA determined?

Q7: What is a hybrid damages-based agreement ("Hybrid DBA") for arbitration?

Q8: Can a client enter into a DBA with a solicitor, and another Hybrid DBA with a barrister both representing the client in the same matter and with the DBA Payment referring to the same financial benefit?

Q9: Does ORFS for arbitration apply to offshore lawyers participating in Hong Kong-seated arbitrations?

Q10: What must be stated in the ORFS agreement?

Q11: What is the necessary information that a lawyer must provide to his/her client before entering into an ORFS agreement?

Q12: Can barristers enter into ORFS agreements directly with a client?

Q13: When are legal fees payable under an ORFS agreement? In a DBA or Hybrid DBA, will lawyers get paid the DBA Payment only after the financial benefit is received?

Q14: How are disbursements paid in an ORFS agreement?

Q15: Can a party terminate an ORFS agreement before conclusion of the matter?

Q1:   What are outcome related fee structures ("ORFS") agreements for arbitration?

A1:   An ORFS agreement is any of the following agreements made between a client and a lawyer of the client—
(a)   a conditional fee agreement (see Q3);
(b)   a damages-based agreement (see Q5);
(c)   a hybrid damages-based agreement (see Q7).

Under the Arbitration Ordinance (Cap. 609), three types of ORFS agreement for arbitration are allowed in Hong Kong. In general, an ORFS agreement provides additional flexible funding options, on top of conventional fee arrangements payable irrespective of outcome, for the client and his/her/its lawyer to agree on the fee arrangements based on the outcome of the matter.

(See: Section 98ZB of Part 10B of the Arbitration Ordinance (Cap. 609))

Back to top

Q2:   In what types of proceedings can ORFS be adopted?

A2:   ORFS applies to arbitral proceedings and related court and mediation proceedings.   This includes any Hong Kong court proceedings under the Arbitration Ordinance (Cap. 609), e.g. applications for Court-ordered interim measures in relation to arbitral proceedings and applications to set aside or enforce an arbitral award.

However, an ORFS agreement for arbitration is void and unenforceable to the extent that it relates to a personal injuries claim.

(See: Sections 98ZA and 98ZL of Part 10B of the Arbitration Ordinance (Cap. 609))

Back to top

Q3:   What is a conditional fee agreement ("CFA") for arbitration?

A3:   In a CFA, the lawyer will be paid a success fee for the matter only in the event of a successful outcome for the client in the matter.   Typically, parties to a CFA agree to a "No-Win, No-Fee" or "No-Win, Low-Fee" arrangement in negotiations between the client and the lawyer.

Under a CFA, the client and his/her/its lawyer must agree what constitutes a "successful outcome" of the matter, which must be expressly stated in the agreement.

(See: Section 98ZC of Part 10B of the Arbitration Ordinance (Cap. 609) and Rule 4(1)(c)(i) of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D);
See: Illustrative example of a CFA)

Back to top

Q4:   How are legal fees calculated in a CFA?

A4:   The success fee is a payment calculated by reference to a benchmark fee.   The benchmark fee is the fee that the lawyer would have charged the client if no ORFS agreement had been made for the matter.   CFAs are typically in the form of "No-Win, No-Fee" or "No-Win, Low-Fee" arrangements.

The uplift element (i.e. the difference between the benchmark fee and the total fee payable in the event of a successful outcome) must not exceed 100% of the benchmark fee.

(See: Section 98ZC of Part 10B of the Arbitration Ordinance (Cap. 609) and Rule 4 of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D);
See: Illustrative example of a CFA)

Back to top

Q5:   What is a damages-based agreement ("DBA") for arbitration?

A5:   In a DBA, the lawyer agrees with the client to receive payment for the matter only in the event the client obtains a financial benefit in the matter. The payment is known as a DBA Payment.   It may be agreed that the client must settle disbursements, costs and fees of non-lawyers (see Q14).   The DBA Payment is calculated by reference to the financial benefit that is obtained by the client in the matter.   The agreement must state the financial benefit and the basis for calculating the DBA Payment.   DBA is a form of "No-Win, No-Fee" arrangement.

In respect of DBAs, Hong Kong law adopts the "success fee model", meaning that the lawyer also receives any costs which are recoverable from other parties in the matter.

(See: Section 98ZD of Part 10B of the Arbitration Ordinance (Cap. 609))

Back to top

Q6:   How is financial benefit in a DBA determined?

A6:   Financial benefit means any money or money's worth, but does not include (i) any sum awarded in respect of a lawyer's costs; and (ii) any sum awarded in respect of expenses.   It has a very wide definition and can be applied flexibly by the client and the lawyer.

The DBA Payment must not exceed 50% of the financial benefit obtained by the client, which – in accordance with the "success fee model" (see Q5) is payable in addition to any costs recoverable from other parties in the matter.

(See: Section 98ZA of Part 10B of the Arbitration Ordinance (Cap. 609) and Rule 5(a) of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D);
See: Illustrative example of a DBA)

Back to top

Q7:   What is a hybrid damages-based agreement ("Hybrid DBA") for arbitration?

A7:   In a Hybrid DBA, the lawyer will be paid for the matter—
(a) in the event the client obtains a financial benefit in the matter—a payment calculated by reference to the financial benefit (DBA Payment); and
(b) in any event—a fee, which may or may not be calculated at a discount, for the legal services rendered by the lawyer for the client during the course of the matter.

Unlike a pure DBA, the lawyer may still get paid for part of the legal services rendered during the course of the matter even if the client fails to obtain any financial benefit in that matter.

Under a Hybrid DBA, if a client ultimately does not obtain a financial benefit in the matter, the client is not required to pay his/her/its lawyer more than 50% of the irrecoverable costs, where "irrecoverable costs" means any portion of the lawyer's benchmark fee that is not recoverable from any other party to the

arbitration. This may mean that the lawyer has to repay to his/her client some of the fees which have been paid during the lifetime of the matter.

In the event the client does obtain a financial benefit, but the resulting DBA Payment (see Q5) is less than 50% of the irrecoverable costs that would have been payable in the event of no financial benefit ("capped amount"), the lawyer may elect to retain such capped amount instead. The rationale is to address the anomalous situation where a lawyer entering into a Hybrid DBA with the client may recover more fees if the client receives no financial benefit from its claim than if the client receives only a low amount of financial benefit.

(See: Section 98ZE of Part 10B of the Arbitration Ordinance (Cap. 609) and Rule 6 of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D);
See: Illustrative example of a Hybrid DBA)

Back to top

Q8: **Can a client enter into a DBA with a solicitor, and another Hybrid DBA with a barrister both representing the client in the same matter and with the DBA Payment referring to the same financial benefit?**

A8: Yes. It is possible for a client to enter into two or more DBAs and/or Hybrid DBAs with reference to the same financial benefit in the matter. However, the aggregate sum of the DBA Payments to be paid under all DBAs and/or Hybrid DBAs subsisting at any given time must not exceed 50% of the same financial benefit.

(See: Rule 7 of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

Back to top

Q9: **Does ORFS for arbitration apply to offshore lawyers participating in Hong Kong-seated arbitrations?**

A9:   Yes.   Offshore lawyers participating in Hong Kong-seated arbitrations will be subject to the ORFS regime for arbitration in Hong Kong.   An offshore lawyer is also subject to any relevant regulations of the jurisdiction in which he/she is qualified to practise.

(See: Section 98ZI of Part 10B of the Arbitration Ordinance (Cap. 609))

Back to top

Q10:   What must be stated in the ORFS agreement?

A10:   An ORFS agreement (CFA, DBA or Hybrid DBA) must be in writing and signed by the lawyer and the client.   It must:-

- State the matter to which the agreement relates
- State the circumstances in which the lawyer's fees and expenses are payable
- State that the lawyer has informed the client of the right to seek independent legal advice before entering into the agreement
- Provide a "cooling-off period" of not less than 7 days during which the client may terminate the agreement by written notice without incurring any liability under the ORFS agreement
- Confirm whether disbursements (e.g. barristers' fees) are to be paid by the client irrespective of the outcome
- State the grounds for early termination of the agreement
- Provide an alternative basis on which the lawyer is to be paid by the client in case of early termination

(See: Rule 3 of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

In addition to the above general requirements that are applicable to all three types of ORFS agreements, the following information for specific types of ORFS must be included in the agreement accordingly:-

CFA
- The circumstances that will constitute a successful outcome of the matter
- The basis for calculating the success fee

- When the success fee becomes payable by the client

DBA and Hybrid DBA
- The financial benefit to which the agreement relates
- The basis for calculating the DBA Payment (which must not exceed 50% of the financial benefit)
- When the DBA Payment becomes payable by the client
- Whether barrister's fees are to be regarded as part of the DBA Payment or additional to the DBA Payment

Specifically for Hybrid DBA
- The fee to be paid in any event for the legal services rendered by the lawyer during the course of the matter
- Benchmark fee of the lawyer
- Provides that the client is to pay the lawyer not more than 50% of the irrecoverable costs in the event of no financial benefit
- Provides that where the DBA Payment in the event of obtaining a financial benefit is less than the irrecoverable costs that would have been payable in the event of no financial benefit ("capped amount"), the lawyer may elect to retain such capped amount instead.

An ORFS agreement will only be valid and enforceable if it meets all of the above requirements. Parties to the ORFS agreement may also include a dispute resolution clause in the agreement to determine how disputes relating to the agreement are to be resolved.

(See: Section 98ZK of Part 10B of the Arbitration Ordinance (Cap. 609), and Rules 4, 5 and 6 of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

Back to top

Q11: **What is the necessary information that a lawyer must provide to his/her client before entering into an ORFS agreement?**

A11: Before entering into an ORFS agreement, the lawyer must provide all of the following information to the client in clear and accessible language:-

- Nature and operation of the ORFS agreement, including information in rules 3-6 of the Rules (see Q10)
- For DBA or Hybrid DBA, the requirements in rule 7 of the Rules (see Q8)
- Statement to the effect that the client has a right to seek independent legal advice before entering into the agreement
- Statement to the effect that the client might not recover the costs specified in section 98ZU(3) of the Arbitration Ordinance from other parties to the arbitration (see Q19)
- Statement to the effect that the client might be ordered by the arbitral tribunal to pay another party's costs as described in section 98ZU(4) of the Arbitration Ordinance (see Q20)

Before entering into an ORFS agreement with his/her client, the lawyer must ensure that the client signs and dates an acknowledgment that he/she/it has received and understood the above information.

(See: Rule 8 of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

Back to top

Q12: Can barristers enter into ORFS agreements directly with a client?

A12: With effect from 16 December 2022, the Hong Kong Bar Association's Code of Conduct has been revised allowing barristers to negotiate, enter into and accept a brief or instruction to provide legal services under an ORFS agreement for arbitration directly with a client.

(See: Paragraph 13A.3 of the Hong Kong Bar Association's Code of Conduct)

Back to top

Q13: When are legal fees payable under an ORFS agreement? In a DBA or Hybrid DBA, will lawyers get paid the DBA Payment only after the

financial benefit is received?

A13: An ORFS agreement (CFA, DBA or Hybrid DBA) must state the circumstances in which the lawyer's fees and expenses, or any part of them, are payable.   The client and his/her/its lawyer should agree on this aspect in a clear and unambiguous manner.

For a DBA or Hybrid DBA, it is a specific condition to state when the DBA Payment (see Q10 above on DBA Payment) becomes payable by the client to the lawyer.   The client and his/her/its lawyer can agree that the DBA Payment is due, and is payable, as soon as the arbitration award or order is issued, i.e. if the award or order provides an outcome (and contains relief) which the client and his/her/its lawyer have agreed in their agreement constitutes a "financial benefit" to the client.

(See: Rules 3(b)(ii) and 5(b)(iii) of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D) and definitions of "financial benefit" and "money or money's worth" in Section 98ZA of Part 10B of the Arbitration Ordinance (Cap. 609))

Back to top

Q14:   How are disbursements paid in an ORFS agreement?

A14: An ORFS agreement must state whether disbursements, including barristers' fees, are to be paid by the client irrespective of the outcome of the matter.   The client and his/her/its lawyer are free to negotiate and agree on this term.

(See: Rule 3(b)(v) of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

Back to top

Q15:   Can a party terminate an ORFS agreement before conclusion of the matter?

A15: An ORFS agreement must expressly state that the client may terminate the

agreement by written notice without incurring liability during the cooling-off period of not less than 7 days after the date of the making of the agreement.

(See: Rule 3(b)(iv) of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

The agreement must also state the grounds on which the agreement may be terminated before the conclusion of the matter by either the client and/or the lawyer, subject to negotiation and as agreed by them.

(See: Rule 3(b)(vi) of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

Either party may terminate the agreement if that party reasonably believes that the other party (i) has committed a material breach of the agreement; or (ii) has behaved, or is behaving, unreasonably.

(See: Rule 9 of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

Back to top

Q16: Upon early termination of an ORFS agreement, how are outstanding legal fees calculated?

A16: The ORFS agreement must state the alternative basis, which may or may not be expressed as an hourly rate, on which the lawyer is to be paid by the client in the event of an early termination. The client and the lawyer are free to negotiate and agree on this alternative basis.

(See: Rule 3(b)(vii) of the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D))

Back to top

Q17: Is there any obligation to disclose the existence of an ORFS agreement for

arbitration?

A17: If a lawyer has entered into an ORFS agreement with his client, the lawyer must give written notice to each other party to the arbitration and the arbitration body of –

(a) the fact that an ORFS agreement for arbitration has been made; and
(b) the name of the client.

The timing for giving the notice is as follows:-
(a) on the commencement of the arbitration if the ORFS agreement for arbitration is made on or before the commencement of the arbitration; or
(b) within 15 days after the ORFS agreement for arbitration is made if the arbitration has commenced.

The precise terms of the agreement need not be disclosed.

(See: Section 98ZQ of Part 10B of the Arbitration Ordinance (Cap. 609))

Q18: Is there any obligation to disclose early termination of an ORFS agreement for arbitration?

A18: If the ORFS agreement terminates before the arbitration has ended, the client must give written notice to each other party to the arbitration and the arbitration body of –

(a) the fact that the agreement has ended; and
(b) the date the agreement ended.

The notice must be given within 15 days after the ORFS agreement ends.

(See: Section 98ZR of Part 10B of the Arbitration Ordinance (Cap. 609))

Q19: Will the paying party be liable to bear the success fee of the receiving party who had entered into a CFA with his/her/its lawyer?

A19: Unless the arbitral tribunal is satisfied that there are exceptional circumstances, the arbitral tribunal may not order the other parties to the arbitration to pay or bear the success fee in a CFA (meaning in this case the uplift above the benchmark fee of the receiving party's lawyer).

(See: Section 98ZU of Part 10B of the Arbitration Ordinance (Cap. 609))

Q20: In an arbitration involving an ORFS agreement, what costs orders may the arbitral tribunal award?

A20: An arbitral tribunal has wide discretion and may award costs of arbitral proceedings having regard to all relevant circumstances.

In an arbitration involving an ORFS agreement, the arbitral tribunal still retains such wide discretion in general but unless it is satisfied that there are exceptional circumstances, the following costs may **not** be ordered to be paid by the paying party to the receiving party:

- Success fee in a CFA (meaning in this case the uplift above benchmark fee, see Q19)
- Legal expenses insurance premium
- Any part of the fee that is in excess of the fee that the lawyer would have been entitled to be paid by the receiving party if there had been no ORFS agreement for the arbitration (normal fee).

(See: Sections 74 and 98ZU of the Arbitration Ordinance (Cap. 609))

Illustrative Examples of CFA, DBA and Hybrid DBA

Example of a CFA:

A lawyer's benchmark fee is HK$4,000 per hour.   He/she may enter into a CFA with a client, where the client being awarded all relief sought is agreed to be the "successful outcome" for the matter.   The CFA may be in the form of "No-Win, No-Fee" or "No-Win, Low-Fee" arrangement.

	"No-Win, No-Fee"	**"No-Win, Low-Fee"**
Successful in obtaining a favourable award	HK$6,000 per hour (The lawyer charges an uplift of 50% from his/her benchmark fee.)	HK$6,000 per hour (The lawyer charges an uplift of 50% from his/her benchmark fee.)
Unsuccessful in obtaining a favourable award	HK$0 (The Lawyer does not receive legal fees.)	HK$2,000 per hour (The lawyer charges at a 50% discount of his/her benchmark fee.)

Back to top

Example of a DBA:

Given the lawyer's confidence in the merits of the matter, the lawyer enters into a DBA with a client on the basis that he/she will receive 50% of the financial benefit in the form of damages awarded to the client in the matter as the DBA Payment, but will not receive any fees in circumstances where no damages are awarded, i.e. a "No-Win, No-Fee" arrangement.

DBA Payment	**Recoverable costs payable to lawyer**	**Total fees payable to the lawyer**
A. Client is awarded damages of HK$50,000 and recoverable costs of HK$7,000 from the other party		
HK$50,000 x 50% = HK$25,000	HK$7,000	HK$32,000 (The lawyer will receive both the DBA Payment and the recoverable costs.)
B. No damages or recoverable costs awarded to client		

HK$0	HK$0	HK$0
		(The lawyer will not receive any DBA Payment or recoverable costs.)

Example of a Hybrid DBA:

A lawyer's benchmark fee for the matter is HK$10,000.   Given the lawyer's need for cash flow, he/she enters into a Hybrid DBA with a client and agrees to charge 50% discount on the benchmark fee (i.e. HK$5,000) during the course of the proceedings and to receive 40% of the financial benefit in the form of damages awarded to the client in the matter as the DBA Payment.

Fees charged during the course of the proceedings	DBA Payment	Recoverable costs payable to lawyer	Total fees payable to the lawyer
A. Client is awarded damages of HK$50,000 and recoverable costs of HK$7,000 from the other party			
HK$5,000	HK$50,000 x 40% = HK$20,000	HK$7,000	HK$27,000 (The lawyer will receive both the DBA Payment and the recoverable costs. As the lawyer is entitled to HK$7,000 as recoverable costs and he has only received HK$5,000 from the client during the course of the proceedings, he should receive an additional HK$2,000 as recoverable costs.)
B. No damages or recoverable costs awarded to client			
HK$5,000	HK$0	HK$0	HK$5,000 (The lawyer can only receive the fees paid by the

			client during the course of the proceedings, which must be capped at 50% of the irrecoverable costs, i.e. 50% of HK$10,000 ("capped amount").)
C. Client is awarded damages of HK$5,000 and recoverable costs of HK$7,000 from the other party			
HK$5,000	*HK$5,000 x 40% = HK$2,000**	HK$7,000	HK$12,000 *(As the DBA Payment is less than the capped amount (i.e. HK$5,000) that would have been payable in the event of no financial benefit (scenario B above), the lawyer may elect to retain HK$5,000 instead of the DBA Payment. The lawyer can therefore elect to receive both the capped amount and the recoverable costs.)

Back to top

The information provided in the above FAQs does not, and is not intended to, constitute legal advice. All the contents are for general informational purposes only.

Department of Justice
June 2023