

**For discussion on  
7 November 2022**

**Legislative Council Panel on  
Administration of Justice and Legal Services**

**Arbitration (Outcome Related Fee Structures for Arbitration) Rules**

**INTRODUCTION**

This paper briefs Members on the draft Arbitration (Outcome Related Fee Structures for Arbitration) Rules (“Rules”) made by the Advisory Body on Outcome Related Fee Structures for Arbitration (“Advisory Body”) pursuant to section 98ZM under Part 10B of the Arbitration Ordinance (Cap. 609) (“AO”)<sup>1</sup>, for the full implementation of the outcome related fee structures for arbitration (“ORFSA”) regime. The draft Rules are attached at **Annex 1**.

**BACKGROUND**

2. The Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022 (“Amendment Ordinance”) passed by the Legislative Council (“LegCo”) on 22 June 2022 and gazetted on 30 June 2022<sup>2</sup> amends the AO and the Legal Practitioners Ordinance (Cap. 159) to provide that certain agreements using ORFSA are not prohibited by the common law doctrines of maintenance, champerty and barratry; to provide for the validity and enforceability of such agreements; to provide for measures and safeguards in relation to such agreements; and to provide for related matters.

3. Pursuant to section 1(2) of the Amendment Ordinance, Divisions 1, 2, 5, 6 and 8 of Part 10B of the AO have come into operation on the day of gazettal of the Amendment Ordinance. Pursuant to section 1(3) of the Amendment Ordinance, Divisions 3, 4 and 7 of Part 10B of the AO would

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<sup>1</sup> See section 98ZM(1) of the AO: The advisory body may, in consultation with the Secretary for Justice and with the prior approval of the Chief Justice, make rules for any or all of the following purposes—  
(a) to specify the general conditions for the purposes of section 98ZK(1)(a);  
(b) to specify the specific conditions for the purposes of section 98ZK(1)(b);  
(c) to generally provide for the effective implementation of the purposes and provisions of this Part.

<sup>2</sup> See gazettal copy of the Amendment Ordinance at: <https://www.gld.gov.hk/egazette/pdf/20222626/es1202226266.pdf>.

come into operation on a day to be appointed by the Secretary for Justice (“SJ”) by notice published in the Gazette. This arrangement is to facilitate the preparatory work for the relevant regulatory framework to be done before the provisions clarifying the legal position come into operation.

4. The Advisory Body appointed by the SJ pursuant to section 98ZT(1) of the AO is responsible for monitoring and reviewing the operation of the provisions on ORFSA and exercising the power under section 98ZM of the AO, including making rules to specify the general and specific conditions for outcome related fee structures (“ORFS”) agreements for arbitration. The draft Rules were prepared by the Advisory Body based on the recommendations in the Report on Outcome Related Fee Structures for Arbitration (“Report”) published by the Law Reform Commission of Hong Kong (“LRC”) on 15 December 2021<sup>3</sup>. Three types of ORFSA agreements are allowed under the Amendment Ordinance, namely: (1) conditional fee agreement (“CFA”), (2) damages-based agreement (“DBA”) and (3) hybrid damages-based agreement (“Hybrid DBA”).

5. The purposes of the Rules are to make provisions –

- (a) to specify the general conditions for ORFS agreements for arbitration for the purposes of section 98ZK(1)(a) of the AO;
- (b) to specify the specific conditions for ORFS agreements for arbitration for the purposes of section 98ZK(1)(b) of the AO; and
- (c) to provide for situations in which there are multiple DBAs or Hybrid DBAs with DBA payments<sup>4</sup> calculated by reference to the same financial benefit, to provide for the provision of information about ORFS agreements to client and to provide for the termination of ORFS agreements.

6. The introduction of the ORFSA regime is necessary for Hong Kong to keep up with the latest practice in international arbitration, enhance access to justice and respond to the demands of arbitration parties (usually sophisticated commercial clients<sup>5</sup>) for flexible fee arrangements. It provides an additional funding option for clients and lawyers to adopt to suit their needs. It will also maintain Hong Kong’s competitiveness and strengthen its position as a centre

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<sup>3</sup> The Report and its Executive Summary can be accessed on LRC’s website: <https://www.hkreform.gov.hk/en/publications/orfsa.htm>. Annex 2 to the Report includes the recommended ORFS safeguards to be included in subsidiary legislation.

<sup>4</sup> “DBA payment” is defined in section 98ZD(a) of the AO.

<sup>5</sup> The ORFSA regime does not apply to personal injuries claim: see section 98ZL of the AO.

for international legal and dispute resolution services in the Asia-Pacific region and beyond. Given that all major arbitral seats permit some form of ORFS, it is high time for Hong Kong to implement the ORFSA regime so as to create a level-playing field with other competing jurisdictions.

## **KEY FEATURES OF THE DRAFT RULES**

7. The draft Rules set out the minimum safeguards for ORFSA. Clients and lawyers are free to negotiate and agree to terms for more protection in individual cases. The Rules are not meant to be exhaustive. A balance has to be struck between prescribing statutory requirements and respecting freedom of contract.

8. The draft Rules contain 6 parts with 9 rules. Their key features are outlined below.

9. Part 1 (Rules 1 and 2) provides for commencement and interpretation of the words and expressions used in the Rules, including the definition of “benchmark fee”.

10. Part 2 (Rule 3) provides for general conditions required for ORFS agreements for arbitration in order that the agreements are valid and enforceable under section 98ZK of the AO.

<u>Rule</u>	<u>General Condition</u>
3(a)(i) & (ii)	The agreement must be in writing and signed by the lawyer and the client
3(b)(i)	The agreement must state the arbitration or any part of it to which the agreement relates
3(b)(ii) & (v)	The agreement must state the circumstances lawyers’ fees and expenses are payable, and whether disbursements are payable
3(b)(iii)	The agreement must state that the lawyer has informed the client of the right to seek independent legal advice

3(b)(iv)	The agreement must state a cooling-off period of not less than 7 days
3(b)(vi) & (vii)	The agreement must state the grounds for early termination and, if so, the alternative basis for paying the lawyer in such event

11. Part 3 (Rules 4, 5 and 6) provides for specific conditions required for ORFS agreements for arbitration in order that the agreements are valid and enforceable under section 98ZK of the AO.

<u>Rule</u>	<u>Specific Condition</u>
CFA	
4(1)	<ul style="list-style-type: none"> <li>(a) The success fee<sup>6</sup> is expressed as a percentage of the benchmark fee</li> <li>(b) The CFA provides that the uplift element (as defined in Rule 4(2)) must not exceed 100% of the benchmark fee</li> <li>(c) The CFA states what constitutes a successful outcome<sup>7</sup>, the basis for calculating the success fee, and when the success fee becomes payable</li> </ul>
DBA and Hybrid DBA	
5(a)	DBA payment – <ul style="list-style-type: none"> <li>(i) is calculated by reference to the financial benefit</li> <li>(ii) must not exceed 50% of the financial benefit</li> <li>(iii) is payable in addition to recoverable costs</li> </ul>
5(b)	The agreement states – <ul style="list-style-type: none"> <li>(i) the financial benefit that relates</li> <li>(ii) the basis for calculating the DBA payment</li> <li>(iii) when the DBA payment becomes payable</li> <li>(iv) whether barristers’ fees are part of or in addition to the</li> </ul>

<sup>6</sup> “Success fee” is defined in section 98ZC(2) of the AO.

<sup>7</sup> “Successful outcome” is defined in section 98ZC(2) of the AO.

	DBA payment
Additionally for Hybrid DBA	
6(1)	Hybrid DBA – (a) states the fees (usually discounted) for the legal services rendered during the course of the matter (b) states the benchmark fee (c) provides the cap the client is to pay the lawyer (being not more than 50% of the irrecoverable costs) in the event of no financial benefit (d) 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 (the capped amount), the lawyer may elect to retain such capped amount instead <sup>8</sup>

12. Part 4 (Rule 7) provides for the maximum aggregate sum of the DBA payments (that is not exceeding 50% of the financial benefit) in the situations where a client enters into multiple DBAs or Hybrid DBAs under which the DBA payments are calculated by reference to the same financial benefit.

13. Part 5 (Rule 8) provides for the information in relation to ORFS agreements that the lawyer must provide to the client in clear and accessible language, and requires the lawyer to ensure the client signs an acknowledgment on having received and understood all such information. The required information includes the nature and operation of the ORFS agreement, the prescribed general and specific conditions, the requirements under Rule 7 regarding DBA and Hybrid DBA, the client’s right to seek independent legal advice, the limitation on award of costs by the arbitral tribunal under section 98ZU(3) and (4) of the AO.

14. Part 6 (Rule 9) provides for the termination of an ORFS agreement by either party on grounds of material breach or unreasonable behaviour.

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<sup>8</sup> The rationale for this rule 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; hence the incentive of the lawyer to “lose” the case. Rule 6 enables the lawyer in the latter event (where a small financial benefit is obtained) to retain the capped amount instead of the DBA payment, thereby removing the said incentive.

## CONSULTATION

15. On 17 December 2020, the Outcome Related Fee Structures for Arbitration Sub-committee of the LRC conducted an extensive public consultation on ORFSA for a period of three months. An overwhelming majority of the respondents to the public consultation were in support of the proposal that ORFSA should be permitted under Hong Kong law. LRC has taken into account the respondents' comments when formulating the final recommendations in the Report, including the recommended ORFS safeguards to be included in subsidiary legislation.

16. The Advisory Body was invited to brief the Advisory Committee on Promotion of Arbitration<sup>9</sup> ("Advisory Committee") on the draft Rules at a meeting on 15 August 2022. The Advisory Committee was fully supportive of the enactment of the Rules targeted to be introduced within 2022. The Advisory Committee has provided some comments which have been taken into account by the Advisory Body in making suitable amendments to the draft Rules.

17. With the support from the Advisory Committee, the Department of Justice ("DoJ"), on behalf of the Advisory Body, has consulted the Law Society of Hong Kong ("Law Society") and the Hong Kong Bar Association ("Bar Association") on the draft Rules. The Law Society and the Bar Association put in submissions, expressing general support for the draft Rules.<sup>10</sup> Two workshops were organised by the Advisory Body for members of the Law Society and the Bar Association on 30 September 2022 and 7 October 2022 respectively, with a view to enabling the legal practitioners to gain a better understanding of how ORFSA would work in practice and to prepare them in advance of the full implementation of the regime. The Administration received positive feedbacks from the participants who considered the workshops useful for exchanging views and learning more about the operation of the Rules.

18. The Advisory Body has taken into account the comments received from these stakeholders when finalizing the draft Rules. A table summarising the major comments received from the Law Society and the Bar Association on the draft Rules and the Advisory Body's responses is attached at **Annex 2**.

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<sup>9</sup> The Advisory Committee on Promotion of Arbitration, chaired by the Secretary for Justice comprising representatives from the legal, arbitration and relevant sectors in Hong Kong, was set up in December 2014 to advise and assist the DoJ in respect of the promotion of arbitration in Hong Kong including advising on initiatives and overall strategies for the promotion of the HKSAR's arbitration services.

<sup>10</sup> Submissions from the Law Society and the Bar Association were received on 27 September 2022 and 19 September 2022 respectively.

## **TRAINING AND PROMOTION**

19. The Administration took the stakeholders' suggestions seriously and recognizes the importance of conducting more training and promotion about the new ORFSA regime.

20. In anticipation of the enactment of the Amendment Ordinance towards end June 2022, DoJ co-organised a seminar entitled "A New Chapter to Arbitration in Hong Kong: Outcome Related Fee Structures for Arbitration (ORFSA)" on 19 May 2022<sup>11</sup> with speakers sharing their views from different perspectives on how ORFSA would change the arbitration landscape in Hong Kong and benefit users and practitioners.

21. In contemplation of the introduction of the Rules, as aforementioned, the Advisory Body held two workshops entitled "ORFSA Rules in Focus: The Practical Know-how" for members nominated by the Law Society and the Bar Association on 30 September 2022 and 7 October 2022 respectively. These workshops organised by the Advisory Body were a start to instill the "train-the-trainers" concept so that the legal practitioners participated would not only gain more knowledge in the area but could also assist with the promotion of ORFSA to potential users in future.

22. The Advisory Body has also engaged in promoting the ORFSA regime in arbitration-related events, including the "ADR in Asia Conference" held recently on 26 October 2022 during the Hong Kong Arbitration Week 2022.

23. In the upcoming annual flagship event of DoJ "Hong Kong Legal Week 2022" (7 to 11 November 2022), the ORFSA regime will be one of the topics to be discussed in the Generations in Arbitration Conference to be held on 8 November 2022.

24. With the joint efforts of the two legal professional bodies, DoJ will continue to organise further trainings and promotional events for the wider legal community and arbitration users after the full implementation of the ORFSA regime in Hong Kong.

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<sup>11</sup> Co-organised with In-house Lawyers Committee of the Law Society, the Hong Kong Chinese Enterprises Association Legal Affairs Steering Committee, China Legal Service (HK) Ltd.

## **WAY FORWARD**

25. Maintaining Hong Kong’s distinctive status and strengths under the “One Country, Two Systems” was emphasized by President Xi Jinping in his speech at the celebration of the 25<sup>th</sup> anniversary of Hong Kong’s return to the motherland. DoJ’s continued efforts in refining the legal framework for arbitration echo the Chief Executive’s 2022 Policy Address in consolidating Hong Kong’s position as the centre for international legal and dispute resolution services in the Asia-Pacific region.

26. DoJ has proactively engaged with the Law Society and the Bar Association, and appreciates that they are working in full force to align with the intended commencement date of the Rules, by making necessary amendments to the Hong Kong Solicitors’ Guide to Professional Conduct and the Hong Kong Bar Association’s Code of Conduct respectively, to permit legal practitioners to enter into ORFS agreements for arbitration and provide for further client-care provisions.

27. The Administration plans to introduce the Rules into the LegCo for negative vetting procedure on 16 November 2022. With the support of the Law Society and the Bar Association, DoJ is hopeful that the Rules, together with Divisions 3, 4 and 7 of Part 10B of the AO, can come into operation on 16 December 2022<sup>12</sup> to complete the full implementation of the ORFSA regime in Hong Kong to benefit arbitration users, the legal sector, as well as the overall development of arbitration services in Hong Kong.

28. Following the implementation of the ORFSA regime, DoJ will further promote the ORFSA regime and continue to work with the legal and dispute resolution sector to develop user-friendly and practical legal guides and tools to facilitate the wider use of ORFSA as a new form of arbitration funding option in Hong Kong. DoJ will continue to render support to the Advisory Body in monitoring and reviewing the operation of the ORFSA regime.

**Department of Justice**  
**October 2022**

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<sup>12</sup> Based on the above intended date for introducing the Rules into the LegCo for negative vetting procedure, the initial 28-day period for amending the Rules will expire on 14 December 2022. According to section 34(4) of the Interpretation and General Clauses Ordinance (Cap. 1), such period may be extended to the first sitting of the LegCo held not earlier than the 21<sup>st</sup> day after the day of its expiry (i.e. extended to the first sitting of the 2023 LegCo session, which may be sometime in mid-Jan 2023).



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## **Arbitration (Outcome Related Fee Structures for Arbitration) Rules**

(Made by the advisory body under section 98ZM of the Arbitration Ordinance (Cap. 609) in consultation with the Secretary for Justice and with the prior approval of the Chief Justice)

### **Part 1**

#### **Preliminary**

**1. Commencement**

These Rules come into operation on [16 December 2022].

**2. Interpretation**

(1) In these Rules—

*benchmark fee* (基準收費), in relation to a matter, means the fee, which may or may not be expressed as an hourly rate, that the lawyer would have charged the client for the matter if no ORFS agreement had been made for the matter.

(2) The words and expressions used in these Rules and defined in Part 10B of the Ordinance have the same meaning as in that Part.

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## **Part 2**

### **General Conditions for ORFS Agreements**

#### **3. General conditions for ORFS agreements**

For the purposes of section 98ZK(1)(a) of the Ordinance, the general conditions for an ORFS agreement are that—

- (a) the agreement—
  - (i) is in writing; and
  - (ii) is signed by the lawyer and the client; and
- (b) the agreement—
  - (i) states the matter to which the agreement relates, that is the arbitration or any part of it;
  - (ii) states in what circumstances the lawyer’s fees and expenses, or any part of them, are payable;
  - (iii) states that the lawyer has informed the client of the right to seek independent legal advice before entering into the agreement;
  - (iv) states that during a period of not less than 7 days after the date of the making of the agreement, the client may terminate the agreement by written notice without incurring liability;
  - (v) states whether disbursements, including barristers’ fees, are to be paid by the client irrespective of the outcome of the matter;
  - (vi) states the grounds on which the agreement may be terminated before the conclusion of the matter to which the agreement relates; and

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## Arbitration (Outcome Related Fee Structures for Arbitration) Rules

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- (vii) states 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 a termination under subparagraph (vi).
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## Part 3

### Specific Conditions for ORFS Agreements

#### 4. Specific conditions for conditional fee agreements

- (1) For the purposes of section 98ZK(1)(b) of the Ordinance, the specific conditions for a conditional fee agreement are that—
  - (a) the success fee payable by the client to the lawyer in the event of a successful outcome is expressed as a percentage of the benchmark fee;
  - (b) the uplift element does not exceed 100% of the benchmark fee; and
  - (c) the agreement—
    - (i) states the circumstances that constitute a successful outcome of the matter to which the agreement relates;
    - (ii) states the basis for calculating the success fee; and
    - (iii) states when the success fee becomes payable by the client to the lawyer.

- (2) In subrule (1)—

***uplift element*** (提升元素), means the portion of the total fee payable by the client to the lawyer in the event of a successful outcome that exceeds the benchmark fee for the matter.

#### 5. Specific conditions for damages-based agreements and hybrid damages-based agreements

For the purposes of section 98ZK(1)(b) of the Ordinance, the specific conditions for a damages-based agreement or a hybrid damages-based agreement are that—

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- (a) the DBA payment within the meaning of section 98ZD(a) of the Ordinance—
    - (i) is calculated by reference to the financial benefit that is obtained by the client in the matter to which the agreement relates;
    - (ii) does not exceed 50% of the financial benefit that is obtained by the client in the matter; and
    - (iii) is payable in addition to any recoverable lawyer’s costs; and
  - (b) the agreement—
    - (i) states the financial benefit to which the agreement relates;
    - (ii) states the basis for calculating the DBA payment;
    - (iii) states when the DBA payment becomes payable by the client to the lawyer; and
    - (iv) states whether—
      - (A) barrister’s fees are to be regarded as part of the DBA payment; or
      - (B) the client is liable to pay barrister’s fees in addition to the DBA payment.

**6. Additional specific conditions for hybrid damages-based agreements**

- (1) For the purposes of section 98ZK(1)(b) of the Ordinance, the additional specific conditions for a hybrid damages-based agreement are that the agreement—
  - (a) states the fee referred to in section 98ZE(b) of the Ordinance;
  - (b) states the benchmark fee;

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- (c) provides that in the event that no financial benefit is obtained by the client in the matter to which the agreement relates, the client is not required to pay to the lawyer more than 50% of the irrecoverable costs; and
  - (d) provides that in the event that the client obtains a financial benefit in the matter but the DBA payment is less than the capped amount—
    - (i) the lawyer may elect to retain the capped amount instead of the DBA payment; and
    - (ii) if the lawyer so elects—the capped amount instead of the DBA payment is to be payable by the client to the lawyer.
- (2) In subrule (1)—
- capped amount*** (上限款額), in relation to a matter to which a hybrid damages-based agreement relates, means the amount of the irrecoverable costs that would have been payable to the lawyer by the client under the agreement in the event described in subrule (1)(c);
- irrecoverable costs*** (不可追討的訟費), in relation to a matter to which a hybrid damages-based agreement relates, means any portion of the benchmark fee that is not recoverable from any other party to the arbitration.
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**Part 4**

**Multiple Damages-based Agreements or Hybrid Damages-based Agreements**

**7. Multiple damages-based agreements or hybrid damages-based agreements**

- (1) If—
    - (a) in relation to a client, 2 or more specified agreements subsist at any given time; and
    - (b) the DBA payments under those specified agreements are calculated by reference to the same financial benefit,  
the aggregate sum of the DBA payments to be paid by the client under those specified agreements must not exceed 50% of the financial benefit.
  - (2) Subrule (1) applies regardless of the terms and conditions under the specified agreements.
  - (3) In subrule (1)—  
***specified agreement*** (指明協議) means a damages-based agreement or a hybrid damages-based agreement.
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## **Part 5**

### **Provision of Information**

#### **8. Provision of information**

- (1) Before a lawyer enters into an ORFS agreement with a client, the lawyer must ensure that—
  - (a) the client is provided with all of the information specified in subrule (2) in clear and accessible language; and
  - (b) the client signs and dates an acknowledgment that the client has received and understood the information mentioned in paragraph (a).
- (2) The information is—
  - (a) the nature and operation of the ORFS agreement, including the general conditions under Part 2, and the specific conditions under Part 3 that are applicable to the agreement;
  - (b) if the ORFS agreement is a damages-based agreement or hybrid damages-based agreement—the requirements under rule 7;
  - (c) a statement to the effect that the client has a right to seek independent legal advice before entering into the agreement; and
  - (d) a statement to the effect that the client—
    - (i) might not recover costs specified in section 98ZU(3) of the Ordinance from other parties to the arbitration; and
    - (ii) might be ordered by the arbitral tribunal to pay the costs of another party to the arbitration as described in section 98ZU(4) of the Ordinance.

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## Arbitration (Outcome Related Fee Structures for Arbitration) Rules

## **Part 6**

### **Termination of ORFS Agreements**

#### **9. Termination of ORFS agreements**

- (1) Before the conclusion of the matter to which an ORFS agreement relates, any party to the agreement may terminate the agreement if the party reasonably believes that—
  - (a) the other party to the agreement has committed a material breach of the agreement; or
  - (b) that other party has behaved, or is behaving, unreasonably.
- (2) Subrule (1) applies subject to the terms and conditions of the ORFS agreement.



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## Arbitration (Outcome Related Fee Structures for Arbitration) Rules

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Dr. Benny LO  
Member,  
advisory body

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### **Explanatory Note**

The purposes of these Rules are to make provisions—

- (a) to specify the general conditions for ORFS agreements for arbitration for the purposes of section 98ZK(1)(a) of the Arbitration Ordinance (Cap. 609) (**AO**);
  - (b) to specify the specific conditions for ORFS agreements for arbitration for the purposes of section 98ZK(1)(b) of the AO; and
  - (c) to provide for situations in which there are multiple damages-based agreements or hybrid damages-based agreements with DBA payments calculated by reference to the same financial benefit, to provide for the provision of information about ORFS agreements to the client and to provide for the termination of ORFS agreements.
2. The Rules contain 6 Parts.
3. Part 1 provides for commencement (rule 1) and provides the definition of *benchmark fee* and provides that the words and expressions used in the Rules and defined in Part 10B of the AO have the same meaning as in Part 10B of the AO (rule 2).
4. Parts 2 and 3 respectively provide for general conditions and specific conditions required for ORFS agreements for arbitration in order that the agreements are valid and enforceable under section 98ZK of the AO.
5. In order to meet the general conditions, in particular, an ORFS agreements for arbitration is required to state—
  - (a) the matter to which the agreement relates; (rule 3(b)(i));
  - (b) that the lawyer has informed the client of the right to seek independent legal advice (rule 3(b)(iii)); and

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- (c) that there is a cooling-off period of not less than 7 days during which the client may terminate the agreement (rule 3(b)(iv)).
6. In order to meet the specific conditions—
- (a) a conditional fee agreement is required, in particular—
    - (i) to provide that the uplift element must not exceed 100% of the benchmark fee (rule 4(1)(b)); and
    - (ii) to state the circumstances that constitute a successful outcome of the matter to which the agreement relates (rule 4(1)(c)(i));
  - (b) a damages-based agreement or hybrid damages-based agreement is required, in particular—
    - (i) to provide that the DBA payment within the meaning of section 98ZD of the AO must not exceed 50% of the financial benefit that is obtained by the client in the matter to which the agreement relates (rule 5(a)(ii));
    - (ii) to provide that the DBA payment is payable in addition to any recoverable lawyer’s costs (rule 5(a)(iii)); and
    - (iii) to state the financial benefit to which the agreement relates (rule 5(b)(i)); and
  - (c) a hybrid damages-based agreement is required to also provide that—
    - (i) in the event that no financial benefit is obtained by the client in the matter, the client is not required to pay to the lawyer more than 50% of irrecoverable costs (rule 6(1)(c)); and
    - (ii) in the event that the client obtains a financial benefit in the matter but the DBA payment is less than the



irrecoverable costs that would have been payable in the situation described in sub-subparagraph (i), the lawyer may elect to retain and be paid by the client such irrecoverable costs instead of the DBA payment (rule 6(1)(d)).

7. Part 4 provides for situations in which a client enters into multiple damages-based agreements or hybrid damages-based agreements under which the DBA payments are calculated by reference to the same financial benefit. In such situations, the sum of the DBA payments to be paid by the client under each of the specified agreements must not exceed 50% of the financial benefit (rule 7).
8. Part 5 provides for the information in relation to ORFS agreements that the lawyer must provide to the client in clear and accessible language, and requires the lawyer to ensure that the client signs and dates an acknowledgment that the client has received and understood such information (rule 8).
9. Part 6 provides for the termination of an ORFS agreement (rule 9).

**Major Comments Received from the Law Society and the Bar Association on the Draft Rules  
and the Advisory Body's Responses**

**A. Comments from the Bar Association**

	<b>Comments</b>	<b>Responses from Advisory Body on ORFSA</b>
1.	<ul style="list-style-type: none"><li>The Rules should be drafted in general terms broad enough to encompass the different phases of an arbitration and types of proceedings in which a lawyer (including a barrister) may be engaged.</li></ul>	<ul style="list-style-type: none"><li>Rule 3(b)(i) of the current draft Rules, as revised, requires the ORFS agreement to state the matter, i.e. the arbitration or any part of it, to which the agreement relates.</li><li>It should be wide enough to encompass the different phases of an arbitration and types of proceedings.</li></ul>
2.	<ul style="list-style-type: none"><li>The grounds for termination should be included as general conditions of ORFS agreements, which should include the common law right of a client to terminate the agreement.</li></ul>	<ul style="list-style-type: none"><li>Under Rule 3(b)(vi) of the current draft, as revised, it is a general condition for an ORFS agreement to state the grounds for termination.</li><li>Under Rule 9 of the current draft, as revised, a party to an ORFS agreement has the right to terminate in case the other party has committed a material breach of the agreement, or behaved unreasonably.</li><li>It is considered not necessary to set out exhaustively the statutory grounds on which a client may terminate an ORFS agreement.</li></ul>
3.	<ul style="list-style-type: none"><li>The grounds for termination set out in the Rules should be expanded to include scenarios, e.g. serious breakdown of confidence, conflict of interests, elevation to public officers, ill-health, etc.</li></ul>	<ul style="list-style-type: none"><li>The grounds for termination stated in the Rules are not meant to be exhaustive.</li><li>Parties are free to negotiate and agree on additional grounds on which either party can terminate the agreement.</li></ul>

4.	<ul style="list-style-type: none"> <li>The Rules should provide for the formula for calculation of the lawyer's fee upon termination depending on the nature of the termination.</li> </ul>	<ul style="list-style-type: none"> <li>Under Rule 3(b)(vii) of the current draft, as revised, it is a general condition for an ORFS agreement to state the alternative basis, instead of the formula, on which the lawyer is to be paid by the client in case of termination, which may or may not be expressed as an hourly rate.</li> </ul>
5.	<ul style="list-style-type: none"> <li>The Rules should provide that the client will remain liable for disbursements and other costs and fees in case of termination.</li> </ul>	<ul style="list-style-type: none"> <li>Rule 3(b)(vii) of the current draft, as revised, requires the ORFS agreement to state the alternative basis for fee charging in case of termination.</li> <li>Rule 3(b)(v) requires the agreement to state whether disbursements are to be paid by the client irrespective of the outcome of the matter.</li> </ul>
6.	<ul style="list-style-type: none"> <li>It should not be necessary to provide for the maximum amount of fees payable upon early termination, as the parties should be in the best position to determine the termination fee.</li> </ul>	<ul style="list-style-type: none"> <li>The parties should be able to determine the termination fee and the alternative basis for fee charging, as provided in Rule 3(b)(vii) of the current draft, as revised.</li> </ul>
7.	<ul style="list-style-type: none"> <li>It is unclear whether barristers should directly enter into ORFS agreements with clients and may accept instructions from lay clients in court proceedings under the AO.</li> </ul>	<ul style="list-style-type: none"> <li>Barristers may enter into ORFS agreements with the lay clients.</li> <li>In accordance with the Bar Association's Code of Conduct, barristers appearing in court proceedings (including arbitration-related court proceedings) should be instructed by a solicitor or an authorized person/body as set out in the Code of Conduct with the need of a backsheets.</li> <li>The Bar Association may consider revising the Code of Conduct to create an exemption such that barristers who enter into ORFS agreements directly with the lay clients for court proceedings under the AO will be allowed to appear before courts without briefs or backsheets.</li> </ul>

8.	<ul style="list-style-type: none"> <li>The Rules should provide for notice to be given to a barrister of any ORFS agreement entered into by the client in the arbitration in which the barrister has been instructed.</li> </ul>	<ul style="list-style-type: none"> <li>This requirement is considered unnecessary; there are already disclosure requirements under s.98ZQ of the AO.</li> </ul>
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## **B. Comments from the Law Society**

	<b>Comments</b>	<b>Responses from Advisory Body on ORFSA</b>
9.	<ul style="list-style-type: none"> <li>It is unclear what are the consequences when a “circumstance” not stated in the agreement arises.</li> </ul>	<ul style="list-style-type: none"> <li>Rule 3(b)(ii) provides flexibility for parties to agree on the circumstances where lawyer’s fees are payable under the ORFS agreement depending on specific case facts.</li> </ul>
10.	<ul style="list-style-type: none"> <li>It is proposed that the client should only be entitled to independent legal advice on the ORFS arrangement but not the ORFS agreement, given the risk of disclosing the lawyer’s private information.</li> </ul>	<ul style="list-style-type: none"> <li>Parties are allowed to disclose information relating to arbitral proceedings and awards to a professional or any other adviser under section 18(2)(c) of the AO.</li> <li>For the purpose of seeking independent legal advice on the ORFS arrangement, the client should be at liberty to disclose the content of the ORFS agreement to another lawyer.</li> <li>This is consistent with the requirement set out in the Code of Practice for Third Party Funding of Arbitration.</li> </ul>
11.	<ul style="list-style-type: none"> <li>It is proposed that lawyers should also be entitled to the cooling-off period.</li> </ul>	<ul style="list-style-type: none"> <li>Rule 3(b)(iv) offers statutory protection to clients, who are understandably less familiar with legal and contractual terms than lawyers.</li> <li>Lawyers may negotiate with clients suitable cooling-off terms or warranties and make use of termination clauses for protection.</li> </ul>
12.	<ul style="list-style-type: none"> <li>It may be difficult to determine the circumstances that constitute a successful outcome in an ORFS agreement and</li> </ul>	<ul style="list-style-type: none"> <li>The circumstances that constitute a successful outcome is a matter for negotiation between the parties depending on</li> </ul>

	<p>the Rules should provide for variation of ORFS agreements to cater for unforeseen circumstances arising in the course of the matter.</p>	<p>specific case facts, bearing in mind that ORFSA allows risk-sharing between clients and lawyers.</p> <ul style="list-style-type: none"> <li>• Separate ORFS agreements can be entered into for different parts of the arbitration.</li> <li>• Parties may agree to vary the terms of the ORFS agreement terms as the case proceeds.</li> </ul>
13.	<ul style="list-style-type: none"> <li>• In situations with multiple DBAs or Hybrid DBAs, it is unclear as to how to ensure the aggregate sum of the DBA payments under those agreements would not exceed 50% of the financial benefit obtained by the client, and the consequence of failure to observe the statutory limit.</li> </ul>	<ul style="list-style-type: none"> <li>• Rule 8(2)(b) of the current draft, as revised, requires lawyers to inform the client of the statutory requirement on multiple DBAs and Hybrid DBAs under Rule 7.</li> </ul>
14.	<ul style="list-style-type: none"> <li>• As it may be difficult for lawyers to explain the nature and operation of an ORFS agreement to the client, the Rules should explicitly set out in detail the information on the nature and operation of the ORFS agreement to be relayed.</li> </ul>	<ul style="list-style-type: none"> <li>• As the ORFSA regime is new to the sector, users and lawyers will understandably require more time to gain experience and familiarize themselves with its operation. DoJ will work with the legal and dispute resolution sector to organise more trainings for arbitration users and practitioners.</li> <li>• The nature and operation of ORFS agreements are case-specific and incapable of being particularized in the Rules.</li> <li>• While both the client and the lawyer, as parties to an ORFS agreement, should understand the fundamentals of the agreement, it is the professional duty of the lawyer to at least provide the information listed in Rule 8(2) to the client, e.g. the general and specific conditions that apply to the ORFS agreement.</li> </ul>
15.	<ul style="list-style-type: none"> <li>• The Rules should provide for the enforcement of ORFS agreements and the termination of agreements in case of death or incapacity of lawyer and change of lawyer.</li> </ul>	<ul style="list-style-type: none"> <li>• Validity and enforceability of ORFS agreements remain subject to established contractual legal principles.</li> <li>• The Rules aim to provide minimum safeguards for the parties and are not meant to be exhaustive.</li> </ul>

16.	<ul style="list-style-type: none"><li>• Trainings on ORFSA, as well as boiler-plates or templates of ORFS agreements, should be provided to familiarise practitioners with the operation of the ORFSA regime.</li></ul>	<ul style="list-style-type: none"><li>• DoJ will work with the legal and dispute resolution sector to organise more trainings, and develop user-friendly and practical legal guides and tools, to facilitate the use of ORFSA by practitioners and their clients.</li></ul>
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**Secretariat, Advisory Body on ORFSA**  
**Department of Justice**  
**October 2022**