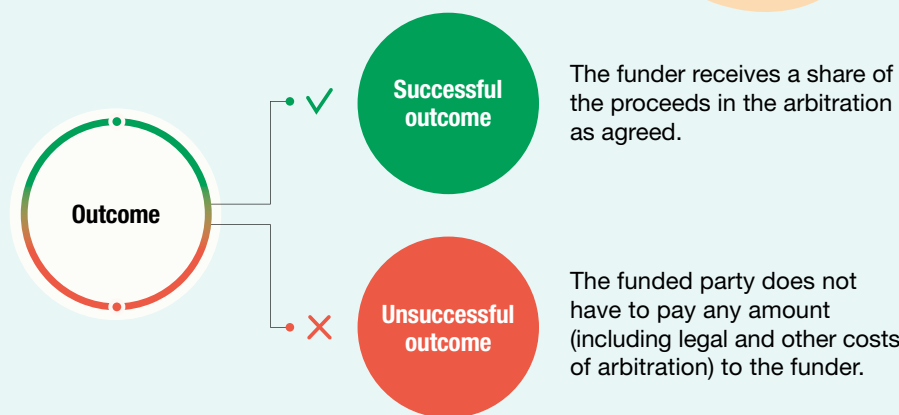


What is TPF of arbitration?

Part 10A of the AO came into effect on 1 February 2019 clarifying that TPF in arbitration and ancillary court proceedings are permitted in Hong Kong. In a TPF arrangement, a third party funder provides funding to a party to an arbitration and will receive a financial benefit only if the arbitration is successful within the meaning of the funding agreement.



Features of TPF of arbitration regime

- TPF of arbitration applies to arbitration proceedings and related proceedings in Hong Kong
- Applies to arbitration outside Hong Kong
- Related measures and safeguards provided in Part 10A of the AO



Disclosure requirements on the funded party

The funded party must give a written notice to each other party to the arbitration and the arbitration body that:

- if a funding agreement is made — the fact that a funding agreement has been made and the name of the third party funder
- if a funding agreement ends (for reasons other than the end of arbitration) — the fact that the funding agreement has ended and the termination date

Code of Practice for TPF of Arbitration (“CoP”)

The CoP sets out the practices and standards with which third party funders are ordinarily expected to comply in carrying on activities in connection with TPF of arbitration. The key ethical and financial standards for third party funders include:

1. Fulfil the capital adequacy requirements
2. Avoid possible conflicts of interest
3. Observe confidentiality and legal professional privilege
4. Avoid influence over the proceedings
5. State the scope of liability for costs and the permitted grounds for termination in funding agreements
6. Maintain an effective procedure for complaints
7. Submit annual returns to the Advisory Body



Full text of
the Code of Practice
for TPF of Arbitration



Parties should seek independent legal advice on the use of funding arrangements for arbitration in Hong Kong.

For information about arbitration development in Hong Kong:



DoJ's website



Legal Hub's website

Funding Options for Arbitration in Hong Kong

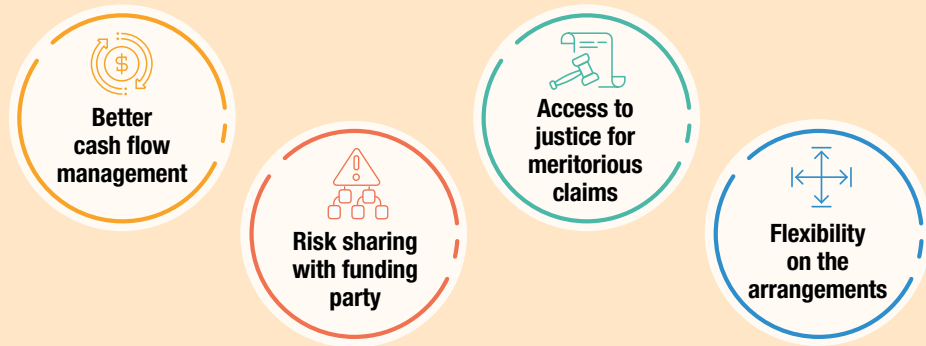


Overview

Diversified financing arrangements are available for the conduct of arbitration in Hong Kong. In addition to the use of own financial resources, the Arbitration Ordinance (Cap. 609) (“AO”) expressly allows two other types of funding options for arbitration in Hong Kong to benefit any parties involved in arbitration:

- Outcome related fee structures for arbitration (“ORFSA”)
- Third party funding (“TPF”) of arbitration

Benefits of external funding arrangements

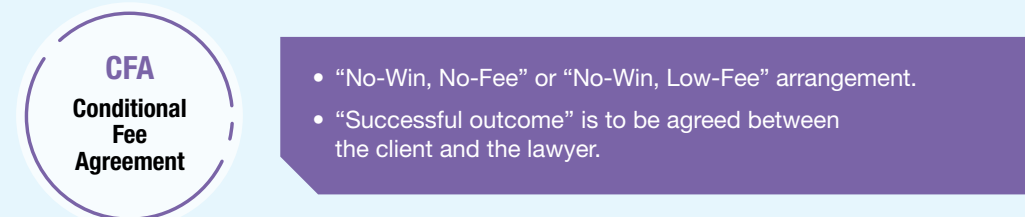


What is ORFSA?

ORFSA is fully implemented in Hong Kong with effect from 16 December 2022. The new Part 10B of the AO allows three types of arrangements providing flexibility for the clients and their lawyers to agree on the fee arrangements based on the outcome in the matter. ORFSA applies to arbitration proceedings and related proceedings.



Three types of ORFSA agreements in Hong Kong



Subsidiary legislation (Cap. 609D) – Requirements for ORFSA agreements

General conditions

- The agreement must be in writing and signed by the lawyer and the client
- The agreement must state:
 - (i) the arbitration or any part of it to which the agreement relates
 - (ii) the circumstances in which lawyers’ fees and expenses are payable, and whether disbursements are payable
 - (iii) that the lawyer has informed the client of the right to seek independent legal advice
 - (iv) a cooling-off period of not less than 7 days for the client
 - (v) the grounds for early termination and, if so, the alternative basis for paying the lawyer in such event



Specific conditions

CFA

- The success fee must be expressed as a percentage of the benchmark fee
- The uplift element must not exceed 100% of the benchmark fee
- The agreement must state:
 - (i) what constitutes a successful outcome
 - (ii) the basis for calculating the success fee
 - (iii) when the success fee becomes payable

DBA and Hybrid DBA

- DBA Payment must:
 - (i) be calculated by reference to the financial benefit
 - (ii) not exceed 50% of the financial benefit
 - (iii) be payable in addition to recoverable costs
- The agreement must state:
 - (i) the financial benefit that relates to it
 - (ii) the basis for calculating the DBA Payment
 - (iii) when the DBA Payment becomes payable
 - (iv) whether barristers’ fees are part of or in addition to the DBA Payment



Additionally for Hybrid DBA

- The agreement must:
 - (i) state the fees for the legal services rendered during the course of the matter
 - (ii) state the benchmark fee
 - (iii) provide that the client is to pay the lawyer not more than 50% of the irrecoverable costs in the event of no financial benefit
 - (iv) provide 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

Disclosure requirements on ORFSA agreements

A written notice must be given to each other party to the arbitration and the arbitration body:

- if an ORFSA agreement is made — by the lawyer of the fact that an ORFSA agreement has been made and the name of the client
- if an ORFSA agreement ends (for reasons other than the end of arbitration) — by the client of the fact that the ORFSA agreement has ended and the termination date

Other measures and safeguards

- ORFSA agreement is void and unenforceable to the extent that it relates to a personal injuries claim
- Success fee and legal expenses insurance premium not recoverable save for exceptional circumstances
- Maximum aggregate sum of DBA Payments in the event of multiple DBAs or Hybrid DBAs not exceeding 50% of the financial benefit
- Provision of information by lawyer before entering into an ORFSA agreement
- Right to terminate ORFSA agreement by either party on grounds of material breach or unreasonable behaviour

