



律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong
Special Administrative Region

Guidance Note and Checklists for Outcome Related Fee Structures for Arbitration (“ORFSA”)



GUIDANCE NOTE

About

The objective of this guidance note is to provide practical and user-friendly information, with a flowchart and checklists to assist arbitration users who wish to enter into ORFSA agreements. The ORFSA regime offers funding options in addition to traditional fee arrangements (e.g. by hourly rates or lump sum fees) provided by lawyers to clients in Hong Kong. The amount of legal fees payable by the client pursuant to an ORFSA agreement will depend on the type of ORFSA agreement and the agreed terms of the agreement based on the outcome of the matter.

Arbitration users can also use ORFSA together with third party funding of arbitration and/or legal expenses insurance. A flowchart with a general overview of issues to consider when using arbitration funding options in Hong Kong is at **Annex 1**. The arbitration funding options set out at Annex 1 are not meant to be exhaustive.

Checklists for the three types of ORFSA agreements are provided in **Annex 2 and Annex 3**. They serve as quick and concise tools for users to ensure that their ORFSA agreements to be entered into are valid and enforceable as required under the relevant legislation.

All information provided and the contents of this guidance note, and its annexures are intended for general informational purposes only, and are not intended to be a substitute for legal advice and should not be relied upon as such.

** Special thanks to Mr. John Lee, Dr. Benny Lo, Ms. Kim Rooney, Ms. Kathryn Sanger and Ms. Briana Young, members of the Working Group on ORFSA Checklist for their support and contributions to the publication of this Guidance Note and Checklists.*

Secretariat of the Working Group on ORFSA Checklist
Department of Justice
The Government of the Hong Kong Special Administrative Region
November 2023

Applicability of ORFSA

1. Pursuant to Part 10B of the Arbitration Ordinance (Cap. 609) ("**AO**")¹, the ORFSA regime in Hong Kong applies to arbitration proceedings, proceedings before an emergency arbitrator and related court proceedings and mediation proceedings under the AO ("**arbitration**"). However, an ORFSA agreement is void and unenforceable to the extent that it relates to a personal injuries claim².
2. The ORFSA regime in Hong Kong applies to 'lawyers' (as defined in section 98ZA of the AO)³ entering into an ORFSA agreement in relation to:
 - (i) arbitration for which the place of arbitration is in Hong Kong;
 - (ii) arbitration for which the place of arbitration is outside Hong Kong;
 - (iii) arbitration for which there is no place of arbitration; or
 - (iv) any part of the above arbitrations (the "**matter**").⁴
3. A foreign lawyer or Hong Kong lawyer who is also admitted as a lawyer in a foreign jurisdiction may also be subject to any applicable regulations of the foreign jurisdiction in which he/she is qualified to practise when engaged under an ORFSA agreement.
4. A Hong Kong lawyer who is engaged under an ORFSA agreement where the place of arbitration is outside Hong Kong should also consider any applicable regulations of that foreign jurisdiction.

Types of ORFSA Agreements Allowed in Hong Kong

5. Hong Kong allows three types of ORFSA agreements:
 - (i) In a Conditional Fee Agreement ("**CFA**"), the client pays the lawyer either no fees, or discounted fees, during the course of the matter. If the client obtains a "successful outcome" in the arbitration, the client will pay the lawyer a "success fee"⁵. The definition of "successful outcome" is a matter for agreement between lawyer and client.
 - (ii) In a Damages-Based Agreement ("**DBA**"), the client pays no fees during the course of the matter. If the client obtains a "financial benefit" (money or money's worth) in the arbitration, the client will pay the lawyer a percentage of that financial benefit (known as the "**DBA Payment**"). If there is no financial benefit, the lawyer will not receive the DBA Payment or any other fee. The percentage used to calculate the DBA Payment is a matter for agreement between lawyer and client (up to a maximum of 50% of the financial benefit).
 - (iii) In a **Hybrid DBA**, the client pays the lawyer a fee, which may or may not be calculated at a discount, during the course of the matter, plus a DBA Payment if the client obtains a financial benefit in the arbitration.

Checklists for ORFSA Agreements

6. An ORFSA agreement must meet all general conditions and specific conditions for the type of ORFSA agreement in question to be valid and enforceable⁶.
(See **Annex 2** for Checklist on CFA)
(See **Annex 3** for Checklist on DBA and Hybrid DBA)
7. The general conditions for an ORFSA agreement as well as the specific conditions for each type of ORFSA agreement are set out in the Arbitration (Outcome Related Fee Structures for Arbitration) Rules (Cap. 609D)⁷ (the "**ORFSA Rules**").

¹ https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1657179033918_001

² Sections 98ZK and 98ZL of the AO.

³ 'Lawyer' means a barrister, a solicitor, and a person qualified to practise the law of a jurisdiction other than Hong Kong, including a foreign lawyer as defined by section 2(1) of the Legal Practitioners Ordinance (Cap. 159).

⁴ Section 98ZI of the AO.

⁵ Section 98ZC: **success fee**, in relation to a matter, means a payment calculated by reference to the fee that a lawyer of a client would have charged the client for the matter if no ORFS agreement had been made for the matter

⁶ Rules 3-6 of the Arbitration (ORFSA) Rules (Cap. 609D).

⁷ <https://www.elegislation.gov.hk/hk/cap609D>

General Conditions for All Types of ORFSA Agreements

8. Pursuant to the ORFSA Rules, all three types of ORFSA agreements must meet the following general conditions (the “**General Conditions**”):

- (i) **Be in writing and signed by the lawyer and the client;**
- (ii) **State the matter to which the agreement relates**
(e.g. whether the matter covers the arbitration until the handing down of the Award but includes/excludes the enforcement procedures; whether the matter covers an interlocutory application only);
- (iii) **State in what circumstances the lawyer’s fees and expenses, or any part of them, are payable**
(e.g. as soon as the Award or Order is handed down);
- (iv) **State whether disbursements, including barristers’ fees, are to be paid by the client irrespective of the outcome of the matter;**
- (v) **Provide a “cooling-off period” of not less than 7 days** during which the client may terminate the ORFSA agreement by written notice without incurring any liability under the ORFSA agreement;
- (vi) **State the grounds for early termination of the ORFSA agreement;**
- (vii) **Provide an alternative basis on which the lawyer is to be paid by the client in case of early termination of the ORFSA agreement; and**
- (viii) **State that the lawyer has informed the client of the right to seek independent legal advice before entering into the ORFSA agreement.**

Specific Conditions for a CFA⁸

9. In addition to the General Conditions, a CFA must meet the following specific conditions:

- (i) **State the circumstances that will constitute a successful outcome of the matter**
(e.g. obtaining damages greater than, or equal to, an agreed amount; obtaining an order for specific performance in an alleged breach of contract dispute; obtaining a favourable interlocutory application outcome);
- (ii) **Provide the basis for calculating the success fee by reference to, and expressed as a percentage of, a ‘benchmark fee’**
(the **benchmark fee** is the fee that the lawyer would have charged the client if no ORFSA agreement had been made for the matter⁹);
- (iii) **State when the success fee becomes payable by the client to the lawyer; and**
- (iv) **The agreed ‘uplift element’ does not exceed 100% of the benchmark fee**
(the **uplift element** is the difference between the benchmark fee and the total fee payable in the event of a successful outcome¹⁰, meaning that the total that the lawyer can charge the client in the event of a successful outcome (as agreed) is no more than 2 times the benchmark fee).

Specific Conditions for a DBA and Hybrid DBA¹¹

10. In addition to the General Conditions, a DBA and Hybrid DBA must meet the following specific conditions:

- (i) **State the financial benefit to which the agreement relates¹²**
(e.g. damages awarded by the tribunal, monetary value of the intellectual property rights in dispute, avoidance or reduction of a potential liability being claimed against);

⁸ Rule 4 of the ORFSA Rules.

⁹ Rule 2 of the ORFSA Rules.

¹⁰ Rule 4(2) of the ORFSA Rules.

¹¹ Rule 5 of the ORFSA Rules.

¹² 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 (Section 98ZA of the AO).

(ii) **Provide the basis for calculating the DBA Payment**

(DBA Payment is payable in addition to any recoverable lawyer's costs and should not exceed 50% of the financial benefit obtained by the client¹³. The ORFSA Rules¹⁴ provide for the maximum aggregate sum of the DBA Payments (i.e. not exceeding 50% of the financial benefit obtained by the client) where a client enters into two or more DBAs / Hybrid DBAs where the DBA Payments under those agreements are calculated by reference to the same financial benefit);

(iii) **State when the DBA Payment becomes payable by the client¹⁵**

(e.g. the client and the lawyer can agree that the DBA Payment is due, and is payable, as soon as the Award or Order is issued, i.e. if the Award or Order provides an outcome (and contains relief) which the client and the lawyer have agreed in their agreement that constitutes a "financial benefit" to the client); and

(iv) **Confirm whether barrister's fees are to be regarded as part of the DBA Payment or additional to the DBA Payment.**

(iv) **Provide that where the DBA Payment in the event of obtaining a financial benefit 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.**

Acknowledgment to be Signed by the Client¹⁷

12. Before entering into an ORFSA agreement, the lawyer must provide all information required under the ORFSA Rules to the client, with an acknowledgment signed and dated by the client confirming receipt and full understanding of the information provided by the lawyer (the "**Acknowledgment**").

13. The Acknowledgment should state that the following information has been provided to the client in clear and accessible language¹⁸:

(i) **The nature and operation of the ORFSA agreement, including the general conditions and the specific conditions applicable to the ORFSA agreement;**

(ii) **(For DBA or Hybrid DBA) If there are two or more DBAs / Hybrid DBAs where the DBA Payments under those agreements are calculated by reference to the same financial benefit, that the aggregate sum of those DBA Payments must not exceed 50% of the same financial benefit;**

(iii) **That the client has a right to seek independent legal advice before entering into the ORFSA agreement;**

(iv) **That the client might not recover the costs specified in section 98ZU(3) of the AO from other parties to the arbitration¹⁹; and**

(v) **That the client might be ordered by the arbitral tribunal to pay another party's costs as described in section 98ZU(4) of the AO²⁰.**

Additional Specific Conditions for a Hybrid DBA¹⁶

11. A Hybrid DBA must meet additional specific conditions (i.e., in addition to the specific conditions applied to DBA and Hybrid DBA set out in paragraph 10 above) as follows:

(i) **State the fee to be paid in any event for the legal services rendered by the lawyer during the course of the matter;**

(ii) **State the benchmark fee of the lawyer;**

(iii) **Provide that the client is not required to pay the lawyer more than 50% of the irrecoverable costs in the event of no financial benefit; and**

¹³ Rules 5(b)(ii), 5(a)(ii) and 5(a)(iii) of the ORFSA Rules.

¹⁴ Rules 5 and 7 of the ORFSA Rules.

¹⁵ Rule 5(b)(iii) of the ORFSA Rules.

¹⁶ Rule 6 of the ORFSA Rules.

¹⁷ Rule 8 of the ORFSA Rules.

¹⁸ Rule 8(2) of the ORFSA Rules.

¹⁹ They are the success fee in a CFA, legal expenses insurance premium, and any part of the fee that is in excess of the fee that the lawyer would have been entitled to be paid by the party if there had been no ORFSA agreement for the arbitration.

²⁰ The arbitral tribunal retains wide discretion to order a party to the arbitration to pay another party's costs in an amount not exceeding the fee that the lawyer would have been entitled to be paid by the party if there had been no ORFSA agreement for the arbitration.

Termination of ORFSA Agreements

14. Subject to the terms and conditions of the ORFSA agreement, before the conclusion of the matter, any party to the ORFSA agreement may terminate the agreement if the party reasonably believes that the other party has committed a material breach of the agreement or has behaved or is behaving unreasonably²¹.

Other Useful Information

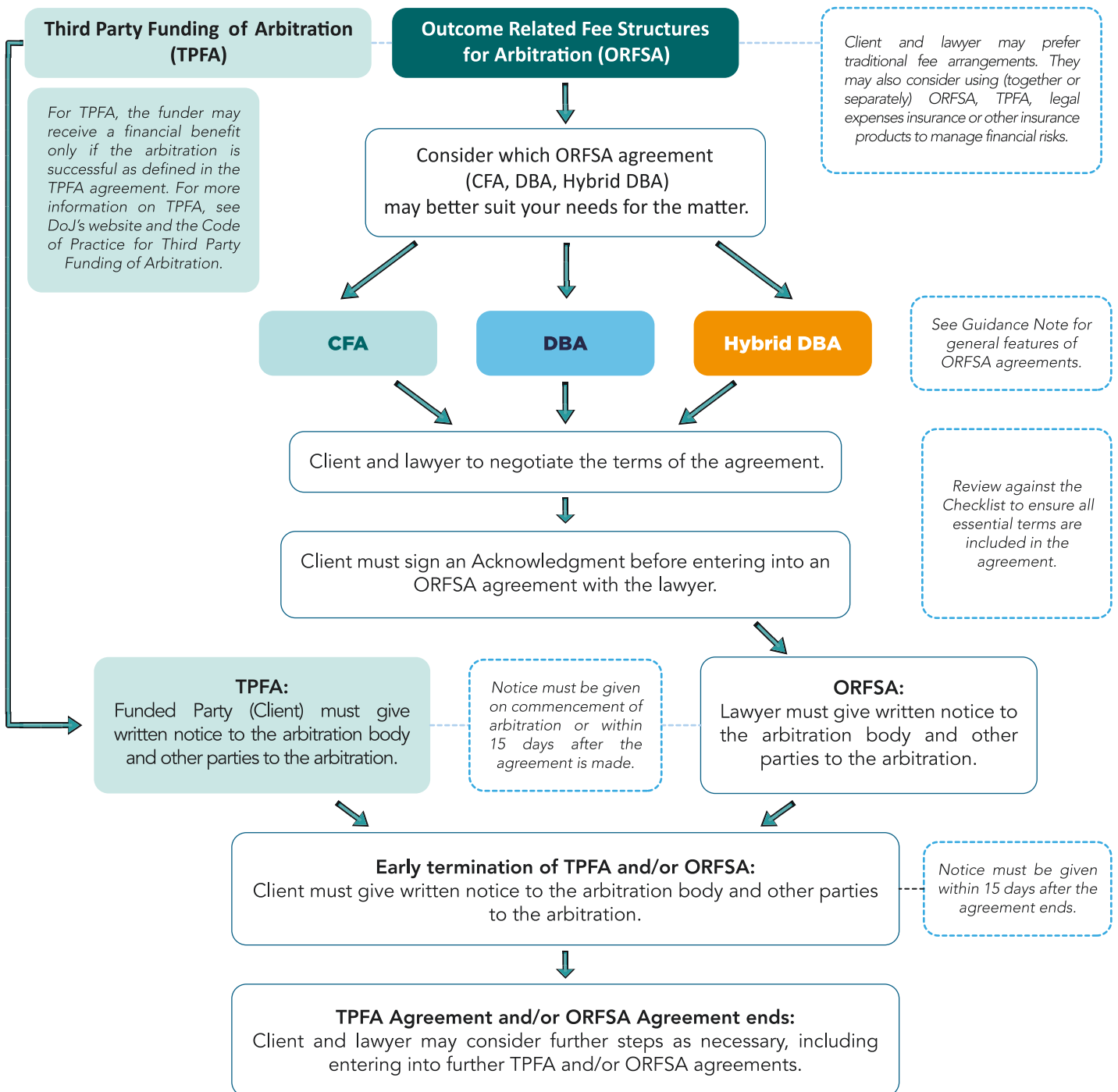
15. For further information on ORFSA, including illustrative examples on the calculation of fees for the respective ORFSA agreements, please refer to the **Top 20 FAQs on Outcome Related Fee Structures for Arbitration** available on the DoJ's website²².
16. A **leaflet** with general information on ORFSA and third party funding of arbitration in Hong Kong is available on the DoJ's website²³.

²¹ Rule 9 of the ORFSA Rules.

²² https://www.doj.gov.hk/en/legal_dispute/pdf/top_20_faqs_on_outcome_related_fee_structures_for_arbitration.pdf

²³ https://www.doj.gov.hk/en/publications/pdf/funding_options_for_arbitration_in_hong_kong_e.pdf

FLOWCHART OF CONSIDERING ARBITRATION FUNDING OPTIONS IN HONG KONG



CHECKLIST FOR ENTERING INTO CONDITIONAL FEE AGREEMENT (CFA)

Checklist

A. Applicability of CFA

- ☐ 1. The matter falls within arbitration proceedings, proceedings before an emergency arbitrator and/or related court proceedings and mediation proceedings under the AO.
- ☐ 2. The matter does not relate to a personal injuries claim.

B. Drafting the Terms of the CFA

- ☐ 3. The written agreement must at least provide the following information:
 - ☐ 3.1 The matter to which the CFA relates (please refer to Guidance Note paragraph 8(ii) for examples).
 - ☐ 3.2 Circumstances that the client and the lawyer agree will constitute a “**successful outcome**” of the matter (please refer to Guidance Note paragraph 9(i) for examples).
 - ☐ 3.3 Basis for calculating the **success fee** by reference to, and expressed as a percentage of, a benchmark fee which is the fee that the lawyer would have charged the client if no ORFSA agreement had been made for the matter (and the agreed uplift element does not exceed 100% of the benchmark fee).
 - ☐ 3.4 When the success fee becomes payable by the client to the lawyer.
 - ☐ 3.5 Circumstances in which the lawyer’s fees and expenses, or any part of them, are payable.
 - ☐ 3.6 Whether disbursements (including barristers’ fees) are to be paid by the client irrespective of the outcome of the matter.
 - ☐ 3.7 The lawyer has informed the client of the right to seek independent legal advice before entering into the CFA.
 - ☐ 3.8 A “cooling-off period” of not less than 7 days.
 - ☐ 3.9 Grounds for early termination of the agreement and alternative basis on which the lawyer is to be paid by the client in case of early termination.

C. Provision of Information by Lawyer and Acknowledgment by Client

- ☐ 4. Before entering into the CFA, the lawyer must provide the following information in clear and accessible language:
- ☐ 4.1 Nature and operation of the CFA, including the information in paragraph 3 above.
 - ☐ 4.2 Client has a right to seek independent legal advice before entering into the CFA.
 - ☐ 4.3 Client might not recover the costs specified in section 98ZU(3) of the AO from other parties to the arbitration:
 - Success fee in a CFA / any part of the fee that is in excess of the fee that the lawyer would have been entitled to be paid by the client if there had been no ORFSA agreement for the arbitration
 - Legal expenses insurance premium.
 - ☐ 4.4 Client might be ordered by the arbitral tribunal to pay another party's costs, as described in section 98ZU(4) of the AO.
- ☐ 5. The client to sign and date an Acknowledgment to confirm receipt and full understanding of the information in paragraph 4 above.

D. Notification Requirement

- ☐ 6. Lawyer to give written notice²⁴ to each other party to the arbitration and the arbitration body of:
- the fact that an ORFSA agreement has been made.
 - the name of the client.
- ☐ 7. (For early termination of the agreement only) If the ORFSA agreement terminates before the arbitration ends, the client must give written notice²⁵ to each other party to the arbitration and the arbitration body of:
- the fact that the ORFSA agreement has ended.
 - the date the ORFSA agreement ended.

The client must sign and date the Acknowledgment before entering into an ORFSA agreement, which must be in writing, dated and signed by the lawyer and the client.

²⁴ The timing for giving the notice is:

a. on the commencement of the arbitration if the ORFSA agreement for arbitration is made on or before the commencement of the arbitration; or
b. within 15 days after the ORFSA agreement for arbitration is made if the arbitration has commenced.

²⁵ The notice must be given within 15 days after the ORFSA agreement ends.

CHECKLIST FOR ENTERING INTO A DAMAGES-BASED AGREEMENT (DBA) OR HYBRID DAMAGES-BASED AGREEMENT (HYBRID DBA)

Checklist

A. Applicability of DBA or Hybrid DBA

- ☐ 1. The matter falls within arbitration proceedings, proceedings before an emergency arbitrator and/or related court proceedings and mediation proceedings under the AO.
- ☐ 2. The matter does not relate to a personal injuries claim.

B. Drafting the Terms of the DBA or Hybrid DBA

- ☐ 3. The written agreement must at least provide the following information:
 - ☐ 3.1 The matter to which the DBA or Hybrid DBA relates (please refer to Guidance Note paragraph 8(ii) for examples).
 - ☐ 3.2 The financial benefit to which the DBA or Hybrid DBA relates (please refer to Guidance Note paragraph 10(i) for examples).
 - ☐ 3.3 The basis for calculating the DBA Payment (which must not exceed 50% of the financial benefit, subject to the maximum aggregate DBA/Hybrid DBA sum in 4.3 below, and is payable in addition to any recoverable lawyer's costs).
 - ☐ 3.4 When the DBA Payment becomes payable by the client.
 - ☐ 3.5 Confirm whether barrister's fees are to be regarded as part of the DBA Payment or additional to the DBA Payment.
 - ☐ 3.6 Whether disbursements (including barristers' fees) are to be paid by the client irrespective of the outcome of the matter.
 - ☐ 3.7 Circumstances in which the lawyer's fees and expenses, or any part of them, are payable.
 - ☐ 3.8 Lawyer has informed the client of the right to seek independent legal advice before entering into the DBA / Hybrid DBA.
 - ☐ 3.9 A "cooling-off period" of not less than 7 days.
 - ☐ 3.10 Grounds for early termination of the agreement and alternative basis on which the lawyer is to be paid by the client in case of early termination.

Below are for Hybrid DBA only

- ☐ 3.11 The fee to be paid in any event for the legal services rendered by the lawyer during the course of the matter.
- ☐ 3.12 The benchmark fee of the lawyer.
- ☐ 3.13 The client is not required to pay the lawyer more than 50% of the irrecoverable costs in the event of no financial benefit.
- ☐ 3.14 Where the DBA Payment in the event of obtaining a financial benefit 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*.

C. Provision of Information by Lawyer and Acknowledgment by Client

- ☐ 4. Before entering into the DBA / Hybrid DBA, the lawyer must provide the following information in clear and accessible language:
 - ☐ 4.1 Nature and operation of the DBA / Hybrid DBA, including the information in paragraph 3 above.
 - ☐ 4.2 Client has a right to seek independent legal advice before entering into the DBA / Hybrid DBA.
 - ☐ 4.3 If there are two or more DBAs / Hybrid DBAs where the DBA Payments under those agreements are calculated by reference to the same financial benefit, the aggregate sum of those DBA Payments must not exceed 50% of the same financial benefit.
 - ☐ 4.4 Client might not recover the costs specified in section 98ZU(3) of the AO from other parties to the arbitration:
 - Any part of the fee that is in excess of the fee that the lawyer would have been entitled to be paid by the client if there had been no ORFSA agreement for the arbitration.
 - Legal expenses insurance premium.
 - ☐ 4.5 Client might be ordered by the arbitral tribunal to pay another party's costs as described in section 98ZU(4) of the AO.
- ☐ 5. The client to sign and date an Acknowledgment to confirm receipt and full understanding of the information in paragraph 4 above.

D. Notification Requirement

- ☐ 6. Lawyer to give written notice²⁶ to each other party to the arbitration and the arbitration body of:
 - the fact that an ORFSA agreement has been made.
 - the name of the client.
- ☐ 7. (For early termination of the agreement only) If the ORFSA agreement terminates before the arbitration ends, the client must give written notice²⁷ to each other party to the arbitration and the arbitration body of:
 - the fact that the ORFSA agreement has ended.
 - the date the ORFSA agreement ended.

The client must sign and date the Acknowledgment before entering into an ORFSA agreement, which must be in writing, dated and signed by the lawyer and the client.

²⁶ The timing for giving the notice is:

- a. on the commencement of the arbitration if the ORFSA agreement for arbitration is made on or before the commencement of the arbitration; or
- b. within 15 days after the ORFSA agreement for arbitration is made if the arbitration has commenced.

²⁷ The notice must be given within 15 days after the ORFSA agreement ends.



律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong
Special Administrative Region

Guidance Note and Checklists for Outcome Related Fee Structures for Arbitration (“ORFSA”)



f LEAD.Office



法建办-LEADOffice



in 法治建設辦公室



PDF E-Booklet

