

Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022

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A BILL

To

Amend the Arbitration Ordinance and the Legal Practitioners Ordinance to provide that certain agreements using outcome related fee structures for arbitration 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.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022.
- (2) Subject to subsection (3), this Ordinance comes into operation on the day on which it is published in the Gazette.

- (3) Section 5, in so far as it relates to Divisions 3, 4 and 7 of the new Part 10B, comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

2. Enactments amended

- (1) The Arbitration Ordinance (Cap. 609) is amended as set out in Part 2.
 - (2) The Legal Practitioners Ordinance (Cap. 159) is amended as set out in Part 3.
-

Part 2

Amendments to Arbitration Ordinance

3. Section 98H amended (meaning of *funding agreement*)

(1) Section 98H—

Renumber the section as section 98H(1).

(2) After section 98H(1)—

Add

“(2) To avoid doubt, a funding agreement is not to be construed to include an ORFS agreement for arbitration within the meaning of Part 10B.”.

4. Section 98OA added

Part 10A, Division 3, after section 98O—

Add

“98OA. Part 10A not applicable to ORFS agreements for arbitration

This Part does not apply to an ORFS agreement for arbitration within the meaning of Part 10B.”.

5. Part 10B added

After Part 10A—

Add

“Part 10B

Outcome Related Fee Structure Agreement for Arbitration

Division 1—Purposes and Application

98Y. Purposes

The purposes of this Part are to—

- (a) provide that an ORFS agreement for arbitration is not prohibited by the common law doctrines of maintenance, champerty and barratry;
- (b) provide for the validity and enforceability of ORFS agreements for arbitration that meet certain general and specific conditions; and
- (c) provide for measures and safeguards in relation to ORFS agreements for arbitration.

98Z. Part 10B not applicable to funding agreements

This Part does not apply to a funding agreement within the meaning of Part 10A.

Division 2—Interpretation

98ZA. Interpretation

In this Part—

advisory body (諮詢機構) means the person appointed by the Secretary for Justice under section 98ZT(1);

arbitration (仲裁) includes the following proceedings under this Ordinance—

- (a) court proceedings;
- (b) proceedings before an emergency arbitrator;
- (c) mediation proceedings;

arbitration body (仲裁機構)—

- (a) in relation to an arbitration (other than the proceedings mentioned in paragraphs (b) and (c))—means the arbitral tribunal or court, as the case may be;
- (b) in relation to proceedings before an emergency arbitrator—means the emergency arbitrator; or
- (c) in relation to mediation proceedings—means the mediator appointed under section 32 or referred to in section 33, as the case may be;

authorized body (獲授權機構) means the person appointed by the Secretary for Justice under section 98ZT(2);

Cap. 159 (《第159章》) means the Legal Practitioners Ordinance (Cap. 159);

client (當事人), in relation to a lawyer, includes—

- (a) a person who retains or employs, or is about to retain or employ, the lawyer; and
- (b) a person who is or may be liable to pay the lawyer's costs;

code of practice (實務守則) means the code of practice issued under section 98ZN and as amended from time to time;

conditional fee agreement (按條件收費協議)—see section 98ZC;

damages-based agreement (按損害賠償收費協議)—see section 98ZD;

emergency arbitrator (緊急仲裁員) has the meaning given by section 22A;

expenses (開支) means—

- (a) disbursements incurred by a lawyer, or directly by a client of the lawyer, in a matter; or
- (b) any legal expenses insurance premium incurred by a client;

financial benefit (財務利益)—

- (a) means any money or money's worth; but
- (b) does not include—
 - (i) any sum awarded in respect of a lawyer's costs; and
 - (ii) any sum awarded in respect of expenses;

hybrid damages-based agreement (混合式按損害賠償收費協議)—see section 98ZE;

lawyer (律師) means—

- (a) a person who is enrolled on the roll of barristers kept under section 29 of Cap. 159;
- (b) a person who is enrolled on the roll of solicitors kept under section 5 of Cap. 159; or
- (c) a person who is qualified to practise the law of a jurisdiction other than Hong Kong, including a foreign lawyer as defined by section 2(1) of Cap. 159;

legal expenses insurance (法律開支保險) means a contract of insurance that provides reimbursement to a client or a lawyer for some or all of the legal fees, adverse costs or disbursements incurred in respect of a matter;

mediation proceedings (調解程序) means mediation proceedings referred to in section 32(3) or 33;

money or money's worth (金錢或金錢的等值)—

- (a) means—
 - (i) any money, assets, security, tangible or intangible property or services;
 - (ii) any amount owed under an award, settlement agreement or otherwise; or
 - (iii) any other consideration reducible to a monetary value; and
- (b) includes any avoidance or reduction of a potential liability;

ORFS means outcome related fee structure;

ORFS agreement (ORFS協議)—see section 98ZB.

98ZB. Meaning of ORFS agreement

- (1) An ORFS agreement is any of the following agreements made between a client and a lawyer of the client—
 - (a) a conditional fee agreement;
 - (b) a damages-based agreement;
 - (c) a hybrid damages-based agreement.
- (2) A reference to an ORFS agreement for arbitration in this Part is a reference to an ORFS agreement—
 - (a) made between a client and a lawyer of the client for an arbitration; and
 - (b) made on or after the day on which Divisions 3, 4 and 7 have all come into operation.

- (3) To avoid doubt, an ORFS agreement for arbitration is not to be construed to include a funding agreement within the meaning of Part 10A.

98ZC. Meaning of *conditional fee agreement*

- (1) A conditional fee agreement is an agreement, made for a matter between a client and a lawyer of the client, under which the lawyer agrees with the client to be paid a success fee for the matter only in the event of a successful outcome for the client in the matter.

- (2) In subsection (1)—

success fee (成功收費), 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;

successful outcome (成果), in relation to a client in a matter—

- (a) means any outcome of the matter falling within the description of being successful as agreed to between the client and a lawyer of the client; and
- (b) includes any financial benefit that is obtained by the client in the matter.

98ZD. Meaning of *damages-based agreement*

A damages-based agreement is an agreement, made between a client and a lawyer of the client for a matter, under which—

- (a) the lawyer agrees with the client to be paid for the matter only in the event the client obtains a financial benefit in the matter (*DBA payment*); and
- (b) the DBA payment is calculated by reference to the financial benefit that is obtained by the client in the matter.

98ZE. Meaning of *hybrid damages-based agreement*

A hybrid damages-based agreement is an agreement, made between a client and a lawyer of the client for a matter, under which the lawyer agrees with the client to 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; and
- (b) in any event—a fee, usually calculated at a discount, for the legal services rendered by the lawyer for the client during the course of the matter.

Division 3—ORFS Agreements for Arbitration Not Prohibited by Particular Common Law Offences or Tort

98ZF. Particular common law offences do not apply

The common law offences of maintenance (including the common law offence of champerty) and of being a common barrator do not apply in relation to an ORFS agreement for arbitration.

98ZG. Particular tort does not apply

The tort of maintenance (including the tort of champerty) does not apply in relation to an ORFS agreement for arbitration.

98ZH. Other illegality not affected

Sections 98ZF and 98ZG do not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

98ZI. Application of Part 10B for non-Hong Kong arbitration

Despite section 5, this Part applies in relation to an arbitration for which the place of arbitration is outside Hong Kong or there is no place of arbitration as if the place of arbitration were in Hong Kong.

**Division 4—General Provisions for ORFS
Agreements for Arbitration**

98ZJ. Application of Division 4

This Division applies in relation to an ORFS agreement for arbitration.

98ZK. Validity and enforceability of ORFS agreements for arbitration

- (1) An ORFS agreement for arbitration that meets—
 - (a) all general conditions specified in the rules; and
 - (b) all specific conditions specified in the rules for the kind of ORFS agreement to which the agreement belongs,

is not void or unenforceable only because of its being an ORFS agreement for arbitration.

(2) In subsection (1)—

rules (規則) means rules made by the advisory body under section 98ZM.

98ZL. ORFS agreement for arbitration void and unenforceable to extent relating to personal injuries claim

(1) Despite section 98ZK, an ORFS agreement for arbitration is void and unenforceable to the extent that it relates to a personal injuries claim.

(2) In this section—

personal injuries (人身傷害) includes any disease and any impairment of a person's physical or mental condition;

personal injuries claim (人身傷害申索) means a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death.

Division 5—Power to Make Rules

98ZM. Power of advisory body to make rules for matters under Part 10B

(1) 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.
- (2) Any rules made under subsection (1)—
- (a) may be of general application or make different provisions for different cases or classes of cases; and
 - (b) may include the incidental, supplementary and consequential provisions that the advisory body considers necessary or expedient.

Division 6—Code of Practice

98ZN. Code of practice may be issued

- (1) The authorized body may issue a code of practice setting out the practices and standards with which lawyers who enter into ORFS agreements for arbitration are ordinarily expected to comply in connection with those agreements.
- (2) The authorized body must publish the code of practice in the Gazette.
- (3) The code of practice comes into operation on the day on which it is published in the Gazette.
- (4) The code of practice is not subsidiary legislation.
- (5) The authorized body may amend or revoke the code of practice.

- (6) Subsections (2), (3) and (4) apply in relation to an amendment or revocation of the code of practice in the same way as they apply in relation to the code of practice.

98ZO. Non-compliance with code of practice

- (1) A failure to comply with a provision of the code of practice does not, of itself, render any person liable to any judicial or other proceedings.
- (2) However—
 - (a) the code of practice is admissible in evidence in proceedings before any court or arbitral tribunal; and
 - (b) any compliance, or failure to comply, with a provision of the code of practice may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.

Division 7—Other Measures and Safeguards

98ZP. Communication of information for ORFS agreements for arbitration

- (1) Despite section 18(1), information referred to in that section may be communicated by a party to a person for the purpose of entering into, or seeking to enter into, an ORFS agreement for arbitration with the person.
- (2) However, the person may not further communicate anything communicated under subsection (1), unless—

- (a) the further communication is made—
 - (i) to protect or pursue a legal right or interest of the person; or
 - (ii) to enforce or challenge an award made in the arbitration,
in legal proceedings before a court or other judicial authority in or outside Hong Kong;
 - (b) the further communication is made to any government body, regulatory body, court or tribunal, and the person is obliged by law to make the communication; or
 - (c) the further communication is made to a professional adviser of the person for the purpose of obtaining advice in connection with the ORFS agreement for arbitration.
- (3) If a further communication is made by a person to a professional adviser under subsection (2)(c), subsection (2) applies to the professional adviser as if the professional adviser were the person.
- (4) In this section—
communicate (傳達) includes publish or disclose.

98ZQ. Disclosure about ORFS agreement for arbitration

- (1) If an ORFS agreement for arbitration is made between a client and a lawyer of the client, the lawyer must give written notice of—
- (a) the fact that an ORFS agreement for arbitration has been made; and
 - (b) the name of the client.

- (2) The notice must be given—
 - (a) for an ORFS agreement for arbitration made on or before the commencement of the arbitration—on the commencement of the arbitration; or
 - (b) for an ORFS agreement for arbitration made after the commencement of the arbitration—within 15 days after the agreement is made.
- (3) The notice must be given to—
 - (a) each other party to the arbitration; and
 - (b) the arbitration body.
- (4) For subsection (3)(b), if there is no arbitration body for the arbitration at the time, or at the end of the period, specified in subsection (2) for giving the notice, the notice must instead be given to the arbitration body immediately after there is an arbitration body for the arbitration.

98ZR. Disclosure about end of ORFS agreement for arbitration

- (1) If an ORFS agreement for arbitration ends (other than because of the end of the arbitration), the client must give written notice of—
 - (a) the fact that the agreement has ended; and
 - (b) the date the agreement ended.
- (2) The notice must be given within 15 days after the ORFS agreement for arbitration ends.
- (3) The notice must be given to—
 - (a) each other party to the arbitration; and
 - (b) the arbitration body (if any).

98ZS. Non-compliance with Division 7

- (1) A failure to comply with this Division does not, of itself, render any person liable to any judicial or other proceedings.
- (2) However, any compliance, or failure to comply, with this Division may be taken into account by any court or arbitral tribunal if it is relevant to a question being decided by the court or arbitral tribunal.

Division 8—Miscellaneous

98ZT. Appointment of advisory body and authorized body

- (1) The Secretary for Justice may, by notice published in the Gazette, appoint as the advisory body a person the Secretary for Justice considers appropriate to monitor and review the operation of this Part and exercise the power under section 98ZM.
- (2) The Secretary for Justice may, by notice published in the Gazette, appoint as the authorized body a person the Secretary for Justice considers appropriate to exercise the powers under section 98ZN.

98ZU. Limitation on award of costs by arbitral tribunal

- (1) Despite section 74(3), an arbitral tribunal may not order costs specified in subsection (3) to be paid to a party to an arbitration if an ORFS agreement for arbitration has been entered into between the party and a lawyer of the party for the arbitration.
- (2) However, the arbitral tribunal may still order those costs to be paid to a party to the arbitration if satisfied that there are exceptional circumstances justifying the ordering of those costs.

- (3) The costs are those that fall within any of the following descriptions—
 - (a) if the ORFS agreement for the arbitration is a conditional fee agreement—the success fee as defined by section 98ZC(2);
 - (b) any legal expenses insurance premium;
 - (c) 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 ORFS agreement for the arbitration (*normal fee*).
 - (4) To avoid doubt, this section does not prevent the arbitral tribunal from ordering a party to the arbitration to pay costs in an amount not exceeding the amount of the normal fee.”
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Part 3

Amendment to Legal Practitioners Ordinance

6. Section 64 amended (general provisions as to remuneration)

Section 64(1)—

Repeal paragraph (b)

Substitute

“(b) any agreement—

- (i) by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding stipulates for payment only in the event of success in that action, suit or proceeding; and
 - (ii) that is not an ORFS agreement for arbitration within the meaning of Part 10B of the Arbitration Ordinance (Cap. 609); or”.
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Explanatory Memorandum

The main object of this Bill is to amend the Arbitration Ordinance (Cap. 609) (*AO*) and the Legal Practitioners Ordinance (Cap. 159) (*LPO*), in order to provide that certain agreements using outcome related fee structures (*ORFS*) for arbitration are not prohibited by the common law doctrines of maintenance, champerty and barratry, to provide for the validity and enforceability of such agreements and to provide for measures and safeguards in relation to such agreements. The Bill is based on the recommendations made in the Report on Outcome Related Fee Structures for Arbitration published by the Law Reform Commission of Hong Kong on 15 December 2021 (*LRC Report*).

New Part 10B Added to AO

2. Clause 5 adds a new Part 10B to the AO. The new Part 10B, which is based on the draft provisions in the LRC Report, contains 8 Divisions (sections 98Y to 98ZU).
3. The new Part 10B is intended to come into operation in 2 stages: Divisions 1, 2, 5, 6 and 8 of it will commence on the gazettal of this Ordinance, while Divisions 3, 4 and 7 of it will commence on a day to be appointed (see clause 1(2) and (3)). This is to facilitate the preparatory work for the relevant regulatory framework to be done before the provisions clarifying the legal position come into operation.

Division 1 of New Part 10B—Purposes and Application (Sections 98Y and 98Z)

4. Division 1 of the new Part 10B provides for the purposes and application of that Part. In particular, the new section 98Y states that the purposes of that Part are to provide that certain agreements using ORFS for arbitration are not prohibited by particular common law doctrines, to provide for the validity and enforceability of such agreements and to provide for related measures and safeguards.

Division 2 of New Part 10B—Interpretation (Sections 98ZA to 98ZE)

5. Division 2 of the new Part 10B provides for the interpretation of key concepts.
6. Significantly, in the new sections 98ZA and 98ZB—
 - (a) ***ORFS agreement*** is defined to mean a conditional fee agreement, a damages-based agreement or a hybrid damages-based agreement;
 - (b) the definition of ***lawyer*** is given a broad meaning to include barristers, solicitors and a person who is qualified to practise the law of a jurisdiction other than Hong Kong, including a foreign lawyer as defined by section 2(1) of the LPO; and
 - (c) specific definitions are given for ***expenses***, ***legal expenses insurance*** and ***money or money's worth***.
7. The new sections 98ZC, 98ZD and 98ZE respectively provide for the definitions of ***conditional fee agreement***, ***damages-based agreement*** and ***hybrid damages-based agreement***.

Division 3 of New Part 10B—ORFS Agreements for Arbitration Not Prohibited by Particular Common Law Offences or Tort (Sections 98ZF to 98ZI)

8. Division 3 of the new Part 10B provides that ORFS agreements for arbitration are not prohibited by the common law doctrines of maintenance, champerty and barratry (as to both civil and criminal liability).
9. The new sections 98ZF and 98ZG declare that those common law doctrines do not apply in relation to any ORFS agreement for arbitration. The new section 98ZH makes it clear that those sections do not affect whether a contract is to be treated as illegal for other reasons.

Division 4 of New Part 10B—General Provisions for ORFS Agreements for Arbitration (Sections 98ZJ to 98ZL)

10. The new section 98ZK provides for the validity and enforceability of ORFS agreements for arbitration.
11. The new section 98ZL provides that an ORFS agreement for arbitration is void and unenforceable to the extent that it relates to a personal injuries claim.

Division 5 of New Part 10B—Power to Make Rules (Section 98ZM)

12. The new section 98ZM empowers the advisory body, in consultation with the Secretary for Justice and with the prior approval of the Chief Justice, to make rules to specify the general conditions for the purposes of the new section 98ZK(1)(a) and the specific conditions for the purposes of the new section 98ZK(1)(b). The rules may also generally provide for

the effective implementation of the purposes and provisions of the new Part 10B.

Division 6 of New Part 10B—Code of Practice (Sections 98ZN and 98ZO)

13. The new section 98ZN empowers the authorized body to issue a code of practice setting out the practices and standards with which lawyers who enter into ORFS agreements for arbitration are ordinarily expected to comply in connection with those agreements. The authorized body may also amend or revoke the code of practice. The code of practice is not subsidiary legislation and must be published in the Gazette.

Division 7 of New Part 10B—Other Measures and Safeguards (Sections 98ZP to 98ZS)

14. Division 7 of the new Part 10B provides for certain measures and safeguards where an arbitration involves an ORFS agreement for arbitration.
15. The new section 98ZP allows the communication of confidential information relating to arbitral proceedings to a person for the purpose of entering into, or seeking to enter into, an ORFS agreement for arbitration with the person. However, the recipient of the information is then subject to confidentiality requirements.
16. The new sections 98ZQ and 98ZR deal with disclosure of information relating to an ORFS agreement for arbitration. If an ORFS agreement for arbitration is made between a client and a lawyer of the client, the lawyer must inform each other party and the arbitration body by written notice of that fact and the name of the client within a specified time frame (new

section 98ZQ). Similarly, disclosure about the end of an ORFS agreement is also required (new section 98ZR). This is to minimize the possibility of conflicts of interest being the subject of a challenge to the arbitration process.

17. The new section 98ZS makes similar provisions to the new section 98ZO about the consequence of a failure to comply with Division 7 of the new Part 10B.

Division 8 of New Part 10B—Miscellaneous (Sections 98ZT and 98ZU)

18. The new section 98ZT empowers the Secretary for Justice to appoint an advisory body and an authorized body for the purposes of the new Part 10B and provides that the appointments are to be made by notice published in the Gazette.

Amendment to LPO

19. Clause 6 amends section 64 of the LPO to enable the validity of ORFS agreements for arbitration.