

**HONG KONG BAR ASSOCIATION'S RESPONSE TO
CONSULTATION PAPER DATED DECEMBER 2020 OF THE OUTCOME RELATED
FEE STRUCTURES FOR ARBITRATION SUB-COMMITTEE OF THE LAW REFORM
COMMISSION OF HONG KONG**

DATED 6 JULY 2021

Introduction

1. Hong Kong is one of the world's leading international arbitration centres, as recently confirmed again by the "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" conducted by Queen Mary University of London & White & Case.¹
2. This submission sets out the response of the Hong Kong Bar Association (the "HKBA") to the recommendations in the "*Outcome Related Fee Structures for Arbitration Consultation Paper*" dated December 2020 (the "**Consultation Paper**") of the Outcome Related Fee Structures for **Arbitration** Sub-committee of The Law Reform Commission of Hong Kong (the "**HKLRC Subcommittee**").
3. In summary the HKLRC Consultation Paper recommends that prohibitions on the use of outcome related fee structures ("**ORFS**") in the nature of conditional fees, success fees and contingency fees (including CFAs, DBAs, and Hybrids DBAs (as defined in paragraph 15 below) should be lifted so that "Lawyers" may choose to enter into these for "Arbitration".
4. Appendix 1 of the Consultation Paper ("**Appendix 1**") defines
 - (1) "Lawyers" as:

"A person who is qualified to practise the law of any jurisdiction, including Hong Kong. For the purposes of the [HKLRC Consultation] Paper, "Lawyer" includes (but is not limited to) Hong Kong barristers, solicitors and Registered foreign lawyers."
 - (2) "Arbitration" as:

"Any arbitration, whether or not administered by a permanent arbitral institution, in or outside Hong Kong, including the following proceedings under the Arbitration Ordinance: (i) court proceedings; (ii) proceedings before an emergency arbitrator; and (iii) mediation proceedings".
5. Unless otherwise stated the definitions used in these submissions are those contained in Appendix 1 (a copy of Appendix 1 is set out in Schedule One below). The footnotes in italics in this submission are extracted from the HKLRC Consultation Paper.
6. All but one of the other leading arbitration centres in the world allow lawyers to offer some or all forms of ORFS for contentious proceedings, including arbitration, including London, Mainland China, Paris, Geneva and New York, as outlined at paragraph 3.1 of the Consultation Paper. Arbitration is a competitive sector. Arising from the flexibility of the arbitration process, in most jurisdictions (including Hong Kong) parties and their counsel can decide in which jurisdiction or State the legal place of an arbitration will be.
7. It is notable that various forms of OFRSs have already been successfully implemented in many jurisdictions, including England and Wales and Australia, which both have an independent referral bar, as well as in Mainland China and the USA.
8. The HKBA considers that it is essential for Hong Kong as an international legal services centre to ensure that:
 - Hong Kong's arbitration framework continues to reflect international best practice.

¹ <http://www.arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/>

- Hong Kong's attractiveness and competitiveness as an international arbitration centre are preserved and promoted.
 - Access to justice is supported, by providing parties to an Arbitration with a range of funding sources, with appropriate safeguards in the public interest to ensure their informed consent, the transparency of arrangements, protection against conflicts, and that clear termination and dispute resolution provisions are included, among others.
 - Both litigants and their legal representatives should be allowed a full range of options on how to structure their costs and/or risks in the conduct of an Arbitration. This is in furtherance of the principle of freedom of contract, which is a fundamental principle of Hong Kong law.
 - Members of Hong Kong's legal profession, including barristers, should be able to offer fee structures similar to those that their competitors in other jurisdictions can offer, to enhance their opportunities, and to promote the choice of Hong Kong as the place of the Arbitration.
9. The HKBA's *Code of Conduct* (the "**Code of Conduct**")² by Rule 13.1 already expressly allows a practising barrister, in relation to legal services provided outside Hong Kong (an arbitration taking place outside Hong Kong where their work is done outside Hong Kong) to work on a contingency fees basis, provided contingency fees are lawful in such jurisdiction.
10. However, the position is otherwise for arbitrations taken place in Hong Kong; see for example,
- (1) Paragraph 6.3(a) of the Code of Conduct which states that:
- "[a] practising barrister must not appear as [c]ounsel: (a) in a matter in which he himself is a party or has a material personal (whether pecuniary or otherwise) interest".*
- (2) Paragraph 9.9 of the Code of Conduct which states that:
- "A practising barrister may not accept a brief or instructions on terms that payment of fees shall depend upon or be related to a contingency. For the avoidance of doubt nothing in this rule shall prevent a member from accepting payment of his fees by instalments and payment of interest on his fees either as agreed or allowed on taxation."*

Assumptions

11. The HKBA has assumed for the purposes of these comments that:
- (1) An agreement between a successful party and the Lawyer for an ORFS has no impact on the costs that the unsuccessful party will be liable to pay to the successful party. Assuming that this assumption is correct, the HKBA suggests that this should be expressly stated in the HKLRC Final Report, and in amending legislation, regulations and codes.
- (2) Any relevant amendments to the Arbitration Ordinance will state that ORFS do not fall within the scope of Part 10A of the *Arbitration Ordinance* (CAP 609) that provides for third party funding of arbitration.

² <https://www.hkba.org/content/code-conduct>; *Consultation Paper* (paragraphs 1.28 – 1.29)

General Support for Recommendations with Safeguards

12. In the circumstances the HKBA generally supports the recommendations of the HKLRC Subcommittee in the Consultation Paper that:
 - (1) Hong Kong law be amended to permit ORFS in commercial arbitration taking place in Hong Kong which are in the nature of "conditional fees"³ and "contingency fees"⁴, whether CFAs, DBAs and Hybrid DBAs, as defined below, with appropriate safeguards in the public interest, as summarized in these comments.
 - (2) Hong Kong law be reformed to allow a written agreement between a Lawyer⁵ and client, whereby (i) the Lawyer advises on arbitration, mediation and related litigation proceedings defined as "Arbitration" (as set out above) and (ii) the Lawyer receives a financial benefit if those proceedings are successful, within the meaning of that agreement, provided that appropriate safeguards are put in place.
13. These submissions focus on the position of barristers, while making some more general comments.
14. The HKBA's general comments are set out in paragraphs 17 to 29 below.
15. The HKBA's comments as to each recommendation of the HKLRC Subcommittee in the Consultation Paper are summarized in the table at paragraph 30 below.

Definitions of ORFS, CFA, DBA and a Hybrid DBA

16. Appendix 1 of the Consultation Paper includes the following definitions:

- (1) "Outcome Related Fee Structure" is defined in Appendix 1 as:

"an agreement between a Lawyer and client, whereby the Lawyer advises on contentious Proceedings and the Lawyer receives a financial benefit if those Proceedings are successful within the meaning of that agreement." Also known as a "success fee agreement."

For the purpose of the Consultation Paper, "ORFS" includes: (a) "CFAs"; (b) "DBAs"; and (c) "Hybrid DBAs."

- (2) A "CFA" is a Conditional Fee Agreement. It is defined in Appendix 1 as:

"an agreement pursuant to which a Lawyer agrees with client to be paid a success fee in the event of the client's claim succeeding, where the success fee is not calculated as a proportion of the amount awarded to or recovered by the client".⁶

³ I.e. a CFA, as defined above.

⁴ In some literature, "contingency fee" is given a wide meaning and includes any type of calculation on a "no win, no fee" basis. However, in other contexts, "contingency fee" is taken to mean "percentage fee", whereby the lawyer's fee is calculated as a percentage of the amount awarded by the court (also known as a DBA).

⁵ A person who is qualified to practise the law of any jurisdiction, including Hong Kong. For the purposes of this paper, "Lawyer" includes (but is not limited to) Hong Kong barristers, solicitors and Registered foreign lawyers.

⁶ CFAs as defined in Appendix 1 include arrangements where: (a) the Lawyer charges no fee during the course of the Proceedings, and is paid only the success fee if the client's case succeeds (also known as a

- (3) A “DBA” is a Damages-based Agreement. It is defined in Appendix 1 as:

“an agreement between a Lawyer and client whereby the Lawyer receives payment only if the client is successful, and where the payment is calculated by reference to the outcome of the Proceedings, for example as a percentage of the sum awarded or recovered. Also known as a “contingency fee”, “percentage fee”, or “no win, no fee” arrangement”.

- (4) A “DBA Payment” is a damages-based Agreement Payment. This is defined by Appendix 1 as:

“The part of the financial benefit obtained in respect of the outcome of the claim or Proceedings that the client agrees to pay the Lawyer in accordance with a DBA or a Hybrid DBA.”

It is also known as a “damages-based fee”.

- (5) A “Hybrid DBA” is a Hybrid Damages-based Agreement. This is defined in Appendix 1 as:

“an agreement between a Lawyer and client whereby the Lawyer receives both fees for legal services rendered (typically at a discounted hourly rate) and a payment that is calculated by reference to the outcome of the Proceedings, for example as a percentage of the sum awarded or recovered if the client is successful. It is also known as a “no win, low fee” arrangement.”

Form of Safeguards

17. As outlined earlier, the definition of “Lawyer” in Appendix 1 is: “A person who is qualified to practise the law of any jurisdiction, including Hong Kong. For the purposes of the [HKLRC Consultation] Paper, “Lawyer” includes (but is not limited to) Hong Kong barristers, solicitors and Registered foreign lawyers.”
18. Parties are regularly represented in international arbitration taking place in Hong Kong by lawyers from other jurisdictions who are neither admitted in Hong Kong nor registered as foreign lawyers and hence will not be bound by Hong Kong’s regulatory framework. For example, such lawyers may:
- (1) practise in jurisdictions where professional conduct rules do not require the same high level protection of their clients required of Hong Kong lawyers and Registered Foreign lawyers; and/or
 - (2) be unregulated, for example, by providing legal services on the internet.
19. Accordingly the HKBA suggests that the HKLRC’s Final Report and any draft legislation should clarify what is meant by “qualified to practise in the law of any jurisdiction”. For example, does this term extend to a lawyer who does not hold a current practicing certificate (or its equivalent) although he or she is eligible to hold one?
20. The HKBA also suggests that arbitrations involving personal injuries should be excluded from the scope of any law reform to permit ORFS. By contrast to employment compensation cases which the HKCFA held are not arbitrable (see *Aquito Lima Buton v. Rainbow Joy*

“no win, no fee” agreement); or (b) the Lawyer charges a fee during the course of the Proceedings, either at the usual rate or at a discounted rate, plus the success fee if the client’s case succeeds (also known as a “no win, low fee” agreement).

Shipping Ltd Inc (2008) 11 HKCFAR 464), personal injuries cases appear to be arbitrable. In the early 2000's there was a serious concern in the Hong Kong legal profession about the work of recovery agents in personal injury cases being charged on a contingency fees basis. Indeed, the first convicted case against a solicitor, *HKSAR v Cheung Oi-ping and Winnie Lo* (DCCC No. 610 of 2008; 25 June 2009) for champerty and maintenance was in the personal injuries context content (although their conviction was later quashed by the HKCFA in FACC No. 2 of 2011 on 30 January 2012).

21. The HKBA suggests that it is in the public interest that safeguards for financial and ethical matters be applied to provision of funding by Lawyers that are similar in nature to those covered by Hong Kong's *Code of Practice for Third Party Funding of Arbitration* (the "**Code of Practice**"), including addressing the following:
- (1) Pre-contractual negotiations, making and performance of any funding agreement between the Lawyer and a funded party (including a potential funded party) for the Lawyer's funding of arbitration commenced or entered into on or after the date of commencement of the relevant law reform.
 - (2) The standards and practices with which Lawyers funding a client in an Arbitration should comply, including such matters as the:
 - (a) lawyers' responsibility for associated firms and co-counsel;
 - (b) promotional materials;
 - (c) the terms of the funding agreement, including the obligation of a Lawyer to provide a Hong Kong address for service in the funding agreement, subject to the mode of service agreed upon by the parties; and
 - (d) need for the funding agreement to set out and explain clearly in the funding agreement the key features, risks and terms of the proposed funding including as to:
 - (i) The scope of work covered (e.g. pre commencement of arbitration, representation in arbitration (claims, defences, setoffs and counterclaims) and emergency arbitration, ancillary litigation, recognition and enforcement proceedings, mediation).
 - (ii) The "*financial benefit*" or "*success*" to which the funding agreement relates and which triggers any entitlement to the Lawyer.
 - (iii) The amount to which the Lawyer will be entitled to payment in all circumstances, including whether or not the client receives any financial benefit, or succeeds and the formula for calculating this.
 - (iv) The approved forms of payment, including whether crypto-currencies or digital currencies are permissible, and the approved modes of transmission of payment.
22. The HKBA suggests that as is provided for in the Code of Practice, similar areas to those provided for in section 98Q of the *Arbitration Ordinance* concerning third party funding of arbitration, should be addressed in a Code of Practice for Lawyers Funding Arbitration (the "*Proposed Lawyers Funding Code*") including:

- (1) The Lawyer must take reasonable steps to ensure that the funded party receives independent legal advice on the terms of the funding agreement before signing it;
 - (2) Providing an address for Service of the Lawyer in Hong Kong subject to such mode of service as may be agreed with the funded party;
 - (3) Management of conflicts of interest;
 - (4) Confidentiality and Legal Professional Privilege;
 - (5) Mandatory disclosure of the Lawyers funding;
 - (6) Whether the Lawyer is liable for adverse costs, premiums for costs insurance, to provide security for costs and to meet any other financial liability;
 - (7) The grounds for termination of the Lawyer's funding;
 - (8) Dispute Procedure regarding the funding agreement;
 - (9) Complaints procedure;
 - (10) Submission by the Lawyer of Annual Returns to a designated body as to any complaints received and any adverse findings against it;
 - (11) The obligation of a funder to respond to the designated body's requests for clarification.
23. In addition the following matters should be addressed:
- (1) The relationship of third party funding to Lawyer funding;
 - (2) That the "*cab rank rules*" applicable to barristers does not apply where the barrister is being requested to agree to a ORFS; and
 - (3) Provision for a "*cooling off*" period after client signing an agreement, for example 7 days.
24. The HKBA suggests the following as to implementation of the safeguards outlined in paragraphs 19 to 23 above:
- (1) The applicable Hong Kong professional conduct rules be amended to ensure that all relevant safeguards have been adopted, so that a Lawyer practicing as a Hong Kong solicitor or barrister or as a registered foreign lawyer (each a "**Hong Kong Lawyer**") is bound by them.
 - (2) The relevant legislation implementing reform provide for these safeguards.
 - (3) The Proposed Lawyers Funding Code be issued that applies to any Lawyer who is not a Hong Kong Lawyer.
 - (4) A designated body be established to monitor the compliance with them by Lawyers who enter ORFS agreements.

The Cab Rank Rule

25. A fundamental characteristic of serving as a barrister is that the barrister is bound by the "cab-rank" rule. In Hong Kong, pursuant to Article 6.1 of the HKBA's Code of Conduct, the cab rank rule requires a barrister to:

"accept any brief to appear before a court or instruction to provide any other legal services in a field in which the barrister practises or professes to practise if

- (a) *the brief or instruction is within the barrister's capacity, skill and experience;*
- (b) *the barrister would be available to prepare and appear or otherwise work when the brief or instruction would require him to do so, and is not already committed to other engagements which may, as a real possibility, prevent him from being able to advance a client's interests to the best of his skill and diligence;*
- (c) *the fee offered on the brief is proper; [13] and*
- (d) *the barrister is not obliged or permitted to refuse the brief or instruction under paragraphs 6.2 to 6.7;*

and must do so irrespective of

- (i) *the nature of the case;*
- (ii) *the party on whose behalf he is instructed; and*
- (iii) *any belief or opinion which he may have formed as to the character, reputation, cause, conduct, guilt or innocence of that person."*

26. The Consultation Paper observed that the cab rank rule is inconsistent with CFAs given that CFAs "will require barristers to decide whether to take risks in the hope of reward", which would depend "precisely upon their views of their clients' prospects of success".⁷ As also observed in the Consultation Paper, The Bar Standards Board Handbook of the England and Wales Bar Association provides that a barrister may decline instructions if such "instructions are on the basis that [they would] do the work under a conditional fee agreement or damages based agreement". (the "BSBH Exception").⁸

27. The HKBA agrees with the HKLCR Subcommittee that:

" a lawyer's duty not to place himself or herself in a position where their duties and interests may conflict is a core duty of loyalty and that the fiduciary nature of this relationship does not, and should not, change by mere reason of the fact that the Lawyer is being remunerated under an ORFS."

28. However, the perception of a conflict may arise if a barrister receives an ORFS and hence has a pecuniary interest in the outcome of the Arbitration. Hence the HKBA considers the HKBA's Code of Conduct would need to be revised to address the issue of conflicts. If ORFSs for Arbitration are introduced in Hong Kong the HKBA considers that the Code of

⁷ Peter Kunzlik, "Conditional Fees: The Ethical and Organisational Impact on the Bar" (1999) 62 MLR 850, at 862.

⁸ Bar Standards Board of England and Wales, *The Bar Standards Board Handbook* (2020), version 4.5, at Guidance gC91.

Conduct will need to be revised, for example, by including a provision similar to the BSBH Exception.

Other General Comments

29. The HKBA suggests that other issues to be considered include:

- (1) Whether the provisions in the *Arbitration Ordinance* for award of costs (section 74) and taxation of costs (section 75) need amendment to accommodate ORFS; and
- (2) Whether new forms of payment (e.g. crypto-currency) are permissible and if so, how much payments should be made and recorded: see paragraph 21(2)(d)(iv) above.

Summary of the HKBA's Comments on Each Recommendation

30. The HKBA's comments as to each of the HKLRC Subcommittee's recommendations are set out below:

	CFAs	
	<p><u>Recommendation 1</u></p> <p>The Sub-committee recommends that prohibitions on the use of CFAs in Arbitration by Lawyers should be lifted, so that Lawyers may choose to enter into CFAs for Arbitration. (Paras 5.1-5.5)</p>	The HKBA supports Recommendation 1 with appropriate safeguards – please see paragraphs 19 - 23 above.
	<p><u>Recommendation 2</u></p> <p>Where a CFA is in place, the Sub-committee recommends that any Success Fee and ATE Insurance premium agreed by the claimant with its Lawyers and insurers respectively should not be recoverable from the respondent.</p> <p>(Paras 5.6-5.13)</p>	The HKBA supports Recommendation 2.
	<p><u>Recommendation 3</u></p> <p>Where a CFA is in place, the Sub-committee recommends that there should be a cap on the Success Fee which is expressed as a percentage of normal or "benchmark" costs. The Sub-committee invites proposals on what an appropriate cap should be, up to a maximum of 100%.</p> <p>The Sub-committee also invites proposals on whether barristers should be subject to the same, or a different, cap and, if different, what that cap should be, up to a maximum of 100%. (Paras 5.14-5.17)</p>	<p>As to Recommendation 3, the HKBA suggests that where a CFA is in place, there should be a cap on the Success Fee which is expressed as a percentage of normal or "benchmark" costs, being the costs charged by the Lawyer whether as on hourly rate or a fixed sum. The HKBA suggests that an appropriate cap should be up to a maximum of 50 %.</p> <p>A barrister should be subject to the same cap as other Lawyers.</p>
	<p style="text-align: center;">DBAs</p> <p><u>Recommendation 4</u></p> <p>The Sub-committee recommends that prohibitions on the use by Lawyers of DBAs in Arbitration should be lifted, so that Lawyers may use DBAs for Arbitration. (Paras 5.18-5.24)</p>	The HKBA supports Recommendation 4.
	<p><u>Recommendation 5</u></p>	The HKBA supports

	<p>Where a DBA is in place, the Sub-committee recommends that any ATE Insurance premium agreed by the claimant with its insurers should not be recoverable from the respondent. (Para 5.25)</p>	<p>Recommendation 5.</p>
	<p><u>Recommendation 6</u></p> <p>The Sub-committee invites submissions on whether the Ontario model or the Success fee model should apply to DBAs.</p> <p>It is the Sub-committee's preliminary view that the 2019 DBA Reform Project's recommendation to move to a Success fee model should be followed.</p> <p>(Paras 5.26-5.30)</p>	<p>With respect to Recommendation 6 the HKBA proposes that initially the Ontario model should generally apply which requires that the DBA payment includes recoverable costs to prevent overcompensation of Lawyers.</p> <p>If the Success Fee model is applied, a reduced cap should apply, once again to prevent overcompensation of Lawyers.</p>
	<p><u>Recommendation 7</u></p> <p>The Sub-committee recommends that there should be a cap on the DBA Payment, which should be expressed as a percentage of the "financial benefit" or "compensation" received by the client. The cap should be fixed after consultation.</p> <p>The Sub-committee is of the view that there is scope for capping the maximum DBA Payment at less than the 50% cap currently adopted in England and Wales for commercial claims, particularly if the Success fee model is adopted, and that an appropriate range for consultation is 30% to 50%.</p> <p>(Paras 5.31-5.35)</p>	<p>The HKBA agrees that there should be a cap on the DBA Payment, which should be expressed as a percentage of the "financial benefit" or "compensation" received by the client. The cap should be fixed after consultation with the client.</p> <p>The cap on the DBA Payment, should be expressed as a percentage of the "financial benefit" or "compensation" received by the client.</p> <p>The HKBA considers that the cap should be:</p> <p>(1) 40% if the Ontario Model is adopted.</p> <p>(2) 30% if the Success Fee Model is adopted.</p>
	<p><u>Recommendation 8</u></p> <p>The Sub-committee recommends that a CFA, DBA, or Hybrid DBA should specify whether, and if so in what circumstances:</p> <p>(a) a Lawyer or client is entitled to terminate the fee agreement prior to the conclusion of Arbitration; and if so</p>	<p>The HKBA agrees with Recommendation 8.</p>

	<p>(b) any alternative basis (for example, hourly rates) on which the client shall pay the Lawyer in the event of such termination. (Paras 5.36-5.43)</p>	
	<p><u>Recommendation 9</u></p> <p>(1) The Sub-committee recommends that clients should be able to agree, on a case by case basis, whether:</p> <p style="padding-left: 40px;">(a) the DBA Payment (and thus the DBA Payment cap) includes barristers' fees; or</p> <p style="padding-left: 40px;">(b) barristers' fees would be charged as a separate disbursement outside the DBA Payment.</p> <p>(2) To the extent that barristers can be, and are, engaged directly, this could also be arranged via a separate DBA between client and barrister. In such circumstances, a solicitor's DBA Payment plus a barrister's DBA Payment in relation to the same claim or Proceedings should not exceed the prescribed DBA Payment cap. (Paras 5.44-5.48)</p>	<p>The HKBA agrees with Recommendation 9.</p>
	<p>Hybrid DBAs</p> <p><u>Recommendation 10</u></p> <p>The Sub-committee recommends that Hybrid DBAs be permitted.</p> <p>In the event that the claim is unsuccessful (such that no financial benefit is obtained), the Sub-committee invites submissions as to:</p> <p style="padding-left: 40px;">(a) whether the Lawyer should be permitted to retain only a proportion of the costs incurred in pursuing the unsuccessful claim;</p> <p style="padding-left: 40px;">(b) if the answer to sub-paragraph (a) is "yes", what an appropriate cap should be in these circumstances; and</p> <p style="padding-left: 40px;">(c) if the answer to sub-paragraph (a) is "yes", whether the relevant</p>	<p>As to Recommendation 10 the HKBA agrees that Hybrid DBAs should be permitted.</p> <p>In the event that the claim is unsuccessful (such that no financial benefit is obtained), the HKBA considers that:</p> <p style="padding-left: 40px;">(a) The Lawyer should be permitted to retain only a proportion of the costs incurred in pursuing the unsuccessful claim;</p> <p style="padding-left: 40px;">(b) An appropriate cap would be 30% of such costs in these circumstances; and;</p> <p style="padding-left: 40px;">(c) The relevant regulations should provide that, if the DBA Payment is less than the capped amount of irrecoverable costs, the Lawyer is entitled to retain</p>

	<p>regulations should provide that, if the DBA Payment is less than the capped amount of irrecoverable costs, the Lawyer is entitled to retain the capped amount of irrecoverable costs instead of the DBA Payment. (Paras 5.49-5.55)</p>	<p>the capped amount of irrecoverable costs instead of the DBA Payment.</p>
	<p>Legislation</p> <p><u>Recommendation 11</u></p> <p>The Sub-committee recommends that appropriate amendments in clear and simple terms be made to:</p> <ul style="list-style-type: none"> (a) the Arbitration Ordinance; (b) the Legal Practitioners Ordinance; (c) The Hong Kong Solicitors' Guide to Professional Conduct; (d) the HKBA Code of Conduct; and (e) any other applicable legislation or regulation <p>to provide (as applicable) that CFAs and/or DBAs and/or Hybrid DBAs are permitted under Hong Kong law for Arbitration. (Paras 5.56-5.57)</p> <p><u>Recommendation 12</u></p> <p>The Sub-committee recommends that the more detailed regulatory framework should be set out in subsidiary legislation which, like the legislative amendments referred to in Recommendation 11, should be simple and clear to avoid frivolous technical challenges. Client-care provisions should also be set out in professional codes of conduct so that trivial breaches can be dealt with expeditiously by the professional bodies.</p> <p>(Paras 5.58-5.61)</p>	<p>The HKBA agrees with Recommendations 11 and 12.</p> <p>Please see paragraphs 17 to 29 above.</p>
	<p>Further Consultation</p> <p><u>Recommendation 13</u></p> <p>The Sub-committee invites submissions</p>	<p>Please see paragraphs 17 to 29 above.</p>

	<p>on:</p> <ul style="list-style-type: none">(a) Whether and how the professional codes of conduct and/or regulations should address what other safeguards are needed. For example to:<ul style="list-style-type: none">(i) be clear in what circumstances a Lawyer's fees and expenses, or part of them, will be payable;(ii) include a requirement under professional conduct obligations to give the client all relevant information relating to the ORFS that is being entered into, and to provide that information in a clear and accessible form;(iii) require a claimant using CFAs or DBAs or Hybrid DBAs to notify the respondent and Tribunal of this fact;(iv) inform clients of their right to take independent legal advice; and(v) be subject to a "cooling-off" period.(b) What should be the relevant method and criteria for fixing "Success Fees" in CFAs.(c) Whether personal injury claims should be treated differently from other claims in Arbitration, by:<ul style="list-style-type: none">(i) imposing a lower cap on any Success Fee or DBA Payment in respect of a personal injury claim that is submitted to Arbitration; or prohibiting Lawyers from entering into ORFSs in respect of personal injury claims that are submitted to Arbitration.(d) Whether any additional category/ies of claim should be treated differently from other claims that are submitted to Arbitration if ORFSs are	
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	<p>introduced.</p> <p>(e) Whether a DBA Payment may be payable (depending on the terms agreed between Lawyer and client) wherever a financial benefit is received by the client, based on the value of that financial benefit.</p> <p>(f) Whether the relevant financial benefit may be a debt owed to a client, e.g. under a judgment or settlement, rather than money or property actually received.</p> <p>(g) Whether provision should be made for cases in which the result will not involve monetary damages by providing a definition of money or money's worth that includes consideration reducible to a monetary value.</p> <p>(h) Whether respondents should be permitted to use DBAs, e.g. to provide for a DBA Payment in the event the respondent is held liable for less than the amount claimed or less than an agreed threshold.</p> <p>(Paras 5.62-5.74)</p>	
	<p><u>Recommendation 14</u></p> <p>The Sub-committee recommends that Lawyers and legal practices should be permitted to charge separately for work done in relation to separate but related aspects of the Arbitration, such as counterclaims, enforcement actions and appeals. (Para 5.75)</p>	<p>The HKBA agrees with Recommendation 14.</p>

31. The HKBA would be happy to expand upon the comments in this Note if these will assist. It would also appreciate an opportunity to comment on any draft legislation that may be prepared to permit ORFS.

Dated 6 July 2021.

Kim Rooney (Chair), David Fong, Norman Nip SC,
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Hong Kong Bar Association.

Appendix 1

Defined Terms Used in the Consultation Paper

Abbreviation	Definition
2005 LRC Consultation Paper	Consultation paper published by the Conditional Fees Sub-committee of the LRC in September 2005.
2007 LRC Report	Report published by the Conditional Fees Sub-committee of the LRC in July 2007.
2016 TPF Report	Report published by the TPF Sub-committee in October 2016.
2019 DBA Reform Project	An independent review of the 2013 DBA Regulations (as defined in paragraph 3.42 below) in England and Wales by Professor Rachael Mulheron and Mr Nicholas Bacon, QC in 2019.
Arbitration	Any arbitration, whether or not administered by a permanent arbitral institution, in or outside Hong Kong, including the following proceedings under the Arbitration Ordinance: (i) court proceedings; (ii) proceedings before an emergency arbitrator; and (iii) mediation proceedings.
Arbitration Ordinance	Arbitration Ordinance (Cap 609) of Hong Kong.
ATE Insurance	After-the-Event Insurance. A contract of insurance between client and insurer, taken out after the event giving rise to the Proceedings, that provides reimbursement for a proportion of the client's fees, adverse costs, and disbursements in the event that the client's case is unsuccessful.
CFA	Conditional Fee Agreement. An agreement pursuant to which a Lawyer agrees with client to be paid a success fee in the event of the client's claim succeeding, where the success fee is not calculated as a proportion of the amount awarded to or recovered by the client . CFAs include arrangements where: (a) the Lawyer charges no fee during the course of the Proceedings, and is paid only the success fee if the client's case succeeds (also known as a " no win, no fee " agreement); or (b) the Lawyer charges a fee during the course of the Proceedings, either at the usual rate or at a discounted rate, plus the success fee if the client's case succeeds (also known as a " no win, low fee " agreement).
CJC Report	<i>The Damages-Based Agreements Reform Project: Drafting and Policy Issues</i> , published in 2015 by the Civil Justice Council of England and Wales.

Abbreviation	Definition
Consultation Paper	The Consultation Paper on Outcome Related Fee Structures for Arbitration issued by the Sub-committee.
DBA	<p>Damages-based Agreement.</p> <p>An agreement between a Lawyer and client whereby the Lawyer receives payment only if the client is successful, and where the payment is calculated by reference to the outcome of the Proceedings, for example as a percentage of the sum awarded or recovered.</p> <p>Also known as a "contingency fee", "percentage fee", or "no win, no fee" arrangement.</p>
DBA Payment	<p>Damages-based Agreement Payment.</p> <p>The part of the financial benefit obtained in respect of the outcome of the claim or Proceedings that the client agrees to pay the Lawyer in accordance with a DBA or a Hybrid DBA.</p> <p>Also known as a "damages-based fee".</p>
Hong Kong	Hong Kong Special Administrative Region of the PRC.
Hybrid DBA	<p>Hybrid Damages-based Agreement.</p> <p>An agreement between a Lawyer and client whereby the Lawyer receives both fees for legal services rendered (typically at a discounted hourly rate) and a payment that is calculated by reference to the outcome of the Proceedings, for example as a percentage of the sum awarded or recovered if the client is successful.</p> <p>Also known as a "no win, low fee" arrangement.</p>
Jackson Report	<i>Review of Civil Litigation Costs: Final Report</i> by the Right Honourable Lord Justice Jackson dated December 2009.
Lawyer	A person who is qualified to practise the law of any jurisdiction, including Hong Kong. For the purposes of this paper, "Lawyer" includes (but is not limited to) Hong Kong barristers, solicitors and Registered foreign lawyers.
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012 of the United Kingdom.
Legal Practitioners Ordinance	Legal Practitioners Ordinance (Cap 159) of Hong Kong.
Lord Justice Jackson	Sir Rupert Jackson, Lord Justice of Appeal of England and Wales from 2008 to 2018.
LRC	The Law Reform Commission of Hong Kong.
Mainland China	The PRC (for the purposes of this Consultation Paper) excluding Hong Kong, Macao Special Administrative Region and Taiwan.

Abbreviation	Definition
Ontario model	The damages-based fee regime which operates in Ontario, Canada, as described in paragraph 3.45 of the Consultation Paper.
ORFS	<p>"Outcome Related Fee Structure", an agreement between a Lawyer and client, whereby the Lawyer advises on contentious Proceedings and the Lawyer receives a financial benefit if those Proceedings are successful within the meaning of that agreement.</p> <p>Also known as a "success fee agreement".</p> <p>For the purposes of this Consultation Paper, "ORFS" includes:</p> <ul style="list-style-type: none"> (a) CFAs; (b) DBAs; and (c) Hybrid DBAs.
PRC	The People's Republic of China.
Proceedings	Litigation or arbitration proceedings.
Registered foreign lawyer	A person registered as a foreign lawyer under Part IIIA of the Legal Practitioners Ordinance.
Sub-committee	Outcome Related Fee Structures for Arbitration Sub-committee of the LRC.
Success Fee	<p>Additional fee in respect of the claim or Proceedings that the client agrees to pay the Lawyer in accordance with a CFA.</p> <p>The Success Fee can be an agreed flat fee, or calculated as a percentage "uplift" on the fee charged during the course of the Proceedings.</p>
Success fee model	The damages-based fee regime proposed in the 2019 DBA Reform Project in England and Wales, as described in paragraph 4.86 of the Consultation Paper.
Third Party Funder	A provider of Third Party Funding.
Third Party Funder Hybrid DBA	An agreement between a Lawyer and a Third Party Funder, by which the Lawyer agrees to share his DBA Payment with the Third Party Funder in return for the Third Party Funder paying part of the time and other costs of the claim to the Lawyer as the claim progresses.
Third Party Funding	<p>The provision of funding for an Arbitration within the meaning of section 98G of the Arbitration Ordinance, i.e.:</p> <ul style="list-style-type: none"> (a) under a funding agreement; (b) to a funded party; (c) by a Third Party Funder; and (d) in return for the Third Party Funder receiving a financial benefit only if the Arbitration is successful within the meaning of the

Abbreviation	Definition
	funding agreement in circumstances where the Third Party Funder has no other interest in the Arbitration.
TPF Sub-committee	Third Party Funding for Arbitration Sub-committee of the LRC.
Tribunal	An arbitral tribunal, consisting of one or three arbitrator(s), established by the agreement of the parties to finally resolve disputes or differences by arbitration.