



**ARBITRATION AND LEGAL PRACTITIONERS LEGISLATION  
(OUTCOME RELATED FEE STRUCTURES FOR ARBITRATION)  
(AMENDMENT) BILL 2022**

**SUBMISSION**

**INTRODUCTION**

1. In December 2020, the Outcome Related Fee Structures (“**ORFS**”) for Arbitration Sub-committee (“**Sub-committee**”) of the Law Reform Commission of Hong Kong (“**LRC**”) published a consultation paper on ORFS for Arbitration. The Law Society of Hong Kong (“**Law Society**”) in March 2021 provided a submission in response. The Law Reform Commission in December 2021 published a report on the above consultation. In a summary, the LRC recommended that the law in Hong Kong should be amended to lift the prohibitions on the use of ORFS by lawyers in arbitration taking place in and outside Hong Kong.
2. The Government agreed to the above recommendations, and issued the *Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures) (Amendment) Bill 2022* (“**Amendment Bill**”) on 25 March 2022. The Amendment Bill was introduced to the Legislative Council on 30 March 2022.
3. The Law Society notes that that the main object of the Amendment 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”.*<sup>1</sup>

4. At a meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council on 28 March 2022, the Department of Justice repeated the above. It also advised the Panel that regulatory framework, including appropriate safeguards, of ORFS for arbitration in Hong Kong, will be put out in subsidiary legislation in the next stage of the legislative process<sup>2</sup>.
5. There is therefore a “two-stage” legislation exercise for the ORFS regime. The issuing of the Amendment Bill is “stage one” and the drafting and canvassing of the subsidiary legislation is “stage two” of the exercise.

## **GENERAL COMMENTS**

6. We agree to the Government’s two-stage legislative approach, viz. (a) appropriate amendments in clear and simple terms be made to the relevant ordinances; and (b) detailed regulatory framework be put in place in subsidiary legislation. As the framework is to be set out only in subsidiary legislation, this approach can expedite the overall legislative process and help the HKSAR Government to more easily and in more responsive manner update and amend the regulatory framework of ORFS for arbitration in the future.
7. The above is subject to a caveat that the preparation and completion of the legislation exercise for the subsidiary legislation i.e. “stage-two” of the exercise, must be proceeded with and be concluded expeditiously.
8. Our specific comments on the Amendment Bill are set out in the following paragraphs.

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<sup>1</sup> See the Explanatory Memorandum

<sup>2</sup> See the various Government Responses to the LRC Report, as set out in the Annex to the LegCo Paper [LC Paper No. CB\(4\)192/2022\(02\)](#) dated March 2022

## SECTION 1:

### PROPOSED AMENDMENTS TO THE AMENDMENT ORDINANCE

9. In respect of those proposed amendments to the Arbitration Ordinance, generally speaking, we consider the Amendment Bill achieves the object as set out in the Explanatory Memorandum of the Bill and is capable of giving effects to the recommendations by the LRC and, for that, receives our support.
10. There are however a few issues in the Amendment Bill which require closer attention.
  - (a) *Lawyers who have entered into ORFS shall not be held liable for adverse costs*
11. Third-party funding for arbitration is allowed since 1 February 2019, where the place of arbitration is Hong Kong or, if outside Hong Kong, for funding of services provided in Hong Kong. This follows from the *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*.
12. Under the Amendment Bill, a lawyer taking on an arbitration case under ORFS can be considered as providing “funding” to that party (by acceding to fees and opting for conditional fee agreements, damages-based agreements or hybrid damages-based agreements). There are certain similarities between third party funding and ORFS, and therefore it is not impossible that a lawyer who has entered into an ORFS would be construed as a third-party funder. As third-party funders could be held liable for costs made against them under certain circumstances (see for example the case of *Essar v Norscot* [2016] EWHC 2361 (Comm))<sup>3</sup>, the lawyer taking on ORFS arrangement could potentially attract costs liability. The costs exposure in some cases could be dire.
13. The above (or a theoretical possibility of the above happening) clearly discourages lawyers from taking on ORFS for arbitration. That runs contrary to the stated policy intentions i.e. to promote ORFS to Hong

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<sup>3</sup> See also the paragraphs 3.14 – 3.20 of the LRC Report.

Kong for arbitration, and to strengthen the status of Hong Kong as an international arbitration hub.

14. We note Section 98ZB(3) of the Amendment Bill provides that

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

This is not sufficient to address the above concern.

15. To remove any lingering doubts and uncertainty arising from the above, we suggest clause(s) be added to the Amendment Bill to further amend the Arbitration Ordinance, to expressly and clearly state that lawyers who have entered into ORFS for arbitration shall *not* be construed as third-party funders for arbitration; and in any event the lawyer taking on ORFS for arbitration should not be held liable for any adverse cost made against his or her clients.

**(b) Award of costs by arbitral tribunal**

16. Section 98ZU of the Amendment Bill provides the following (emphasis supplied)

***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.*

17. Under the above provisions, an arbitral tribunal may not order costs set out in section 98ZU(3) of the Amendment Bill be paid to a party to an arbitration if an ORFS agreement has been entered into, but in “*exceptional circumstances*” could do so. We have no objection to this, as that is fair and that also follows the reasoning in the LRC Report (see paragraphs 3.11 and 3.12 of the LRC Report). However, the Amendment

Bill is silent on what “exceptional circumstances” are or how “exceptional” the circumstances need to be in order to qualify for this proviso.

18. We take the view that some species, examples or guidance on the scope of “exceptional circumstances” should be given (either in the Amendment Bill or in the subsidiary legislation) as to what constitutes “exceptional circumstances”. This assists the arbitral tribunal with consistency in applying the proviso. It would also be helpful to the parties, as the award is not open to the public and there is generally no appeal to the said award.

(c) ***Disclosure of ORFS agreement for arbitration***

19. Related to the above is the disclosure of an ORFS agreement to the parties. Section 98ZQ(1) of the Amendment Bill provides the following

***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.*
20. The ORFS agreement itself should not be disclosed in the subject arbitration to any parties, save and except for the argument on costs in exceptional circumstances. This is important because the agreement itself may give the opposite party and/or the arbitrator hints and indications on the strength and merits of a party’s case and any arrangement for insurance.
21. For avoidance of doubts and also for the sake of protection of confidentiality of an ORFS agreement between a lawyer and his/her client, we consider that the HKSAR Government must make it unambiguously clear that under no circumstances could the parties in the subject arbitration disclose copies of the ORFS agreements or information or details of the agreement even upon request by the arbitrators, save and except for the argument on costs in exceptional circumstances.

**(d) *Implementation of ORFS for arbitration***

22. Singapore passed her *Legal Profession (Amendment) Act 2022* on 12 January 2022. The Act which was gazetted on 25 February 2022 approves conditional fee arrangement in international arbitration and domestic arbitration, as well as certain proceedings in the Singapore International Commercial Court. Our Amendment Bill does not serve the same purpose as the Singaporean Act, but insofar as ORFS is concerned, we note that the following matters, which are set out in the Singaporean Act, is absent from our Amendment Bill:

- (a) Enforcement of conditional fee agreement;
  - (b) Death or incapacity of solicitor of foreign lawyer or winding up or dissolution of law practice entity after conditional fee agreement made; and
  - (c) Change of solicitor, foreign lawyer or law practice entity after conditional fee agreement.
23. We are not at this stage advocating the same provisions in the Singaporean Act to appear in our Amendment Bill. We are however asking the Government to consider the above three issues or scenarios, and address these in our ORFS regime, in order that, for example when a party is to choose between the two jurisdictions, the party could know for certainty what would happen in any one of the above three situations if that party is to have the ORFS agreement entered into in Hong Kong.

**(e) *Personal injuries claims***

24. Section 98ZL of the Amendment Bill excludes personal injuries claim from the ORFS regime. This is welcomed and *must be included* in the Amendment Bill.

25. However, the definition of “personal injuries claims” in the Amendment Bill is too narrow. It has not included e.g. awards made under the Employees’ Compensation Ordinance (Cap. 282). These awards are “compensation (補償)” and not “damages (賠償)”. On the other hand, common law claims and Employees’ Compensation claims may not be the only forms of Personal Injuries claims, e.g. there are claims arising from

- (a) Pneumoconiosis and Mesothelioma (Compensation) Ordinance, Cap. 360;
  - (b) Occupational Deafness (Compensation) Ordinance, Cap. 469.
26. The draftsman of Section 98ZL apparently has taken the definition directly from the wordings contained in Order 1, rule 4 of the Rules of the High Court. That is not wide enough for the purpose of an ORFS regime.
27. We suggest section 98ZL be amended as follows:

***“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)*** *include any disease ~~and any impairment of a person’s physical or mental condition;~~ impairment of a person’s physical or mental condition, and any resulting fatalities;*

***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,~~ monetary compensation or other forms of relief arising out of personal injuries.”*

***(f) Chinese term for the word “lawyer”***

28. Throughout the Amendment Bill, references are made to “lawyer”. For example, under the Amendment Bill, an ORFS agreement is a conditional fee agreement, a damages-based agreement or a hybrid damages-based agreement made between a client and a “lawyer” of the client (section 98ZB); the authorized body (as defined) may issue a code of practice for “lawyers” (section 98ZN).

29. The term “lawyer” is defined in the Amendment Bill in the following

**“98ZA. Interpretation**

*In this Part—*

*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;”*

30. In the Chinese version of the Amendment Bill, the definition of the term “律師” is as follows:

**“98ZA. 釋義**

*在本部中—*

*律師* (lawyer) 指—

- (a) *登記於根據《第159章》第29條所備存的大律師登記冊上的人；*
- (b) *登記於根據《第159章》第5條所備存的律師登記冊上的人；或*
- (c) *合資格從事香港以外的司法管轄區的法律執業的人，包括《第159章》第2(1)條所界定的外地律師；”*

31. We do not object to the concept of using a collective term “lawyer” to include solicitors, barristers and registered foreign lawyers for the purpose of the Amendment Bill.

32. We agree that the term “lawyer” is commonly understood to be a person who practises law. Using the collective term “lawyer” to cover solicitors, barristers and registered foreign lawyers who all practise law in accordance with the relevant statutes and professional rules is appropriate.

33. “律師” is the generic term in Chinese used commonly for a person who practises law.

34. Hence, we understand the basis for using the Chinese term “律師” for “lawyer”, as provided in section 98ZA in the Amendment Bill and we do not propose any change to the Amendment Bill.
35. However, the more fundamental issue that needs to be addressed in due course is the modernization of the Chinese translations for the different types of lawyers to ensure that each of the Chinese terms conveys to the public clearly the nature of work of each type of lawyers.
36. The current Chinese terms used in the Legal Practitioners Ordinance to describe the different types of lawyers must be reviewed holistically to avoid misleading and confusing the public about their work or the overall structure of the legal profession. As can be seen in section 98ZA of the Amendment Bill, the Chinese term for “lawyer” which covers solicitors, barristers and registered foreign lawyers overlaps with the Chinese term for “solicitor”.

## **SECTION 2: PROPOSED AMENDMENTS TO THE LEGAL PRACTITIONERS ORDINANCE**

37. We have no comment on the proposed amendments to the Legal Practitioners Ordinance as per clause 6 of the Bill.

## **CONCLUSION**

38. The Law Society firmly supports policy directives that enhance the competitiveness of lawyers of Hong Kong in arbitration. For arbitration, there must be a level playing field. As ORFS nowadays is one of the commonly accepted fee structures in international arbitration practice, ORFS must be made available to lawyers in Hong Kong and their clients for arbitration.
39. At the time of this Submission, we have not received any confirmation from the Department of Justice (either at the meeting of the Panel on Administration of Justice and Legal Services of the Legislative Council on 28 March 2022, or otherwise) on the time as to when the subsidiary legislation for ORFS could be put out for consultation. The establishment of ORFS for arbitration for HKSAR *must* receive top priority and the

subsidiary legislation should be prepared for consultation *as soon as practicable*.

**The Law Society of Hong Kong**  
**26 April 2022**