

L.N. 213 of 2022

Arbitration (Outcome Related Fee Structures for Arbitration) Rules

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Arbitration (Outcome Related Fee Structures for Arbitration) Rules

(Made by the advisory body under section 98ZM of the Arbitration Ordinance (Cap. 609) in consultation with the Secretary for Justice and with the prior approval of the Chief Justice)

Part 1

Preliminary

1. Commencement

These Rules come into operation on 16 December 2022.

2. Interpretation

(1) In these Rules—

benchmark fee (基準收費), in relation to a matter, means the fee, which may or may not be expressed as an hourly rate, that the lawyer would have charged the client for the matter if no ORFS agreement had been made for the matter.

(2) The words and expressions used in these Rules and defined in Part 10B of the Ordinance have the same meaning as in that Part.

Part 2

General Conditions for ORFS Agreements

3. General conditions for ORFS agreements

For the purposes of section 98ZK(1)(a) of the Ordinance, the general conditions for an ORFS agreement are that—

- (a) the agreement—
 - (i) is in writing; and
 - (ii) is signed by the lawyer and the client; and
- (b) the agreement—
 - (i) states the matter to which the agreement relates, that is the arbitration or any part of it;
 - (ii) states in what circumstances the lawyer's fees and expenses, or any part of them, are payable;
 - (iii) states that the lawyer has informed the client of the right to seek independent legal advice before entering into the agreement;
 - (iv) states that during a period of not less than 7 days after the date of the making of the agreement, the client may terminate the agreement by written notice without incurring liability;
 - (v) states whether disbursements, including barristers' fees, are to be paid by the client irrespective of the outcome of the matter;
 - (vi) states the grounds on which the agreement may be terminated before the conclusion of the matter; and

- (vii) states the alternative basis, which may or may not be expressed as an hourly rate, on which the lawyer is to be paid by the client in the event of a termination under subparagraph (vi).

Part 3

Specific Conditions for ORFS Agreements

4. Specific conditions for conditional fee agreements

- (1) For the purposes of section 98ZK(1)(b) of the Ordinance, the specific conditions for a conditional fee agreement are that—
 - (a) the success fee payable by the client to the lawyer in the event of a successful outcome is expressed as a percentage of the benchmark fee;
 - (b) the uplift element does not exceed 100% of the benchmark fee; and
 - (c) the agreement—
 - (i) states the circumstances that constitute a successful outcome of the matter to which the agreement relates;
 - (ii) states the basis for calculating the success fee; and
 - (iii) states when the success fee becomes payable by the client to the lawyer.
- (2) In subrule (1)—

uplift element (提升元素) means the portion of the total fee payable by the client to the lawyer in the event of a successful outcome that exceeds the benchmark fee for the matter to which the agreement relates.

5. Specific conditions for damages-based agreements and hybrid damages-based agreements

For the purposes of section 98ZK(1)(b) of the Ordinance, the specific conditions for a damages-based agreement or hybrid damages-based agreement are that—

- (a) the DBA payment within the meaning of section 98ZD(a) of the Ordinance—
 - (i) is calculated by reference to the financial benefit that is obtained by the client in the matter to which the agreement relates;
 - (ii) does not exceed 50% of the financial benefit that is obtained by the client in the matter; and
 - (iii) is payable in addition to any recoverable lawyer's costs; and
- (b) the agreement—
 - (i) states the financial benefit to which the agreement relates;
 - (ii) states the basis for calculating the DBA payment;
 - (iii) states when the DBA payment becomes payable by the client to the lawyer; and
 - (iv) states whether—
 - (A) barrister's fees are to be regarded as part of the DBA payment; or
 - (B) the client is liable to pay barrister's fees in addition to the DBA payment.

6. **Additional specific conditions for hybrid damages-based agreements**

- (1) For the purposes of section 98ZK(1)(b) of the Ordinance, the additional specific conditions for a hybrid damages-based agreement are that the agreement—
 - (a) states the fee referred to in section 98ZE(b) of the Ordinance;
 - (b) states the benchmark fee;
 - (c) provides that in the event that no financial benefit is obtained by the client in the matter to which the agreement relates, the client is not required to pay to the lawyer more than 50% of the irrecoverable costs; and
 - (d) provides that in the event that the client obtains a financial benefit in the matter but the DBA payment is less than the capped amount—
 - (i) the lawyer may elect to retain the capped amount instead of the DBA payment; and
 - (ii) if the lawyer so elects—the capped amount instead of the DBA payment is to be payable by the client to the lawyer.
- (2) In this rule—

capped amount (上限款額), in relation to a matter to which a hybrid damages-based agreement relates, means the amount of the irrecoverable costs that would have been payable to the lawyer by the client under the agreement in the event described in subrule (1)(c);

irrecoverable costs (不可追討的訟費), in relation to a matter to which a hybrid damages-based agreement relates, means any portion of the benchmark fee that is not recoverable from any other party to the arbitration.

Part 4

Multiple Damages-based Agreements or Hybrid Damages-based Agreements

7. Multiple damages-based agreements or hybrid damages-based agreements

(1) If—

- (a) in relation to a client, 2 or more specified agreements subsist at any given time; and
- (b) the DBA payments under those specified agreements are calculated by reference to the same financial benefit,

the aggregate sum of the DBA payments to be paid by the client under those specified agreements must not exceed 50% of the financial benefit.

(2) Subrule (1) applies regardless of the terms and conditions under the specified agreements.

(3) In this rule—

specified agreement (指明協議) means a damages-based agreement or hybrid damages-based agreement.

Part 5

Provision of Information

8. Provision of information

- (1) Before a lawyer enters into an ORFS agreement with a client, the lawyer must ensure that—
 - (a) the client is provided with all of the information specified in subrule (2) in clear and accessible language; and
 - (b) the client signs and dates an acknowledgment that the client has received and understood the information mentioned in paragraph (a).
- (2) The information is—
 - (a) the nature and operation of the ORFS agreement, including the general conditions under Part 2, and the specific conditions under Part 3, that are applicable to the agreement;
 - (b) if the ORFS agreement is a damages-based agreement or hybrid damages-based agreement—the requirements under rule 7;
 - (c) a statement to the effect that the client has a right to seek independent legal advice before entering into the agreement; and
 - (d) a statement to the effect that the client—
 - (i) might not recover the costs specified in section 98ZU(3) of the Ordinance from other parties to the arbitration; and

- (ii) might be ordered by the arbitral tribunal to pay the costs of another party to the arbitration as described in section 98ZU(4) of the Ordinance.

Part 6

Termination of ORFS Agreements

9. Termination of ORFS agreements

- (1) Before the conclusion of the matter to which an ORFS agreement relates, any party to the agreement may terminate the agreement if the party reasonably believes that—
 - (a) the other party to the agreement has committed a material breach of the agreement; or
 - (b) that other party has behaved, or is behaving, unreasonably.
- (2) Subrule (1) applies subject to the terms and conditions of the ORFS agreement.

Approved this 7th day of November 2022.

Andrew CHEUNG
Chief Justice

Made this 7th day of November 2022.

Kathryn SANGER
Member,
advisory body

Briana YOUNG
Member,
advisory body

Dr. Benny LO
Member,
advisory body

Explanatory Note

The purposes of these Rules are to make provisions—

- (a) to specify the general conditions for ORFS agreements for arbitration for the purposes of section 98ZK(1)(a) of the Arbitration Ordinance (Cap. 609) (*AO*);
- (b) to specify the specific conditions for ORFS agreements for arbitration for the purposes of section 98ZK(1)(b) of the AO; and
- (c) to provide for situations in which there are multiple damages-based agreements or hybrid damages-based agreements with DBA payments calculated by reference to the same financial benefit, to provide for the provision of information about ORFS agreements to the client and to provide for the termination of ORFS agreements.

- 2. The Rules contain 6 Parts.
- 3. Part 1 provides for commencement (rule 1) and provides for the definition of *benchmark fee* and provides that the words and expressions used in the Rules and defined in Part 10B of the AO have the same meaning as in Part 10B of the AO (rule 2).
- 4. Parts 2 and 3 respectively provide for general conditions and specific conditions required for ORFS agreements for arbitration in order that the agreements are valid and enforceable under section 98ZK of the AO.
- 5. In order to meet the general conditions, in particular, an ORFS agreement for arbitration is required to state—

- (a) the matter to which the agreement relates (rule 3(b)(i));
- (b) that the lawyer has informed the client of the right to seek independent legal advice (rule 3(b)(iii)); and
- (c) that there is a cooling-off period of not less than 7 days during which the client may terminate the agreement (rule 3(b)(iv)).

6. In order to meet the specific conditions—

- (a) a conditional fee agreement is required, in particular—
 - (i) to provide that the uplift element must not exceed 100% of the benchmark fee (rule 4(1)(b)); and
 - (ii) to state the circumstances that constitute a successful outcome of the matter to which the agreement relates (rule 4(1)(c)(i));
- (b) a damages-based agreement or hybrid damages-based agreement is required, in particular—
 - (i) to provide that the DBA payment within the meaning of section 98ZD of the AO does not exceed 50% of the financial benefit that is obtained by the client in the matter to which the agreement relates (rule 5(a)(ii));
 - (ii) to provide that the DBA payment is payable in addition to any recoverable lawyer's costs (rule 5(a)(iii)); and
 - (iii) to state the financial benefit to which the agreement relates (rule 5(b)(i)); and
- (c) a hybrid damages-based agreement is also required to provide that—

- (i) in the event that no financial benefit is obtained by the client in the matter to which the agreement relates, the client is not required to pay to the lawyer more than 50% of the irrecoverable costs (rule 6(1)(c)); and
 - (ii) in the event that the client obtains a financial benefit in the matter but the DBA payment is less than the irrecoverable costs that would have been payable in the situation described in sub-subparagraph (i), the lawyer may elect to retain and be paid by the client such irrecoverable costs instead of the DBA payment (rule 6(1)(d)).
- 7. Part 4 provides for situations in which a client enters into multiple damages-based agreements or hybrid damages-based agreements under which the DBA payments are calculated by reference to the same financial benefit. In such situations, the sum of the DBA payments to be paid by the client under each of those agreements must not exceed 50% of the financial benefit (rule 7).
- 8. Part 5 provides for the information in relation to ORFS agreements that the lawyer must provide to the client in clear and accessible language, and requires the lawyer to ensure that the client signs and dates an acknowledgment that the client has received and understood such information (rule 8).
- 9. Part 6 provides for the termination of an ORFS agreement (rule 9).