

Annex 1

**Draft Amendments to Legal Practitioners Ordinance (Cap. 159) and
Arbitration Ordinance (Cap. 609)**

(The following draft provisions are possible amendments of the Legal Practitioners Ordinance (Cap. 159) and the Arbitration Ordinance (Cap. 609) and are included to assist in explaining the proposals in this report. They are not the final version for the legislative process if legislation were to be introduced to give effect to the proposals.)

Amendments to Legal Practitioners Ordinance (Cap. 159)

*(Note: For ease of reference, the amendments to the existing text of s. 64 of Cap. 159 is shown in **red**)*

64. General provisions as to remuneration

- (1) Nothing in section 58, 59, 60, 61 or 62 shall give validity to—
 - (a) any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or
 - (b) any agreement—
 - (i) that is not an ORFS agreement for arbitration within the meaning of Part 10B of the Arbitration Ordinance (Cap. 609); and
 - (ii) 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; or
 - (c) any disposition, contract, settlement, conveyance, delivery, dealing or transfer which is under the law relating to bankruptcy invalid against a trustee or creditor in any bankruptcy or voluntary arrangement with creditors within the meaning of the Bankruptcy Ordinance (Cap. 6).
(Amended 27 of 1998 s. 7)
- (2) A solicitor may take security from his client for his costs to be ascertained by taxation or otherwise.
- (3) Subject to the provisions of any rules of court, upon every taxation of costs with respect to any contentious business, the taxing officer may—
 - (a) allow interest at such rate and from such time as he thinks just on moneys disbursed by the solicitor for the client, and on moneys of the client in the hands of, and improperly retained by, the solicitor;
 - (b) in determining the remuneration of the solicitor, have regard to the skill, labour and responsibility involved in the business done by him, the general complexity of the matter and the amount or value of the matter in issue.

Amendments to Arbitration Ordinance (Cap. 609)

(Note: A new subsection (2) is to be inserted into section 98H of Cap. 609. For ease of reference, the new subsection (2) is shown in **red**.)

98H. Meaning of *funding agreement*

(1) A funding agreement is an agreement for third party funding of arbitration that is—

- (a) in writing;
- (b) made between a funded party and a third party funder; and
- (c) made on or after the commencement date of Division 3.

(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.**

(Note: The following provision is to be inserted into Division 3 of Part 10A of Cap. 609)

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

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

(Note: The following new Part 10B is to be inserted after Part 10A)

Part 10B

Outcome Related Fee Structure Agreement for Arbitration

Division 1—Purposes

98Y. Purposes

The purposes of this Part are to—

- (a) ensure that an ORFS agreement for arbitration is not prohibited by particular common law doctrines;
- (b) provide for the 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 is not applicable to a funding agreement within the meaning of Part 10A.

Division 2—Interpretation

98ZA. Interpretation

(1) In this Part—

advisory body means the person appointed by the Secretary for Justice under section 98ZS(1);

arbitration includes the following proceedings under this Ordinance—

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

- (c) mediation proceedings;

arbitration body—

- (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 means the person appointed by the Secretary for Justice under section 98ZS(2);

Cap. 159 means the Legal Practitioners Ordinance (Cap. 159);

client, in relation to a lawyer, includes—

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

code of practice means the code of practice issued under Division 6 and as amended from time to time;

conditional fee agreement—see section 98ZB;

damages-based agreement—see section 98ZC;

expenses means any of the following items—

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

financial benefit—

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

hybrid damages-based agreement—see section 98ZD;

lawyer 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;
- (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 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 means mediation proceedings referred to in section 32(3) or 33;

money or money's worth—

- (a) means any money, assets, security, tangible or intangible property, services, any amount owed under an award, settlement agreement or otherwise, and 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 means any of the following agreements made between a client and the lawyer of the client—

- (a) a conditional fee agreement;
 - (b) a damages-based agreement;
 - (c) a hybrid damages-based agreement.
- (2) In this Part, a reference to an ORFS agreement for arbitration is a reference to an ORFS agreement—
- (a) made between a client and the lawyer of the client for an arbitration; and
 - (b) made on or after the day on which this Part comes 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.

98ZB. Meaning of conditional fee agreement

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

success fee means a payment calculated by reference to the fee that the lawyer would charge the client for the matter if no ORFS agreement were made for the matter;

successful outcome, in relation to a matter—

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

98ZC. Meaning of damages-based agreement

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

- (a) the lawyer agrees with the client to be paid 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.

98ZD. Meaning of hybrid damages-based agreement

A hybrid damages-based agreement is an agreement, made between a client and the lawyer of the client for a matter, under which the lawyer agrees with the client to be paid—

- (a) in the event the client obtains a financial benefit in the matter—a payment calculated by reference to the financial benefit; and
- (b) 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

98ZE. 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 any ORFS agreement for arbitration.

98ZF. Particular tort does not apply

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

98ZG. Other illegality not affected

Sections 98ZE and 98ZF 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.

98ZH. Limited 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

98ZI. Application of Division 4

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

98ZJ. 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 this section—

rules means rules made by the advisory body under section 98ZL.

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

- (1) Despite section 98ZJ, 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 includes any disease and any impairment of a person's physical or mental condition;

personal injuries claim means a claim for damages in respect of personal injuries to a person or any other person or in respect of a person's death.

Division 5—Power to Make Rules

98ZL. 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 to—
 - (a) specify the general conditions referred to section 98ZJ(1)(a);
 - (b) specify the specific conditions referred to section 98ZJ(1)(b); and
 - (c) generally provide for the effective implementation of the purposes and provisions of this Part.
- (2) Any rules made under subsection (1) may—
 - (a) be of general application or make different provisions for different cases or classes of cases; and
 - (b) include the incidental, supplementary and consequential provisions that the advisory body considers necessary or expedient.

Division 6—Code of Practice

98ZM. 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 ORFS agreements for arbitration.
- (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) to (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.

98ZN. 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

98ZO. 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 having, 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 includes publish or disclose.

98ZP. Disclosure about ORFS agreement for arbitration

- (1) If an ORFS agreement for arbitration is made between a client and the 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 ORFS agreement for arbitration 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.

98ZQ. 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 ORFS agreement for arbitration has ended; and
 - (b) the date the ORFS agreement for arbitration 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).

98ZR. 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

98ZS. 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 powers under section 98ZL.
- (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 98ZM.

98ZT. Limitation on award of costs by arbitral tribunal

- (1) Despite section 74(3), an arbitral tribunal may not order costs falling within any of the following descriptions to be paid to a party where an ORFS agreement has been entered into with the lawyer of the party for that arbitration—
 - (a) if the ORFS agreement for the arbitration is a conditional fee agreement—the success fee within the meaning of section 98ZB(2);
 - (b) any premium for a legal expenses insurance contract;
 - (c) any part of the fee that is greater than the fee that the lawyer would have been entitled to be paid by the client if there were no ORFS agreement in respect of the arbitration (*normal fee*),
unless the arbitral tribunal is satisfied that are exceptional circumstances justifying the ordering of such costs.
- (2) To avoid doubt, subsection (1) does not prevent the arbitral tribunal from ordering a party to pay costs in an amount not exceeding the amount of the normal fee.