

LRC issues consultation paper on Outcome Related Fee Structures for Arbitration

The Outcome Related Fee Structures for Arbitration Sub-committee of the Law Reform Commission (Sub-committee) published a consultation paper on *Outcome Related Fee Structures for Arbitration* today (December 17) to launch a three-month public consultation.

The Sub-committee recommends that the law in Hong Kong be amended to permit lawyers to use outcome related fee structures (ORFSs) for arbitration taking place in and outside Hong Kong. It also invites public views on appropriate safeguards to be put in place in the professional codes of conduct and in subsidiary legislation.

Co-chair of the Sub-committee, Ms Kathryn Sanger, said in a press conference that the recommendations are made with the objective of preserving and promoting Hong Kong as a leading centre for arbitration services, and to enable Hong Kong to compete on an even playing field with other popular arbitral seats which allow some form of ORFSs.

In the consultation paper, ORFS refers to an agreement between a lawyer and client, whereby the lawyer receives a financial benefit if the case is won. It includes several types of agreements, namely conditional fee agreements (CFAs), damages-based agreements (DBAs) and hybrid damages-based agreements (Hybrid DBAs).

Ms Sanger said that there are two forms of CFA. One form is a "no win, no fee" arrangement where the lawyer charges no fee during the course of the proceedings and is paid his or her usual fee plus an uplift if the client's case succeeds. Another form is a "no win, low fee" arrangement where the lawyer charges at the usual rate or at a discounted rate during the course of the proceedings, plus a success fee if the client's case succeeds. For these two forms of arrangements, a success fee refers to an additional

fee that the client agrees to pay the lawyer only upon the success of the case. It can be an agreed flat fee, or calculated as a percentage "uplift" on the fee charged during the course of the proceedings.

As for a DBA, it is a form of "no win, no fee" arrangement. If the client's case is unsuccessful, the lawyer charges no fee. In the event of success, under a DBA, the lawyers' fee is calculated by reference to the outcome of the proceedings, for example as a percentage of the amount awarded or recovered (DBA Payment).

A Hybrid DBA is a form of "no win, low fee" arrangement. The lawyer charges a fee for the legal services rendered (typically at a discounted rate) and, in the event of success, the DBA Payment.

At present, ORFSs are unlawful for litigation and arbitration proceedings in Hong Kong. However, major arbitral seats permit some form of ORFSs and there is significant and increasing demand from clients for such an arrangement.

Ms Sanger said that the Sub-committee has reviewed the current position relating to ORFSs for arbitration and considered that reform is required. The consultation paper sets out the Sub-committee's recommendations for reform, including its proposals for amending the relevant laws and regulations.

She said that the Sub-committee has studied the legal regimes and experiences of a number of other jurisdictions, including Singapore, England and Wales, Australia, Mainland China and the United States. The Sub-committee has also made reference to the Law Reform Commission's previous study of conditional fees for proceedings (including arbitration) between 2003 and 2007, as well as third party funding for arbitration between 2013 and 2016.

Apart from recommending removing the prohibition on the use of ORFSs for arbitration for lawyers, the Sub-committee also makes recommendations on the operation of individual regimes relating to CFAs, DBAs and Hybrid DBAs.

For instance, the Sub-committee recommends that a cap should be placed on the success fees for the CFA regime as well as the DBA Payment for the DBA and Hybrid DBA regimes respectively.

The Sub-committee also invites submissions on various aspects such as whether personal injury claims should be treated differently from other claims in arbitration and whether any additional category/categories of claim should be treated differently from other claims that are submitted to arbitration if ORFSs for arbitration are introduced.

The Sub-committee welcomes views, comments and suggestions on any issues discussed in the consultation paper. All views should be submitted on or before March 16, 2021, to: The Secretary, Outcome Related Fee Structures for Arbitration Sub-committee, Law Reform Commission, by mail (4/F, East Wing, Justice Place, 18 Lower Albert Road, Central), by fax (3918 4096) or by email (hklrc@hkreform.gov.hk).

The consultation paper and the executive summary can also be accessed on the Commission's website at www.hkreform.gov.hk. Hard copies of the consultation paper are also available on request from the Secretariat of the Law Reform Commission at the above address.

Ends/Thursday, December 17, 2020