



HKI Arb Webinar:

“Hong Kong’s Outcome Related Fee Structure Reform: a Win-Win for Arbitrating Parties and their Lawyers?”

26 July 2022 | 6:00pm (HKT)



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Agenda

- Introduction to ORFSs
- Hong Kong's ORFS Reform
- Comparison to Singapore's ORFS Reform
- Practical ORFS Considerations for lawyers in Hong Kong

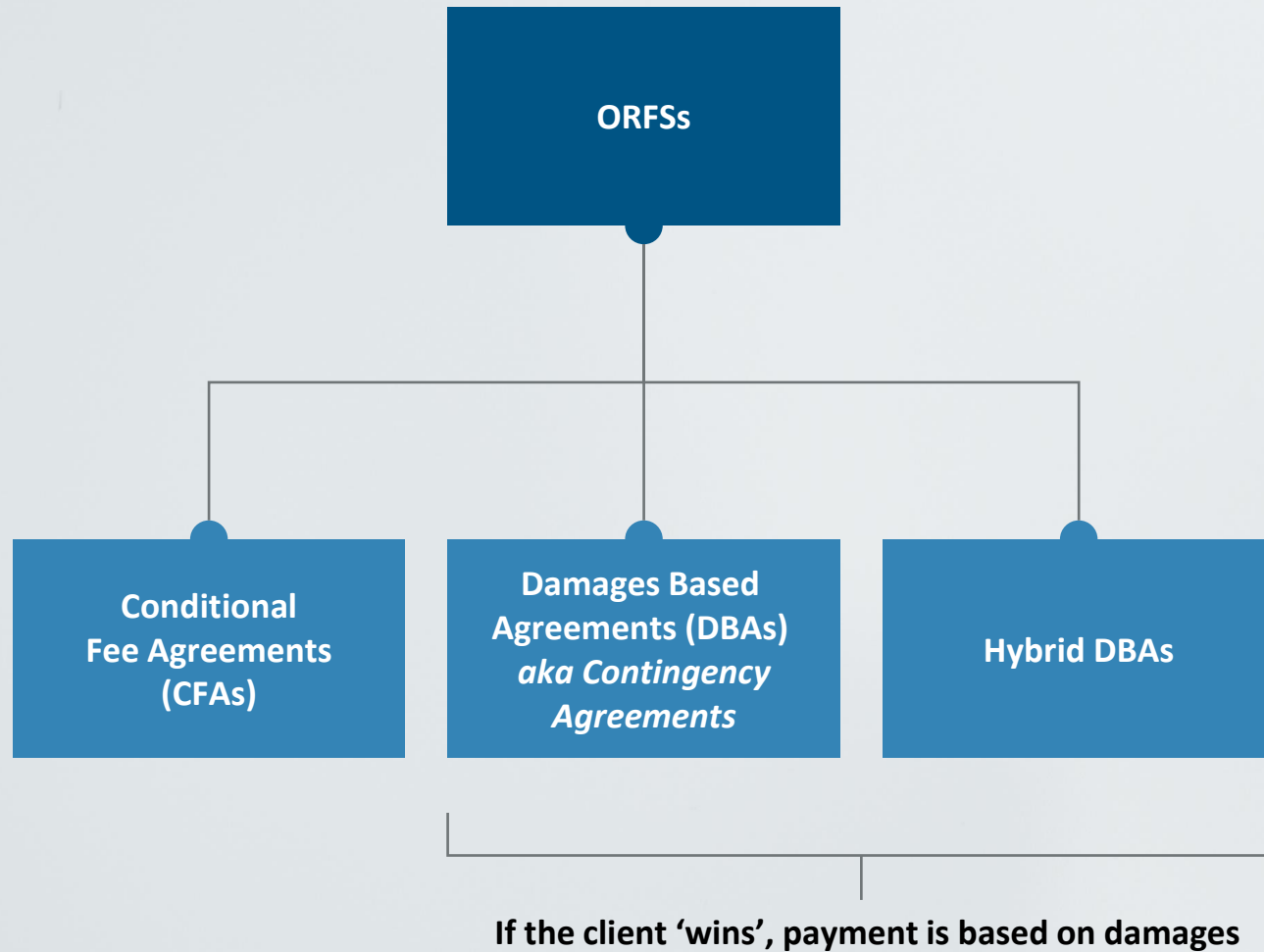
Introduction to ORFSs

What are ORFSs?



Agreement conditioning part or all of the lawyer's fee and/or costs on a defined outcome (e.g., a successful claim or defence)

ORFSs: CFAs, DBAs and Hybrid DBAs



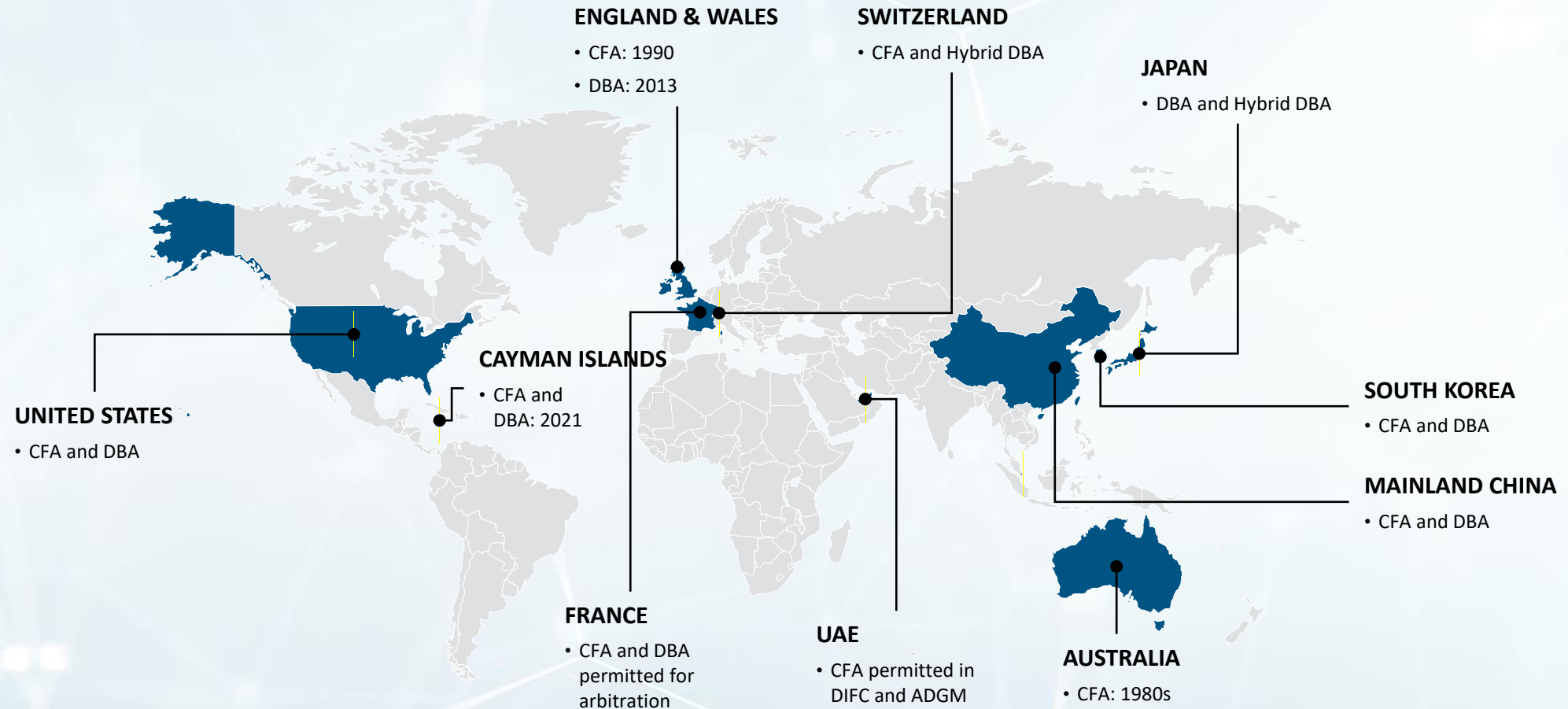
Why ORFSs matter to clients?



Why ORFSs matter to lawyers?



Dispute resolution hubs increasingly permit ORFSs

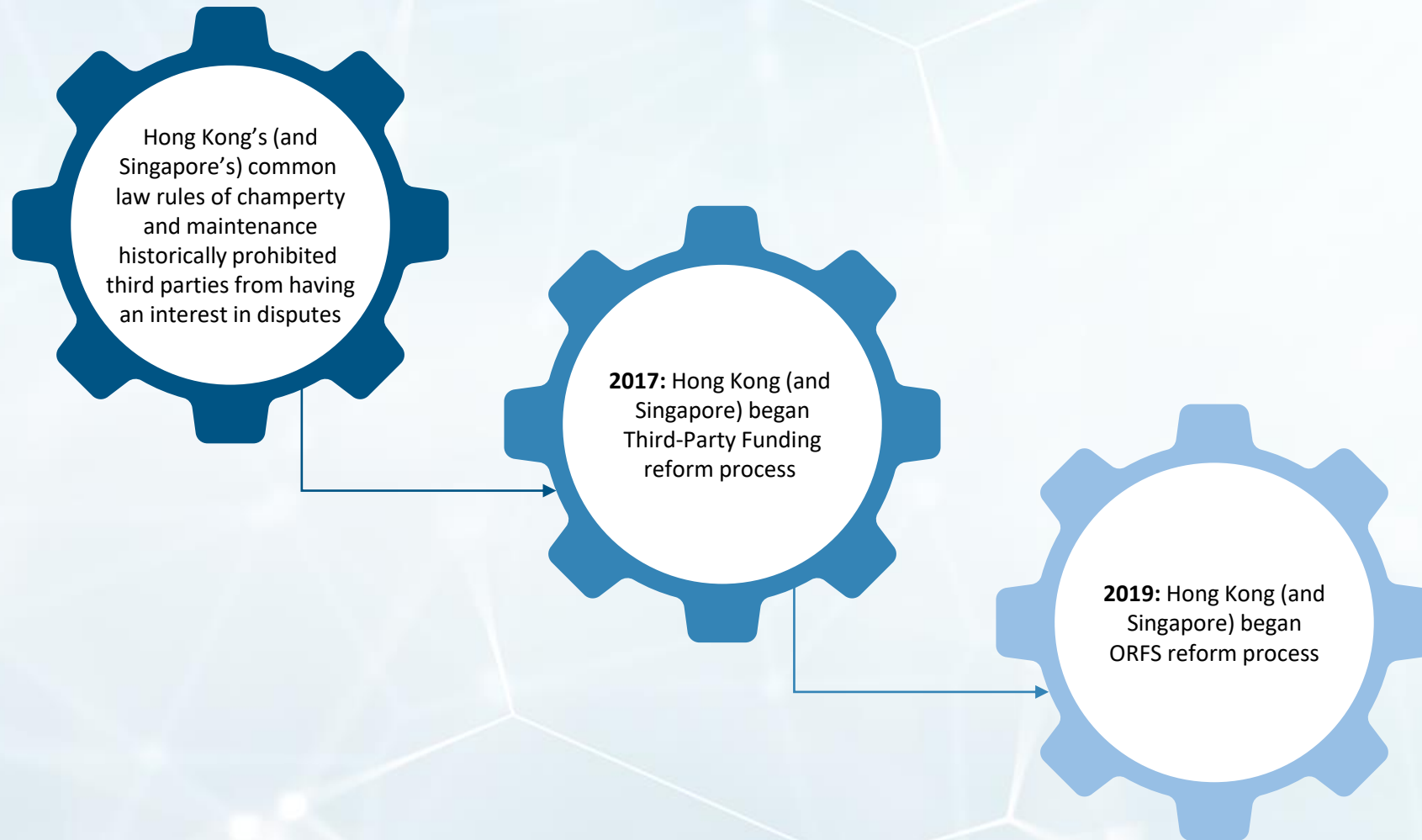


See Hong Kong ORFS sub-committee, Consultation Paper; Lord Justice Jackson, Review of Civil Litigation Costs: Preliminary Report (2009), Vol 1; Cayman Islands, The Private Funding of Legal Services Act, 2020; DIFC and ADGM courts regulations.

Hong Kong's CFA, DBA and Hybrid DBA Regime

**Arbitration and Legal Practitioners Legislation
(Outcome Related Fee Structures for Arbitration)
(Amendment) Ordinance 2022**

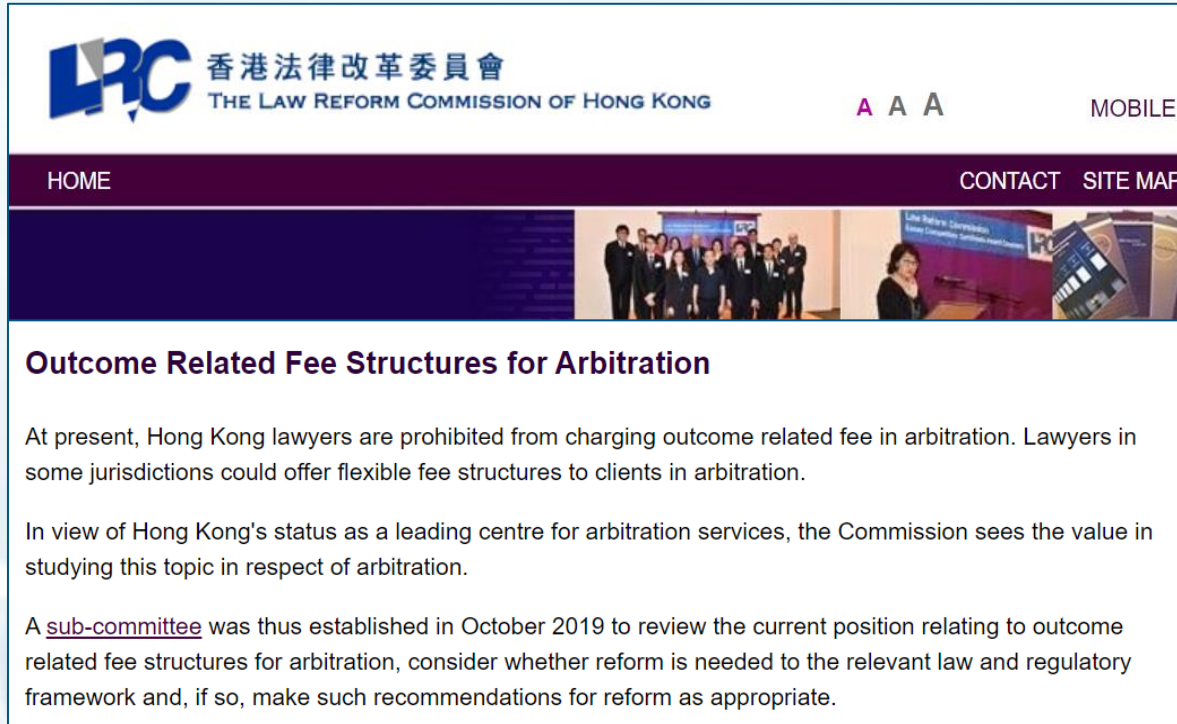
ORFS Reforms in Hong Kong



Hong Kong's ORFS Reform Process

OCTOBER 2019

Hong Kong Law Reform Commission established the sub-committee on outcome related fee structures for arbitration (the "Sub-Committee").



The screenshot shows the homepage of the Law Reform Commission of Hong Kong. The header includes the LRC logo, the name in Chinese and English, and navigation links for HOME, CONTACT, and SITE MAP. A banner image shows a group of people. The main content area is titled "Outcome Related Fee Structures for Arbitration" and contains text about the current prohibition on outcome-related fees, the Commission's interest in the topic, and the establishment of a sub-committee in October 2019 to review the current position and recommend reforms.

Outcome Related Fee Structures for Arbitration

At present, Hong Kong lawyers are prohibited from charging outcome related fee in arbitration. Lawyers in some jurisdictions could offer flexible fee structures to clients in arbitration.

In view of Hong Kong's status as a leading centre for arbitration services, the Commission sees the value in studying this topic in respect of arbitration.

A sub-committee was thus established in October 2019 to review the current position relating to outcome related fee structures for arbitration, consider whether reform is needed to the relevant law and regulatory framework and, if so, make such recommendations for reform as appropriate.

Hong Kong's ORFS Reform Process

OCTOBER 2019

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17 DECEMBER 2020

The Sub-Committee published a Consultation Paper on Outcome Related Fee Structures ("ORFS") for Arbitration.

Consultation paper

Outcome Related Fee Structures for Arbitration (HKLR Consultation Paper)

On 17 December 2020, the Outcome Related Fee Structures for Arbitration Sub-committee of the Law Reform Commission ("Sub-committee") published a consultation paper proposing that the law in Hong Kong should be amended to permit lawyers to use outcome related fee structures ("ORFSs") for arbitration taking place in and outside Hong Kong.

The Sub-committee considers that the recommendations are made with the objective to preserve and promote Hong Kong's competitiveness as a leading centre for arbitration service and to enable Hong Kong to compete on an even playing field with other popular arbitral seats which allow some form of ORFSs.

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15 DECEMBER 2021

The Law Reform Commission published a Report with its recommendations.

Report

Outcome Related Fee Structures for Arbitration (HKLRC Report)

On 15 December 2021, the Law Reform Commission ("Commission") released a report on Outcome Related Fee Structures for Arbitration, recommending that the law in Hong Kong be amended to lift the prohibitions on the use of outcome related fee structures (ORFSs) by lawyers in arbitration taking place in and outside Hong Kong.

Hong Kong's ORFS Reform Process

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17 DECEMBER 2020

The Sub-Committee published a Consultation Paper on Outcome Related Fee Structures ("ORFS") for Arbitration.

15 DECEMBER 2021

The Sub-Committee published a Report with its recommendations.

30 MARCH 2022

The Legislative Council introduced the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022.

Hong Kong's ORFS Reform Process

30 MARCH 2022

The Legislative Council introduced the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022.

A BILL

To

Amend the Arbitration Ordinance and the Legal Practitioners Ordinance to provide that certain agreements using outcome related fee structures 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; to provide for measures and safeguards in relation to such agreements; and to provide for related matters.

Enacted by the Legislative Council.

Hong Kong's ORFS Reform Process

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30 JUNE 2022

Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022.

Hong Kong's ORFS Reform Process

30 JUNE 2022

Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022.

98Y. Purposes

The purposes of this Part are to—

- (a) provide that an ORFS agreement for arbitration is not prohibited by the common law doctrines of maintenance, champerty and barratry;
- (b) provide for the validity and 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.

1. CFAs, DBAs and HYBRID DBAs will be Permitted

98ZB. Meaning of *ORFS* agreement

- (1) An ORFS agreement is any of the following agreements made between a client and a lawyer of the client—
- (a) a conditional fee agreement;
 - (b) a damages-based agreement;
 - (c) a hybrid damages-based agreement.

Ordinance 2022, Section 98ZB

2. Scope of Application



WHO CAN OFFER ORFSs? (“*lawyer*” definition, Ordinance 2022)

- Barristers
- Solicitors
- Registered Foreign Lawyers



WHAT PROCEEDINGS CAN ORFSs BE USED FOR? (“*arbitration*” definition, Ordinance 2022)

- Arbitrations in or outside of Hong Kong, including Emergency Arbitration proceedings
- Related court proceedings (e.g., arbitrator challenges, enforcement of Awards)
- Mediation proceedings

3. CFAs

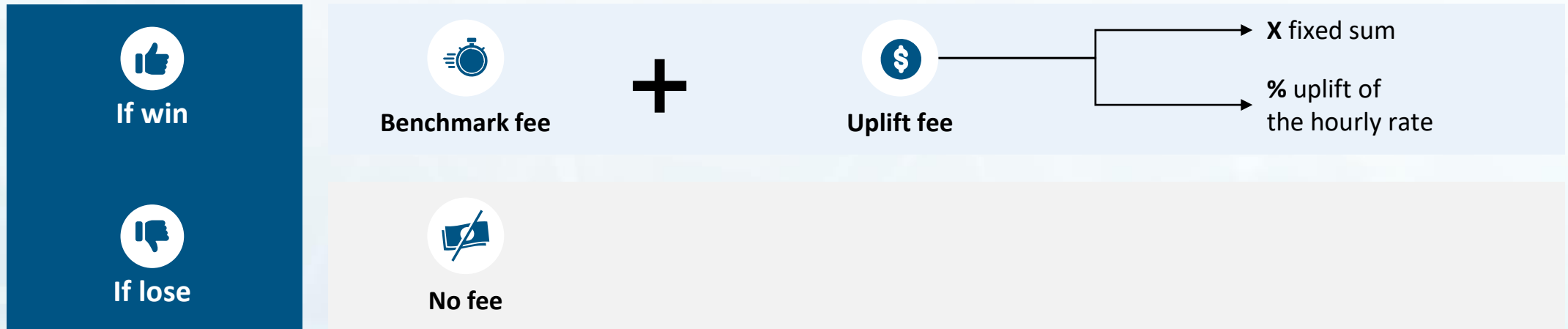
98ZC. Meaning of *conditional fee agreement*

- (1) A conditional fee agreement is an agreement, made for a matter between a client and a lawyer of the client, under which the lawyer agrees with the client to be paid a success fee for the matter only in the event of a successful outcome for the client in the matter.
- (2) In subsection (1)—
 - success fee* (成功收費), in relation to a matter, means a payment calculated by reference to the fee that a lawyer of a client would have charged the client for the matter if no ORFS agreement had been made for the matter;
 - successful outcome* (成果), in relation to a client in a matter—
 - (a) means any outcome of the matter falling within the description of being successful as agreed to between the client and a lawyer of the client; and
 - (b) includes any financial benefit that is obtained by the client in the matter.

3. CFAs (No-Win, No-Fee)

- 1.6 Another form is commonly known as a “no win, no fee” arrangement. This is where the Lawyer charges *no fee* during the course of the Proceedings, and charges a Success Fee, namely “benchmark” fees *plus* an uplift, in the event of a successful outcome for the client in the matter.

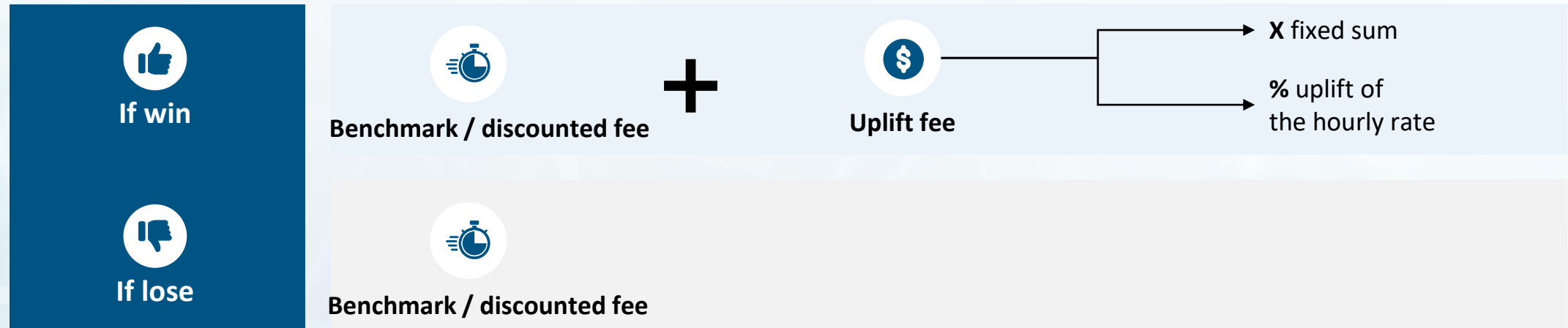
Sub-committee’s Report, p.7



3. CFAs (No-Win, Low-Fee)

- 1.5 One form of CFA is commonly known as a “no win, low fee” arrangement. This is where the Lawyer charges at “benchmark” rates or, more commonly, at a discounted rate during the course of the Proceedings, and then charges a Success Fee on top in the event of a successful outcome for the client in the matter.

Sub-committee’s Report, p.7



3. CFAs – Cap on Upside

**Recommended ORFS safeguards to be included
in subsidiary legislation**

1. The subsidiary legislation should include provisions as set out below
 - (a) Any success fee in a CFA should be subject to a cap of 100% of “benchmark” costs;

Sub-committee’s Report, pp.26–27 and Annex 2

4. DBAs (No-Win, No-Fee)

98ZD. Meaning of *damages-based agreement*

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

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

Ordinance 2022, Section 98ZD



If win



If lose



% of damages



No fee

4. Hybrid DBAs (No-Win, Low-Fee)

98ZE. Meaning of *hybrid damages-based agreement*

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

- (a) in the event the client obtains a financial benefit in the matter—a payment calculated by reference to the financial benefit; and
- (b) in any event—a fee, usually calculated at a discount, for the legal services rendered by the lawyer for the client during the course of the matter.

Ordinance 2022, Section 98ZE



If win



If lose



% of damages



Discounted fee

4. Hybrid DBAs – Caps on Recovery if Lose

In the event that a claim under a Hybrid DBA is unsuccessful (such that no Financial Benefit is obtained),

- (i) the Lawyer should be permitted to retain only a proportion of the “benchmark” costs he or she has incurred in pursuing the unsuccessful claim; and
- (ii) that proportion should be capped at 50% of the irrecoverable cost incurred in pursuing the unsuccessful claim;

Sub-committee’s Report, pp.58–62 and Annex 2

4. DBAs and Hybrid DBAs – Caps on Upside

Recommended ORFS safeguards to be included in subsidiary legislation

1. The subsidiary legislation should include provisions as set out below
 - (a) Any success fee in a CFA should be subject to a cap of 100% of “benchmark” costs;
 - (b) Any DBA Payment should be capped at 50% of the Financial Benefit obtained by the client:

Sub-committee’s Report, pp.42–44 and Annex 2

5. Recoverability of Costs

Benchmark

Normal hourly fee

No-Win Low-Fee CFA

70% of normal fee

Success Fee

No-Win No-Fee DBA

30% of the damages

Recoverable

Client cannot
recover absent
exceptional
circumstances
justifying the
order of such costs

Ordinance 2022, Section 98ZU

6. Safeguards



REQUIREMENTS

- ORFS's existence/termination must be disclosed to the other party and the tribunal (Ordinance 2022, Section 98ZQ / 98ZR)
- Not permitted for personal injuries cases (Ordinance 2022, Section 98ZL)



PROPOSED SAFEGUARDS

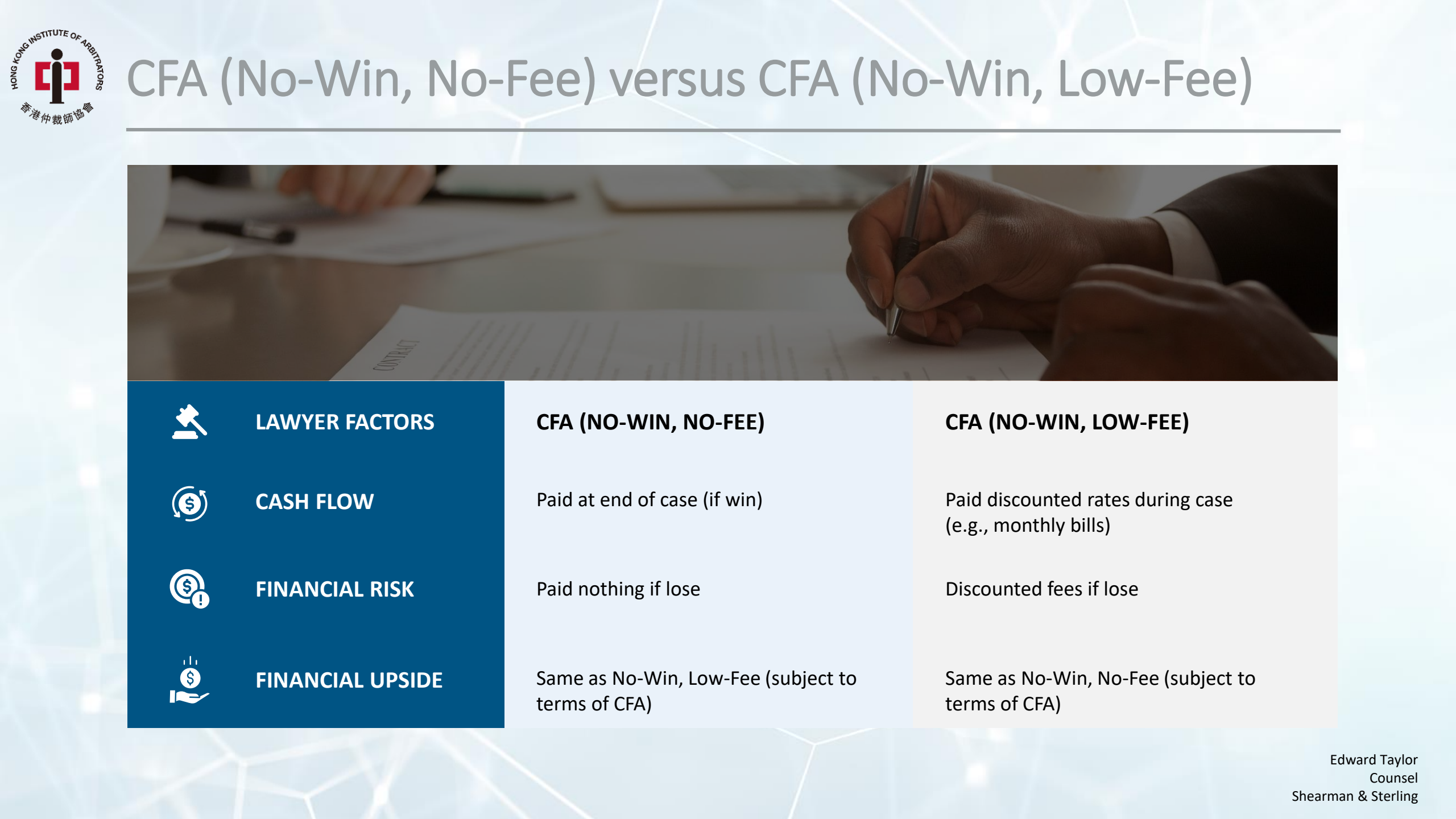
- Must be in writing and signed by the client
- Client provided with all relevant information by lawyer
- Client has right to seek independent legal advice
- 7 day cooling off period
- Disbursements to be paid irrespective of outcome
- Lawyers entitled to terminate if i) Client breaches the ORFS; ii) Client behaves unreasonably; or iii) Other grounds identified in ORFS agreement.

Comparison to Singapore's ORFS Reforms





Hong Kong's and Singapore's ORFS Reforms: A Comparison

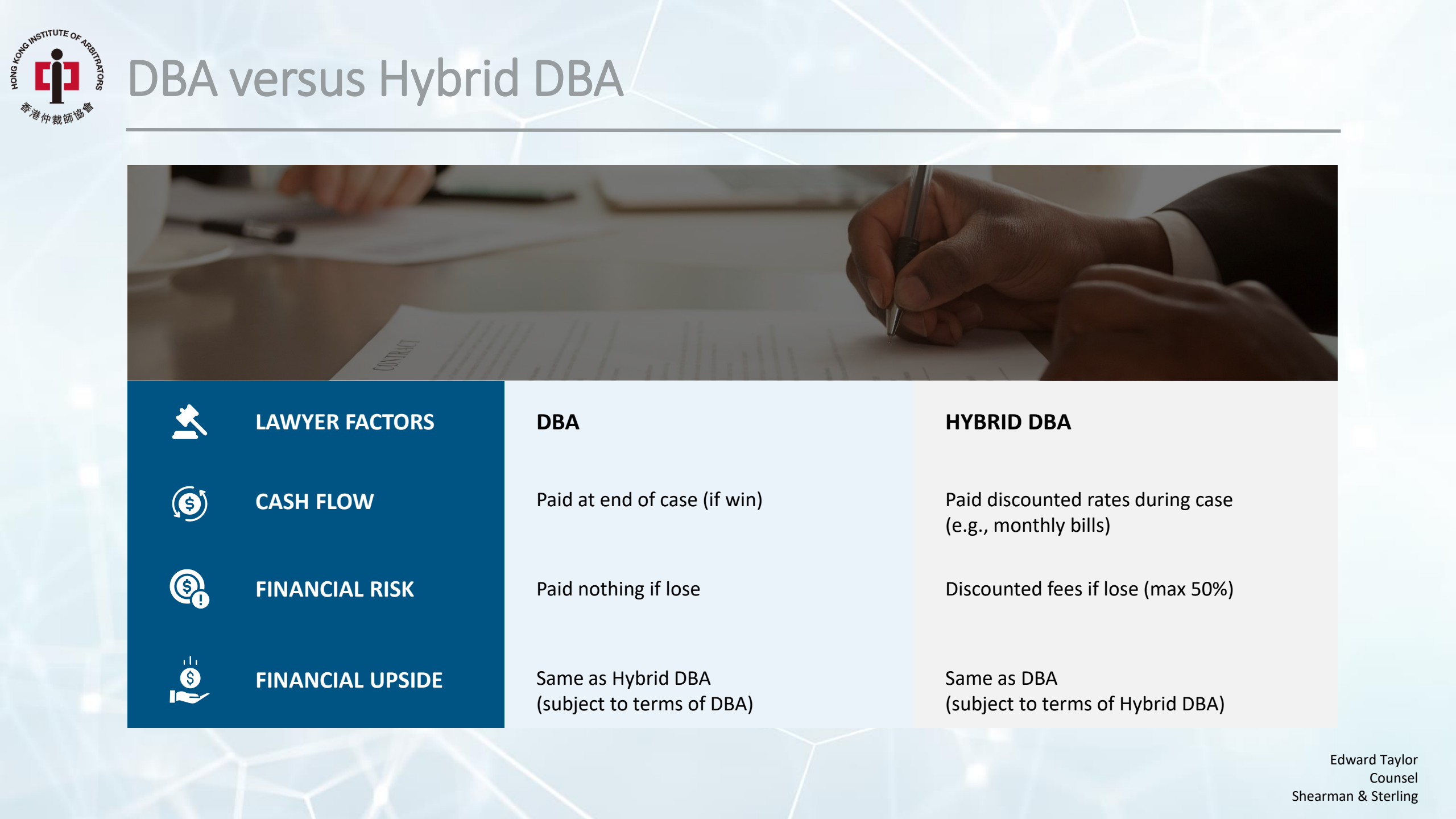
	HONG KONG	SINGAPORE
Permitted ORFSs	CFA, DBA & Hybrid DBA	CFA
Permitted proceedings	Arbitrations, emergency arbitrations, related court and mediation proceedings	Arbitrations, SICC proceedings, related court and mediation proceedings
Recoverability	Uplift not recoverable absent exceptional circumstances	Uplift not recoverable
Caps on uplift	Yes	No
Cooling-off period	7 days	5 days
Disclosure	Required	TBC

Hong Kong's ORFS Reforms: Practical Considerations for Lawyers







CFA (No-Win, No-Fee) versus CFA (No-Win, Low-Fee)

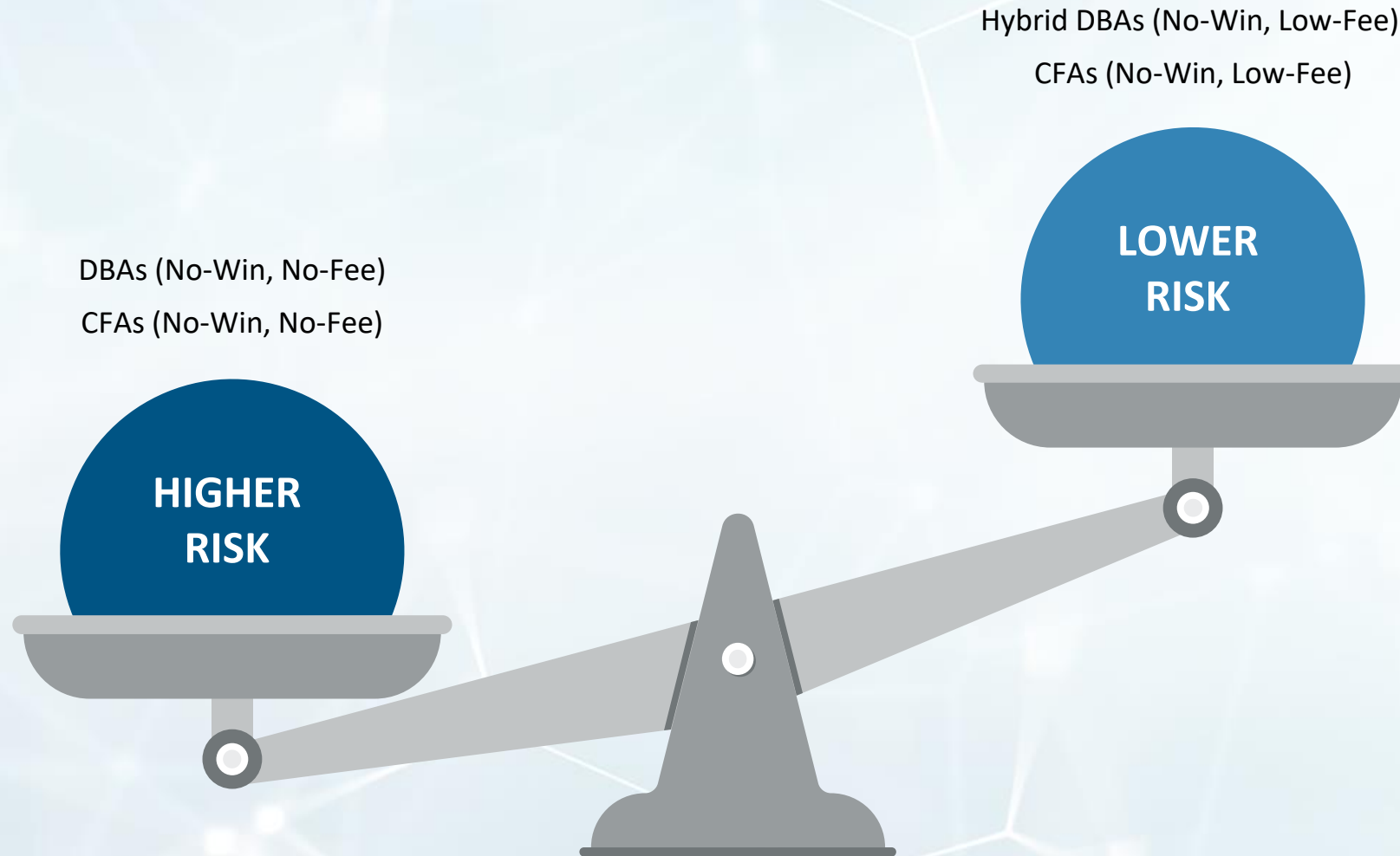
	CFA (NO-WIN, NO-FEE)	CFA (NO-WIN, LOW-FEE)
 LAWYER FACTORS		
 CASH FLOW	Paid at end of case (if win)	Paid discounted rates during case (e.g., monthly bills)
 FINANCIAL RISK	Paid nothing if lose	Discounted fees if lose
 FINANCIAL UPSIDE	Same as No-Win, Low-Fee (subject to terms of CFA)	Same as No-Win, No-Fee (subject to terms of CFA)



DBA versus Hybrid DBA

	DBA	HYBRID DBA
 LAWYER FACTORS		
 CASH FLOW	Paid at end of case (if win)	Paid discounted rates during case (e.g., monthly bills)
 FINANCIAL RISK	Paid nothing if lose	Discounted fees if lose (max 50%)
 FINANCIAL UPSIDE	Same as Hybrid DBA (subject to terms of DBA)	Same as DBA (subject to terms of Hybrid DBA)

ORFSs: Risk Profile for Lawyers



Using ORFSs in Practice (1)



CASE STUDY

Client has a
HKD 10
million claim

Client requesting
20% discount on
hourly rates

Complex dispute

If win



CFA
(No-Win, Low-Fee)



If lose

100% of hourly fees

20% uplift

80% of hourly fees

Using ORFSs in Practice (2)



CASE STUDY

Client has a HKD 20 million claim against insurer

Client wants to minimize upfront legal fees

Narrow dispute (contractual interpretation issue)

If win



HYBRID DBA



If lose

20% of damages (i.e., HKD 4 million)

50% of hourly fees

Using ORFSs in Practice (3)



Different ORFSs for different phases of the arbitration
e.g. “No-Win, Low-Fee” CFA for jurisdictional phase; Hybrid DBA for merits phase

Combine ORFS with Third Party Funding

Combine ORFS with traditional fee arrangements e.g. normal hourly fees up to a HKD 1 million cap with excess fees subject to a “No-Win, No-Fee” CFA with 100% uplift

ORFS Risks: Enforceability of ORFS

Volterra Fietta ordered to repay former client in BIT case

Sebastian Perry
25 May 2021

[Print article](#)



The firm "fell foul" of UK legislation on conditional fee agreements

London boutique Volterra Fietta has been ordered to repay US\$1.6 million to a former client after its conditional fee agreement for an investment treaty arbitration was found to be unenforceable.

The Senior Courts Cost Office, part of the High Court of England and Wales, ruled in March that the law firm should repay the fees to Liechtenstein-registered blood plasma company Diag Human and its owner Josef Stava, a Czech-Swiss national.

ORFS Risks: Challenges for Lawyer-Client Relationship



Questions





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