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Outcome-Related Fee Structures and Arbitration in the UAE

This article briefly outlines the basic features and types of outcome-related fee structures (ORFS) for dispute funding, followed by a detailed analysis of the UAE legal landscape of the acceptability of ORFS in arbitration proceedings. This article puts forward a case for introducing ORFS in the UAE in line with public policy requirements of the country through a meaningful regulatory framework.

Cet article décrit brièvement les caractéristiques de base et les types de structures de frais liés aux résultats de financement des litiges, suivi d'une analyse détaillée du paysage juridique des EAU sur l'acceptabilité des frais liés aux résultats dans les procédures d'arbitrage. Cet article présente des arguments en faveur de l'introduction de frais liés aux résultats aux Émirats arabes unis conformément aux exigences de la politique publique du pays, grâce à un cadre réglementaire significatif.



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Introduction

The world is rapidly transitioning from the era of doctrine of “Maintenance” and “Champerty” (historic common law rules prohibiting third party funding) towards an era of dispute funding to ensure that parties to disputes have equal access to the courts and tribunals and ultimately a fair trial. Many jurisdictions have abolished historic rules prohibiting dispute funding to create a conducive environment for the parties to access justice. In 2013, Lord Neuberger, the former President of the UK Supreme Court stated: “access to the courts is a right and the State should not stand in the way of individuals availing themselves of that right.”

Litigation funding has become an increasingly popular means of bringing cases to court in recent years, especially in the United Kingdom. Data from the UK law firm RPC in 2021 suggested that the value of the pipeline of court cases

and cash held by the top UK litigation funders had reached GBP 2 billion.

Most recently, Hong Kong has introduced a bill permitting lawyers to use ORFS in arbitration and litigation matters, a development which will allow Hong Kong to maintain its status among the world's top arbitration seats.

Recently, in addition to promoting third-party disputes funding, certain jurisdictions have allowed lawyers to use "Outcome-Related Fee Structures" (**ORFS**) in arbitrations and litigation to ensure that parties to the disputes have the required means at their disposal to contest their claims properly and effectively. Most recently, Hong Kong has introduced a bill permitting lawyers to use ORFS in arbitration and litigation matters, a development which will allow Hong Kong to maintain its status among the world's top arbitration seats.

The United Arab Emirates, based on the principles of Civil Law, did not inherit many of the historical impediments to third party funding e.g., champerty and maintenance, faced by the common law jurisdictions. Accordingly, third party funding has never been prohibited in the country; however, it was not regulated until recently, which created uncertainty regarding its permissibility and which resulted in a scarcity of third-party funders. In contrast to the legality of third-party funding, ORFS, especially in the onshore UAE, has remained untested on account of contingency fees being in violation of the public policy.

This article will briefly outline the basic features and types of ORFS followed by a detailed analysis of the prevalent legal landscape in the UAE with regards to acceptability of ORFS in the arbitration proceedings. This paper will attempt to argue a case for introducing ORFS in the UAE in line with public policy requirements of the country through a meaningful regulatory framework

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Outcome Related Fee Structures

ORFS are fee arrangements which set out the terms and conditions governing the mandate between a lawyer and a client, under which the lawyer who represents the client in contentious proceedings is entitled to receive a monetary benefit in the event of success. ORFS enhance the ability of

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A. TYPES OF ORFS

ORFS are commonly described in three major forms which are as follows:

I. Conditional Fee Arrangements

An arrangement in which a client pays the legal fees to the lawyer only in certain situations is known as a conditional fee arrangement (**CFA**). CFAs are agreements which are also known as "no win, no fee agreements" whereby a client need not pay any legal fees to the lawyer if the claim fails. The lawyer may also charge a success fee where the claim is successful.

II. Damages-Based Agreements

A Damages-Based Agreement (**DBA**) is a type of ORFS wherein a lawyer and a client agree that the lawyer will receive payment only if the claim is successful and such a payment is calculated based on damages, such as a portion or percentage of the sum awarded.

III. Hybrid DBAs

Hybrid DBAs are arrangements between the client and the lawyer wherein it is agreed that the lawyer will receive legal fees for representation as well as a payment based on the damages awarded or outcome of the proceedings. This arrangement is also known as a "no win, no fee" arrangement.

B. LEGAL POSITION WITH REGARDS TO THE ORFS IN THE UAE

The legal framework in the UAE has made significant strides in the recent past with regards to explicitly allowing and regulating third party funding in the country. These developments have been taken across the board from the onshore UAE to the financial free zones. The Dubai International Financial Centre (DIFC) being the pioneer, issued Practice Direction No. 2/2017¹ on Third Party Funding in the DIFC Courts, followed by Abu Dhabi Global Market's (ADGM) Litigation Funding Rules² issued in 2019. Most recently, the newly issued arbitration rules of Dubai International Financial

1. DIFC Practice Direction No. 2/2019, DIFC Courts Fees Amendment, issued on 13 March 2019 (corresponding to 6 Rajab 1440 H).

2. ADGM Litigation Funding Rules 2019, issued on 16 April 2019.

Centre (DIAC)³ explicitly deal with the third-party funding arrangements. However, the legal framework in the country is not consistent and open when it comes to ORFS.

I. Onshore UAE

The Federal Supreme Court has reaffirmed the bar on contingency fee arrangements in its judgments.

ORFS have not been so common in the mainland UAE owing to prohibition on the contingency fee arrangements. Article 31 of Federal Law No. 23/1991⁴ regarding the Regulation of the Legal Profession states that “it shall not be permitted for a lawyer to buy all of part of the rights which are in dispute, nor to agree to take a part thereof in respect of fees.” Violation of this provision may result in disciplinary consequences for the lawyer, under Article 47 of the same law. Along the same lines, the Federal Supreme Court has reaffirmed the bar on contingency fee arrangements in its judgments. The situation is cemented by Ministerial Resolution No. 666/2015⁵ on the Code of Ethics and Professional Conduct of the Legal Profession in the UAE, which makes clear in its Articles 1, 2C, 3D and 4C, that Federal Law No. 23/1991 applies to all lawyers providing legal services in the UAE, including those acting in the DIFC and those lawyers involved in arbitration.

In an upshot, there seem to exist clear impediments in the way of implementing ORFS in mainland UAE, largely due to the public policy requirements.

II. Dubai International Financial Centre

While the DIFC does allow conditional fee arrangements, contingency fees are not considered best practice.

The DIFC is an independent financial freezone in Dubai, established in 2004 to promote business and trade in the UAE. Being a freezone, the DIFC has its own distinct set of laws and courts based on the common law judicial system as opposed to the UAE mainland legal system, which is a civil law jurisdiction. Accordingly, the DIFC has devised its own rules and regulations to regulate the legal practitioners practising within its jurisdiction. DIFC Court’s mandatory Code of Conduct does not mention contingency or success fees, while the DIFC Courts’ Best Practice Code does specify that contingency fees are not to be considered a best practice. Article 9.3 of the DIFC Courts’ Code of Best Legal Professional Practice states that “A Lawyer may not receive a contingency fee in respect of any litigious or contentious

action.” On the other hand, conditional fee arrangements (whereby, in the event that the client is successful, the legal representative receive an uplift in fees, as opposed to a share in the proceeds) are permitted subject to disclosure requirements.

While the DIFC does allow conditional fee arrangements, contingency fees are not considered best practice. A recent DIFC courts judgment, *Loralia Group LLC v. Landen Saudi Company*⁶ has stirred a new debate regarding the acceptability of contingency fees within the DIFC. The applicant in the case filed a claim seeking to set aside an arbitral award issued in favour of the respondent on the grounds that the award “is in conflict with the public policy of the UAE”, specifically the public policy against contingency fees.

The Court articulated that contingency fees for legal representatives may be de facto illegal onshore; however, they merit case-by-case scrutiny in the DIFC.

The DIFC Court, while dismissing the applicant’s plea to set aside the award, distinguished the public policy against contingency fees in the onshore UAE and the DIFC. The Court articulated that contingency fees for legal representatives may be *de facto* illegal onshore; however, they merit case-by-case scrutiny in the DIFC. Contingency fees may not be considered “best practice” in the DIFC, but this label cannot be sufficient to create and support a public policy against contingency fees within the DIFC. The Court further held that unreasonable fee arrangements may include contingency fee arrangements, but not all contingency fee arrangements are automatically invalid. Instead, judges and arbitrators are required to assess whether a fee arrangement is reasonable and proper. This requirement speaks volumes in respect of the overall public policy as regards legal fees. The decision of DIFC Court in *Loralai* clearly gives encouragement for the further development of ORFS within the DIFC jurisdiction.

III. Abu Dhabi Global Market

Similar to the DIFC, ADGM is a standalone international financial center with its own distinct set of laws and court system. The legal framework in the ADGM appears more receptive to ORFS than the mainland and the DIFC. The ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appoints Regulations 2015⁷ (“ADGM Regulations”) expressly deals with CFAs and DBAs. In this regard, Articles 222- 225 lay down the conditions that must be satisfied for CFAs and DBAs to be valid in the ADGM. These conditions range from the requirement of the agreements to be in writing to certain disclosure and notice obligations.

3. DIAC Arbitration Rules 2022, issued on 3 March 2022.

4. Federal Law No. 23/1991, On the Regulation of The Legal Profession, Issued on 16 December 1991.

5. Ministerial Decision No. 666/2015 on the Rules of Professional Conduct and Ethics of the Legal Profession in UAE, issued on 29 November 2015 (corresponding to 17 Safar 1437 H).

6. *Loralia Group LLC v. Landen Saudi Company* [2018] DIFC ARB 004, www.difccourts.ae/rules-decisions/judgments-orders/arbitration/loralia-group-llc-v-landen-saudi-company-2018-difc-arb-004.

7. ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015, issued on 17 December 2015, (corresponding to 6 Rabi Al-Awwal 1437 H).

With the abolishment of DIFC-LCIA Arbitration Centre, introducing ORFS could aid Dubai's goal of establishing and promoting DIAC as a premier arbitration centre, globally.

C. THE CASE FOR INTRODUCING ORFS IN THE UAE

I. Benefits of Allowing ORFS

The introduction of ORFS within the UAE could have the positive impact of promoting the arbitral institutions of the country. In particular, with the abolishment of DIFC-LCIA Arbitration Centre, introducing ORFS could aid Dubai's goal of establishing and promoting DIAC as a premier arbitration centre, globally. Furthermore, it should alleviate concerns raised by the sudden abolishment of the DIFC-LCIA and restore confidence in Dubai as a preferred seat of arbitration.

Additionally, the introduction of alternative fee structures may have a huge impact on the adjudication of the construction claims in the country. The construction industry is one of the leading economic sectors in the Middle East, where numerous infrastructure projects worth billions of dollars are commenced or completed every year. Due to this substantial activity in the construction industry, disputes become inevitable. The parties to these disputes mostly prefer arbitration as a dispute resolution mechanism compared to other modes e.g., litigation.

Subcontractors have been compelled to relinquish their meritorious claims due to their inability to afford the hefty legal fees in an economic crunch owing to the pandemic.

Most recently, the impact of COVID-19 has been felt across all sectors in the UAE, including the construction sector. The restrictions placed during COVID-19 caused the construction industry to undergo several major changes and challenges. One of the significant challenges faced by the industry at the time was the requirement of quarantining and social distancing of workers. Furthermore, delay in supply chains and key team members being stuck in other parts of the world impeded the performance and fulfillment of contractual obligations. While delay in the fulfillment of obligations may have affected construction contractors as well as subcontractors, it is often the smaller subcontractors who do not have the ability to carry the risk. As a result, subcontractors have been compelled to relinquish their meritorious claims due to their inability to afford the hefty legal fees in an economic crunch owing to the pandemic. With the constant rise in construction disputes and painstaking high risk faced by subcontractors in the construction industry, the introduction of outcome-related fee structures may come as more than a relief.

At the outset, the alternative fee structures could not only boost arbitrations within the UAE, but it will also provide greater means to justice and once implemented. The parties would certainly prefer keeping UAE as the seat of arbitration owing to the availability of the ORFS.

II. The Public Policy Argument against ORFS

A traditional critique of ORFS is that it paves the way for frivolous litigation and encourages parties to commence claims which they might not otherwise maintain.

The major impediment to ORFS in the UAE appears to be the public policy against contingency fees. The public policy argument is not a hollow one and is based on the potential abuses inherent in the structure of ORFS. A traditional critique of ORFS is that it paves the way for frivolous litigation and encourages parties to commence claims which they might not otherwise maintain. Likewise, ORFS are often blamed for encouraging satellite litigation, thereby increasing the workload on the courts and consequently hurting the public exchequer. Another criticism around ORFS is that when a lawyer performs on the basis of an outcome-related fee structure, he or she may have a direct interest in the end result of the dispute. In this manner, the lawyer may breach the duty of imparting impartial advice to the client. In such situations where the outcome of the dispute may bring a greater benefit to the lawyer, he or she may settle for lesser than what the client deserves in order to secure the legal fees expeditiously. Similarly, ORFS may tempt the lawyers in demanding a higher percentage to uplift the legal fees.

The public policy argument is substantiated by a sound criticism of ORFS; however, this criticism is not on ORFS itself but how these structures are manipulated and abused. The risks associated with ORFS can be managed through an extensive regulatory framework. In this regard, the UAE can follow the example of Hong Kong and formulate legislation to safeguard ORFS against its inherent potential for abuse.

III. Addressing the Public Policy Argument

The argument that ORFS are against public policy is based on the abuse of alternate fee structures by stakeholders and the risk to the overall wellbeing of the legal system associated with such abuse. These associated risks can be mitigated by adopting statutory safeguards and regulating ORFS. In this regard, it is recommended that UAE follows Hong Kong by introducing ORFS through comprehensive legislation that can be deliberated upon in the UAE with extensive consultation. The legislation would be issued following consultation with all stakeholders and addressing the inherent concerns.

Legislation can introduce certain safeguards to ensure that ORFS are not abused. One of the most essential safeguards would be requiring a written and signed agreement between the lawyer and client specifying the details of the agreed fee structure.

Legislation can introduce certain safeguards to ensure that ORFS are not abused. One of the most essential safeguards would be requiring a written and signed agreement between the lawyer and client specifying the details of the agreed fee structure. The client must know its rights before signing the agreement and must be provided all necessary clarifications, such as the definition of “successful outcome” in order to avoid confusion at a later stage. Furthermore, the client must be provided with a cooling-off period during which it is given the freedom to terminate the agreement by written notice. This will ensure that the client is allowed reasonable time to consider the agreement even after signing it. It is also important for the lawyer to state the reasons for uplift in fees to the client clearly and uplift must be allowed to a reasonable extent only. The client must be informed of the risks being undertaken by the lawyer. Likewise, hefty penalties may be introduced to curb frivolous claims so as not to put excessive pressure on the legal system. Furthermore, strict disclosure requirements similar to the ones for third party obligations may be introduced within the ORFS framework to ensure transparency. Irrespective of ORFS, control over a case will rest with the client, who will independently decide whether to settle or pursue a claim.

If safeguards to prevent the possibility of abuse within ORFS are implemented, there exists a strong argument that ORFS would not only be in consonance with the public policy of the UAE, but also consistent with jurisprudential principle in sharia law (*maslaha*) i.e., that a transaction should advance public interest in a way that ORFS can provide parties an opportunity to contest their meritorious claims that they might otherwise be unable to pursue.

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Conclusion

There are clear benefits of implementing ORFS in the UAE. The UAE needs to take the leap by going through a process of public consultation with the relevant stakeholders in order to address the public policy concerns and see how they can be addressed effectively through a legislative framework. OFRS being legalized in the UAE will give a big boost to the arbitration industry in the country.

Middle East experienced legal financier Joe Durkin notes:

“Construction disputes are on the rise. There has been the announcement across GCC jurisdictions of the insolvency of several high-profile contractors, which has had a domino effect on the supply chain. Prior to the disruption caused by COVID-19, the numbers of disputes in the construction sector had been increasing. Pre-COVID there had been the insolvency of several high-profile contractors across the GCC, which has worsened in the past two years, having had a domino effect on the supply chain. There is also a growing understanding by CEOs and CFOs of Middle East construction and energy companies, about how dispute finance can be used as an effective and profitable financial solution. There has been a shift in the mindset of leading contractors about how third-party funding can help a company manage the cost of its legal claims, turn the legal department into a profit centre and even offer the potential for monetisation straight into the P&L.”

ORFS would enhance the confidence of businesses operating within the emirates as they would then be able to contest their claims without worrying about liquidity issues. The UAE would certainly flourish as an arbitration seat which would boost local arbitration centres e.g., DIAC, enabling them to compete with leading arbitration institutions globally and align with and support the country’s ambition to become a leading arbitration centre. Time will tell but the wind is blowing in the right direction.

توضح هذه المقالة بإيجاز الميزات الرئيسية وأنواع اتفاقيات الأتعاب المرتبطة بالنتيجة والمتعلقة بتمويل النزاعات يتبعها تحليل مفصل للمشهد القانوني في الإمارات العربية المتحدة فيما يتعلق بقبول هذا النوع من الاتفاقيات في إجراءات التحكيم. تطرح هذه المقالة أيضاً مقترحا لاستخدام مثل هذه الاتفاقيات في الإمارات العربية مواكبة لمتطلبات السياسات العامة للبلاد من خلال وضع إطار تنظيمي مناسب.

BIOGRAPHY

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