

The Model Damages Based Agreement Draft prepared by the Chancery Bar Association.

NOTE

IMPORTANT: The Chancery Bar Association considered revising this Note and the draft DBA in early 2016. Despite canvassing views amongst the membership at that time, there was insufficient evidence available as to the use of DBAs in practice to enable any reliable conclusions to be drawn about the strengths or weaknesses of the existing draft. Indeed the evidence suggested that DBAs are used very infrequently by members of the Association. Accordingly, no changes of substance have been made to the remainder of this Note or the draft DBA. For all the reasons expressed below, we continue to recommend caution before entering into a DBA.

- 1 The model draft Damages Based Agreement (“**DBA**”) has been prepared by volunteers for the Chancery Bar Association.¹ It is a pro forma agreement for contingency agreements now made lawful by s.58AA of the Courts and Legal Services Act 1990, as amended by s.154 of Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Damages Based Agreements Regulations 2013 (SI 2013 no.609), which regulations came into force from 1 April 2013 (“**the Regulations**”). We would recommend that possible users read the relevant parts of the Act and read the Regulations before committing themselves.
- 2 The model agreement proposes the use of the Standard Terms presently contained in Annex T of the Code of Conduct (see the BSB website).
- 3 Neither the Bar Council nor the Law Society have prepared a model DBA because of their view that the Regulations are deficient. (On the Bar Council website is a paper which reviews the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Conditional Fee Agreements Order 2013 and the Damages Based Agreement Regulations 2013. As regards the DBA Regulations, the Bar Council complains that hybrid agreements are not permitted, ie agreements where lawyers are able to agree that they should receive some costs if the defined “win” does not occur (rather than no costs at all).)
- 4 The model agreement assumes a written agreement between the solicitor and the barrister. (There is a view that the DBA should be made between the

¹ In these circumstances, neither the draftsmen or draftswomen or any members of the Ch B Assoc accept any responsibility to any third party or any person who chooses to use the model damages based agreement, unless instructed in the normal way on a paid basis.

barrister and lay client, because of the way that s 58AA refers to a DBA being an agreement between a person providing advocacy services and the recipient of those services which provides that the recipient is to make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter in relation to which the services are provided.)

- 5 The Regulations allow a barrister to charge (inclusive of VAT) for first instance cases a sum equal to 50% of the sum ultimately recovered for the client (subject to certain costs deductions etc as set out in regulation 4 (1)(a)). The financial benefit to the client out of which the barrister is to be paid must be specified in the DBA, and may be damages or some other monetary payment. Regulation 4 (4) provides that the 50% cap shall only apply to claims or proceedings at first instance (which presumably therefore means that on appeals a higher percentage can be charged)². (Regulation 4 (3) stipulates not providing for payment above an amount which, including VAT, “*is equal to 50% of the sums ultimately recovered by the client*” - this latter phrase may mean damages, or it may mean damages and costs.)
- 6 Because regulation 4 (3) links payment of the fee to the sums ultimately recovered by the client, it is likely that full enforcement of the fee is not possible before recovery (whether by way of execution or otherwise) by the client.
- 7 In addition, because of the wording of regulation 4 (3), and the provision that a DBA “*must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client*” it will not be possible to provide for some other form of payment if the agreement requires early termination. For example, it is common in CFA’s to stipulate that in the event of termination the client is liable to pay the ordinary hourly rate/hours spent. However, if such provision is included in a DBA it is likely to mean that the DBA is unenforceable under s 58AA (2) of the Act because it does not satisfy the statutory requirement of a DBA. For a similar reason, if a DBA was to specify that an hourly rate/hours spent fee was payable if the claim was lost, that would offend against regulation 4 (1) and be likely to mean the DBA was unenforceable.
- 8 A DBA is a different agreement to a conditional fee agreement in that a DBA is a type of contingency fee agreement allowing a barrister to be paid by payment of a percentage of the recoveries, whereas a conditional fee agreement provides for an uplift on the ordinary hourly rate charged.

² Albeit a possible construction of r.4 (4) is that DBA’s are limited to first instance claims only, but that seems unlikely on the wording which focuses on the “amounts prescribed in paragraphs (2)(b) and (3) ...”.

- 9 The Regulations have no application to conditional fee agreements, and conditional fee agreements are not replaced by DBAs.
- 10 We recommend that members proceed with caution as regards DBAs, as they are new and untested for the purposes of the Chancery Bar, albeit they have been used since 2010 in employment matters. ~~The draft DBA has been sent to BMIF for its approval and confirmation that work done under it is covered by insurance.~~ BMIF confirmed in April 2014 that the form of the draft DBA was approved and that work done under it would be covered by insurance³. Since the DBA essentially follows the Chancery Bar CFA and incorporates the terms of the Standard Contractual Terms, which BMIF has previously approved, it seems likely that BMIF cover will extend to work done under this form of DBA. Please check the ChBA website to see whether BMIF has given that confirmation, and failing that check with BMIF, before signing a DBA in this form.
- 11 We welcome any comments or observations on either the model agreement or this note, and we will be reviewing the drafts on an occasional basis so as to update them in appropriate ways. Please send your comments to Francesca at admin@chba.org.uk marked "DBA".

21 May 2013

(Initial paragraph added April 2016)

The Chancery Bar Committee

³ The second sentence of paragraph 10 was revised in May 2017.