

## NOTE FOR FINANCE COMMITTEE

### Legal expenses for briefing out cases not covered by Approved Fee Schedules (2010-11)

#### INTRODUCTION

At the Finance Committee (FC) meeting on 14 October 1981, Members delegated to the then Attorney General (now Secretary for Justice) and the Solicitor General the authority to negotiate and approve payment of higher fees for engaging barristers in private practice in cases of unusual complexity or length; and fees for professionals on matters briefed out which are not covered by the approved scale of fees. At the same meeting, the Administration agreed to provide Members with periodic reports indicating the levels of fees so negotiated and approved. This note reports on the expenditure incurred by the Department of Justice (the Department) within 2010-11 on briefing out cases not covered by the approved fee schedules.

2. The Department has been briefing out certain criminal and civil cases, according to fee schedules approved by the FC<sup>1</sup>, or at negotiated fees in specified circumstances. Briefing out is mainly to meet operational needs. In general, the Department may resort to briefing out when –

- (a) there is a need for expert assistance where the requisite skill is not available in the Department;

/(b) .....

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<sup>1</sup> At the FC meeting held on 13 June 2003, Members gave approval for the Director of Administration to exercise the delegated authority to make adjustments to the approved fees provided that the extent of adjustment was no greater than the movement of the Consumer Price Index (C). Members also approved at the same meeting a downward adjustment to the rates of the approved fees by 4.3%. The adjusted rates have been effective since 4 July 2003. On 12 June 2007, the authority for approving adjustments to the approved fees was re-delegated to the Permanent Secretary for Home Affairs.

- (b) there is no suitable in-house counsel to appear in court for the Hong Kong Special Administrative Region;
- (c) there is a need for advice or proceedings involving members of the Department;
- (d) there is a need for continuity and economy, e.g. where a former member of the Department who is uniquely familiar with the subject matter is in private practice at the time when legal services are required; and
- (e) the size, complexity, quantum and length of a case so dictate.

In addition, some criminal cases are briefed out with the objective of promoting a strong and independent local Bar by providing work, particularly to the junior Bar, and of securing a pool of experienced prosecutors to supplement those within the Department. This practice is also intended to help change the commonly-held perception that all prosecutors must be government lawyers whereas the private Bar can represent only the defence in criminal cases.

Encl. 1 3. The approved schedule of fees for 2010-11 is at Enclosure 1<sup>2</sup>.

#### **LEGAL EXPENSES NOT COVERED BY APPROVED FEE SCHEDULES FOR THE YEAR ENDING 31 MARCH 2011**

4. During the year ending 31 March 2011, the Department paid out a total of \$216,673,925 as briefing out expenses. The breakdown of expenditure under *Subhead 000 Operational expenses* is as follows –

**/Payment .....**

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<sup>2</sup> On 13 November 2009, with Legislative Council's endorsement, the rates of the approved criminal legal aid fees were adjusted upward by around 8%. As the Department uses the same scale of fees for briefing out, the briefing out fees for cases briefed since that date were adjusted accordingly.

	\$
<b>Payment for hire of legal services and related professional fees</b>	
(a) Briefing out of cases according to approved fee schedule	54,735,010
(b) Briefing out of cases at fees not covered by the approved scales	115,691,833
	<u>170,426,843</u>
<b>Payment for legal services for construction dispute resolution</b>	
(c) Briefing out of construction dispute resolution cases at fees not covered by approved scales <sup>3</sup>	46,247,082
	<u>216,673,925</u>

5. As regards paragraph 4(b), the Department briefed out various matters which were not covered by the approved scale of fees to lawyers, accountants, expert witnesses, consultants and appointed arbitrators. The amount of \$115,691,833 incurred in 2010-11 involved 585 cases. Details are set out at Encl. 2 Enclosure 2.

6. As regards paragraph 4(c), the Department briefed out various matters which were not covered by any approved scale of fees to private practitioners engaged to undertake specialised work relating to construction dispute resolution. The amount of \$46,247,082 incurred in 2010-11 involved 20 cases. Details are set out at Encl. 3 Enclosure 3.

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Department of Justice  
July 2012

<sup>3</sup> There is no approved scale of fee for construction dispute resolution because it is not possible to fix scale fees for construction or other civil cases which vary by complexity and nature.

**Approved scale of maximum fees for briefing out cases**

		<b>For cases briefed from 13.11.2009 and onwards (rate effective since 13.11.2009)</b>
<b>(a)</b>	<b>Court of Appeal</b>	<b>\$</b>
	(i) brief fee	29,460
	(ii) refresher fee per day	14,730
<b>(b)</b>	<b>Court of First Instance</b>	<b>\$</b>
	(i) brief fee	22,100
	(ii) refresher fee per day	11,050
	(iii) conference per hour	1,160
<p>Brief fees and refresher fees are subject to a 10% increase on the base figure for each of the second to the sixth defendant.</p>		
<b>(c)</b>	<b>District Court</b>	<b>\$</b>
	(i) brief fee	14,720
	(ii) refresher fee per day	7,360
	(iii) conference per hour	950
<p>Brief fees and refresher fees are subject to a 10% increase on the base figure for each of the second to the sixth defendant.</p>		
	(iv) brief fee for attending sentencing hearings or procedural applications	2,930
<b>(d)</b>	<b>Magistrates' Court</b>	<b>\$</b>
	(i) brief fee	8,830
	(ii) refresher fee per day	4,410 *
	(iii) brief fee on daily basis	5,880

\* There is a discrepancy of \$5 between the approved rate (\$4,410) and the actual rate adopted in effecting the payments (\$4,415). The difference is handled under delegated authority.

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**Enclosure 2 to FCRI(2012-13)6**

**Hire of legal services and related professional fees  
Breakdown of cases briefed out at fees  
not covered by the approved scales in 2010-11**

<b>Brief description of case/matter</b>	<b>Number of counsel/ legal firms/other professionals involved</b>	<b>Expenditure \$</b>
<b>Civil</b>		
<p>1. <b>CLP Power Hong Kong Limited v The Commissioner of Rating and Valuation (LDGA 241/04, LDRA 365/04, LDRA 366/04, LDRA 367/04, LDRA 368/04 and LDRA 369/04)</b></p> <p>Fees and expenses incurred in relation to briefing local leading and junior counsel to advise and represent the Commissioner of Rating and Valuation (CRV) in the trial before the Lands Tribunal of the six rating appeals/Government rent appeals by CLP Power Hong Kong Limited (CLP) against CRV's valuation for CLP's "Generation, Transmission &amp; Distribution System/Tenement" for assessment year 2004/05 (as test appeals). Fees and expenses were also incurred in engaging various experts to advise and serve as witnesses for the CRV. The main issue of the appeals was on the appropriate valuation method to be adopted. The trial commenced on 22 February 2010, and adjourned part-heard on 1 April 2010. It resumed on 11 to 20 December 2010, and 26 January 2011 to 2 February 2011, with judgment reserved.</p>	6	8,116,063
<p>2. <b>Democratic Republic of the Congo and others (Secretary for Justice intervening) v FG Hemisphere Associates LLC (FACV 5/10, FACV 6/10 and FACV 7/10)</b></p> <p>Fees and expenses incurred in relation to briefing local leading and junior counsel to advise on and appear on behalf of Secretary for Justice (SJ) in his appeal against the decision of the Court of Appeal (CA) dated 10 February 2010 to the Court of Final Appeal (CFA), which was heard together with other parties' appeals</p>	4	5,412,603

<b>Brief description of case/matter</b>	<b>Number of counsel/ legal firms/other professionals involved</b>	<b>Expenditure \$</b>
<p>against the same decision. SJ intervened in the proceedings since first instance because of the public importance of the issues involved.</p> <p>Fees and expenses were also incurred in relation to briefing a Senior Counsel from Australia to advise on the merit of the appeal.</p>		
<p>3. <b>The Hong Kong Electric Company Limited v The Commissioner of Rating and Valuation (CACV 27/10 (on appeal from LDRA 358/04 and LDGA 224/04))</b></p> <p>Fees and expenses incurred in relation to briefing local leading and junior counsel to advise and represent the CRV at his appeal to the CA against the Lands Tribunal's judgment dated 30 November 2009 which allowed the rating appeals and Government rent appeals of the Hong Kong Electric Company Limited for the assessment year 2004/05.</p>	2	2,515,781
<p>4. <b>W (HCAL 120/09)</b></p> <p>Fees and expenses incurred in relation to briefing a Queen's Counsel (QC) from London and local senior and junior counsel on behalf of the Registrar of Marriages as the Respondent in the above judicial review case. The proceedings were instigated by "W", a post-operative male-to-female transsexual, challenging the decision of the Respondent in disallowing her marriage registration with her male partner and the constitutionality of sections 21 and 40 of the Marriage Ordinance (Cap. 181).</p>	3	2,080,834
<p>5. <b>Best Origin Limited v The Commissioner of Rating and Valuation (CACV 67/08 (on appeal from LDGA 14/98))</b></p> <p>Fees and expenses incurred in relation to briefing a London QC and a local junior counsel to advise and represent the CRV at the Best Origin Limited's appeal</p>	2	2,076,838

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<p>to the CA against the judgment of the Lands Tribunal dated 25 February 2008 in LDGA 14/98 concerning CRV's assessment of the rateable value of a development site. The appeal was heard on 4 to 8 October 2010 and dismissed by the CA unanimously on 19 November 2010. Best Origin Limited's application for leave to appeal to the CFA was heard and dismissed by the CA on 15 April 2011.</p>		
<p>6. <b>The Medical Council of Hong Kong v Dr Chan Hei Ling Helen</b> <b>(FACV 13/09)</b></p>	2	1,678,071
<p>Fees and expenses incurred in relation to briefing a London QC and a local junior to represent the Medical Council (the Council) in appealing the decision of the CA which impugned the practice of the Legal Adviser of the Council in retiring with the Council during its deliberations and assisting in producing a draft of the Council's decision.</p>		
<p>7. <b>Takco Limited v Secretary for Justice</b> <b>(HCA 196/07)</b></p>	2	1,354,500
<p>Fees and expenses incurred in relation to briefing local leading and junior counsel in resisting a claim lodged by Takco Limited (the Plaintiff) in the Court of First Instance (CFI) involving a dispute between the Government as landlord and the Plaintiff as tenant of certain land in Cha Kwo Ling, Kowloon.</p>		
<p>8. <b>Penny's Bay Investment Company Limited v Director of Lands</b> <b>(FACV 8/09 (on appeal from CACV 176/07 and CACV 177/07))</b></p>	2	1,251,143
<p>Fees and expenses incurred in relation to briefing a London QC and a local junior counsel to advise and represent the Director of Lands in this appeal before the CFA. Penny's Bay lodged two claims in the Lands Tribunal for determination of compensation pursuant to the Foreshore and Seabed (Reclamations) Ordinance (Cap. 127).</p>		

	Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
9.	<b>Fuchs, Walter Alfred Heinz v Commissioner of Inland Revenue (FACV 22/09)</b>  Fees and expenses incurred in relation to briefing local leading and junior counsel on behalf of the Commissioner of Inland Revenue (CIR) in the Taxpayer's appeal to the CFA against salaries tax assessment. The issue is the chargeability of certain payment received by the employee upon termination of an employment contract.	2	1,232,550
10.	<b>Aviation Fuel Supply Company v Commissioner of Inland Revenue (HCIA 6/09)</b>  Fees and expenses incurred in relation to briefing a London QC and a local counsel on behalf of CIR in the appeal against profits tax assessment. The appeal concerns the taxability of a lump sum received by the Taxpayer from the Airport Authority under a build-operate-transfer franchise agreement.	2	1,214,481
11.	<b>The Hong Kong Electric Company v The Commissioner of Rating and Valuation (LDRA 358/04, LDRA 464/05, LDRA 146/06, LDRA 99/07, LDGA 224/04, LDGA 166/05, LDGA 179/06 and LDGA 106/07)</b>  Fees and expenses incurred for engaging experts to advise and serve as witnesses for CRV in the trial of the rating appeals and Government rent appeals under LDRA 358/2004 and LDGA 224/2004 against CRV's valuation of the company's "Generation, Transmission & Distribution System/Tenement" for the assessment year 2004/05, which took place during financial year 2009-10.	2	1,116,338
12.	Fees and expenses incurred in 522 other civil cases under \$1 million each	-	56,903,454
<b>Sub-total: 533 cases</b>			<b>84,952,656</b>



Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<b>Criminal</b>		
13. <b>Hong Kong Special Administrative Region (HKSAR) v Nancy Ann Kissel (HCCC 55/10)</b>	1	3,913,874
<p>The defendant was charged with and convicted of murdering her husband after trial in 2005. Her appeal against conviction was dismissed by the CA in 2008 but was allowed by the CFA in 2010 and a retrial was ordered. The case was complex and the defendant was represented by a QC. A QC from London was engaged to prosecute the re-trial. The defendant was subsequently convicted of murder after the re-trial and sentenced to life imprisonment. On 16 February 2012, she applied for leave to appeal against her conviction out of time. The hearing date for the leave to appeal has yet to be fixed.</p>		
14. <b>HKSAR v Ma Bo Kee &amp; Nine Others (HCCC 352/09)</b>	2	2,860,000

The founder and Chairman of a public listed company together with his son and other financial officers of the company were charged with 21 counts of offences relating to conspiracy to defraud, making false statements and money laundering. Due to the complexity of the case, the estimated length of the trial (about 100 days) and the number of defendants involved (ten), two senior junior counsel were briefed to prosecute the case.

As a number of facts could be agreed by both parties, the actual trial only lasted for 40 days. Six of the defendants were convicted, either on own plea or after trial, while three were found not guilty. The jury was unable to reach a verdict on one of the defendants; and having reviewed the evidence, the charge against that defendant was not proceeded with. Five defendants lodged their applications against conviction/sentence. The hearing will be heard on 28 November 2012.

<b>Brief description of case/matter</b>	<b>Number of counsel/ legal firms/other professionals involved</b>	<b>Expenditure \$</b>
15. <b>HKSAR v Kevin Barry Egan, Chui Man Si and Andrew Lam (FACC 3/09, 4/09, 5/09)</b>	3	2,656,143
<p>A London silk and a local counsel were engaged to prosecute these three appeals in the CFA. The same counsel also represented the prosecution at the trial in the District Court and the appeal before the CA.</p> <p>In this case, all defendants were charged with conspiracy to pervert the course of public justice. Chui was also charged with attempted perjury, while Egan was additionally charged with attempting to disclose information about the identity of a participant in the witness protection programme. The three defendants were convicted by the trial judge. On appeal, the convictions of Chiu and Lam were affirmed by the CA while the conviction of Egan was squashed. The prosecution, Chiu and Lam respectively appealed to the CFA, and the appeals of Chui and Lam against conviction were allowed while the appeal of the prosecution in respect of the acquittal of Egan was dismissed.</p>		
16. <b>Hostage-taking incident in Manila (CCDI 732/10 - 739/10)</b>	1	2,610,000

Eight Hong Kong tourists on board a tour bus were killed in a hostage-taking incident in Manila on 23 August 2010. The bodies of the deceased were brought back to Hong Kong and upon submission of a Death Investigation Report by the Hong Kong Police, which comprised the evidence of over 100 witnesses, the Coroner ordered a consolidated inquest into the death of these eight persons be held from 14 February 2011 with 25 days reserved.

Given the enormous public interest vested in this case and the international dimension involved therein, a Senior Counsel with expertise in this area of law was briefed to act as “coroner’s officer” to assist the coroner in handling the inquest.

<b>Brief description of case/matter</b>	<b>Number of counsel/ legal firms/other professionals involved</b>	<b>Expenditure \$</b>
17. <b>HKSAR v So Ching Chung &amp; 16 Others (DCCC 296/09 &amp; 744/09)</b>	2	2,458,800

The prosecution arose from a large scale operation by the Customs and Excise Department, and the defendants were charged with dealing with proceeds of cigarette smuggling. Due to the complexity of the case, the estimated length of trial, the number of defendants involved, it was considered necessary to brief two senior junior counsel to prosecute the case. The first part of the trial (with 15 defendants) lasted for 78 days and the second part of the trial (with the remaining two defendants) lasted for 29 days. All the defendants were convicted and ten of the defendants in the first trial appealed against their conviction/sentence. All the convictions were upheld on appeal while one defendant was successful in his appeal against sentence.

18. <b>HKSAR v Chiang Lily &amp; Two Others (DCCC 265/09 &amp; 266/09)</b>	1	1,915,000
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Fees and expenses were incurred in engaging a Senior Counsel to prosecute the trial. The case involved Defendant 1 (D1), a company director of two public listed companies, being found to have conspired with D2 and D3 respectively to deceive the shareholders of the two companies as well as the regulatory authorities in respect of the true extent of the interests of D1 in the share options/shares of the two companies.

After a 62-day trial, D1 and D2 were convicted of conspiracy to defraud while D1 and D3 were found guilty of fraud and of authorising the issue of a prospectus containing an untrue statement. D1 and D3 have lodged an appeal against both convictions and sentences while D2 has appealed against conviction only. The substantive appeal will be heard on 5 March 2013 (with four days reserved).

<b>Brief description of case/matter</b>	<b>Number of counsel/ legal firms/other professionals involved</b>	<b>Expenditure \$</b>
19. <b>HKSAR v Ko Kit (CACC 65/09)</b>	3	1,450,000
<p>This appeal concerns a case of alleged corruption-facilitated cigarette smuggling. One of the three defendants (D1) absconded but was convicted in his absence, while the other two defendants (D2 and D3) were also convicted upon trial. Both D2 and D3 filed application to appeal against conviction. The same senior counsel and two junior counsel who prosecuted the trial were briefed to prosecute the appeal. The case went for 136 days and the appeal was dismissed by the CA.</p>		
20. <b>HKSAR v Tse Tat Fung Tommy &amp; Three Others (CACC 167/08)</b>	2	1,325,000
<p>Fees and expenses were incurred in engaging a Senior Counsel and a junior counsel to prosecute this appeal in the CA which arose from a 99-day trial in the District Court. The case involved two directors plus senior employees of a publicly listed company in Hong Kong being convicted of (i) conspiring to pay illegal rebates to employees of local travel agencies; (ii) conspiring to conceal from the Inland Revenue Department of commission payments made to travel agencies; and (iii) the two company directors, with the assistance of staff members of the company, stealing money from the company. The appeal filed by all defendants was heard between 15 and 22 March 2010. In the event, the conviction and sentence appeals of the applicants were all dismissed.</p>		
21. <b>HKSAR v Yip Kim Po &amp; Four Others (DCCC 960/07)</b>	3	1,082,000
<p>Fees and expense were incurred in engaging a Senior Counsel and a junior counsel to prosecute the trial in the District Court. The case involved six defendants who faced 18 charges relating to the fraudulent use of banking facilities extended to a subsidiary of a public listed company. The first and second defendants were represented by Senior Counsel. The District Court</p>		

<b>Brief description of case/matter</b>	<b>Number of counsel/ legal firms/other professionals involved</b>	<b>Expenditure \$</b>
trial lasted for 80 days. All defendants were convicted and have lodged their appeal against conviction and sentence. The hearing was fixed for 9, and 12 to 16 November 2012.		
22. <b>HKSAR v Wong Tai Wai (HCCC 176/09)</b>	1	1,055,000
Counsel was engaged to prosecute this case in the CFI which was investigated by the Independent Commissioner Against Corruption back in late 1990s. The defendant was a bank employee indicted for seven counts of agent accepting advantages and seven counts of conspiracy to defraud concerning fraudulent use of letters of credit. The defendant emigrated to Canada and was extradited for trial. The defendant was subsequently acquitted after a trial of over 60 days.		
23. Fees and expenses incurred in 41 other criminal cases under \$1 million each	-	7,904,740
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<b>Sub-total: 51 cases</b>		<b>29,230,557</b>
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<b>Hire of Consultant</b>		
24. Fees and expenses for engaging legal consultants	1	1,508,620
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<b>Sub-total: 1 case</b>		<b>1,508,620</b>
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<b>Total expenditure</b>	<b>(585 cases)</b>	<b>115,691,833</b>
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**Legal services for construction dispute resolution  
Breakdown of cases briefed out at fees  
not covered by the approved scales in 2010-11**

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<p>1. <b>Route 8 - Lai Chi Kok Viaduct</b> - Contract No. HY/2003/01 <b>Arbitration between Acciona Infraestructuras, S.A. (formerly known as NECSO Entrecanales Cubiertas S.A.) and the Government of the Hong Kong Special Administrative Region (HKSAR)</b></p> <p>Fees and expenses incurred in relation to briefing solicitors' firm, leading and junior counsel, quantum and programming experts and bridge design experts in an arbitration in respect of claims brought by the Contractor against the Government for various complex issues regarding design, variations, additional work, extensions of time, valuation of variations, prolongation costs, disruption costs and management of change costs.</p>	6	32,844,782
<p>2. <b>Stonecutters Bridge</b> - Contract No. HY/2002/26 <b>Arbitration between Maeda-Hitachi-Yokogawa-Hsin Chong Joint Venture and the Government of the HKSAR</b></p> <p>Fees and expenses incurred in relation to appointing an arbitrator, and briefing a solicitors' firm, outside counsel and quantum expert, in an arbitration in respect of claims brought by the Contractor against the Government for various complex technical and legal issues regarding the measurement and valuation of an item in the Bill of Quantities and Contract Price Fluctuation.</p>	4	5,840,373

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<p>3. <b>Mainlaying between Sai Ying Pun and Kennedy Town</b> <b>- Contract No. 20/WSD/00</b> <b>Arbitration between Brington Engineering Limited and the Government of the HKSAR</b></p>	3	2,747,274
<p>Fees and expenses incurred in relation to appointing an arbitrator, and briefing outside counsel, quantum expert and programming expert, in an arbitration in respect of claims brought by the Contractor against the Government for extension of time, prolongation costs, disruption costs and finance charges.</p>		
<p>4. <b>Structural System Design and Construction of a Primary School in Area 27 and a Primary School and a Secondary School in Area 101, Tin Shui Wai, New Territories</b> <b>- Contract No. SS H333</b> <b>Arbitration between Hong Kong Construction (Hong Kong) Limited and the Government of the HKSAR</b></p>	3	1,306,283
<p>Fees and expenses incurred in relation to briefing a solicitors' firm, outside counsel and piling expert in an arbitration in respect of claims brought by the Contractor for prolongation costs and entitlements under alleged variations.</p>		
<p>5. <b>Reclamation for Ma Liu Shui Interchange and Reprovisioning of Existing Pier</b> <b>- Contract No. CV/2001/04</b> <b>Arbitration between Zhuhai International Economic &amp; Technical Corporation and the Government of the HKSAR</b></p>	3	1,044,976
<p>Fees and expenses incurred in relation to appointing an arbitrator, and briefing outside counsel and quantum expert, in an arbitration in respect of claims brought by the Contractor against the Government for the cost of operation and maintenance of silt curtains.</p>		

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
6. Fees and expenses incurred in 15 other civil cases under \$1 million each	-	2,463,394
<b>Total expenditure</b>	<b>(20 cases)</b>	<b>46,247,082</b>

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