**Civil Justice (Miscellaneous Amendments) Bill 2007**

**Meeting on 11 June 2007**

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SUBMISSIONS OF

THE HONG KONG LAW COSTS DRAFTSMEN ASSOCIATION

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INTRODUCTION

1. As the Law Society and the Bar Association both did, a working group consisting of members of the Hong Kong Law Costs Draftsmen Association ("the Costs Draftsmen") has considered the relevant proposals in the consultation paper released by the Steering Committee on Civil Justice Reform in April 2006 ("the Consultation Paper"), the Final Report of the Chief Justice's Working Party on Civil Justice Reform ("the Final Report"), and what have now become the Civil Justice (Miscellaneous Amendments) Bill 2007 ("the Bill").

2. In response to the invitation of the Bills Committee of the Legislative Council of 22 May 2007, the Costs Draftsmen had to reconvene hastily to review and discuss their current positions regarding the contents of the Bill. They and their peers last made comments on the Consultation Paper, in response to the request of the Judiciary's Steering Committee on Civil Justice Reform, on 3 July 2006.

3. Being approved legal costing practitioners, the Costs Draftsmen have paid particular attention to what is the Marked-up Version of Provisions Affected by the Rules of the High Court (Amendment) Rules 2007 - Consultation Draft, focusing primarily on the proposed changes to the Rules of the High Court, Orders 62 and 62A (and their District Court equivalent) in particular, and their

potential impact on the taxation process and the legal costing practice. The Costs Draftsmen now submit their comments to the Bills Committee as follows.

GENERAL OBSERVATIONS

4. The Costs Draftsmen note with due respect the "Underlying Objectives (O.1A, r.1)" of the proposed new rules, as follows: "

a. *To increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;*
b. *To ensure that a case is dealt with as expeditiously as is reasonably practicable;*
c. *To promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;*
d. *To promote greater equality between the parties;*
e. *To facilitate settlement of disputes; and*
f. *To ensure that the resources of the Court are distributed fairly."*

5. A more tangible version, or intended realization rather, of these objectives is as reflected by the Chief Secretary for Administration's Office in its Legislative Council Brief of 28 March 2007, under the heading of "JUSTIFICATIONS" at pages 1 to 3, and as its Annex B, entitled "KEY FEATURES OF THE PROPOSED AMENDMENTS TO SUBSIDIARY LEGISLATION". It is noted in particular, that so far as "Procedures for Costs Assessment" is concerned, it is being proposed to the legislators, in order to achieve these objectives, that *"changes be introduced to* –

a. *provide for summary assessment of costs, whereby the court can assess the amount of costs payable and then order payment to be made within a certain period of time;*
b. *empower Masters to do provisional taxation on paper without a hearing;*

c. *empower Chief Judicial Clerks to tax costs if the amount of the bill of costs does not exceed the sum of $200,000 (currently $100,000).*"

and that "*The introduction of summary assessment of costs is aimed at discouraging unwarranted interlocutory applications.*"

and that "*The proposed changes are also intended to dispense with the present elaborate and lengthy taxation procedures, thereby saving time and costs.*"

6. The Costs Draftsmen note with grave concern however, the proposers' manifested intention to make, presumably, wide and intensive use of these new provisions and additional powers once they become enacted. That same concern is not abated in the least but rather augmented, now that the proposed new Orders 62 and 62A have been read by them in details.

7. The Costs Draftsmen would pause here to applaud and support the Bar Association's propounded fundamental principles, as aptly and eloquently expressed in Paragraph 2 of its Submission to the Steering Committee, dated 19 July 2006. It may be convenient to quote them here as follows:

"*Principle 1: Expediency should not be achieved at the expense of justice. Any reform must not compromise litigants' right to have a fair hearing and have the merits of their case rigorously and even-handedly determined. There can be no erosion of this paramount concern.*

*Principle 2: Any reform will depend on the quality of the barristers, solicitors and judges who operate the new systems and measures to be implemented. The judge, who will be given enhanced case management powers under the Civil Justice Reform, will play a pivotal role. Judges must follow consistent approaches across the board. Otherwise, "case management" will arbitrarily vary from judge to judge and leave litigants with the sense of taking part in a lottery. This would undermine respect of the Rule of Law. There will need to be a sufficient number of experienced judges, so as to ensure the continuing process of case management with the judge assigned to handle the case.*"

8. The Costs Draftsmen cannot agree more and find these principles equally valid and applicable in the taxation process as part and parcel of the entire litigation procedure, albeit that "barristers, solicitors and judges" and "costs draftsmen and taxing masters" are interchangeable terms when these principles are viewed in the respective contexts.

9. From the perspective of these fundamental principles that the Costs Draftsmen would gratefully adopt, the now proposed summary costs assessments, and provisional taxations on paper without a hearing, whether by taxing masters or the judicial clerks, may indeed operate adversely and oppressively, to discourage even warranted applications, ensue extra time and costs of the parties and the Court, and ultimately defeat their supposed purposes manifested to do good on the contrary. The Costs Draftsmen set out hereunder their observations and reservations in regard to those issues that they can manage to identify presently as they may affect the legal costing practice and the taxation process only. Apologies must be offered here for the limitations and crudity of this work which must be put together hastily and at the Costs Draftsmen's already sparingly private hours given the imminence and extremely stringent time and resources available to them. It is hoped that more could be offered by them given another opportunity and under better circumstances. Having said this, the Costs Draftsmen are no less grateful for the Bills Committee's kind invitation on this occasion which is most appreciated.

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THE DRAFT RHC AMENDMENT

**Draft RHC Amendment O.62 rr.8, 8A, 8B, 8C, 8D**

10. It is being proposed that the current r.8 be deleted entirely and replaced by the new rr.8, 8A, 8B, 8C and 8D instead, presumably in correlation with and in

furtherance to the suggested amendments to the High Court Ordinance (Cap.4), s.52A as regards "wasted costs orders" against "legal representatives", defined to include both counsel and solicitors.

11. Apart from extending the liability coverage to counsel, these amendments seek to vest in the Court even wider power and discretion in making a wasted costs order against a legal representative, including the power to make such wasted costs orders on its own motion, to summarily determine the quantum of such wasted costs, and to fully dictate the mode and manner of the conduct of such wasted costs motions or applications.

12. Much has already been expounded by the Bar Association in its Submissions, paragraphs 10 to 12, in its strenuous objection against these proposals[1]. Their inhibitive and ruinous effect, their being open to abuse and use as a means of intimidation, the lack of any assurance that these might be used only sparingly and only in exceptional cases, and the lack of any redress available to an aggrieved representative for his costs expended in having to show cause, are all felt and shared by the Costs Draftsmen who have little to add here, save to proffer that the current r.8 already affords litigants an adequate protection against their solicitors' own delay, misconduct or default etc. resulting in any wasted costs. If the aim is to extend the coverage to include counsel's default as well one only needs replace the word "solicitor" with "legal representative" and with a reference to the new s.52A (Cap.4). The Costs Draftsmen fail to see any justification for deleting the entire current r.8 and replacing it with such a cumbersome and problematic new rr. 8 and 8A to D.

**Draft RHC Amendment O.62 rr.9(4)(b), 9(5), 9A, 9B, 9C, 9D**

13. It is noted with much concern that for interlocutory proceedings a party would no longer be entitled to taxed costs as of right as it currently does, if these amendments were enacted. The subtle difference per the proposed new r.9A(1)(a) i.e. "in lieu of taxation" means the Court could thenceforth dispense

[1] See also paras. 144 – 153 at pp.62 – 70 of those Submissions

with taxation altogether for this type of costs, albeit subject to very limited exceptions per r.9C(1) that follows. These exceptions are very limited in scope indeed, shifting the burden to the paying party who disputes a summary assessment to show substantial grounds as a prerequisite. A dissenting receiving party on the other hand would have no redress unless he is under disability, etc.

14. It seems clear, particularly in view of the manifested Underlying Objectives (O.1A, r.1) and the Chief Secretary for Administration's Office's "JUSTIFICATIONS" and "KEY FEATURES OF THE PROPOSED AMENDMENTS TO SUBSIDIARY LEGISLATION", that there is every incentive for the Court to make wide/intensive use of r.9A(1)(a) i.e. to make summary assessments of interlocutory costs in lieu of taxations. The Costs Draftsmen have great reservations as to whether costs would actually be saved for the parties this way ultimately. Whereas it may appear that some of the Court's time may be saved from a short-term perspective, if at the end of the day taxation commences it would become inevitable for the parties to have to trace, work out and then exclude those costs previously allowed summarily. The Costs Draftsmen do foresee great difficulties ahead in these scenarios so that the parties would end up having to expend even more time and costs embarking on these extra tasks albeit with little hope for a success if the previous allowances were arbitrary behind-closed-doors assessments. The disarray thus aroused would far outweigh any benefit derived hence being quite contrary to the Underlying Objectives expounded in the first place.

15. Regarding any summary assessment, provisional taxation or assessment on paper without a hearing, the Costs Draftsmen hold the view that these necessarily go against natural justice and the Bar Association's fundamental Principles 1 and 2 as mentioned in paragraph 7 above, that would "*compromise litigants' right to have a fair hearing and have the merits of their case rigorously and even-handedly determined.*" Their proper implementations are also dependent, as rightly pointed out by the Bar Association, on the quality, proficiency and consistency of the court officials, hence draining on the public resources whilst providing no guarantee that the

parties' time and costs would be saved at the end of the day when taxation is proceeded with.

16. If the Court intends to impose on itself these extra tasks and duties one would naturally enquire how well it is equipped and prepared for such. If it ends up having to require additional staffing of the Judiciary and allocation of extra public resources in order to cope, then one would equally query its effectiveness. It is most undesirable to rip the litigants of their current rights to a contested taxation and to substitute it rather with an arbitrary process behind closed doors. The least that one would expect is perhaps some statistics, hitherto lacking, to support such a proposition.

17. The Costs Draftsmen note and agree with the Bar Association's views in Paragraphs 103 and 104 of its Submission, and concur that:

    a. *"Without a general consensus as to what are the current acceptable and reasonable levels of professional fees and charges, consistency in such summary assessment can hardly be achieved"* and

    b. *"the Court's current power in making gross sum assessment, pursuant to* (the current*) O.62 r.9(4)(b), is sufficient*" for achieving the Underlying Objectives.

18. By virtue of r.9D there would basically be no taxation of any interim costs until the case concludes, except where the order states otherwise or where the taxing master sees no prospect of "further order being made". In the former scenario one may ask when interest should start to accrue. To follow the classic doctrine in *Hunt v. Douglas*, etc. i.e. to have interest accruing as from the date of the final order at the conclusion of the case may mean that the receiving party would unjustly suffer from a loss of interest he could have received as he currently does, to accrue as from the date of the interim costs order itself.

**Draft RHC Amendment O.62 r.10**

19. The present rr. 10 (2), (3) and (4) as to costs entitlement when accepting a payment-in would be completely removed, in view of the fact that O.22 would be completely overhauled and replaced by provisions for sanctioned offers and payments – an acclaimed, hence borrowed, feature of the Civil Procedure Rules ("the CPR") in England and Wales. Much has already been propounded by the legal professions on these and the Costs Draftsmen have little to add, other than their own comments on O.62A regarding the costs sanction on indemnity basis upon a party's failure to beat a sanctioned offer from the other side. More of this later in these Submissions.

**Draft RHC Amendment O.62 r.13(1A)**

20. This would raise the threshold of provisional taxations by judicial clerks to $200,000, instead of the present $100,000. More is to be done by court clerks arbitrarily, less to be done by the taxing masters to hear the parties and/or their advocates on an open, contested taxation as part of the inherent adversarial process of the common law system. The Costs Draftsmen repeat their dissent and concerns towards any such hasty expansion of arbitrary assessments the efficacy of which has remained unproven. They also reiterate their remarks as stated per paragraphs 15, 16 and 17 above.

**Draft RHC Amendment O.62 r.13A**

21. These seek to further empower the already powerful taxing masters to give virtually whatever directions as they "may", for "just & expeditious disposal of taxation", for "saving costs of taxation", as to form & contents of a bill of costs, as to the filing of papers & vouchers, as to how objections may be raised or reply made thereto, or as to steps to be taken or things to be done before taxations. These are indeed very wide and general additional powers to be conferred to the masters, so much so that one must ask as a matter of course what limits and safeguards there are that ought to come together with these

proposals. The Costs Draftsmen, like the Bar Association and the Law Society, are concerned that it remains doubtful whether consistency or universal application might be achieved in the directions to be given under these provisions. They agree with the two legal professions' views that the implications and impacts of these cannot be properly assessed unless and until some form of Practice Directions or code of conduct is in sight and, because of this, must disagree with the Law Society's view on the other hand that this is a matter that should not delay the implementation of these new rules[2]. The Costs Draftsmen hold the view rather that there should not be any such implementation, unless and until misgivings and doubts in these respects are properly assuaged, given the vast range of discretion now sought to be vested in the taxing masters by means of these provisions.

**Draft RHC Amendment O.62 r.21(1), (2) &(4)**

22. The taxation procedure as it currently is would be completely overhauled. A receiving party first files a "notice of commencement of taxation" together with a bill of costs, and then serves it within seven days. A prescribed taxing fee is to be paid when the bill is filed. Read with r.32B this would no longer be a deposit the balance of which is presently refundable upon a taxation that determines as well how much taxing fee the paying party should pay the receiving party. It is not known why the status quo should be disrupted as is being proposed here, or why the receiving side should be made to bear that loss.

**Draft RHC Amendment O.62 r.21A**

23. Upon compliance with a taxing master's directions given under r.13A, the party seeking taxation may apply for an appointment to tax, to serve it within seven days. One would ask when such directions would be given and what the parameters within which these might be given are, such as the present Practice Direction 14.3. One also wonders if the current practice would be followed by

[2] The Law Society's Submissions on the Civil Justice Reform, dated 13 July 2006, para.V.1 at pp.51-52.

allocating a call-over or return date when a r.21(1) notice is filed. The Costs Draftsmen would repeat their remarks in paragraph 21 above regarding r.13A.

**Draft RHC Amendment O.62 r.21B**

24. If there is no application under r.21A, a taxing master may tax without a hearing and make an order nisi which becomes absolute unless an application is made within fourteen days for a hearing. If such an application is made, an appointment will be fixed by the taxing master, to be served within seven days. There will be a potential costs sanction however if the taxed costs turn out not to "materially exceed" the provisionally assessed amount. This is a brand new penalty hitherto non-existent throughout the history of the local taxation scene. It is not known why this is considered as necessary or proper. To avoid such a penalty a party might simply avoid a provisional assessment in the first place by making an r.21A application in any case.

25. The taxed costs as such would not be considered as "materially exceeding" a previous provisionally assessed amount if the amount exceeded is "disproportionate to the costs of the hearing". It is not known yet what might be regarded as "disproportionate" for this purpose, or what might happen if those costs were caused by the other side.

**Draft RHC Amendment O.62 r.21C**

26. Once satisfied that "there is a good reason to do so", the taxing master "may" give an appointment to tax the whole or part of the bill of costs. It is indeed surprising to see such "good reason" being added as a vague criterion, and the word "may" used denoting the discretionary nature of such an appointment being given. Nothing is offered by the proposer however as to what might be the criteria for constituting such good reason or the lack of it. Rather, this seems totally out of line with a party's basic statutory right to a taxation pursuant to O.62 r.9(1). It would be unfortunate to see such a right being eroded by rendering it discretionary. Reference is made once again to the Bar Association's Principles 1 and 2.

**Draft RHC Amendment O.62 r.21D**

27. A prescribed fee would be payable by the receiving party and deductible from the paid taxing fee under r.21(4). The remainder would be refundable, if the bill is withdrawn less than seven days before the appointment to tax. It is not known how much exactly is being proposed for such a fee, or how this might correlate with the then prevailing High Court Fees Rule. Currently a taxing fee deposit, being a deposit only, is fully refundable if the bill is withdrawn seven days before a call-over and a maximum of $1,000 payable if less than seven days. There is no reason why this should be changed to the parties' detriment, if the Court is dedicated, as it professes itself to be, to save costs for the parties and to promote early settlement in lieu of taxation.

28. The District Court in the case of *Centaline Property Agency Ltd. v. Ho Wing Chung Jackson [DCCJ 13630/1999]* ruled, much to the practitioners' dismay, that an appointment to tax includes a call-over for this purpose. It may be convenient to take this opportunity to clear the anomaly so that the parties contemplating a settlement in lieu of taxation might know the precise time limits for retrieving the maximum amount possible of the paid taxing fee deposit.

**Draft RHC Amendment O.62 r.22 (1) to (3)**

29. The current provisions as to delay in filing a bill of costs would be completely overhauled and replaced by this new version of r.22, which prescribes a three-month period, as from the order for taxation that is, in which to file a notice of commencement, failing which the taxing master may order with sanctions and conditions "as he thinks fit, including a condition that the person in whose favour the order is made shall pay a sum of money into court."

30. The Costs Draftsmen's instant and unanimous reaction is that three-months must be inadequate save for the simplest cases involving the least of costs and

devoid of any need for the parties to deliberate their positions and/or negotiate settlement in lieu of submitting a bill of costs. Common sense dictates that no hard and fast rule is feasible as to the time required before a bill of costs is finalized and ready to be submitted. Size, volume and circumstances do vary from case to case and the hitherto lack of such a strict requirement in the court rules is by no means an accident. It is submitted that a rigid, fixed period is neither necessary nor desirable, and that the current r.22 provisions which confer on the taxing masters a wide discretionary power to order sanctions as may be appropriate in a case's own circumstances, are sufficient to deter and penalize a party for any undue delay.

31. It is not known what might become of the suggested payment into court the taxing master might order the paying party to make pursuant to the new r.22(3), what its purpose is, and how it might affect the parties' positions in such a case. Nor is it understood how this might help the paying party in grievance, or penalize the receiving party in default.

**Draft RHC Amendment O.62 r.22 (5)**

32. This seeks to prescribe a limitation period for enforcing a costs order but leaves in brackets a suggested two years. It is not known what the proposers' position truly is and why this is considered as being necessary. As the current limitation period is twelve years pursuant to the Limitation Ordinance (Cap.347, s.4(4)), to shorten it to a mere two years is indeed a drastic change and one must query the rationale for such a change and how this change might correlate or interact with the existing Limitation Ordinance provisions.

**Draft RHC Amendment O.62 r.23**

33. The present r.23 regarding the deposit of "taxation bundles" would be completely removed. One wonders why and whether it means that the Court would prefer to adopt a totally flexible hence uncertain approach, so that there would be no rules at all on this subject.

**Draft RHC Amendment O.62 r.24 (1A)**

34. This adds a new provision that if a party fails to turn up for a taxation, the taxing master may proceed in his absence, including doing so "without a hearing" as per r.21B(1). The current practice pursuant to r.24(1) and Practice Direction 14.3, however, is that the taxation would be proceeded with in the defaulting party's absence in such a case. The hearing continues, the party present is allowed to make submissions, and the bill then taxed largely "as is".

35. It is not known once again why it is thought that this status quo should be disrupted, or why it is considered necessary or desirable to rip the innocent party of the opportunity to make due submissions and quickly dispense with the matter by taxing the bill there and then in such a case, but to subject his case to an arbitrary assessment behind closed doors instead.

**Draft RHC Amendment O.62 r.26 (2)**

36. This provides for costs sanctions against a party responsible for adjournments owing to its failure to comply with directions given under r.13A above. To this the Costs Draftsmen's response is to repeat their concern raised above regarding r.13A.

**Draft RHC Amendment O.62 r.32A**

37. This, while confirming the current practice and accepted principle that a party's entitlement to costs to be taxed includes his costs of the taxation, seeks to add new provisions as to liability for those costs of the taxation, so that the Court may make "some other order" as to taxation costs having regard to all the circumstances including the parties' conduct or the amount taxed off or whether it was reasonable for a party to have raised a particular issue in the process.

38. The Costs Draftsmen doubt very much the aptness in principle to make the incidence of taxation costs result-based in a monetary sense. Leaving that

aside for now though, if the amount taxed off does matter then how much or what percentage would be considered as material? Likewise what would constitute unreasonable conduct, claim or dispute by a party? There seems little, if any, room for any anomaly here, if these issues are to be included as criteria to determine the incidence of the taxation costs, or they would merely ensue further protracted disputes and arguments towards the end of or upon a taxation, hence defeat the primary purposes these amendments are professed to seek to achieve in the first place.

39. Costs sanctions against a party's unreasonable conduct in the course of litigation, taxation presumably included, is already well provided for under the current version of r.9A, which clearly defines such conduct to have to be frivolous, vexatious or for what the Court may in the circumstances consider just. Interim payment of costs payable forthwith would be ordered against the party in such a case. Curiously enough though, the proposers now seek to remove these altogether on the one hand for no apparent reason, and replace them on the other with what are the new rr.9A, 9B, 9C and 9D that the Costs draftsmen find problematic and comment on at paragraphs 13 to 18 above.

**Draft RHC Amendment O.62 r.32B**

40. This provides for the reimbursement for taxing fees by the paying party to be confined to "an amount equivalent to the prescribed taxing fee calculated on the basis of the amount of costs allowed". Read with the new r.21(4) this means that, whilst the receiving party is required to pay a prescribed taxing fee calculated presumably on the presented value of the bill of costs on the outset, he could in the normal course of events recover only a fraction of that at the end of the taxation from the paying party, yet the Court would not refund the short-fall from what is currently a "taxing fee deposit". The need for or propriety of such a proposition is simply beyond the Costs Draftsmen's comprehension.

**Draft RHC Amendment O.62 r.32C**

41. This provides for the further circumstances in which the Court may exercise its new r.32A powers to make "some other order" on account of a party's or its legal representative's misconduct. The Costs Draftsmen have nothing to add, other than to join the Bar Association in its objections to this[3].

**Draft RHC Amendment O.62 First Schedule and Second Schedule**

42. The Costs Draftsmen do not have any initial comment on the proposed amendments, but in view of the Law Society's Submissions on the First Schedule would wish to express their dissent against the Law Society's promotion of preparing bills of costs "in chronological form" as an "overriding aim"[4]. Whilst understanding and sympathizing some solicitors' concern and lament over the difficulty the untrained eye may experience in following what costing practitioners would commonly regard as the "time-costs section" of a typical bill of costs, it must be put right that any thought or suggestion that such a "format of bills" was a creation by law costs draftsmen is but a total fallacy and misconception. Nor is it true that such a time-costs section represents the entirety of a bill of costs prepared by a law costs draftsman.

43. As legal costing practitioners, the Costs Draftsmen agree that there must be merits, alongside drawbacks, of presenting bill items in a chronological order. As a matter of fact they have always adopted such a practice the best they could albeit within the strict parameters in which they are allowed to do so. The prevailing bill format is the result of an evolution that took place throughout the history of the local taxation practice, an agreed and accepted approach based upon on-hand knowledge, experience, common sense and a continuous interaction between the Court, taxing masters in particular, and

[3] Consultation Paper on Proposed Legislative Amendments for the Implementation of Civil Justice Reform – SUBMISSION OF THE HONG KONG BAR ASSOCIATION, dated 19 July 2006, para.158 at p.71.

[4] The Law Society's Submissions on the Civil Justice Reform, dated 13 July 2006, para.V.3 at pp.54-58.

costing practitioners consisting of costs draftsmen and solicitors alike. A typical bill of costs consists of three main sections, what one might regard as the "scale-charges section" to begin with, followed by the "main item" or "time-costs section", and finally the "taxation costs section". There is little exception that prudent costs draftsmen would always present the respective bill items in each of these sections in as much a chronological manner as they could.

44. Those who criticize a time-costs section the way it is may rest assured that they are not the first to have canvassed the viability of presenting time-costs in a purely chronological way without the various headings by reference to the categories listed in item 5 of Part 1 of the First Schedule. The reason why this has not been taken any further is simply that it was the Court who ruled against it and indeed protested strongly against it when some litigants tried to adopt such an approach in several instances[5]. It has to be accepted that there is no perfect bill format on earth and that a strictly chronological bill, necessarily prolonging the bill hence the time required for taxing it, must pose great difficulties in any ordinary taxation of an averagely complex litigation case. The grouping and categorizing of the time-costs under the various headings, now dreaded by some, is but a compromise required by the Court aiming at summarizing those costs hence shortening the taxation process. It has never posed any difficulty though to the experienced masters or the trained professionals in reading and understanding a bill presented this way.

45. The Costs Draftsmen have considered the specimen bill format presented by the Law Society in its Submissions but would not endorse it for these reasons. The only advantage of this suggested format is that it may be easier for an amateur to produce such a bill of costs.

46. The Costs Draftsmen join the Law Society however in seeking to persuade the Court to review the current suggested charge-out rates for the practitioners and the scale charges per the O.62 Schedules and to endorse a favorable increment

[5] See for example Law Society Circular 154/91 and letter from Mr. Registrar Betts to Mr. John Croxen, the then Secretary General of the Society, dated 31 May 1991.

as soon as possible. The last review/increment was made in 1997[6] whereas previously there used to be regular increments at least once every two years.

**Draft RHC Amendment O.62A**

47. These are new provisions enabling any party to a taxation to make a "sanctioned" costs offer to the other side[7], and where the offeror is the paying party, to back that offer up by a "sanctioned payment"[8]. The key feature of these, like that of their counterparts per the new O.22 to cater for the substantive litigation process, is to require the offering paying party to put his money where his mouth is – an acclaimed aspect said to have worked well according to the English and Welsh experience in operating the Civil Procedure Rules ("CPR").

48. Unlike their counterparts per the new O.22 though, the costs consequences suggested for a party's failure to beat or "better" the other side's sanctioned costs offer made under the new O.62A are for that failing party to pay the costs of the taxation on an indemnity basis as from the date the offer was received[9]. A plaintiff's failure to beat an O.22 sanctioned offer on the other hand would attract merely costs on a party-and-party basis[10].

49. It is not known why such harsher costs consequences are considered as being necessary or desirable or even appropriate in a taxation which is only part and parcel of the entire litigation process. Such a "double-standard" is indeed perplexing, particularly when an indemnity costs sanction is in principle applicable only if a defaulting party has acted unreasonably, defaulted tremendously or in the nature of being frivolous or vexatious or being grossly negligent etc. To fail to beat an offer could at best be regarded as an error of judgment only and hardly even close to being such gross misconduct.

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[6] See The Law Society's Circulars 97-234(PA), 287/95, 123/95, 115/95
[7] O.62A, r.2
[8] O.62A, r.3
[9] O.62A, rr.14, 15
[10] O.22, r.21

50. The Costs Draftsmen submit therefore that the suggested indemnity costs sanctions for O.62A rr.14 and 15 to impose is inappropriate and should be substituted by ordinary costs consequences on a party-and-party basis.

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Presented by : The Hong Kong Law Costs Draftsmen Association©

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