

NOTE FOR FINANCE COMMITTEE

Legal expenses for briefing out cases not covered by Approved Fee Schedules (2011-12)

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 2011-12 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 FC¹, 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) 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)

¹ 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.

- (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 2011-12 is at Enclosure 1.

LEGAL EXPENSES NOT COVERED BY APPROVED FEE SCHEDULES FOR THE YEAR ENDING 31 MARCH 2012

4. During the year ending 31 March 2012, the Department paid out a total of \$207,670,044 as briefing out expenses. The breakdown of expenditure under *Subhead 000 Operational expenses* is as follows –

	\$
Payment for hire of legal services and related professional fees	
(a) Briefing out of cases according to approved fee schedule	52,957,027
(b) Briefing out of cases at fees not covered by the approved scales	92,534,230
	145,491,257
Payment for legal services for construction dispute resolution	
(c) Briefing out of construction dispute resolution cases at fees not covered by approved scales ²	62,178,787
	207,670,044

/5.

² 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.

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 \$92,534,230 incurred in 2011-12 involved 550 cases. Details are set out at Enclosure 2.

Encl. 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 \$62,178,787 incurred in 2011-12 involved 24 cases. Details are set out at Enclosure 3.

Encl. 3

Department of Justice
December 2012

Approved scale of maximum fees for briefing out cases

	For cases briefed up to 8.3.2012 (rate effective since 13.11.2009)	For cases briefed from 9.3.2012 and onwards (rate effective since 9.3.2012)#
(a) Court of Appeal		
	\$	\$
(i) brief fee	29,460	29,920
(ii) refresher fee per day	14,730	14,960
(b) Court of First Instance		
	\$	\$
(i) brief fee	22,100	22,440
(ii) refresher fee per day	11,050	11,220
(iii) conference per hour	1,160	1,170
Brief fees and refresher fees are subject to a 10% increase on the base figure for each of the second to the sixth defendant.		
(c) District Court		
	\$	\$
(i) brief fee	14,720	14,940
(ii) refresher fee per day	7,360	7,470
(iii) conference per hour	950	960
Brief fees and refresher fees are subject to a 10% increase on the base figure for each of the second to the sixth defendant.		
(iv) brief fee for attending sentencing hearings or procedural applications	2,930	2,970
(d) Magistrates' Court		
	\$	\$
(i) brief fee	8,830	8,970
(ii) refresher fee per day	4,410 *	4,480
(iii) brief fee on daily basis	5,880	5,970

On 9 March 2012, with Legislative Council's endorsement, the rates of the approved criminal legal aid fees were adjusted upward by around 1.6%. 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.

* 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.

Enclosure 2 to FCRI(2012-13)15

**Hire of legal services and related professional fees
Breakdown of cases briefed out at fees
not covered by the approved scales in 2011-12**

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
Civil		
<p>1. Chu Yee Wah v Director of Environmental Protection (CACV 84/11)</p> <p>Fees and expenses incurred in relation to briefing local leading and junior counsel to act for the Director of Environmental Protection (DEP) in her appeal to the Court of Appeal (CA) against the judgment of the Court of First Instance (CFI) of 18 April 2011 which allowed this Judicial Review (JR) application. Two academics were also engaged to advise DEP in respect of the appeal.</p> <p>The JR is against DEP's decisions made on 23 October 2009 and 4 November 2009 respectively in granting approval to the Environmental Impact Assessment (EIA) Reports relating to two out of the three designated projects of the Hong Kong-Zhuhai-Macau Bridge Project (namely, the Hong Kong Boundary Crossing Facilities and the Hong Kong Link Road) and in granting environmental permits for the said projects. On 27 September 2011, the CA handed down its judgment allowing DEP's appeal with costs at the CA and below.</p>	5	3,611,600
<p>2. Telecommunications (Competition Provisions) Appeal Board - Appeal No. 29 Smartone Mobile Communications Ltd. v The Telecommunications Authority (TA) (MIS 528/10)</p> <p>Fees and expenses incurred in relation to briefing a London Queen's Counsel (QC) and a local counsel</p>	3	3,490,487

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<p>on behalf of TA in the proceedings taken out by Smartone Mobile Communications Ltd. (Smartone) before the Telecommunications (Competition Provisions) Appeal Board. PCCW-HKT Telephone Limited was joined as an intervener. After rounds of case management conferences, Smartone withdrew the case in April 2012. Fees and expenses also incurred in engaging a local law firm to carry out the solicitors' work in this case.</p>		
<p>3. Democratic Republic of the Congo and Others (Secretary for Justice (SJ) intervening) v FG Hemisphere Associates LLC (FACV 5/10, FACV 6/10 and FACV 7/10)</p>	4	3,316,278
<p>Fees and expenses incurred in relation to briefing London QC and 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 CA dated 10 February 2010 to the Court of Final Appeal (CFA), which was heard together with other parties' appeals against the same decision. SJ intervened in the proceedings since first instance because of the public importance of the issues involved.</p>		
<p>4. 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)</p>	5	3,202,622
<p>Fees and expenses incurred in relation to briefing local leading and junior counsel and engaging experts for the Commissioner of Rating and Valuation (CRV) in the six rating appeals and Government rent appeals lodged by CLP Power Hong Kong Limited (CLP) against CRV's valuation of CLP's "Generation, Transmission & Distribution System/Tenement" for the assessment year of 2004/05 (as test appeals). The main issue of the appeals was on the appropriate valuation method to be adopted. The trial of these six appeals before the Lands Tribunal (LT) commenced on 22 February 2010, and was adjourned part-heard on 2 February</p>		

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<p>2011. From 30 January 2012 to 1 February 2012, the LT heard the parties' submissions on the effect of the CFA's judgment in the rating appeals and Government rent appeals lodged by the Hong Kong Electric Co. Ltd. (FACV 12/10) dated 21 June 2011 on these six CLP appeals, with judgment reserved.</p>		
<p>5. The Hong Kong Electric Co Limited. v The Commissioner of Rating and Valuation (FACV 12/10)</p>	3	2,431,300
<p>Fees and expenses incurred in relation to briefing out local leading and junior counsel for CRV in an appeal by the Hong Kong Electric Co Ltd. (HEC) to the CFA against the CA's judgment of 14 September 2010 on the case. In its judgment, CA allowed CRV's appeal against the LT's judgment of 30 November 2009 in favour of HEC in a rating appeal and a Government rent appeal for the assessment year of 2004/05 against CRV's assessment of rates and Government rent for HEC's "Generation, Transmission & Distribution System/Tenement". On 21 June 2011, the CFA allowed HEC's appeal with costs to HEC, setting aside the CA's judgment and restoring the LT's judgment. On 6 January 2012, the CFA also handed down a judgment on interest to be applied to the sum overpaid by HEC to CRV, accepting CRV's arguments and also with costs to CRV.</p>		
<p>6. Secretary for Justice v Chau Ka Chik Tso (by its Manager Chau Fuk Sze Duly Registered under the New Territories Ordinance Cap. 97) and 14 Others (FACV 5/11)</p>	3	1,661,200
<p>Fees and expenses incurred in briefing local leading and junior counsel for the Government's appeal to the CFA against the CA's judgment in this case. The Plaintiffs claimed for paper or possessory title over some discrepant areas in Yuen Long. The CFI dismissed the Plaintiffs' claims and declared that such areas are Government land. Some of the Plaintiffs appealed against the CFI's judgment and</p>		

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
the CA allowed the Plaintiff's appeal. On 8 December 2011, CFA handed down a judgment dismissing Government's appeal with costs to the Plaintiffs.		
7. New Hong Kong Tunnel Co Ltd. v The Secretary for Justice on behalf of the Government of the Hong Kong Special Administrative Region (MIS 295/11)	7	1,297,539
Fees and expenses incurred in relation to briefing an overseas leading counsel, a local senior counsel and a local junior counsel to act for the Government in the Eastern Harbour Tunnel Toll Increase Arbitration ("the Arbitration") instituted by the New Hong Kong Tunnel Co Ltd. (NHKTC) pursuant to section 55 of the Eastern Harbour Crossing Ordinance (Cap. 215). Fees and expenses also incurred in engaging experts to advise the Government in the Arbitration, and paying one of the two arbitrators and an umpire for the Arbitration.		
On 3 October 2011, a preliminary hearing was held before the arbitrators. During the financial year of 2011-12, in accordance with the arbitrators' directions, the parties filed and served their respective pleadings, while NHKTC also filed and served its experts' reports. The substantive hearing took place between 16 and 19 July 2012. On 22 October 2012, the arbitrators released to the parties the Partial Final Award and Reasons for Award. The arbitrators determine that NHKTC's application for an upward variation in the tolls fails and is dismissed.		
8. Chu Yee Wah v Director of Environmental Protection (HCAL 9/10)	3	1,274,700
Fees and expenses incurred in relation to briefing local leading and junior counsel to act for DEP in the JR proceedings before the CFI, in which the Applicant sought to JR DEP's decisions made on 23 October 2009 and 4 November 2009 respectively		

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<p>in granting approval to the EIA Reports relating to two out of the three designated projects of the Hong Kong-Zhuhai-Macau Bridge Project (namely, the Hong Kong Boundary Crossing Facilities and the Hong Kong Link Road) and in granting environmental permits for the said projects. On 18 April 2011, the CFI handed down its judgment allowing the JR and ordering DEP to pay one-third of the Applicant's costs of the JR.</p>		
<p>9. Vallejos Evangeline Banao also known as Vallejos Evangeline B. v Commissioner of Registration and Another (HCAL 124/10)</p>	4	1,215,151
<p>Fees and expenses incurred in relation to briefing a London QC, one local senior counsel and one local junior counsel to act for the Commissioner of Registration in resisting a JR application taken out by a foreign domestic helper seeking right of abode in Hong Kong. An outside local expert on constitutional law and the Basic Law was also engaged to give advice on relevant issues. The decisions under challenge are the Commissioner's refusal to issue the Applicant a Hong Kong permanent identity card on 2 December 2008 and the Registration of Persons Tribunal's dismissal on 4 June 2010 of the Applicant's appeal against the Commissioner's refusal. The JR application was heard by the CFI on 22 and 23 August 2011 and was allowed by the judgment handed down on 30 September 2011.</p>		
<p>10. The Catholic Diocese of Hong Kong also known as The Bishop of the Roman Catholic Church in Hong Kong Incorporation v Secretary for Justice (FACV 1/11)</p>	2	1,059,000
<p>Fees and expenses incurred in relation to briefing a local leading counsel and a local junior counsel to represent SJ who acted on behalf of the Secretary for Education and Manpower in the appeal to the CFA by the Catholic Diocese of Hong Kong challenging the constitutionality of the provisions in the</p>		

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
Education Ordinance (Cap. 279) concerning the establishment of incorporated management, in so much as they are applicable to aided primary and secondary schools run by the Applicant. The CFA dismissed the appeal on 13 October 2011.		51,354,612
11. Fees and expenses incurred in 490 other civil cases under \$1 million each	-	51,354,612
Sub-total: 500 cases		73,914,489

Criminal

12. Hong Kong Special Administrative Region (HKSAR) v Nancy Ann Kissel (HCCC 55/10)	1	1,885,382
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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 for the leave to appeal will be held from 7 to 9 October 2013.

13. HKSAR v Chiang Lily & Two Others (DCCC 265/09 & 266/09)	1	1,710,000
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Fees and expenses were incurred in engaging a Senior Counsel to prosecute the trial. Defendant (D)1 was a director of two listed companies. D2 was a director of one of the two companies, and D3 was a director of the other company. It was alleged that D1 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

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<p>the interests of D1 in the share options/shares of the two companies.</p>		
<p>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 authorizing 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).</p>		
<p>14. HKSAR v Chan Chi Wan, Stephen & Two Others (DCCC 1214/10)</p>	1	1,400,000
<p>This trial involved five corruption and fraud charges against a senior officer of a local television (TV) station (D1), the proprietor of an advertising company (D2) and a sales director of the TV station (D3).</p>		
<p>The case was complex and the defendants were each represented with by two counsel, with both D1 and D2 having one of their counsel being a Senior Counsel (SC). An SC and a junior counsel were engaged to prosecute the trial which lasted for 18 days. The judge acquitted the defendants of all charges and the prosecution has brought an appeal by way of cases stated against the acquittal of D1 and D2. The hearing was held on 6 and 7 November 2012 and the appeal was allowed. The case is remitted back to the District Court to resume trial.</p>		
<p>15. HKSAR v Cheung Ching Ho (DCCC 1443/09)</p>	1	1,280,000
<p>Fees and expenses were incurred in engaging an SC to prosecute this case. The Defendant pleaded not guilty to four counts of conspiracy to defraud, contrary to Common Law and punishable under section 159C(6) of the Crimes Ordinance (Cap. 200). He applied for a permanent stay of the proceedings and was refused by the District Court. Thereafter the Defendant changed his pleas</p>		

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
to guilty and was convicted. He was sentenced to imprisonment for two years and one month.		
16. HKSAR v Fan Cho Man & Others (FACC 6/10, FACC 7/10, FACC 8/10, FACC 10/10, FACC 11/10 and FACC 12/10)	4	1,278,384
The case was related to a complicated fraud arising from the takeover of a Hong Kong publicly listed company. The defendants were variously charged with conspiracy to defraud and false statement by company directors. All defendants were convicted after trial for 102 days, and on appeal to the CA, save for one conviction of D1, all convictions of all defendants were upheld. The defendants appealed to the CFA while the prosecution also lodged a cross appeal in respect of the one of conviction D1 which was quashed by the CA. The hearing lasted for three days. Because of the complexity of the issues involved, an SC and a barrister, who had conducted the appeal in the CA, were briefed to handle the appeal. At the end, all the convictions of the defendants were quashed by the CFA.		
17. HKSAR v Chu Chien Tung & Four Others (HCCC 320/10)	2	1,196,000
This is a CFI case involving five defendants prosecuted for 21 charges related to a complicated listing fraud by publishing reports which contained false information. Because of the number of defendants, the length of trial, and the complexity of the issues involved, two experienced counsel were briefed to handle the prosecution. The trial lasted for 29 court days. D1 to D3 were convicted while there was a “hung jury” against D4 and D5 where the jury was unable to reach a verdict in respect of them. The prosecution has sought a re-trial against D4. The case was heard from 3 to 10 September 2012 before the District Court. The defendant pleaded guilty and was sentenced to 12 months’ imprisonment on 18 September 2012.		

	Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
18.	HKSAR v Yeung Wai, Birney (CACC 176/10 & CAAR 4/10) HKSAR v Wong Chi Wai, Philip (CACC 203/10 & CAAR 6/10)	2	1,131,960

These appeals and applications arose from two trials in the District Court against two defendants, who were the handling solicitor and the barrister at trial respectively acting for an individual who stood trial in the District Court for theft.

During the course of the theft trial, the two defendants conspired to apply pressure to a prosecution witness such that she would seek to set aside her witness summons on the grounds of legal professional privilege.

The solicitor was subsequently convicted after trial of one count of doing acts tending and intended to pervert the course of public justice and was sentenced to four months' imprisonment suspended for 12 months. His appeal against conviction was allowed and his sentence was set aside.

The barrister was convicted after trial of one count of attempting to pervert the course of public justice and was sentenced to six months' imprisonment. His subsequent appeal against conviction and the prosecution's application for review of his sentence were dismissed.

Because of the complexity of the issues involved, a QC from London and a local SC (who had conducted the trial of Wong), were briefed to handle the above-mentioned appeals by the defendants and the application by the prosecution.

19.	Fees and expenses incurred in 43 other criminal cases under \$1 million each	-	8,738,015
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Sub-total: 50 cases

18,619,741

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
Total expenditure	(550 cases)	<u>92,534,230</u>

**Legal services for construction dispute resolution
Breakdown of cases briefed out at fees
not covered by the approved scales in 2011-12**

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<p>1. Route 8 - Lai Chi Kok Viaduct - Contract No. HY/2003/01 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)</p> <p>Fees and expenses incurred in relation to appointing an arbitrator, and briefing a solicitors' firm, leading and junior counsel, quantum and programming experts and bridge design expert 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	41,295,945
<p>2. Sha Tin New Town, Stage II - Road T3 and Associated Roadworks - Contract No. ST 79/02 Arbitration between MBH Joint Venture (Maeda Corporation, Barbican Construction Co. Ltd, Hsin Chong Construction Co. Ltd) and the Government of the HKSAR</p> <p>Fees and expenses incurred in relation to briefing a solicitors' firm and quantum and programming experts in an arbitration in respect of claims brought by the Contractor against the Government for the cost of extensions of time, disruption, prolongation, acceleration, variations and missing items.</p>	2	6,455,162

	Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
3.	<p>Cheung Chau Old Town Road and Drainage Improvements Stage 2 - Contract No. IS 13/04 Arbitration between China Metallurgical Group Corporation and the Government of the HKSAR</p> <p>Fees and expenses incurred in relation to appointing an arbitrator, and briefing a solicitors' firm, external counsel, quantum expert and engineering expert (concrete) in an arbitration in respect of claims brought by the Contractor against the Government for the reimbursement of its costs incurred for alleged variation, missing items, disruption and prolongation costs.</p>	4	4,805,172
4.	<p>Western & Central District Water Supply Stage 1 Mainlaying in Sheung Wan and Sai Ying Pun - Contract No. 13/WSD/94 Water Supply to West Kowloon Reclamation - Stage 1 Construction of Shek Kip Mei No. 2 Fresh Water Service Reservoir & Associated Mainlaying - Contract No. 14/WSD/94 Arbitration between UDL Contracting Limited and the Government of the HKSAR</p> <p>Fees and expenses incurred in relation to appointing an arbitrator, and briefing a solicitors' firm, external counsel and quantum expert in an arbitration in respect of claims brought by the Contractor against the Government for the cost of extension of time, delay cost, variations, measurement and interest/finance.</p>	4	3,063,259
5.	<p>Structural System Design and Construction of a Primary School in Area 27 and a Primary School and a Secondary School in Area 101 in Tin Shui Wai, New Territories - Contract No. SS H333 Arbitration between Hong Kong Construction (Hong Kong) Limited and the Government of the HKSAR</p>	3	1,836,355

Brief description of case/matter	Number of counsel/ legal firms/other professionals involved	Expenditure \$
<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 against the Government for prolongation costs and entitlements under alleged variations.</p>		
<p>6. Stonecutters Bridge - Reinforced Concrete Paving to Portion of site used as Works Area - Contract No. HY/2002/26 Arbitration Appeal Proceedings between Maeda-Hitachi-Yokogawa-Hsin Chong Joint Venture and the Government of the HKSAR</p>	4	1,113,934
<p>Fees and expenses incurred in relation to briefing a solicitors' firm, overseas leading counsel and local junior counsel to advise and represent Government in relation to the appeal by the Contractor to the High Court for an order granting leave to appeal against the Partial Award made by the Arbitrator on 3 March 2011. Fees and expenses also incurred in engaging a quantum expert to advise the Government on the case.</p>		
<p>7. Fees and expenses incurred in 18 other civil cases under \$1 million each</p>	-	3,608,960
Total expenditure	(24 cases)	62,178,787
