



# **“Assessment of Costs of Arbitration”**

**Speaker: Alfonso Fung**

**Moderator: Raymond Yang**

**Date: Monday, 20 December 2021**

**Time: 6:00pm – 7:30pm (HKT)**

# Moderator & Speaker

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**Moderator:**  
**Raymond Yang**

Counsel, Mayer Brown;  
Council Member, HKI Arb



**Alfonso Fung**  
**FHKI Arb**

Law Costs Draftsman,  
Alfonso Fung & Co

# What this talk is about

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- This talk is not about what order the tribunal should make, it is about how best to carry out the assessment of costs by the tribunal under s74 of the Hong Kong Arbitration Ordinance Cap. 609, or taxation of costs by the court under s75 Cap. 609 in an efficient, effective and economical way after an award is made.
- The material is based on the experience gained from serving as assessor to tribunals and acting for the parties.
- The seat of arbitration is Hong Kong with Hong Kong Law as the governing law.

# Section 74, Cap. 609, in so far as it relates to the assessment of costs, is as follows:-

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74. Arbitral tribunal may award costs of arbitral proceedings

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(5) Subject to section 75, the arbitral tribunal must—

(a) assess the amount of costs to be awarded or ordered to be paid under this section (other than the fees and expenses of the tribunal); and

(b) award or order those costs (including the fees and expenses of the tribunal).

(6) Subject to subsection (7), the arbitral tribunal is not obliged to follow the scales and practices adopted by the court on taxation when assessing the amount of costs (other than the fees and expenses of the tribunal) under subsection (5).

(7) The arbitral tribunal—

(a) must only allow costs that are reasonable having regard to all the circumstances; and

(b) unless otherwise agreed by the parties, may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration....

## Taxation of costs by the court is governed by Section 75 Cap. 609, viz:-

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75. Taxation of costs of arbitral proceedings (other than fees and expenses of arbitral tribunal)

- (1) Without affecting section 74(1) and (2), if the parties have agreed that the costs of arbitral proceedings are to be taxed by the court, then unless the arbitral tribunal otherwise directs in an award, the award is deemed to have included the tribunal's directions that the costs (other than the fees and expenses of the tribunal) are to be taxed by the court on the party and party basis in accordance with rule 28(2) of Order 62 of the Rules of the High Court (Cap. 4 sub. leg. A).
- (Amended 7 of 2013 s. 7)

# The taxation of costs in the High Court is governed by Order 62 RHC

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Order 62 r2 RHC provides that the following rules in O62 apply to a taxation of arbitration costs under s75 Cap. 609, viz:-

- Rule 7(4)..The taxing master shall, in relation to any thing done or omission made in the course of taxation, have the same power to disallow or to award costs as the Court has under Paragraph (1) to direct that costs shall be disallowed to or paid by any party.
- Rule 8D (except §4). Personal liability of legal representative for costs – supplementary provisions.
- Rule 8E..Stages of considering whether to make direction under rule 8D(1).
- Rule 9D(1) and (4): .(1) the costs of any proceedings shall not be taxed until the conclusion of the action, and (4) Where it appears to a taxing master that there is no likelihood of any further order being made in a cause or matter; he may order the person entitled to payment of the costs of any interlocutory proceedings which have taken place to commence taxation proceedings in accordance with rule 21.
- Rules 13 and 13A.. Power of certain judicial clerks to tax costs (bills not exceeding \$200,000) and; Taxing Master may give directions.
- Rules 14 to 16..Supplemental powers of taxing masters; Disposal of business by one taxing master for another; Extension of time. ....(continue next page)

- Rule 17(1)..A taxing master may from time to time in the course of the taxing of any costs by him issue an interim certificate for any part of those costs which has been taxed.
- Rules 17A and 17B..Final Certificate; Taxing Master may set aside his own decision.
- Rule 18..Power of taxing master where party liable to be paid and to pay costs (set off).
- Rule 21 (except sub rule 4) & 21A..Mode of commencing proceedings for taxation; Application for taxation to be set down.
- Rule 21B, 21C & 21D...(21B) Provisional taxation by a taxing master for bills exceeding \$200,000, variation of the order nisi and costs implication if the oral taxation does not bring about a result materially better than the provisional taxation; (21C) Taxation with a hearing; (21D) Withdrawal of bill of costs and refund of taxing fee.
- Rule 22 to 26..Delay (exceeding 3 months from order) in commencement of taxation or in proceeding with taxation, 2 years limitation from the order for costs; Taxation (oral taxation when a party entitled to be heard does not turn up); power to adjourn.
- Rule 28A (except sub-rules 4 and 7)..Costs of a litigation in person.
- Rule 32A.. Liability for costs of taxation being in the discretion of the taxing master.
- Rule 32B.. Reimbursement of taxing fees by the paying party to the receiving party by the paying party on the amount allowed.
- Rule 33 to 35..Application to taxing master for review; Review by taxing master; Review by taxing master's certificate by a judge.

## Rules in Order 62 not applicable to taxation of arbitration costs

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- Noticeably absent from these applicable rules are rules 28, 29, 30, 31 and 32, which defines the basis and scales for taxation and assessment of costs. Under r28 there are (1) the Party & Party basis (allowing only costs which are necessary or proper for the attainment of justice) (2) the Common Fund basis (allowing reasonable costs) (3) the indemnity basis (allowing costs that are not unreasonable) (4) Solicitors and own client basis (allowing all costs with the express or implied instructions of the client and (5) the Trustee Basis, allowing all costs unless the trustee is in breach of trust. They are arranged more or less in the order of degree of generosity.
- Although O62 r28 RHC is not among the applicable rules I did come across the situation from time to time that a tribunal would order costs on a higher basis than the usual reasonable test by ordering assessment on an indemnity basis.
- I reckon this is permitted under s74(1)(2) Cap. 609 which provides:-
- 74. Arbitral tribunal may award costs of arbitral proceedings
  - (1) An arbitral tribunal may include in an award directions with respect to costs of arbitral proceedings (including the fees and expenses of the tribunal).
  - (2) The arbitral tribunal may, having regard to all relevant circumstances (including the fact, if appropriate, that a written offer of settlement of the dispute concerned has been made), direct in the award under subsection (1) to whom and by whom and in what manner the costs are to be paid.



# So how may a Law Costs Draftsman help?

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A Law Costs Draftsman can be appointed an assessor to provide technical assistance to the tribunal under s54(2) Cap. 609, which provides:-

54. Article 26 of UNCITRAL Model Law (Expert appointed by arbitral tribunal)

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(2) Without affecting article 26 of the UNCITRAL Model Law, given effect to by subsection (1), in assessing the amount of the costs of arbitral proceedings (other than the fees and expenses of the tribunal) under section 74—

(a) the arbitral tribunal may appoint assessors to assist it on technical matters, and may allow any of those assessors to attend the proceedings; and

(b) the parties must be given a reasonable opportunity to comment on any information, opinion or advice offered by any of those assessors.

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- In such a capacity the Law Costs Draftsman's task would involve providing technical support to the tribunal. The assignment requires reading in, considering the receiving party's bill of costs and the paying party's objections as well as any reply, and making comments.
  - In my case I would provide a table of non-binding recommendations with calculation of the amounts to be allowed for each item and for the whole bill supported by reasons.
  - The tribunal would provide instructions as to any discretionary areas like rates and time for any specific areas/items in the course of the exercise; and would make the final decision as to allowance of individual items and as to the bill as a whole.
  - An Order Nisi on the allowance can then be delivered to the parties for their comments, any party can make an application for a hearing before a final award is made. In an oral assessment the assessor may sit in to assist the tribunal as appropriate.

# Is the involvement of an assessor costs saving and effective?

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- By its very nature this exercise is both technical and time consuming, it requires knowledge and experience of the historical and going rates for various professionals, the work and the time normally considered reasonable (or not unreasonable as on an Indemnity Basis) for proceedings of similar nature. It also entails the use of some specialist software for the calculation of often thousands of entries with different fee earners with different rates over a period of time.
- An experienced Law Costs Draftsman with arbitration qualification would bring into the assessment not only his specialist knowledge and experience, but also proven systems to speed up the process. In my case I use a set of Excel Addons written by myself to help with the tedious calculations.
- The use of a Law Costs Draftsman goes a long way to reduce the overall costs of the assessment exercise if one only considers the lower hourly rate of a Law Costs Draftsman (\$1,800) vis-à-vis an arbitrator (~\$6,500 maximum under the HKIAC guideline).

# The starting point is what sort of a bill of costs should the tribunal direct

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- As an assessor I have seen bills of costs in the format of a Statement of Costs, or in the format of a taxation bill (both prescribed by PD14.3), or in some cases, detailed office bills with privileged information redacted. Obviously if only costs for coming up with a bill is considered the office bill approach would be the cheapest, followed by the Statement of Costs. A taxation bill would be the most expensive in the short run whether it is prepared in house, or by a Law Costs Draftsman.
- But drafting a bill requires a lot of patience, skill and technical support. One special feature of arbitration costs is the cap which may be imposed for interlocutory applications. When drafting a bill the Law Costs Draftsman would have to identify the relevant time entries, calculate them to ascertain if they exceed the cap, if so substitute the details with a capped amount pursuant to the relevant order.
- In Hong Kong the format of a taxation bill has been carefully designed by 2 former Registrars of the High Court before the Civil Justice Reform; they are prescribed in PD14.3.
- A bill should provide sufficient information to allow the paying party to assess its reasonableness and for the tribunal to assess it. It should provide information as to costs claimed for each individual item of work, for example information as to how much time is claimed for a Statement of Claim in total is preferable to hundreds of entries spread over 20 days in a detailed bill, or as part of all documents lumped together as “preparation of documents” in a Statement of Costs. Equally it would be impossible for anyone to form any view on entries of daily sub-total of 8 hours handling 1 conference, 10 letters, 10 telephone calls, drafting document and researching law without breakdown.

- A Statement of Costs is only meant to be used for broad-brush gross sum assessment. It would work if the tribunal and the parties are happy with such an approach.
- Although reading ss74(6)(7) together the only test the tribunal should apply is one of reasonableness with a free hand in the conduct of the assessment, the tribunal nevertheless must exercise its discretions judicially. To do so the tribunal would have to consider the case advanced by both parties and the supporting evidence before making any allowance.
- To this end a bill of costs in the form of a taxation bill may be preferable than a redacted detailed office bill, as the latter would normally be daily entries without grouping, it tends to attract more challenge and it shifts the burden to identify and summarise items under any particular task to the other parties or to the assessor or to the tribunal. In another word the savings in the costs for drawing up a proper bill of costs will be more than offset by the extra time costs for the assessor/tribunal in vetting it.

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- A even more daunting task is when the tribunal would call for filing of “taxation bundles” for examination before an oral assessment. My experience in such a situation is that the bundle would run into tens or hundreds of thousands of pages of emails, letters, drafts, attendance notes (if any), or the party filing a redacted detailed office bill would be unable to assemble a set without incurring substantial time and costs for the exercise.
  - So my suggestion as an assessor is for the tribunal to direct (1) filing of a bill with object/event driven groupings, communication items are counted and put together without listing the details of dates/time/fee earner in the body of the bill, but put into a separate schedule ready for delivery to the paying party when requested; (2) filing and service of a soft copy of the bill in Excel format; (3) filing of a list of objections within a certain deadline from the service of the bill of costs (normally 28 days), the objections are to be put next to the items claimed in the Excel spreadsheet the receiving party has served; (3) filing and service of the Excel soft copy of the objections put into the spreadsheet served by the receiving party; (4) filing of a Reply to the objection likewise inserted into the spreadsheet now containing the items claimed, the objections and the reply; (5) appoint an assessor with arbitration qualification and/or experience skilled in the operation of Excel, with instructions to insert a set of non-binding recommendation against the claim for costs and objections.

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- Whether the tribunal will hold an oral assessment depends on the response from the parties. The tribunal should not deny any party the chance to be heard. The assessor may be invited to sit with the tribunal to provide technical assistance.
  - I reckon a easier approach is to demonstrate by way of a simple non-binding recommendation table for a hypothetical case; as set out in the following slides.
  - The form of the non-binding recommendation can be used both in an assessment by the tribunal or in a taxation of costs in the High Court. The only difference is the application of the Party & Party basis unless otherwise ordered by the tribunal. The audience can simply take note that the Party & Party basis is the most conservative basis of taxation on which only what are “necessary or proper” would be allowed, contrast it to the allowance of “reasonable” costs under s74(7)(a) Cap.609, which is akin to the Common Fund basis under rule Order 62 rule 28(4).
  - Practically my experience tells an agreement to have arbitration costs taxed by the court would work to the benefit of the paying party.

**Without further ado, let us take a look  
at the following spreadsheet.**





Summary of Costs Claimed		Summary of Non-binding recommendations		
	Section A: Solicitor's Costs	\$ 1,166,366.67	Section A: Solicitor's Costs \$ 538,900.01	
	Section B.1: Counsel's Fee	\$ 202,000.00	Section B.1: Counsel's Fee \$ 172,000.00	
	Section B.2: Disbursements	\$ 4,359.00	Section B.2: Disbursements \$ 4,359.00	
	Section C: Costs of Taxation	\$ 56,000.00	Section C: Costs of Taxation \$ 35,650.00	
		\$ 1,428,725.67	\$ 750,909.01	
Item	Description	Claimed \$	Assessor's Non-Bindng Recommendation	Proposed\$
<b>Section A: Solicitors' Costs</b>				
Fee Earner:				
1	<p>Item: Partner Mr. Peter Partner ("PP") - admitted in 1975, hourly rates charged at HK\$5,800 (Non-Indemnity Basis) and thereafter at HK\$7,000 (Indemnity Basis)</p> <p>Objection: The claim of hourly rates at the top end of the usual taxation rates is manifestly excessive having regard to the lack of complexity of the claim for non-indemnity basis work. The hourly rate will not be increased ipso facto simply because of the taxation being on an indemnity basis. difference in basis (62/App/22 RHC).</p> <p>Reply: The rates are reasonable and are commensurate with PP's PQE.</p>	<p>The reference to 62/App/22 is no longer good rule, see P Chan PJ's decision in FAMV 33 of 2008 dated 12th Oct 2012 at §§33 &amp; 34. In that decision the hourly rates of a partner less senior than PP was allowed \$6,000 per hour on an indemnity basis when the going rate for him on taxation was \$4,000 (a 50% increase). Whilst the instant claim is not very complex it nevertheless is not a run of the mill case. Taking into account the substantial amount at stake of HKD10 million the receiving party is entitled to take a very serious view of the matter and instruct someone of PP's seniority; suggest the rates of \$5,800/\$7,000 be allowed</p>		
2	<p>Item: Associate Ms. Anna So ("AS") - admitted in 2015, hourly rates charged at HK\$3,900/HK\$5,000</p> <p>Objection: Excessive rate for her PQE; suggest allowing \$3,200</p> <p>Reply: The rates are reasonable and are commensurate with AS's PQE.</p>		<p>The usual allowance for a solicitor of AS' PQE is indeed \$3,200 for the non-indemnity basis work; suggest allowing \$3,200, the rate for indemnity basis work will be allowed at \$4,000 after applying a uplift similar to PP's rates.</p>	
2	<p>Item: Forign Lawyer Mr. Fred Lawson ("FL"), admitted in UK in 2000, rate charged at HK\$5,800/\$7000</p> <p>Objection: FL is not a solicitor admitted in Hong Kong, he is not entitled to claimed fees, or be allowed the same rate as a qualified person under the Legal Practitioners Ordinance</p> <p>Reply: The rates are reasonable and are commensurate with FL's PQE, the fact he is not a solicitor admitted in Hong Kong is not relevant</p>		<p>Under s76 Cap 609 Section 50 of the Legal Practitioners Ordinance (Cap. 159) does not apply to the recovery of costs in arbitration. The factor to consider is whether the use of FL in addition to PP would create duplication and whether the work undertaken by FL is comparable to PP, or to AS, or to TS. FL has been engaged in assisting PP under his supervision in work which could have been undertaken by AS; suggest allowing \$3,200/\$4,000</p>	
4	<p>Item: Trainee Solicitors ("TS") - hourly rate charged at \$1,700/\$2,300</p> <p>Objection: Excessive rate, suggest allowing \$1,300 throughout</p> <p>Reply: The taxation rate for a trainee solicitor is \$1,700, the uplift for indemnity basis work is reasonable</p>		<p>The usual taxation rate for TS is indeed \$1,700 for non-indemnity basis work. An increase to take into account the indemnity basis of taxation following P Chan PJ's decision is reasonable; suggest allowing \$1,700/\$2,000</p>	

Item: Stage 1: Pre-action Stage				
5	<p>Item: Repair Contract and other evidential documents provided by client exceeding 1,200 pages - considering [PP@5800: 10 hrs + FL@5800:10 hrs + AS@3900: 20 hr]</p> <p>Objection: Multiple fee earners working on one piece of work not allowable under r3 62/App/21 RHC; excessive time as it would not be necessary to go through each and every clause of the contract, nor the drawings or the communication between the parties regarding defects and penalties. The claim of a total time of 40 hours among the 3 fee earners to read barely 3 lever arch files is prima facie excessive; suggest allowing PP 5 hr</p> <p>Reply: The Contract in Chinese alone consists of 125 pages, the communication between the parties are important to establish the bargain eventually agreed that the outstanding contract price be fixed at \$10 million. PP and his team were duty bound to fully understand the case in order to advise the Claimant any possible argument or defence.</p>	\$ 194,000.00	<p>Whilst under s74(6) Cap. 609 the tribunal is not obliged to follow the scale and practices adopted by the court on taxation when assessing the amount of costs; it is nevertheless pertinent to consider whether deploying 3 fee earners to consider the same set of document would be reasonable in the circumstance. The tribunal is invited to take note of the non-binding recommendation as to hourly rate for PP and FL. Save in very unusual case the court on taxation will not allow more than one partner leading a junior; suggest allowing [PP@5800: 3 hr + AS@3200:6 hr]</p>	\$ 36,600.00
6	<p>Item: Claimant's letter before action- drafting [PP@5800: 1 hr]</p> <p>Objection: Time excessive. There should be a reduction of 30 minutes</p> <p>Reply: Time claimed reasonable, there is no basis to make the deduction sought by the Respondent.</p>	\$ 5,800.00	<p>Time claimed seems excessive for a letter before action; especially when taking into account the time claimed for considering documents; suggest allowing [PP@5800: 30 min]</p>	\$ 2,900.00
7	<p>Item: Conferences with client taking instructions in 3 meetings [PP@5800:3 hr + FL@5800: 3 hr]</p> <p>Objection: Justify necessity and time and the use of more than 1 fee earner; suggest allowing no more than 2 meetings by 1 fee earner for 2 hours, if at all</p> <p>Reply: The meetings are clearly recorded, the time spent and the number of fee earners attending was neither excessive nor unreasonable and should be allowed</p>	\$ 34,800.00	<p>The attendance notes show 2 fee earners attending the same meeting on all 3 occasions. It would be reasonable to hold the 3 meetings to go through the documents and to take instructions, but the use of 2 fee earners is considered duplication; suggest allowing [PP@5800: 3 hr]</p>	\$ 17,400.00
8	Communication during pre-action stage (including letters/emails/fax/calls)			
8.1	<p>Item: with client : 5 out/10 in/6 calls [PP@5800:3 hr + FL@5800:3 hr + AS@3900:1 hr]</p> <p>Objection: Justify necessity and time; excessive number of exchanges during this short period of time; suggest allowing PP 3 hr only</p> <p>Reply: The items are clearly set out in the schedule of communication, the claim of time including the use of more than 1 fee earner for an item reasonable at the relevant period when precise instructions have to be taken to formulate the claim</p>	\$ 38,700.00	<p>Upon examination of the schedule of communication it is apparent that time recording in 6 minutes units was used; and 2 fee earners were claimed in about 50% of the items. Whilst s74(6) provides the tribunal is not obliged to following the scale and practices of the court in taxation it is nevertheless necessary to consider if the time claim and duplication are reasonable. The use of 6 minutes unit was a creature of certain UK rule back in the 1980s when letters are allowed by counts each fetching 6 minutes with a view to cut down on the time for taxation and/or an arrangement between the solicitors and the clients. The tribunal should instead consider the likely reasonable time for doing any particular item of work irrespectively of the rough and ready arrangement, which does inflate the time by a factor of 15-17% overall. Suggest allowing one fee earner at the assessed time; rounded off to [PP@5800:1 hr 40 min + FL@3200:1 hr + AS@3200:1 hr]</p>	\$ 16,066.67
8.2	<p>Item: with Respondent: 3 out/2 in/1 call [AS@3900:1 hr 30 min]</p> <p>Objection: Short routine letters and a short telephone call only; suggest allowing AS 45 min</p> <p>Reply: The time claimed is reasonable</p>	\$ 5,850.00	<p>Agree with the paying party that time claimed is excessive but not to the extend proposed the the paying party; suggest allowing [AS@3200:1 hr]</p>	\$ 3,200.00



	Item: Stage 2A: The day of Arbitration Notice to the day before the expiry of the Plaintiffs Sanctioned Offer			
9	<p>Item: Request for Arbitration with enclosure - drafting revising and finalizing [PP@5800: 3 hr + FL@5800:8 hr]</p> <p>Objection: Time excessive. Simple debt collection case. The request for arbitration only have 5 pages and the so-called 150 pages already included 125 pages of Contract under item 2; the use of more than 1 fee earner not allowable; suggest allowing PP 2 hr</p> <p>Reply: It is necessary for PP to review all the relevant rules for the preparation of the request for arbitration. The time spent was reasonable and not excessive. Suggest no deduction.</p>	\$ 63,800.00	At his PQE PP is supposed to be familiar with the rules; 2 fee earners at a total claim of 11 hr is unreasonable; suggest allowing [PP@5800:1 hr + FL@3200:3 hr]	\$ 15,400.00
10	<p>Item: Application for Arbitration with a cover letter and enclosure under the HKIAC Short Form Arbitration Rules - drafting revising and finalizing [PP@5800: 45 mins]</p> <p>Objection: Time excessive. It only contains 5 pages but not 13 pages as stated by Claimant. Simple filling of information of the parties and proposed arbitrator; suggest allowing PP 20 min</p> <p>Reply: It is necessary for PP to review all the relevant rules for the application. The time spent was reasonable and not excessive. Suggest no deduction.</p>	\$ 4,350.00	At his PQE PP is supposed to be familiar with the rules; time claimed excessive; suggest allowing [PP@5800:30 min]	\$ 2,900.00
11	<p>Item: Order for Directions No. 1 (3 pages) - - considering [PP@5800: 15 mins]</p> <p>Objection: Time excessive for considering a short and very standard Order for Directions; suggest allowing pp 5 min</p> <p>Reply: PP would need to take note of the directions and time frame; the claim of 15 minutes is reasonable and should be allowed</p>	\$ 1,450.00	Accept [PP@5800: 15 min] being reasonable	\$ 1,450.00
12	<p>Item: Statement of Claim with appendix (151 pages) - drafting revising and finalizing [PP@5800: 2 hr + FL@5800:5 hr]</p> <p>Objection: Time excessive. The content of Statement of Claim is nearly the same as Request for Arbitration, use of 2 fee earners not allowable; suggest allowing PP 1 hr</p> <p>Reply: It is reasonable for PP to spend 2 hours for the preparation the Statement of Claim with all appended documents and being assisted by FL bearing in mind this is one of the most important documents in the whole arbitration. Suggest no deduction.</p>	\$ 40,600.00	There is indeed much similarity in the Request for Arbitration and the Statement of Claim; time claimed excessive in view of the similarity, the time already claimed for considering evidence and meetings with client; suggest allowing [PP@5800:30 min + FL@3200: 2 hr]	\$ 9,300.00
13	<p>Item: Sanctioned offer dated 07.07.2019 (2 pages) - drafting revising and finalizing [PP@5800: 30 mins]</p> <p>Objection: Time excessive for a standard form Sanctioned offer; suggest allowing PP 15 min</p> <p>Reply: PP would need to consider the amount to be put into the sanctioned offer; the time claimed is reasonable</p>	\$ 2,900.00	The sanctioned offer form is indeed copied from the standard court form, the amount for the sanctioned offer would have been considered when the claim is formulated; suggest allowing [PP@5800: 15 min]	\$ 1,450.00
14	<p>Item: Order for Directions No. 2 (2 pages) - - considering [PP@5800: 15 mins]</p> <p>Objection: Excessive time for a short order for directions; suggest allowing PP 5 min</p> <p>Reply: PP would need to take note of the directions and time frame; the claim of 15 minutes is reasonable and should be allowed</p>	\$ 1,450.00	Accept [PP@5800: 15 min] being reasonable	\$ 1,450.00



15	<p>Item: Defence of the Respondent - considering [PP@5800: 2 hr + FL@5800: 2 hr]</p> <p>Objection: Excessive time for considering Defence in a little over 2 pages; unreasonable to claim 2 fee earners; suggest allowing PP 1 hr</p> <p>Reply: It is reasonable for PP and FL to each spending 2 hours for the consideration of the Defence with all appended document bearing in mind this is one of the most important documents in the whole arbitration. Suggest no deduction.</p>	\$ 23,200.00	The defence was largely a denial and non-admission; the use of 2 fee earners for the time claimed is excessive; suggest allowing [PP@5800: 1 hr 30 min] only	\$ 8,700.00
16	<p>Item: Reply - drafting revising and finalizing [PP@5800: 1 hr + FL@5800:2 hr]</p> <p>Objection: Time excessive. The content of Reply is little more than 1 page; unreasonable to engage 2 fee earners; suggest allowing PP 1 hr only</p> <p>Reply: It is reasonable for PP to spend 1 hours for the preparation the Reply and being assisted by FL bearing in mind this is one of the most important documents in the whole arbitration. Suggest no deduction.</p>	\$ 17,400.00	The claim of 3 hours altogether to prepare the Reply is excessive; suggest allowing [PP@5800: 1 hr]	\$ 5,800.00
17	<p>Item: Sanctioned offer dated 24.08.2019 (2 pages) - drafting revising and finalizing [PP@5800: 30 mins]</p> <p>Objection: Time excessive. Only two pages and almost the same content as the previous Sanctioned Offer; suggest allowing PP 10 min</p> <p>Reply: The time spent was reasonable as it was necessary to calculate, consider and take into account of the amount of simple/compound interest, which the Claimant was entitled to recover for the purpose of preparing and calculating the amount in the sanctioned offer. This is not just a copy from the sanctioned offer made on 7 August 2018. Suggest no deduction.</p>	\$ 2,900.00	Accept the 2nd sanctioned offer could not have required more time than the first; suggest allowing [PP@5800: 10 min]	\$ 966.67
18	<p>Item: Order for Directions No. 3 (2 pages) - - considering [PP@5800: 15 mins]</p> <p>Objection: Excessive time for a short order for directions; suggest allowing PP 5 min</p> <p>Reply: PP would need to take note of the directions and time frame; the claim of 15 minutes is reasonable and should be allowed</p>	\$ 1,450.00	Accept [PP@5800: 15 min] being reasonable	\$ 1,450.00
19	<p>Item: Witness Statement of Chan Tai Man (25 pages) - drafting revising and finalizing [PP@5800: 5 hrs + AS@3900:8 hr]</p> <p>Objection: Time excessive, the statement basically repeated the contents of the Statement of Claim; unreasonable to use 2 fee earners and failure to delegate; suggest allowing AS 3 hr, PP's time is part of the general care and conduct</p> <p>Reply: Disagree. The witness statement of Mr. Chan Tai Man is not simply a copy of the Statement of Claim. The witness statement also included further development of the case. The time spent was reasonable as this is another essential document forming the Claimant's evidence in chief in respect of the Claimant's claim. Suggest no deduction.</p>	\$ 60,200.00	An examination of the statement indeed shows much similarity with the Statement of Claim. It however contains evidence regarding the part payment and development not mentioned in the Statement of Claim; the use of AS is a proper delegation of work but only reasonable time may be allowed for her to read in; the use of PP for this important piece of document should be separately allowed instead of being treated as part of the nominal allowance for general care and conduct; suggest allowing [PP@5800:1 hr + AS@3200:5 hr]	\$ 21,800.00



20	<p>Item: Witness Statement of Cheung Sam filed on behalf of the Respondent [PP@5800: 3 hr + AS@3900:3 hr]</p> <p>Objection: Time excessive for a straight forward factual witness statement in 8 pages; unreasonable to engage 2 fee earners; suggest allowing AS 2 hr</p> <p>Reply: Disagree. The witness statement of Cheung Sam was an important documents forming the Respondent's evidence in chief; the use of 2 fee earners and the time taken are reasonable</p>	\$ 29,100.00	Agreed with paying party 2 fee earner should not be allowed; and that it would be reasonable to allow [PP@5800:3 hr] for considering this statement	\$ 17,400.00
21	Item: Conferences within Stage 2A:			
22	<p>Item: with witness - Mr. Chan Tai Man [PP@5800: 3 hrs. 30 mins + AS@3900: 3 hr 30 min]</p> <p>Objection: Time excessive for a simple debt collection case, unnecessary to use PP to take proof when AS was tasked with the drafting of the witness statement; suggest allowing AS 1 hr 30 min</p> <p>Reply: Disagree. Mr. Chan Tai Man cannot read English. It was necessary for PP to go through his statement and interpret the contents to Mr. Chan in Cantonese before he signed the statement; PP had to attend client as the partner in charge and case handler</p>	\$ 33,950.00	Agree with the paying party the attendance should mainly be attended by AS who drafted the statement; note that in one meeting PP attended part of the time; suggest allowing AS 2 hr 30 min for taking proof and going through the same with Mr. Chan in Cantonese plus PP 30 min for the part of the meeting he attended making [AS@3200:2 hr 30 min + PP@5800: 30 min]	\$ 10,900.00
23	Item: Communications within Stage 2A (including all letters/faxes/emails/calls)			
23.1	<p>Item: with client: 16 out/20 in/12 calls [AS@3900:9 hr]</p> <p>Objection: Time excessive. Simple debt collection case The statement of claim and the witness statement already set out the main facts; and there were only limited steps undertaken during the material time, any extensive communication could only be solicitors and own client costs not recoverable inter parties; suggest allowing AS 3 hr</p> <p>Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.</p>	\$ 35,100.00	For the reasons set out in the assessment re item 5.1, and after examining the schedule and the actual letters/telephone records suggest allowing [AS@3200:5 hr 30 min]	\$ 17,600.00
23.2	<p>Item: with Respondent: 5 out/3 in/8 calls [AS@3900:3 hr]</p> <p>Objection: Time excessive; suggest allowing AS 2 hr</p> <p>Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.</p>	\$ 11,700.00	Time claimed slightly excessive; suggest allowing [AS@3200:2 hr 30 min]	\$ 8,000.00
23.3	Item: with the Arbitrator: 19 out/5 in [PP@5800:5 hr]		Not opposed; allow [PP@5800:3 hr]	\$ 17,400.00
23.4	<p>Item: 17.4. with Counsel: 50 out/30 in/10 calls [AS@3900:15 hr]</p> <p>Objection: Justify necessity and time; over reliance on counsel; suggest allowing AS 4 hr</p> <p>Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.</p>	\$58,500.00	For the reasons set out in the assessment re item 5.1, and after examining the schedule and the actual letters/telephone records there is a significant element of over reliance on counsel. Counsel should be briefed to render specific advice, to settle necessary documents requiring counsel's input and not being used as if he is another supervising partner; suggest allowing [AS@3200:8 hr]	\$ 25,600.00

	Item: Stage 2B: The day of the expiry of the Claimant's Sanctioned Offer to trial (Indemnity Basis)			
24	Item: Order for Directions No. 4 (1 page) -- considering [PP@7000: 15 mins]	\$ 1,750.00	not opposed, allow [PP@7000: 15 min]	\$ 1,750.00
25	Item: Drafting brief to Counsel - drafting [PP@7000: 10 mins]	\$ 1,166.67	not opposed, allow [PP@7000: 10 min]	\$ 1,166.67
26	Item: Trial Bundles and trial bundle index (250 pages) Preparing index and collating documents [PP@7000:5 hrs + AS@5000:5 hr]  Objection: Time excessive, over use of senior fee earner; suggest allowing AS 2 hr only  Reply: Disagree. The time spent was neither excessive nor unreasonable. There is no basis to make the deduction sought especially when this item is to be taxed on an indemnity basis	\$ 60,000.00	The time claimed is unreasonable having regard to the volume of documentation, the use of 2 fee earners each spending a whole day to prepare the trial bundles is also consider unreasonable; suggest allowing [AS@4000:3 hr + PP@7000:1 hr]	\$ 19,000.00
27	Item: Preparation for trial			
27.1	Item: Considering and approving Opening Submissions (10 pages) [PP@7000: 5 hr + AS@5000: 5 hr]  Objection: Unreasonable duplication of claim for 2 fee earners doing the same thing, excessive time as counsel was instructed to conduct the trial; suggest allowing PP 2 hr covering both the submission and the authorities  Reply: Disagree. The time spent was neither excessive nor unreasonable. There is no basis to make the deduction sought especially when this item is to be taxed on an indemnity basis	\$ 60,000.00	Excessive time and over manning when counsel was briefed to conduct the trial; a claim of 8 hrs for each fee earner to considering the opening submission and the authorities is unreasonable. The authorities would have been cited with the relevant part discussed in the submission such an extensive reading of the whole cases would not be necessary or reasonable. As to the use of 2 fee earners it is not unreasonable to have both fee earners having the conduct of the case to consider the submission; suggest allowing [PP@7000:4 hr + AS@4000: 4 hr] altogether considering the instructing solicitor is still duty bound to make sure the submission is correct	\$ 33,000.00
27.2	Item: Considering List of Authorities and relevant authorities (187 pages) [PP@7000: 3 hrs + AS@5000: 3 hr]	\$ 36,000.00	see above	\$ -
27.3	Item: Reviewing the trial bundle [PP@7000: 1 hr + AS@5000: 1 hr]  Objection: Duplication with item for preparing the trial bundle; suggest no allowance  Reply: same as above	\$ 12,000.00	Agree with the paying party this is a duplicated claim of time; suggest no allowance	\$ -
27.4	Item: Considering the Repondent's submission and authorities [PP@7000: 3 hr + AS@5000: 3 hr]  Objection: Unreasonable duplication of claim for 2 fee earners doing the same thing, excessive time as counsel was instructed to conduct the trial; suggest allowing PP 2 hr  Reply: same as above	\$ 36,000.00	It is not unreasonable to have both fee earners having the conduct of the case to consider the opposing party's submission in the discharge of their duty; time is consider excessive; suggest allowing [PP@7000:2 hr+AS@4000:2 hr]	\$ 22,000.00



28	<p>Item: Pre-trial conferences with client and witness [PP@7000: 3 hr + AS@5000: 3 hr + TS@2000: 3 hr]</p> <p>Objection: Unreasonable to engage 2 fee earners in conference, excessive time; suggest allowing PP 2 hr</p> <p>Reply: Disagree. 3 fee earners did attend the conferences, the TS was responsible for taking note of the discussion at the conferences</p>	\$ 42,000.00	<p>Allowance of 3 fee earners attending a conference is unusual even on an indemnity basis; suggest allowing [PP@7000: 3 hr + AS@4000: 3 hr]</p>	\$ 33,000.00
29	<p>Item: Attending trial before the Arbitral Tribunal [PP@7000: 5 hr + AS@5000: 5 hr + TS@2000: 5 hr]</p> <p>Objection: Unreasonable to use 3 fee earners to attend trial when normally only 1 would be allowed; suggest allowing PP 5 hr only</p> <p>Reply: Disagree. 3 fee earners did attend the trial, the TS was responsible for taking note of the cross examination</p>	\$ 70,000.00	<p>Allowance of 3 fee earners attending trial is unusual even on an indemnity basis; suggest allowing [PP@7000: 5 hr + AS@4000: 5 hr]</p>	\$ 55,000.00
30	<p>Item: Final Award Save as to Recoverable Costs (25 pages) Perusing and - considering [PP@7000: 2 hrs]</p> <p>Objection: Time excessive; case is straight forward; suggest allowing PP 30 min</p> <p>Reply: Disagree. The time spent was neither excessive nor unreasonable. Suggest no deduction as the relevant costs were awarded on an indemnity basis.</p>	\$ 14,000.00	<p>Time unreasonable having regard to his standing and the contents of the award, suggest allowing [PP@7000: 1 hr]</p>	\$ 7,000.00
31	<p>Item: Claimant's Submissions on Costs with List of Authorities and relevant authorities - drafting revising and finalizing [PP@7000: 9 hrs]</p> <p>Objection: Time excessive, the law on costs to follow the event is well established; suggest allowing PP 3 hr</p> <p>Reply: The time spent was neither excessive nor unreasonable. PP had to go through the case to establish the application for indemnity costs as the Respondent had failed to beat the sanctioned offer</p>	\$ 63,000.00	<p>Unreasonable time, suggest allowing [PP@7000: 6 hr]</p>	\$ 42,000.00
32	<p>Item: Order for Directions No. 5 dated 29.12.2019 (2 pages) - considering [PP@7000:15 mins]</p>	\$ 1,750.00	<p>not opposed, allow [PP@7000:15 min]</p>	\$ 1,750.00
33	<p>Item: Final Award Save as to Taxation of Costs - perusing and - considering [PP@7000: 1 hr 30 mins]</p> <p>Objection: Time excessive; suggest allowing PP 30 min</p> <p>Reply: The Final Award Save as to Taxation of Costs consists of 15 pages. It was necessary for PP to consider the same with care so as to advise the lay client as to the next steps. The time spent was neither excessive nor unreasonable. Suggest no deduction as these costs were awarded on an indemnity basis.</p>	\$ 10,500.00	<p>Unreasonable time, suggest allowing [PP@7000: 1 hr]</p>	\$ 7,000.00

34	Item: Communications within Stage 2B: (including all letters/faxes/emails/calls)			
34.1	Item: with client: 10 out/5 in/10 calls [AS@5000:5 hr] Objection: Excessive time; suggest allowing AS 3 hr Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.	\$ 25,000.00	Accept the time claimed is not being unreasonable; suggest allowing [AS@4000: 5 hr]	\$ 20,000.00
34.2	Item: with Respondent: 8 out/4 in/4 calls [AS@5000:3 hr] Objection: Excessive time; suggest allowing AS 2 hr Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.	\$ 15,000.00	Accept the time claimed is not being unreasonable; suggest allowing [AS@4000: 2 hr]	\$ 8,000.00
34.3	Item: with the Arbitrator: 6 out/3 in [PP@7000:1 hr 30 min] Objection: Excessive time; suggest allowing PP 45 min Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.	\$ 10,500.00	Accept the time claimed is not being unreasonable; suggest allowing [PP@7000: 1 hr 30 min]	\$ 10,500.00
34.4	Item: with counsel: 8 out/5 in/5 calls [AF@5000: 3 hr] Objection: Excessive time; suggest allowing AS 2 hr Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.	\$ 15,000.00	Accept the time claimed is not being unreasonable; suggest allowing [AS@4000: 3 hr]	\$ 12,000.00
34.5	Item: with Witness - Mr. Chan Tai Man: 3 out/1 in/3 calls [AS@5000: 1 hr 30 min] Objection: Excessive time; suggest allowing AS 45 min Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.	\$ 7,500.00	Accept the time claimed is not being unreasonable; suggest allowing [AS@4000: 1 hr 30 min]	\$ 6,000.00
34.6	Item: with HKIAC: 7 out/6 in/3 calls [TS@2000:2 hr] Objection: Excessive time; suggest allowing TS 1 hr Reply: Disagree. The time spent was reasonable and not excessive. There is no basis to make the deduction sought by the Respondent.	\$ 4,000.00	Accept the time claimed is not being unreasonable; suggest allowing [TS@2000: 2 hr]	\$ 4,000.00
35	Item: General General care and conduct [PP@7000: 2 hr] Objection: Excessive rate; suggest allowing PP 1 hr Reply: The general rule is to allow 5 minute per month for general rule and conduct; the matter took 2 years, 2 hours should be allowed	\$ 14,000.00	Accept 2 hours but at different rates; suggest allowing [PP@5000:1 hr + PP@7000: 1 hr]	\$ 12,000.00
		<b>\$ 1,166,366.67</b>		<b>\$ 538,900.01</b>



	Item: Section B: Disbursements			
	Item: B.1 Counsel's Fees			
36	Item: Counsel's fee for settling Statement of Claim	\$ 40,000.00	not opposed, allow as claimed	\$ 40,000.00
37	Item: Counsel's fee for settling letters; general advice throughout  Objection: Unspecific advice, or settling letters are not recoverable over reliance on counsel; suggest no allowance  Reply: No reason to disallow counsel's fees for settling letters and giving general advice from time to time	\$ 30,000.00	Agree with the paying party, the onus of proof is on the receiving party who has failed to produce supporting evidence and justification for extensive use of counsel; for the same reasons set out in the non-binding recommendation re #23.4 suggest no allowance	\$ -
38	Item: Pre-trial conference  Objection: Pre-trial conference should be on the brief; suggest no allowance  Reply: Pre-trial conference agreed to be charged separately	\$ 12,000.00	Apparently the brief to counsel specifically provided for conference being charged separately; suggest allowing the same on an indemnity basis	\$ 12,000.00
39	Item: Brief to attend trial before the tribunal (including perusal of papers and all preparation)  Objection: Excessive brief; suggest allowing \$80,000  Reply: Brief fee reasonable on an indemnity basis	\$ 120,000.00	Not an unreasonable brief fee on an indemnity basis; suggest allowing \$120,000	\$ 120,000.00
	Item: Total for Section B.1:	\$ 202,000.00		\$ 172,000.00

	Item: B2 Other Disbursements			
40	Item: Conference room rental fees to Hong Kong Efficient Legal Professional Mediation Centre	\$ 2,500.00	not opposed, allow \$2,500	\$ 2,500.00
41	Item: Photocopying, travelling and miscellaneous expenses	\$ 1,859.00	not opposed, allow \$1859	\$ 1,859.00
	Item: Total of Section B.2:	<b>\$ 4,359.00</b>		<b>\$ 4,359.00</b>
	Item: Section C: Costs of Taxation			
42	Item: Reviewing files, drafting bill of costs [PP@7000: 8 hrs]  Objection: Time excessive. Not reasonable to use 8 hours to review files and drafting bill of costs; unnecessary over use of a senior fee earner; suggest allowing TS 4 hr  Reply: It was not unreasonable nor excessive for PP to spent 8 hours to review all the files in details and draft the Bill of Costs; suggest no deduction as these costs were awarded on an indemnity basis.	\$ 56,000.00	Unreasonable to use a senior fee earner to draft a bill; suggest allowing [PP@1800: 8 hrs]	\$ 14,400.00
43	Item: Considering List of Objections, drafting Reply (to be inserted)	\$ -	Allow [PP@5000:3 hr]	\$ 15,000.00
44	Item: Considering Order Nisi on assessment (to be inserted)	\$ -	Allow [PP@5000:1 hr]	\$ 5,000.00
45	Item: Considering Final Award (to be inserted)	\$ -	Allow [PP@5000:15 min]	\$ 1,250.00
		<b>\$ 56,000.00</b>		<b>\$ 35,650.00</b>

# Assessment of Costs of Arbitration

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- I hope the above is of some use to members of the audience.
- Thank you for attending this talk.
- End

# Q&A



# **“Assessment of Costs of Arbitration”**

**Speaker: Alfonso Fung**

**Moderator: Raymond Yang**

**Date: Monday, 20 December 2021**

**Time: 6:00pm – 7:30pm (HKT)**