

A NEW MODE OF DISPUTE RESOLUTION FOR HONG KONG



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A novel form of dispute resolution, an alternative to litigation and arbitration, is about to be introduced in Hong Kong. The authors explain the characteristics of the new dispute resolution system, and identify a number of legal questions to which the new system gives rise. On balance, the authors conclude that the new dispute resolution system will not constitute an unacceptable ouster of the court's jurisdiction, and will provide an expeditious and useful alternative to existing mechanisms.

Introduction

A new speedy,¹ private, non-statutory and potentially cost-saving mode of dispute resolution is about to be introduced into Hong Kong. The new system is intended as a useful alternative to litigation and arbitration. It provides for both binding and non-binding documentary adjudication by a panel of experts. A body, to be known as the "Adjudication Panel" (the Panel), is to be established with the role of determining documentary disputes relating to (a) commercial agreements; (b) transactions relating to land, intellectual property, media, publishing, sport and entertainment, universities and tertiary education, and corporate and partnership interests and valuations; and (c) disputes involving professional negligence arising out of any of the above matters.

The service will be available for the determination of disputes arising not only in the private sector, but also for those involving Government. The new body will determine disputes both in Hong Kong and England and Wales and the parties can agree that the determination be made in accordance either with the laws of Hong Kong or of England and Wales or of any other common law jurisdiction.

The new dispute resolution process is groundbreaking and gives rise to a number of legal questions that will be considered in this article. First, the mechanics of the new process will be explained.

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¹ It is expected that determinations can be made within two months of the agreement of terms of reference to a Panel. In matters of particular urgency, expedited determinations can be made within seven days or less.

Determination of Disputes by Experts and Differences Between Expert Determination and Arbitration

The mode of resolution of disputes provided for is by way of expert determination. Expert determination is a procedure by which the parties to an agreement contract jointly to instruct a third party to decide the issue.² This mode of dispute resolution has been available in England from as early as 1754³ and has the advantages of being quick, private, and relatively cheap, when compared with litigation or arbitration.

It is important to distinguish expert determination from arbitration.⁴ Whilst the procedures bear many similarities, there are several significant differences:⁵

- (a) disputes for resolution by way of arbitration are usually presented to the arbitrator in a more formal manner (ie by pleadings) than is the case in expert determinations;
- (b) whereas an arbitrator exercises a judicial function very similar, but not identical, to that of a judge, an expert manifests far fewer judicial attributes in the exercise of his functions;
- (c) whereas arbitrators in their decision-making are subject to a certain degree of court supervision by way of appeal,⁶ experts are subjected to a much smaller degree of court supervision;⁷

² *Expert Determination*, John Kendall, (London: FT Law and Tax, 2nd edn) p 1.

³ The earliest reported example is *Belchier v Reynolds* (1754) 3 Keny 87; 96 ER 1318.

⁴ In *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, 428 Lord Wheatley identified the following attributes of arbitration: (i) there must be a dispute between the parties which has been formulated in some way or another; (ii) the parties must have submitted the dispute to a third party to resolve in such a manner that he is called upon to exercise a judicial function; (iii) in appropriate cases the parties must have been given an opportunity to present submissions and evidence in support of their claims; and (iv) the parties must have agreed to accept the third party's decision.

⁵ Some of the differences between arbitration and expert determination were identified by Kaplan J in *Mayers v Dugash* [1994] 1 HKC 755, where one of the parties had applied to have the "arbitrator" removed under the Arbitration Ordinance (cap 341) for misconduct. Kaplan J held that the person appointed to resolve the dispute had, in fact, been appointed in the capacity of an expert rather than as an arbitrator and removal on grounds of misconduct was not, therefore, available. It must be borne in mind that some of the differences between arbitration and expert determination may be removed by agreement of the parties.

⁶ Appeal lies, with the consent of the parties or with the leave of the court, on any question of law arising out of an arbitration award to the court under section 23(2) of the Arbitration Ordinance (cap 341). The court must not grant leave, however, unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement: *ibid* s 23(4). According to the "Nema Guidelines" (see *Pioneer Shipping Ltd v BTP Tioxide Ltd, the Nema* [1982] AC 724, HL) the courts are more likely to grant leave to appeal against a domestic award on a point of law where the subject matter of the arbitration is a standard form of contract rather than a "one-off" contract which is of importance to the parties alone.

⁷ See discussion in "Issues Arising from the Expert Determination Procedures", section (b), below.

- (d) whereas an arbitrator can be removed and an arbitration award can be set aside on the grounds of failure to comply with the rules of natural justice,⁸ experts' determinations are not generally amenable to judicial review;⁹
- (e) whereas arbitration awards can be enforced directly by the courts,¹⁰ experts' determinations can only be enforced by way of a suit upon the contract;¹¹
- (f) whereas oral evidence is commonly received in arbitrations, expert determinations are often made upon documentary evidence alone;
- (g) whereas arbitrators enjoy statutory immunity from suit in negligence, experts do not¹² and any immunity they may enjoy must depend upon the agreement of the parties.

The New Provisions

(a) Reference of disputes to the Panel

Any dispute within the relevant categories may be referred to the Panel either by way of a pre-dispute agreement or after the dispute has arisen.

Where the parties agree to submit a relevant dispute to expert determination by a Panel, they should agree in advance to abide by the Adjudication Panel Rules (the Rules). The effect of the Rules is summarised below.

(b) Adjudication panels

Unless the parties agree to determination by a sole adjudicator, each reference to the Panel will be determined by a panel of three adjudicators nominated by the Committee and each Panel will include one member who holds, or who has held, appellate judicial office and / or who holds the title of Queen's Counsel or Senior Counsel in a common law jurisdiction.

⁸ Under s 25(1), (2) of the Arbitration Ordinance, the court may remove an arbitrator where he has misconducted himself or the proceedings and any award made may be set aside. Misconduct would include breach of the "*audi alteram partem*" rule or lack of impartiality.

⁹ *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853, CA; *Dlugash v Mayers* [1997] 2 HKC 814. In the latter case, Le Pichon J held that, although a term would be implied into a contract that an expert should conduct his determinations fairly, nonetheless, the duty to act fairly did not necessarily bring into play the rules of natural justice in their full rigour. The learned judge concluded by saying that nothing short of conduct that could not, on any reasonable view, be said to be broadly fair would suffice to impugn an expert's determination. Some degree of egregiousness had to be established.

¹⁰ See s 2GG of the Arbitration Ordinance, which provides that an award on an arbitration is, with the leave of the court, enforceable in the same way as a judgment of the court.

¹¹ See discussion in "Issues Arising from the Expert Determination Procedures", section (c) below.

¹² See discussion in "Issues Arising from the Expert Determination Procedures", section (d) below.

(c) *The Committee*

The Committee has many functions, but the main ones are to decide whether an issue is appropriate for determination by a Panel, to fix the reference fee to be paid for each determination, to nominate the adjudicators on each Panel, to give directions to the parties as to the lodgement of documents and to make arrangements for the Panel hearings.

(d) *The conduct of the determination*

The Panel will make its determination upon the documents submitted to it and will not generally hear oral evidence. In conducting the hearing the Panel members act as experts rather than arbitrators. If the Panel is not unanimous in its determination, the majority decision will prevail.

The determination may include terms as to the payment of interest, all or part of the reference fee and costs.

(e) *Appeals to the courts*

Unless the parties agree otherwise, the validity of a determination may not be challenged by way of appeal to the courts on the grounds of any absence of reasons or alleged deficiency or error of fact or law. The effect of this provision is discussed in more detail below.¹³ In any case, however, where the court does have jurisdiction,¹⁴ the parties have agreed that the Court of First Instance will have exclusive and final jurisdiction and, unless otherwise agreed, no party will seek to exercise any right of appeal or application for leave to appeal from the Court of First Instance to any other court.

(f) *Enforceability of the Panel's determinations*

The parties agree, by accepting the Rules, that they will comply with the terms of any determination and, subject to what is said below,¹⁵ Panel determinations will be enforced in the usual manner through the courts.

Issues Arising from the Expert Determination Procedures

Several interesting issues arising out of this new procedure merit consideration and comment.

¹³ See discussion in "Issues Arising from the Expert Determination Procedures", sections (a) and (b) below.

¹⁴ See "Issues Arising from the Expert Determination Procedures", section (b) below.

¹⁵ See discussion in "Issues Arising from the Expert Determination Procedures", section (c) below.

(a) Is it proper to oust the court's jurisdiction?

The Rules provide that the experts shall enjoy exclusive and binding jurisdiction to determine all matters referred to them. Does this constitute an unacceptable ouster of the court's jurisdiction? The answer would appear to be that it does not. As a general principle, any provision purporting to oust a person's right to sue in court will not be recognised on grounds of public policy¹⁶. It should be noted that, in respect of arbitration agreements, the legislature has specifically recognised the rights of the parties, subject to certain exceptions, to exclude any right of appeal (referred to as an "exclusion agreement").¹⁷ This provision does not, of course, extend to expert determinations. It is suggested that a reference to an expert on the terms that he will enjoy exclusive jurisdiction does not improperly oust the jurisdiction of the court, since the court retains jurisdiction over certain aspects of the determination procedure (see 4(b) below). Further, the court retains jurisdiction to enforce the determination. Although the transfer of jurisdiction to the expert is substantial, it is far from complete and not sufficient to offend public policy.¹⁸

(b) To what extent is an expert's determination reviewable by the courts?

Although determinations of experts have been said to be "judge proof",¹⁹ this is not quite correct. The basic principle seems to be clear: the courts will strive to uphold the terms of the agreement of the parties. As we have seen above, where the parties accept the Adjudication Panel Rules, by so doing, they agree that the validity of any determination will not be challenged on the grounds of any deficiency or error of fact or law and no appeal will lie from the determination. Since the parties have thereby clearly agreed to exclude the jurisdiction of the court, the court will abide by that agreement and will not interfere – even if the court would conclude that the expert's determination involves an error of fact or law.

This does not have the effect, however, of totally excluding the court's jurisdiction. Case authority has established that, notwithstanding an exclusion provision of the nature stated above, the courts will intervene if (a) the expert has decided the wrong issue; (b) the expert has asked himself the wrong questions; (c) the expert has departed substantially from his brief in some other way; or (d) there has been fraud or collusion on the part of the expert in reaching his determination.

¹⁶ See *Doleman and Sons v Osset Corporation* [1912] 3 KB 257.

¹⁷ S 23B of the Arbitration Ordinance.

¹⁸ See further John Kendall "Ousting the Jurisdiction" (1993) 109 LQR 385.

¹⁹ See Jonathan Gaunt QC "What makes an award judge-proof?" [1991] 29 Estates Gazette 70.

The case law merits brief attention. In *Jones v Sherwood Computer Services plc*²⁰ Dillon LJ held that, where the parties had agreed to be bound by the report of an expert, that report, whether or not it contained reasons for the conclusion in it, could not as a general rule be challenged in the courts on the ground that mistakes had been made in its preparation. It could only be challenged if it could be shown that the expert had departed from the instructions given to him in a material respect. The basis for this conclusion is purely that “*pacta sunt servanda*”: contracts must be obeyed.²¹

The degree of court supervision over the expert is perhaps most succinctly summarised by Lightman J in *British Shipbuilders v VSEL Consortium Plc*:²²

- (i) Questions as to the role of the expert, the ambit of his remit (or jurisdiction) and the character of his remit (whether exclusive or concurrent with a like jurisdiction vested in the court) are to be determined as a matter of construction of the agreement.
- (ii) If the agreement confers on the expert the exclusive remit to determine a question, then, subject to (iii) and (iv) below, the jurisdiction of the court to determine the question is excluded because, as a matter of substantive law, for the purposes of ascertaining the rights and duties of the parties under the agreement, the determination of the expert alone is relevant and any determination by the court is irrelevant. It is irrelevant whether the court would have reached a different conclusion or whether the court considers that the expert’s decision is wrong, for the parties have in either event agreed to abide by the decision of the expert.
- (iii) If the expert in making his determination goes outside his remit, eg by determining a different question from that remitted to him or if his determination fails to comply with any conditions which the agreement requires him to comply with in making his determination, the court may intervene and set his decision aside. Such a determination by the expert as a matter of construction of the agreement is not a

²⁰ [1992] 1 WLR 277.

²¹ Thus in *Campbell v Edwards* [1976] 1 WLR 403 Lord Denning MR said at 407: “It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake, they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything”. This conclusion, that the court’s jurisdiction depends upon the extent to which it has not been excluded by the agreement of the parties, is supported by the decision of the House of Lords in *Mercury Ltd v Director General of Telecommunications* [1996] 1 WLR 48, HL.

²² [1997] 1 Lloyd’s Rep 106, 109.

determination which the parties agreed should affect their rights and duties and the court will say so.²³

- (iv) Likewise, the court may set aside the decision of an expert, where the agreement so provides, if his determination discloses manifest error.²⁴
- (v) The court has jurisdiction ahead of a determination by the expert to determine a question as to the limits of his remit or the conditions which an expert must comply with in making his determination, but, as a rule of procedural convenience, will, save in exceptional circumstances, decline to do so. This is because the question is ordinarily merely hypothetical, only proving live if, after seeing the decision of the expert, one party considers that the expert got it wrong. To apply to the court in anticipation of the decision and before it is clear that he has got it wrong, is likely to prove wasteful of time and costs, the saving of which may be presumed to have been the, or at least one of the, objectives of the parties in agreeing to the determination of the expert.²⁵

This approach was adopted by Le Pichon J in *Dlugash v Mayers*,²⁶ where the learned judge concluded that it would render wholly nugatory the perceived advantages of expert determination, if the court could second-guess expert determinations by holding that they were flawed simply because the court would have come to a different conclusion.

(c) *How are experts' determinations enforced?*

Unlike the award of an arbitrator, which legislation provides can be enforced with the leave of the court in the same manner as a judgment of the court,²⁷

²³ See, for example, *Sonnix Ltd v Kaifull Investments Ltd* [2000] 3 HKC 102, where Yuen J said at 116 "Where an expert has been instructed to "verify" or ascertain the truth of a matter in a process which raises a question of interpretation, and he misinterprets the legislation and makes a determination on the basis of an incorrect interpretation, he is not dealing with the question as intended by the parties and his decision is open to review by the courts".

²⁴ See, for example, *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 WLR 48, HL, where there was no provision in the agreement giving exclusive jurisdiction to the expert and excluding the court's jurisdiction.

²⁵ These principles were approved in *National Grid Co plc v M25 Group Ltd* [1998] 2 EGLR 32. See also *Nikko Hotels (UK) Ltd v MEPC Plc* [1991] 2 EGLR 103, where Knox J said at 108, "The result, in my judgment, is that if the parties agree to refer to the final and conclusive judgment of an expert an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert's decision will be final and conclusive and, therefore, not open to review or treatment by the courts as a nullity on the ground that the expert's decision on construction was erroneous in law, unless it can be shown that the expert has not performed the task assigned to him. If he answered the right question in the wrong way, the decision will be binding. If he has answered the wrong question, his decision will be a nullity". The same conclusion was reached in *Norwich Union Life Insurance Society v P & O Property Holdings Ltd* [1993] 1 EGLR 164.

²⁶ [1997] 2 HKC 814, 822.

²⁷ S 2GG, Arbitration Ordinance (Cap 341).

no statute provides for the enforcement of the determinations of experts. It follows, therefore, that a decision of an expert cannot be directly enforced by the courts. Can it be argued that the determination of an expert is, in reality, the same as a decision of an arbitrator and can, therefore, be enforced under the provisions of the Arbitration Ordinance? In view of the many distinctions between arbitration awards and determinations of experts, we would confidently suggest that an expert's determination does not constitute an arbitration award and cannot be enforced under the Arbitration Ordinance.

How, then, can experts' determinations be enforced? It is suggested that an expert's determination can only be enforced under the law of contract. Failure to obey an expert's determination constitutes a breach of the Rules and the party seeking enforcement of a determination must commence a fresh action in court based upon the contract. Such proceedings may, of course, be commenced by way of application for summary judgment under RHC Order 14. Enforcement provisions in respect of expert's determinations are, therefore, somewhat disadvantaged when compared with arbitration awards in that they can only be enforced by way of fresh action in the court and can similarly only be enforced internationally following court proceedings and consequent order.

(d) What is the potential liability of an expert adjudicator in negligence?

Unlike arbitrators who enjoy a certain degree of immunity in negligence,²⁸ it would appear that, as a matter of general law, an expert can be held liable in negligence, unless the parties have expressly agreed that he will not be so liable. This was the conclusion reached by Dillon LJ in *Jones v Sherwood Computer Services plc*,²⁹ approved subsequently by Kaplan J in *Mayers v Dlugash*,³⁰ where the learned judge ruled that an expert might be sued in negligence in the absence of an agreed immunity.³¹ The expert would also be amenable to suit under the Supply of Services (Implied Terms) Ordinance (Cap 475s) for failing to supply his services with reasonable care and skill.

In respect of determinations made under this scheme, the Rules provide that the Panel is to be immune from suit.

²⁸ S 2GM of the Arbitration Ordinance provides that an arbitral tribunal is liable in law for an act done or omitted to be done only if it is proved that the act was done or omitted to be done dishonestly.

²⁹ Note 20 above at 286. Dillon LJ cited as authority the decision of the House of Lords in *Sutcliffe v Thackrah* [1974] AC 727, HL. For further authority see *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, HL.

³⁰ [1994] 1 HKC 755.

³¹ See also *Kuah Kok Kim v Ernst & Young (a firm)* [1997] 1 SLR 169, where Lai Kew Chai J held that an action might be brought against experts either in negligence or for breach of contract.

Conclusion

The extent to which disputants will avail themselves of this new mode of dispute resolution remains to be seen. Inasmuch as it provides a procedure for resolution which is private and which should reduce delay and cost for the parties, the new scheme for dispute resolution must be welcomed.