

Expert Determination and Arbitration

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Introduction



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Subject Matters

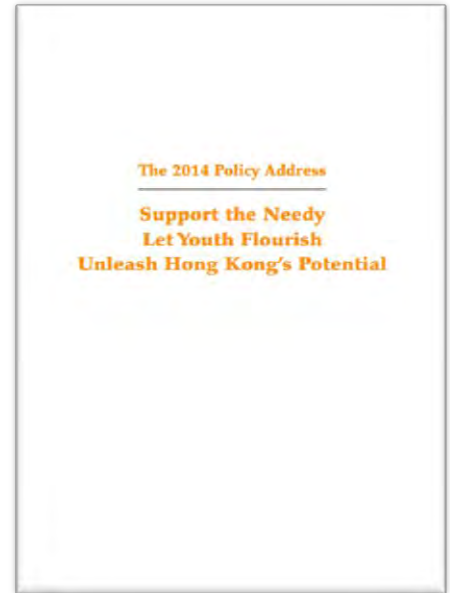
**Dispute resolution in
HK property market** → **Expert Determination**
→ **Arbitration**

- Rental values in rent review and lease renewals
- Capital values of property interests in joint venture projects



Pilot Scheme for land premium arbitration

- In January, Chief Executive announced that *“The Government will introduce a Pilot Scheme for Arbitration on Land Premium to facilitate early agreement on Land premium payable by way of arbitration.”*
- The Lands Department is conducting consultations



Source: The 2014 Policy Address- <http://www.policyaddress.gov.hk/2014/eng/pdf/PA2014.pdf>



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Prevalence of Expert Determination in the Private Market



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The choice of method – Expert Determination

- Dictated by the contract made between the parties
- Expert determination is popular in private market:
 - Quick
 - Inexpensive
 - No delay and expenses associated with legal process
 - Result is binding and private



Arbitration

- Arbitration is thought as a kind of litigation
- **Arbitration Ordinance** applies to arbitration under an arbitration agreement if the place of arbitration is in HK.

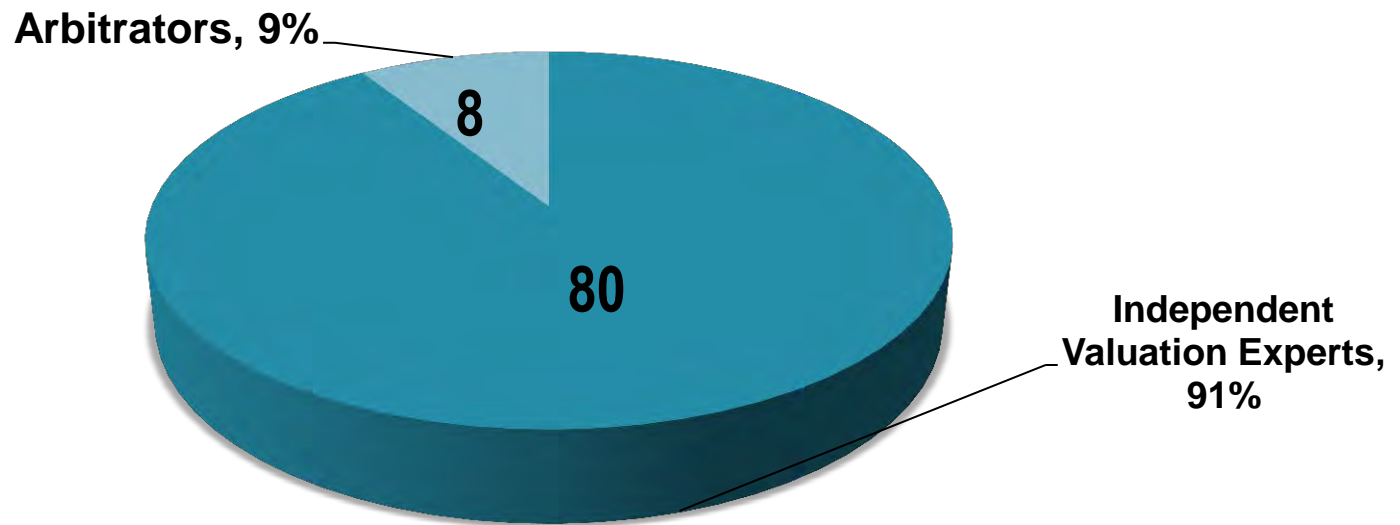
| Chapter | 609 | ARBITRATION ORDINANCE | Gazette Number | Version Date |
|---|-----|-----------------------|------------------|--------------|
| | | Long title | E.R. 2 of 2014 | 10/04/2014 |
| An Ordinance to reform the law relating to arbitration, and to provide for related and consequential matters. | | | | |
| [1 June 2011] L.N. 38 of 2011 | | | | |
| (Enacting provision omitted—E.R. 2 of 2014) | | | | |
| (Originally 17 of 2010) | | | | |
| Part | 1 | PRELIMINARY | L.N. 38 of 2011 | 01/06/2011 |
| Section | 1 | Short title | E.R. 2 of 2014 | 10/04/2014 |
| (1) This Ordinance may be cited as the Arbitration Ordinance. | | | | |
| (2) (Omitted as spent—E.R. 2 of 2014) | | | | |
| (Amended E.R. 2 of 2014) | | | | |
| Section | 2 | Interpretation | L.N. 163 of 2013 | 03/03/2014 |
| (1) In this Ordinance— | | | | |
| “arbitral tribunal” (仲裁庭) means a sole arbitrator or a panel of arbitrators, and includes an umpire; | | | | |
| “arbitration” (仲裁) means any arbitration, whether or not administered by a permanent arbitral institution; | | | | |
| “arbitration agreement” (仲裁協議) has the same meaning as in section 19; | | | | |
| “arbitrator” (仲裁員), except in sections 23, 24, 30, 31, 32 and 65 and section 1 of Schedule 2, includes an umpire; | | | | |
| “claimant” (申索人) means a person who makes a claim or a counter-claim in an arbitration; | | | | |
| “Commission” (貿法委) means the United Nations Commission on International Trade Law; | | | | |
| “Convention award” (公約裁決) means an arbitral award made in a State or the territory of a State, other than China or any part of China, which is a party to the New York Convention; | | | | |
| “Court” (原訟法庭) means the Court of First Instance of the High Court; | | | | |
| “dispute” (爭議) includes a difference; | | | | |
| “function” (職能) includes a power and a duty; | | | | |
| “HKIAC” (香港國際仲裁中心) means the Hong Kong International Arbitration Centre, a company incorporated in Hong Kong under the Companies Ordinance (Cap 32) as in force at the time of the incorporation and limited by guarantee; (Amended 28 of 2012 ss. 912 & 920) | | | | |
| “interim measure” (臨時措施)— | | | | |
| (a) if it is granted by an arbitral tribunal, has the same meaning as in section 35(1) and (2); or | | | | |
| (b) if it is granted by a court, has the same meaning as in section 45(9); | | | | |
| and “interim measure of protection” (臨時保全措施) is to be construed accordingly; | | | | |
| Macao (澳門) means the Macao Special Administrative Region; (Added 7 of 2013 s. 3) | | | | |
| Macao award (澳門裁決) means an arbitral award made in Macao in accordance with the arbitration law of Macao; (Added 7 of 2013 s. 3) | | | | |
| “the Mainland” (內地) means any part of China other than Hong Kong, Macao and Taiwan; | | | | |
| “Mainland award” (內地裁決) means an arbitral award made in the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People’s Republic of China; | | | | |
| “mediation” (調解) includes conciliation; | | | | |
| Cap 609 - ARBITRATION ORDINANCE | | | | |

Source: Arbitration Ordinance-
[http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/\\$FILE/CAP_609_e_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf)



Appointments made by President of HKIS

Nos. of appointments made in the three years from 2007 to 2009








Source: Statistics collected by the HKIS



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Selected Tenancies – Expert Determination/Arbitration

| Development | APM | Harbour City | IFC II | Landmark Atrium | Pacific Place |
|-----------------------------|---|---|--|---|---|
| |  |  |  |  |  |
| Use | Retail | Retail | Office | Retail | Retail |
| Expert Determination | ✓ | | ✓ | ✓ | ✓ |
| Arbitration | | ✓ | | ✓ | |

- Expert determination has been adopted in 4 out of the 5 selected tenancies.



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Source: Tenancies registered in the Land Registry

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Joint Venture - Expert Determination



新世界發展有限公司
New World Development Company Limited



The contract relates to the grant of default call right.



Subject matter: fair market value of defaulting party's interest in joint venture.



If fail to reach an agreement on fair market value, then the fair market value shall be determined by an independent expert.



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Selection and Appointment of Valuation Expert/ Arbitrator



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Some of the matters covered in selected tenancies

- Issues to be determined:
market rental and fair market value
- Qualifications for the Expert Determiner
- The methods of selection
- Appointment of the Determiner



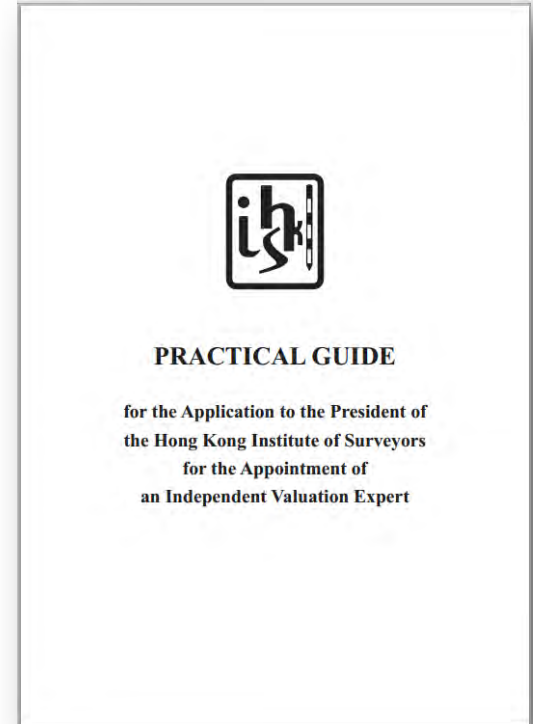
Some of the matters covered in selected tenancies (Cont'd)

- Reasoned Determination
- The payment of the Expert's fees and expenses
- Parties' costs
- Timing



Selection and Appointment

- President of HKIS nominates valuation expert/arbitrator.
- **“Practical Guide for the Application to the President of the Hong Kong Institute of Surveyors for the Appointment an Independent Valuation Expert”** (“Practical Guide”) published in 2011
- Also available in HKIS website:
<http://www.hkis.org.hk/ufiles/PRAGuide-eng20110520.pdf>



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The Appointment

- Before commencement, the valuation expert should settle:
 - fee and terms of engagement with the parties
- The appointment could stop if
 - The fees and terms of engagement could not be agreed
 - Or the dispute had been settled
 - No fee would be paid for abortive work by the parties



Proposed Modification to the Appointment Process

- **“Guidance Notes of Surveyors acting as experts in commercial rent review determinations (Hong Kong)” (“Guidance Notes”)**
- Jointly prepared by HKIS and RICS (HK)
- Intended to be published within this year



Proposed Modification to the Appointment Process (Cont'd)

- Appointment of valuation expert subject to
 - precedent of relevant undertakings for payment of the expert
- If no undertaking is received, the appointment does not take effect.
- Efficiency in the process should be improved.



Submissions, Representations and Reasons



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Independent Expert Determination

- The process could include:
 - Submission(s) of expert reports (by both parties)
 - Rebuttal(s)
- The expert not bound by the representations and rebuttals
- The expert can exercise his own discretion



Representations

- Selected tenancies in Pacific Place and Landmark Atrium covered matters on representations



PACIFIC PLACE



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Arbitration

- In arbitration, the arbitrator will rely upon the submissions
- Particularly evidence presented by the parties



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Determination with or without reasons

- Dictated by:
 - Terms of the contract between the two parties
 - The instruction to the independent valuation expert
- The default position would be for determination without setting out reasons.
- Selected tenancy in *PACIFIC PLACE* has specified the written decision is to be made with reasons and within certain time frame



Pilot Scheme for Arbitration on Land Premium



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Arbitration on Land Premium

- The government will use **arbitration** for disputes related to **land premium**
- Land Premium:
 - Involves public money
 - Very large in lump sum
- Concerns on:
 - Fairness
 - Conflicts of interests
 - Post-award interests available to arbitrators



Arbitration on Land Premium (Cont'd)

- HKIS welcomes the new government initiative
- Suggestions to Director of Lands on 22/04/2014:
 - Arbitration mechanism
 - Arbitration agreement between government and landowner
 - Basis of arbitration
 - Timing to complete the arbitration
 - Composition of arbitration panel



Limitation of Liability



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Liability of Independent Valuation Expert

- Could be liable for **negligence**.
- Valuers limit their liability in contracts for valuation services
- **Guidance Notes (to be published)** states that the appointed valuer need to hold appropriate level of professional indemnity cover.



Liability of Arbitrator

- In **Arbitration Ordinance**, arbitrator is liable in law only if the act was done or omitted to be done **dishonestly**.



Conclusion

- Both expert determination and arbitration are common methods of dispute resolution in the HK property market
- **Expert determination** is common for rental disputes. Expert is not bound by representations and rebuttals
- **Arbitrators** rely upon the submissions and evidence presented
- Contract terms for dispute resolution could include
 - Qualification requirements
 - Appointment process
 - Determination with/without reasons



A good understanding of **market practice** and different **terms and conditions** would be useful to interested parties who might require such dispute resolution services.



Thank you



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