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Feature **roundtable**

Kiss and make up

► **Chris To**

secretary general,
Hong Kong International
Arbitration Centre

“My role at the HKIAC is to involve as many professions as possible in arbitration and promote Hong Kong as an international centre for arbitration.”

► **Tony Parton**

partner, investigations and forensic services,
PricewaterhouseCoopers

“I lead PwC's forensic services practice for Asia Pacific. I have served as an arbitrator and as an expert determining purchase pricing in sales and purchase agreements. Most of my work in Hong Kong involves investigations in China.”

► **Peter Nixon**

managing director,
Potential Dialogue Ltd.

“I started my career as an accountant with PricewaterhouseCoopers and then established my own company providing mediation services and training in negotiation skills.”

It's all too common for two parties to disagree over the cost of a transaction or the value of an asset. When you can't agree on the figures, it doesn't have to end in acrimony. Arbitration, mediation and expert determination are all ways of reaching an outcome that avoid taking the case before the courts. It's an area where accountants are playing a growing role, acting as expert witnesses, arbitrators and facilitators.

On 13 December 2005, A Plus and Herbert Smith gathered a panel of experts to find out what Hong Kong accountants are bringing to the table.



► **Jackson Yeung**
chief executive,
CFO Solutions Ltd.

“I’m a qualified CPA and a CFO with 20 years’ experience in oil and gas trading. In the oil and gas industry nearly all buy-sell contracts or major investments will include arbitration clauses.”

► **Philip Yang**
chairman, Hong Kong
International Arbitration
Centre

“I’m a full-time maritime and international trade arbitrator and helped found the Hong Kong International Arbitration Centre in 1985. I work mainly in Hong Kong but have also arbitrated cases in London, Singapore and Beijing.”

► **Chris Fordham**
principal, forensic and
dispute services, Deloitte

“I lead the forensic and dispute practice at Deloitte, working in Hong Kong, China and around Asia. In the area of arbitration we are involved in evidence gathering and acting as expert witness, principally in loss and valuation.”

► **Tony Dymond**
litigation partner,
Herbert Smith

“A lot of my work is construction related, so I see a lot of work in the full spectrum of litigation, arbitration and alternative dispute resolution.”



The role of accountants in arbitration and alternative dispute resolution

>> Our round table chairman Jackson Yeung (*left*) opens the discussion by exploring the role of accountants as expert witnesses.

► Money fights: escalate or negotiate?

MEDIATION AND NEGOTIATION

EXPERT DETERMINATION

Process

Use of an authoritative third party to settle a dispute through compromise. Typically the least formal and most discrete way to resolve a dispute.

Effective and discrete way of settling disputes, particularly on technical issues.

Drawbacks

Best suited to resolving conflict at an early stage.

The parties must agree on an expert and the powers he or she is granted.

Possible role for accountants

Facilitator

Expert

Jackson Yeung: At present, the main area for accountants in arbitration and other forms of dispute resolution is acting as an expert witness. How can accountants develop their skills in handling evidence?

Chris Fordham: As accountants giving expert evidence, we treat arbitration and litigation the same way. We do covert work to gather evidence, which we can then pass on to a lawyer. We have technical specialists who can extract or recover electronic data in various kinds of files and formats. We can help the plaintiff gather the right evidence from the other party, and finally give evidence of opinion relating to valuation or losses.

Philip Yang: Evidence means finding facts and giving opinion. As an arbitrator I have difficulty understanding how you can come to a satisfactory figure for a valuation or contingency loss. This is what accountants can do and what makes them so useful.

Fordham: Our forensic accountants are involved in a lot of work with insurance claims. For example, I've been working

with hotels in Hong Kong that are still making claims for business interruption during the SARS outbreak.

Tony Parton: Forensic accountants can trawl through huge amounts of data, applying sophisticated software. But it all hinges on collecting relevant data. Safeguarding, analysing and presenting the right information will be key to winning a case.

Yeung: Tony, as a lawyer, how important is the accountant to your job in commercial arbitration?

Tony Dymond: You simply can't run a case without the support of an accountant to gather and explain the evidence. You need a competent expert witness to explain and assist you to understand the other side's case. If I'm cross-examining the other side's expert, I want my expert sitting next to me, whispering in my ear.

>> There is growing opportunity for accountants to act as arbitrators, particularly in cases involving disagreements on valuation and pricing.

ADR glossary

▶ Accounting arbitration

Many arbitration cases rely on the expertise of accountants to give opinion on valuation in a purchase price dispute. An example would be to interpret – and understand the motivations behind – a badly worded purchase price adjustment provision.

Yeung: How much arbitration is there in Hong Kong and how many cases involve accountants?

Yang: The HKIAC handles around 280 cases per year. At present only a small number involve accountants as arbitrators, but there is a great future for the accounting and legal professions to get closer together. Some of the greatest difficulties arise in specialist accounting areas, for example in valuing assets or quantifying losses.

ARBITRATION

Suitable for a bilateral dispute, allowing two parties to appoint an arbitrator to settle their case. Contractual provisions establish the conditions for use of arbitration in the event of a dispute.

The lack of precedent in arbitration makes outcomes unpredictable. The use of an arbitration panel can make the process costly when hearings are lengthy.

Expert witness, arbitrator

LITIGATION

Dispute resolution through the courts. Effective for multi-party or multi-agreement disputes. Most courts offer rights of appeal.

Litigation is seen as an aggressive move. The hearings are open to the public and the ruling may set, or be based on, precedent.

Expert witness



► **New York Convention**

The New York Convention of 1958 is the most important international treaty relating to international commercial arbitration. It provides for a simple and effective method of obtaining recognition and enforcement of foreign arbitral awards.

in and understand the issues very quickly. Accountants could get a lot of work as arbitrators and mediators if they stay close to banks and insurance companies.

Yeung: What about mergers and acquisitions? They are taking off in Asia and especially China, so will that create more arbitration work?

Parton: If you are looking at an acquisition in Asia, there's typically a lot of up-front due diligence to settle pricing issues. In the United Kingdom, contracts often have more clauses built in, to allow adjustments at a later date.

Fordham: Our engagement letters in China always include an arbitration clause, but in Hong Kong our letters always have a litigation clause. I think the profession is aware of arbitration as an option in dispute resolution, but there aren't many people actively involved working as arbitrators at the present time.

Parton: Most commercial disputes involve an accounting angle, but those disputes may not always be so large, complex or commercially sensitive as to require the extensive involvement of accountants.

Yeung: In the oil and gas industry, where I do much of my work, arbitration clauses are already the norm. Are there other sectors where accountants can get more involved?

Yang: Banks can certainly use accountants more. There are many disputes between banks, for example over letters of credit, where there is a difference of interpretation of an index or a doubt over the conformity of a document.

Accountants can help handle these disputes through arbitration and mediation.

Chris To: The bigger banks with an international spread of assets are getting involved in arbitration. Most local banks are still more inclined to litigate, but that might change. Banks can also use arbitration mechanisms to handle customer complaints discreetly and consistently. Retail banks won't always accept they have a problem, but the Monetary Authority documents several hundred written complaints every year. The government wants to use taxpayers' money to set up a tribunal for customer complaints, but I'd say an arbitration panel involving accountants could do the job just as effectively.

Peter Nixon: I was recently approached by a bank that wanted an external mediator and facilitator to oversee a global supply contract with a big IT company. The bank's disputes are regular, high dollar items, but the management wouldn't go to litigation or arbitration because they don't believe these third parties would understand all the issues. I believe that's the strength of accountants, they can walk

► **Tony Dymond**

When to litigate and when to arbitrate

The big advantage of arbitration is enforceability. The New York Convention makes an arbitration award easier to enforce internationally than a court decision. The other advantage is the ability for the parties to choose a tribunal. Speed and cost are touted as advantages of arbitration, but some arbitrations drag on for years. You can draft rules to limit cost and set a compressed timetable – short form arbitration is becoming more common in the construction industry. Litigation can be quicker, as there are procedures to get a summary judgement, without full oral evidence and call witnesses. If there's a clear-cut case – such as an unpaid debt – then litigation makes more sense. There's also the impact of receiving a writ – it forces people to sit up and take notice.



► Peter Nixon

A win-win situation is possible

>> Our round table panelists discuss their experiences in other forms of dispute resolution, including mediation, expert determination and negotiation.

Yeung: Mediation is another area where accountants can apply their skills and knowledge.

Nixon: Mediation is about managing the process, not the conclusion. Accountants can work as mediators, putting both sides of the issue on the table, exploring how much each side can give and showing each side where they are wrong or being unrealistic.

Fordham: Mediation allows you to cut a deal and explore new ways to work together. As the mediator you should be flexible – it's their process. Accountants can make good mediators if they have a sense for business as well as the numbers.

Nixon: It depends on the individual and their facilitative skills. You need to be aware of body language, personal styles, tactics, all forms of communication.

Fordham: As accountants should we consider mediating between two of our own clients? Presumably they trust us already if they are clients – so should we be scared?

Parton: It does happen. I've mediated between clients, but it's fraught with difficulties. It works best when both parties want or need some kind of continuing business relationship.

Yeung: What about expert determination?

Parton: I did a lot of expert determination work in the U.K., so when I came to Asia I was very surprised how little it was used.

Many companies are looking for a win-lose situation rather than a win-win situation. John Nash won the Nobel prize in Economics for proving the best possible outcome is not what is best for you, but rather what is best for you and for the other party.

Disputants come to me because they want to solve their problem. I help to effect a solution by getting the right people to talk about the right issues in the right way. Remove any one of these variables and you end up with a suboptimal outcome that'll drag down profits.

I mediated a dispute in a project management team. The team was responsible for recurring projects undertaken by a multinational company and consisted of senior representatives from four different and separately contracted organisations. Project costs and variances were material as were the savings generated by the project. There was a lot of mistrust among these representatives – in fact they were barely talking to one another. By stepping into the fray as a neutral third party, I was able to facilitate dialogue. I helped to steer focus back to the project's goals and keep it on course. Finding a solution required a keen awareness of cost issues, an advanced understanding of interpersonal conflicts. One of my tasks was to create expert process steps – for example break-out sessions, caucusing and profiling exercises – that kept things moving forward.



Dymond: I've only seen one expert determination case in Hong Kong. It involved hundreds of millions of dollars and was settled quickly and conclusively. In the U.K. construction industry you now have compulsory adjudication, which is similar. Although people can appeal to an arbitration panel, my experience is that it happens very rarely.

Yeung: Most M&A deals require an auditor to determine net asset value, so this is an area where accountants already offer a form of expert determination. Peter, you are in an unusual position, a

CPA and a trained negotiator. Can you give us an example of your work?

Nixon: I'm involved with a client to train their procurement negotiation team. These officers are very focused on the buy side, but had little grasp of the working capital issues. There was a gap of 12 months between the start of the supply contract and the receipt on the sale side. The CFO in their head office was worried about working capital, but their preoccupation was to sign up deals and ensure quality.

>> As commercial transactions and financial reporting standards get more complex, accountants have new opportunities to assist in dispute resolution.

Yeung: Are new financial reporting standards making the role more complicated?

Parton: Its not just about accounting standards. Transactions, systems and technologies are all becoming more complex.

Yeung: For an accountant even the term profit can be nebulous. Accountants can help draft contracts, by explaining what is the best terminology.

Fordham: I had a case recently where there was a buyout with a loss mechanism, and the payout was based on 50 percent of net assets and 50 percent of profit. Although appearing sensible from a layman's point of view, the clause was so vague as to how the mechanism was actually going to work that it needed an accounting expert witness to give an opinion on it.

Yeung: If a company doesn't include an arbitration clause, any dispute will end up in the courts, where interpretations and outcomes may be different from one jurisdiction to the next. Do accountants need to better understand the detail of arbitration clauses, or be more involved in choosing between arbitration and litigation?

Dymond: As a lawyer that's something we would consider part of the core scope of our work. It's a sophisticated decision to make, and not something that we'd expect to fall to the accountant. I'm not suggesting you shouldn't do it, just that a lawyer should be advising you.

Yeung: The decision maker is the client – a CFO will have a team of legal advisors behind him. This is definitely lawyers' work, but accountants may have a reason to want to arbitrate say, in Hong Kong rather than in London.

“I've mediated between clients, but it's fraught with difficulties.” *Tony Parton*

Parton: I'm not aware of accountants being directly involved in drafting contracts, but they can help with the terminology, for example of licensing, royalties or intellectual property.

>> Yeung concludes the discussion by questioning whether accountants had the right skills to take on work as arbitrators and mediators.

Yeung: Can accountancy firms do more to train their staff in dispute resolution skills?

Parton: It's a difficult business model for the large accountancy firms as we are set up to cater for large assignments, often involving large teams. Acting as an arbitrator or a mediator does not require this kind of teamwork. Arbitration and mediation will be more suitable to more senior people with a background in one of the big firms, because of their experience working with a large range of clients.

To: We have tried to involve and inform younger accountants about arbitration. Senior partners are often too busy to get involved so it would be good to start preparing the next generation.

Parton: I don't see this work being suitable for younger accountants. It's great to have an understanding of the principles, in relation to arbitration and litigation. In mediation you also need the experience, to anticipate what might happen next if the two sides don't settle, and to inform either party about what they are letting themselves in for.

Nixon: Practising accountants, like



lawyers, are comfortable in the areas where they are trained and like to come in at the more refined high end. Accountants in commercial entities are familiar with all kinds of disputes, and are probably more aware that all disputes have a cost.

Dymond: There are difficulties in leveraging your position as an arbitrator or mediator. In Hong Kong all the large arbitration cases go to a small number of arbitrators. These people may not be very profitable to their firm, but they can bring in a lot of other business down the line on the back of their profile.

Parton: We face a similar problem of leverage. In Hong Kong and China the big firms are flat out in every service line. This provides more opportunities for small practices and commercial accountants to get involved in mediating and arbitrating.

Yeung: Do accountants have the right skills for this work?

Parton: Mediation skills don't come naturally. You need experience to see where a situation is heading – as well as the specific technical, commercial and forensic skills.

To: The current accounting programmes in Hong Kong universities don't include anything about dispute resolution or negotiation skills – there's an opportunity for that to change as degree programmes are extended from three to four years.

Nixon: Arbitration can get you to a neutral point at the table, but at some point emotional judgements must take over and affect the outcome, so negotiation and communication skills remain paramount. **A+**

► Chris To

The case for arbitration

Right from the start, a business must have provisions in place to resolve commercial disputes. Skilful contract drafting, and an understanding of the true intentions of all parties in a deal, can deliver a significant competitive advantage once your business is up and running.

Disputes are a fact of life in business, and they often hinge on financial transactions. They require a professional with practical financial experience, rather than a judicial temperament, to resolve them.

What is arbitration?

Arbitration is a legal process which results in an award being issued by an arbitrator or arbitrators. Arbitration awards are final and binding, and can only be challenged in exceptional circumstances. An award has a status much like a court judgement and is enforceable in the same way. Arbitration awards made in Hong Kong are enforceable in over 135 countries and territories that have ratified or acceded to the New York Convention. Awards made in Hong Kong are also enforceable in mainland China, which makes Hong Kong a particularly attractive place to arbitrate.

There are five main reasons why arbitration is so attractive:

- Party autonomy
- Limited judicial review of arbitral awards
- Discretion (*particularly when trade secrets are involved*)
- Informality and flexibility of the process (*coupled with the arbitrator's specialist technical knowledge in the subject*)
- Comparatively low cost

Growing popularity

In the last few years, new bilateral investment treaties between private investors and state entities have chosen alternative dispute resolution mechanisms as their preferred means for resolving possible disputes. The Washington Convention led to the creation of an arbitration procedure under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes, covering disputes arising out of investment contracts between a host state and a foreign national.

Arbitration is not perfect. One drawback is that the doctrine of precedent does not apply, so each case is decided on its merits and cannot be used as a guide to future similar cases. Nevertheless, arbitration can be an effective way to resolve commercial disputes.

The Hong Kong International Arbitration Centre is looking at ways to get accountants more involved in arbitration work. With their knowledge of financial services and financial practices, accountants can easily contribute their skills to an area that is becoming important, especially to cross-border business. Knowing the process and the mechanism can greatly assist parties in reaching an amicable solution that preserves long-term relationships.

