

DISCLAIMER:

This proforma expert determination agreement (this “Proforma Agreement”) is provided by the Building Affairs Expert Determination Centre (the “BAEDC”) as reference only and should be amended to suit the specific circumstances of the parties and the expert in each case after careful discussion among themselves. Nothing herein should be regarded as constituting a professional or other advice for any matters. BAEDC and HKIS (or the employees, consultants, officers, members or representatives whatsoever of BAEDC and HKIS) shall not be liable for any loss or damage, howsoever incurred, which may result from usage and/ or reliance of this Proforma Agreement.

EXPERT DETERMINATION AGREEMENT

THIS AGREEMENT (the “**Agreement**”) is dated _____ made between:-

(1) Party A¹: _____
Address: _____

(2) Party B: _____
Address: _____

(jointly, the “**Parties**” and each a “**Party**”); and

(3) Expert: _____ (the “**Expert**”)
Address: _____

WHEREAS:-

- (1) The Parties have submitted an application to the Building Affairs Expert Determination Centre (the “**BAEDC**”) of The Hong Kong Institute of Surveyors for the nomination of expert in respect of expert determination on building related technical issues or disputes;
- (2) BAEDC has nominated the Expert as the expert to resolve the building related technical issues or disputes between the Parties; and
- (3) The Parties and the Expert hereby agree to conduct expert determination in respect of the Disputes (as defined hereinafter) in accordance with the terms and conditions of this Agreement.

IT IS HEREBY AGREED as follows:-

1. Definition and Interpretation

- 1.1. In this Agreement, the following expressions, except where the context otherwise requires, have the following meanings:-

¹ Modify as necessary if there are more than two parties.

“BAEDC”	means the Building Affairs Expert Determination Centre set up by the HKIS;
“Business Days”	means a day other than a general holiday in accordance with the General Holidays Ordinance (CAP. 149) or Saturday;
“Disputes”	means the building related technical issues or disputes to be determined by the Expert, as set out in Schedule 1 of this Agreement;
“Expert’s Decision”	means the determination made by the Expert in relation to the Disputes;
“Expert Determination”	means expert determination conducted by the Expert in relation to the Disputes in accordance with this Agreement;
“Expert Fees and Expenses”	means the fees of the Expert calculated based on the amount of time spent for the Expert Determination (including but not limited to any preparation, attendance of conference, and investigation) and the hourly rate as set out in Schedule 2, as well as the disbursements incurred by the Expert in relation to the Expert Determination;
“HKIS”	means The Hong Kong Institute of Surveyors; and
“Rules and Procedures	means the rules and procedures agreed and adopted by the Parties and the Expert

1.2. Unless the context otherwise requires:-

- (a) References to **“persons”** include without limitation individuals, unincorporated bodies, government entities, companies, corporations and any other entities whatsoever;
- (b) Words importing the masculine gender include the feminine and neuter genders and vice versa; and
- (c) Words importing the singular number include the plural and vice versa.

1.3. The schedules to this Agreement are an integral part of this Agreement and references to this Agreement include references to such schedules.

2. Appointment of Expert

The Parties hereby agree that the Disputes shall be resolved by Expert Determination and the Parties hereby jointly appoint the Expert as an expert to determine the Disputes in accordance with the Rules and Procedures.

3. Role of Expert

- 3.1. The Expert shall act as an independent expert based on his expertise and in accordance with the Rules and Procedures to resolve the Disputes but not as an arbitrator, legal adviser or any other capacities.
- 3.2. The Expert Determination shall not be considered as an arbitration and/ or hearing conducted under any legislation or rules whatsoever.

4. Independence and Conflict of Interest

- 4.1. The Expert shall act independently and be neutral and impartial at the time of accepting an appointment and must remain so during the entire proceedings until the Disputes have been finally determined by him; the Expert must not do or permit anything to be done which may reasonably impede his independence and impartiality.
- 4.2. The Expert shall not act, or attempt to act, for any of the Parties in respect of matters apart from those in connection with this Agreement during the continuance of this Agreement and shall disclose to the Parties all prior dealings (if any) he had with any of the Parties and/ or any conflict of interest situation.
- 4.3. The Parties and the Expert hereby declare that there is no conflict of interest situation between any of the Parties and the Expert to the best of their knowledge and belief, save as those already made known to and agreed by the other Party before the execution of this Agreement.
- 4.4. If the Expert, subsequently becomes aware of any circumstances that may reasonably impede his independence and impartiality, the Expert shall immediately inform the Parties. The Expert must cease to determine the Disputes, unless with the consent of the Parties.

5. Conduct of Expert Determination

- 5.1. The procedure of the Expert Determination shall be governed by the Rules and Procedures. Subject to any provisions to the contrary, the rules of evidence normally applied to arbitration or any proceedings do not apply to the Expert Determination.
- 5.2. The Parties and the Expert shall comply with the Rules and Procedures in the Expert Determination.

- 5.3. The Expert must conduct the Expert Determination of the Disputes in accordance with the Rules and Procedures.
- 5.4. In case of any conflict between the terms of the Rules and Procedures and the terms of Agreement, the terms of this Agreement shall prevail.
- 5.5. The Parties agree to participate in the Expert Determination in good faith and shall use their best endeavours to do or procure to be done anything which the Expert may reasonably require for the determination of the Disputes.
- 5.6. The Parties hereby undertake that all factual submissions and/ or documents provided to the Expert in the course of Expert Determination are true, accurate and not misleading to the best of their respective knowledge and belief.
- 5.7. Save and except to those listed in clause 5.8 of this Agreement, all submissions, documents and/ or communications in respect of the Disputes between the Parties and the Expert shall be communicated to all other Parties and the Expert.
- 5.8. Notwithstanding clause 5.7 above, any of the Parties and the Expert shall not require the following submissions, documents and/ or communications between the other Parties and the Expert:-
 - (a) any settlement(s) and/ or negotiation in respect of the Disputes between the Parties; and
 - (b) any information and/ or communication in any form under the protection of litigation/ legal professional privilege.

6. Expert Determination

In the course of the Expert Determination, the Expert:-

- (a) shall comply with any applicable code of conduct, rules of conduct, standards and/ or other guidance documents issued by BAEDC and/ or HKIS;
- (b) may consider any materials submitted by the Parties in the course of Expert Determination which he considers to be relevant;
- (c) may refer to any practice note(s) or code(s) of practice or recognised guideline(s) the Expert deems relevant to the Disputes;
- (d) proceed in such manner he thinks fit without being bound to observe the rules of evidence;
- (e) may (but shall not be obliged to), notwithstanding the aforesaid, conduct his own investigation in respect of the Disputes;
- (f) may, with the prior written consent of the Parties, employ or otherwise bring along such assistant or service providers as he deems fit and provided that such

assistant or service providers agree to be bound by the confidentiality obligations hereunder;

- (g) may draw adverse inference from the fact that any failure of a Party to use its best endeavours to do or procure to be done anything which the Expert may reasonably require for the determination of the Disputes; and
- (h) shall determine the Disputes in accordance with any relevant materials submitted by the Parties, his own investigation results and/ or his own expertise.

7. Expert's Decision

- 7.1. Subject to clause 7.2 below, the Expert shall generally deliver to the Parties the Expert's Decision within []² days after all investigations and submissions have been completed.
- 7.2. If the Expert considers that he needs to deliver the Expert's Decision at a later date due to the complexity of the Disputes or any other reason whatsoever, the Expert shall inform the Parties the estimated date for delivery of the Expert's Decision before the expiry of the period set out in clause 7.1 above.
- 7.3. The Parties hereby expressly agree that the Expert's Decision [shall/shall not]³ include any reasons.
- 7.4. The Expert is empowered to award relief as the Expert considers appropriate⁴ as part of the Expert Determination.

8. Effect of Determination

- 8.1. The Expert's Decision shall, in the absence of manifest error, be regarded as final and conclusive in relation to the Disputes, and the Parties hereby agree to be bound by the Expert's Decision.
- 8.2. The Parties agree and undertake that they will not challenge the Expert Determination in any legal proceedings or otherwise.

9. Fees and Costs

- 9.1. [The Parties will be jointly and severally liable for the Expert Fees and Expenses in equal shares/ pending the conclusion of Expert's Decision or termination of the

² Specify as appropriate

³ Delete as appropriate

⁴ The Expert and the Parties shall agree on the jurisdiction/ scope of the relief, including but not limited to, interest of any damages awarded, loss of enjoyment, alternative accommodation, damages for discomfort, inconvenience and disturbance, etc.

proceedings when the Expert shall determine the Parties' respective proportion for the Expert Fees and Expenses]⁵.

- 9.2. The Parties shall deposit the amount specified in Schedule 2 as estimated by the Expert to secure the Expert Fees and Expenses upon execution of this Agreement. Such deposit shall be made to and held by the Expert free of interest and may be drawn from as required by the Expert for the purpose of settling the Expert Fees and Expenses incurred. Should there be funds remained in the deposit paid after the delivery of the Expert's Decision and/or the termination of Expert Determination, the Expert shall return the balance to the Parties within 14 business days.
- 9.3. The Parties shall settle the Expert Fees and Expenses within 7 days after the receipt of the notification from the Expert informing that the Expert's Decision has been ready or the proceedings have otherwise finally terminated.
- 9.3. The Expert's Decision shall be delivered to the Parties upon payment in full of the outstanding Expert Fees and Expenses.
- 9.4. No refund of fees, expenses, costs and disbursement will be allowed save for exceptional circumstances.

10. Release

- 10.1. Save in the case of fraud or gross misconduct by the Expert, the Expert will not be liable to either of the Parties for any act or omission by the Expert in the performance of the Expert's obligations under this Agreement.
- 10.2. The Parties shall jointly and severally indemnify the Expert against all claims or liability of any kind whatsoever arising out of or in any way in connection with any act or omission by the Expert (except fraud or gross misconduct) in the performance of the Expert's obligations under this Agreement.

11. Confidentiality

- 11.1. The Expert and the Parties will keep the Expert Determination private and confidential except:-
 - (a) to whom information is required or requested to be disclosed by any court of competent jurisdiction or any governmental, taxation or other regulatory authority or similar body, or pursuant to any applicable laws or regulation;

⁵ Delete as appropriate

- (b) to whom information is required to be disclosed in connection with, and for the purposes of, any litigation, arbitration, administrative or other investigations, proceedings or disputes; and
- (c) with the written consent of the Parties and the Expert;
- (d) For research, experience sharing and/or statistical purposes, BAEDCthe BAEDC and the HKIS shall be entitled to collect anonymous information/ data in respect of a summary of the expert determination proceedings and the fees charged by the nominated experts upon completion of the expert determination in compliance with Personal Data (Privacy) Ordinance (Cap. 486).

11.2. In particular, the Expert shall not at any time, without the consent of the Parties, disclose to any other person:-

- (a) any details or information concerning the subject matter to which any dispute or difference referred under this Agreement;
- (b) any of the contents of this Agreement, or any information disclosed by the Parties in any proceedings and/ or submissions relating to the Expert Determination;
- (c) any documents prepared for the purpose of the determination (including but not limited to the Expert Determination); or
- (d) any communication or conversation exchanged between the Parties and/or amongst the Parties and the Expert.

12. Notice

12.1. Each communication to be made under this Agreement shall be made in writing and, unless, otherwise stated, may be made by fax, letter and/ or email to the contact details set out in Schedule 3 or such contact details as may be notified to the other parties by not less than 5 Business Days' prior written notice.

12.2. Any communication or document to be made or delivered will be effective only if it is expressly marked for the attention of the Party identified hereunder and will only be effective:-

- (a) if by way of fax, when received in legible form;
- (b) if by way of letter, when left at that relevant address or two days after being deposited in the post postage prepaid in an envelope addressed to it at that address; or
- (c) if by way of email, when actually received (or made available) in legible form.

13. Governing Law and Dispute Resolution

- 13.1. This Agreement shall be governed by and construed in accordance with the laws of Hong Kong.
- 13.2. Any dispute, controversy, difference or claim arising out of or relating to this Agreement, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

The seat of arbitration shall be Hong Kong. The number of arbitrators shall be [one (1)]⁶. The arbitration proceedings shall be conducted in [English/ Chinese]⁷.

14. Limitation on Liability

- 14.1. To the extent permitted by law, the Parties and the Expert expressly acknowledge that neither BAEDC nor HKIS (or any of their employees, consultants, officers, members or representatives whatsoever) shall be liable to the Parties and/ or the Expert in contract, tort, negligence, breach of statutory duty or otherwise for any loss, damage, costs or expenses of any nature (direct, indirect or consequential) whatsoever incurred or suffered by them (including but not limited to any economic loss or other loss of turnover, profits, business or goodwill).
- 14.2. None of the Parties will call BAEDC and HKIS (or any employee, consultant, officer, member or representatives whatsoever of BAEDC and HKIS) as a witness, consultant, arbitrator or expert in any litigation or arbitration in relation to the Disputes.

15. Partial Invalidity

If, at any time, any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

16. Amendments and Waivers

⁶ Or otherwise specify as appropriate

⁷ Delete as appropriate

No term of any of this Agreement may be amended or waived without the prior written consent of the Expert and the Parties and any such amendment or waiver shall be made in writing by the Expert and the Parties.

17. Opt out of Contracts (Rights of Third Parties) Ordinance (Cap. 623)

For the purposes of the Contracts (Rights of Third Parties) Ordinance (Cap. 623), any party who is not a party to this Agreement shall have no right to enforce any of the provisions herein.

The Parties and the Expert hereby acknowledge that they have read, understood and agreed the above terms of this Agreement.

Party A:

(Signature)
Name:
Position (if any):
Date:

Party B⁸:

(Signature)
Name:
Position (if any):
Date:

Expert:

(Signature)
Name:
Date:

⁸ Modify as necessary if there are more than two parties

Schedule 1 – Disputes⁹

Nature of the Dispute:	The issues or disputes relate to the following areas: <input type="checkbox"/> Water seepage; <input type="checkbox"/> Decoration and fitting-out works; <input type="checkbox"/> Repair and maintenance works for existing buildings (but excluding disputes on the handover status of new flats or commercial units); <input type="checkbox"/> Liability of unauthorized building works <input type="checkbox"/> Others, please specify: _____
Background Information:	The background of the issues and/ or disputes is as follows:-
Issues to be determined:	The issues and/ or disputes to be determined by the Expert:-

⁹ Based on the information submitted by the Parties under the application to BAEDC and/or such determined by the Expert

Schedule 2 - Expert Fees and Expenses

Hourly Rate of Expert:	<p>In respect of the Expert Determination, the expert shall charge for his services based on the amount of time spent in the Expert Determination (including but not limited to time spent for any preparation, attendance of conference, and investigation)</p> <p>The hourly billing rates for the Expert are as follows:- [Name of Expert] HK\$ [amount]</p>
Disbursement:	Includes but shall not be limited to: courier and postal services, long distance copying charges, costs for testing, travel expenses, venue etc.
Deposit:	HK\$ [] – to be paid on execution of this Agreement
Payment Instructions:	[please insert payment method here – cheque / cashier order, bank account etc.]

Schedule 3 – Contact Details

Party A:

Address:	
Fax No.:	
Email Address:	
Attn:	

Party B¹⁰:

Address:	
Fax No.:	
Email Address:	
Attn:	

Expert:

Address:	
Fax No.:	
Email Address:	
Attn:	

¹⁰ Modify as necessary if there are more than two parties