

Construction Industry Security of Payment Ordinance
DEVB's Guideline on Conflicts of Interest in Adjudication

Foreword

The Construction Industry Security of Payment Ordinance (Chapter 652 of the Laws of Hong Kong) (the “**Ordinance**”) aims to improve the payment practices in the construction industry, and to provide a mechanism for speedy resolution of payment disputes through adjudication proceedings, with a view to improving the cash flow problems encountered by stakeholders along the construction supply chain. When payment dispute arises, a claiming party may initiate adjudication by serving an adjudication notice on the paying party and an adjudicator nominating body, who will nominate and appoint an adjudicator to determine the payment dispute.

Pursuant to section 28 of the Ordinance, an individual is ineligible to act as an adjudicator in relation to a payment dispute if the individual has a conflict of interest or circumstances exist that give rise to justifiable doubts as to the individual’s independence or impartiality. Further, adjudicators have obligation under section 29 of the Ordinance to declare and disclose any conflict of interest and any circumstances likely to give rise to justifiable doubts as to the individual’s independence or impartiality before appointment and during the adjudication proceedings.

As agreed in the Task Force for the Construction Industry Security of Payment Ordinance, which comprises various stakeholders along the construction industry supply chain in Hong Kong, the International Bar Association “IBA Guidelines on Conflicts of Interest in International Arbitration” (2024 Edition) (“**IBA Guidelines**”) shall be followed by adjudicator nominating bodies and adjudicators in performing the requirements under sections 28 and 29 of the Ordinance, with certain exceptions to suit the Ordinance’s requirements and the local construction industry practices.

Glossary

Term	Definition
adjudicator nominating body (ANB)	means a nominating body under the Ordinance which has been agreed and selected by the parties to nominate and appoint an adjudicator to determine a payment dispute
adjudicator	means the individual who is appointed or is being considered by an ANB to be appointed, as an adjudicator, in accordance with the Ordinance to determine a payment dispute
Hong Kong	means the Hong Kong Special Administrative Region of the People's Republic of China
IBA	means the International Bar Association
IBA Guidelines	means IBA Guidelines on Conflicts of Interest in International Arbitration (2024 Edition) published by the IBA Arbitration Committee
justifiable doubts	means justifiable doubts as to the adjudicator's impartiality or independence
Ordinance	means the Construction Industry Security of Payment Ordinance (Chapter 652 of the Laws of Hong Kong)

Introduction

1. Under the Ordinance, adjudication is designed to provide a prompt and cost-effective interim resolution of payment disputes. The nomination and appointment of adjudicator by an ANB under the Ordinance is intended to be a simple and quick process and to facilitate the promptness of the adjudication proceedings. Before appointing an adjudicator, an ANB must undertake appropriate checks and be satisfied that an individual does not have a conflict of interest in respect of the appointment, or circumstances exist that give rise to justifiable doubts as to the individual's independence or impartiality.
2. An adjudicator is expected to have knowledge, expertise and experience in the local construction industry. The relevant industry experience may be gained through frequent involvements and connections with businesses and individuals who operate in the sector, including architects, engineers, surveyors and lawyers.
3. These involvements and connections play an important role in broadening and deepening an individual's experience and expertise, and in ensuring the adjudicator is accepted by the parties as being able to understand and rigorously evaluate the evidence they submit and ultimately resolving the dispute satisfactorily. In some circumstances, however, an individual may be too closely connected with one of the parties to the dispute, or the subject matter of the dispute, bringing their ability to act independently or impartially as an adjudicator into question. In such circumstances, the individual is ineligible to be appointed.

Part I of the IBA Guidelines

4. Adjudicators and ANB should follow General Standards (1) to (7) and the explanations to the General Standards in Part I of the IBA Guidelines, with necessary modifications and the express deviations set out in paragraph 5 below, to the evaluation of existence of conflict of interest and justifiable doubts under section 28 and the obligation to disclose conflict of interest and justifiable doubts under section 29 of the Ordinance (“**Requirements**”).
5. To suit the Ordinance and the construction industry practices in Hong Kong, the following exceptions should be adopted in carrying out the Requirements:
 - (i) The period for raising objections as specified in General Standard 4(a) is not applicable in the Hong Kong context and the period for raising the relevant objections should be the period specified in the relevant ANB adjudication rules or the period specified by the relevant ANB in accordance with its rules.
 - (ii) In order to cope with the timeframe (7 working days) for nomination and appointment of adjudicator in accordance with the Ordinance, waiver by express agreement of the parties as allowed under General Standard 4(c) is not applicable in the Hong Kong context.
 - (iii) General Standard 4(d) is not applicable in the Hong Kong context as the circumstances depicted therein amount to conflict of interest which cannot be waived by express agreement.
 - (iv) Given that the adjudicator nominating process needs to be completed within 7 working days after the adjudication notice is served on the ANB, the duty to investigate relevant information to fulfil the duty of disclosure as set out in General Standard 7(d), and the relevant explanations, shall be limited to the extent of what is reasonably practicable within the period of time allowed during the nomination and appointment process.

Part II of the IBA Guidelines

6. Adjudicators and ANB should follow Part II of the IBA Guidelines, except for the ‘Waivable Red List’ and the provisions relating to the ‘Waivable Red List’, with necessary modifications and the express deviations set out in paragraphs 7 – 9 below, to the performance of the Requirements
7. The situations listed in items 2.1.1 and 2.1.2 under “Waivable Red List” should be regarded as situations under “Non-Waivable Red List” in the Hong Kong context.
8. The situations listed in items 2.2.1 to 2.3.8 under “Waivable Red List” should be regarded as situations under “Orange List” in the Hong Kong context.
9. The situation listed in item 3.2.2 under the “Orange List” should be regarded as situation under the “Green List” in the Hong Kong context.

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