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Adjudication Handbook **for Security of Payment Provisions**

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INTRODUCTION

1. In June 2015, the Development Bureau (“DEVB”) conducted a public consultation on the “Proposed Security of Payment Legislation for the Construction Industry” (“SOPL”) with a view to enhance cash flow down the contractual chain. The proposed measures included the statutory right to adjudicate payment disputes and extension of time, which will be provided in the proposed SOPL as a statutory right when it is enacted.
2. On 5 October 2021, the DEVB published a circular DB TC(W) 6/2021. There, the Government formulated a framework (“SOP Framework”) of security of payment provisions (“SOPP”), which was to be applied to all public works contracts. Readers and users of this handbook should bear in mind that the SOPL has yet to be implemented in Hong Kong. Adjudication provided for under Hong Kong’s SOPP is therefore purely contractual, unlike the statutory adjudication of other jurisdictions. The SOPP is a pilot scheme aimed to facilitate the introduction of the SOPL through experience gained in public works contracts and for that purpose, it also contains the parties’ right to adjudicate.
3. This handbook aims to provide practical guidance on some of the common issues that may arise during adjudication commenced under the SOPP. It is intended to provide a step by step guideline for parties to make the best use of the current contractual adjudication procedure and enhance cash flow. While this handbook aims to be consistent with and mindful of good practice, it is not put forward as a benchmark of good practice. Further, the handbook will need to be reviewed once the forthcoming SOPL is introduced as there may or may not be material differences with the contractual SOPP scheme.

Adjudication in Hong Kong

4. The important distinction between adjudication and other forms of ADR lies in the fact that the process is expected to result in one party being compelled, at least temporarily, to pay a sum of money to the other. Hence, the key features of adjudication include the parties’ rights to adjudicate during the progress of the works, and to receive the adjudicated decision within a short period of time. As will be discussed below, the Hong Kong SOPP model sets this time limit to be 55 days from the date of the adjudicator’s appointment. It is worth noting that SOPL and SOPP are very different. Unlike SOPL, SOPP is contractual in nature only and there is no legislation or statutory scheme that applies. The adjudications commenced under the SOPP are therefore subject to contractual interpretation. This means emphasis is given to the natural and ordinary meaning of the words of the agreement to adjudicate. Weight is given to the construction of the same which is more consistent with business common sense in case of potential competing interpretations. This is important when the construction of provisions becomes relevant, for example, in a challenge to jurisdiction based on the claim having been time-barred by operation of the SOPP. In addition, given the contractual nature of SOPP adjudication, the parties cannot apply to the Court to set aside the award under any circumstances.

Who can commence adjudication?

5. Unlike the statutory regime, which is still pending in Hong Kong, the contractual nature of adjudication under the SOPP means only parties whose contracts contain the rights to adjudicate can commence adjudication. Given the Government requires the Main Contractors and the Engineer to ensure that the relevant SOPP are included in the sub-contracts down the line, it is expected that all sub-contracts would include the relevant SOPP. Technically this means any parties to public works contracts containing the SOPP are entitled to commence adjudication. This includes all tiers of sub-contracts which are under the main contracts subject to the SOPP.
6. The only exception to the right to adjudicate is where the sub-contracts are solely for the supply of materials, plants or services. For those sub-contracts, parties do not have the right to adjudicate.

What can be adjudicated?

7. Payment disputes over (1) construction work; and/or (2) related goods and services; carried out/ supplied, or undertaken to be carried out/supplied.

Do I need to engage a lawyer?

8. Engagement of lawyers is not required. A party to an adjudication may be represented by any representative that the party considers appropriate, whether a lawyer or not.
9. In this regard the parties should know that under the SOPP, a party to an adjudication is not liable to pay any cost or expenses incurred by the other party to the adjudication as a result of or in relation to the adjudication.



PAYMENT CLAIM

10. It is expressly provided for in the SOPP that a contractor (or sub-contractor of the relevant tier) is entitled to a progress payment if the contractor (or sub-contractor of the relevant tier) has carried out or undertaken to carry out construction work or has supplied or undertaken to supply related goods and services in accordance with the relevant contract or sub-contract. The amount of a progress payment which a contractor (or sub-contractor of the relevant tier) is entitled to, is the amount calculated in accordance with the relevant contract or sub-contract.
11. The SOPP means a contractor (or sub-contractor of the relevant tier) can serve a “*payment claim*” for a progress payment on the employer (or contractor of the relevant tier) on or after the “*reference date*” for the payment.¹ “*Reference date*” is defined as a date determined by, or in accordance with, the relevant contract or sub-contract of the relevant tier as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied under the relevant contract or sub-contract. Strategically, it is therefore important to make sure you spend time to ensure your payment claim is in order and make the most out of the available time before the last available reference date.
12. A progress payment becomes due and payable on the earlier of (i) the date determined, or in accordance with, the relevant contract or sub-contract as the payable date and (ii) the date falling 60 days after the “*payment claim*” for progress payment is served. If the “*payment claim*” is served on a date later than the “*reference date*”, for the purpose of (i) above, the “*reference date*” for the progress payment will be the date on which the “*payment claim*” is served and the payable date is determined accordingly.
13. The SOPP sets out certain requirements of a “*payment claim*”, which must (1) be in writing; (2) identify the construction work or related goods and services to which the payment relates; and (3) state the amount of progress payment that the contractor (or sub-contractor of the relevant tier) claims to be payable.
14. A claim or application for payment made under the relevant contract (or sub-contract of the relevant tier) that satisfies the requirements will then be taken as a “*payment claim*” served on the employer (or the contractor of the relevant tier). It is important to note that payment claims do not need to be endorsed, or otherwise state that it is made under the SOPP. If a payment claim meets the formalities, it will be a payment claim which can lead to adjudication.
15. The contractor (or sub-contractor of the relevant tier) cannot serve more than one payment claim for each reference date under the relevant contract or sub-contract. The contractor (or sub-contractor of the relevant tier) may include in the claimed amount of a “*payment claim*” any amount that has been the subject of a previous “*payment claim*” only if the amount was disputed as due by the employer (or contractor of the relevant tier), but it cannot include in the claimed amount of a “*payment claim*” any amount that is the subject of an ongoing adjudication.

¹ If the contractor (or sub-contractor of the relevant tier) serves a “*payment claim*” for a progress payment before the “*reference date*”, the “*payment claim*” is taken to have been served on the “*reference date*”.

PAYMENT RESPONSE

16. The employer (or contractor of the relevant tier) served with a “*payment claim*” may respond by serving a “*payment response*” no later than the earlier of (1) the date determined by the relevant contract or sub-contract and (2) 30 days after the “*payment claim*” is served. If the contractor (or sub-contractor of the relevant tier) serves the “*payment claim*” for the progress payment on a date later than the “*reference date*”, for the purposes of (1) above, the “*reference date*” for the progress payment will be the date on which the “*payment claim*” is served and the date by which a payment response is to be served is determined accordingly.
17. Similarly, the SOPP sets out requirements of a “*payment response*”. It must (1) be in writing; (2) identify the payment claim to which it relates; (3) state the amount (if any) admitted as due under the relevant contract or sub-contract before any set off or withholding, and the basis of the calculation of the amount; (4) state the amount (if any) not admitted as due under the relevant contract or sub-contract before any set off or withholding, the grounds for, and the basis of the calculation of the amount; (5) state the amount, the grounds for, and the basis of the calculation of any amount to be set off or withheld; and (6) state the net amount to be paid (if any) and the calculation of the amount.
18. A certificate or assessment issued under the relevant contract or sub-contract in response to a “*payment claim*” or application for payment that meets the relevant requirements will be treated as a “*payment response*” served by the employer (or contractor of the relevant tier). However, if the employer (or contractor of the relevant tier) issues its own “*payment response*” on or before the time for serving “*payment response*”, such “*payment response*” will take precedence over the certificate or assessment and/or supplement the same as appropriate.
19. If the employer (or contractor of the relevant tier) does not serve a “*payment response*” on or before the date specified, the employer (or contractor of the relevant tier) is regarded as disputing the full claimed amount, but will not be able to raise any set off in any adjudication in relation to the “*payment claim*” concerned. For example, if the employer does not issue a valid payment response referring to the entitlement to set off, it will not be able to rely upon on the same in the subsequent adjudication. The types of set off which the employer can rely upon are generally wide and would include, for example, common law set off.

PAYMENT DISPUTE

20. It is a mandatory requirement under the SOPP that payment disputes be referred to adjudication. This is also the starting point under the provisions, which gives parties a right to refer a payment dispute to adjudication. While “dispute” is a common word with a simple meaning, it would be far from accurate to conclude that this area is by any means straightforward, and indeed the DEVB’s circular has a specific definition of “payment dispute”.
21. There are two hurdles to overcome before a party can refer a dispute to adjudication. First, whether the payment dispute has crystallised – i.e. whether a dispute even exists. Secondly, whether an entitlement to commence adjudication is unconditional, even if there is clearly a payment dispute.
22. The existence of a payment dispute is important because without one, an adjudicator lacks jurisdiction and there is simply nothing that can be referred to adjudication. It is a common misunderstanding

that once the other party has been notified of a claim, a dispute exists. However, some jurisdictions have established that a dispute will only crystallise and come into existence when it is brought to the attention of the opposing party, who has had the chance to consider and admit, modify or reject the claim or assertion. This highlights that it is important for the responding party to have had a chance to consider the claim and reject it, before the claiming party serves a notice of adjudication.

23. The provisions in Hong Kong have circumvented potential problems of a non-crystallised dispute, by incorporating the concept of ‘deemed crystallisation’. This is achieved through the DEVB’s definition of “payment dispute”, encompassing the situation where the paying party fails to serve a payment response. In other words, a dispute will be deemed to exist even if there is no response. Practically, in light of the provisions, it is important parties make timely responses, or valid and effective reservations as to the jurisdiction. Failing to do this could indicate that the party has acceded to the adjudicator having jurisdiction to handle the dispute.
24. More often than not, parties consider the next step after a dispute has crystallised to be a seamless transition to adjudication. Taking a careful look at the provisions shows otherwise. In the event a payment dispute has arisen, particular attention should be given to whether the specific claim handling procedures and requirements as specified under the relevant contract have been completed. In other words, payment dispute can only be progressed after the claims have been assessed under the requisite claim handling procedure. For example,
 - (1) For contracts using GCC for Civil Engineering Works, E&M Engineering Works or Building Works (1999 Edition), the claim handling procedure involves the Engineer, Surveyor or Supervising Officer notifying the contractor of that assessment.
 - (2) For NEC3 Engineering and Construction Contracts, the claim handling procedure ends only when the Project Manager notifies the Contractor of that decision. Likewise, for NEC3 Term Service Contracts, the claim handling procedure is only completed after the Service Manager has notified the Contractor of that decision.
 - (3) For NEC4 Engineering and Construction Contracts, currently the most common form of NEC contract used in Hong Kong, the claim handling procedure ends when the Project Manager notifies the contractor of that decision regarding a compensation event, or, otherwise implements a compensation event. While the intricacies of compensation events and the process of implementing a compensation event go beyond this handbook, it should be noted that only NEC4 contracts specify a number of events that are identified as compensation events in the contract, and hence referable to adjudication.
25. All of this means adding another layer of time and cost to the process, before a party is entitled to refer the dispute to adjudication. It also runs the risk of third parties slowing down (or at worst interfering with) what would have been an otherwise speedy resolution of a payment dispute.
26. Finally, the devil is in the details. The provisions have specifically chosen to use the word “dispute”, and not “disputes”. Before serving a notice of adjudication, care must be taken to make sure one single dispute is being referred, which has not previously been settled, or referred to arbitration or adjudication, to the adjudication. For clarity, a single dispute could mean one item within the payment response. For example, a single dispute could be the valuation of one item within the many valuations

of a variation as part of one monthly claim, a variation order, or an interim payment application. Guidance can also be taken from English courts, who have continuously taken the view that a party is only entitled to refer a single dispute to each adjudication. It is better to err on the side of caution to avoid the risk of referring separate and distinct disputes to adjudication, where there will be no jurisdiction and thus unnecessary time and costs will be incurred.



NOTICE OF ADJUDICATION

27. The Notice of Adjudication (“**Notice**”) is, arguably, the most important document in the whole adjudication process, as it marks the commencement of the adjudication.

What should the Claimant consider before serving the Notice?

28. Before serving a Notice, the Claimant should check whether the contract contains a provision enabling it to commence adjudication. This should be relatively straightforward if the contracts are subject to the SOPP. Also, it is relevant to see whether an Adjudicator Nominating Body (“**ANB**”) has been specified in the contract. If so, the Claimant should check if there are any rules set out by the specified ANB.
29. Parties are advised to strictly comply with the formal requirements of the Notice in order to avoid costly and undesirable delays in the adjudication process. Great care should be taken when drafting the Notice. While there remains uncertainty in the landscape of adjudication under the SOPP in Hong Kong, experience from other jurisdictions shows that a notice of adjudication not served strictly in accordance with the contract renders the adjudication process void, and any decision unenforceable.² In summary, the Notice must (1) be in writing; and (2) identify/describe the Claimant and the Respondent, the relevant payment claims and any payment response, the nature and description of the payment dispute and, the claimed amount and remedy/remedies sought.
30. The Claimant should also note that once the adjudication has been commenced, although it can withdraw the adjudication by serving a written notice of withdrawal to the adjudicator, the Respondent and the ANB at any time, it will have to bear the fees and expenses of the adjudicator and of any independent expert(s) appointed by the adjudicator. In any event and similarly taking reference from experience from other jurisdictions, how an adjudicator will exercise his or her discretion in deciding costs will depend on the facts and circumstances of each case and there is neither a hard and fast rule nor guidelines in this regard.

When, who and how to serve the Notice?

31. The Notice must be served within 28 days from the date when the payment dispute arises. It must be served on the Respondent as well as the ANB on the same day.

² As in the English case of **AM Construction Ltd v. The Darul Amaan Trust** [2022] EWHC 1478 (TCC).

32. The Claimant should also be careful when identifying the correct and proper Respondent, which means identifying the name of the legal entity rather than the trading name of the Respondent. Experience from the UK³ suggests there is nothing inherently fatal about commencing, pursuing or issuing an adjudication decision in the trading name of a legal entity. However, where the decision was subsequently enforced against the true legal entity, there have been instances where a responding party attempts to challenge the adjudicator’s jurisdiction on the ground that the adjudication was initiated and pursued and the decision issued against a trading name, which is not a legal personality capable of (a) being a party to an adjudication or (b) entering into a contract. This risk can be avoided by careful drafting at the outset.
33. Clause 40 of the SOPP states that the Notice must be served “(a) in a manner specified in these SOP Provisions; or (b) if no manner is so specified – in a manner specified by the *Adjudicator / Adjudicator or in the adjudication rules published by the adjudicator nominating body as specified in SOP Clause 13”. In the circumstances, as the mode of service of the Notice is not specified in the SOPP, problems may arise if there are no adjudication rules which deal with the manner of service. While it remains unknown as to the default manner of service, to avoid disputes as to manner, the parties are encouraged to agree on the manner of service in the contract.
34. It is important to adjudicate when ready. There is one chance at adjudication for a claimant for work claimed (when the relevant dispute is submitted to adjudication). The Claimant should also check the contractually specified method of service of the Notice. While the Hong Kong approach remains to be seen, it is clear from case law in other jurisdictions that unless the Notice has been properly served by the referring party on the responding party, there is no jurisdiction, and the adjudication process is a nullity.⁴
35. In addition to the above, the Claimant should also check whether:
- (1) The payment dispute is already subject to an existing Notice. This is because the SOPP does not allow multiple notices to be served for the same payment dispute.
 - (2) If the claimed payment is subject to the contractual claim handling procedure specified in the contract (discussed above), whether such procedure has been conducted and complied with. If it has not, then the dispute should not be referred to adjudication until this is done.
 - (3) The Respondent was aware of the submissions or evidence on the date of service of the Notice and whether such submissions or evidence should reasonably have been served before the said date. This is because the SOPP mandates the adjudicator to disregard such submission or evidence if they could not be reasonably and fairly responded to by the other party. This provision seeks to prevent parties from keeping evidence up their sleeves with a view to ambush the other party later, during adjudication. Hence, the Claimant should ensure no such circumstances will arise (the same principle applies to Respondents). Other than the fact that the adjudicator must disregard the subject/evidence if it could not be reasonably and fairly responded to by the other party, the SOPP does not address to what extent such requirement

³ **Durham County Council v. Jeremy Kendall** (Trading as HLB Architects) [2011] EWHC 780 (TCC), at para. 38, and **MG Scaffolding (Oxford) Ltd v. Palmloch Ltd** [2019] EWHC 1787 (TCC).

⁴ For example, it has been found that “because an adjudicator derives his jurisdiction from the Notice of Adjudication, if it is proved that the Notice has not been validly served, it will generally operate to deprive the adjudicator of any jurisdiction.”, see **Primus Build v. Pompey Centre** [2009] EWHC 1487 (TCC).

should be observed by the parties. When exercising their discretion the adjudicator will consider the volume of the subject submissions/evidence and, whether they are substantial and the reason why it was not or could not have been produced beforehand. This will require the adjudicator's consideration on a case by case basis and will be subject to the overarching consideration of whether submitting the documents now would amount to ambushing the other party.

What should the Respondent do after receiving a Notice?

36. Having received the Notice, the Respondent should check (1) whether the Notice was served within 28 days from the date when the payment dispute arose; and (2) whether there is a proper dispute. This requires checking whether the disputes referred to in the Notice are the subject of a payment dispute (in other words, whether they have satisfied the procedure of a payment claim – payment response process); (3) whether the party identified and named in the Notice is correct; (4) whether the Notice was validly served in compliance with the agreed/specified manner of service; and (5) whether the dispute was already subject to a separate Notice. If the Claimant has failed to comply with the above, the Respondent may consider raising a jurisdictional challenge.
37. The SOPP regime does not require the Respondent to provide a response to the Notice. However, where the Respondent considers a jurisdiction challenge to be appropriate, it should notify the referring party (and the adjudicator later on) as soon as it becomes aware of the challenge.
38. The grounds to challenge the adjudicator's jurisdiction include, for example, there being no payment dispute; the parties having been incorrectly named; and/or the Notice not being validly served in accordance with the applicable adjudication procedure (see discussion above).
39. The Respondent may adopt the most common approach, that is, to reserve its right to challenge the adjudicator's jurisdiction and to proceed with the adjudication.⁵ However, reference can be taken from other jurisdictions, which have demonstrated that a general reservation of position on jurisdiction may not be effective.
40. In summary, while a general reservation may be effective in some cases,⁶ providing it to solely ensure that all options are open gives rise to the risk of waiving the right to judicial objections. A Respondent should exercise due care in making a reservation after having received a Notice.

⁵ Other approaches include, for instance, agreeing to let the adjudicator determine the jurisdictional dispute or refusing to participate in the adjudication, yet the adjudication will still continue in the absence of the Respondent.

⁶ See, for example, **GPS Marine Contractors v. Ringway Infrastructure Services** [2010] EWHC 283 (TCC), para. 37-39.

APPOINTMENT OF ADJUDICATOR

41. Appointing a suitably qualified adjudicator to decide the parties' dispute is one of the key steps to determining the dispute by adjudication. There are two ways to appoint an adjudicator, either by agreement between the parties, or by nomination from the DEVB's Register of ANB, who will select and appoint an adjudicator on behalf of the parties.

Appointment by Agreement

42. Unless a particular adjudicator(s) is expressly agreed and named in the contract prior to a dispute arising, the 5 working day timescale after the day on which the Notice is served for appointment means that it is very difficult or impractical for the parties to agree a particular adjudicator after a dispute has arisen.
43. If parties wish to select and name a panel of adjudicators, this will have to be part of any pre contractual discussions. Due to the ad hoc nature of a dispute arising, it is recommended that parties naming adjudicators list a panel, to overcome issues of unavailability, and potential conflicts that may arise after they were named in the contract and to ensure that the declared interests can be fulfilled.

Appointment by an ANB

44. A more common approach of appointment is by an ANB. The DEVB maintains a register of ANBs across a range of industries and professions, with each institution maintaining their own register of suitably qualified adjudicators. The SOPP requires the parties to agree on and set out the name of the ANB in the contract.
45. There is no default ANB, so parties should ensure that an ANB is named. Should none be chosen under the contract, there may be difficulties in appointing an adjudicator after a dispute has arisen and it may not be possible to constitute the decision maker. Each of the ANB should have their own set of rules and the respective ANB rules are maintained by the DEVB. The appointment process is similar across each ANB, with the application and appointment process summarised below being:
 - (1) Complete the application form and pay the application fee, within 1 working day after the Notice is served;
 - (2) The ANB will notify the Claimant that the application was received, and payment made within 1 working day; and
 - (3) The ANB will proceed to appoint an adjudicator and inform the Claimant and the Respondent in writing of the appointment, within 5 working days beginning on the commencement date of the adjudication.
46. At the time of accepting the appointment, the adjudicator must declare and disclose their interests including any conflicts of interest, and must act independently, impartially, in a timely manner, cost effectively and comply with the rules of natural justice. Additionally, there must also be no issues or circumstances likely to give rise to justifiable doubts as to their impartiality and independence

from commencement and throughout the adjudication process. The concept of justifiable doubt is not common in adjudication rules, but is found in some arbitration institution rules.

47. The appointment of an adjudicator is typically at the discretion of the ANB, whose decision is final and without grounds to appeal. Some of the ANBs have the option for the Claimant to suggest the professional skills required for an adjudicator and may even suggest an adjudicator with those skills, although the ANB is not obliged to follow the specific requirements of the Claimant when considering these specific suggestions.
48. An important point in the context of ANB rules is that in the interest of efficiency, where an adjudication is one of a series of adjudications on the same contract, normal policy is to nominate the same adjudicator because of potential savings in costs and time unless both parties are in agreement not to re-appoint. The appointment of the initial adjudicator is of great importance to the parties.
49. If the Claimant does name a particular adjudicator or list out specific skills of the adjudicator, this must be because of genuine concerns and not to gain an advantage on the proceedings. Other jurisdictions have considered it a breach of natural justice, where the adjudicator's decision resulted from a Claimant's attempt to gain tactical advantage.⁷ Courts have also refused to enforce an adjudicator's decision on the basis of the specific requirements listed on the application.⁸
50. Any adjudicator named by the Claimant must also not be affected by possible bias. As the requirement of impartiality is imposed on the adjudicator, sustained allegations of apparent bias may arise where there are unilateral communications between the adjudicator and one of the parties.⁹

ADJUDICATION

What are the procedures involved?

51. The only two mandatory procedures prescribed by the SOPP are (1) the service of adjudication submission by the Claimant, which must be within 1 working day after the date the adjudicator is appointed; and (2) the Respondent's service of the adjudication response on the adjudicator and the Claimant, within 20 working days after the adjudication submission is served. The Claimant should note that failure to serve the adjudication submission within the time specified will result in the adjudication being terminated. The adjudicator has power to extend the deadline for service of an adjudication response, however, any application for extension must be made as soon as possible. This is subject to the overriding principles of natural justice, and that a party should be given reasonable opportunity to present its case and deal with that of the other party.
52. Adjudicators may establish the procedures of the adjudication proceedings, including the language of the proceedings, allow further written submissions, request or require either party to produce documents, set deadlines for submission, production of documents, with the consent of the parties appoint their own independent expert, call a conference, carry out inspection, and decide on the fees and expenses of the adjudicator.

⁷ **Downs Road Development LLP v. Laxmanbhai Construction** (UK) Ltd [2021] EWHC 2441 (TCC), at para 22.5.

⁸ **In Eurocom v. Siemens** [2014] EWHC 3710 (TCC) application for summary judgment to enforce an adjudication award failed, in circumstances where there was a strong prima facie case that the adjudicator's appointment had been invalid due to a fraudulent misrepresentation.

⁹ **Glencot Development and Design Co Ltd v. Ben Barrett & Son** (Contractors) Ltd [2001] All ER (D) 384, at para 25.

Submission and Responses

53. Making a submission or responding to a submission in an adjudication requires careful consideration. The submission or the response made is the single most important document on which the adjudicator will rely on in arriving at his or her findings and conclusions. While there is no universal way of preparing such a submission or response, some general rules are helpful and should be borne in mind.
54. The first rule is “structure”. Like a building, the structure forms an essential and critical part of a submission or response. Without a proper structure, the content of a submission or response, no matter how good and comprehensive it is, falls apart without being able to grasp the attention of an adjudicator. The structure of a submission or response in an adjudication is arguably even more important than that in a normal litigation or arbitration because an adjudicator will generally have less time to read and consider the documents and come to a reasoned decision.
55. Different drafters may have different styles in his or her structure. Usually, however, a helpful structure can be divided into 3 parts:
- (1) Factual background – the factual background should set out, in a chronological way, the story to tell the readers. Do not avoid the weak part of the case selectively because that will dent the credibility of the submission. Try to confront it and explain why it does not matter materially in the dispute.
 - (2) The contractual or legal basis – this should be well thought out beforehand and set out succinctly in the submission or response.
 - (3) Application of the contractual or legal basis to the dispute – this is the most difficult part. Try to be objective and explain to the readers why the party deserves the compensation or remedies sought. A calm and objective submission will go further than a submission with disproportionate overtones.
56. The second rule is “plain language”. As the architect Ludwig Mies van der Rohe once famously said, less is more. The general rule is that if 1 sentence can make the point, do not use 2 sentences. Avoid long sentences and break them down into shorter sentences if possible, use modern simple words instead of old-fashioned English. Again, this is important because of the generally tight schedule of adjudication.
57. Third, “supporting documents”. Without the supporting documents, a submission or response is a skeleton without flesh, an allegation without substantiation. An adjudicator, like



a judge or an arbitrator, looks for evidence in support of a party's case. A pure allegation without supporting documents will not be believed or accepted. Good practice requires a bundle of supporting documents be prepared and paginated. A submission or response should refer to the page numbers of such bundle for all important factual or legal statements so that the adjudicator can check the supporting documents immediately.

58. In modern days, such bundle can be prepared electronically with Optical Character Recognition technology. This will save time and costs in preparing a hard copy, enable the adjudicator to work at anywhere and carry out his or her own search independently and conveniently.

Will there be a hearing?

59. Adjudicators are not expected to apply strict rules of evidence, can decide based on documents and do not need to have formal hearings with sworn witnesses and cross examination. This was expressly referred to in the SOPL consultation document. Adjudicators also do not have the statutory power to administer oaths.
60. Parties should expect that even if the adjudicator wishes to meet the parties, it should be for raising questions and allowing parties to explain the issues and respective arguments, in an informal setting. Adjudication should not be turned into compressed arbitration style proceedings.
61. In large adjudications, however, there may be a need for conducting hearings, in particular, where the adjudication involves complex points of law, or, with major factual disputes with contradictory documentary evidence. For example, if the adjudicator is faced with two entirely conflicting statements as to the contents of a discussion, they may decide to arrange a hearing at which this evidence can be tested orally.

DECISION AND ENFORCEMENT

When should I expect to receive the adjudication decision?

62. Under the SOPP, unless the parties have agreed to a longer period, the adjudicator must through the ANB that appointed the adjudicator, deliver the decision within 55 working days from the date of the adjudicator's appointment.¹⁰ If the adjudicator fails to deliver the decision within time (absent an extension), the adjudication would be terminated.

What is the effect of an adjudication?

63. A SOPP adjudication decision is binding on the parties and enforceable as a matter of contractual obligation unless and until (1) the payment dispute to which the decision relates is settled by agreement in writing between the parties, or, (2) the payment dispute is determined by arbitration or court proceedings.

¹⁰ See Appendix in relation to the adjudication timeline prescribed under the SOPP.

What can I expect from an adjudicator's decision?

64. The adjudication decision must be in writing and, unless the parties have prior agreement that reasons are not required, the decision must contain reasons. The adjudication decision should also only contain disputes that are referred to in the Notice.
65. The adjudication decision must include determination of the payment dispute as referred to the adjudicator, the adjudicated amount (amount of the progress payment), the interest, and the date on which the adjudicated amount is payable, and, the proportion of the fees and expenses of the adjudicator and of any independent expert appointed by the adjudicator (as opposed to by the parties) payable by each party.
66. The adjudication decision may contain a decision on the extension of time (“EOT”), if the EOT is subject to the time-related costs forming part of the payment dispute. While the amount of the time-related cost is binding and enforceable on an interim basis, the EOT decided by the adjudicator as part of assessing the time-related costs is not binding. That said, a party is not liable for liquidated damages if the work has been completed within the EOT so decided by the adjudicator.
67. The adjudicator may also in the decision decide that it has no jurisdiction over the dispute as referred to it. In such case the adjudication is terminated.
68. Finally, parties should be wary that an adjudicator's determination is only interim. There is nothing preventing an unsuccessful claimant from pursuing (via arbitration) to recover amounts not awarded in adjudication. Similarly, nothing stops an unsuccessful respondent from suing for repayment of amounts paid in adjudication.

How can I enforce an adjudicator's decision?

69. Given that under the SOPP, adjudication is only contractual in nature, the winning party cannot enforce the adjudicator's decision by registering the same with the court as if it is a judgment. This will change under statutory regime when SOPL is enacted and promulgated, however that has not yet happened.
70. If the adjudicated amount is not paid by the Respondent on or before the date specified in the adjudicator's decision, or (where no such date is specified) within 30 days from the date the adjudication decision was delivered to the parties, the Claimant:
 - (1) Is entitled to interest on the unpaid portion of the adjudicated amount, calculated on simple interest at the applicable judgment debt rate as published by the High Court.
 - (2) Can seek enforcement through exercising its right to suspend or reduce rate of progress. This can be done by the Claimant serving a written notice of intention to the Employer (expressly stating it is given under the SOPP) 5 working days before the intended date of suspension or reduction of rate, notifying it of the Claimant's intention to suspend or reduce the rate of work if the adjudicated amount is not paid in full before the intended starting date of such action.
 - (3) For sub-contractors as claiming parties, they can apply to the Employer for direct payment from the Employer.

(a) This can be done by serving an application to the Employer stating the responding party has failed to pay the whole or part of the adjudicated amount under the sub-contracts, in accordance with the SOPP.

(b) Then, unless the main contractor can prove within 28 days that it or any sub-contractor of any tier has made payment, or a sub-contractor of higher tier to the Claimant has become bankrupt, has had a receiving order/petition in bankruptcy, has agreed to carry out the sub-contract under a committee of inspection of its creditors, has become a liquidated corporation, or any sub-contractor at higher tiers to the responding party will be unable to recover the amount of direct payment by way of deduction from payment due; then the Employer may directly pay the outstanding amount to the claiming party. The Employer has a discretion as to the amount of payment, if any.

(4) The Claimant should consider consulting legal representation as to whether they would like to apply for summary judgment at Court. Each case depends on its own facts but generally the threshold of successfully obtaining a summary judgment is very high.

71. Notably if the Claimant is a first tier sub-contractor making a claim against the main contractor, the non-payment of an adjudicated amount will be a breach of the SOPP and the Claimant should note that, in such case, the main contractor would be at risk of receiving a “poor” rating in the Contractor’s Performance Report which main contractors should be particularly aware of.

CHALLENGING THE DECISION

What can be done if you have challenged the adjudicator’s appointment?

72. Notably the SOPP is mindful of the possibility of the parties’ challenge to the adjudicator’s appointment. The adjudicator is required to declare and disclose interests, and confirm that they will comply with the principles of natural justice and in accordance with the applicable law. However, there are no provisions setting out the consequences of an adjudicator’s breach of such requirements. In the circumstances, upon a challenge of the adjudicator’s appointment, the adjudicator will have to deal with the challenge, as was referred to them. This needs to be dealt with in the decision.

73. However, even if the adjudicator then erroneously decides against the challenge, the contractual nature of the SOPP means there is in practice, little which the challenging party can do. Therefore, the challenging party cannot bring its challenge to Court for resolution and is only left with contractual remedies, being damages. On this note, however, the SOPP expressly excludes the civil liability of adjudicator to the extent prohibited by law or in relation to liability for fraud. As a result, parties have no remedies against the adjudicator unless they can prove fraud or that the adjudicator breached the law.

What if the adjudicator has adopted the wrong procedure, fact and/or law

74. The starting point is that it is difficult for a party to challenge the adjudicator's decision even if the wrong procedure, fact and/or law have been adopted. This is particularly so given the SOPP prescribes contractual adjudication and there is no venue for the winning party to challenge the decision through the courts.
75. As regards the likely situation when the SOPL is enacted, Hong Kong will likely follow the English position in that the decision will also likely be enforceable, unless there is a substantial breach of the principle of natural justice.¹¹ The result is that as long as the adjudicator addresses the dispute referred to them, that decision would be binding on the parties.
76. The situation may be different if the adjudicator breaches the express terms of the SOPP, for example, by considering the submission made by a party out of time or a substantial failure to give the parties reasonable opportunities to present their own case and to address the other case.
77. In any event, if a party is dissatisfied with the adjudication decision, the remedy is to refer the dispute to arbitration, so that the issue can be heard afresh. It should be noted that hearing the issues fresh means it is not an appeal of the adjudicator's decision.

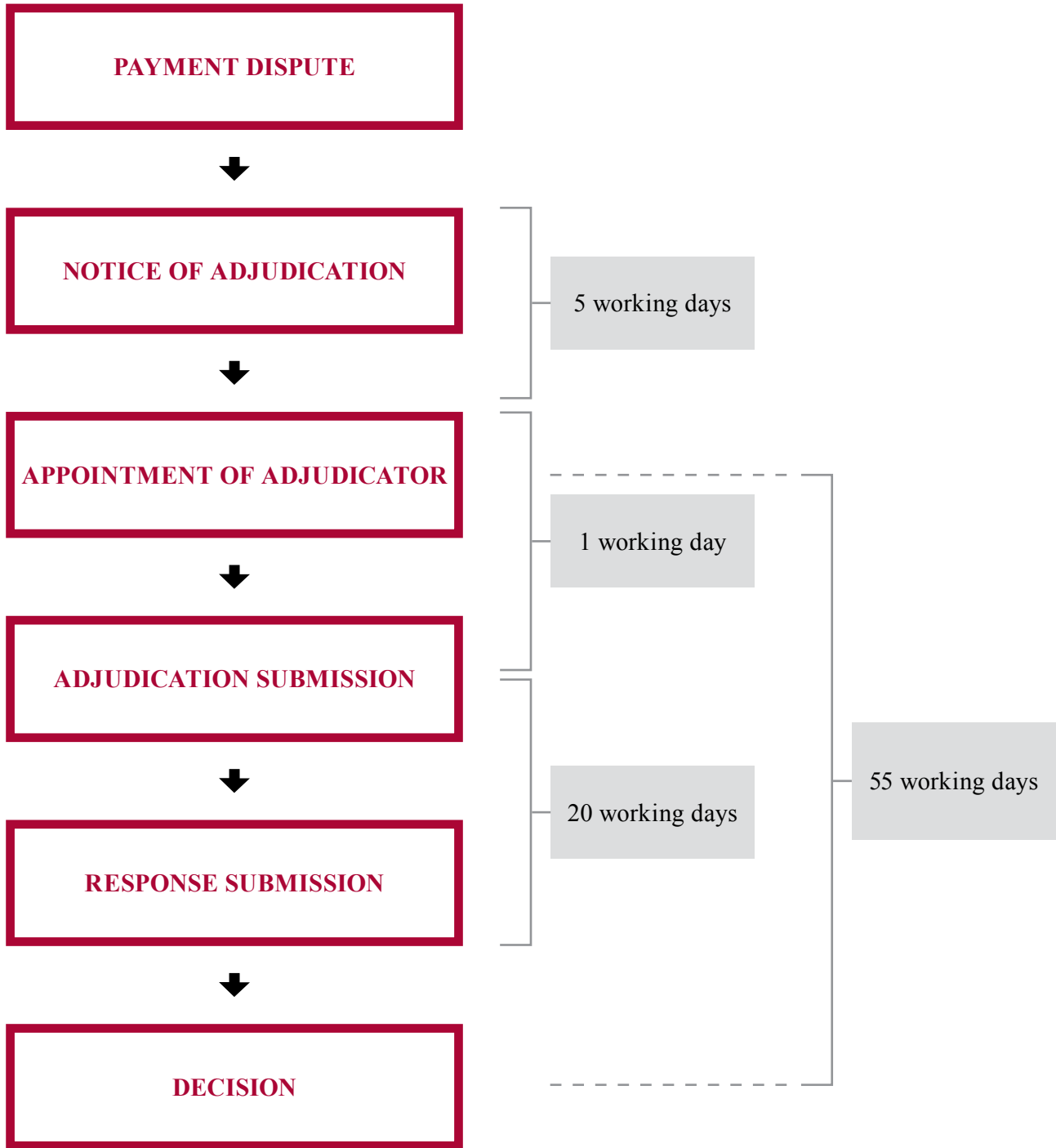
What if the adjudication decision contains a typographical error

78. Either party may apply to the adjudicator, to correct any computational or typographical errors or any errors of a similar nature. Such correction, however, must be made within 5 working days from the date the decision is delivered. Upon expiry of the 5 working days, the adjudicator will not have the power to correct the decision. Further, the correction should only be to correct a mistake of an accidental error or omission in nature. The adjudicator cannot change their mind on the substantive issues.
79. It is up to the adjudicator to decide whether an error has been made. If the adjudicator does not conclude there is an error, there is little that a party can do, other than referring the dispute to arbitration or litigation.

¹¹ See **Bouygues UK Ltd v. Dahl-Jensen EWHC 182** (TCC) where the “adjudicator’s decision, albeit he may have made error of law as to the relevant contractual provisions, is still binding and enforceable until the matter is corrected in the final determination”.

APPENDIX

Adjudication Timeline Prescribed under the SOPP



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