



AALCO HONG KONG REGIONAL ARBITRATION CENTRE

亞非法協香港區域仲裁中心

AALCO Hong Kong Regional Arbitration Centre Construction Industry Security of Payment Ordinance Practice Note on the Jurisdiction of the Adjudicator

1. Scope of Application and Interpretation

- 1.1 This Practice Note is issued to provide guidance as to the scope of the jurisdiction of an adjudicator as defined under Section 2 of the Construction Industry Security of Payment Ordinance, Cap. 652 (the “**Ordinance**”) and the AALCO Hong Kong Regional Arbitration Centre (“**AALCO-HKRAC**”) Security of Payment Adjudication Rules (“**Rules**”).
- 1.2 This Practice Note is intended to supplement the Rules. Where there is a conflict between the provisions of the Rules and this Practice Note, the Rules will prevail.
- 1.3 AALCO-HKRAC may interpret the terms as well as the scope of application of this Practice Note as it considers appropriate.

2. Existence of a construction contract

- 2.1 In order for an adjudicator to have jurisdiction to adjudicate a payment dispute under the Ordinance, an adjudicator must be satisfied that a construction contract exists between the parties to the adjudication. Under Section 2 of the Ordinance, a construction contract:

“(a) means a legally enforceable agreement under which –

- (i) a party agrees to carry out construction work for another party; or*
- (ii) a party agrees to supply related goods and services for construction work to another party; but*

(b) does not include a development contract under which the whole consideration payable is calculated otherwise than by reference to the value of the construction work or the related goods and services”.

- 2.2 Some of the typical examples where no construction contract exists between the parties to the adjudication are set out below:

1. There is no legally enforceable agreement between the parties to the adjudication (see paragraphs 2.3 & 2.4 below).

2. The parties to the adjudication are not the parties named in the contract, and there is no justifiable explanation as to such substitution (see paragraphs 2.5 & 2.6 below);
3. The contract in question is not a “construction contract” as defined under Section 2 of the Ordinance. For example, (i) the contract does not include any “construction work” or “related goods and services” (see paragraphs 2.7 - 2.9 below) or (ii) the contract is a development contract (see paragraphs 2.10 - 2.11 below).

Existence of a Contract

- 2.3 The first issue that an adjudicator must determine after his/her appointment is to consider whether a “legally enforceable agreement” exists between the parties.
- 2.4 There is no requirement in the Ordinance that a construction contract must be written or evidenced in writing. Therefore, an adjudicator may be able to exercise jurisdiction over oral construction contracts as long as the adjudicator is satisfied that they are legally enforceable.

Parties to a Contract

- 2.5 An adjudicator should ensure that the parties to the adjudication are the same parties that have entered into the construction contract and whom are legally bound by the contract.
- 2.6 Where a contract is signed on behalf of a party by an agent, an adjudicator should ensure that the agent had authority to enter into the construction contract on behalf of that party.

Definition of “construction work”

- 2.7 The term “construction work” is defined in Section 3 of the Ordinance as:

*“(a) the construction, installation or erection of a specified structure; or

(b) the replacement, extension, renewal, alteration, repair, restoration, maintenance, dismantling or demolition of, or the addition to, an existing specified structure.”¹*
- 2.8 The term “specified structure” is further defined in Schedule 2 of the Ordinance. The Ordinance therefore only covers certain types of works for certain structures. The adjudicator must satisfy himself/herself that the contract in question relates to construction work as defined in Section 3 and Schedule 2 of the Ordinance.

¹ Sections 3(2) & (3) of the Ordinance elaborate further the meaning of “construction work”.

Definition of “related goods and services”

2.9 The term “related goods and services” is defined in Section 6 of the Ordinance as, in relation to construction work:

“(a) goods of the following kind –

- (i) materials or components supplied for forming part of a specified structure arising from the construction work;*
- (ii) plant, equipment or materials for use in connection with carrying out the construction work;*

(b) services of the following kind –

- (i) providing manpower resources for the carrying out of the construction work;*
- (ii) transporting the goods specified in paragraph (a);*
- (iii) disposing of any materials in connection with the construction work;*
- (iv) conducting feasibility or planning studies that may give rise to the construction work;*
- (v) providing consultancy services² in connection with the construction work;*
- (vi) providing engineering testing services in connection with the construction work.”*

Development Contract

2.10 Pursuant to the definition of construction contract under Section 2 of the Ordinance, a development contract is not a “construction contract”. A development contract is a contract under which the whole consideration payable is calculated otherwise than by reference to the value of the construction work or related goods and services.

2.11 A typical example of a development contract is where a land owner engages a developer to design and construct certain apartments. The land owner is not required under the development contract to make any payment to the developer for the value of the design and construction work. The land owner and the developer will share the profit upon sale of the apartments.

2.12 However, the exclusion of the development contract as a “construction contract” does not affect whether contract further down the chain is a “construction contract” under Section 2 of the Ordinance. Following from the example in paragraph 2.11 above, if the developer engages consultants and/or contractors to carry out construction work or supply related goods and services for works covered by the development contract, if payment is based on the value of the construction works or related goods and services, such contract with the consultants and/or contractors will be regarded as “construction

² Section 6(2) of the Ordinance elaborates further the meaning of “consultancy services”.

contracts” under the Ordinance, despite that the works are covered under a development contract.

3. Application of the Ordinance

- 3.1 The Ordinance only applies to certain public contracts and main private contracts and their subcontracts (see Diagrams 1 and 2 in the Annex to this Practice Note). An adjudicator should only adjudicate payment disputes arising from construction contracts covered by the Ordinance.

“Public contracts” and their subcontracts

- 3.2 Pursuant to Section 7 of the Ordinance, the Ordinance applies to (i) public contracts entered into on or after the commencement date of the Ordinance (i.e. 28 August 2025) with a contract value not less than the value specified in Schedule 4 to the Ordinance; (ii) all subcontracts, at any tier, of the public contract. The definition of public contract is provided in Section 4(1) of the Ordinance and Schedule 3 to the Ordinance.
- 3.3 If the contract value of a public contract is not less than the value specified in Schedule 4 to the Ordinance (see paragraph 4.1 below), the Ordinance will apply to the whole of the public contract and its subcontracts at any tier, regardless of whether the construction work carried out under these contracts is new works or repair and alteration works. However, the Ordinance does not apply to any part of these contracts that falls within the description of Sections 9(1) and 9(2) of the Ordinance (see paragraphs 5.1-5.2 below).

“Main private contracts” and their subcontracts

- 3.4 Pursuant to Section 8 of the Ordinance, the Ordinance also applies to (i) main private contracts entered into on or after the commencement date of the Ordinance (i.e. 28 August 2025); with contract value not less than the value specified in Schedule 4 to the Ordinance; and (ii) all subcontracts, at any tier, of the main private contract. The definition of main private contract is provided in Section 4(2) of the Ordinance.
- 3.5 If the contract value of a main private contract, calculated in accordance with Sections 8(3) and 8(4) of the Ordinance (see paragraph 4.2 below), is not less than the value specified in Schedule 4 to the Ordinance, the Ordinance will apply to the whole of the main private contract and its subcontracts at any tier, regardless of whether the construction work carried out under these contracts is new works or repair and alteration works. However, the Ordinance does not apply to any part of these contracts that falls within the description of Sections 9(1), 9(2), and 9(3) of the Ordinance (see paragraphs 5.1-5.3 below).

4. Calculation of the contract value (mixed contract)

- 4.1 In order for an adjudicator to have jurisdiction under the Ordinance, the value of a public contract, as at the date on which the contract was entered into, should not be less than the value specified in Schedule 4 of the Ordinance.
- 4.2 In respect of main private contracts, the contract value as at the date on which the contract is entered into, should not be less than the value specified in Schedule 4 of the Ordinance. The contract value of the main private construction contract should only include (see Diagram 3 in the Annex to this Practice Note):
- (i) the value of the carrying out of construction work referred to in Section 3(1)(a) of the Ordinance;
 - (ii) the value of the carrying out of construction work under the main private contract (a) that is referred to in Section 3(1)(b) of the Ordinance; and (b) that requires the approval and consent of the Building Authority under Section 14(1) of the Buildings Ordinance (Cap. 123) for it to commence or be carried out; and
 - (iii) the value of the supply of related goods and services for the construction work specified in paragraph (i) or (ii) above.

The contract value of the main private contract must also not include the value of the carrying out of construction work, or the supply of related goods and services for construction work, where the construction site is — (i) an existing residential unit as defined in Section 2 of the Ordinance (which does not include any premises specified in Schedule 1); or (ii) the common parts of a building (as defined by Section 2 of the Building Management Ordinance (Cap. 344)) that contain one or more existing residential units. The Deed of Mutual Covenant of a building will typically specify the demarcation of the common parts of the building.

5. Exempted situations under the Ordinance

- 5.1 Pursuant to Section 9(1) of the Ordinance, where part of a construction contract under which the consideration payable for construction work carried out or related goods and services supplied under the contract is to be calculated otherwise than by reference to the value of construction work or the related goods and services, the Ordinance does not apply to such part and the adjudicator cannot exercise jurisdiction over payment disputes arising from such part of the construction contract. For example, where the employer is required under a Design, Build and Operate contract to pay the “design and build” parts by reference to the value of the design and construction work, whilst, for the “operation” part, the main contractor is required to carry out the maintenance and repair work after completion of the works at its own cost in return for the operation rights of the facility, the Ordinance applies only to the extent of the “design and build” parts. Thus, the adjudicator only has jurisdiction over payment disputes arising from the “design and build” parts of the construction contract. However, if the main contractor engages a subcontractor to carry out construction work required under the “operation” part and the construction work is to be paid by reference to the value of the

construction work carried out, then the subcontract will still be covered by the Ordinance. (see Diagram 4 in the Annex to this Practice Note).

- 5.2 Pursuant to Section 9(2) of the Ordinance, the Ordinance also does not apply to the parts of a construction contract that deal with construction work carried out outside of Hong Kong or related goods and services supplied for construction work carried outside Hong Kong.
- 5.3 The Ordinance also does not cover construction work carried out on residential premises under main private contracts and their subcontracts. Where part of these construction contracts deals with the carrying out of construction work or the supply of related goods and services for construction work at a construction site that is (i) an existing residential unit as defined in Section 2 (which does not include any premises specified in Schedule 1) of the Ordinance; or (ii) the common parts of a building (as defined by Section 2 of the Building Management Ordinance (Cap 344)) that contains one or more existing residential units, the Ordinance shall not apply. The adjudicator shall have no jurisdiction to determine payment disputes arising from such “residential” part of a construction contract.

6. Payment Dispute within the scope of Ordinance

- 6.1 According to Section 23 of the Ordinance, a payment dispute under the Ordinance arises between a claiming party and a paying party if:
 - (i) The claiming party has served a payment claim on the paying party under Section 18 of the Ordinance; and
 - (ii) Any of the events in subsection (2) occurs.
- 6.2 The events listed under Section 23(2) of the Ordinance are as follows:
 - (i) The paying party serves a payment response on the claiming party under Section 19 of the Ordinance in which (a) the claimed amount is disputed in full or (b) the admitted amount is less than the claimed amount.
 - (ii) The paying party serves a payment response on the claiming party under Section 19 of the Ordinance in which an admitted amount is stated to be paid but the paying party fails to pay the admitted amount in full by the payment deadline of the progress payment.
 - (iii) The paying party fails to serve a payment response in reply to the payment claim by the payment response deadline.
- 6.3 Under Section 23(4) of the Ordinance, if a construction contract provides for a claim handling procedure for a claim for any additional payment, a payment dispute does not arise to the extent that it relates to the additional payment unless:
 - (i) An assessment on the additional payment has been made in accordance with the claim handling procedure; or

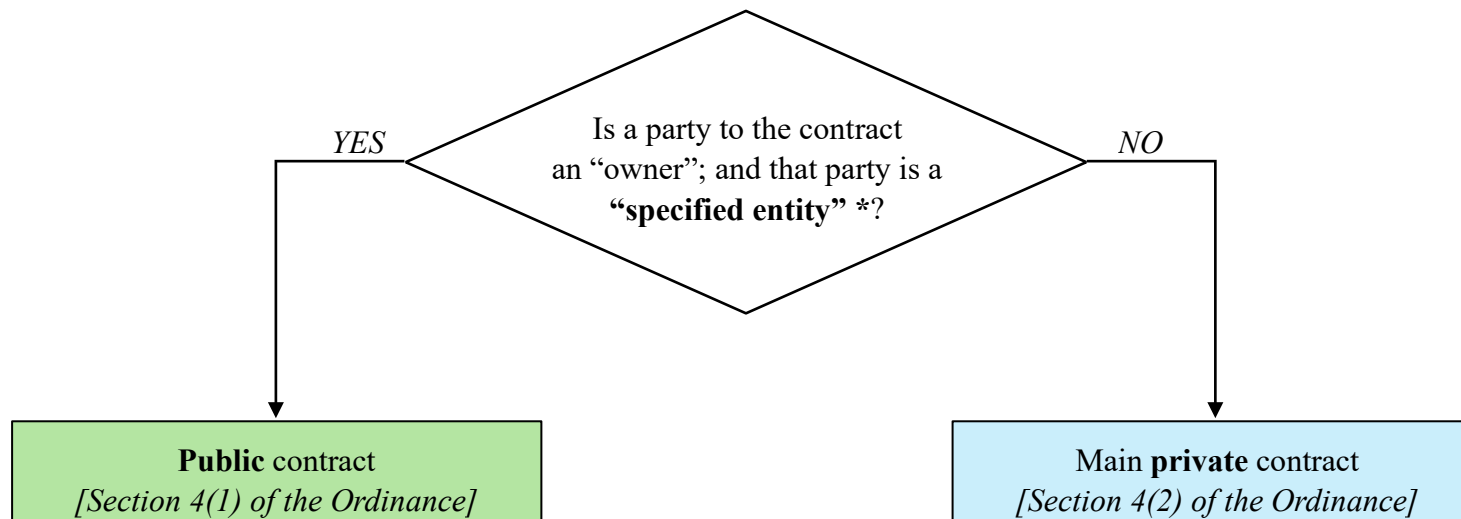
- (ii) An assessment on the additional payment has not been made in accordance with the claim handling procedure within the period which is provided for assessment of the claim in the claim handling procedure or, if the claim handling procedure does not provide for such period, within a reasonable period.
- 6.4 The adjudicator has to determine whether the claim handling procedure has been complied with.
- 6.5 If the claim handling procedure does not specify a period within which an assessment needs to be made, the adjudicator needs to determine whether the respondent has assessed the additional payment within a “reasonable period”. A reasonable period must be one that allows the respondent a fair chance to consider the claim for additional payment. In assessing the duration of a “reasonable period”, the adjudicator may consider the following factors:
 - (i) Whether the claim is made sufficiently clear as to its cause and contractual basis. If the claim is ill-defined, a longer period of time may be required to enable the respondent to clarify the positions with the claimant before the respondent can fairly consider and admit or reject the claim;
 - (ii) Whether the claim has been made in a timely manner. If the claim is made a long time after the occurrence of the relevant events, a longer period of time may be required to enable the respondent to retrieve relevant factual information before the respondent can fairly consider and admit or reject the claim;
 - (iii) Whether the claim is complex. If the claim involves complex factual matrix and/or controversial legal or engineering issues, a longer period of time may be required to enable the respondent to fairly consider (including the time for seeking any necessary legal or expert advice) whether to admit or reject the claim; and
 - (iv) Whether the claimant and the respondent have agreed on any deadline (or extended deadline) for deciding the claim for additional payment in issue.

7. Jurisdictional challenges

- 7.1 As the existence of a “construction contract” within the scope of the Ordinance is a prerequisite for an adjudicator to have jurisdiction under the Ordinance, a party may raise jurisdictional challenges prior to the formal appointment of the adjudicator as to whether there is a “construction contract”. Pursuant to Article 4.7 of AALCO-HKRAC’s Adjudication Rules, where a question arises as to the jurisdiction of the adjudicator, the nominating body will proceed with the adjudication and leave questions of jurisdiction to be handled by the adjudicator, once appointed.
- 7.2 The adjudicator should remind themselves that, under Section 33(1) of the Ordinance, an adjudicator’s jurisdiction is limited to determining (a) the payment dispute for which a party initiates adjudication proceedings under Section 24 of the Ordinance; and (b) any other matters that are necessary to exercise the adjudicator’s jurisdiction.

- 7.3 Under Section 33(2) of the Ordinance, an adjudicator has the power to rule on his or her own jurisdiction.
- 7.4 Any objection to jurisdiction should be included in the Adjudication Response pursuant to Articles 8 and 10.2 of AALCO-HKRAC's Adjudication Rules and should include the factual and legal basis of such objection. Where such an objection to jurisdiction is raised, the adjudicator may consider directing the non-objecting party to file any further submission in response to the jurisdictional challenge.
- 8. Communication with AALCO-HKRAC and adjudicating parties for ruling on jurisdiction**
- 8.1 8.1 If the adjudicator finds that he or she does not have jurisdiction to decide the payment dispute pursuant to Section 33 of the Ordinance, the adjudicator should address that lack of jurisdiction by issuing a determination under Section 42(1)(b) of the Ordinance stating that the adjudicator does not have jurisdiction to determine the payment dispute.

Diagram 1: Meanings of *public contract* and *main private contract* under the Ordinance



***Remarks:**

- (1) "Owner" is defined in Section 2 of the Ordinance.
- (2) According to Section 4(3) of the Ordinance, "**specified entity**" means any of the following – the Government, a body specified in Schedule 3 to the Ordinance or a subsidiary undertaking of the body.
- (3) A construction contract jointly signed by a "**specified entity**" and a private owner (e.g. owner of residential unit, retail shop or office) is a **public contract**. If the "**specified entity**" (e.g. Hong Kong Housing Society) only signs the contract **on behalf of** the residential owner, this contract is a main **private contract**.

Diagram 2: The application of the Ordinance to certain public contracts/main private contracts and their subcontracts

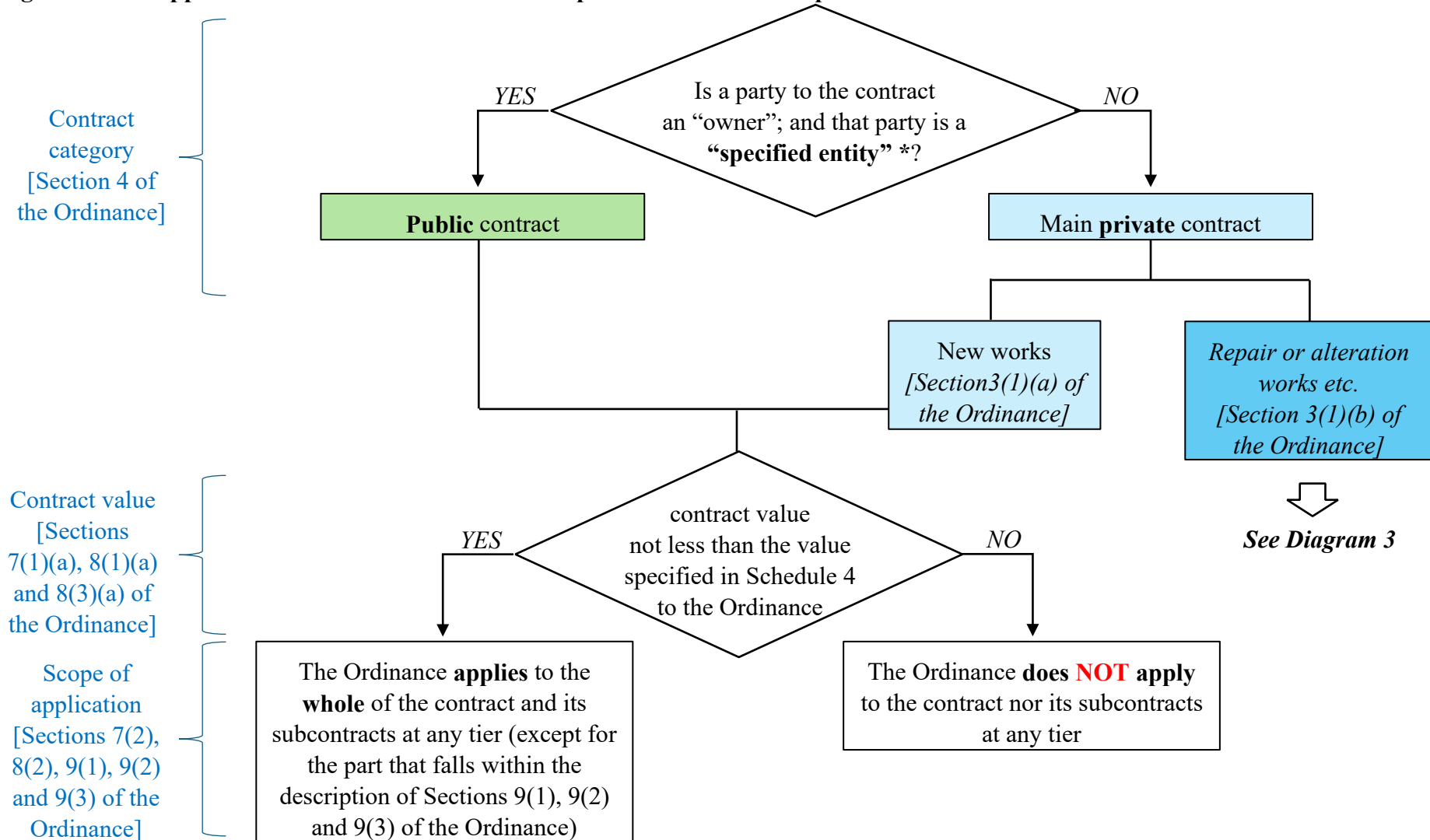


Diagram 3: The application of the Ordinance to certain main private contracts (involving *repair or alteration works etc.*) and their subcontracts

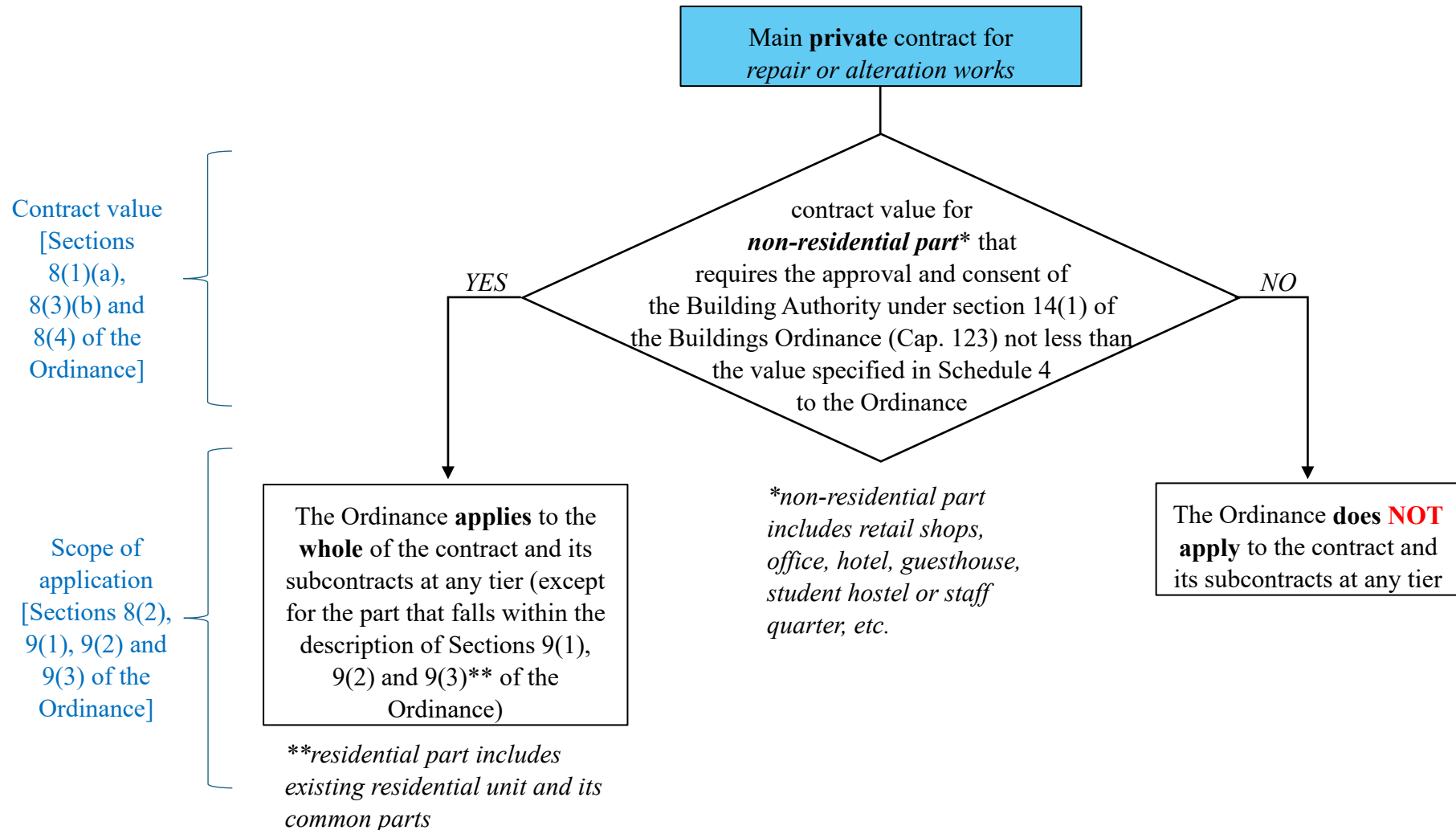
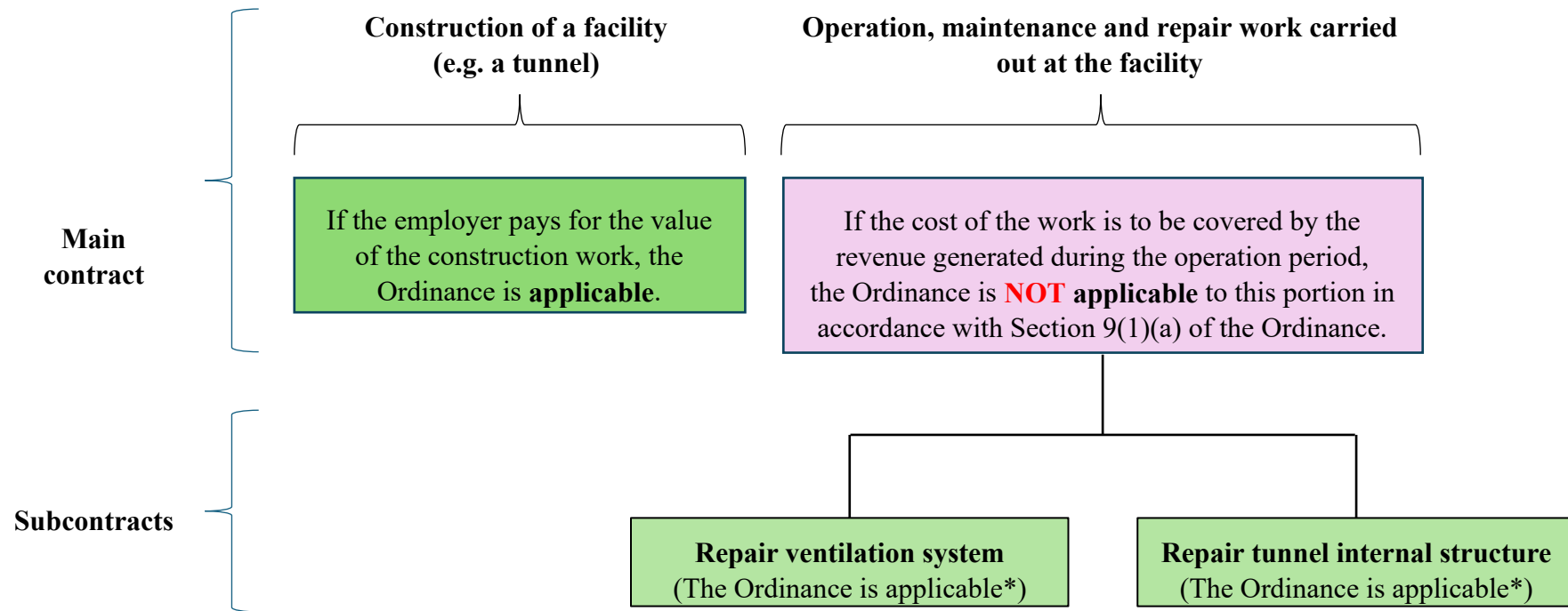


Diagram 4: The non-application of the Ordinance to a part of a construction contract pursuant to Section 9(1)(a) of the Ordinance



** The subcontractors employed by the main contractor to carry out the maintenance or repair works are paid for the value of such works. Pursuant to Section 5 of the Ordinance, the maintenance contract between the main contractor and the subcontractor is a "subcontract" of the main contract. Thus, according to Section 7(1)(b) or 8(1)(b) of the Ordinance, the Ordinance applies to these subcontracts.*