

HONG KONG BAR ASSOCIATION

REVISED PRACTICE GUIDELINES FOR AD HOC ADMISSION OF OVERSEAS COUNSEL (July 2015)

1. These guidelines substitutes the Guidelines published in 1999 by HKBA on Admission of Overseas Counsel. The attached Checklist is designed:
 - (1) to assist solicitors and overseas Counsel applicants with applications for ad hoc admission to appear in the Hong Kong Courts;
 - (2) to facilitate consistency in applications and therefore consistent consideration of them by the Bar; and
 - (3) to set out the Bar's analysis of and application of the current guidelines laid down in the case authorities published up to June 2015.
2. The Bar endorses the view expressed by Chan CJHC (as he then was) in *Re Flesch QC* [1999] 1 HKLRD 506, that the public interest is the paramount if not sole consideration in the exercise of the Court's discretion under s.27(2) of the Legal Practitioners Ordinance Cap 159 and that a sensible and flexible approach should be adopted so as to balance different aspects of the public interest.
3. The public interest in a strong local Bar should not be seen as a "competing", but a balancing, public interest. That public interest can be further promoted by the appropriate admission of overseas Counsel.
4. These guidelines and attached Checklist are intended:
 - (a) to facilitate applications in appropriate cases; and
 - (b) to remove the abuse, which has unfortunately sometimes been apparent in highly unmeritorious applications or applications made

extremely late or with very little information to enable their being dealt with properly;

- (c) to discourage applications in inappropriate cases or applications which are procedurally flawed.

5. The Bar considers the following to be the guiding principles laid down by the authorities:

- (1) Any application should be timely made. In particular, the Court would take into account any prejudice that may be caused to the other party or parties in the event of a late application (e.g. difficulties of instructing overseas counsel of their own).
- (2) All relevant material should be placed before the Court (and, therefore, be available for the consideration of the Bar), including but not limited to;
 - (a) where it is alleged that the case is one of unusual difficulty or complexity, a summary of the nature of the case and its difficulty or complexity;
 - (b) where it is alleged that it is a case which involves a determination of some legal principles which may have an impact on the development of local jurisprudence, a summary of the nature of the case and the legal principles involved and whether it is likely that the case would, in the opinion of the legal representatives, go to the Court of Final Appeal.
- (3) Any attempt to instruct local Counsel must be reasonable, serious and genuine.
- (4) Local junior Counsel should be instructed other than on a nominal basis (such that the earlier and greater the involvement of at least one local Counsel, the better are the chances of an application succeeding).

- (5) It would be difficult to persuade a Court that there are cases which no local Counsel are capable of handling due to unusual difficulty and complexity. That a case is of such difficulty and complexity only reduces the number of local Counsel who would be thought suitable.
- (6) If it is said that a case will have an impact on the development of local jurisprudence, the impact must be of some real and substantial, not merely trivial, significance.
- (7) It is not sufficient for the applicant to show that the resolution of the dispute involves “interesting” legal issues, or that the law may be capable of development. Nor would it suffice to show that there is no direct authority on the point.
- (8) An application for admission of an overseas junior counsel in Hong Kong is only justifiable in truly exceptional circumstances, particularly if it is intended that the work to be done is work that can and should normally be done by junior counsel.
- (9) Where the case involves matters that are primarily dependent on local circumstances prevailing in Hong Kong (e.g. a local ordinance with no equivalent overseas), this would be a ground justifying the refusal of an application.
- (10) It *may* be a relevant factor in favour of admission to show that a case may end up in the Court of Final Appeal. However, this would not assist the applicant if an appeal to the CFA were a mere possibility in the future, which may be dependent on how the case is argued in the lower courts. In such a case, it would be open for an application to be made at a later stage.

6. To ensure these principles are properly followed, the Bar has resolved that with immediate effect the Bar shall not ordinarily give its consent to an application unless:

- (1) the application to the Bar for consent (“the Application”) is made at the stage of setting down and in any event not less than 3 months before the Hearing;
- (2) the Application is accompanied by:
 - (a) a certificate from the Junior Counsel in the case stating:
 - (i) that he has been properly instructed on the case otherwise than on a nominal basis;
 - (ii) that the principles set out in these guidelines have been complied with;
 - (iii) a brief overview of the case involved;
 - (iv) if the ground relied on is unusual difficulty and complexity, a brief statement as to whether the difficulty and complexity lies on the facts or in law or both;
 - (v) if the unusual difficulty and complexity is on the facts, a brief explanation as to what the factual issues are and why they are difficult and complex;
 - (vi) if the unusual difficulty and complexity is in law, a brief analysis as to what are the difficult and complex questions of law;
 - (vii) if the ground relied on is that the case involves the determination of legal principles which may have substantial impact on the development of the Hong Kong law, a summary and brief analysis of the legal principles involved;
 - (viii) if it is alleged that the case may end up in the Court of Final Appeal, a brief explanation as to the basis of such likelihood;

- (ix) any other matters which he considers appropriate of the consideration of the Bar;
 - (b) if a ground relied on is the unavailability of suitable local Counsel, a list of names of local Counsel considered to be suitable for the case and full particulars of the circumstances under which it was discovered that local Counsel was not available (including the name of local Counsel who has been approached and the date when he or she was approached);
 - (c) if no local Counsel is intended to be instructed on the ground that none is suitable or otherwise, a brief explanation for taking such view;
 - (d) if a local Senior Counsel is intended to be or has been instructed, the name of the local Senior Counsel and the date when he or she was instructed (if appropriate);
 - (e) full background information of the overseas Counsel intended to be instructed (in particular, any expertise or experience in the area in issue);
- (3) where a local Senior Counsel is intended to be or has been instructed, the Junior Counsel's certificate is signed and endorsed by that local Senior Counsel jointly with the local Junior Counsel;
- (4) the Application clearly states precisely what work the overseas Counsel is intended to undertake and at which hearing(s) it is intended he would appear (references such as to "all related matters" will not be acceptable).

7. Members are reminded that the aforesaid certificate should be as brief as possible and in normal circumstances should not exceed 5 pages.
8. Furthermore, the Bar considers it the duty of the Junior Counsel in the case to draw to the attention of the Bar Council any matter or representation of fact which he or she believes or knows to be untrue or misleading as soon as practicable.
9. In order to facilitate the compliance with these guidelines and a speedy response from the Bar, there is annexed hereto a Checklist for all parties concerned to consider before an application for consent is made to the Bar.
10. Whenever possible, the Junior Counsel in the case should explain to the Applicant or his or her solicitors that consent for admission given by the Bar does not normally extend to either interlocutory or appeal hearings unless expressly stated otherwise.
11. In normal circumstances, strict compliance with these Guidelines is the minimum requirement for the Bar to consider giving consent to the application. In case the Bar refuses to give its consent and the application is dismissed by the Court, the Bar may seek costs against the applicant pursuant to Rule 3(2)(b) of the Barristers (Admission) Rules (Cap 159AA).

Issued by Hong Kong Bar Association

Dated the 7th day of July 2015

HONG KONG BAR ASSOCIATION

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| I. | Basis of Application | |
| | A. - “unusual difficulty or complexity | <p>Question :</p> <ol style="list-style-type: none"> 1. What is said to be the unusual difficulty or complexity? 2. Is the unusual difficulty or complexity in point of fact or in point of law? 3. Is there any suitable local Counsel? 4. Is suitable local Counsel unavailable? 5. What evidence of looking for such local Counsel is put forward? 6. Is applicant of sufficiently high quality and standing for the case? |
| | B — “the case may involve a determination, possibly by CFA, of some legal principles which may have an impact on the development of local jurisprudence” | <ol style="list-style-type: none"> 1. What is the legal principle for determination? 2. Is that principle one which may have an Impact on the development on local jurisprudence? 3. Is the possible impact real (not merely trivial)? 4. Is the likelihood that the case may involve such a determination substantial? 5. How likely is the case to go to CFA (and on what is leave expected to be granted)? |
| II. Mechanics of Application | | |
| 1. | Is the applicant a QC? | |
| 2. | Has local Counsel been briefed? | |
| 3. | Are there details of the name or names of local Counsel briefed to appear? | |

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| 4. | Has local Counsel been actively involved in the case from an early stage? |
| 5. | What details as to date or dates briefed and his or their involvement in the case thus far? |
| 6. | When was decision made that overseas Counsel would be briefed to appear? |
| 7. | Has hearing date been fixed? |
| 8. | If so, how far away is that hearing date? |
| 9. | What evidence of attempts to look for suitable local Counsel with appropriate skill and experience, and the results of such attempts? |
| 10. | Is there a brief CV for applicant? |
| 11. | Is there a summary of the alleged unusual difficulty or complexity (if appropriate)? |
| 12. | Is there a summary of the nature of the case and legal principles involved, which may have substantial impact on the development of the Hong Kong law, and the likelihood of the case going to the CFA? |
| 13. | Are there any other special circumstances upon which reliance is placed? |
| 14. | Viewed objectively, has the attempt to instruct local Counsel been “reasonable, serious and genuine”? |
| 15. | Has the applicant been involved in earlier proceedings (e.g. arbitration) in relation to the same case? |