Problems inherited in Building Management (Amendment) Ordinance

1. The amendment in Sections 3, 3A & 4 does not help to solve the problem in case Developers/Managers who hold large number of undivided shares in common area but object to form Owners' Corporations. For instance, a rival party with 20% of undivided shares can object to the formation of corporation under Section 3A in appointment of management committee (MC) after application to the Authority. Or, Developers/Managers holding large number of undivided shares in common areas can simply vote down the appointment of MC at a meeting convened under section 3, 3A or 4. There is also an argument in the meaning of 'resolution of the owners of not less than 30% of the shares" in S3(2)(b) : whether, so long as owners of not less than 30% of the shares vote for the appointment of MC at an owners' meeting convened under S3(1), then a MC may be appointed pursuant to S3(2)(b) notwithstanding that owners of a higher percentage of shares vote against it in the same meeting ; or , whether 'a resolution' in S3(2)(b) means not only the votes of owners of not less than 30% of the shares per se is required, but they must also be the majority votes.

2. The amendment in Section 27(1A) fails to set out the detailed requirement of the audit report. The Public also wonders why the Section 27(1A) does not carry any penalty clause in contrast with Section 27(1) (see S27(3)). Since the new Section 27(1A) is to replace the previous one which would mean that OCs with flat units not more than 50 will be waived of the previous requirement " shall be audited by an accountant retained by the corporation or such other person as may be approved by the corporation by a resolution passed at a general meeting.....". Public perceives that it is a step backward for the smaller OCs.

3. The enumeration of flats number causes confusion to public as counting of garage and carport are explicitly excluded in Section 27(1A) and Second Schedule Para.1A, but, the counting of number of flats is not mentioned in Fourth Schedule. People wonder why the three Sections cannot be in tie.

4. The public is disappointed that there is no improvement in setting out a clearer guideline in the part of Code of Practice on Procurement of Supplies, Goods and Services. Many BM personnel opine that it is too ambiguous and fraught of grey areas and problems.

5. The amendments in Section 5(5)(c)(iii), Third Schedule Para.3(5)(b)(iii) and Eighth Schedule Para.13(c)(iii) have given due consideration to the practical situation of appointing proxies in attending general meetings. However, it is arguable whether "co-owners" include both "joint tenant" and "tenant in common". Some people argue that it should confine to joint tenant only because wordings "joint ownership (as in S5(5)(c))" and "jointly owned (as in Third Schedule Para.3(5)(b) & Eighth Schedule Para.13(c))" are used in the provisions of the Ordinance. Further amendment or definition on "co-owners" will help to give a much clearer picture.

6. The amendments in Section 5(5)(iii), Third Schedule Para.3 (5)(b)(iii) and Eighth Schedule Para.13(c)(iii) have helped, to a certain extent, solving the problem of "co-owners" in voting and appointing proxies in general meetings. People hope that the same would be duly amended in Section 3(1)(c). It would be clearer to state explicitly whether only one of the "co-owners" or all of the "co-owners" should sign or endorse to act as convenor in order that the total undivided shares of their unit be counted towards the 5%.

Comments on the Inadequacy

1. The BM(A)O has attended to only a small portion of unclear provisions in BMO. There still exists a lot of unclear provisions and grey areas which have provoked a lot of arguments and disputes.

2. The Seventh Schedule and the amendment are inadequate in beating prevalent unfair terms in DMCs. For example, developers or managers holding large number of undivided shares in common areas which will affect the formation of owners' corporations, shares of ownership (undivided shares) not proportionate to shares in contribution of funds (i.e. voting shares not equal to management shares), stipulation of unfair terms in appointment of management committee and election of MC members, too great power for managers etc. People opine that the Lands Department should do more and should have more surveillance in the stipulation and approval of DMCs.

3. There is a lot of complaints from owners against the malpractice and abuse of power of OC Chairmen and MC members. If the OC Chairmen and MC members refuse to compile with BMO (in some cases, OC Chairmen even refuse to convene owners' meetings upon 5% owners' request), the only way will be via a cumbersome legal proceeding to apply to Lands Tribunal for arbitration, which most of the owners cannot afford. This is a deterrent for owners to exercise their right of monitor effectively and actively against the MC. People suggest setting up a cheaper, convenient and more effective mechanism in solving simple BM disputes and problems of non-compliance of BMO. Some suggest setting up a Building Management Tribunal with reference to the mode of Labour Tribunal.

4. There are numerous complaints against malpractice and abuse of the power of management companies, especially in financial and pecuniary terms. They urge for a monitor and complaint mechanism in the industry.

5. People opine that BMO does not have a clear guideline on the distribution of duty and power between the DMC manager and OC in case of their co-existence.

   For example : S20 stipulates that an OI shall establish and maintain a general fund and may establish and maintain a contingency fund... ... .. S27 and Sixth Schedule also require that MC shall maintain proper books or records of account and other financial records... ... . However, Seventh Schedule (para. 3 & 4) at the same time requires that manager shall maintain account and special fund and also (para.2) shall maintain proper books or records of account and other financial records... ... . In case of co-existence of OI and manager, people will argue who shall be obliged to take up the statutory duties.

6. People think that even the HAD staff and LR staff are unable to provide concrete advice in detailed OC formation process such as the number of OCs be formed in a given estate or villa, proxy format and its authenticity, detailed MC election and appointment process etc. When they approached legal practitioners for advice, they found that the views from legal advisers were also diverged. People are also confused why more or less the same type of duty of BM are taken up by two different grades (Liaison Officers and Housing Officers) of staff in HAD.

Some Suggestion on Further Improvement in BMO Provisions

Part II

Sections under this Part would better be rephrased to give a clear indication that it refers to the first appointment of management committee, i.e. corporation has not yet been formed in the building so as to distinguish it from appointment of management committee in re-election, after dissolution, or because of revival of inactive management committee etc. in which owners have been incorporated already.

Section 3(2)(b)

Deed of Mutual Covenant may have a tougher requirement than 30% owners' shares for appointment of management committee. People suggest to delete "*if there is no deed of mutual covenant, or the deed contains no provision for the appointment of a management committee,*" since the purpose of BMO is to facilitate the incorporation of owners of flats in buildings.

People, including the legal practitioners in the field always argue whether **'a resolution**' in S3(2)(b) means for the appointment of a management committee (MC) at an owners' meeting convened under S3(1), not only the votes of owners of not less than 30 % of the shares per se is required but they must also be the majority votes, or in the other way, so long as owners of not less than 30 % of the shares vote for the appointment of a MC notwithstanding owners of a higher percentage of shares votes against it in the same meeting. If it is the former intent, the provision should be written as *"by* ***a resolution passed by a majority of the votes*** *of the owners voting either personally or by proxy in the meeting but not less than 30% of the total shares"*. If it is the latter intent, then the provision should be written as *"by a* ***vote*** *of the owners not less than 30% of the share voting either personally or by proxy in the meeting"*.

Section 5 (5)

It does not mention about registered mortgagee in possession of an owner's flat . Perhaps a paragraph similar to Schedule 3 para.3(6) should be added to make them in line.

Section 5 (6)

People argue whether non-owner such as representative of the management company, tenants' representative or any other person can be chairman of the meeting, i.e. the one presiding at the meeting. It is thought that chairman of the meeting may not necessarily be one of the convenors. If there is dispute in who should be the one presiding at the meeting, how is it to be resolved ? As person presiding the meeting has the power to accept or reject proxies received less than 24 hours, resolution by voting will not be possible since validity of such proxies are not yet determined at that moment and which will in return affect who will be appointed as chairman of the meeting..

Section 8(3)

People are confused on the differentiation of common seal and rubber stamp. Most of the Owners' Corporations have rubber stamp but no common seal. When they print their rubber stamps, seldom of them will be authenticated by the signature of both the chairman and secretary.

Section 16

A phrase "*or any terms and provisions in BMO or DMC*" should better be added after "*……..the rights, powers, privileges and duties of the owners in relation to the common parts*" to make the meaning of the Section more complete.

Section 23(4)(a)

People are confused by the meaning of the phrase "*subject to the terms on which he occupies the flats*". Does it mean that this Section will simply not apply if the owner deliberately adds a term of not accepting any deduction of amount by person other than him etc. in a tenancy agreement ?

Section 24

"Distraint" may be a better word than "Distress".

Section 27(1A)

According to most of the reputable dictionaries, "retain" is to get service by payment. Does it work if one of the owner, being a certified public accountant, stands out and takes up the audit work for the Owners' Corporation free of charge ? Is there any better word than "retain" ?

Section 28

There is no similar requirement for manager in "*insurance policy to be made available by management committee for inspection*". A similar clause should better be added in Schedule 7.

Section 34D

Some problem in the interpretation of "manager" – what about if it is a contract manager retained by the Owners' Corporation to take up only part of the DMC duties ? Does it fall within the definition of manager in Part VIA and Seventh & Eighth Schedules of BMO.

Section 45(3)

The beginning phrase "*Subject to the provisions of this Ordinance*" is somehow confusing and conflicting as BMO provisions explicitly contain and provide 9 offences with penalty clauses, and the Lands Tribunal is to take care of the proceedings relating to the interpretation and enforcement of the provisions of the Ordinance (see Schedule 10 para.1). The amendment of S45(3) with the insertion of "any jurisdiction other than civil jurisdiction or any" in BM(A)O aims to exclude any criminal offences from the jurisdiction of Lands Tribunal but retention of the beginning phrase makes the meaning of this Section blurred and confused. It seems to me that this phrase is somehow redundant.

Schedule 2 para.2(1)(a)

The subparagraph(1) describes the ways in appointing members of management committee in meetings convened under section 3, 3A, 4 or 40C with further elaboration in its sub-subparagraphs. Subparagraph (1)(a)(i) mentions the way in case of meeting convened under section 3 while subparagraph (1)(a)(ii) mentions way in any other case, i.e. 3A, 4 or 40C. Since the paragraph only refers to meetings convened under sections 3, 3A, 4 and 40C, the appointment of MC members in re-election at alternate AGM has not been mentioned (Sch2 para.5(2) only states appointment of MC members at AGM shall be in accordance with this Ordinance). In this regard, it would be better to substitute "*3, 3A, 4 or 40C*" with "*3, 3A, 4, 40C or para.5 of this Schedule*" in Sch2 para.2(1) to make the meaning more complete.

Schedule 2 para.2(1)(a)(i)

"*from amongst themselves, or in accordance with the deed of mutual covenant (if any)*" – which of them will take priority ? Why not so written as section3(2) ?

Schedule 2 para.2(1)(b)

Can tenants' representative appointed under section 15(1) be appointed as the chairman of the management committee? He is deemed to be appointed by owners as a member of the management committee (see Sch2 para.2(2)).

Schedule 2 para.2(1)(c)

People find that the meaning of "*if that office (howsoever named) is specified in a deed of mutual covenant (if any)*" is too vague and hard to determine.

Schedule 2 para.9

The meaning of "*(rounded up to the nearest whole number)*" in English and "*計至最接近的整數*" in Chinese does not match exactly. Actually the wordings in bracket are redundant and can be deleted.

It is a very frequent controversy over the quorum at a meeting of a management committee : whether the base of counting of 50% should be the existing filled MC members (not counting the vacant seats) or it should be the originally appointed seats of MC members (counting the vacant and non-filled seats altogether) ? It will help if provisions of BMO explicitly spell it out.

Schedule 2 para.10(4B)

A provision, similar to Schedule 6 para3, in respect of inspecting and copying minutes of meeting of management committee should be added in the Ordinance.

Schedule 2 para.11 (2)

People opine it is unfair that corporate owner as MC member has the privilege to retain the MC post and re-appoint another representative in place despite his previously authorized representative has committed any of the faults under para.4(2) in Schedule 2, while the other ordinary

owners as MC members can't. It is thought that if a MC member, being an authorized person of a corporate owner has committed (c) and (f) of Sch2 para.4(2), the corporate owner can no longer appoint another authorized representative in his place. The corporate owner, to a certain extent, should also be liable to the performance of his authorized representative.

Schedule 3 para.3(5)(a)

The meaning in phrase "subject to the provisions of any instrument registered in the Land Registry" may be too board. Why not so written as section5(5)(a) or section22(1)&(2) ?

Schedule 3 para.4(3)

Sometimes the secretary, for one reason or another, may not be able to receive the proxies. Should it be so rigid that the proxy should be lodged with the secretary ? Wordings similar to Schedule 2 para5A may be considered. Also, if the chairman of the owners' meeting is not chairman of the management committee (see Sch3 para.4(3)), who is to determine the acceptance of proxies received less than 24 hours before the meeting (the decision to accept proxies received less than 24 hours or not will in return affect the election and appointment of chairman of the owners' meeting in case of absence of MC chairman and Vice-chairman (see Sch3 para3(2)) ?

Schedule 3 para.6(3)

A provision, similar to Schedule 6 para3, in respect of inspecting and copying minutes of general meeting of the corporation should be added in the Ordinance.

Schedule 5 para.3

Is there any requirement such as when and how to revise the budget ? If there is no requirement and it is totally up to the management committee at any time to revise the budget, then the preparation of a budget will be meaningless and the management committee can increase management fee at any time.

Schedule 7 para.2(5)

Why tenants' representative, registered mortgagee or person authorized in writing in that behalf by an owner or registered mortgagee are not included in the provision ? It should be in line with section 27(2) and Schedule 6 para.3.

Schedule 7 para.7

People always argue whether the OI should strictly follow the terms and provisions of Seventh Schedule in order to terminate the appointment of manager if their DMC or management contract contains provisions for an easier and quicker termination of service.

Since the purpose of the insertion of Seventh Schedule is to provide an easier alternative to terminate the manager's service in case the DMC has too tough a provision for the termination, the meaning of the provision will be perfect and clear of argument by adding the following phrases :

"(1A) A corporation may terminate the manager's appointment in accordance with the deed of mutual covenant or other contract (if any) ; or
(1) No matter what the provisions of DMC or contract (if any) be, subject to subparagraph (5) and (5A), at a general meeting convened for the purpose a corporation may, by a resolution of the owners of not less than 50%……."

Schedule 7 para.8

Conflict exists. If the manager's appointment ends for any reason, he shall within 2 months of the date his appointment ends prepare a certain document and handover a certain materials. However, in accordance with the interpretation of "manager" in section 34D, just when the appointment ends, he will no longer be a manager "for the time being". The "manager" will not be bound by the provision.

Schedule 8

It would be better to indicate that provisions under this Schedule only applies to buildings with owners committee but not buildings with management committee, i.e. it is not applicable in buildings in which owners' corporation have been formed already.

Code of Practice on Procurement of Supplies, Goods and Services Section 20A and 44 of the Building Management Ordinance (Cap. 344)

The existing Code of Practice on Procurement is fraught of flaws and is always complained by people as vague and difficult to follow.

Limits of Tender

2. In order to decide whether the Code of Practice is adequate or not , we have to in the first place find out the objectives of setting up the Code of Practice. I presume that the objectives of the Code of Practice are to increase the transparency of the procurement activities of the management bodies in private buildings and to eliminate malpractice or bribery in the activities as far as possible. But at the same time, we are also trying the best not to interrupt or make the operation of the management bodies difficult by introducing the Code.

3. If my presumption is right, I am afraid that there will not be a universally accepted criterion for the tender limits. To set a higher limit, we are enhancing the power of the management bodies and hence increasing the chance of abuse and malpractice. On the other hand, if we set a lower limit, we are making the operation of the private building affairs more difficult and cumbersome. The sum of $100,000 or 200,000 may be too small for an estate with thousands units but it may be too big for a building of a dozen flats. We have to strike a balance between the two. There will not be an ideal limit and every case should be determined on its own merit.

4. If the above argument stands, I do not think that any amendment to the existing limits is appropriate. Instead, I would suggest allowing to increase 'flexibility' to the Code of Practice by deleting the phrase "or such other percentage in substitution therefore as may be approved by the corporation by resolution passed at a general meeting," and adding a phrase "**unless the Owners Corporation has approved another amount in substitution by resolution passed at a general meeting"** at the ends of paragraph 1 and paragraph 8. That means the Owners

Corporation not only have the power to lower the limits but also has the power to elevate the limits.

5. The purpose of the Code of Practice is to set a general guideline for the owners because in many cases the owners are unable to manage their affairs properly or they are too apathetic to take care of their own business. I see no reason why we cannot accept their self-determined criterion if the decision does not contravene any ordinance and has been passed through a legitimate procedure in a proper manner. The spirit of the Code of Practice, as well as BMO, is in fact to encourage participation of individual owners.

Practicability and Enforcement of Code of Practice

6. We must remember the Court Case of Joyful Villas, Kwun Tong (Lands Tribunal Case BM no. 177/95) in which the Presiding Officer, Mr. Z.E. LI has held that the breach of Code of Practice does not necessarily render the decision of an owners incorporated to incur expenses invalid nor does it necessarily absolve its members from liability to contribute to such expenses. Judge LI also commented in his verdict that (i) the requirement of a specific number of tenders by the Code of Practice might be viewed as impractical because an owners incorporated had no control over how many contractors might submit tenders and, (ii) Section 44(2) of the BMO was very vague on the consequence for the breach of the Code of Practice. I totally agree with the comments of Judge LI.

7. It is not clearly stated in the Code of Practice that whether the tender required should be an invited tender or an open tender. Open tender is ideal for a fair play of procurement exercise while invited tender is more flexible but may be abused when it is in the hands of dishonest persons. Since it is not explicitly specified, I presume that both of the types are allowed. The defect as mentioned in (i) of Judge LI can simply be rectified by adding an expression "**the management body have to adhere to the required number of tenders <u>unless</u> the invitation to tender is an open one"** in paragraph 4 of the Code of Practice. The interpretation of open tender should also be specified in the Code of Practice, such as it should be published in a Chinese newspapers or an English newspapers as specified by the Secretary for

Home Affairs and that it is open to all eligible bidders. There is always a controversy that the minimum number of tenders specified in the Code is no. of tenders to be invited or no. of tenders to be obtained. If it is a number to be invited, it would be vulnerable to abuse and manipulation.

8. If we are going to issue a Code of Practice, of course we expect the others to follow it as far as possible. However, with the precedent case of Joyful Villas and with the vague terms about the consequence for breach of the Code of Practice in Section 44 subsection (2) of BMO, how could we convince the others to follow the Code of Practice since it is not a 'must'? The authority of the Code of Practice will all depend on the answer to the question "What about if we don't follow it ?" We may have to **consider imprinting articulate wordings on the consequence of not following the Code of Practice,** but which may involve amendment of relevant section of BMO.

Code of Practice for both of the Incorporated Owners and Managers

9. Paragraph 5 of Schedule 7 in BMO requires the manager to comply with standards and guidelines specified in Code of Practice However, the present Code of Practice does not provide relevant procedures for the manager to follow if the building does not have any Owners Corporation. For instances, para.2, para.3, para.6, para.7, para.8, para.9, etc. all imply that the procedure applies to building with Owners Corporation only. The Code of Practice should be amended duly so that it can apply to management body no matter it is a management committee or a manager, and whether it is with an Owners Corporation or without an Owners Corporation.

Incompatibility of Contract Sum between Code of Practice and Para.5 of Schedule 7 in BMO

10. In para. 5 of Schedule 7 in BMO, it is specified that the manager has to follow Code of Practice, i.e to procure by tender, when he enters a contract that involves an average annual expenditure of more than 20 % of the budget or revised budget, as the case may be, for that financial year or of such greater amount as the Authority may specify by notice

in the Gazette. In para. 1 of Code of Practice, it is specified that any supplies, goods or services the value of which exceeds or is likely to exceed (a)$100,000 or such other sum in substitution by the Authority in Gazette; or (b) the sum which is equivalent to 20 % of the annual budget of the corporation or such other percentage in substitution as approved by the corporation by resolution passed at a general meeting, whichever is the lesser, shall be procured by invitation to tender.

11. They are incompatible in two senses. Firstly, the BMO specifies that the manager has to procure by tender if the amount involved exceeds 20 % of the annual budget or of a greater amount specified by the Code of Practice. But the Code of Practice instructs that any procurement with sum exceeds 20 % of the annual budget or a lesser amount ($100,000, an amount specified by the Authority) has to be by tender. Secondly, the sum described in BMO is that the contract that involves an average annual expenditure of more than 20% of the budget for the financial year. In code of Practice, the sum described is that the values sum, or value of the contract, which is equivalent to 20 % of the annual budget. It will be helpful to put it clear by making the following illustration. If the building has an annual budget of $500,000 and its management body enters a 3-years contract with a cleansing company with monthly remuneration of $5000. The total contract sum will be $180,000 but the annual expenditure will only be $60,000. In this case, it obviously exceeds the limit as described by Code of Practice but not by Schedule 7 of BMO.

12. I am not quite sure whether the writer of the Code of Practice was intentionally making the difference. But in both cases, it will make people confused.

Break-down of Contract and Value-Add After Work

13. The Code of Practice only stipulates the limit of a sum of the contract. Some perpetrators may manipulate it by breaking the contract into subcontracts. On the other hand, it is quite a common phenomenon that the expenditure after work would be quite different from the start of contract or start of work, in most cases it will be more expensive. Legal charges, consultation fees and building renovation

work expenses are some of the common examples. Contemplation may be required to plug the loopholes of it.

Unclear Meaning / Implication in ways Corporation may take to accept or reject tenders

14. Para. 8 of the Code stipulates that when the sum of tenders exceeds $200,000 or 45% of the annual budget whichever the lesser, the tenders have to be submitted to the corporation for decision. And the Corporation **may** by a resolution passed at a general meeting of the corporation, accept or reject them. It gives people an impression that there are other ways besides holding a general meeting that the Corporation may determine to accept or reject the tenders. The sentence should be re-phrased to bring out a more explicit meaning, whether there is other way or it is the only way? If it is the only way, “may” should be replaced by “shall”. If there is other way, it is better to specify.

Paper No. CB(2)1606/00-01(16)

17 May 2001

Clerk to the Subcommittee on
Review of the Building Management Ordinance,
Legislative Council Secretariat,
3/F, Citibank Tower,
3 Garden Road, Central,
Hong Kong.

Dear Sir/Madam,

Views on Review of the Building Management Ordinance

I write to respond to your press release dated 1 May 2001 inviting views on review of the Building Management Ordinance.

The Government has taken a positive approach towards the inadequacy of the existing Building Management Ordinance. The Building Management (Amendment) Ordinance has helped to a certain extent to solve part of the grey areas, however, there are still lots of areas which are subject to challenge and controversy. I appreciate the establishment of the Subcommittee on review of the Building Management Ordinance, which has shown a continual concern of the LegCo or the Government on the inadequacy of existing BMO. The need of keeping a constant review of BMO does surely exist.

I have worked out my views on the inadequacy of the BMO and inter alia, suggest some improvements in the provisions. I hope my work will be part of the concerted effort that will help the Subcommittee to achieve its aim of perfecting the BMO.

I do not prepare to make oral representations to the Subcommittee, but in case of any queries in my work, you are welcome to contact me

A copy of the work in diskette is also attached to facilitate your compilation.

Yours sincerely,

(Thomas Chan)