

**Bills Committee on
Buildings (Amendment) Bill 2003**

Relationship between Individual Owners and Owners' Corporations

Purpose

At the Bills Committee meeting held on 6 November 2003, Members expressed concern at how disputes between individual owners and their owners' corporation (OC) could be dealt with. This paper provides more information on this subject.

Home Affairs Department's Role

2. The Home Affairs Department (HAD) is tasked to advise and assist private building owners and OCs in their building management responsibilities. In case of disputes among owners, OCs and management companies, HAD staff will provide liaison and informal mediation service with a view to resolving the disputes. Although HAD staff performing mediation service are not accredited mediators, given their experience and efforts, their work in this regard has had some success. While each case is different, HAD usually points out to disputing parties the relevant requirements of the Building Management Ordinance (BMO) (Cap. 344) and, where relevant, the requirements in the statutory orders or notices; as well as the possible consequences of non-compliance. Where legal and professional advice is needed, e.g. in the interpretation of the deed of mutual covenant (DMC), HAD staff will help to arrange an appointment for the building owners and OCs with the lawyers and professionals providing voluntary service at HAD's four Building Management Resource Centres.

Tenth Schedule to the Building Management Ordinance

3. Some Members have asked whether disputes between individual owners and their OCs regarding the manner of complying with a statutory order issued by the Building Authority (BA) are covered by

the Tenth Schedule to the BMO.

4. According to section 16 of the BMO, when owners of a building have been incorporated, the rights, powers, privileges and duties of the owners in relation to the common parts of the building shall be exercised and performed by the OC to the exclusion of the owners. In other words, an order served by the BA which is related to the common parts of the building should be served on an OC.

5. When disputes arise between individual owners and their OCs regarding the manner of complying with statutory order, the exact grounds of challenge will have to be ascertained before it can be established as to whether they fall within the Tenth Schedule (at Annex A), and hence may be heard and determined by the Lands Tribunal. These grounds vary in different cases, e.g., over the interpretation of the DMC, allocation of the contribution by owners, the scope of works to be carried out (whether they are confined to or beyond the orders), whether the location concerned is regarded as common area or exclusive use area under the DMC, the validity of an owners' meeting, procurement of service requirement under section 20A of the BMO, etc. That said, we consider that paragraphs 1 and 5 of the Tenth Schedule, read together with section 45 of the BMO (Annex B), will generally be relevant in most building management disputes.

Advisory Service Counter

6. Some Members have asked whether it is feasible to operate an advisory service counter in the Lands Tribunal to help resolve disputes between OCs and individual owners in connection with compliance with statutory orders served under the Buildings Ordinance (BO).

7. The feasibility of establishing such a counter will have to be further explored in consultation with the Lands Tribunal. Our preliminary view is that we need to carefully consider whether it would be more efficient and effective for the proposed counter to be set up for the sole purpose of resolving disputes on compliance with statutory orders served under the BO or for dealing with all building management disputes in general. We will also have to avoid giving any impression that the counter will adjudicate on the need to comply with a statutory order. The need to preserve the legitimacy and effectiveness of the OC's work is another consideration. We propose to further look into these issues in the context of reviewing the usefulness of mediation as a

dispute resolution mechanism. (Please see paragraph 9 below.)

Mediation and Arbitration

8. Some Members have asked the Administration to consider the feasibility of mandating arbitration in dispute cases between an individual owner and his OC on the manner of complying with the BA's statutory orders before prosecuting the owner for obstruction under the proposed new section 39B (Clause 38).

9. We are supportive of promoting the use of mediation services for dealing with building management disputes. Indeed, with the assistance of the Hong Kong Mediation Council and the Hong Kong Mediation Centre, HAD is now exploring the feasibility of using mediation as an alternative dispute resolution mechanism through a pilot scheme on mediation. The pilot scheme has, over the past year, taken on four cases of which two have been successfully resolved. Obviously a sample size of four cases is too small for definitive conclusions to be drawn. So far, however, we have had limited success in encouraging building owners and OCs to participate in the pilot scheme. To promote the benefits of mediation, HAD is organizing more seminars and briefings with the assistance of the two professional organizations. Both organizations have agreed to extend the scheme until April 2004. We will keep the situation under review and further assess the effectiveness of mediation on building management disputes when more cases have been dealt with through the pilot scheme. In our review, we will also take into account the experience of the labour dispute resolution mechanism and the result of the pilot scheme on family disputes implemented by the Judiciary.

10. The suggestion for compulsory arbitration requires very careful consideration. For example, we need to examine –

- (a) how this would impact on the mainly voluntary approach to building management matters in general that we have followed hitherto;
- (b) the circumstances under which mandatory arbitration is required, i.e., whether the requirement should apply only to disputes over the manner of compliance with the BA's statutory orders, to all statutory orders issued under different ordinances to the OC, or to all disputes between an individual owner and his OC;

- (c) the resource and practical implications for both the owner and the OC, e.g., whether the OC's costs could be recouped from all the owners of the building while the owner has to shoulder the cost himself;
- (d) how the mandatory arbitration requirement should be enforced;
- (e) how arbitration decisions should be enforced; and
- (f) the relationship between both the process and the outcome of the arbitration on the one hand and enforcement of the statutory order on the other.

11. It is clear from paragraph 10 that the suggestion of mandatory arbitration goes far beyond the ambit of the Buildings Ordinance (BO), i.e., ensuring building safety and health. The proposed new section 39B (Clause 38) focuses on the need to comply with the BA's orders, and to give recognition to the fact that, by virtue of the BMO, the OC is responsible for statutory orders relating to the common parts of the building. However, disputes between an individual owner and his OC regarding the detailed manner in which such orders are to be complied with are essentially civil matters. As with other disputes of this nature, they should not be dealt within the context of the BO. We, therefore, have reservations about the suggestion to mandate arbitration for the purpose of the proposed new section 39B (Clause 38).

Housing, Planning and Lands Bureau
Home Affairs Department
November 2003

Chapter:	344	Title:	BUILDING MANAGEMENT ORDINANCE
Schedule:	10	Heading:	Hearing and determination of specified proceedings by tribunal

1. Proceedings relating to the interpretation and enforcement of the provisions of this Ordinance.
2. Proceedings relating to the interpretation and enforcement of the terms and provisions of a deed of mutual covenant, including such terms or provisions impliedly incorporated into a deed of mutual covenant under Part VIA.
3. Proceedings relating to the use, occupation, enjoyment, possession or ownership of the common parts or any other part of a building in which the owners have a common interest.
4. Proceedings relating to the calculation or apportionment of-
 - (a) any sums payable or purported to be payable under a deed of mutual covenant (if any);
 - (b) the funds and contributions referred to in sections 20 and 21;
 - (c) any management expenses or charges (howsoever named);
 - (d) any other outgoings, payments, debts or liabilities due or liable under this Ordinance or in accordance with the terms and provisions of an instrument which is registered in the Land Registry including a deed of mutual covenant (if any).
5. Proceedings relating to any question of law concerning the powers and duties of-
 - (a) a corporation;
 - (b) a management committee, and of the chairman, secretary and treasurer thereof;
 - (c) a manager within the meaning of section 34D(1);

- (d) an owners' committee within the meaning of that section;
- (e) the tenants' representative,

including such powers and duties (if any) of a financial, pecuniary or fiduciary nature.

6. Proceedings relating to any question of law concerning ownership, occupation or possession of the whole or any part of the building, including ownership or an undivided share in a building or in land on which there is a building.

7. Without prejudice to paragraph 6 and subject to section 45(3), proceedings relating to any question of law concerning the extent and applicability or otherwise of any contractual or proprietary right enjoyed by owners and occupiers or otherwise referred to in the terms and provisions of an instrument which is registered in the Land Registry including a deed of mutual covenant (if any).

8. Proceedings relating to any question of law concerning any breach or alleged breach of any covenant, term or condition specified in an instrument which is registered in the Land Registry including a deed of mutual covenant (if any).

9. Proceedings relating to the enforcement of any contractual or proprietary right referred to in paragraph 7 or any covenant, term or condition referred to in paragraph 8, as the case may be, whether by way of specific performance, injunction, declaration, damages or otherwise.

Chapter:	344	Title:	BUILDING MANAGEMENT ORDINANCE
Section:	45	Heading:	Jurisdiction of tribunal in relation to building management

(1) The tribunal shall have jurisdiction to hear and determine any proceedings specified in the Tenth Schedule.

(2) No person other than a person to whom this section applies shall be competent to commence any proceedings referred to in subsection (1).

(3) Subject to the provisions of this Ordinance, nothing in this section or the Tenth Schedule shall be construed to vest in the tribunal any jurisdiction other than civil jurisdiction or any jurisdiction to make any order which would, if made, have the effect of rendering void, negating or substantially varying in whole or in part any contractual or proprietary right enjoyed by any owner or occupier or otherwise referred to in the terms and provisions of an instrument which is registered in the Land Registry including a deed of mutual covenant (if any). (Amended 69 of 2000 s. 22)

(4) This section applies to the following persons, namely-

- (a) an owner;
- (aa) the Authority; (Added 69 of 2000 s. 22)
- (b) a person referred to in section 3(1)(a) or (b);
- (c) a management committee;
- (d) a corporation;
- (e) a manager within the meaning of Part VIA;
- (f) an owners' committee within the meaning of that Part;
- (g) a registered mortgagee;
- (h) an administrator;
- (i) with leave of the tribunal, the tenants' representative; or
- (j) with leave of the tribunal, any other person specified in an instrument which is registered in the Land Registry including a deed of mutual covenant (if any).

(5) In this section and the Tenth Schedule, "proprietary right" (所有權權利) includes any such right express or implied whether specified in an easement, licence, permission or otherwise.