

建築物管理條例 v 大廈公契 v 大廈維修

概述

Overview 概述

- The overlapping legal systems for Building Management (管理物管的雙軌法律系統)--**Common Law** and **Legislation**
- Identify the rights and obligations of the stakeholders (監定持份者之權利和義務)
 - Stakeholders: government (政府), developers (發展商), owners (業主), occupiers (佔用人), manager (管理公司), incorporated owners (業主立案法團), architect (建築師), contractors (承建商), visitors (訪者), trespassers (侵入者), members of public (公眾人士)

Legislation 法例

- Building Mgt Ordinance (Cap 344), 建築物管理條例
- Buildings Ordinance (Cap.123), 建築物條例
- Conveyancing and Property Ordinance (Cap 219), 物業轉易及財產條例
- Land Registration Ordinance (Cap 128), 土地註冊條例
- Companies Ordinance (Cap 622), 公司條例
- Control of Exemption Clauses Ordinance (Cap 71), 管制免責條款條例
- Factories and Industrial Undertakings Ordinance (Cap 59) 工廠及工業經營條例
- Occupational Safety and Health Ordinance (Cap 509) 職業安全及健康條例
- Competition Ordinance (Cap 619), 競爭條例
- Prevention of Bribery Ordinance (Cap 201), 防止賄賂條例等等

Agreement between two parties (雙方協議)

- Three factors to be binding (成立合約的三大原素):

- Offer and Acceptance 要約和接受

- Consideration 約因

- Intent to create legal relation 受法律約束的意圖

- Claim damages 申請賠償 (monetary, 金錢上) when breach (違約)

- Non-monetary damages (非金錢之賠償): specific performance (強制執行), injunction (禁制令), declaration (聲明) – need EQUITY (衡平法), must be granted by court (只能由法庭頒令)

- Damages is compensatory (補償性質)

- Cause of action (訴訟理由) without contractual relationship (無合同關係) includes:
 - Negligence (疏忽), Nuisance (滋擾), Trespass (侵佔), Vicarious Liability (轉承責任)
- Need to establish DUTY of CARE (謹慎責任)
- Fault-based (以過失責任為基礎): damages calculation based on scenario that no fault occurred (i.e. scenario before fault)
- Tort-based statutory offence (以侵權法為基礎的條例):
 - Occupier Liability Ordinance (佔用人法律責任條例)

Jurisdiction 司法管轄權

- Small Claim tribunal (小額錢債審裁處): Civil Jurisdiction (民事訴訟) < HK\$75,000
- District Court (區域法院): Civil Jurisdiction < HK\$3,000,000
- High Court (高等法院): Civil Jurisdiction > HK\$3,000,000
- Land Tribunal (土地審裁處):
 - Possession: Landlord and Tenant (Consolidation) Ordinance, 業主與租客(綜合)條例
 - Building Mgt: Building Mgt Ordinance, 建築物管理條例 (Cap 344)
 - Compensation(賠償): Payable by Government because of public development (發展)
 - Compulsory Sales (強拍)
 - Appeal: Rating Ordinance (差餉條例), Government Rent (地租)

Burden of Proof 舉證責任: On the claimant (原告)

Standard of Proof 舉證標準: Balance of probability (可能性的衡量)

Disputes arises 爭議產生時

- Identify the power, rights and obligations of the respective parties 監定持份者之權利和義務

Steps 步驟:

1. Search through legal documents which relate to a particular bldg such as the government lease, assignments, the DMC and any sub-DMC; 翻查有關法律文件
2. Search public records such as deeds and Instruments maintained by Land Register under Cap 128 and register of incorporated companies under Cap 622; 翻查有關公眾法律文件
3. Check if any legislation which may be applicable like BMO; 翻查有關法例
4. Identify the common law (judge-made) rules (contract or tort) which might confer rights or imposes obligations on the parties; 翻查有關案例

Background

A: Government (G) grants lease to Developer (D) with terms; D sells units in undivided

share to the public subject to G's terms under Deed of Mutual Covenant

(發展商和政府簽訂轉賣租契後，按照政府賣地條款以不可分割份額 **(大廈公契)** 的方式(轉賣給公眾)

Land Interests

- Land under s.2 of CPO (CAP 219) (**土地定義**), inter alia:
 - any estate (**產業權**), right (**權利**), interest (**權益**) or easement (**地役權**) in or over any land;
 - the whole or part of **an undivided share** in land (**土地的不分割份數的全部或部分**),
- and any estate, right, interest or easement in or over the whole or part of **an undivided share**

Land Lease > DMC > BMO (2/3)

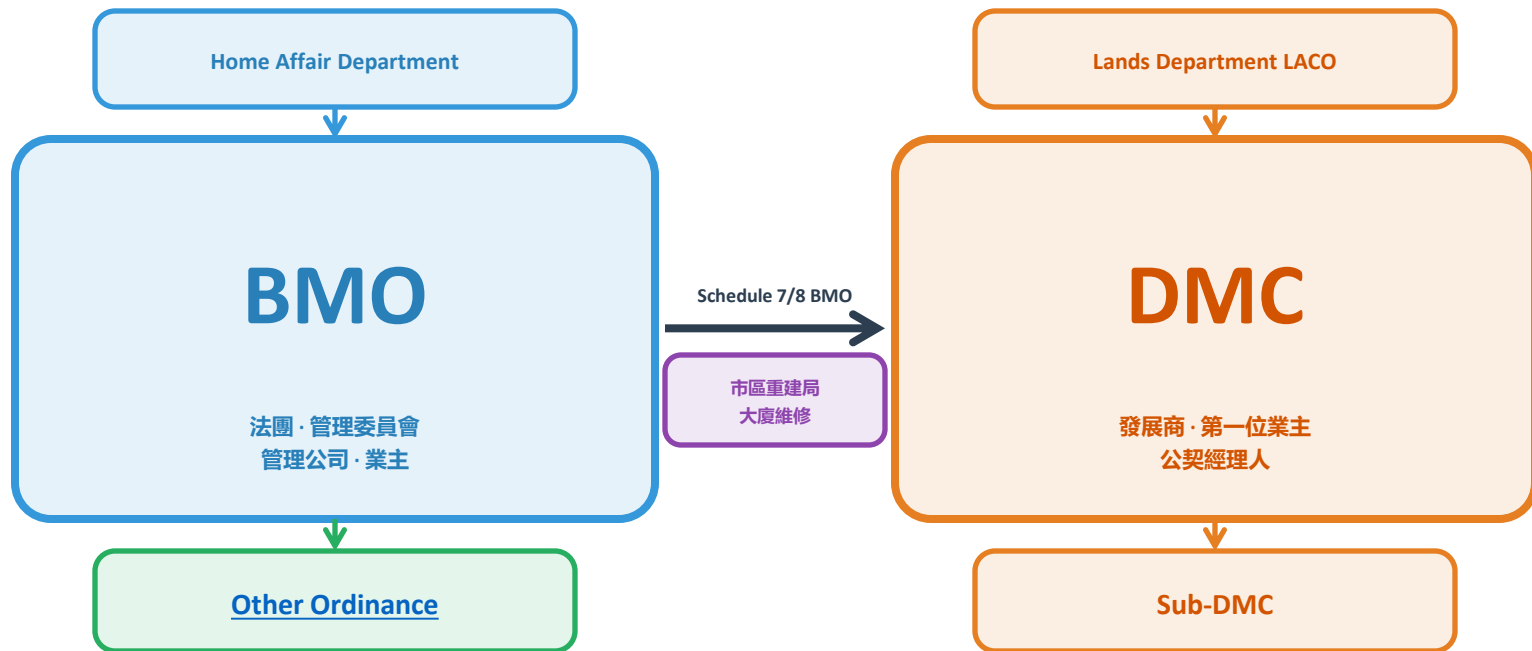
- DMC is a fundamental document governing building management in Hong Kong, operating alongside the Building Management Ordinance (Cap 344)
- A Deed of Mutual Covenant ("DMC") is an agreement under seal. It binds all owners of a multi-unit or multi-storey building. It basically sets out rules to regulate the rights and liabilities of co-owners. Covenants govern the relationship between the developer, co-owners (共同業主) and manager with respect to the tenancy of undivided shares and management of the building, subject to BMO (Cap 344)
- Parties: developer, first purchaser of a unit, and management company (if appointed). Even owners who did not sign are directly bound. DMC covenants enforceable against successors in title
- Binding force over all owners, incorporated owners, manager, tenants and users. Relevant parties can take legal action against violators. Remedies include: damages against losses, injunction order, and declaration concerned

Land Lease > DMC > BMO (3/3)

Building Management Ordinance (Cap 344)

- 第I部 – 簡稱和釋義
- 第II部 – 管理委員會
- 第III部 – 法團的成立
- 第IV部 – 與法團有關的條文
- 第V部 -- 管理委員會的解散及管理人的委任
- 第VI部 – 法團的清盤
- 第VIA部 -- 公契
- 第VII部 -- 雜項
- 第VIII部 -- 歸於土地審裁處的司法管轄權
- 附表 1-11

BMO v DMC v Building Maintenance (1/2)



DISCUSSION

- Lands Department--DMC Approval
- Home Affair Department -- Administrator for Cap 344 (effective 13.7.2025)
[Major Amendment : Type 1 /Type 2 Procurment & Large -scale Maintenance]
- Issues: Water Seepage / Falling Canopy / Unauthorised Buliding Work / Fire Safety, External Wall
- Replacement; Lift, Elevator, Water Tank, Pipe, Water Membrane
- Urban Renewal Authority --- Finance
- Building Department / Fire Service Department /others ---Regulators
- ICAC / Competition Commission--Law Enforcement
- HKIE / HKIA / HKIS - Consultant / Contractor

LITIGATION 訴訟

Cost 成本:

High-cost; not always within control; difficult to predict.

ARBITRATION 仲裁

Cost 成本:

Can reduce costs, depending on scope of discovery, time limits etc.
Worst case: as expensive as litigation with no appeal rights.

MEDIATION 調解

Cost 成本:

Extremely low-cost.

LITIGATION 訴訟

**Adversarial
對抗性:**

Highly
adversarial.

ARBITRATION 仲裁

**Adversarial
對抗性:**

As adversarial as
litigation.

MEDIATION 調解

**Adversarial
對抗性:**

Negotiation
aided by neutral
third party;
shuttle
diplomacy.

LITIGATION 訴訟

Procedure

程序: Rules govern procedure, little flexibility; can take on life of its own.

ARBITRATION 仲裁

Procedure

程序: Parties may (within limits) select procedures, timing; rules of selected institution govern in default.

MEDIATION 調解

Procedure

程序: Parties may select procedures. Virtually unlimited flexibility.

LITIGATION 訴訟

Discovery 證據:

Virtually unlimited discovery rights (documents, interrogatories, depositions, expert reports).

ARBITRATION 仲裁

Discovery 證據:

Discovery rights depend on rules selected & arbitrator discretion. Think about whether you will want discovery.

MEDIATION 調解

Discovery 證據:

Parties may select procedures for disclosure of positions, evidence. Also think about it as two-way.

LITIGATION 訴訟

Decision 裁決:

Generalist judge
or jury decides.
Judges vary.

ARBITRATION 仲裁

Decision 裁決:

Can select
arbitrators with
special expertise
to decide.

MEDIATION 調解

Decision 裁決:

Parties may
select mediator
with expertise;
usually no
"decision."

LITIGATION 訴訟

Governing 適用:

Facts, law and precedent govern decision, remedies and awards.

ARBITRATION 仲裁

Governing 適用:

Party-selected standards can (within limits) govern decision, remedies and awards (e.g. choice of law, business standards).

MEDIATION 調解

Governing 適用:

Usually no "decision" or "award," only agreement vs. not. Parties can agree to give mediator Solomonic power.

LITIGATION 訴訟

Remedies 救濟:

All legal remedies available but not necessarily creative or pragmatic business solutions.
Win/lose.

ARBITRATION 仲裁

Remedies 救濟:

Parties can limit or expand arbitrator's authority to award remedies & certain damages, e.g. punitive damages, sanctions.

MEDIATION 調解

Remedies 救濟:

Outcome not limited to legally available remedies; parties can craft pragmatic solutions that no Court or arbitrator would impose.
Win/win.

LITIGATION 訴訟

Appeal 上訴:

Broad rights of appeal from an adverse judgment.

ARBITRATION 仲裁

Appeal 上訴:

Final & binding; extremely limited grounds to vacate or modify award.

MEDIATION 調解

Enforce 執行:

Outcome is by agreement; this should always be made an enforceable contract.

The End and Thank You

Q&A Session