

DCCJ 3960/2021

[2022] HKDC 301

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. 3960 OF 2021**

BETWEEN

SILVER KING CHINA LIMITED Plaintiff

and

HUY YUN SHIU 1st Defendant

THE INCORPORATED OWNERS OF 2nd Defendant
NO. 67A WATERLOO ROAD

KONG SHUM UNION PROPERTY 3rd Defendant
MANAGEMENT COMPANY LIMITED

Before: His Honour Judge MK Liu in Chambers (Open to Public)

Date of Hearing: 8 April 2022 (Remote Hearing)

Date of Decision: 8 April 2022

DECISION

1. On 3 September 2021, the 2nd and the 3rd defendants (“D2” and “D3”) took out a summons (“the 1st summons”) for an order that the proceedings in this action be stayed and the dispute between the plaintiff (“P”) on the one hand and the 1st defendant (“D1”), D2 and D3 (all the defendants be collectively referred to as “Ds”) on the other hand be referred to arbitration, and costs of the summons be paid by P on an indemnity basis. The application is supported by D1 but opposed by P.

Background

2. It is common ground that:-

(1) P is the owner of the premises on the G/F, 1/F, 2/F of No. 67A Waterloo Road, Kowloon, Hong Kong (“the Building”).

(2) D1 is the owner of the 3/F of the Building.

(3) D2 is the incorporated owners of the Building.

(4) D3 is the management company of the Building.

3. On 18 August 2021, P issued the writ of summons herein, with a statement of claim (“S/C”) annexed thereto.

4. P's case as pleaded in the S/C is as follows:-

(1) P is claiming in the capacity of a co-owner of the Building over some alleged water leakage problems caused by D1 to P's premises since about December 2019. P sues Ds for breaching the DMC of the Building ("the DMC"), the Building Management Ordinance ("BMO"), negligence, and nuisance.

(2) P's case against D1 is that the alleged water leakage problems were caused by D1's negligence and the water leakage constituted a nuisance to P. Further or alternatively, the water leakage problem was caused by D1's failure to maintain the flat roof of the 3/F ("the Flat Roof") in a good repair and condition, and by such failure D1 has breached s.34H(1) of the BMO. D1 has also breached various provisions in the DMC.

(3) Further, D1 has performed some unauthorized building works ("UBWs") in the Building, including some UBWs done at the common parts of the Building. Having performed some UBWs at the common parts, D1 has breached s.14 of the Building Ordinance ("BO") and s.34I(1) of the BMO. Further, by conducting some UBWs on the Flat Roof, D1 has breached s.34H(1) of the BMO.

(4) In respect of the UBWs done at the common parts of the Building, D2 and D3 have failed to take any action against D1, and by which D2 and D3 are in breach of Clauses 7 and 8 of the DMC, and are also in breach of their statutory duties under ss.18, 34H(1) and 34(I)(1) of the BMO. Further, D2 and D3 are also negligent and in breach of their common duty of care owed to P as one of the co-owners of the Building.

5. P seeks the following reliefs:-

(1) As against D1, injunctive reliefs and damages to be assessed;

(2) As against D2 and D3, a declaration that they are in breach of Clauses 7 and 8 of the DMC and ss.18(1) and 34I(1) of the BMO, injunctive reliefs and damages to be assessed.

6. On 30 August 2021, D2 and D3's solicitors wrote to P's solicitors and suggested that that in accordance with Clause 16 of the DMC, P's claim should be referred to arbitration.

7. Clause 16 of the DMC are as follows:-

“All disputes and questions which shall hereafter arise between the parties hereto **touching these presents or the construction or adjudication thereof or whether these presents are still subsisting** or not or touching any account or calculation to be made hereunder or as to **any act deed or**

omission by any of the parties hereto or as to any other matter in any way relating to these presents or the rights duties or liabilities of any person hereunder shall be referred to a single arbitrator in case the parties agree upon one otherwise to two arbitrators one to be appointed by each party to the difference and their umpire in accordance with and subject to the provisions of the Arbitration Ordinance 1963 and the decision of the arbitrator arbitrators or umpire as the case may be on any of the matters and things aforesaid shall be final and absolutely binding upon all the parties hereto.” (Emphasis added)

8. On 3 September 2021, P’s solicitors replied and said that given the nature of P’s claim (i.e. including nuisance, negligence, breach of DMC, and breach of BMO) and the reliefs sought (i.e. including injunctive reliefs and damages), this court “*is a proper forum*”. On the same date, D2 and D3’s solicitors took out the 1st summons.

The parties’ respective positions

9. Ds’ position is that the disputes herein between P on the one hand and Ds on the other hand are *prima facie* within the ambit of Clause 16 of the DMC. In accordance with s.20(1) of the Arbitration Ordinance (Cap. 609) (“AO”), the disputes should be referred to arbitration and the proceedings in this action be stayed.

10. In P’s written submissions dated 6 April 2022 (“P’s Sub”), P has put forward the following grounds in opposition to the 1st summons:-

- (1) D3 is not a party to the arbitration agreement in Clause 16 of the DMC.

(2) The nature of the claim against D2 and D3 is not within the ambit Clause 16 of the DMC.

(3) Clause 16 of the DMC is incapable of being performed.

(4) The mandatory stay provision in s.20 of the AO will deny public's right to information regarding the safety and management of the Building, and is therefore inoperative in the present case.

(5) D2 and D3 have not satisfied the procedural requirements under Order 12 rule 8 of the Rules of the District Court.

11. The points set out in [10(1)] and [10(5)] above are only raised by P for the first time in P's Sub. In response to those points, D2 and D3 took out a summons ("the 2nd summons") on 7 April 2022, by which D2 and D3 seeks leave to amend the acknowledgement of service filed by them on 3 September 2021 ("the A/S"), and leave to file the 2nd Affidavit of Tang Chi Keung. Mr Tang is the solicitor acting for D2 and D3 in this case. In that affidavit, Mr Tang explained that the mistake in the A/S as pointed out by P in P's Sub (see [36] below) is an inadvertent clerical mistake. In the same affidavit, Mr Tang also produced a copy of the management agreement between D2 and D3 ("the Management Agreement"). At the beginning of this hearing, I have heard submissions from the parties on the 2nd summons. The application made by the 2nd summons is supported by D1 and is not opposed by P. However, P says that D2 and D3 should explain to the court why the mistake in the A/S can

be an inadvertent clerical mistake. I observe that Mr Tang has said under oath that the mistake in the A/S is indeed an inadvertent clerical mistake. Since the 2nd summons is not opposed, I do not see any need to conduct any further investigation on this matter. I allowed the application made by D2 and D3 in the 2nd summons.

The principles

12. In Clause 16 of the DMC, the arbitration ordinance mentioned is the Arbitration Ordinance 1963. However, as explained by Bewley J in *Wong Yu Hing v Tong Pak Wing*¹, where an arbitration agreement refers expressly to the “Arbitration Ordinance 1963”, the court would employ a “*sensible and reasonable*” construction that “*caters for the development of arbitration as reflected in amendments to the Ordinance*”. Any other construction should only be the result of very clear language. I respectfully agree. In my view, the plain meaning of Clause 16 of the DMC is that the matters within the ambit of that clause should be referred to arbitration, and the relevant statute should be the arbitration ordinance in force at the time when the matter arises. Accordingly, in the present context, the relevant arbitration ordinance is the AO, which came into operation on 1 June 2011.

13. S.20 of the AO provides:-

“(1) Article 8 of the UNCITRAL Model Law, the text of which is set out below, has effect—

“Article 8. Arbitration agreement and substantive claim before court

¹ [1995] 1 HKC 160, at 166B

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement **shall**, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
.....”

.....

(5) If the court refers the parties in an action to arbitration, it **must** make an order staying the legal proceedings in that action.” (Emphasis added)

14. Once the conditions in s.20(1) are satisfied, the court shall refer the matter to arbitration and must stay the legal proceedings in that action.

15. The relevant legal principles have been comprehensively set out by Marlene Ng J in *Lau Lan Ying v Top Hill Company*²:-

(1) At [26]:

“..... section 20 of the AO provides for mandatory stay of legal proceedings in favour of arbitration where the action is the subject of (a) an arbitration agreement (b) which is not null and void, inoperative or incapable of being performed, and there is (c) a dispute/difference between the parties (d) that is within the ambit of the arbitration agreement.”

(2) At [36]:

“..... **the onus is on the applicant for a stay ... to show there is a *prima facie* or plainly arguable case that there is a dispute ... between the parties, and an**

² [2021] HKCFI 290

arbitrator ought to be appointed to arbitrate their dispute (or “difference”). The proper threshold test is whether there is a *prima facie* or plainly arguable case because “if the judge were to go into the matter more deeply, he would in effect be usurping the function of the arbitrator.” (Emphasis added)

(3) At [38]:

“ “..... [for] the stay to apply, the action before the court must be “in the same matter” that is the subject of the arbitration agreement, and not merely “related” to or “involved” in it **In ascertaining the “matter”, the court should consider the substance of the controversy as it appears from the circumstances and evidence, and not just the particular terms in which the claimant has sought to formulate its claim in court. The focus is on the dispute, and not the pleadings**”. In doing so, the court should undertake a **practical and common-sense inquiry** in relation to any reasonably substantial issue that is not merely peripheral or tangentially connected to the dispute in the court proceedings. **The court should not characterise the “matter” in either an overly broad or an unduly narrow and pedantic manner.**” (Emphasis added)

(4) As explained at [33]–[35], the court “takes into account 3 matters” when construing an arbitration clause:

(a) “First, there is a *prima facie* assumption that **contracting parties intend all disputes relating to a particular transaction to be resolved by the same tribunal**, and by agreeing to arbitrate they have *prima facie* chosen arbitration as the appropriate tribunal.” (Emphasis added)

(b) “Secondly, ... arbitration clauses should be **construed as broadly/liberally as possible** because any doubts concerning the scope of arbitral issues should be resolved in favour of arbitration.” (Emphasis added)

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(c) “Thirdly, ... an earlier decision on the meaning of a particular form of words is persuasive. The strength of the persuasive force depends upon the extent of the similarity between the contract and the surrounding circumstances in (a) the earlier decision and (b) the instant case”

(5) At [73]:

“..... the court in a stay application under section 20(1) of the AO will not evaluate/determine the merits of the defence or the issues raised by the defendant to the plaintiff’s claim because the court is merely concerned to consider the existence and nature of the dispute/difference on the construction and effect of the arbitration clause”

(6) At [27]:

“(i) once the party seeking stay for arbitration has brought himself within section 20(1) of the AO, **it is for the resisting party who contends the arbitration agreement is null and void, inoperative or incapable of being performed to establish so**, and [the] **standard of proof is a high one**, and (ii) **the court should construe such bar to mandatory stay** in Article 8 of the Model Law (and section 20(1) of the AO) **narrowly.**” (Emphasis added)

(7) At [28]:

“..... Hong Kong courts have been **rigorous in their application of the provision for mandatory stay in all but exceptional circumstances** as borne out in *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKLRD 582 ... :

“11. The modern trend of the courts is to uphold arbitration agreements, to facilitate arbitrations, and (save in circumstances necessary to safeguard due process and as allowed under the international Conventions) not to intervene in an

arbitration, which is the parties' free choice as to the method of dispute resolution, and the substantive law and forum to govern and oversee the arbitration.

12. As a matter of public policy, Hong Kong as a party to the New York Convention has the duty to comply with its duties under art.II of the Convention: to recognize and enforce an arbitration agreement and to stay actions before the Court in breach of a valid and subsisting arbitration agreement. Under s.20 of the [AO], a Court before which an action is brought in a matter which is the subject of an arbitration agreement 'shall' refer the parties to arbitration, unless the Court finds that the agreement is null and void, inoperative or incapable of being performed. The Court has the duty to stay an action in accordance with the arbitration agreement found to exist.

.....

19. It should therefore be an exceptional case when a party seeks recourse from the court, instead of the arbitral tribunal, when there is an arbitration clause in an agreement between the parties.”” (Emphasis added)

(8) At [29]:

“Thus, once the party seeking a stay for arbitration has brought himself within section 20(1) of the AO, there are contractual (ie the parties' intention to resolve their dispute/difference by arbitration) and public policy (ie Hong Kong's convention obligations) considerations for giving effect to mandatory stay of proceedings unless there are exceptional reasons to show otherwise. Since the courts will give effect to the commercial purpose of arbitration agreements so far as the language used by the parties permits, the relevant question becomes “whether there is any conceptual reason why parties who have agreed to submit the question to arbitration should not be allowed to do so”.”

(9) As explained at [120], where it is contended that “*arbitration is precluded by public policy considerations*”, “the courts will be slow to find that such demanding test is met unless there are exceptional or compelling reasons”. The learned judge referred to *Fung Hing Chiu Cyril v Henry Wai & Co* ³ as an illustration of the court’s analysis where there are various public policy interests / considerations at play:

“Without disputing that there is a public policy interest for the Court to exercise control and supervision over solicitors who are officers of the Court, it is relevant to bear in mind that there are also public policy interests in holding parties to a contract, entered into by their free will, to settle their disputes by arbitration. **It is also undeniable that Hong Kong is promoted as an important international arbitration centre, and that the Courts here encourage parties’ resolution of their disputes by arbitration – as can be evidenced by the object and principles of the Ordinance (set out in s.3 thereof), and the authorities on how the powers of the Court under the Ordinance are exercised. A further important policy consideration is that Hong Kong and the Courts here should observe the obligations assumed under international conventions, such as the New York Convention of which Hong Kong is a party, and the duties thereunder: under art.II, to recognise and enforce an arbitration agreement; and under art.III, to recognise arbitral awards as binding and to enforce them. To the extent that there may be any possible conflict between these policy considerations, then a proper balance has to be drawn by the Courts, in the exercise of its jurisdiction and powers on the facts of each case.**” (Emphasis added)

³ [2018] 1 HKLRD 808

16. In *Gossip Daily Limited v Next Media Magazines Limited*⁴ DHCJ Keith Yeung SC (as he then was) explained the court's approach in determining whether court proceedings fall within the ambit of an arbitration clause where contractual and tortious causes of action are invoked at [16(d)]:-

"Whether a tortious claim is within the ambit of an arbitration clause remains one of construction. If the terms of an arbitration clause show clearly that the parties intended it to cover a tortious claim, there can be no room for the application of the so-called "close connection rule test" to exclude the same. It is only when the intention of the parties is not clear that the "close connection test" could be used as a construction aid."

17. Where resort is made to the "close connection test", such test is satisfied by showing either that the resolution of a contractual issue is necessary for a decision on the tortious claim or in the alternative that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other.⁵

Clause 16 of the DMC prima facie being an arbitration agreement between P and Ds

18. For the purpose of considering whether there should be a stay in favour of arbitration, the applicant bears the burden to show that there is a *prima facie* case that the parties are bound by an arbitration agreement.⁶

⁴ [2018] HKCFI 1951

⁵ *Xu Yi Hong v Chen Ming Han* [2006] 4 HKC 633, per DHCJ To (as he then was) at [38]

⁶ *PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309, per Tang VP (as he then was) at [49] – [51]

The applicant would only need to show a *prima facie* case, not a conclusive case.

19. Although the DMC is not a written agreement signed by any party to these proceedings, there is no dispute that Clause 16 of the DMC is an arbitration agreement between P on the one hand, and D1 and D2 on the other hand. However, P submits that Clause 16 of the DMC cannot be an arbitration agreement between P and D3. In P's submissions:-

(1) Neither D3 nor its predecessor is/was ever a signing party to the DMC. There is no evidence that D3 has agreed to or has become a party to the arbitration clause in Clause 16.

(2) That D3 being made an agent for D2 does not change the fact that D3 is not a party to the DMC.

(3) There is nothing in the Management Agreement saying that D3 is bound by the DMC.

20. With respect, I am unable to accept these submissions.

(1) As submitted by D2 and D3, it is P's pleaded case that "[D3] was and still is the property management company of the Building acting in the course of its business as an agent of [D2]." ⁷ This plea is not disputed by D2 and D3. Accordingly, it is common

⁷ S/C, [1(f)]

ground that D3 was appointed by D2 as manager of the Building and acts in the course of its business as an agent of D2.

(2) S.18(2)(c) of the BMO provides that incorporated owners have the power to “*retain and remunerate a manager or other professional trade or business firm or person to carry out on behalf of the corporation any of the duties or powers of the corporation under this Ordinance or the deed of mutual covenant (if any).*”

(3) Since D3 is the agent retained by D2 to carry out D2’s duties under the DMC, while there is a dispute between a co-owner and D3 as to whether D3 has failed to discharge such duties, the following would certainly be arguable:

(a) Bearing in mind that D3 is D2’s agent, the dispute between the co-owner and D3 would also be a dispute between that co-owner and D2. The dispute between the co-owner and D3 would in substance be same as the dispute between that co-owner and D2.

(b) There is no reason why the dispute between the co-owner and D2 would be resolved by arbitration in accordance with Clause 16 of the DMC, but the same subject matter between the

co-owner and D3 would be resolved through litigation in court.

21. In view of P's position as pleaded in [1(f)] of the S/C, P cannot deny that D3 was and is D2's agent carrying the duties of D2 in managing the Building. Further, P is suing D3 for, *inter alia*, breaching Clauses 7 and 8 of the DMC⁸, and ss.34H(1) and 34I(1) of the BMO⁹ (which are deemed to be terms of the DMC by the operation of ss.34H(2) and 34I(2) of the BMO). In other words, P is saying that D3 is bound by the DMC. That being the case, D3 would also be subject to Clause 16 of the DMC and would also be entitled to take the benefit conferred by that clause.

22. The fact that there is nothing in the Management Agreement saying that D3 is being bound by the DMC is neither here nor there. What is important is that in its own pleading, P is saying that D3 is being bound by the DMC. P must be bound by its own pleaded case.

23. For the reasons above, it is plainly arguable that Clause 16 of the DMC can be regarded as an arbitration agreement governing the dispute between P and D3. I would proceed to consider whether the matters in dispute in this case are *prima facie* covered by Clause 16.

⁸ S/C, [30(b)]

⁹ S/C, [31]

Matters in dispute prima facie within the ambit of Clause 16 of the DMC

24. In my view, there is a *prima facie* or plainly arguable case that the matters in dispute between P on the one hand and Ds on the other hand in these proceedings are within the ambit of Clause 16 of the DMC.

(1) Regarding P's claims against D1:

(a) In respect of P's claim that D1 has breached certain provisions in the DMC, it is plain that the claim is a dispute or a question between P and D1 touching upon the DMC.

(b) By the operation of s.34H(2) of the BMO, the obligation of D1 under s.34H(1) is deemed to be an obligation owed by D1 to all the other co-owners of the Building under the DMC. Hence, the allegation that D1 has breached s.34H(1) is also a dispute or a question touching the DMC.

(c) Regarding the claim based upon negligence and nuisance, the crux of the complaint in fact is also the alleged water leakage problem. In my view, this claim is also related to the rights and liabilities of P and D1 as co-owners of the Building. It is plainly arguable that such a claim is also covered by Clause 16 of the DMC.

(d) In fact, nuisance is also covered by Clause 10 of the DMC.

(e) In respect of P's claim against D1 concerning the alleged UBWs, D1's duties under s.34H(1) and s.34(I)(1) are also duties owed by D1 to all the other co-owners under the DMC.¹⁰ It is doubtful whether P can have a cause of action against D1 by relying upon s.14 of the BO. In any event, assuming that such a cause of action exists, in my view, it is arguable that such a claim is a tortious claim based upon the same factual matters, which should also be covered by Clause 16 of the DMC.

(2) As to P's claims against D2 and D3:

(a) Plainly, the allegation that D2 and D3 have breached Clauses 7 and 8 of the DMC is a claim touching upon the DMC.

(b) By the operation of ss.34H(2) and 34I(2), any duties owed by D2 and D3 to P under ss.34H(1) and 34I(1) (if any) would arguably be duties owed to P under the DMC. P's claim against D2 and D3 in relation to s.18 of the BMO cannot be

¹⁰ See ss.34H(2) and 34I(2) of the BMO.

separated from P's claim based upon ss.34H(1) and 34I(1) of the BMO. *Prima facie*, P's claim against D2 and D3 based upon the BMO is within the ambit of Clause 16 of the DMC.

- (c) In respect of P's claim against D2 and D3 based upon negligence and breach of common duty of care, the factual basis in support of this claim is same as the factual basis in support of the claim based upon the DMC and the BMO. I am of the view that arguably the claim based upon negligence and breach of common duty of care is arguably covered by Clause 16 of the DMC.

25. In my judgment, Ds have shown that the conditions in Article 8(1) of the UNCITRAL Model Law, which has been given effect by s.20(1) of the AO, have been satisfied. Accordingly, unless P can show that Clause 16 of the DMC is null and void, inoperative or incapable of being performed, I shall stay the proceedings herein in favour of arbitration.

Clause 16 of the DMC not incapable of being performed

26. P submits that Clause 16 of the DMC is incapable of being performed in the present case because its mechanism for appointment of arbitrators is incapable of being performed in a dispute involving multiple parties:-

- (1) Clause 16 provides that disputes are to be referred to:

“a single arbitrator in case the parties agree upon one, otherwise to two arbitrators, one to be appointed by each party to the difference, and their umpire”

(2) Clause 16 stipulates an agreed mode of appointment of arbitrators that provided for (a) each party’s entitlement to appoint one arbitrator and (b) the maximum number of arbitrators, which is restricted at two.

(3) In the present case, there are four parties to the present dispute. In the event that the identity of the single arbitrator cannot be agreed, the express entitlement for each party to appoint an arbitrator may lead to the result that more than 2 arbitrators are appointed despite the stipulation of Clause 16.

27. I am not persuaded by these submissions.

28. In the event that the parties herein fail to agree to appoint a single arbitrator, the parties can try to agree that they would appoint a single arbitrator selected by a neutral and reputable organization, for example, the Hong Kong International Arbitration Centre (“HKIAC”). If all the parties are acting reasonably, there should be no difficulty in pursuing this option.

29. Alternatively, the parties can have discussion to try to agree on an appointment procedure to cater for the current situation. In the event

that the parties fail to agree on an appointment procedure, the mechanism laid down in ss.13 and 24 of the AO would apply. S.24 of the AO provides:-

“(1) Article 11 of the UNCITRAL Model Law, the text of which is set out below, has effect subject to section 13(2) and (3)—

“Article 11. Appointment of arbitrators

.....

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure, or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

.....”

(4) In any other case (in particular, if there are more than 2 parties) article 11(4) of the UNCITRAL Model Law, given effect to by subsection (1), applies as in the case of a failure to agree on an appointment procedure.” (Emphasis added)

30. By the operation of s.13(2) and (3), and s.24(1) and (4) of the AO, in the event that the parties involved in this case cannot agree on an appointment procedure, HKIAC would take the necessary measure to secure the appointment of arbitrator(s).

31. With respect, I do not regard the problem mentioned in P's submissions is real and incapable of being resolved.

Whether stay should be refused after taking into account the principles set out in s.3 of the AO?

32. P submits that s.20 of the AO is inoperative in this case because the principle of open justice and the public's right to seek and receive information would be infringed if the dispute is referred to arbitration. At the same time, P says that it does not seek to argue that, by reason of the secrecy of the arbitration process, ss.18 and 20 of the AO are objectionable in general.

33. P submits that:-

(1) There are exceptional and/or compelling reasons such that, in the present case, s.20(1) of the AO is inoperative and/or that its application to the present case is precluded by public policy considerations.

(2) P relies upon the dictum of Ribeiro PJ in *Paquito Lima Buton v Rainbow Joy Shipping Ltd Inc*¹¹:

"44. However, it is clear that there is no overriding right to insist on arbitration. The AO makes it clear that the parties' freedom to agree on how their dispute is to be resolved is "subject to the observance of such safeguards as are necessary in the public interest". Furthermore, the UML 42 expressly recognizes that domestic laws may be enacted which exclude certain

¹¹ (2008) 11 HKCFAR 464

disputes from arbitration. **It follows that the mandatory stay provisions of art.8 are inoperative if some other law precludes their application to the dispute in question.**” (Emphasis added by P)

(3) S.3(2) of the AO provides that:

“This Ordinance is based on the principles—

(a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and

(b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance.”

(4) In this case, the application of s.20(1) of the AO is precluded by the Hong Kong Bill of Rights Ordinance (“HKBORO”), because, in the context of the present case, Clause 16 of the BMO has the effect of denying the public’s right to information and right to know — a right guaranteed under Article 16(2) of the Hong Kong Bill of Right as set out in the HKBORO.

(5) The persons who have a proper interest in the information in the present case are (a) all the co-owners of the Building; (b) the tenants and visitors within the Building; (c) the public in the vicinity of the Building; and (d) co-owners or tenants of other buildings managed by D3. The safety of the Building, as well as whether the Building has been managed properly by D3, should be made known to the aforesaid persons.

(6) Further, the dispute between the parties should be resolved in court so that the Buildings Department (“BD”) would know whether there are UBWs inside the Building. The BD would need to take enforcement action if the UBWs mentioned by P indeed exist.

34. With respect, P’s submissions do not have a valid legal basis.

(1) In the *Paquito* case, one of the issues is whether the court is bound to stay a claim for employees’ compensation in favour of arbitration where an operative arbitration agreement exists. The Court of Final Appeal held that s.18A(1) of the Employees’ Compensation Ordinance (“ECO”) has conferred exclusive jurisdiction on the District Court to deal with all ECO claims save in the cases expressly excepted. Arbitration is not such an exception. Accordingly, there is no power to stay ECO proceedings in favour of arbitration.¹²

(2) As said by Ribeiro PJ at [44] of the *Paquito* case, the mandatory stay provisions in Article 8 of the UNCITRAL Law would be inoperative if some other law precludes their application to the dispute in question.

¹² *Paquito*, [41] to [55]

(3) The main plank in P's submissions is Article 16(2) of the Hong Kong Bill of Right. However, s.7(1) of the HKBORO expressly provides:

"This Ordinance binds only—

(a) the Government and all public authorities; and

(b) any person acting on behalf of the Government or a public authority."

(4) None of the parties in these proceedings is the Government or a public authority, and none of them are acting on behalf of the Government or a public authority.

(5) P submits that an arbitrator is a public authority. However, P is unable to cite any authority in support of this proposition. I refuse to accept this submission.

(6) In my view, it is plain and obvious that the HKBORO has no application at all. With respect, the legal basis of P's submissions is flawed. Accordingly, P's submissions must be rejected.

(7) S.3(2)(b) of the AO expressly provides that "*the court should interfere in the arbitration of a dispute **only** as expressly provided for in this Ordinance.*" P has not pointed to any provision in the AO which would prevent the operation of the mandatory stay provisions in Article 8 of the UNCITRAL Model Law in this case.

(8) There is no law preventing the operation of the mandatory stay provisions in this case.

35. Each and every co-owner of the Building has acquired an interest in the Building subject to and with the benefit of the provisions in the DMC, including Clause 16. This is the informed choice made by each co-owner at the time of acquisition of his unit in the Building. For the reasons set out in the above, there is no legal basis upon which the court may refuse to enforce the mandatory stay provisions prescribed in s.20(1) of the AO in this case.

Non-compliance with Order 12 rule 8

36. In P's Sub, P says that D2 and D3 has failed to comply with the requirement laid down in Order 12 rule 8(2) by failing to give a notice of intention to defend in the prescribed form. P's submissions are as follows:-

(1) Order 18 rule 8(2) provides:

“(2) A defendant who wishes to argue that the Court should not exercise its jurisdiction in the proceedings on one or more of the grounds specified in paragraph (2A) or on any other ground shall also give notice of intention to defend the proceedings and shall, within the time limited for service of a defence, apply to the Court for —
(b) an order staying the proceedings ...”

(2) “Notice of intention to defend” means an acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf

it is signed intends to contest the proceedings to which the acknowledgment relates. See Order 1 rule 4(1).

(3) An acknowledgment of service must be in Form No. 14, 15 or 15A in Appendix A, whichever is appropriate. See Order 12 rule 3(1).

(4) Form No. 14 in Appendix A contains the following question and requires a defendant to tick the appropriate box to indicate his intention:-

“2. State whether the Defendant intends to contest the proceedings (tick appropriate box)”

(5) However, in the A/S filed by D2 and D3 on 3 September 2021, there was not a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings. Question 2 in the A/S reads:

“2. State whether the 2nd and 3rd Defendants intend to contest the jurisdiction of the District Court

(6) The A/S filed by D2 and D3 does not satisfy the definition of “notice of intention to defend” under Order 1 rule 4. Therefore, D2 and D3 have not complied with the procedural requirement under Order 12 rule 8(2) before taking out the 1st summons.

37. However, after the amendment to the A/S made by the 2nd summons, P has fairly dropped this ground.

38. For the sake of completeness, I would say that even without the amendment, the non-compliance would not have the effect of preventing D2 and D3 from getting an order in terms of the 1st summons. Order 2 rule 1 provides:-

“Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, **the failure shall be treated as an irregularity and shall not nullify** the proceedings, any step taken in the proceedings, or any document, judgment or order therein.” (Emphasis added)

39. In my view, the non-compliance is an irregularity, which shall not nullify D2 and D3’s application made by the 1st summons. Although the A/S filed by D2 and D3 is not in the prescribed form, by the A/S, D2 and D3 have clearly conveyed the message to P that they would contest the jurisdiction of this court over the dispute between P on the one hand and D2 and D3 on the other hand. P has not been prejudiced by that A/S in any way. The non-compliance cannot be a ground resisting the stay application.

Allowing the stay application

40. In my judgment, P has failed to show that Clause 16 of the DMC is null and void, inoperative or incapable of being performed. In accordance with s.20(1) and (5) of the AO, I shall refer the matters in

dispute to arbitration and stay the proceedings herein. The stay application made in the 1st summons must be allowed.

Costs of the application

41. In my view, costs should follow the event, with a certificate for counsel.

42. P does not object that costs of the 1st summons should be paid by P to D2 and D3. However, P submits that D1 should not get costs of the 1st summons, because D1 has not made the stay application jointly with D2 and D3. P has referred me to a letter from D2 and D3's solicitors to P's solicitors dated 31 August 2021, in which D2 and D3's solicitors said:

“..... we have come into contact with [D1] and invited him to support [D2 and D3]'s request to [P], and consider a joint application with our clients for a stay of proceedings for reference of the dispute to arbitration, if required. We understand that [D1] will seek independent legal advice on this matter.”

43. With respect, I do not accept P's submissions.

- (1) The order sought in the 1st summons dated 3 September 2021 is that “[t]here be a stay of proceedings in this Action and the dispute between [P] and [D1], [D2] and [D3] be referred to arbitration”. Plainly, although the 1st summons is taken out by D2 and D3 only, the scope of the order sought in the summons also covers D1.

(2) At the very early stage, D1 has indicated that he is supporting the stay application made in the 1st summons. D1 has indicated his position in the call-over hearing on 19 October 2021 and obtained leave to file affidavits and written submissions.

(3) As submitted by D1, since the 1st summons has already covered D1's position, it would not be necessary for D1 to take out another summons for a stay.

(4) In my view, D1 is also a successful party in the stay application. P is liable to pay costs of the application to D1 as well.

44. Ds submit that costs of the 1st summons should be assessed on an indemnity basis. Ds rely upon *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd*¹³, in which Mimmie Chan J said:-

“7. This principle of awarding costs on an indemnity basis in the absence of special circumstances has been approved by the Court of Appeal as “a salutary practice”, in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 2)* [2012] 4 HKLRD 569 and in *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKLRD 627.

.....

14. There was no reason to differentiate between unsuccessful attempts to resist enforcement of an arbitral award made under an arbitration agreement, where the general rule was that the unsuccessful party would be ordered to pay indemnity costs unless special circumstances could be shown, and **unsuccessful**

¹³ [2016] 1 HKLRD 582

attempts to resist enforcement and recognition of the agreement itself. Parties to an arbitration agreement should expect the Court to recognize and enforce the agreement. If they took the risk of instituting court proceedings in breach of the agreement, they should expect to pay costs on a higher scale if their attempt to impeach the agreement failed.”
(Emphasis added)

45. P accepts that the general rule is that in proceedings arising out of or in connection with arbitral proceedings, the court would normally consider it appropriate to order indemnity costs. However, the court may depart from this general rule if there are special circumstances.¹⁴ P submits that it would be reasonable for P to contest the stay application, for this is not a clear case for stay. P says that at the very least, it is arguable that some of the claims in this case may not be subject to the mandatory stay. P submits that all these constitute special circumstances, and hence indemnity costs should not be ordered against P.

46. With respect, it would be sufficient for me to say that this case is a clear case for stay. I do not see any reason why indemnity costs should not be ordered.

Deposition

47. I allow the stay application. There be an order that the proceedings in this action be stayed and the dispute between P and Ds herein be referred to arbitration. Costs of the 1st summons be paid by P to Ds forthwith on an indemnity basis, with a certificate for counsel. Costs

¹⁴ *Gao Haiyan v Keeneye Holdings Ltd (No.2)* [2012] 1 HKC 491, 494

payable by P to D2 and D3 be summarily assessed at HK\$150,000, and costs payable by P to D1 be summarily assessed at HK\$130,000.

48. Lastly, it remains for me to thank counsel for the assistance rendered to the court.

(MK Liu)
District Judge

Mr Herbert Leung, instructed by V. Hau & Chow, for the plaintiff

Ms Lorinda Lau, instructed by K.Y. Leung & Carina Chen, for the 1st defendant

Mr Dexter Leung, instructed by Paul C.K. Tang & Chiu, for the 2nd and 3rd defendants