

# Part 3: Other Laws Governing Estate Agency Practice and Conveyancing Procedures

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## **OTHER LAWS GOVERNING ESTATE AGENCY PRACTICE**

### **THE LAW OF CONTRACT**

#### *The contract*

1. A contract is an agreement between two or more parties that is legally binding and enforceable at law. A contract can be either express or implied. Generally, an express contract can be in writing or oral. In some cases, the law will imply the existence of a contract from a consistent course of conduct of the parties.

A contract may be a simple contract or a deed. A contract in writing can be signed “underhand” by the party to be bound, by placing his signature on the contract. A contract made by deed must be “signed, sealed and delivered”. It means that a party to be bound by a deed must:

- sign the document;
  - seal it by attaching his seal; or
    - attaching a red wafer, or
    - inserting in a circle the letters “L.S.” to indicate where the seal would be attached; and
  - deliver it.
2. A limited number of contracts are required to be by deed. For example, all powers of attorney must be created by deed. Generally, any document creating or disposing of a legal estate or interest in land must be by deed, such as:
    - a lease for more than three years;
    - an assignment; and
    - a mortgage.

#### *Formation of a contract*

3. The essential elements of a contract are (1) offer, (2) acceptance, (3) consideration and (4) intention to create legal relation.
4. An offer is a definite promise made by the offeror to the offeree to do or to forbear from doing certain specified acts. It is usually made to a particular person. In some cases the offer can be made to the public, such as where an advertisement offering a reward for services is published.

An offer is not an “invitation to treat”, which is an invitation to make an offer. For example, an invitation to bid made by the auctioneer at an auction of government land is an invitation to treat, not an offer.

As a general rule, an offer may be withdrawn prior to its acceptance. In order for the withdrawal to be effective, the offeror must communicate to the offeree the withdrawal of the offer. In some cases, the offer may lapse if it has not been accepted within the stipulated time or, where no time is stipulated, after the lapse of a reasonable time.

5. When an offer is accepted, a contract comes into existence so long as the acceptance complies with the following rules:

- the acceptance must be unqualified. An offer cannot be accepted conditionally, which will destroy the offer and act as a counter-offer made by the offeree;
- silence does not amount to acceptance. The offeror cannot impose a contract on the offeree by telling him he will be bound if he does not communicate his rejection within a certain time; and
- if acceptance is made by post, it is effective at the time of posting of the letter of acceptance (not when the letter is received by the offeror).

However, the position is not so clear where the parties communicate by electronic or telephonic means. It would seem that acceptance by telex is effective when the telex is received; by fax at the time it is communicated; and by email at the time when the email is sent.

In e-mail communications which are subject to the terms of the Electronic Transactions Ordinance, where one party has designated an information system for the purpose of receiving electronic records, receipt occurs when the electronic record is accepted by the designated information system. If the party has not designated any information system, receipt occurs when the electronic record comes to his knowledge. It is unclear whether knowledge is actual or constructive, and so in e-commerce an online seller should always state in his offer the required method of communication of acceptance.

6. A simple contract requires consideration to be enforceable. Consideration is sometimes said to be “the price a party pays” for the other’s promise. But a contract by deed is enforceable without consideration.

There are several rules governing consideration. These include:

- consideration cannot be past. So if an estate agent voluntarily performs services for a client who then promises to pay for them, this promise is not legally binding because the agent has not given any consideration to the client in return for the promises for payment;
- consideration must be legal and cannot include an illegal act;
- consideration needs to be of value, but does not have to be equivalent to the thing received. The court is not concerned with the adequacy of the consideration or bargain. A sale of property at a price substantially below the market price is still a good consideration; and
- part payment of an existing debt owed to the creditor cannot discharge the remaining part of the debt because the debtor has given nothing (i.e. he has suffered no detriment) for being released from the remaining part of the debt. Thus, if an estate agent were owed a commission of \$10,000 by a client, and he agrees to accept \$8,000 only without receipt of any consideration, he still has the right to recover from the client the remaining \$2,000 even if he promises not to. But if the promise is given in a deed by the estate agent, it will be enforceable by the client.

7. A contract must also show that the parties intended their promises to be binding and to create a legal relationship between themselves. The presumption is that social arrangements between friends, or domestic arrangements between relatives such as husband and wife, are not intended to create legal relation and do not give rise to legally binding contracts.

Commercial contracts operate under different principles and it is presumed that an agreement between commercial parties must be intended to create legal relation and gives rise to a legally binding contract.

8. The parties may negotiate the terms of a property transaction, and agree that there is no binding contract between them until a formal sale and purchase agreement (SPA) has been executed by them. These negotiations are referred to as being “subject to contract”. If the parties subsequently cannot agree on the terms, or decide not to proceed, there is no liability on either party because there is as yet no binding contract.
9. The term “subject to contract” is quite different from a “provisional or preliminary agreement for sale and purchase” (PASP) which is usually drafted by the estate agent. The “PASP” usually provides for the execution of a formal SPA, to be drafted by the vendors’ solicitors and approved by the purchasers’ solicitors, for the replacement of the PASP. The PASP is generally a binding agreement enforceable on its terms.

#### *Contract for Land*

10. A contract for the sale of land has a dual nature. On the one hand, it is a contract and must exhibit the essentials of offer, acceptance, consideration and intention to be legally bound. On the other hand, entry into the contract will create an interest in land, often called a proprietary interest. The law requires certain formalities for a land contract. These requirements are found in Section 3(1) of the Conveyancing and Property Ordinance (CPO).
11. Section 3 of the CPO provides:
- (1) Subject to Section 6(2), no action shall be brought upon any contract for the sale or other disposition of land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorised by him for that purpose.
  - (2) This section applies to contracts or other dispositions whenever made and does not affect the law relating to part performance or sales by the court.
12. Therefore, a contract for the sale or other disposition of land can be:
- entirely in writing; or
  - evidenced by a note or memorandum containing basic terms of the contract such as the details of the parties, the price, the property and the completion date.

The terms of a contract for the sale or other disposition of land must be certain. The contract must contain, at least,

- the parties;

- the property;
- the price; and
- other material terms, such as the completion date.

The parties should be named and described so that their identities are clear, and the property must be clearly identified and adequately described. The specific price and completion date should be stated.

The law will then imply into such contract all other necessary terms common to a property transaction.

13. If Section 3(1) is not complied with, the contract is not enforceable. However, a party who has performed obligations under the unenforceable agreement can seek specific performance under Section 3(2) on the basis of part performance. Part performance is evidence of actions which were performed because the party believed a contract was in existence. For example, if a lessee claims to have a four-year lease, but there is nothing in writing, the fact that the lessee has paid rent for one month would indicate that there is some type of tenancy agreement. It would then be up to the court to decide what those terms are.
14. The contract alone will not give the purchaser legal title to the land. For that, a deed is necessary: Section 4 of the CPO.

#### *Interpretation of a contract*

15. The terms of a contract may not be clear in all cases, probably because not all of them are put down in writing. Many statements made in negotiations leading up to entry into the contract may not be included as terms in the contract. Statements and representations made by the parties before or at the time of entering into a contract can be classified as:
  - Mere puffs: these are statements which have no legal effect because neither the person making the statement nor the person to whom the statement is made believes the truth of the statement;
  - Representations: a representation is a statement of fact which does not form part of the contract but which induces or persuades a party to enter into the contract. If it is not true, it may be actionable as a misrepresentation; and
  - The terms of the contract: in a written contract, it is presumed that the contract contains all the terms of the parties, other than any terms which may be implied into the contract by the court.

#### *Express and implied terms*

16. Express terms are those expressly agreed upon by the parties. They can be conditions, warranties, or innominate terms.
  - A condition is a major term, the breach of which entitles the innocent party to terminate the contract and to claim damages.

- A warranty is a minor term. On breach, the innocent party can claim damages but cannot terminate the contract.
- An innominate term is one which is left to the court to decide how to deal with. A breach which has a serious effect will cause the term to be treated the same way as a condition. For a minor breach, the term will be treated as a warranty.

17. Any contract, even one in writing, can have terms implied into it by the court. The main categories of implied terms are:

- terms implied by reference to trade, custom and usage;
- terms implied by statute;
- terms implied to give business efficacy to the contract. These terms are necessary to allow the contract to be effectively enforced; and
- terms implied by reference to the nature of the contract. Terms in this category are implied because the particular type of contract should be protected in some way.

Implied terms can also be conditions, warranties or innominate terms.

#### *Breach of contract*

18. If one of the parties to a contract breaches a term of the contract, he is in breach, and the innocent party is entitled to claim damages from him for any loss the latter suffered as a result of the breach. If the term so breached is of a condition, or the court finds that the breach is a serious breach, the innocent party may also terminate the contract.

Where before the due date for performance, a party indicates he will breach the contract, he is treated as offering to repudiate the contract. The innocent party can then either:

- accept the “anticipatory” breach, terminate the contract and sue for breach; or
- do nothing and if the guilty party still breaches the term on the due date of performance, sue him for breach.

#### *Common law and equitable remedies*

19. The common law remedy for breach of contract is damages. The plaintiff must prove the existence of a valid contract, a breach of contract by the defendant, and that the plaintiff suffers loss as a result of the breach. Damages are given to him as compensation for his loss for the other party’s breach.

Damages compensate the innocent party’s loss. They do not, by giving an amount in excess of that loss, punish the defendant for his breach. The measure of damages is usually assessed on the basis of the amount needed to put the innocent party in the position he would have been in had there been no breach and the contract been performed.

20. In many contracts, there is a clause in the contract indicating a pre-agreed amount to be paid by the party in breach to the innocent party that suffers loss on breach as being a genuine pre-estimate of loss. If so, this “agreed sum” will be treated as “liquidated damages” to be upheld. However, if this “agreed sum” is really a threat to prevent a

breach, it will be treated as a penalty and not enforceable, and the court will instead assess the actual damages payable.

21. In a land contract, the agreed sum clause deals with the deposit in particular. Traditionally the vendor is entitled to forfeit the deposit upon the purchaser's breach. In some cases, he will also be entitled to sue for any loss in excess of the amount of the deposit forfeited.

Courts have decided that a deposit in the sale of land represents a sum of 10% of the purchase price. Any deposit amount which is more than 10% of the purchase price will likely be a penalty and cannot be forfeited. In such a case, on the purchaser's default, the vendor cannot keep any of the deposit and must go to court to sue for his actual loss.

22. As a general rule, common law damages are deemed inadequate in respect of breaches of land contracts. The court is usually prepared to give the innocent party the equitable remedy of specific performance at the innocent party's request. Thus the purchaser can seek the Court's assistance to compel the vendor to convey the property to him in accordance with the contract of sale where the vendor refuses to proceed with the contract.

When the plaintiff seeks an equitable remedy he must prove that the contract is valid, and that the defendant breaches it. Then he must ask the court to exercise its discretion and grant him the relief he wants. The court will refuse to grant the remedy if there are factors which make the courts consider it unfair for the plaintiff to receive the remedy he seeks, e.g. undue delay in seeking the remedy.

23. The other equitable remedies are:

- Injunctions: where the court orders the defendant to stop doing something. This is only an interim order, and a permanent remedy is also needed;
- Rescission: where there are faults in the formation of the contract, which are so important that neither party is treated in law as having agreed to enter into the contract. The parties can ask the court for a formal declaration of rescission; and
- Rectification: a remedy whereby the court reads a written contract as having been amended to reflect the actual bargain of the parties, not the bargain contained in the writing.

## MISREPRESENTATION

24. A misrepresentation is a false or untrue statement of fact made by one party ("the representor") to the other ("the representee") at the time or before a contract is made, intending to induce the representee to enter into that contract and the representee is in fact so induced and actually enters into that contract. A misrepresentation can be made orally, in writing or by conduct. Though silence generally does not amount to misrepresentation, in some cases, it can be. In *Shum Kong Ors v Chui Ting Lin & Ors* [2001], the vendors owned a three-storey village house of 700 sq ft. The property also consisted of a garage, and a large garden of 3,500 sq ft. The house, the garage and the garden were in the same enclosure. The garage and the garden were actually on government land held by way of short-term tenancy. This tenancy could not be assigned by the vendors to the purchasers. Neither the vendors nor the estate agent told the purchasers about the short-term tenancy of the garage and the garden. The court held that this conduct amounted to misrepresentation by silence because it created the impression that the sale included the house, the garage and the garden. The purchasers were able to rescind the contract.

25. Misrepresentation may be fraudulent, innocent or negligent.

- Fraudulent misrepresentation – this is where the representor makes a false statement knowingly, or without belief in its truth, or recklessly as to whether or not it is true, and he makes the statement to induce the representee to enter into the contract. The representee can either rescind the contract, sue for damages under the Misrepresentation Ordinance (MO), or sue in tort for damages for deceit. The remedy of deceit is not an easy one to pursue as courts are reluctant without clear and cogent proof to say that a person deliberately lies in contracting.
- Negligent misrepresentation – advice given by the representor to the representee is wrong or defective, and as a result the representee takes an action (or fails to take an intended action) suffering loss as a result.
- Innocent misrepresentation – a false statement is made by a representor who has reasonable grounds for believing that the statement is true, throughout the negotiations stage and up to the time the contract is made.

## **NEGLIGENCE**

26. The three basic elements to constitute an action in tort of negligence are:

- the defendant owes a duty of care to the plaintiff in law;
- the defendant breaches that duty; and
- the plaintiff suffers loss or damage from the breach of duty where the loss or damage relates to physical injuries or damage to his property and the loss is foreseeable.

Negligence covers the doing of the act, as well as the failure to do an act when it should be done.

27. The core of the action of negligence is a breach of a legal duty of care owed by the plaintiff to the defendant which results in loss to the plaintiff. The duty of care is a duty to take reasonable care to avoid acts or omissions which the defendant could reasonably foresee would be likely to injure his “neighbour”.

No contract between the parties is needed for an action in tort of negligence.

28. In examining the breach of the duty of care, courts now look to see if:

- the damage or injury is foreseeable at the time the defendant does the act; and if
- there is some relationship, referred to as “sufficient proximity”, between the parties so that the plaintiff must be within the reasonable contemplation of defendant as the person who will be affected when doing the act.

29. Even if the defendant does owe a duty of care to the plaintiff, the plaintiff must still show that the defendant has in fact breached that duty. The court decides, based on factors mentioned above, whether the defendant is liable to the plaintiff because no “reasonable man” would act in that way. So if the defendant does something which a reasonable man would not do in those circumstances, then the duty of care has been breached. If the

breach occurs because the defendant had omitted to do something, the same “reasonable man” principle applies. The “reasonable man” is the average person.

30. The plaintiff must also show:

- that the breach is the cause of the loss or damage; and
- that the damage or loss is not too “remote” from the breach.

There must be a causal link between the breach and the loss or damage. If it is caused by some factor other than the defendant’s negligence, then the defendant is not liable.

Some courts apply a “but for” test to see if the breach is the cause of the loss or damage. If the plaintiff can show that “but for” the defendant’s actions the harm would not have occurred to the plaintiff, then the breach is the cause of the damage. So if there is a break in the chain between the breach and the damage, then the loss or damage will not have been caused by the breach.

31. Loss or damage will be too remote when it is caused not by the action of the defendant but by an intervening event. The amount of damages claimed must also be linked to the loss or damage caused and cannot be too unusual or too far from the breach.

32. Damages may be awarded for a negligent misstatement even without a contractual relationship where there is a “special relationship” between the parties. This means:

- the plaintiff seeks advice or information from the defendant, who possesses special skill;
- the defendant knows or ought to have known that the plaintiff will rely on such advice or information;
- the plaintiff has acted on the advice or information, and has suffered economic loss; and
- it is reasonable for the plaintiff to seek the advice from the defendant and to act on it.

33. In some cases, the duty of care arises because the defendant is said to have “assumed responsibility” for his statements which he knows will be relied upon. This assumption is often made in cases where the plaintiff is a professional and it is reasonable to assume he has special skill and knowledge, for example, if the person making the statement is a solicitor.

34. A client of an estate agent who seeks advice from an estate agent about the price he should ask for the property he is selling may be able to sue if the advice that has been given turns out to be wrong, and the client suffers loss as a result. This is because:

- the estate agent giving advice should have special knowledge of the property market;
- the agent knows or ought to have known that the client would act on such advice;
- the client in fact acts on such advice and suffers loss; and

- it is reasonable for the client to seek advice from the agent and to act on it.

Estate agents should therefore be cautious and take professional care in offering advice to clients on the asking price.

## **OTHER ORDINANCES RELATING TO ESTATE AGENCY PRACTICE**

### *The CPO*

35. Section 4 of the CPO provides that a legal estate in land can be created only by deed.
36. Section 5 of the CPO requires that an instrument creating or disposing of equitable interests in land:
- must be in writing; and
  - that writing can be signed by the person creating or disposing of the interest or by his lawfully authorised agent.
37. Section 6 of the CPO provides as follows:
- (1) All interests in land created by parol and not put in writing and signed by the persons creating the same, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.
  - (2) Nothing in Section 3 or 5 or in subsection (1) shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without a premium.

This sets out the consequences of the failure to observe Section 3 (refer to paragraph 11 above) or Section 5. Instead of receiving an interest in land, any non-compliant transaction will operate only as a personal interest between the parties. It will not give an interest in land.

38. However, nothing in Sections 3 (land contract in writing) or 5 (instrument in writing) of the CPO applies to a lease for a term of not more than three years if the tenant is in possession, paying market rent, and does not pay a premium for the tenancy. Such a tenancy will be valid and will be effective against a subsequent purchaser, so this makes the interest a proprietary one in the land, not merely a personal or contractual interest.

### *The Land Registration Ordinance (LRO)*

39. Section 2(1) of the LRO provides that:

The Land Registry shall be a public office for the registration of deeds, conveyances, and other instruments in writing, and judgments; and all deeds, conveyances, and other instruments in writing, and all judgments, by which deeds, conveyances, and other instruments in writing, and judgments, any parcels of ground, tenements, or premises in Hong Kong may be affected, may be entered and registered in the said office in the prescribed manner.

This produces a deeds system under which the registration of a memorial, evidencing a document claiming an interest in land, in the Land Registry gives notice of the claim, and gives priority against subsequent, registered transactions. The Land Registrar will register a memorial so long as the claimed interest concerns land and is in writing.

40. Section 3 of the LRO provides for the priority of registered instruments:

(1) Subject to this Ordinance, all such deeds, conveyances, and other instruments in writing, and judgments, made, executed, or obtained, and registered in pursuance hereof, shall have priority one over the other according to the priority of their respective dates of registration, which dates shall be determined in accordance with regulations made under this Ordinance.

(2) All such deeds, conveyances, and other instruments in writing, and judgments, as last aforesaid, which are not registered shall, as against any subsequent bona fide purchaser or mortgagee for valuable consideration of the same parcels of ground, tenements, or premises, be absolutely null and void to all intents and purposes:  
 Provided that nothing herein contained shall extend to bona fide leases at rack rent for any term not exceeding three years.

41. Registration of an instrument determines priority. If the instrument is registered within one month from the date of execution, then priority is given not from the date of registration, but from the date of execution. If it is registered more than one month from the date of execution, then priority is given from the date of registration.

42. Example

<u>SPA</u>	<u>Date of Execution of Document</u>	<u>Date of Registration</u>
A	1 Jan 2006	15 Feb 2006
B	4 Jan 2006	31 Jan 2006
C	3 Jan 2006	10 Feb 2006

B has the highest priority and C has a higher priority than A.

43. Section 3(2) of the LRO provides that unregistered instruments have no effect against any subsequent bona fide purchaser or mortgagee for valuable consideration dealing with the land. However, priority is given to a tenancy for a term not more than three years even without registration. On the other hand, if there is an option to renew, or an option to purchase, given in this tenancy, the option will only have priority if it is registered. So it is necessary to register a tenancy with an option to protect the option.

*The Housing Ordinance (HO)*

44. Section 17A of the HO empowers the Housing Authority to sell any property in a housing estate where the title is vested in the Authority, or it has control and management of the estate. In selling, the Housing Authority may fix the terms, covenants and conditions.

However the Director of Housing has overall power to stipulate that the SPA and the assignment of property sold under Section 17A of the HO shall be subject to the terms and

conditions contained in the Schedule to the HO. The Schedule to the HO sets out detailed restrictions to which the property will be subject.

45. Section 17B of the HO provides that if there is a breach of any term of condition in the SPA, the assignment or other form of alienation will be void.
46. Properties disposed of under the Home Ownership Scheme (HOS) and the Tenants Purchase Scheme (TPS) to the HO are subject to the following alienation restrictions contained in the Schedule:

- *For TPS flats within the first two years from the date of first assignment*

In the first two years the property cannot be disposed of except to the Housing Authority at the list price specified in the assignment.

- *For TPS flats within the third to fifth year from the date of first assignment and for HOS flats within five years from the date of first assignment*

(i) If the owner wishes to dispose of it, he shall first offer to assign it to the Housing Authority at market value assessed by the Director of Housing at the time of the owner's offer to assign less the original purchase discount. Only after the Housing Authority has declined the offer can the owner dispose of it in the open market, but subject to payment of a premium to the Housing Authority.

(ii) Only after the owner has received the Housing Authority's (a) confirmation in writing declining the owner's offer to assign the property *and* (b) acknowledgement of his premium application, can he enter into an SPA for the property. It must be a condition of such agreement, however, that the premium as assessed by the Director of Housing be paid prior to assignment and within 28 days of the date of the agreement or within such period as may be otherwise stipulated by the Director of Housing.

- *For TPS flats and HOS flats five years after the date of first assignment*

After the expiration of five years after the date of first assignment of a property by the Housing Authority to an owner, the owner can dispose of it in the open market but subject to payment of a premium as assessed by the Director of Housing to the Housing Authority. Again, he can enter into an SPA provided that it is a condition of such agreement that the premium as assessed by the Director of Housing be paid prior to assignment and within 28 days of the date of the agreement or within such period as may be otherwise stipulated by the Director of Housing.

Any person who sells or otherwise disposes of his property before payment of the assessed premium commits an offence under the HO and is liable on conviction to a fine of \$500,000 and to imprisonment for one year and such sale or disposal will also be void.

#### *Personal Data (Privacy) Ordinance (PDPO)*

47. The definition of "personal data" is provided in Section 2 of the PDPO. It means:

- any data relating directly or indirectly to a living individual;

- from which it is practicable for the identity of the individual to be directly or indirectly ascertained; and
- in a form in which access to or processing of the data is practicable.

Personal data then means any recorded information of the type referred to which can be accessed, processed or retrieved. It includes information relating to an individual such as name, telephone number, address, sex, age, occupation, marital status, salary, financial status, nationality, photograph, Hong Kong identity card or passport number, medical and employment records, including assessments of employment performance, and expressions of opinion.

48. Under the PDPO, a “data user” means a person who, either alone or jointly or in common with other persons, controls the collection, holding, processing or use of the data. This user can be an individual, a company, a public body or a government department. The “data subject” is the individual who is the subject of the data.
49. The Schedule to the PDPO sets out six principles for the protection of data:
- Principle 1 addresses the purpose and manner of collection of personal data. It seeks to ensure that the collection is necessary, lawful and fair and that the collection from the data subject is consensual.
  - Principle 2 requires all practicable steps to be taken to ensure the accuracy of data.
  - Principle 3 requires that a data user cannot without the consent of the data subject use personal data for any purpose other than the purpose for which the data were to be used at the time of collection.
  - Principle 4 addresses security of personal data and requires all practical steps be taken to ensure that personal data held by a data user are protected against unauthorised or accidental access, processing, erasure or other use.
  - Principle 5 requires all practical steps to be taken to ensure that a person can ascertain a data user’s policies and practices and be informed of the kind of personal data held and the purposes for which the personal data are held.
  - Principle 6 provides that a data subject is entitled to ascertain from a data user if the data user has personal data and to request access to and to correct such personal data.
50. Section 34 of the PDPO provides that where the data user uses the information for direct marketing purposes, he must:
- the first time he uses the data inform the data subject that the data subject is entitled to require him to stop using that data; and
  - if the data subject so requests, stop using that data.

For this purpose, direct marketing includes:

- the offering of goods, facilities or services; and
- the advertising of the availability of goods, facilities or services.

In any direct marketing activities, the data user should provide the individual concerned with an “opt-out” option, i.e. the option not to receive any further communication from him. For example, with direct marketing by mail, the material should provide the customer with the choice of an opt-out option and a return address for him to indicate his choice of such option. Once the data subject chooses the opt-out option, the data user must cease to use the data in question.

### *The Unconscionable Contracts Ordinance (UCO)*

51. The UCO gives the court power to deal with certain unconscionable contracts. It applies to a contract for the sale of goods or supply of services in which one of the parties “deals as consumer”. A consumer, in this case, is someone who is not dealing in the course of a business, and the subject matter of the contract is of a type ordinarily supplied or provided for private use or consumption.

If the court finds a contract was unconscionable at the time it was made, it can:

- refuse to enforce the contract;
- enforce the remainder of the contract without the unconscionable part;
- limit the application of, or revise or alter, any unconscionable part so as to avoid any unconscionable result.

52. Section 6 of the UCO sets out guidelines for the court in considering whether a contract is “unconscionable”. These include:

- the relative strengths of the bargaining positions of the parties;
- whether the consumer was required to comply with conditions which were not reasonably necessary for the protection of the other party’s legitimate interests;
- whether the consumer was able to understand any documents relating to the supply of goods or services;
- whether any undue influence or pressure was exerted on the consumer or any unfair tactics used against him; and
- the amount for which the consumer could have obtained the same goods or services from another person.

53. A contract between an estate agent and a client is a contract for the supply of services in which most clients deal as consumers. So this contract will generally be subject to the terms of the UCO.

### *The Prevention of Bribery Ordinance (PBO)*

54. Section 5 of the PBO seeks to ensure that there is fair play in the procurement of contracts with public bodies. A person will be guilty of an offence if, without lawful authority or reasonable excuse, he offers an advantage to a public servant, to induce or reward the public servant for assistance in procuring a contract (or sub-contract) with a public body or in the payment of the price or other moneys under the contract (or sub-contract). Similarly, any public servant who solicits or accepts such advantage is guilty of an offence.

55. “Advantage” is defined in the PBO to cover almost anything of value, except entertainment. Examples of “advantage” include a gift, loan, fee, reward or commission (in cash or in kind), any payment or release of any loan, any other service. “Entertainment” means the provision of food and drink for immediate consumption and any other entertainment connected with such provision (e.g. a floor show provided in the course of dinner).
56. “Public body” includes the Government, the Executive Council, the Legislative Council, any District Council, and any body appointed by the Chief Executive or Chief Executive in Council. A list in Schedule 1 to the PBO specifies 103 relevant public bodies.
57. Section 9 of the PBO deals with corruption in the private sector. Section 9(1) provides it is an offence for an agent who, without lawful authority or reasonable excuse, solicits or accepts an advantage as an inducement to, or reward for, or otherwise on account of, his doing or forbearing to do any act in relation to his principal’s affairs without the permission of his principal. Any person who offers an advantage to the agent in these circumstances is also guilty of an offence under Section 9(2).

“Principal” includes an employer. “Agent” is any person employed by or acting for the principal. A practitioner in the employ of an estate agency firm would be an agent of the estate agency company as well as the client. The estate agency company is also the agent of the client. Permission for the acceptance of any advantage must be given to the agent by the principal. Permission can be given prior to the event, or as soon as reasonably possible after the offer or acceptance.

Under Section 9(3) of the PBO, it is also an offence for an agent who, with intent to deceive his principal, uses any receipt, account or other document which contains any statement which is false or erroneous or defective in any material particular and which is intended to mislead his principal.

*The MO and the Control of Exemption Clauses Ordinance (CECO)*

58. A party can avoid liability under the MO by incorporating a clause in the contract to exclude or restrict (a) any liability for misrepresentation or (b) any remedy which may be available to the innocent party for such misrepresentation. However Section 4 of the MO provides that such clause will not be effective unless it satisfies the requirements of “reasonableness” set out in Section 3(1) of the CECO.
59. The CECO provides that “reasonableness” is satisfied only if the court determines that the term was a fair and reasonable one having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

**CONVEYANCING PROCEDURES**

**CONVEYANCING STEPS**

60. The first stage involves the preliminary matters, and negotiations between all parties. Among these:
  - the vendor signs the estate agency agreement with an estate agent and puts up his property for sale in the market through the estate agent;
  - a purchaser signs the estate agency agreement with an estate agent and views the property through the estate agent;

- if the purchaser is interested in purchasing the property and he requires mortgage finance, he will make all necessary enquiries with banks about a mortgage on the property;
- the purchaser may proceed to negotiate the terms for the purchase of the property through the estate agent. The estate agent may act for one party (sole agency) or both parties (dual agency); and
- the estate agent negotiates the terms of sale and purchase between the parties, and when they have reached agreement he will draw up a PASP for them to sign.

61. The second stage involves the documentation of a PASP and later the SPA. The steps here include:

- the vendor and purchaser enter into a PASP normally prepared by the estate agent;
- although it is called “provisional” or “preliminary”, the PASP can be binding or non-binding;
- the purchaser pays the initial deposit, which usually ranges from 1%-5% of the purchase price;
- the parties appoint their respective solicitors;
- the vendor's solicitors prepare the draft SPA (commonly referred to as the formal SPA) and send it to the purchaser's solicitors for their approval together with the title deeds, or certified copies of those deeds, if available at the time of signing;
- the purchaser's solicitors will review the draft and make amendments if necessary;
- after the terms of the SPA have been agreed, it will be signed;
- arrangements need to be made for the stamping of the SPA if the property is a residential property. However, the purchaser's solicitors may seek deferral of the stamp duty pending completion; and
- the SPA will be registered in the Land Registry.

62. In the third stage the purchaser's and the vendor's solicitors, in particular, have several matters to attend to prior to arranging for completion. These include:

- if the property is subject to an existing mortgage, the vendor's solicitors will request the mortgagee to send the title deeds, and to advise them of the amount payable on redemption of the property;
- the purchaser's solicitors will raise requisitions on title in writing with the vendor's solicitors within such time as is provided in the SPA (usually seven working days from receipt of the title deeds);
- the vendor's solicitors must answer the requisitions satisfactorily and promptly;
- the purchaser's solicitors will receive a letter of instruction from the purchaser's mortgagee, if they are to act, instructing them to prepare the mortgage documents;

- after receiving the vendor's solicitors' reply to requisitions on title, the purchaser's solicitors will consider whether to recommend the purchaser to accept title of the property;
- the vendor's solicitors will prepare an apportionment account on income and outgoings as well as management deposits; and
- officers and valuers of the purchaser's mortgagee will inspect the property for valuation purpose. Such inspection will normally be arranged by the estate agent.

63. The fourth stage relates to completion. Among these steps:

- the purchaser's solicitors will arrange for the purchaser to execute the assignment, the mortgage and all other relevant documents several days before the completion date;
- the purchaser will have to pay the balance of the purchase price excluding that provided by the mortgagee, and the fees and disbursements of his solicitors;
- the purchaser makes a final inspection of the property with the estate agent on or immediately before the completion date to verify vacant possession of the property will be delivered. If the property is sold with an existing tenancy, usually no such inspection will take place;
- after inspection of the property and on being satisfied that vacant possession can be delivered, the purchaser will confirm with his solicitors who will then arrange for draw down of the mortgage loan with the purchaser's mortgagee, and send to the vendor's solicitors (to complete the transaction by the specified time on the completion date):
  - the assignment duly executed by the purchaser, and
  - the balance of the purchase price;
- against payment of the balance of the purchase price the purchaser's solicitors will receive undertakings, from the vendor's solicitors, to:
  - immediately deliver to the purchaser's solicitors vacant possession of the property by handing over the keys; and
  - within a specified period, return the assignment duly executed by the vendor, the mortgage deed of the existing mortgage, and its release duly executed by the vendor's mortgagee;
- the vendor's solicitors will arrange for the vendor to execute the assignment on the completion date and pay to him the balance of the purchase price;
- the vendor's solicitors will send to the vendor's mortgagee for its execution the release of the vendor's mortgage together with the redemption money as soon as possible after execution of the assignment by the vendor, and will request the vendor's mortgagee to return to them the release duly executed within a specified period; and
- the vendor's solicitors will send to the purchaser's solicitors the assignment and the release duly executed within the period mentioned in the undertaking.

64. The final stage is post-completion. Steps include:
- the parties pay the commission due to the estate agent (if not already paid);
  - the purchaser's solicitors arrange for stamping of the assignment. If the *ad valorem* duty has been paid at the time of contracting the SPA, then only \$100 is payable at this time;
  - the release, the assignment, and the mortgage are registered in the Land Registry; and
  - after the documents are returned from the Land Registry, the purchaser's solicitors send them together with all other title deeds and documents of the property to the purchaser or the purchaser's mortgagee (or the purchaser, if there is no mortgage) for its custody.

## **SALE AND PURCHASE AGREEMENT/ASSIGNMENT**

### *The provisional agreement for sale and purchase (PASP)*

65. As previously explained, a secondary sale of land is effected through an estate agent who arranges for the vendor and purchaser to enter into a PASP normally prepared by the estate agent. The PASP can be binding and non-binding but PASPs prepared by estate agents are generally binding contracts.

In *DH Shuttlecocks Ltd v Keung Shiu Tang* [1993] 2 HKC 600, the vendor and purchaser entered into a PASP. However in the course of preparation of the formal SPA, the vendor's solicitors attempted to vary the terms of the PASP by including a special stipulation in regard to requisitions on title. The purchaser did not accept the variation. The vendor treated this as repudiation by the purchaser, and forfeited the initial deposit and unilaterally terminated the PASP. However, the court held that even though the word "provisional" was included in the PASP, the PASP represented a fully binding contract. Neither party could unilaterally impose new terms to the PASP.

If the parties are unable to agree on the term of the formal SPA so that no formal SPA is signed, the PASP will remain in force as a binding contract to be relied on by the parties to complete the purchase.

66. The common form of PASP adopted by estate agents is a tripartite agreement between the vendor, the purchaser, and the estate agent. The parties are free to agree on the terms they like. The following are terms commonly adopted in a PASP:
- Name, address and HKID number of the vendor: this information is necessary to correctly identify the vendor. Before an estate agent arranges for a vendor to sign a PASP, the agent should ensure that his name is correct and should obtain a copy of his identification document. This is a statutory requirement in cases of residential properties: see Section 13(3) of the Practice Regulation. For a limited company vendor, its certificate of incorporation number or business registration number and registered office should be stated.
  - Name, address and HKID number of the purchaser: this information is used to correctly identify the purchaser. If the purchaser is a limited company, its certificate of incorporation number or business registration number and registered office should be stated.

- Agreement to sell and purchase: a clause provides clearly that the vendor agrees to sell and the purchaser agrees to purchase the property.
- Description of the property: the address should follow that shown in the Land Register. Any roof, flat roof, garden, car park, or other parts forming part of the property must be clearly stated.
- Purchase price: the purchase price for the property should be clearly stated.
- Manner of payment of the purchase price:
  - the initial deposit – this is usually 1%-5% of the purchase price and is usually payable by the purchaser to the vendor upon signing the PASP. However, for the protection of the purchaser, where the property is mortgaged to a mortgagee (in particular, if the property is a “negative equity property” where the balance of purchase price will be insufficient to repay the outstanding mortgage loan), the initial deposit should be made payable to the vendor's solicitors or the purchaser's solicitors as stakeholders until completion;
  - the balance of the deposit – the initial deposit and the balance of the deposit will usually add up to 10% of the purchase price. The balance of the deposit is usually payable upon the signing of the formal SPA. The formal SPA is usually signed within 14 days of the PASP; and
  - the balance of purchase price which will be payable upon completion on or before a specified date.
- Completion date: in view of the fact that there is five-day clearing, it is not advisable to arrange for the completion date to be on Saturday.
- That the property is sold free from encumbrances: except those encumbrances which the parties agree not to be removed.
- Delivery of vacant possession/Subject to tenancy: if the property is not tenanted, and is being sold with vacant possession, the vendor must deliver physical vacant possession of the property to the purchaser on completion. If the property is sold subject to an existing tenancy, the particulars of the tenancy, including the name of the tenant, the rent and term of the tenancy, and whether the rental deposit will be transferred to the purchaser on completion, should be stated in the PASP. (The rental deposit paid by the tenant may be transferred to the purchaser with the consent of the tenant by all parties entering into a novation agreement under which the purchaser assumes the obligation to refund the deposit to the tenant on expiry of the tenancy. This discharges the vendor from the obligation of refunding the rental deposit to the tenant. An alternative is to deposit the rental deposit with the vendor's solicitors or the purchaser's solicitors as stakeholder to be held by them until the tenancy expires.)
- Where there is a sub-sale, the vendor will sell as confirmor. The initial deposit should be paid to the vendor's solicitors or the purchaser's solicitors as stakeholders where the balance of purchase price is insufficient for the vendor to complete the purchase.
- Solicitors: each party will specify the firm of solicitors to represent him in the transaction.

- Legal cost and stamp duty: usually each party will pay his own legal costs and the purchaser will pay all the stamp duty payable.
- Purchaser's default: where the purchaser fails to complete the PASP due to the purchaser's default, the vendor will be entitled to forfeit the initial deposit, and to sell the property to others. Usually the PASP will provide that the vendor after forfeiting the initial deposit will have no further claim against the purchaser and will not seek specific performance of the PASP.
- Vendor's default: where the vendor fails to complete the sale pursuant to the PASP due to the vendor's default, the PASP usually provides that the vendor must refund the initial deposit to the purchaser, compensate the purchaser with a sum equivalent to the amount of the initial deposit, and reimburse the purchaser for the amount of any stamp duty paid by the purchaser, or pay the stamp duty himself and thereafter the purchaser has no further claim against the vendor, and cannot seek specific performance of the PASP.
- Estate agent's commission: in consideration of the services provided by the estate agent, he is entitled to receive a commission from one or both of the parties to the transaction. Under the Estate Agents Ordinance, in respect of residential property, the estate agent is not entitled to claim any commission unless he has entered into an estate agency agreement in the prescribed form with his client: see Part 2.
- Defaulting party to pay commission: on the failure to complete the sale the defaulting party is required to compensate the estate agent for the commission. Once again, if the relevant property is a residential property, the estate agent must have entered into an estate agency agreement in the prescribed form to be able to claim in court for unpaid commission.
- Property sold on "as is" basis: where property is sold on an "as is" basis, it is sold and delivered to the purchaser in the same physical condition it was in at the time the PASP was entered into. This clause does not remove the obligation of the vendor to disclose the existence of unauthorised structures.
- Prior negotiations: the PASP sometimes states that it supersedes all prior negotiations, representations, understandings and agreements of the parties.
- Chattels: furniture and fittings sold with the property will be listed in a schedule to the PASP. Section 10(c) of the Practice Regulation requires the estate agent to prepare a written inventory of these prior to the signing of any SPA or lease in respect of a residential property. Residential property PASP have to be stamped (the purchaser may apply for postponement until completion) while non-residential property PASP do not.
- Residential/non-residential: as required by Section 29B(5) of the Stamp Duty Ordinance (SDO), every SPA should state whether the property is residential or non-residential property.
- Certificate of value: in order to avoid splitting one sale and purchase into more than one sale and purchase so as to claim a lower rate of stamp duty, a certificate of value is necessary where the property is a residential property, and a rate of duty lower than the top rate of stamp duty is being claimed. For example, if the consideration for the sale of a residential property is less than \$2,000,000, the stamp duty payable is only \$100. But for the parties to have the benefit of this

lower rate, the SDO requires the following certificate to be given in the contract (which includes the PASP):

“It is hereby certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value, or the aggregate amount or value of the consideration exceeds HK \$2,000,000.00.”

For non-residential property PASP (which do not have to be stamped), or where the lower rate of stamp duty is not being claimed so that the consideration exceeds \$6,720,000 for which duty is payable at the top rate of 3.75%, no certificate of value is necessary.

- Appointment of agent: the PASP will indicate whether the estate agent is a dual agent acting for both the vendor and the purchaser, or a single agent acting for the vendor or the purchaser only.
- Remarks: any special terms agreed between the parties are usually stated in this last clause at the end of the PASP.
- Acknowledgement of receipt of initial deposit: the vendor will acknowledge receipt of the initial deposit by signing the receipt clause. If the initial deposit is to be stakeheld by solicitors, the solicitors will acknowledge receipt.

#### *The formal sale and purchase agreement (SPA)*

67. The formal SPA is usually prepared by the vendor's solicitors with the purchaser's solicitors commenting on and approving the form. The formal SPA shall include what has been agreed in the PASP. The following are commonly adopted in the formal SPA:

- Description of the parties: particulars of the parties similar to those in the PASP are set out in a schedule to the SPA.
- Agreement to sell and purchase: a clause provides that the vendor agrees to sell and the purchaser agrees to purchase the property as described.
- Description of property: the contract contains a detailed description of the property, including the lot number, the number of undivided shares in the land and the building assigned to the property. In the case of a multi-storey building, the term and commencement date of the government lease and particulars of the DMC (for a multi-storey building) will be stated in a schedule to the SPA.
- Purchase price and manner of payment: the purchase price and its manner of payment will be as specified in the PASP.
- Completion date: the time and date of completion will be specified in the SPA. The completion time is as agreed by the parties, and is usually between 9:30am and 5:00pm (on a week day).
- Place for completion: completion is usually stated to take place in the office of the vendor's solicitors, although in practice completion usually takes place against “solicitors’ undertakings” (the purchaser would execute the assignment of the property in the office of his solicitors, who would then send the purchase money and the assignment executed by the purchaser to the vendor’s solicitors, against the latter’s undertaking to deliver to the purchaser's solicitors (i) immediately the

keys of the property, and (ii) within a specified period the assignment duly executed by the vendor, the mortgage deed relating to the existing mortgage and its release duly executed by the vendor's mortgagee).

- Furniture and fittings: details of furniture and fittings sold with the property are set out in a schedule to the SPA. The usual terms are:
  - the furniture and fittings will be sold on an “as is” basis;
  - the vendor gives no warranty as to the condition of the furniture or fittings;
  - the vendor warrants that the furniture and fittings are not subject to any hire-purchase and are free from any other incumbrances; and
  - failure by the vendor to deliver the furniture and fittings to the purchaser on completion will not entitle the purchaser to withdraw from the purchase but will entitle him to damages.
- Good title: the vendor agrees to prove and give good title to the property at his expense and will produce attested or certified copies of documents required to be produced under Section 13 of the CPO as proof of title back to not less than 15 years before the date of the SPA.
- Requisition on title: usually requisitions on title must be made within seven working days of the receipt of the title deeds by the purchaser's solicitors, failing which the purchaser shall be deemed to have waived his right to raise requisitions on title.
- Purchaser's insistence on requisitions: if the purchaser insists on any requisition on title which the vendor is unable to answer, the vendor may cancel the sale by giving to the purchaser prior notice in writing. Unless the purchaser withdraws the requisition within the notice period, the SPA will be cancelled and the purchaser will be entitled to the return of all the deposits paid but without any compensation.
- Documents of title: title deeds (or certified copies) which relate to the property will be delivered to the purchaser.
- Vacant possession: unless the property is sold subject to an existing tenancy, the vendor shall deliver vacant possession of the property to the purchaser upon completion.
- Risk of property: unless the SPA provides otherwise, immediately after the signing of the SPA, the property will be at the purchaser's risk. A prudent purchaser should take out proper insurance coverage on the property for his protection.
- Purchaser's failure to complete: if the purchaser fails to complete the purchase in accordance with the SPA, the vendor will have the following remedies:
  - the deposit will be forfeited to the vendor;
  - the vendor will be entitled to terminate the SPA;
  - the vendor may resell the property;
  - if the price on resale by the vendor is lower than the SPA price, the purchaser shall be liable for the deficiency and all incidental expenses;
  - any increase in price on resale belongs to the vendor;
  - the vendor is entitled to register at the Land Registry a memorandum of rescission signed by the vendor; and
  - these remedies are without prejudice to the vendor's other rights under the SPA.

- Vendor's failure to complete: if the vendor fails to complete the sale according to the SPA, the purchaser will have the following remedies:
  - the deposit is returned to the purchaser; and
  - the purchaser is entitled to claim against the vendor for any further damage sustained by the purchaser by reason of the vendor's failure to complete the sale. In addition, the purchaser can seek specific performance of the SPA in equity either in lieu of or in addition to a claim for damages against the vendor.
  
- Time of the essence: time shall be of the essence for the performance of obligations in the SPA. Failure to perform exactly on time enables the other party to terminate the SPA. It has been held that even if the purchaser is only a few minutes late for completion, the vendor can terminate the contract and forfeit the deposit. Where the vendor prevents the purchaser completing on time, for example he delays in giving details of how the cheques are to be made out, the purchaser will be the innocent party and will be able to take appropriate action against the vendor.
  
- Property sold on "as is" basis: the property will be sold on an "as is" basis. The purchaser has inspected the property and has accepted its physical condition. No warranty is given by the vendor as to the physical condition of the property. (Note: this "as is" clause normally will not prevent the purchaser from taking action against the vendor in respect of illegal structures.)
  
- Orders or notices before completion
  - Orders or notices issued by any government authority before completion requiring the vendor to demolish or reinstate the property or any part of it: these orders/notices are usually issued in respect of unauthorised structures. It is usual to provide in the SPA that the vendor shall bear the costs for such demolition or reinstatement, or the purchaser may elect to cancel the SPA and obtain a refund of the deposit.
  - Orders or notices issued by the Government or the incorporated owners or the manager of the building before completion requiring the vendor as a co-owner to contribute to the cost of repair or renovation of the common areas or facilities: SPA normally provides that such costs are borne by the vendor, but the purchaser is not entitled to cancel the SPA.
  - Orders or notices issued under the Lands Resumption Ordinance, Town Planning Ordinance (TPO), and so on, before completion affecting the property: it is usual to provide in the SPA that if such notices are issued before completion, the purchaser may rescind the SPA and all the deposits paid shall be refunded to him.
  
- Vendor's solicitors as agent: the vendor will declare that the vendor's solicitors are the vendor's agent for the purpose of receiving all money payable to the vendor, and that payment of any money to the vendor's solicitor will be a sufficient discharge of the purchaser's obligation in respect of that payment. This provision is for the protection of the purchaser so where he pays the purchase price on completion to the vendor's solicitors, and they abscond with the money, the purchaser will be deemed to have made payment and the vendor must complete the sale, because he has authorised his solicitors to receive for him all money payable to him. If the SPA contains no such provision, the purchaser should insist

on drawing the cheque for the purchase price in favour of the vendor or the vendor's mortgagee, not his solicitors.

- Stamp duty: the Collector of Stamp Revenue can review the consideration and require additional stamp duty to be paid; this is also paid by the party who pays the stamp duty.
- Apportionment of rents and outgoings: all rents and profits will be received and outgoings will be paid by the vendor up to the actual day of completion and as from that day all outgoings shall be paid by the purchaser. All rents profits and outgoings shall if necessary be apportioned between the vendor and the purchaser and paid on completion. The outgoings which need to be apportioned are management fees, rates and government rent. The purchaser will also be required to reimburse the vendor for any management deposits paid by him. If the vendor no longer has the receipt for the management deposits, the vendor's solicitors can write to the manager of the building for confirmation of such payment. In regard to the utility accounts of the property, the normal practice is for the vendor to cancel his accounts with and obtain a refund of the relevant deposits from the utility companies and for the purchaser to open new accounts with the utility companies.
- Inspection by purchaser's mortgagee: the vendor shall allow the purchaser's mortgagee to view the property once for valuation purposes upon reasonable prior notice being given to the vendor before completion.
- Final inspection by purchaser: the vendor shall allow the purchaser to view the property once before completion to verify vendor is in a position to deliver vacant possession on completion.
- Solicitors' costs: each party shall bear his own solicitors' costs of and incidental to the SPA and the subsequent assignment.
- Discharge of existing mortgage: if the property is at present subject to an existing mortgage, the vendor will, at his own expense, obtain a release/discharge of the property from such mortgage on or before completion.
- Vendor's capacity: the vendor shall on completion assign the property as "beneficial owner"; or in other capacities such as confirmor, mortgagee, legal chargee, personal representative, or trustee as the case may be. Different covenants for title will be implied under the CPO for different capacities.
- No third party has an interest: the vendor declares and confirms that no third party has any right or interest in the property. In the event that there is any third party claim against the property on or before completion, the vendor shall forthwith refund to the purchaser all the deposits paid but without prejudice to the purchaser's right to claim against the vendor for all damages sustained by the purchaser by reason of the vendor's failure to complete the sale in accordance with the terms of the formal agreement.

### *Assignment*

68. The assignment is the document which is executed as a deed and transfers title in the property from the vendor to the purchaser. It is usually drafted by the purchaser's solicitors and approved by the vendor's solicitors. However, in the case of sale of flats in a

development, it is common practice for the sake of consistency for the vendor developer's solicitors to supply a standard draft for the development to the purchaser's solicitors.

69. Under the SDO, *ad valorem* duty is payable on the sale of immovable property. *Ad valorem* duty is determined according to the value of the transaction to which the document relates.

On the sale of a residential property, *ad valorem* stamp duty is required to be paid on the SPA, although payment is usually deferred until completion with the consent of the Collector of Stamp Revenue. On a formal SPA signed within 14 days after the signing of the PASP, stamp duty has to be paid within 30 days thereafter. If the formal SPA is signed more than 14 days after the signing of the PASP, stamp duty has to be paid within 30 days after the signing of the PASP. A penalty is payable for late stamping.

70. Where the SPA has been stamped with *ad valorem* duty, the assignment is chargeable with a fixed duty of \$100 only. Stamp duty is also payable on each subsequent sub-sale agreement of residential property. For example, if the purchaser executes a nomination in favour of a third party, that nomination will be regarded as a contract subject to full *ad valorem* duty. No *ad valorem* duty is payable if the nomination is in favour of a parent, spouse or child of the purchaser.
71. Stamp duty is payable on non-residential properties, only on the assignment. This must be paid within 30 days after execution of the assignment. A penalty is payable for late stamping.

## TITLE

72. Subject to any modification in the usual terms of the SPA, the vendor is usually required to give good title to the property as well as to show good title. This duty will be implied in any sale and purchase agreement even if it is not expressly stated. However, the parties are free to modify or limit the vendor's obligation to give good title.
73. Showing title consists of forwarding the title deeds, or certified copies, to the purchaser for inspection prior to completion, and satisfactorily answering any requisitions on title raised by the purchaser.
74. A good title is generally understood to mean such title as will enable the purchaser to hold the property against any challenger. It does not have to be a perfect title. Generally, it will be a title which can be forced on an unwilling purchaser in an action for specific performance by the vendor. To comply with the CPO and prove good title, the vendor usually must produce to the purchaser the government lease, as well as proof of title extending not less than 15 years before the date of the SPA commencing with an assignment, a mortgage or a legal charge.

## COMPLETION

75. Several matters must be dealt with before and after completion. Before completion the purchaser must:
- confirm the exact amount payable on completion. This usually consists of the balance of the purchase price, his solicitors' fees, and the disbursements. Two days before the date of completion should be allowed for clearance of the cheque or cashier's order to pay the amount due;

- execute all necessary documents at his solicitors' office several days before the date of completion;
- make an appointment with the vendor through the estate agent for a final inspection of the property to verify that vacant possession of the property will be delivered. Carry out the inspection in the morning on the completion date by the latest. After the inspection, inform his solicitors of the result of the inspection;
- the purchaser may need to produce a copy of the SPA or a letter from his solicitors confirming the date of completion in order to open an account with a utility provider;
- If the purchaser is a limited company, a written resolution or minutes of a meeting of the Board of Directors of the company has to be prepared, authorising one or more directors or other person(s) to execute the assignment and the mortgage in accordance with its articles of association. Bring the common seal and the rubber chop of the company for execution of all relevant documents at the solicitors' office before completion.

76. The vendor must:

- ensure that the furniture and fittings sold to the purchaser and vacant possession of the property will be delivered to the purchaser on completion;
- produce the receipts for management fee deposits and for the latest management fees and demand notes for rates and government rent (if any) for his solicitors, for the preparation of an apportionment account; and
- execute at his solicitors' office the assignment and other relevant documents. If the vendor is a limited company, bring along its common seal and rubber chop for execution of the assignment and prepare a written resolution of the Board of Directors of the company authorising one or more directors or other person(s) to execute the assignment in accordance with its articles of association. Deliver the keys to the property to his solicitors or the estate agent for delivery to the purchaser on completion.

77. A sub-sale, sometimes called a "confirmor sale", occurs when a purchaser enters into a PASP or a SPA and, before completion, sub-sells onto a sub-purchaser. The head purchaser is referred to as the "confirmor".

- A confirmor should ensure there is no prohibition against sub-sale in the principal agreement (dealing with his purchase from the vendor). Prohibition of sub-sale would be rare in Hong Kong. A typical PASP will provide that the property will be assigned to the purchaser 'or its nominee(s) or sub-purchaser(s)'.
- If the sub-purchaser fails to complete the purchase, the confirmor is still required to complete the purchase in accordance with the principal agreement.
- Completion of the sub-sale should take place on the same completion date but at a slightly earlier time as provided in the principal agreement. For example, if the completion time in the principal agreement is at or before 5:00pm, then the completion time in the sub-sale agreement is usually at or before 3:30pm. This will enable the confirmor's solicitors to have sufficient time to deliver the balance of the purchase price to the vendor's solicitors at or before 5:00pm after receiving the balance of the purchase price from the sub-purchaser's solicitors at or before 3:30pm.

78. A sub-purchaser may not have the opportunity to inspect the property before entering into a sub-sale agreement with the confirmor. A sub-purchaser should be advised of the usual provision in a sub-sale agreement that a sub-purchaser is deemed to have inspected the property and accepted its physical condition on an “as is” basis.
79. The terms of a sub-sale agreement are usually subject to those of the principal agreement. The sub-purchaser is bound by whatever terms the confirmor has accepted under the principal agreement. For example, if under the principal agreement the confirmor has accepted an unauthorised alteration in the property, the sub-purchaser, by signing the sub-sale agreement, which is subject to the principal agreement, also accepts such unauthorised alteration. The sub-purchaser should be given a copy of the principal agreement and all correspondences between the vendor and the confirmor before entering into the sub-sale agreement.
80. The balance of the purchase price payable by the sub-purchaser on completion should be sufficient to cover the balance of the purchase price payable by the confirmor under the principal agreement. If insufficient, the deposit payable by the sub-purchaser to the confirmor should be stakeheld by solicitors.

## **MORTGAGE**

81. A mortgage is defined in the CPO as “a security over land for securing money or money’s worth”. It is a transaction in which property is provided by a borrower as security or collateral for a loan. The borrower who gives the mortgage is the mortgagor and the lender who receives the mortgage is the mortgagee.
82. A mortgage can be a legal charge, or an equitable charge or mortgage.

Section 44(1) of the CPO provides that “a mortgage of a legal estate, including any second or subsequent mortgage of that legal estate, may be effected at law only by a charge by deed expressed to be a legal charge”. Under this legal charge, the mortgagor does not transfer title to the land to the mortgagee, and does not need any equitable interest, called an equity of redemption, to recover the land. Instead, under Section 44(1) the mortgage acts to impose an encumbrance on the title, enabling the mortgagee to sell the land on default of repayment, or breach of some of the terms in the contract.

Upon repayment of the loan in full, the mortgagor is entitled to have the mortgage cancelled or discharged.

Most mortgages contain a clause for securing “all monies”. It enables the mortgagee to increase the charged amount without the need of the mortgagor to enter into any further mortgage.

### *Essential mortgage terms*

83. Most mortgages over land in Hong Kong are taken by banks. Most banks in Hong Kong have their own standard mortgage forms, although for residential property most banks now use the standard forms of mortgage prepared by the Hong Kong Mortgage Corporation.
84. A mortgage usually contains the following provisions:
  - Covenant to pay: under this, the mortgagor covenants to pay to the mortgagee all sums of money due from time to time under the mortgage. This covenant is a personal contractual obligation of the mortgagor and remains binding on him so

long as any sum of money is still due to the mortgagee, even after sale of the mortgaged property on default.

- Charge over the property: the mortgagor charges his property to the mortgagee as a continuing security for the payment of money which may be due to the mortgagee. Such charge of property, without any limit being stated in the mortgage, operates to create an “all-monies” mortgage.
- Mortgagor’s representations and warranties: the mortgagor represents and warrants that he is the “beneficial owner” of, has a good and marketable title to and has exclusive possession of the property, and that the property is free from encumbrances.
- Mortgagor’s other covenants: the mortgagor covenants that he will:
  - keep the property insured in such manner as the bank requires;
  - keep and maintain the property in good repair;
  - permit the mortgagee and its officers to enter into and view the property at all reasonable times; and
  - perform all the terms and conditions in the government grant of the land and the deed of mutual covenant of the building.

85. Negative pledge: in most cases the mortgagor also covenants that he will not without the prior written consent of the mortgagee part with the use, occupation or possession of the property. Therefore, whenever a property is mortgaged, the mortgagor should obtain the prior written consent of the mortgagee before entering into any tenancy agreement for the property. If consent is not sought and obtained, the tenant is a trespasser as against the mortgagee.

86. When the mortgagor has repaid the debt due to the mortgagee, including any amounts under the “all monies” clause, the mortgagor will have the right to require the mortgagee to release the property from the charge. The cost of the release will be borne by the mortgagor.

87. A mortgage will set out a list of specified events, called “events of default”. If any of such events occurs, the mortgagee will be entitled to demand immediate repayment of all the money secured under the mortgage and to take over the mortgaged property. Such events include (among others) the mortgagor becoming bankrupt or being wound up, the mortgagor's failure to repay any monies due to the mortgagee or breach of any other provisions in the mortgage, and the warranties or any information in the mortgage given by the mortgagor being untrue or inaccurate.

88. Where any event of default has occurred, the mortgagee will have the power to enter into possession of the property, to let or sell the property and to exercise other rights in respect of the property. The mortgagee also has the right to appoint a receiver to exercise the above rights.

89. If the mortgagee exercises its power of sale after an event of default has occurred, the sale proceeds will be applied in the following manner:

- first, in payment of the receiver's remuneration and all costs and expenses incurred in the sale of the property;
- secondly, in payment of the amount due and owing under the mortgage; and

- the remaining balance will be paid over to the persons entitled thereto (usually the mortgagor).
90. Often there are various transactions and documents associated with the mortgage, which may bind the mortgagor, or a guarantor. These include:
- A “facility letter” may be issued by the bank, which is signed by the borrower, and which sets out the amount and interest rate of the mortgage loan, the amount of the monthly repayments, and the terms and conditions of repayment, etc.
  - Where the mortgagor is a limited company, the bank will usually require the directors, or perhaps the majority shareholders of the borrower, to provide deeds of guarantee in favour of the bank.
  - If the mortgaged property is subject to an existing tenancy, the bank may require the mortgagor to execute an assignment of rental whereby the mortgagor assigns his interest in the rent under the tenancy to the bank to add to the security of the bank.
91. A fixed rate mortgage is a mortgage that has a fixed interest rate for a set and specified period of time. The fixed rate period may vary from as short as a few months to as long as 10 years or more. With this type of mortgage, any fluctuations in interest rates do not affect the borrower. Whether interest rates rise or fall, his monthly payment remains the same.
- Banks usually charge a higher rate of interest for fixed rate mortgages than for floating rate mortgages because they have to bear the risk of interest rates rising during the fixed rate period. Fixed rate mortgages are particularly popular when interest rates are rising, or when it is expected that interest rates may rise in the near future.
92. A floating rate mortgage is a mortgage where the interest rate varies during the duration of the loan. Interest rates for mortgages in Hong Kong are normally tied to the prime rate or interbank rate. Borrowers may be charged a few percentage points above or below the prime rate or interbank rate. If the interest rate for a particular mortgage is, for example, “prime less two” then, if the prime rate is 6%, the interest rate on the loan is 4%.
- The monthly payments for a floating rate mortgage varies, and a borrower will lose out if the prime rate or interbank rate rises, but will gain if it falls.
93. A third type of mortgage, called a fixed adjustable rate mortgage, is a combination of the above two types of mortgages. It specifies a fixed interest rate for a stated period. At the end of this stated period, the mortgagor can choose either to fix a new mortgage rate for another fixed term at the then prevailing fixed rate of the bank or to convert to a floating rate mortgage.
94. A mortgage application usually proceeds in the following manner:
- a mortgagor approaches a bank for a mortgage, usually after he has viewed a property and intends to purchase it;
  - the bank does a quick valuation of the property and advises the client of the terms of the mortgage, including the maximum amount of loan which could be advanced under such mortgage;
  - upon such advice being given but before formal approval of his mortgage application, the client may proceed to purchase the property and enter into a PASP

but he has to take the risk of the bank not approving the mortgage loan;

- after that, he submits a formal application together with copies of his tax returns and other income proof documents;
- the bank may appoint a valuer to physically inspect the property;
- the bank performs a credit assessment on the client; and
- if the application is successful, the bank will inform the client and instruct its solicitors to prepare a mortgage of the property.

95. The following matters are usually considered by the bank before approving the mortgage:

- Loan-to-value ratio: a bank will generally advance a mortgage loan of an amount equivalent to no more than 70% of the market value of a property (as determined by the bank) or 70% of the purchase price, whichever is lower, but a higher loan-to-value ratio may be obtained if the applicant joins the Mortgage Insurance Programme of the Hong Kong Mortgage Corporation Limited. A premium ranging from 1%-4% of the amount of the loan in excess of 70% of the market value of the property will be payable, depending on the relevant loan-to-value ratio, the loan tenor, and the payment method of the premium. The 70% loan to value ratio also does not apply to special categories of properties, e.g. units under the Home Ownership Scheme.
- Repayment ability: in assessing his repayment ability, the applicant's income, his profession or business, his level of education, his financial background and prospects, his credit history and his relationship with the bank (if he is an existing customer) will all be thoroughly considered.
- Debt-to-income ratio: a bank may require the monthly mortgage payment not to exceed a certain percentage (e.g. 50%) of the applicant's income.
- Age of building: broadly speaking old buildings are less marketable than new buildings and so a lower loan-to-value ratio may apply to old buildings.
- Loan term: the longest repayment period for a mortgage loan is usually 25 to 30 years. Some banks require the total of (i) age of building and (ii) loan tenor not to exceed 40 to 60 years.
- Age of borrower: the risks of lending to an old borrower are clearly higher than the risks of lending to a young borrower. Some banks require the total of (i) the age of the borrower and (ii) loan tenor not to exceed, say, 65 years.

## PROPERTY-RELATED TAXATION

### *Stamp duty*

96. Stamp duty is a duty or tax on documents. It is levied under the SDO on the documents specified in the four Heads in the First Schedule to the SDO. Some of these documents attract fixed duty, others *ad valorem* duty, i.e. the amount of which is determined according to the value of the transaction to which the document relates. Broadly speaking, stamp duty is payable on the following documents:

- under Head 1 on (i) conveyances on sale (assignments) of immovable properties, (ii) agreements for sale of residential properties, and (iii) leases of immovable properties;
- under Heads 2 and 3, on certain documents relating to Hong Kong stock and certain Hong Kong bearer instruments;
- under Head 4, on duplicates and counterparts of any document chargeable with stamp duty (e.g. the duplicate of a lease).

97. A penalty is imposed for late stamping of documents. The general rate is two times the stamp duty where the delay does not exceed one month; four times the duty where the delay exceeds one month but does not exceed two months; and 10 times the duty in all other cases.

#### *Property tax*

98. Property tax is charged on the owner of land or building in Hong Kong at the standard rate on the net assessable value of such land or building. The standard rate is 16% as from the year of assessment 2004/05. The assessable value of land or building is the consideration payable to the owner in respect of the right of use of that land or building. The net assessable value is the assessable value less the following deductions provided for in the Inland Revenue Ordinance:

- the rates, where they are paid by the owner; and
- 20% of the assessable value (after deduction of rates paid by the owner), as a “broad-brush” allowance for repairs and outgoings.

99. A corporation carrying on a trade, profession or business in Hong Kong can apply for exemption from property tax in the following circumstances:

- the profits from the property are part of the profits of the trade, profession or business carried by the corporation; or
- the corporation occupies the property for the purposes of producing profits subject to profits tax.

#### *Government rent*

100. Privately owned land in Hong Kong is held by way of leasehold. Rent is payable for that lease to the Government. From 27 May 1985, government rent equivalent to 3% of the rateable value of the land became payable in respect of the following types of land:

- land in the New Territories and New Kowloon north of Boundary Street held under leases which expired before 30 June 1997. These leases had been extended to 30 June 2047 by the New Territories Leases (Extension) Ordinance; and
- land held under leases granted on or after 27 May 1985. Such a lease invariably requires the lessee to pay an annual rent equivalent to 3% of the rateable value of the land.

101. Government rent in respect of the above types of land is now governed by the Government Rent (Assessment and Collection) Ordinance, under which the Government

may demand payment from a tenant of the premises, or the person who is liable to pay the rates. Therefore, a tenant, who has agreed under his tenancy agreement with the landlord to pay rates, may be liable for government rent if the landlord should default in payment.

### *Rates*

102. Rates are an indirect tax on properties, charged at a certain percentage of the rateable value of a property. For the financial year 2005/2006, the rates percentage charge was 5%.

The rateable value of a property is an estimate of the annual rental value of the property at a designated valuation reference date, assuming that the property was then vacant and available for letting.

103. In general, all properties in Hong Kong are assessed for rates. In the 2005/2006 valuation list, there were about 2.2 million assessments covering about 2.83 million units of properties.

104. Under the Rating Ordinance (RO), both the owner and the occupier are liable for rates, and in the absence of an agreement to the contrary, rates are paid by the occupier. Therefore, if a tenancy agreement between a landlord and a tenant contains no provisions on liability for rates, the Government may recover the rates from the tenant. In the RO, the definition of “owner” includes a mortgagee or chargee. Therefore, a mortgagee or chargee of a property is also liable for rates of the property.

105. For new buildings, the rates and/or new government rent become payable on the following dates:

- in respect of domestic premises, the date after 90 days from the date of issue of the occupation permit/consent to assign/consent to lease/certificate of compliance (whichever is applicable), irrespective of the date on which the premises are first occupied; and
- in respect of non-domestic premises, the date after 180 days from the date of the occupation permit/consent to assign/consent to lease/certificate of compliance (whichever is applicable) or the date on which the premises are first occupied, whichever is the earlier.

106. There can be no exemption from rates even if a property is unoccupied, unless it is land on which there is no building, other than a car park, and it is unoccupied, in which case a refund of any rates paid can be applied for.

### *Profits tax*

107. Profits tax is charged on corporations, individuals, partnerships, and unincorporated bodies of persons carrying on a trade, profession or business in Hong Kong on assessable profits arising in or derived from Hong Kong from such trade, profession or business. The profits tax system in Hong Kong has the following features:

- only profits arising from the “carrying on of a trade, profession or business in Hong Kong” are subject to profits tax;
- Hong Kong has no capital gains tax, and profits tax is levied only on “revenue profits” and not on income of a capital nature;

- generally speaking, all expenses and outgoings, to the extent that they are incurred in producing chargeable profits, and are not of a capital nature, are allowed as tax deductions.

The profits tax rate for corporations is 17.5% as from the year of assessment 2003/4, and for unincorporated businesses it is 16% as from the year of assessment 2004/05.