

Circular

Circular No. 13-06 (CR)

Guidelines on completion of a provisional agreement:

- **Do not arrange for clients to sign a provisional agreement with the spaces providing for the essential terms of the transaction left blank.**
- **Obtain consent before making any amendment to a signed provisional agreement.**
- **Ensure that all information in a provisional agreement is true and accurate.**
- **Avoid selecting a Saturday, Sunday or public holiday as a payment date.**
- **Do not arrange for a vendor to confirm receipt of any deposit in advance.**
- **List in a provisional agreement any items included in the sale and purchase.**
- **State clearly which version shall prevail if a provisional agreement is written in both English and Chinese.**
- **Supply a copy of the provisional agreement to the client after signing.**

Completion of Provisional Agreement

The sale and purchase of second-hand properties in Hong Kong are often conducted through estate agents who assist the parties to first enter into a provisional agreement for sale and purchase¹ (provisional agreement). In most cases, the provisional agreement is prepared by the handling estate agent and is invariably a legally binding contract. A provisional agreement which is not completed properly may easily give

¹ Also called a preliminary agreement for sale and purchase.

rise to complaints and/or disputes. This Circular sets out certain matters to which licensees must pay attention when preparing a provisional agreement.

Uncompleted Agreements

2. Licensees must not arrange for their clients to sign a provisional agreement unless all blank spaces in the agreement for providing the property description, the names of the parties to the agreement, purchase price, payment terms, completion date and all other essential terms of the transaction have been filled in.
3. The total amount of commission payable by the purchaser in the event of his default should be specified in the provisional agreement before arranging for the purchaser to sign the agreement. Likewise, the total amount of commission payable by the vendor in the event of his default should also be specified in the provisional agreement before he signs the agreement.
4. Any explanation that arranging for a party to sign a provisional agreement with essential terms not filled in might facilitate the licensee to negotiate the terms more flexibly with the other party, and that the relevant party also consents to such an arrangement, **would not be regarded as a reasonable excuse** as such an arrangement would put the relevant party at risk.
5. The addition or variation of a term in an executed provisional agreement may have significant impact on the rights and liabilities of the parties. If a party wishes to amend the terms of the provisional agreement after it is signed by the other party, licensees must first obtain the consent of the other party, and should seek his written consent to the change or arrange for them to initial against the amendment as confirmation. On the other hand, licensees must not arrange for their clients to put their initials in advance in the provisional agreement with a view to

facilitating the subsequent addition, deletion or amendment of any of the terms in the agreement. Where any agreement on any special term (e.g. costs for repair of building, unauthorized building works) has been reached, licensees should advise their clients to seek legal advice before arranging for them to enter into the provisional agreement.

6. The provisional agreement should constitute the full and entire understanding and agreement between the parties at the time when it was entered into by the parties. In other words, licensees should expressly state all the terms and conditions agreed by the parties with regard to the transaction in one document (i.e. the provisional agreement) only and not in separate documents with a view to concealing the true terms and conditions of the sale and purchase.

Parties²

7. The name and the number of the identification document (e.g. HKID Card number or Passport number) of the parties, which are essential in correctly identifying the parties, must be clearly stated, and their addresses should also be provided in the provisional agreement. If the purchaser of a transaction does not provide an address to be inserted in the provisional agreement, the licensee should before arranging for the parties to enter into the agreement inform the vendor about it accordingly and advise him of the risk of being unable to locate the whereabouts of the purchaser in the event of any subsequent dispute.
8. Licensees must properly verify the identity of the parties by carefully checking the name of the party on the identity card or identification document before arranging for them to sign the provisional agreement. Licensees are reminded that under

² For guidelines issued by the EAA on “Proper Authorization by Absent Contracting Party” and “Signing of Provisional Agreement for Sale and Purchase/Provisional Tenancy Agreement by a Limited Company”, licensees should refer to Circular Nos. 06-02(CR) and 09-06(CR) respectively.

section 13(3) of the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (Practice Regulation), a licensee shall, for the purpose of avoiding the fraudulent misrepresentation of identity in an agreement for sale and purchase of a residential property, take all practicable steps to ensure that the name of the vendor is correct when the agreement is entered into and if the vendor is an individual, the licensee should take a copy of his Hong Kong identity card or other identification document.

Property Description

9. The property must be accurately described in the provisional agreement and its address should follow that as shown in the land search record of the property. Any car parking space, roof, flat roof, garden or other parts forming part of the property, if included, must be clearly stated.

Consideration & Delivery of Vacant Possession

10. Licensees must ensure that all the information given in the provisional agreement is true and accurate, such as whether vacant possession will be delivered to the purchaser or whether the property is sold subject to tenancy upon completion of the transaction.
11. The purchase price stated on the provisional agreement must be the true consideration of the transaction. Licensees must refrain from reducing or inflating the true consideration whether at the request of their clients or otherwise. A licensee who assists clients to defraud the Government of any stamp duty by reducing the true consideration stated on the provisional agreement, or to defraud the purchaser's financier for obtaining a higher loan amount by inflating the purchase price, may infringe the law.

Payment Dates

12. Licensees should avoid selecting a Saturday, Sunday or public holiday as the due date for payment of the deposit or any part of the purchase price because the banking industry adopts a 5-day clearing week. If any party to the transaction would like to select a Saturday, Sunday or public holiday as the payment date for the deposit or any part of the purchase price for any special reason, licensees should advise the parties of the difficulties they may face in obtaining a bank mortgage loan or redeeming the property on those days and that they should seek legal advice before entering into the provisional agreement.

Acknowledgement of Receipt of Initial Deposit

13. Licensees must not arrange for the vendor to confirm the receipt of any initial deposit in the provisional agreement by signing the receipt clause thereof before the vendor has received the cheque or money for the deposit. Where the cheque is made payable to the vendor's solicitors, the receipt should state so.

Inventory

14. If any items (e.g. furniture, electrical appliances) are included in the sale and purchase, licensees should list them in the provisional agreement. Licensees are reminded that under section 10(c) of the Practice Regulation, they are required to establish what is to be included in the sale of the property and prepare a written inventory thereof before the signing of a provisional agreement.

Language

15. If the provisional agreement is written in both English and Chinese, licensees must make it clear in the agreement which version shall prevail in case of conflict or inconsistency.

Explanation

16. To comply with section 13(1) of the Practice Regulation, licensees are reminded that they must not arrange for a client (unless he is legally represented when entering into a provisional agreement) to enter into the provisional agreement if they have not already explained the meaning of each clause of the provisional agreement and drawn their client's attention to the meaning of the essential terms and provision thereof, and recommended that the client seek legal advice if the client does not understand any part of the provisional agreement.

Supply of a Copy of the Provisional Agreement

17. Licensees should supply a copy of the provisional agreement to the party as soon as that party has signed the agreement. If any of the terms of the provisional agreement have been varied by making amendment(s) on the provisional agreement itself, licensees should supply a copy of the amended version of the provisional agreement to the parties and seek a written receipt thereof from the party concerned as soon as practicable.

Licensees are reminded that under paragraph 3.4.1 of the Code of Ethics issued by the EAA, they should protect and promote the interests of their clients. Moreover, pursuant to paragraph 3.5.1 of the Code of Ethics, they shall, in fulfilling their duties, exercise due care and due diligence.

Licensees who fail to comply with the above guidelines may be subject to disciplinary action by the EAA.

November 2013

Holders of Statements of Particulars of Business
 should bring this Circular to the attention of all staff
 engaged in estate agency work