

CB1/BC/6/01
2869 9213
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4 March 2003

Dr Stanley HO
President
Real Estate Developers Association of Hong Kong
Room 1403 World Wide House
19 Des Voeux Road
Central
Hong Kong

Dear Dr HO,

Bills Committee on Companies (Amendment) Bill 2002

The Bills Committee is concerned that, according to the Administration's interpretation of the proposed sections 157I(2) and 157I(3)(b) of the Bill, the security provided by a company in contravention of section 157H(1), (2) or (4) shall be unenforceable against the company and, therefore, the application of the two proposed sections as now drafted may have serious consequences on the rights of mortgagees/chargees and their subsequent assignees.

I enclose the following documents for your reference:

- (i) Administration's Paper under CB(1) 395/02-03(01);
- (ii) Administration's Paper under CB(1) 989/02-03(02); and
- (iii) the proposed sections 157H, 157I(2) and 157I(3)(b).

The Bills Committee understands that the Administration's position on the two proposed sections as set out in paragraph 12 of the Paper No. CB(1) 395/02-03(01) and paragraphs 6, 7 and 8 of the Paper No. CB(1) 989/02-03(02) is as follow:

- (a) a transaction contravening section 157H(1), (2) or (4) is an illegal contract and the person who obtains a security from the company in contravention of section 157H(1), (2) or (4) should not be able to enforce such security against the company notwithstanding the proposed section 157I(3)(b) which provides that the passing of interest in any property under the security document should not be affected;

- (b) the cumulative effect of the two proposed sections on the chargee's interest in the property passed under the security document is that in the event that the loan is not repaid, the chargee cannot sell the property (which is the subject of the security). Nevertheless, it is unlikely for the company to sell the property to a third party as the interest of such party will be subject to the prior interest of the chargee. Thus, if the company wishes to sell the property, it has to obtain a release of the security from the chargee by paying the outstanding amount due under the loan. The Administration believes that the inability to enforce the security against the company is a serious consequence that suffices to deter a person from lending money in contravention of section 157H; and
- (c) with regard to the position of an innocent third party, because interests in the property can successfully pass to the chargee, a third party can validly acquire an interest in the property from the chargee. However, as the chargee cannot enforce the security against the company, any third party who acquires an interest in the property from the chargee similarly cannot enforce the security against the company.

At its meeting on 27 February 2003, the Bills Committee deliberated on the response of the Administration to the concerns of the Committee. In view of the serious impact on the rights of mortgagees/chargees and their subsequent assignees, I am instructed to seek your views, if any, on the effect of the two proposed sections.

The next meeting of the Bills Committee will be held on 12 March 2003. Please let me know if you have any comments on the two proposed sections at your earliest convenience.

Yours sincerely,

(Miss Becky YU)
Clerk to Bills Committee

Encl.

cc Hon Audrey EU Yuet-mee, SC, JP (Chairman) w/o encl.