

**Hong Kong Bar Association's Comments on
Companies (Amendment) Bill 2002**

We refer to the letter from the Clerk to the Bills Committee of the Legislative Council to the Bar dated 9 May 2003 regarding proposed amendments to section 157H of the Companies Ordinance.

It seems to us a bit tortuous to have a separately defined term "conditional sales agreement" which is only used once in section 157H(7). The alternative would be to incorporate the definition of "conditional sales agreement" directly into sub-para (b) of the definition of "credit transaction".

Further, we think that the definition is awkward and rather inapt. A problem of the drafting is that the use of the part in brackets - (notwithstanding or land) - suggests that the buyer being in possession is something which might otherwise cause the transaction not to be a "conditional sales agreement". It could be argued that the definition as currently drafted means that a "conditional sales agreement" is an agreement for the sale of goods or land under which the purchase price or part of it is payable by instalments, and the property in the goods or land is to remain in the seller until such conditions are fulfilled, and that the words in brackets simply make it clear that such an agreement is still a conditional sales agreement even if possession is granted prior to passing of property. In other words, on such an argument, conditional sales agreement (as defined) go beyond situations in which possession is granted, and cover all agreements for the sale of goods or land on instalment terms, where property does not pass until full payment is received. This is clearly not what was intended. Even if such an argument were not right, perhaps because the words "is to be" probably carry with them the implication that it is under the agreement that the buyer is to be in possession, would it not be more satisfactory to define the term along these lines:-

“an agreement for the sale of goods or land under which (i) the purchase price or part of it is payable by instalments, (ii) the property in the goods or land is to remain in the seller until such conditions ... are fulfilled, and (iii) the buyer is [(notwithstanding such reservation of property)] given possession of the goods or land prior to the fulfilment of such conditions.”

Even under a sale and purchase of land in the normal manner in Hong Kong the price is payable by instalments: initial deposit, further deposit, final balance,

and the property remains in the seller until final payment. The only feature in the present definition which distinguishes such a normal sale and purchase from a "conditional sales agreement" is that the buyer "is to be" in possession. But there are problems with the wording as a number of matters are unclear:

(i) When does the buyer have to be in possession under the definition? We would have thought that the buyer has to be in possession prior to the passing of property (i.e. prior to the fulfilment of the conditions).

(ii) The wording that the buyer is to be in possession until the conditions are satisfied can be ambiguous, although we think that perhaps the word "until" relates not to the buyer's possession, but to the property remaining in the seller, given the brackets.

(iii) The definition would apply in a case where the buyer is given early possession - e.g. for renovation etc - is this intended? However, even on our suggested wording, the situation of a buyer being given early possession would be caught if this were provided for in the agreement. It may be that this is intended, since that would not be the usual situation where possession and property both pass on the assignment which is made upon full payment of the purchase price.

Dated: 29 May 2003