

The application of the Contracts (Rights of Third Parties) Ordinance, Cap. 623 on the agreements for sale and purchase in respect of first-hand residential properties

The Sales of First-hand Residential Properties Authority (SRPA) has received enquiries from vendors on a suggestion to incorporate a clause in the agreement for sale and purchase (ASP) in respect of first-hand residential properties to exclude the application of the Contracts (Rights of Third Parties) Ordinance (Cap. 623) (“Cap. 623”).

Cap. 623 enables parties to a contract (“contracting parties”) to confer enforceable contractual rights on a third party if they so wish. In short:

- (a) if it is the intention of the contracting parties to allow the third party to enforce a term of the contract, Cap. 623 would give effect to the intention of the contracting parties; or
- (b) if the contracting parties do not intend the term to be enforceable by the third party, they may make a provision in the contract to exclude the application of Cap. 623.

Schedule 5 to the Residential Properties (First-hand Sales) Ordinance (Cap. 621) (“Cap. 621”) sets out the mandatory provisions which should be included in the ASP in respect of a first-hand residential property in an uncompleted development. Schedule 6 to Cap. 621 sets out the mandatory provisions which should be included in the ASP of a first-hand residential property in a completed development pending compliance. Schedule 7 to Cap. 621 sets out the mandatory provisions which should be included in the ASP of a first-hand residential property in a completed development which is not a completed development pending compliance.

Clause 28 in Schedule 5 to Cap. 621, clause 25 in Schedule 6 to Cap. 621, and clause 16 in Schedule 7 to Cap. 621 confer certain benefits and rights on third parties, namely, the Owners’ Corporation incorporated under the Building Management Ordinance (Cap. 344) (“OC”) or the manager of the development concerned.

It is the policy intention of the Administration that, in the event of the winding-up (whether voluntary or otherwise) or dissolution of the vendor, the benefit and rights of and in all warranties and guarantees under all contracts relating to the construction of the development shall be assigned by the vendor to the OC or, if no such OC exists, to the manager of the development. Therefore, the aforementioned mandatory clauses were included in the aforementioned Schedules to Cap. 621.

The SRPA considers that an opt out clause to exclude the application of Cap. 623 on the ASP in respect of a first-hand residential property runs contrary to the policy intention of having the mandatory clause 28 in Schedule 5 to Cap. 621, the mandatory clause 25 in Schedule 6 to Cap. 621 and the mandatory clause 16 in Schedule 7 to Cap. 621.

It appears to the SRPA that, if the concern of the vendors is that the parties may not rescind the contract or vary the contract without the consent of the OC or the manager of the development if Cap. 623 applies to the ASP of a first-hand residential property, they may wish to consider section 6 of Cap. 623, which sets out the circumstances under which the parties may rescind the contract or vary the contract.

Sales of First-hand Residential Properties Authority
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