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Securitisation 2011
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Chapter 20

Hong Kong



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Eversheds

1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller, (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a receivable "contract" be deemed to exist as a result of behaviour of the parties?

There is no specific evidentiary requirement in order to make a debt obligation enforceable. A contract is not enforceable unless there is (i) an intention to create legal relations, (ii) consideration, and (iii) sufficient certainty regarding the terms of the contract. In the absence of an express agreement, an agreement may be implied by the conduct of the parties. The existence of a contract may be inferred from a historic relationship between the parties. An invoice may constitute evidence of a contract, particularly within the context of a historic relationship.

1.2 Consumer Protections. Do Hong Kong's laws (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

Under the **Money Lenders Ordinance (Cap. 163)**, s.25(3), any agreement for the repayment of a loan or for the payment of interest on a loan in respect of which the effective rate of interest exceeds 48% per annum shall, having regard to that fact alone, be presumed to be a transaction which is extortionate. Section 24 of the Ordinance further provides that where the interest rate exceeds 60% per annum, no agreement for the repayment of any loan or for the payment of interest on any loan and no security given in respect of any such agreement or loan is enforceable. Breach of s.24 of the Ordinance is a criminal offence carrying a maximum penalty of HK$5,000,000 fine and 10 years' imprisonment. However, s.24 of the Ordinance does not apply to any loan made to a company that has a paid up share capital of at least HK$1,000,000. The Ordinance also does not apply to an "authorised institution" within the meaning of the **Banking Ordinance (Cap. 155)**.

A provision setting an additional interest rate payable on default is not enforceable if the amount constitutes a penalty and not a genuine and reasonable pre-estimate of the loss likely to be suffered as a result of the default.

Subject to limited exceptions, there is no general consumer protection legislation permitting a consumer to cancel a receivable contract for a specified period of time. In the insurance industry, there are self-regulatory guidelines whereby policyholders of long term insurance policies are permitted to withdraw unconditionally during a prescribed cooling off period with full premium refund. For unlisted structured products with tenors of over 12 months, the SFC (Securities and Futures Commission) released a new product code on 28 May 2010 which prescribed a cooling off period of at least five business days where such products are sold to the public.

Other statutory rights provided to a consumer include the **Unconscionable Contracts Ordinance (Cap. 458)**, the **Supply of Services (Implied Terms) Ordinance (Cap. 457)**, the **Consumer Council Ordinance (Cap. 216)**, and the **Control of Exemption Clauses Ordinance (Cap. 71)**. These rights are outlined under question 8.4 below.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

In ***FG Hemisphere Associates LLC v Democratic Republic of Congo & Ors*** CACV 373/2008 & CACV 43/2009 (10 February 2010), the Hong Kong Court of Appeal held that the doctrine of restrictive immunity applies in Hong Kong. In that case, it was decided that the Democratic Republic of Congo (DRC)'s agreement to arbitrate does not represent a waiver of immunity from execution (which DRC enjoyed as a sovereign state). At the time of writing, the decision is being appealed to the Hong Kong Court of Final Appeal.

In **Hua Tian Long** [2010] HKEC 603 (23 April 2010), the Hong Kong Court of First Instance held that a People's Republic of China state entity could invoke "Crown immunity" in Hong Kong, irrespective of whether the disputed transactions were commercial in nature. Such immunity could be waived where the defendant has submitted to the jurisdiction of the Hong Kong courts, or where the right to immunity is waived. At the time of writing, this decision is being appealed.

Notwithstanding ongoing appeals, both **FG Hemisphere** and **Hua Tian Long** provide timely reminders that care needs to be taken when dealing with sovereign parties.

Contracts entered into by the government and other public bodies for the procurement of goods and services and the execution of public works are to some extent governed by special statutory and common law rules. The procedural rules in respect of actions against the government are governed by the **Crown Proceedings Ordinance (Cap. 300)**.

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Although the ordinary principles of contract law are relevant to contracts made with the government and public authorities, certain special considerations attach to the contractual capacity of the government and other public bodies. Public bodies cannot enter into contracts which are beyond their powers. A public body cannot by contract fetter its right or duty to exercise a discretion vested in it by law, although this principle appears to be limited to contracts which are incompatible with the discharge of its functions and so will not normally include commercial contracts. The provision of funds by the Legislative Council is not a condition precedent to the validity of contracts entered into by the government, although payment cannot be made until the expenditure has been authorised by the Legislative Council (s.32(1) of the Ordinance).

2 Choice of Law – Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in Hong Kong that will determine the governing law of the contract?

In the absence of any express choice of law, the courts will search for the legal system with which the facts of the matter in dispute has the most "real and substantial connection". Under Hong Kong law, Hong Kong courts may refer to English court decisions when adjudicating cases, and English common law authority prior to 30 June 1997 would be imported.

2.2 Base Case. If the seller and the obligor are both resident in Hong Kong, and the transactions giving rise to the receivables and the payment of the receivables take place in Hong Kong, and the seller and the obligor choose the law of Hong Kong to govern the receivables contract, is there any reason why a court in Hong Kong would not give effect to their choice of law?

No, there is none.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in Hong Kong but the obligor is not, or if the obligor is resident in Hong Kong but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in Hong Kong give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such that between the seller and the obligor under the receivables contract?

Subject to our comments below and provided that the choice of law is clear and unambiguous, Hong Kong courts will generally give effect to the choice of foreign law.

There are certain limitations in the recognition of foreign law, for example, the choice of law must be *bona fide*, legal and is not against public policy. A choice of law might not be upheld if it was made with the intention of evading the law of the jurisdiction with which the relevant obligations have their most substantial connection and which, in the absence of the stated choice of law, would have invalidated such obligations. Further, even if a foreign law is chosen to govern the contract, Hong Kong courts will continue to apply mandatory rules of Hong Kong law to it. For example, if the contract relates to interests in real property in Hong Kong, it is likely that the Hong Kong courts would apply the law in Hong Kong to determine the issues.

2.4 CISG. Is the United Nations Convention on the International Sale of Goods in effect in Hong Kong?

Although the People's Republic of China (PRC) is a CISG participating country, it is not entirely clear if CISG applies in the territory of Hong Kong.

Some scholars have argued that CISG applies in Hong Kong (see Ulrich Schroeter, *The Status of Hong Kong and Macau under the United Nations Convention on Contracts for the International Sale of Goods*, (2004) 16 Pace Int'l L. Rev. 307). Others have argued that CISG does not apply in Hong Kong (see Michael Bridge, *A Law for International Sale of Goods*, (2007) 37 Hong Kong L.J. 17; Xiao Yongping and Long Weidi, *Selected Topics on the Application of the CISG in China*, (2008) 20 Pace Int'l L. Rev. 61).

Having considered this question, the Supreme Court of France concluded that although the PRC is a participating country of CISG, CISG did not apply to Hong Kong (***Cour de cassation* (Telecommunications products case)**, 2 April 2008). This view was supported by the United States Federal District Court (Georgia) in ***Innotex Precision Limited v. Horei***, 17 December 2009.

However, the United States Federal District Court (Arkansas) came to a different conclusion (see ***Electrocraft Arkansas v Super Electric Motors***, 23 December 2009).

Pending filing by the PRC of a suitable CISG-related depositary notification with the Secretary-General of the UN, or determination of this question by the Hong Kong courts, the better view is that CISG probably does not apply in Hong Kong.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does Hong Kong's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., Hong Kong's laws or foreign laws)? Are there any exceptions to this rule that would apply to receivables sale transactions?

There is no general rule under Hong Kong law requiring the sale of receivables to be governed by the same law as the law governing the receivables themselves. However, note that certain issues regarding transfer and perfection of receivables will generally be determined by the law governing the receivables, irrespective of the law governing the sale agreement.

3.2 Freedom to Choose Other Law. If (a) the receivables are governed by one country's laws (whether Hong Kong's laws or foreign laws), (b) the seller sells the receivables to a purchaser located in a third country, and (c) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, will a court in Hong Kong give effect to their choice of foreign law? Are there any exceptions to this rule that would apply to receivables sale transactions?

Generally yes. The principles set out in question 2.3 would apply. However, note that certain issues regarding transfer and perfection of receivables will generally be determined by the law governing the receivables, irrespective of the law governing the sale agreement.

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3.3 Freedom to Choose Home Country Law. Conversely, if (a) another country's law governs the receivables (e.g., a foreign obligor's country), and (b) the seller and purchaser are resident in Hong Kong, will a court in Hong Kong permit the seller and purchaser to choose the law of Hong Kong to govern the receivables sale? Will a court in Hong Kong permit the seller and purchaser to choose the law of Hong Kong to govern the receivables sale if only one of the seller or the purchaser are resident in Hong Kong? Are there any exceptions to this rule that would apply to receivables sale transactions?

See question 3.2 above.

3.4 Recognition of Foreign Law Sales. If (a) both the receivables contract and the receivables purchase agreement are governed by the same foreign law, and (b) the requirements for a true sale have been fully met under that foreign law, will a court in Hong Kong recognise that sale as being effective against the seller, the obligors and other third parties (such as creditors or insolvency administrators of the seller and the obligors) without the need to comply with Hong Kong's own sale requirements? Are there any exceptions to this rule?

Hong Kong courts will continue to apply mandatory rules of Hong Kong law. For example, if the contract relates to interests in real property in Hong Kong, Hong Kong courts would apply the law in Hong Kong to determine the issues. If the seller is a Hong Kong company which becomes insolvent, Hong Kong insolvency law will apply.

4 Asset Sales

4.1 Sale Methods Generally. In Hong Kong what are the customary methods for a seller to sell receivables to a purchaser?

Accounts receivable are generally sold by assignment. A sale of receivables by assignment requires an agreement (whether in writing or otherwise) between the assignor and the assignee (with valuable consideration and a clear intention to assign). An agreement for the assignment of future receivables will usually take effect as the receivables come into existence.

There are two types of assignment: legal assignment; and equitable assignment.

If certain procedural requirements set out in the **Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)**, s.9 are satisfied - i.e. the assignment is absolute, in writing under the hand of the assignor (not purporting to be by way of charge only) and notice in writing of the assignment is given to the debtor - then the assignment will take effect "in law" (i.e. legal assignment).

However, for commercial and practical reasons, it is not uncommon for sellers of receivables to prefer to avoid giving notices to debtors. Therefore, transfer of ownership of receivables by equitable assignment (which does not require notices to debtors) is commonly used.

A receivable may also be sold by novation (which requires the agreement of all parties to the underlying contract as well as the purchaser) or by a declaration of trust.

4.2 Perfection Generally. What formalities are required generally for perfecting (i.e., making enforceable against other creditors of the seller) a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

For an equitable assignment of receivables to be perfected, the requirements of the **Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)**, s.9 described in question 4.1 above must be satisfied. This usually means that written notice must be given to the debtor.

Priority between competing assignments of accounts receivable is determined by the order in which notice of the assignments is given to the debtor, not the order of the assignments themselves (except where the later assignee is not *bona fide* and was aware of the earlier assignment at the time that he entered into the later assignment). Therefore, until notice of assignment is given to the debtor, an assignment is vulnerable in terms of priority to any other assignment of which notice is given to the debtor.

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

An equitable assignment of interests relating to land must be in writing (**Conveyancing and Property Ordinance (Cap. 219)**, s.5). To ensure that the legal interest in the mortgage loan is not subject to a claim by a third party, a prudent buyer would also ensure that the transfer of the mortgage loan is registered at the relevant Land Registry office.

A negotiable instrument is transferred by an act of negotiation, such as delivery or endorsement. The transfer of bills of exchange and promissory notes are dealt with in the **Bills of Exchange Ordinance (Cap. 19)**. Generally, a bearer instrument is transferred by delivery and a registered instrument is transferred by entry in the appropriate register.

With regard to consumer loans, see question 8.4.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Does the answer to this question vary if (a) the receivables contract does not prohibit assignment but does not expressly permit assignment; or (b) the receivables contract expressly prohibits assignment? Are there any limitations regarding the purchaser notifying the obligor of the sale of receivables even after the insolvency of the seller or the obligor?

A debtor must be notified of an assignment before the receivable is enforceable against it by the purchaser. Until it receives notice, among other things:

(i) the debtor may validly discharge its debt by paying the seller;

(ii) the debtor and the seller may amend the underlying agreement;

(iii) the debtor may raise against the purchaser all the defences it could have raised against the seller (including set-off); and

(iv) a subsequent assignee or encumbrancer of the seller's receivables will take priority over the purchaser if such

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assignee or encumbrancer did not have notice of the assignment of the seller's receivables at the time the subsequent assignment or encumbrance is granted and is the first to give notice of its assignment or encumbrance to the relevant debtor.

The purchaser will only be able to sue the debtor in its own name if it has given notice and the assignment otherwise fulfils the criteria for an assignment pursuant to the **Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)**.

If a receivable contract is silent on the right to assign (i.e. it does not prohibit assignment nor expressly permits assignment), the creditor can generally sell the receivable without the consent of the debtor except in certain limited exceptions (e.g. assignment is prohibited by public policy). If the receivable contract does contain an anti-assignment provision, and the purported transfer is in breach of this prohibition, the transfer will be ineffective against the debtor in the absence of the debtor's consent.

As long as there is a true sale of the receivables, there is no prohibition against serving a notice of assignment after the insolvency of the seller or the obligor.

4.5 Restrictions on Assignment; Liability to Obligor. Are restrictions in receivables contracts prohibiting sale or assignment generally enforceable in Hong Kong? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If Hong Kong recognises prohibitions on sale or assignment and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or on any other basis?

Yes, contractual anti-assignment provisions are generally enforceable.

A seller assigning receivables in breach of a contractual anti-assignment restriction may be liable to the obligor for breach of contract. A purchaser, if he is aware of the anti-assignment provisions in the receivables contract and nonetheless proceeds with the assignment, could be liable to the obligor under the tort of inducing a breach of contract.

4.6 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables?

A contract to sell receivables must describe the receivables so that they are capable of being identified at the time of the purported assignment (or at the time they come into existence, for a sale of future receivables). For an assignment contract to be valid, it must be clear what is being assigned (see question 1.1). If the sale is by declaration of trust, the subject matter of the trust (i.e. the receivables being sold) must be sufficiently certain and the respective interests of the purchaser and any other beneficiaries of the trust must be capable of determination at any time. There is no required form for a sale document.

There is no requirement for the receivables being sold to share objective characteristics.

Provided that the intention is sufficiently clear, the sale of all the seller's receivables to the purchaser would be sufficient identification of receivables.

4.7 Respect for Intent of Parties; Economic Effects on Sale. If the parties denominate their transaction as a sale and state their intent that it be a sale will this automatically be respected or will a court enquire into the economic characteristics of the transaction? If the latter, what economic characteristics of a sale, if any, might prevent the sale from being perfected? Among other things, to what extent may the seller retain (a) credit risk; (b) interest rate risk; and/or (c) control of collections of receivables without jeopardising perfection?

Simply calling a transaction a "sale" does not guarantee a "true sale". The court will not only look at the name or form, but also the substance of the transaction, including the economic characteristics of the transaction.

For a sale of receivables to be treated as perfected and as an insolvency-safe "true sale", it must avoid being classed as a sham transaction or re-characterised as a secured loan. It must also not be vulnerable on insolvency as further discussed in section 6 below.

In the Hong Kong case of ***Chase Manhattan (Asia) Limited v First Bangkok City Finance Limited*** [1988] 1 HKC 97, the Hong Kong Court of Appeal considered and applied the principles set out in the English case of ***Re George Inglefield*** [1933] Ch.1. The three essential differences between a sale and a secured loan, as set out in Re George Inglefield, are:

(i) In a transaction of sale, the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge, the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them.

(ii) If the mortgagee realises the subject-matter of the mortgage for a sum more than sufficient to repay him, with interest and the costs, the money that has passed between him and the mortgagor he has to account to the mortgagor for the surplus. If the purchaser sells the subject-matter of the purchase and realises a profit, he has not got to account to the vendor for the profit.

(iii) If the mortgagee realises the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to repay the money advanced by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance having been made. If the purchaser were to resell the purchased property at a price which is insufficient to recoup him the money that he paid to the vendor, he would not be entitled to recover the balance from the vendor.

An obligation to repurchase assets that are in breach of warranties will not contravene the requirement that the seller does not have the right to reacquire the property, provided that the obligation is seen as a remedy for breach of warranty and not a method of transferring loss or profit, so the warranty must relate to the state of the asset on sale and not its subsequent performance.

The requirement that the purchaser not be obliged to account to the seller for profit on the sale of the property should not preclude customary profit strip techniques used in securitisations.

The requirement that the seller not be obliged to make up any shortfall if the property is sold at a loss should not preclude certain customary credit enhancements that may be given by the seller in securitisations. The entry by the seller into derivative transactions with the purchaser to hedge the purchaser's interest rate risks should not prevent a true sale occurring. In securitisation

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transactions, it is common for the seller to retain control of collection (as service or collection agent for the purchaser) and this should not prevent a "true sale".

4.8 Continuous Sales of Receivables. Can the seller agree in an enforceable manner (at least prior to its insolvency) to continuous sales of receivables (i.e., sales of receivables as and when they arise)?

An agreement for continuous sale of receivables is enforceable between the seller and the purchaser as an agreement to assign. It cannot be a legal assignment under s.9 of the **Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)**. The agreement will operate to assign the receivable on the agreed date in the future. Notice is still required to perfect the assignment and the assignment is therefore vulnerable in terms of priority to intervening assignments of which notice is given to the debtor (see question 4.2).

If the original agreement simply prescribes a mechanism for future sales of receivables, and the agreement of the parties is still required at the time of transfer, the original agreement is not enforceable. The enforceable contract would come into existence at the time an offer to sell receivables (on previously agreed terms) was accepted.

4.9 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? In that regard, is there a distinction between receivables that arise prior to or after the seller's insolvency?

The present assignment of adequately identified future property for valuable consideration is possible in equity (***Holroyd v Marshall*** (1862) 11 ER 999 and ***Tailby v Official Receiver*** (1888) 13 App. Cas. 523).

An assignment for valuable consideration of receivables that do not exist at the time of the assignment will be treated as an agreement to assign in equity. It cannot be a legal assignment under s.9 of the **Law Amendment and Reform (Consolidation) Ordinance (Cap. 23)**. This agreement will operate to assign the receivables as soon as they come into existence (although notice is still required to perfect the assignment).

See question 6.5 below on the effect of the seller entering into insolvency proceedings before the receivables come into existence.

4.10 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

Whether additional formalities will be required in order for the related security to be transferred concurrently with the sale of receivables will depend on the nature of the related security that is being transferred. For example, an equitable assignment of interests relating to land must be in writing (**Conveyancing and Property Ordinance (Cap. 219)**, s.5). The transfer of mortgages would also require registration with the Land Registry offices.

5 Security Issues

5.1 Back-up Security. Is it customary in Hong Kong to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that the sale is deemed by a court not to have been perfected?

The Hong Kong "true sale" analysis (based on English law principles set out in question 4.7 above), is critically dependent on consistency of treatment - the documents, operation of the transaction and the actions of the parties need to be consistent in all respects with the transaction being a sale rather than a secured loan. Taking a security interest requires registration (see question 5.2 below). Carrying out a "back-up" security registration as if the transaction had created a registrable charge might prejudice the true sale analysis, since it would indicate (a) that the parties were not sure of the true sale analysis and (b) that the parties did not intend to operate in all respects consistently with the true sale analysis. It is therefore not market practice to take a "back-up" security interest in a Hong Kong law true sale securitisation.

Instead of taking a security interest in a "true sale" transaction, as a "back-up", the seller may agree that, if at any time it holds any property, interest, right, benefit or proceeds that it had agreed to sell to the purchaser under the receivables sale agreement (e.g. because the purported sale was flawed), it will hold such property, interest, right, benefit and/or proceeds on trust for the purchaser.

5.2 Seller Security. If so, what are the formalities for the seller granting a security interest in receivables and related security under the laws of Hong Kong, and for such security interest to be perfected?

If security over a receivable is created by way of charge, the assignor may be required to register the charge within 5 weeks after its creation (**Companies Ordinance (Cap. 32)**, s.80). Failure to register when required may result in a loss or priority and the charge will be void as against the liquidator and any creditor of the company. The registration requirement applies to (a) any charge by a company registered in Hong Kong and to (b) any charge over property in Hong Kong by a company incorporated outside Hong Kong and registered under Part XI of the Companies Ordinance as a "non-Hong Kong company" (**Companies Ordinance (Cap. 32)**, s.91, which was amended in December 2007 to remove uncertainty on registration of charges created by foreign companies in Hong Kong).

5.3 Purchaser Security. What are the formalities for the purchaser granting a security interest in receivables and related security under the laws of Hong Kong, and for such security interest to be perfected?

An assignment is not perfected until notice is given to the debtor. Until notice is given, the assignment is subject to disadvantages mentioned in question 4.4 above.

Alternatively, the receivables may be charged by way of security. A charge is not a transfer of ownership interest in the receivables, but it is an encumbrance on the receivables. It is enforceable against the seller and third parties and gives the chargee preferential access to the receivables on the insolvency of the chargor. The degree of preference depends on whether the charge is a fixed charge or floating charge. A charge is vulnerable to the sale of the legal interest in the receivables to a *bona fide* purchaser for value without notice of the charge or, until notice of the charge is given to the underlying debtor, to the sale of an equitable interest in the

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receivables by way of assignment with notice to the debtor. The chargor may be required to register a charge over receivables within 5 weeks after its creation (see question 5.2 above) and such registration constitutes notice.

Under a fixed charge, the receivable (which must be ascertained (or ascertainable) and definite) is appropriated to the satisfaction of the debt between the chargor and the chargee immediately, or immediately upon its coming into existence. A floating charge attaches to a class of receivables, including future receivables, until an event occurs which causes the charge to crystallise, at which point it fastens on the assets then comprised in the class, effectively becoming a fixed charge. A fixed charge has a higher priority on insolvency than a floating charge.

5.4 Recognition. If the purchaser grants a security interest in the receivables under the laws of the purchaser's country or a third country, and that security interest is valid and perfected under the laws of that other country, will it be treated as valid and perfected in Hong Kong or must additional steps be taken in Hong Kong?

Whether a security interest over Hong Kong property under a contract governed by the laws of a different country will be treated as valid and perfected in Hong Kong will depend on (i) the nature of the underlying property and (ii) whether there are any additional mandatory requirements under Hong Kong law to perfect security over the relevant property (any mandatory Hong Kong law requirements must be satisfied).

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to promissory notes, mortgage loans, consumer loans or marketable debt securities?

A security interest in mortgage loans creating an interest in real property should be registered with the Land Registry as an instrument that affects interest in land in Hong Kong, pursuant to the **Land Registration Ordinance (Cap. 128)**, s.2. Where such a security interest should be registered but is not registered, it will be absolutely null and void as against any subsequent *bona fide* purchaser or mortgagee for valuable consideration of the secured property but not as between the parties to the security.

Security granted over book-entry interests in securities held in a clearing system may be security against the chargor's rights in the clearing system as opposed to the securities themselves, and may be perfected by arrangement with the clearing system, either directly or indirectly through an intermediary custodian.

A security interest in negotiable instruments, including bearer debt securities and promissory notes, held outside the clearing systems, may also be granted by a pledge of the instruments. A pledge is a transfer of possession of the instruments with the power to sell the instruments on default of the pledgor. Delivery of non-negotiable instruments (such as the share certificates of registered shares), together with an executed blank transfer form will operate as an equitable charge; alternatively, a legal mortgage over the securities may be created.

5.6 Trusts. Does Hong Kong recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets until turned over to the purchaser?

Yes, Hong Kong law recognises trusts.

5.7 Bank Accounts. Does Hong Kong recognise escrow accounts? Can security be taken over a bank account located in Hong Kong? If so, what is the typical method? Would courts in Hong Kong recognise a foreign-law grant of security (for example, an English law debenture) taken over a bank account located in Hong Kong?

Hong Kong law recognises escrow accounts and security over a Hong Kong bank account. Generally, the security will be in the form of charge over the bank account.

Subject to the local law perfection requirements, Hong Kong law would generally recognise a foreign-law grant of security over a bank account located in Hong Kong.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will Hong Kong's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables ("automatic stay")? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

Subject to the discussion in question 6.3 below, if there is a "true sale" of existing receivables, the insolvency of the seller will not affect the rights of the purchaser. In a "true sale", the purchaser will not be prohibited from collecting, transferring or otherwise exercising ownership rights over receivables acquired by a "true sale" even after the seller has become subject to an insolvency proceedings.

With regard to an agreement to assign future receivables, this will operate to transfer those receivables when they come into existence. However, after insolvency of the seller, if there are any actions required by the seller under the agreement before the receivables are transferred, the purchaser cannot rely on the seller continuing to carry out those actions.

If the sale is not a "true sale", the sale agreement may be re-characterised as a secured loan or an unsecured loan. A grant of security would be void against a liquidator and other creditors of the seller if not registered within 5 weeks after its creation (**Companies Ordinance (Cap. 32)**, s.80).

Prior to a winding-up order or the appointment of a provisional liquidator, there is no moratorium under existing Hong Kong law. However, when a winding-up order has been made, or a provisional liquidator has been appointed, there is a moratorium on any action against the company without leave of the court (**Companies Ordinance (Cap. 32)**, s.186). Enforcement of a secured loan may be subject to such moratorium.

It is also worth noting that at the time of writing, Hong Kong is proposing to introduce a new corporate rescue regime. If implemented, the new regime introduces an additional procedure called provisional supervision, which would involve an initial moratorium. Under the current proposal, the initial moratorium period will be 45 working days. Creditors can vote to extend this initial moratorium period for up to 6 months without having to apply to the court. With court approval, the moratorium may be extended beyond 6 months. There is no limit as to how much longer a court can extend the moratorium. There are very limited exceptions to the moratorium (e.g. certain derivative contracts are

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exempted from the moratorium to allow close-out netting of derivative positions against Hong Kong counterparties).

6.2 Insolvency Official's Powers. If there is no automatic stay, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of rights (by means of injunction, stay order or other action)?

In the case of a "true sale", the insolvency official would not have that power.

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the insolvency proceeding? What are the lengths of the "suspect" or "preference" periods in Hong Kong for (a) transactions between unrelated parties and (b) transactions between related parties?

(i) Unfair preference. Under the **Companies Ordinance (Cap. 32)**, s.266B, any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within 6 months (or in the case of an unfair preference to an "associate", 2 years) before the commencement of its winding up which is an unfair preference may be invalid. A court will not make any order to rescind or reverse transactions that took place during the "suspect" period if the transaction was entered into by the company in good faith and not to defraud its creditors, and the terms of the transaction are *bona fide* arm's length commercial terms entered into for *bona fide* commercial reasons. The **Conveyancing and Property Ordinance (Cap. 219)**, s.59, provides that no "purchase, made *bona fide* and without fraud of any interest in property of any kind in Hong Kong shall be open or set aside merely on the ground of undervalue".

(ii) Fraudulent disposition. Under the **Conveyancing and Property Ordinance (Cap. 219)**, s.60(1), every deposition of property made with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced.

(iii) (If the transaction is a security transaction) under **Companies Ordinance (Cap. 32)**, s.267, a floating charge is invalid if: (a) the chargor is insolvent at the time of entering into the security document or transaction thereunder, or insolvent as a result of the entering into the security document or transaction thereunder; and (b) a winding-up commences within a period of 12 months of the execution of the security document, except that the charge is valid to the extent of the money paid to the chargor plus contractual interest. This avoidance provision does not apply to a fixed charge.

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding?

There is no general doctrine of substantive consolidation under Hong Kong law. Only in very limited circumstances would the separate legal personality of a company be ignored (e.g. fraud).

6.5 Effect of Proceedings on Future Receivables. What is the effect of the initiation of insolvency proceedings on (a) sales of receivables that have not yet occurred or (b) on sales of receivables that have not yet come into existence?

Once a seller enters into insolvency proceedings, a previous agreement to assign future receivables will only continue automatically to transfer receivables as they arise where there is nothing further to be done by the seller in order to earn the receivables.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in Hong Kong establishing a legal framework for securitisation transactions? If so, what are the basics?

There are no laws specifically providing for securitisation transactions in Hong Kong.

On 1 July 1997, Hong Kong became the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China (PRC). On 4 April 1990, the PRC National People's Congress (NPC) adopted the **Basic Law of HKSAR**. Under Article 8 of the Basic Law, the laws of Hong Kong in force at 30 June 1997 (i.e. common law, rules of equity, ordinances, subordinate legislation and customary law) shall be maintained, except for any that contravene the Basic Law and subject to any amendment by the legislature of HKSAR. Under Article 160 of the Basic Law, the laws of Hong Kong in force at 30 June 1997 shall be adopted as laws of the HKSAR except for those which are declared by the NPC Standing Committee to be in contravention of the Basic Law. On 23 February 1997, the Standing Committee made a decision not to adopt the Application of English Law Ordinance (Cap. 88) which applied common law and rules of equity of England to Hong Kong. In ***HKSAR v Ma Wai-kwan and others*** (29 July 1997), the Hong Kong Court of Appeal took the view that the effect of that Standing Committee decision was to repeal the English Law Ordinance as from 1 July 1997, and that the common law and rules of equity of England which applied in Hong Kong on 30 June 1997 continues to apply in the HKSAR, subject to their independent development.

7.2 Securitisation Entities. Does Hong Kong have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

There are no laws specifically providing for establishment of special purpose entities for securitisation in Hong Kong.

7.3 Non-Recourse Clause. Will a court in Hong Kong give effect to a contractual provision (even if the contract's governing law is the law of another country) limiting the recourse of parties to available funds?

A limitation on the liabilities of the special purpose entity to a creditor is likely to be valid. Under Hong Kong law, Hong Kong courts may refer to English court decisions when adjudicating cases, and English common law authority prior to 30 June 1997 would be adopted.

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7.4 Non-Petition Clause. Will a court in Hong Kong give effect to a contractual provision (even if the contract's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

It is likely that a non-petition clause is valid, although there is little authority either way in Hong Kong law. The most effective method of enforcing such a provision would be prior injunctive relief. However, such relief is discretionary and a Hong Kong court would have to consider whether such a clause was contrary to public policy as an attempt to oust the jurisdiction of the court or the insolvency laws of Hong Kong. It is possible that a Hong Kong court would deal with a winding-up petition even if it was presented in breach of a non-petition clause.

In ***BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc*** [2011] EWCA Civ 227 (7 March 2011), the English Court of Appeal appeared to imply, *obiter*, that if a petition for winding up is made in breach of a non-petition covenant, the English court would dismiss the petition. Whether such approach would be adopted by the Hong Kong courts remains to be seen.

7.5 Independent Director. Will a court in Hong Kong give effect to a contractual provision (even if the contract's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

A restriction or limitation in the constitutional documents of a company on the ability of the directors to bring insolvency proceedings may be invalid as a matter of public policy, as a fetter on the proper regulation of a limited company.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in Hong Kong, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in Hong Kong? Does the answer to the preceding question change if the purchaser does business with other sellers in Hong Kong?

Where the receivables which are purchased constitutes a regulated business (e.g. under the **Money Lenders Ordinance (Cap. 163)** or the **Banking Ordinance (Cap. 155)**), the purchaser will be required prior to becoming the legal owner of such receivables, to obtain the necessary licences under those Ordinances.

In general, the mere purchase and ownership of receivables (without any form of physical presence in Hong Kong, either through the establishment of an office or having employees present in Hong Kong) should not in itself be regarded as a carrying on of business in Hong Kong.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

In general no, unless the collection and enforcement by the seller or third party servicer constitutes a regulated business (e.g. regulated under the **Money Lenders Ordinance (Cap. 163)** or the **Banking Ordinance (Cap. 155)**).

8.3 Data Protection. Does Hong Kong have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

The processing of information about living individuals is controlled by the **Personal Data (Privacy) Ordinance (Cap. 486)**. The Ordinance does not cover information about enterprises.

Any person who collects or uses personal information relating to an individual from which it is practicable to identify the individual is deemed to be a "data user" under the Ordinance. A special purpose vehicle acquiring receivables which nevertheless continue to be serviced by the seller is likely to be a "data user", and will have to comply with the "data protection principles" set out in Schedule 1 of the Ordinance.

Individuals have the right to request access to personal data held on them by data controllers and to request that the data is rectify if it is incorrect.

Banks and other authorised institutions subject to the Code of Banking Practice, are also subject to a duty of privacy concerning handling information on their customers.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of Hong Kong? Briefly, what is required?

There is limited consumer protection legislation in Hong Kong that would apply to the purchase of receivables.

The **Money Lenders Ordinance (Cap. 163)**, s.24 which prohibits excessive interest rates was discussed in question 1.2 above.

Under the **Unconscionable Contracts Ordinance (Cap. 458)**, a term in an agreement where a party "deals as consumer" that is "unconscionable" may become partially or wholly unenforceable.

There are other provisions under Hong Kong law which seeks to protect consumers (for example, the **Supply of Services (Implied Terms) Ordinance (Cap. 457)** which imposes certain implied terms on suppliers of services to consumers, and the **Consumer Council Ordinance (Cap. 216)** which established the Consumer Council where consumers can lodge complaints against suppliers of goods and services).

The **Control of Exemption Clauses Ordinance (Cap. 71)** restricts the ability of a party to limit its liability, including contractual liability. A party cannot limit its liability for death or personal injury caused by negligence. Where the other party is a consumer, one can limit its liability for other damage caused by negligence or for breach of contract only insofar as the term satisfies a test of reasonableness set out in the Ordinance.

Where a bank purchaser is an "authorised institution" within the meaning of the **Banking Ordinance (Cap. 155)**, it is required to comply with the Code of Banking Practice in connection with

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dealing with personal customers (i.e. private individuals).

8.5 Currency Restrictions. Does Hong Kong have laws restricting the exchange of Hong Kong's currency for other currencies or the making of payments in Hong Kong's currency to persons outside the country?

Hong Kong does not exercise exchange controls (apart from restrictions on payments to parties subject to United Nations, Hong Kong or the People's Republic of China sanctions implemented and effective under Hong Kong law – in which case the obligations of the parties under the relevant document or relevant transfer or payment may be unenforceable or void).

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in Hong Kong? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located?

There is no withholding tax on interest payments by obligors to the seller or purchaser in respect of receivables.

9.2 Seller Tax Accounting. Does Hong Kong require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

Hong Kong does not have such a requirement. In Hong Kong, the mandatory sources of generally accepted accounting principles (GAAP) are (i) the **Companies Ordinance (Cap. 32)** for companies incorporated in Hong Kong, (ii) the **Hong Kong Financial Reporting Standards (HKFRS)** which have all been converged with the International Financial Reporting Standards (IFRS) issued by the IASB, and (iii) the accounting and disclosure requirements of The Stock Exchange of Hong Kong Limited for companies listed on its main board and on its growth enterprise market. Hong Kong Accounting Standard 8 (HKAS 8, which is identical to IAS 8) provides that in the absence of a Standard or an Interpretation that specifically applies to a transaction, management shall use its judgement in developing and applying an accounting policy that results in information that is: (a) relevant to the economic decision-making needs of users; and (b) reliable, in that the financial statements: (i) represent faithfully the financial position, financial performance and cash flows of the entity; (ii) reflect the economic substance of the transaction and not merely the legal form; (iii) are neutral, i.e. free from bias; (iv) are prudent; and (v) are complete in all material respects. The Hong Kong Institute of Certified Public Accountants has also issued a **Financial Reporting Framework and Standard for Small and Medium-sized Entities** which may be used by small private Hong Kong companies as well as overseas-incorporated entities that do not have public accountability and qualify on the basis of size thresholds given in the Standard.

9.3 Stamp Duty, etc. Does Hong Kong impose stamp duty or other documentary taxes on sales of receivables?

Stamp duty is generally not chargeable on sale of receivables. The **Stamp Duty Ordinance (Cap. 117)** imposed stamp duty on transfers of interest in land. The rates are sliding rates ranging from HK$100 (for prices paid for the property up to HK$2,000,000) up to 4.25% (for prices paid for the property in excess of HK$21,739,120). Besides land transfers, stamp duty is also chargeable on transfer of stock and the issue of bearer instructions.

9.4 Value Added Taxes. Does Hong Kong impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

Hong Kong currently does not impose value added tax, sales tax or other similar taxes on sales of goods or services, on the sale of receivables or on fees for collection agent services. In 2006, the Hong Kong government proposed the introduction of sales tax in Hong Kong but this was abandoned due to widespread public opposition.

9.5 Purchaser Liability. If the seller is required to pay value added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

There are no taxes on the sale of receivables in Hong Kong.

9.6 Doing Business. Assuming that the purchaser conducts no other business in Hong Kong, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in Hong Kong?

The **Inland Revenue Ordinance (Cap. 112)** provides that "profits tax" is payable "at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong…from such trade, profession or business". In general, if the purchaser conducts no other business in Hong Kong, it should not be deemed to be "carrying on a trade, profession or business in Hong Kong".

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