

**Project on Standardization of Mortgage Origination Documents in Hong Kong
(the “Project”)**

**Guidance Notes to the Recommended Core Provisions
for Facility Agreement**

1. **The Steering Committee of the Project, and each member of the Steering Committee, expressly disclaims any liability to the fullest extent possible for the contents of the Recommended Provisions (as defined below), or for any loss, damage or claim suffered or incurred by any mortgage lender or any other person in connection with, or in reliance on, the whole or any part of the Recommended Provisions. Any mortgage lender or any other person proposing to use the Recommended Provisions must seek its own legal advice as to the suitability of the Recommended Provisions for its intended purposes.**
2. Similar to the case of mortgage application form, it is acknowledged that each mortgage lender will have its individual preferences regarding the format of facility agreement. Accordingly, it may not be appropriate to prescribe a standard facility agreement for general adoption by the banking industry. The Steering Committee has therefore developed a set of recommended core provisions for the facility agreement (“Recommended Provisions”) for incorporation into mortgage lenders’ facility agreements.
3. The Recommended Provisions are a set of recommended core provisions and are not exhaustive. In deciding whether to adopt the Recommended Provisions, the mortgage lender should consider whether the Recommended Provisions are compatible with its operational procedures and the requirements of the loan transaction. The incorporation of the Recommended Provisions into the facility agreement is entirely voluntary.
4. The **Code of Banking Practice** (the “Code”) provides that mortgage lenders should endeavour to ensure that the prospective borrower understands the principal terms and conditions of any borrowing arrangement and that the certain information should be provided to the borrower upon application for the loan or in a subsequent offer. Accordingly, the facility agreement should cover the following matters as required by the Code.
 - (a) the rate of interest for the loan and whether it may be varied over the period of the loan;
 - (b) the basis on which interest will be determined and when it will be payable, including the number of days in the year that will be used for calculation;
 - (c) all fees and charges which will apply;

- (d) the specified period for which the loan is to be made available;
- (e) details of the terms of repayment;
- (f) any overriding right to demand immediate repayment (Note: in line with the principle of fairness underpinning the preparation of the model documents, the Steering Committee recommends that there should not be any overriding right to demand immediate repayment and that the exercise of any such right should be triggered only on the happening of an event of default);
- (g) other significant features such as security requirements, late payment charges, and charges or termination fees for early repayment;
- (h) the mortgage lender's right, in the event of a default by the borrower, to set off any credit balance in other accounts held by the borrower against the amount due to the mortgage lender;
- (i) a warning to the customer that the mortgage loan is secured on the property in question and that a default may result in the mortgage lender taking possession of, and selling, the property and the mortgage lender may claim and recover from the customer any shortfall between the amount due to the mortgage lender and any amount it receives from the sale of the property;
- (j) customers to be provided with revised particulars of instalments after every adjustment of the interest rate.

5. As required by the Code, **the mortgagor, if he/she is different from the borrower, should be given an option to choose whether the mortgage will secure an unlimited or a limited amount of the loan facility.** The third party mortgagor should be advised of this right and be asked to initial against the relevant clauses in the facility agreement to ensure that he/she is fully informed and clearly aware of the extent of liabilities that he/she has been asked to assume.

6. Under the Code, mortgage lenders should obtain the consent of the borrower to provide a surety with a copy or summary of the contract evidencing the obligations to be guaranteed or secured, and if the borrower refuses to permit the supply of such documents, the surety should be informed of such refusal prior to the mortgage lender accepting any guarantee or security from the surety.

7. **Before the borrower and the mortgagor sign the facility agreement,** the mortgage lender should advise them to read through the facility agreement carefully. The mortgage lender should remind them that each of them is entitled to seek separate independent legal advice from solicitors of his choice if he wishes to understand the legal commitments which he will assume on signing the facility agreement.

The Steering Committee recommends that as a matter of best practice on the mortgagor should be represented by a separate firm of solicitors to advise him on the liabilities and obligations that he will undertake by creating the mortgage, and that those solicitors

should not also act for the mortgage lender in any capacity due to the inherent conflict of interest that would arise in such a situation. However, the Steering Committee accepts that considerations of time and cost may deter the mortgagor from instructing a separate firm of solicitors in many cases, but ultimately the decision as to whether or not to accept the risks of the conflict of interest inherent in a joint representation situation is a matter for the mortgage lender concerned.

**The Steering Committee of the Project on
Standardization of Mortgage Origination Documents in Hong Kong**

November 2003

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Recommended Core Provisions for Facility Agreement

Important Notice

The mortgage lender should highlight the relevant clauses in the facility agreement relating to fees and charges so that the borrower and the mortgagor are well informed of such fees and charges.

The mortgage lender should also make known to the borrower and the mortgagor the circumstances under which the mortgage lender may exercise its right of set-off in the facility agreement or in the terms and conditions of the accounts opened by the borrower and the mortgagor.

As regards protection of personal data of the borrower and the mortgagor, the mortgage lender should inform the borrower and the mortgagor in its data privacy statement:

- (i) the measures it has put in place to safeguard data privacy; and
- (ii) whether the mortgage lender has adopted the model contract prepared by the Office of the Privacy Commissioner for Personal Data governing the obligations of parties involved in the transfer of personal data outside Hong Kong.

Details of the loan to be granted to the Borrower and how it is to be repaid

- Loan amount
- The specified period for which the loan is available
- Details of terms of repayment
- All fees and charges which will apply, e.g., prepayment fee, redemption fee, valuation fee, handling charges, photocopying charges arising as a result of the mortgage lender assigning its interests in the mortgage loan

Interest to be charged on the loan and how it is calculated

- The rate of interest for the loan and whether it may be varied over the period of the loan
- The basis on which interest will be determined and when it will be payable, including the number of days in the year that will be used for calculation
- Customers to be provided with revised particulars of instalments after every adjustment of the interest rate

- any late payment charge and default interest

Regarding the security to be provided by the Borrower/Mortgagor/Guarantor

- As security, we require a First [Legal/Equitable] Mortgage (the “Mortgage”) over the [identify the subject property] (the “Property”) securing:

Borrower and Mortgagor
(if any) to initial

_____ the loan amount of \$ [] and interest accrued in it and reasonable costs and expenses incurred by us; **OR**
 _____ “all money” in respect of general banking facilities and interest, covering:

Delete as appropriate

*[for a 2-party mortgage] all money, obligations and liabilities due, owing or incurred by you (and if there is more than one of you, then by all of you **jointly**) now or in the future, including unpaid interest and reasonable costs and expenses incurred by us in connection with this Agreement and the Mortgage over the Property;

*[for a 3-party mortgage] all money, obligations and liabilities due, owing or incurred by the borrower now or in the future, including unpaid interest and reasonable costs and expenses incurred by us in connection with this Agreement and the Mortgage over the Property.

- *[• We also require a guarantee in respect of your liabilities under this Agreement.]

Regarding the choice of solicitors and legal fees

- You [and the mortgagor/guarantor] are advised to take separate independent legal advice from solicitors of your own choice to ensure that you [and the mortgagor/guarantor] understand the terms and conditions contained in the Mortgage and the commitment and the full consequences of creating the Mortgage.

* Delete as appropriate.

- Please note that:
 - A. the solicitors preparing the mortgage documents and attending your execution act for us only, but we have no objection for them to provide explanation to you on the meaning of the terms of the this Agreement and the mortgage documents.
 - B. we agree that the solicitors preparing the mortgage documents and attending your execution may also act for you and/or the mortgagor/guarantor. You may request from us a list of approved solicitors and appoint any solicitors on the list to represent yourselves and us in handling the Mortgage.
 - C. the solicitors preparing the mortgage documents act for us only and you and the mortgagor **must seek separate independent legal advice** from solicitors of your own choice to ensure that you and the mortgagor each understand the terms and conditions contained in the Mortgage and the commitment and the full consequences of creating the Mortgage.
- It is important that you read and understand the Mortgage carefully before signing it. You may inspect a copy of our standard form Mortgage at the office of your solicitors or our solicitors during office hours. The Mortgage will contain our usual provisions.
- **All legal costs and other expenses reasonably incurred by us in relation to the advance of the loan and creation of the Mortgage over the Property will be paid for by you [and the mortgagor].**

Regarding insurance on the Property

- The amount insured on the Property as agreed between us is based on:

Tick the appropriate box

- the loan amount and any interest owing on it at the time of taking out the insurance.
- the cost of reinstating the Property in the event of fire or other serious damage.

Regarding default by the Borrower

- You must immediately pay us the outstanding principal balance of the loan, accrued interest and outstanding balance of any other facilities if any one of the following events happen:
 - (a) you are late in paying any money under this Agreement;
 - (b) you break any term of this Agreement (other than a term which requires you to pay money);

- (c) we give you notice that we have found out that you gave us false or incomplete information in the mortgage loan application form which had adversely impaired or misled us in our decision to grant you the loan;
- (d) any other event happens which is an Event of Default under the Mortgage.

- In addition to any general right of set-off or other rights conferred by law or under any other agreement, we may, without prior notice to you, set off or transfer any money standing to the credit of any account(s) which you maintain with us (whether in your own name or in joint names with other persons) in settlement of any amount owing to us in respect of the loan. We shall as soon as reasonably practicable notify you after any exercise of our right of set-off.
- IF YOU [AND THE MORTGAGOR] DO NOT KEEP UP PAYMENTS ON THE MORTGAGE OR OTHER LOAN SECURED ON IT:
 - (1) WE MAY TAKE POSSESSION OF AND SELL THE PROPERTY; AND
 - (2) WE MAY CLAIM AND RECOVER FROM YOU [AND THE MORTGAGOR] ANY SHORTFALL BETWEEN THE AMOUNT OWING UNDER THE MORTGAGE AND THE FACILITY AGREEMENT AND ANY AMOUNT WE RECEIVE FROM THE SALE OF THE PROPERTY.

Other terms and conditions

- Upon giving us [specify the period] prior written notice, the mortgagor will be entitled to redeem the Property on payment of all sums due at the expiry of the notice. All legal costs and other expenses reasonably incurred in relation to the redemption will be paid for by the mortgagor. *[Details of early redemption charge, if any]*
- You agree that we may assign or transfer, or agree to assign or transfer the Facility Agreement, or any of our rights or obligation under it, to any person at any time.
- On any assignment or transfer under the above clause, the assignee or transferee, or its successors and assigns, will be able to enforce this Agreement against you in the same way and to the same extent that we could enforce them before the assignment or transfer.
- Hong Kong law applies to this Agreement and you irrevocably agree that any legal proceedings against you in relation to this Agreement may be brought in the Hong Kong courts.
- You agree that we may, for the purposes of giving effect to the loan to be lent to you and the mortgage created over the Property, and for such other purposes referred to in our data privacy statement, disclose any personal and credit information (including any credit reports) regarding you and your account relationship and/or your accounts and business with us or any of our subsidiaries or our ultimate holding company or any related company (together “**Bank Group Member**”) obtained under this or any other agreement with a Bank Group Member to:

- (a) any financial institution with which you have or propose to have dealings;
- (b) any actual or proposed participant or sub-participant in, or assignee, novatee or transferee of, any of our rights in relation to you;
- (c) any agent, contractor, or third party service provider or professional adviser who provides administrative, telecommunications, computer, payment or securities clearing or other services or facilities to us in connection with the operation of our business;
- (d) any person to whom we are compelled to make disclosure under the requirements of any law; and
- (e) any person under a duty of confidentiality to us, including any Bank Group Member,

provided that such disclosure is in compliance with applicable data privacy laws and codes of practice.

- You agree that we may disclose your personal and credit information (including any credit reports) to a credit reference agency subject to the applicable restrictions set out in the Code of Practice on Consumer Credit Data and transfer to our successors and assigns such information obtained.
- You also agree that a Bank Group Member may transfer any of the above information to any party to whom it is authorized to disclose the same referred to above even if that party's principal place of business is outside Hong Kong or if such information will be held, processed, or used by that party outside Hong Kong.