

## RESPONSES OF HKAB

### 1. CHATS ADVICE AND COMPLETION

#### 1.1. Overview

A main recurring theme of feedback we have received surrounds the flow of the CHATS Advice on Dday and how it impacts on the workflow of the solicitors involved, in particular, the concern that the mechanism as described under the proposal would in effect be requiring the parties to have a formal completion, as opposed to a completion by way of solicitors' undertakings.

In response to these commentaries, we hope to clarify and emphasize that the proposal does not intend to, and is not designed to eradicate the traditional completion logistics undertaken by law firms in concluding a completion by way of solicitors' undertakings. The aim of the proposal is to streamline the flow of fund on Dday by allowing mortgage loan proceeds to flow directly from the PMI to the VMI or the Vendor Account Maintainer. The adoption of PAPT for S&P is intended to and designed to fit into the existing paradigm of the workflow amongst law firms and banks, and as would be explained in further details below, the existing steps and documentation that are key in a completion by way of undertakings remain mostly undisrupted regardless of the adoption of PAPT for S&P. In fact, completion of conveyancing by way of formal completion is expressly excluded from the proposal.<sup>1</sup>

In view of the feedback and in line with the above principles, some details in the proposal in respect of the actions to be taken on Dday will be refined and clarified. In particular, (i) instead of referring to the delivery of "Completion Deck", the proposal will be refined and confined specifically to the delivery of the CHATS Advice only (see further details below) and (ii) the means of delivery of the CHATS Advice from the Vendor Solicitor / the VMI Solicitor to the VMI is not restricted to one particular mode (for example, it can be delivered through email or fax, to be agreed by individual law firm with its instructing bank). These clarifications and refinements should sufficiently address a number of concerns raised.

#### 1.2. Flow of the CHATS Advice on Dday under the proposal

Before going straight to the specific questions raised and our responses, we set out a quick recap on how the CHATS Advice is to be passed from one party to another on Dday.

- (a) **As soon as practicable** upon receipt of the CHATS Advice on Dday, the PMI will circulate it to the PMI Solicitor.<sup>2</sup>
- (b) The PMI Solicitor will (or, if the PMI engages a separate law firm, the PMI Solicitor will deliver to the Purchaser Solicitor by such time as agreed with the Purchaser Solicitor and the Purchaser Solicitor will) then deliver the CHATS Advice to the Vendor Solicitor **by Transaction Closing Time** (i.e. 5:00 pm on Dday or such other agreed time between the Vendor and the Purchaser which is earlier than 5:00 pm on Dday).<sup>3</sup>

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<sup>1</sup> Paragraph 4(a) of the proposal.

<sup>2</sup> Paragraph 7.28 of the proposal.

<sup>3</sup> Paragraph 7.29 of the proposal.

- (c) The Vendor Solicitor will deliver the CHATS Advice to the VMI **by Dday Cut-off Time** (5:30 pm on Dday).<sup>4</sup>
- (d) If the VMI engages a separate law firm, the PMI Solicitor shall deliver the CHATS Advice to the Vendor Solicitor by such time as agreed with the Vendor Solicitor to enable the Vendor Solicitor to then deliver the CHATS Advice to the VMI Solicitor by Transaction Closing Time for onward transmission to the VMI by Dday Cut-off Time.<sup>5</sup>

### **1.3. Circulation of CHATS Advice from PMI to PMI Solicitor**

***Issue:** When would the CHATS Advice be circulated by the PMI to the PMI Solicitor?*

***Responses:***

Presumably, the concern in respect of the timing of this step stems from there being no fixed or mandatory timing for this step, but that it is provided in the proposal that it should be done “as soon as practicable”.

For reference, a CHATS Advice is generated automatically in the CHATS almost instantaneously, if not instantaneously, upon the effect of a CHATS payment. The consensus amongst HKAB and the participating banks is that the PMI will then as soon as practicable upon receiving this CHATS Advice from the CHATS circulate it to the PMI Solicitor. The exact timing of such circulation will vary depending on very specific circumstantial factors, such as the volume of transactions of the day, whether the particular CHATS Advice happens to be in the earlier batch or later batch of the various CHATS Advices being circulated by the relevant PMI officer at the particular time. The aim nonetheless is for all CHATS payments that need to be effected on Dday by that PMI to be effected as early as possible in the morning of Dday and then for the CHATS Advice to be circulated to the PMI Solicitor as swiftly as possible.

This is similar to the existing timeframe under the traditional approach employed by the PMI in making available the drawdown amounts to the PMI Solicitor. While it varies from bank to bank, we are given to understand by our member banks that the current practice and general expectation is for all relevant CO(s) to be made available or remittances to be effected by around noon on Dday. The exact arrangement and timing will be liaised and agreed between the handling officer of the PMI and the handling solicitor of each particular transaction. Under the traditional approach, there is no single universal timepoint in respect of the remittance of drawdown money or circulation of CO(s) by the PMI applicable to all transactions. Similarly, under the PAPT for S&P regime, no mandatory deadline will be imposed in respect of the circulation of CHATS Advice by the PMI to the PMI Solicitor, but the PMI and the PMI Solicitor are free to agree on a timeline that works for them.

### **1.4. Delivery of CHATS Advice from Vendor Solicitor / VMI Solicitor to VMI**

***Issue:** How shall the CHATS Advice be passed from the Vendor Solicitor to the VMI on or before Dday Cut-off Time? Given that there is only 30-minute time gap between Transaction Closing Time and Dday Cut-off Time, how would the Vendor Solicitor have sufficient time to deliver the Completion Deck to the VMI?*

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<sup>4</sup> Paragraph 7.29 of the proposal.

<sup>5</sup> Paragraph 7.29 of the proposal.

### ***Responses:***

The flow of the CHATS Advice under the proposal is designed to simulate and fit into the existing practice to the greatest extent possible.

It is trite practice that the sale and purchase agreements for the majority of conveyancing transactions in Hong Kong would specify 5:00 pm on Dday as the completion time, aligning with the normal banking hours in Hong Kong. Parties may in some exceptional cases agree on a different completion time to cater for specific needs. Against this background, it is designed in the proposal for the “Transaction Closing Time” to be “5:00 pm on Dday or such other agreed time between the Vendor and the Purchaser which is earlier than 5:00 pm on Dday, whereby completion of the property sale and purchase transaction will take place by solicitors’ undertakings”.

Similar to this existing practice where the Purchaser Solicitor must by Transaction Closing Time deliver CO(s) or solicitor’s cheques for the completion amount, as well as other completion deliverables such as the assignment duly executed by the Purchaser, to the Vendor Solicitor (otherwise it would be a default on the part of the Purchaser), under the proposal, the Purchaser Solicitor should by Transaction Closing Time deliver the CHATS Advice and other deliverables (together termed as the “Completion Deck” in the previous draft proposal) to the Vendor Solicitor to fulfil the Purchaser’s completion obligations.

Under the prevailing traditional practice, this “5:00 pm deadline” between the Purchaser and the Vendor (and between the Purchaser Solicitor and the Vendor Solicitor) is present regardless of whether there is an existing mortgage and regardless of the fact that the Vendor Solicitor will also need to within Dday reach out to the VMI to deliver the Redemption Amount and arrange for redemption and release of the existing mortgage. One would be well aware that, as a matter of law, the redemption of the existing mortgage should take place before the sale and simultaneously on Dday, which is why the original release is dated the same date as the assignment despite the fact that the original release document is usually provided post-completion in accordance with the relevant solicitors’ undertakings. In other words, there has always been a time pressure on the part of the Vendor Solicitor to attend to and liaise with the VMI in respect of the redemption of mortgage within normal banking hours on Dday while at the same time the Purchaser Solicitor may very well only deliver the completion amount close to or upon the Transaction Closing Time. Practically, it is therefore very often the case that the Vendor Solicitor will liaise with and urge the Purchaser Solicitor to deliver the completion balance as early as possible on Dday to give the Vendor Solicitor buffer time to arrange for onward transmission of the Redemption Amount to the VMI.

In the context of PAPT for S&P, rather than leaving it entirely up to the tacit and market understanding that the banks will need to receive Redemption Amount within the normal banking hours, a mandatory universal deadline of 5:30 pm (termed as the “Dday Cut-off Time” in the proposal) is designated for this action for all transactions, aligning with the operational time of the CHATS. The Vendor Solicitor (or the VMI Solicitor if it is a different firm) will need to deliver the CHATS Advice to the VMI by Dday Cut-off Time to effect redemption and release of mortgage on Dday. Failing which, the Remittance Amount will be refunded back to the PMI. This is largely similar to the present need of the Vendor Solicitor to satisfy relevant requirements of the VMI within normal banking hours on Dday in respect of the release of mortgage, otherwise mortgage redemption and release will not be able to take effect on Dday and there will still be an encumbrance on the Property upon completion.

The various feedback in respect of the limited time available to the Vendor Solicitor to deliver the Completion Deck (inclusive of the CHATS Advice) by Dday Cut-off Time is well received. **To clarify**

**and refine the proposal, the proposal will only be concerned with the delivery of the CHATS Advice, but not the other documents or deliverables as may be required by the VMI in respect of the redemption of mortgage. As with the present draft proposal, it will be left silent as to the manner or means of delivery of the CHATS Advice from the Vendor Solicitor to the VMI and this shall be governed by the specific requirements of each bank and the specific agreements between the Vendor and the VMI on a case-by-case basis.** In other words, so long as the VMI has received the CHATS Advice (in the manner as specified by the VMI) from the Vendor Solicitor (or the VMI Solicitor if it is a different firm) by Dday Cut-off Time, it will be made aware that the Remittance Amount should be used for redemption of mortgage and, if there is Surplus, distributed to the Vendor. On the other hand, if no CHATS Advice is received by Dday Cut-off Time, the VMI will need to refund the Remittance Amount back to the PMI through the CHATS. Please refer to the updated draft proposal enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter for further clarification.

This does not fall far from the current paradigm that, while legally speaking redemption will need to take place on Dday, each bank will further liaise with each Vendor Solicitor on the specific procedural requirements for facilitating the redemption of mortgage for each specific transaction (for example, some banks may require the Vendor Solicitor to deliver to the VMI CO(s) / solicitor's cheques and other requisite documents as early as 3:00 pm on Dday to allow the VMI to process the items). It is trusted that with the above clarifications and refinements there is no further worry that the adoption of PAPT for S&P will have the effect of creating a formal completion.

## **2. REDEMPTION OF MORTGAGE AND DISTRIBUTION OF SURPLUS**

### **2.1. Redemption of mortgage**

***Issue:** Relevant to the above discussion, a number of feedback relates to the expectation and requirements under the proposal in connection with the redemption of mortgage, for example, what documents need to be delivered to the VMI by Dday Cut-off Time. There were also certain queries concerning the calculation of interest on the mortgage loan, whether the interest on the mortgage loan will be calculated up to Dday+1 and which party will be bearing the interest for Dday+1.*

***Responses:***

Further to the clarification in Section 1 (*CHATS Advice and completion*) above, the proposal is mainly concerned with the usage and delivery of the CHATS Advice. Refinements will be made to the proposal to focus on the receipt of the CHATS Advice by the VMI and remove references to the Completion Deck. From the perspective of PAPT for S&P adoption, the mandatory requirement will be for the Vendor Solicitor (or the VMI Solicitor if it is a different firm, after receiving it from the Vendor Solicitor) to deliver the CHATS Advice to the VMI by Dday Cut-off Time. Otherwise, the Remittance Amount will be refunded back to the PMI.

Any other requirements in connection with the redemption and release of mortgage will depend on the requirements of each participating bank (acting as a VMI) and the liaison and agreement between the Vendor Solicitor and the VMI for each particular transaction. This is same as the current practice.

It is noted that, through the adoption of PAPT for S&P which facilitates a smoother and more efficient flow of fund, it becomes feasible for the VMI, and it is the aim of the VMI, to apply the Remittance Amount towards the redemption of mortgage and distribution of Surplus to the Vendor by End of Dday, i.e. 11:59 pm on Dday, subject to customary screening in compliance with the internal policy of the

VMI and all applicable laws and regulations. Nonetheless, the proposal does not contain any mandatory requirement or guideline in respect of the calculation of interest and responsibility in respect of the extra day of interest for Dday+1 (if so calculated). As with current market practice, interest will be calculated up to the day of full repayment and this will be left to be determined in accordance with the individual practice of each bank and the agreement amongst the relevant parties for each transaction.

## **2.2. Distribution of Surplus arrangement where there are multiple Vendors**

***Issue:** Under the proposal, if there are multiple Vendors, the Surplus may only be credited to the Vendors under one account name. There is the concern that some joint-Vendors may not have a joint account and that there is a lack of flexibility with this new arrangement.*

***Responses:***

Where the joint-Vendors do not share a joint-name account, the joint-Vendors may request the VMI to distribute the Surplus to a single designated bank account, provided that such a designated bank account is maintained in the name of at least one of the joint-Vendors, in his sole name or joint-name with other third parties who are not one of the Vendors. In such case, an authorisation instruction (which may be original or copy depending on individual bank's protocol) to the VMI from the Vendor(s) who are not holders of the account and witnessed/attested by the solicitors of such Vendor(s) would be required.

## **3. APPLICABILITY AND SCOPE OF PAPT FOR S&P**

### **3.1. Withdrawal timing and mode by Purchaser or Vendor**

***Issue:** We have received queries indicating that the proposed withdrawal deadline (on or before Dday-5) may not provide sufficient time to amend the legal and loan documents due to the transition from the PAPT for S&P model to the conventional conveyancing model.*

***Responses:***

Following further consultation, the withdrawal deadline for the Purchaser and the Vendor will be moved to on or before Dday-8, instead of Dday-5. This adjustment aims to provide additional preparation time for the parties to adapt the documents from the PAPT for S&P model to the conventional conveyancing model. The proposal and template documentation have been revised to reflect this latest arrangement. Please refer to the updated drafts enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter.

Given that the requirements of individual banks may differ, the mode for withdrawal by the Purchaser and the Vendor will not be prescribed.

### **3.2. Scope of PAPT for S&P**

#### **3.2.1. Sale or purchase by personal representative**

***Issue:** Whether PAPT for S&P will apply to a conveyancing transaction involving sale or purchase of property by personal representative of an estate?*

***Responses:***

PAPT for S&P will not apply to the purchase of a property by the personal representative of the estate of a deceased individual, as this is a rare scenario. However, if the purchase was initiated by the Purchaser and then the Purchaser becomes incapacitated or passes away during the interim period pending completion (such that a personal representative of the estate steps in during this interim period), PAPT for S&P may still apply, provided all other conditions for completion are met.

PAPT for S&P will apply to the sale of a property by the personal representative of the estate of a deceased individual or by a personal representative of a Vendor who is incapacitated, provided all other criteria are satisfied. However, if the sale was initiated by the Vendor and the Vendor passes away during the interim period pending completion (such that a personal representative of the estate steps in during this interim period), PAPT for S&P will not apply due to the potential complications related to estate and testacy issues.

The above has been further clarified in the draft proposal. Please refer to clause 4(i) and 4(j) of the updated draft proposal enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter.

### **3.2.2.Non-Hong Kong third-party borrower**

***Issue:*** *Whether PAPT for S&P will apply to a conveyancing transaction involving non-Hong Kong PMI Borrower/VMI Borrower?*

***Responses:***

PAPT for S&P excludes conveyancing transactions where the Purchaser and/or the Vendor is a body corporate incorporated outside Hong Kong. Similarly, PAPT for S&P will not cover conveyancing where the PMI Borrower and/or the VMI Borrower is a body corporate incorporated outside Hong Kong, as this is a rare scenario.

On the other hand, PAPT for S&P includes conveyancing scenarios where the Purchaser, the Vendor, the PMI Borrower, and/or the VMI Borrower is a natural person of any nationality, provided they have a HKD bank account in Hong Kong with the participating banks.

### **3.2.3.Multiple mortgages**

***Issue:*** *Whether PAPT for S&P will apply to a conveyancing transaction involving a property with second or third mortgage?*

***Responses:***

At this stage, PAPT for S&P will cover conveyancing scenarios where the Vendor either has no more than one or does not have an existing mortgage over the Property.

For the avoidance of doubt, PAPT for S&P will apply in situations where the Vendor or the VMI Borrower has obtained multiple banking facilities from the same VMI, as long as they are secured only by one first legal charge in favour of the same VMI on the same property.

On the other hand and by way of illustration, PAPT for S&P will not cover situations where the Vendor or the VMI Borrower has obtained additional banking facilities from a different VMI, secured by additional mortgages with different Mortgage Institutions. In other words, PAPT for S&P will not be applicable when there are multiple mortgages registered against the Property at the Land Registry involving multiple Mortgage Institutions.

### **3.2.4. Exceptional situations that render a transaction not suitable for PAPT for S&P after withdrawal deadline**

***Issue:** We have received comments as to the need for disapplication of PAPT for S&P in situations that may arise after the withdrawal deadline (i.e. on or before Dday-8), which could render the transaction unsuitable for adopting PAPT for S&P. There also appears to be a perception that it would be unsuitable to use PAPT for S&P where there are still outstanding title requisitions close to completion.*

***Responses:***

If the inability to adopt PAPT for S&P (i.e. discovery of circumstances making adoption of PAPT for S&P not possible or requiring other workaround) happens after the withdrawal deadline, the Vendor or the Purchaser should notify all the relevant parties as soon as possible. The PMI and the VMI will consider what the appropriate course of action would be given the latest update and allow exceptional handling as necessary to enable the parties to switch back to the conventional payment method or use alternative solution. This is no difference from existing practice when occasionally there will be exceptional circumstances which potentially may affect the ability to proceed to completion or require parties to resolve on the day. PAPT for S&P is flexible enough to enable parties to postpone completion to another day, if needed. See also Section 5.5.1 (*Question on the proposal and the SPA*) below.

Further, even if there are outstanding title requisitions close to completion, PAPT for S&P can nonetheless continue to be adopted. Despite payment of the Remittance Amount from the PMI to the VMI through the CHATS on Dday (if already effected) prior to the title requisitions being settled and prior to Transaction Closing Time, if the Purchaser is still dissatisfied with the responses to the outstanding title requisitions by Transaction Closing Time, he can choose not to complete the transaction and the Purchaser Solicitor should not deliver the CHATS Advice to the Vendor Solicitor (consequently, no CHATS Advice will be delivered to the VMI by Dday Cut-off Time and the Remittance Amount will have to be refunded by the VMI to the PMI). This has the same effect of the Purchaser not delivering the CO(s) to the Vendor at completion in a conventional conveyancing transaction if the Purchaser Solicitor is not satisfied with the title. Likewise, similar to the traditional approach where some Purchaser Solicitors may want to demonstrate the Purchaser's readiness to complete by showing (but not delivering) the CO(s) to the Vendor Solicitor, under PAPT for S&P, the Purchaser Solicitor may also "show" the CHATS Advice to the Vendor Solicitor for the record so long as it is clear and unequivocal in its action that the "showing" of CHATS Advice to the Vendor Solicitor does not constitute as delivering the CHATS Advice for the purpose of completion. See also Section 7 (*Completion and payment workflow*) below.

### **3.3. Banks' services**

#### **3.3.1. Question on withdrawal by banks**

***Issue:** The PMI and the VMI will have ultimate discretion to determine whether a transaction will be excluded from PAPT for S&P. Whether the PMI and the VMI will be allowed to withdraw from participation in PAPT for S&P?*

***Responses:***

The PMI and the VMI will conduct an internal review at the outset to determine whether a transaction meets the in-scope requirements for PAPT for S&P. In general, it is expected that the PMI and the VMI will adopt PAPT for S&P if the in-scope requirements have been met.

Further, even if the PMI and the VMI have agreed to adopt PAPT for S&P in a transaction, they will have a discretion to disapply PAPT for S&P if the transaction subsequently becomes out-of-scope (see response above in Section 3.2 (*Scope of PAPT for S&P*)).

### **3.3.2. Acting as Vendor Account Maintainer**

**Issue:** *In the situation where there is no existing Vendor Mortgage, under the conventional practice, the Vendor will receive the solicitor's cheques for the deposit and the balance of purchase price upon signing the FSPA and the assignment deed respectively. Under PAPT for S&P, the Vendor will have to make prior arrangement with the Vendor Account Maintainer to receive the funds. How do banks intend to charge for acting as the Vendor Account Maintainer, and will there be any restrictions or guidelines in this regard?*

**Responses:**

The decision on whether and how the Vendor Account Maintainer will impose charges for their services is a commercial matter to be determined by the participating banks independently in accordance with applicable laws, regulations and guidelines. The Vendor retains the discretion to decide whether to use a particular bank as its Vendor Account Maintainer (provided that the Vendor needs to have a bank account with the bank that he selected).

### **3.3.3. Preferential treatments**

**Issue:** *We have received concerns regarding potential implications or pressure from the PMI if the Purchaser opts not to use PAPT for S&P. Whether banks may offer preferential treatments, such as different mortgage loan offers, rates, or rebates, based on the use of PAPT for S&P?*

**Responses:**

The proposal will not expressly tie any preferential treatment to the use of PAPT for S&P. However, participating banks should be free to make their commercial decisions independently. The decision whether or not to offer different mortgage loan terms, rates, or rebates will be left to the discretion of the banks.

### **3.4. SPA requirements**

**Issue:** *To clarify whether conveyancing transactions that only have PSPA (臨約到尾) signed will be within the scope of PAPT for S&P.*

**Responses:**

We confirm that PAPT for S&P will only apply to transactions where the parties have signed an FSPA with the sample FSPA clauses incorporated. The PMI Solicitor should confirm in the book loan letter to the PMI that a FSPA with the sample FSPA clauses incorporated has been signed. The draft proposal has been accordingly updated in this respect.

If the parties have signed a PSPA, the PSPA should also incorporate the corresponding sample PSPA clauses (which, following consultation, have been simplified and enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter). Transactions without an FSPA will not be within scope.



### 3.5. Future PAPT transactions

**Issue:** *Under the original paragraph 4.1(a) of the sample clauses in facility letter, if the Purchaser has adopted PAPT for S&P in a present transaction, in the case of a future conveyancing transaction where the title to the Property is being transferred from the Buyer/mortgagor to a new legal owner (“**Future Purchaser**”), the Purchaser shall seek agreement of the Future Purchaser to agree to pay via CHATS, direct transfer or other means acceptable to the mortgagee/bank. We have received a few observations and concerns regarding this paragraph 4.1(a)(i), including that the Purchaser/mortgagee will unlikely remember this obligation when he negotiates a PSPA for the future conveyancing transaction and it is unfair to require the Purchaser/mortgagor to agree to obligations that may happen in the future.*

**Responses:**

We acknowledge the concerns regarding the original paragraph 4.1(a)(i) of the sample clauses in facility letter and we have removed this obligation from the draft proposal. Please refer to the updated draft sample clauses in facility letter enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter.

## 4. LIABILITY OF PARTICIPATING BANKS

### 4.1. General principles

As explained in the proposal, PAPT for S&P involves utilising the existing interbank payment infrastructure, i.e. the CHATS, to facilitate the completion of a sale and purchase transaction. PAPT for S&P at the core involves the direct bank-to-bank transfer of mortgage portion of the completion money, and the use of the CHATS Advice as evidence of successful settlement of funds, which would allow conveyancing practitioners to carry out conveyancing of properties according to conventional conveyancing practices. The goal is to introduce an additional option for paying the mortgage portion of the completion money, rather than for the banks to take up or take over the roles of conveyancing practitioners. Participating banks should not be expected to assume additional obligations or responsibilities simply by offering PAPT for S&P as a payment option.

Therefore, as a matter of principle, participating banks should not be held accountable for the actions or omissions merely because of their participation in and offering PAPT for S&P as a payment option. This principle is reflected in Clause 3(a) of the T&C.

As to the participating banks’ responsibilities and liabilities for participating banks’ own acts and omissions, this is a matter to be governed by existing laws and established legal principles.

### 4.2. Question on T&C

**Issue:** *Whether the T&C would clearly state that the VMI cannot exclude its liability, and that any exclusion of liability would be ineffective if it fails to comply with its obligations or understandings stated in the T&C.*

**Responses:**

There is no need to contain such provisions, given that the participating banks’ responsibilities and liabilities for their own acts and omissions are to be governed by existing laws and established legal principles.

#### 4.3. Comment on Clause 3(a) of the T&C

**Issue:** *There is a suggestion of amending Clause 3(a) of the T&C to remove the words “acts and omissions of the PMI in effecting the payment of the Payment Amount” on the basis that the PMI should be liable for its actions or omissions.*

**Responses:**

Clause 3(a) is not an exclusion clause. Clause 3(a) serves to set out the principle that no participating bank is responsible for the actions or omissions of other parties. Clause 3(a) does not exclude or purport to exclude a participating bank’s liability for its own actions or omissions. For example, the VMI would not be accountable where the PMI has not made the payment (for good reasons or by mistake), or that an unintended recipient bank would not be accountable where the PMI has made the payment (by mistake) to the unintended recipient bank.

### 5. SPECIAL CIRCUMSTANCES

#### 5.1. Unintended recipient banks

##### 5.1.1. Question on Interbank Protocol

**Issue:** *Under PAPT for S&P, if the PMI mistakenly transferred the Remittance Amount to the wrong bank (i.e. an unintended recipient bank), the unintended recipient bank is required to return such funds by 4:00 pm on the next business day. Can this deadline be met by all participating banks?*

**Responses:**

It is HKAB’s mandate that all participating banks, in the position of an unintended recipient bank, must comply with the refund deadline of 4:00 pm on the next business day.

#### 5.2. CHATS Failure

##### 5.2.1. Question on SPA

**Issue:** *Condition(s) for CHATS Failure to result in postponement of completion and how CHATS Failure will be determined and announced.*

**Responses:**

The draft sample clauses for FSPA currently provide that, if there is a CHATS Failure at any time between “9:00am and [11:00am]”, completion will be postponed to the next business day on which no CHATS Failure has occurred between the same hours (Clause 10).

Following further consultation, the sample clauses for FSPA have been revised to the effect that, if there is a CHATS Failure “on Dday **at any time before 12:00 pm**”, the postponement mechanism will be triggered. This is to take into account the fact that 12:00 pm is the latest indicative time for the PMI to transfer the Remittance Amount to the VMI. Please refer to the updated draft sample clauses in FSPA enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter.

HKICL will be responsible for determining whether CHATS Failure has taken place. HKICL will notify users of CHATS (i.e. banks) accordingly.

**Issue:** *Whether CHATS will be functional if there is extreme weather.*

***Responses:***

CHATS will remain operational during extreme weather.

However, we do acknowledge that extreme weather poses challenges for various steps in the completion process, for example, office closures. PAPT for S&P does not intend to alter this position. While the draft proposal and relevant documentation do not have express provisions on extreme weather situation, it is noted that FSPA would typically contain a clause to the effect that completion would be automatically postponed to the next business day if typhoon signal No.8 or above or the Black rainstorm signal is hoisted in Hong Kong at any time between 9:00 am and 5:00 pm on the originally scheduled completion date. To the extent that the FSPA has stipulations to such effect, which is almost always the case in current conveyancing transactions, the sample clauses for FSPA (which is silent on the effect of extreme weather) will not override such term(s).

### **5.3. CHATS Advice Correction Notice**

#### **5.3.1. Question on the proposal**

***Issue:*** *To clarify how CHATS Advice Correction Notice will be used for rectifying errors in CHATS Advice, including the timeline for doing so and the recipient(s) of the notice.*

***Responses:***

The CHATS Advice Correction Notice should only be issued by the PMI if there is an error in the “Redemption Reference” of the CHATS Advice, which is the unique identifier assigned to each conveyancing transaction adopting PAPT for S&P.

While the CHATS Advice Correction Notice is “issued” by the PMI and “addressed” to the VMI, the workflow of delivery of such notice should be consistent with that of CHATS Advice: **following issuance by the PMI, it should pass through (i) the PMI Solicitor and then (ii) the VMI Solicitor to reach the VMI**, i.e. the same route as described in Section 1.2 (*Flow of the CHATS Advice on Dday under the proposal*) above applies. Please refer to the updated draft proposal and template documentation enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter for further clarification on this workflow.

### **5.4. Late discovery of errors in CHATS Advice**

#### **5.4.1. Question on the proposal**

***Issue:*** *If an error in CHATS Advice is only discovered by the time that the VMI receives it, query how the error will be handled (for example, with CHATS Advice Correction Notice)?*

***Responses:***

The method of handling of an erroneous CHATS Advice will depend on the nature of the error, for example whether it involves transfer to the wrong bank, transfer of the wrong amount or inclusion of an incorrect Redemption Reference etc. It will not be correct to rely on the use of CHATS Advice Correction Notice, which relates to correction of Redemption Reference, to rectify all such issues.

The feasibility of rectifying the error will also depend on the time in the day when the VMI receives the erroneous CHATS Advice. For example, if the VMI receives the CHATS Advice from Vendor Solicitor around 3 pm, it will presumably have more flexibility to resolve the error in CHATS Advice (for example, to ask for the CHATS Advice to be re-issued).

In view of the above, the handling of an erroneous CHATS Advice is a fact-sensitive matter and cannot be set down in an exhaustive manner. This is similar to current conveyancing transactions, where errors in the CO(s) and solicitor's cheques might be discovered last-minute and are handled on a case-by-case basis. In any event, we note that the CHATS Advice will be checked by multiple parties, and it is unlikely that the errors will only be discovered when it reaches the VMI.

## **5.5. Last-minute changes in purchase price or Redemption Amount**

### **5.5.1. Question on the proposal and the SPA**

***Issue:** The Purchaser and the Vendor may have less flexibility to deal with last-minute issues which may arise ahead of completion under PAPT for S&P, for example, any changes in purchase price or Redemption Amount.*

***Responses:***

Last-minute issues relating to conveyancing transactions are varied in nature and it is not the intention to address all of them via the design of PAPT for S&P. However, if the parties wish to resolve last-minute issues by adjusting the purchase price or a stakeholding arrangement (for example, the Vendor reducing the purchase price in light of a newly discovered title defect), the Purchaser and the Vendor are still at liberty to use solicitor's cheques and/or CO(s) to make final adjustments by the time of completion.

On the other hand, if there is a last-minute change in the Redemption Amount, the issue here is not unique to transactions adopting PAPT for S&P. In both current transactions and PAPT for S&P, the Vendor will need to use additional funds to make up the Redemption Amount if there is not enough Surplus to do so. Again, the Vendor is permitted to use CO(s) or solicitor's cheques to make up the additional funds under PAPT for S&P.

Finally, while "time is of the essence" and the completion date and time is critical in a conveyancing transaction, the Purchaser and the Vendor may agree to postpone the Dday. As with current transactions, this will allow the parties to buy some time for re-negotiation of commercial terms and put in place new payment arrangements, for example, to instruct the PMI to revise the Remittance Amount if appropriate. A last-minute postponement of Dday is possible where PAPT for S&P is adopted. The Purchaser Solicitor can opt not to pass the CHATS Advice to the Vendor Solicitor by Transaction Closing Time and the Vendor Solicitor can opt not to pass the CHATS Advice to the VMI by Dday Cut-off Time, which will result in the Remittance Amount being refunded back to the PMI. See also Section 7 (*Completion and payment workflow*) below.

## **6. THIRD-PARTY BORROWER**

***Issue:** A number of comments relate to the scenario where (i) the Purchaser/mortgagor and the PMI Borrower are not the same person or (ii) the Vendor and the VMI Borrower are not the same person. Will the consent of these third-party borrowers be required for the adoption of PAPT for S&P?*

***Responses:***

**The consent of a third-party borrower (whether the PMI Borrower or the VMI Borrower) will be required as well for the adoption of PAPT for S&P.** We have revised the draft proposal, the standard clauses, and the T&C to reflect this. Please refer to the updated drafts enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter.

On the buy-side, under the traditional practice, where the Purchaser/mortgagor and the PMI Borrower are not the same person, both the Purchaser/mortgagor and the third-party borrower will be required to sign the facility letter. Where PAPT for S&P is to be adopted, the facility letter in turn will incorporate (a) the sample clauses for facility letters with or without modification, and (b) the standard clauses for incorporating the T&C into the PMI/Buy-side Contract without modification or qualification. Accordingly, the consent of both the Purchaser and the third-party PMI Borrower will be captured.

On the sell-side, the VMI Borrower, as borrower of a facility to be repaid, will need to consent to the use of PAPT for S&P as the means of repayment of the Redemption Amount to the VMI and the distribution of the Surplus to the designated bank account in the name of the Vendor.

## **7. COMPLETION AND PAYMENT WORKFLOW**

### **7.1. General principles**

The completion and payment mechanics for PAPT for S&P are designed to be compatible with existing conveyancing practices as much as practicable under the existing interbank payment infrastructure, and a fundamental principle of PAPT for S&P is that it is the Vendor and Purchaser (and their respective solicitors) who are and remain to be in control of the conveyancing transaction, especially as to completion and payment.

In a nutshell:

- (a) The CHATS Advice is a standard-form document that replaces the CO(s) and solicitor's cheques (insofar as the mortgage proceeds are concerned) and is to be passed along the chain of lawyers in a manner similar to how CO(s) are being passed.
- (b) The CHATS Advice may be sent by electronic means as agreed by individual bank, adding flexibility when compared to CO(s) and solicitor's cheques.
- (c) We recognize that it is an important feature of existing conveyancing practices for Purchasers on the one hand not to proceed with completion if the Purchaser is not satisfied with the Vendor's title, and on the other hand to demonstrate the Purchaser's readiness to complete. The use of the CHATS Advice and the refund mechanism are designed precisely to achieve just that.
- (d) If the VMI does not receive the CHATS Advice (or the receipt or certificate in lieu of such CHATS Advice pursuant to paragraph 10.4 of the draft proposal) by 5:30 pm, this will trigger the mechanism for the VMI to refund the mortgage proceeds to the PMI. This feature is at the core of PAPT for S&P: it allows the Vendor (and the Vendor Solicitor) to retain control not to proceed and complete by withholding the CHATS Advice. In the same vein, the Purchaser (and the Purchaser Solicitor) should not transmit the CHATS Advice to or share it with the Vendor (and the Vendor Solicitor), before the Purchaser is satisfied with the Vendor's title and is willing to complete. See also Section 3.2.4 (*Exceptional situations that render a transaction not suitable for PAPT for S&P after withdrawal deadline*) above.
- (e) PAPT for S&P is designed to allow the parties to agree to postpone completion to a subsequent date if the parties are unable to resolve any outstanding issues as to title by 5:00 pm on the scheduled Dday. All it takes would be for the parties to agree on a different Dday and arrange for payment by PAPT for S&P on such a revised date. Whether the parties

and their Mortgage Institutions would agree to the postponement of course would be a different matter, to be decided by the parties and their Mortgage Institutions having regard to their respective rights and obligations under the law and the applicable contracts as well as their own interests.

In designing the completion and payment mechanics, we also sought as much as possible to preserve and make use of existing timelines and communication channels, taking into operational constraints of both participating banks and law firms.

In a nutshell:

- (f) The timeline for PAPT for S&P is designed to follow the current market practices regarding the timeline for drawdown of mortgage loans and regarding completion and payment of conveyancing transactions.
- (g) The (indicative) time for sending the book loan letter to the PMI – Dday-5 – was selected based on the current market practice which requires Borrowers to issue drawdown notices five days in advance of drawdown date.
- (h) The (mandatory) time for transmitting the CHATS Advice to the VMI – 5:30 pm on Dday – was selected based on the current market practice which requires completion to take place by 5:00 pm, and after considering the operational needs of banks, especially the time to process incoming CHATS Advices and to process refunds.

## **7.2. Comment regarding potential misalignment in transaction management**

***Issue:** Parties and their solicitors should be in control at every stage of the transaction. PAPT for S&P will separate the handling of payment arrangements of a transaction from the remaining aspects of a conveyancing transaction and will lead to potential misalignment in transaction management. For example, there is a risk that the parties will proceed to advanced stages of mortgage loan drawdown, even though some title requisitions remain outstanding. This involves a fundamental change to the conveyancing practice.*

### ***Responses:***

As explained in Section 7.1 (*General principles*) above, the proposal goes to great lengths to ensure that the Purchaser, the Vendor and their respective solicitors are in control of the transaction, including whether to proceed to completion and payment. PAPT for S&P is designed to allow parties to negotiate and deal with requisitions and title issues up to the “last minute”. Therefore, payment remains to be an integral rather than independent aspect of the transaction under PAPT for S&P, and PAPT for S&P is compatible with conventional conveyancing practices.

At the core of the indicative timeline is the market practice regarding notification of drawdown period (the “**Drawdown Notice Period**”), being usually around five days in advance of drawdown. The other recommended times on the indicative timeline are designed based on the five-day Drawdown Notice Period (and hence their indicative nature). Parties and their legal advisers are free, after having regard to their rights and obligations under the applicable contracts, to depart from the recommended times and to exercise their own judgment in their preparations and management of the transaction leading up to the drawdown notice and to completion.

The Drawdown Notice Period is significant to banking operations. It is general practice that a bank acting as a PMI would get prepared for drawdown after the drawdown notice is received and drawdown

will take place on the scheduled Dday subject to its solicitors being reasonably satisfied with the title of the relevant property and the various searches to be conducted on Dday. Therefore, we expect transaction management to be similar in transactions using PAPT for S&P and in those using conventional payment methods. If there are last minute outstanding issues preventing completion to take place, the Purchaser Solicitor should not pass the CHATS Advice to the Vendor Solicitor by the Transaction Closing Time such that VMI will not receive the CHATS Advice by Dday Cut-off Time, which will result in the Remittance Amount being refunded back to the PMI. See also Section 3.2.4 (*Exceptional situations that render a transaction not suitable for PAPT for S&P after withdrawal deadline*) and Section 5.5.1 (*Question on the proposal and the SPA*) above.

If the Purchaser decides not to postpone completion and decides instead to arrange for drawdown notwithstanding outstanding issues as to title, the risk of doing so lies with the Purchaser – this is the same whether or not PAPT for S&P is used.

### 7.3. Comment regarding additional lines of communication

**Issue:** *PAPT for S&P will create additional communication lines among the parties and their solicitors, and through the chain of solicitors involved. For example, the Redemption Quotation Letter issued by the VMI is addressed to both the Purchaser and the Vendor, and information such as the Redemption Amount, Remittance Amount, Purchaser Top-Up Portion, change in name of Vendor and/or VMI Borrower etc. have to be disclosed and continuously updated between the PMI/Purchaser and the VMI/Vendor.*

**Responses:**

The VMI will need various information to properly transfer, hold and distribute the mortgage portion of the completion money under PAPT for S&P. This entails that some additional correspondence will be needed to communicate the necessary information, and any changes or corrections, to the VMI. However, we seek to utilise existing communication channels as much as possible and to limit the need for additional correspondence.

As for the specific examples given in the comment:

- We have revised the proposal so that **the Redemption Quotation Letter will be issued only to the Vendor**. Please refer to the updated draft proposal enclosed in Appendix 3 (*Updated Draft Proposal and Transaction Documents*) to this letter.
- The Redemption Amount (being the amount needed to redeem the existing mortgage) and Remittance Amount (being the amount available from the new mortgage) are information that need to be communicated even under conventional conveyancing practice, specifically for the purpose of preparing CO(s) or split cheques.
- The top-up amount easily can be calculated from the Redemption Amount and Remittance Amount. In any event, conventional methods of payments will be used for the payment of the top-up amount.
- Changes in the names of the Vendor or the VMI Borrower of course will need to be communicated to ensure that payments are made to correct accounts. This is the case even if CO(s) or solicitor's cheque is used instead of CHATS payment.

## 8. REFUSAL OR INABILITY TO PROVIDE THE ASSIGNMENT AFTER COMPLETION

**Issue:** *Sometimes a Vendor is only able to execute the assignment after completion has taken place. If the Vendor refuses or is unable to execute the assignment (for example, by reason of death or incapacitation), the Vendor Solicitor might be asked to account for the losses suffered by the banks and, given that the funds already have been distributed, the Vendor Solicitor would not have the option of returning the money to the Purchaser for the Vendor Solicitor's inability to honour the undertakings given by the Vendor Solicitor.*

### **Responses:**

Under conventional conveyancing practices regarding completion by way of undertaking, the Vendor Solicitor usually gives an undertaking to provide the requisite documents within the stipulated number of days. Under current law and conveyancing practices, the solicitor/solicitor's firm giving the undertaking is personally liable to honour the undertaking even if the undertaking concerns matters beyond the control of the solicitor/solicitor's firm. Therefore, we believe it is best practice for the Vendor Solicitor to have in its possession among other things the duly executed assignment deed before giving the undertaking.

The proposal is in line with such best practices in recommending that the Vendor Solicitor should have in its possession the duly executed assignment deed before passing on the CHATS Advice to the VMI. The issue raised is not a situation that is created due to the adoption of PAPT for S&P, but an issue that would also arise under the traditional approach, if the Vendor Solicitor had not secured an assignment duly executed by the Vendor but went ahead to give relevant solicitors' undertakings upon completion.