

LC: Translation of speech by Secretary for Justice in moving second reading of Contracts (Rights of Third Parties) Bill

Following is the translation of a speech by the Secretary for Justice, Mr Rimsky Yuen, SC, in moving the second reading of the Contracts (Rights of Third Parties) Bill in the Legislative Council today (March 26):

President,

I move that the Contracts (Rights of Third Parties) Bill be read the second time.

Purpose of the Bill

The purpose of the Bill is to implement the recommendations of the report on Privity of Contract published by the Law Reform Commission of Hong Kong (LRC) in September 2005 so as to reform the common law doctrine of privity of contract.

Under the common law doctrine of privity, a person not a party to a contract (i.e. a "third party") cannot acquire or enforce rights under the contract. This prevents effect from being given to the contracting parties' intention to benefit a third party. This doctrine has long been criticised as contrary to the parties' intention to benefit a third party. In certain circumstances, the court may even need recourse to devices such as agency or trust to allow a third party to enforce a right conferred on the third party. In some other cases, a third party may have to resort to separate contracts. This not only brings about inconvenience and complexity, but also extra cost.

The LRC has studied the relevant reforms conducted in various common law jurisdictions such as Australia, England and New Zealand and recommended that this aspect of the doctrine of privity, under which a third person cannot acquire or enforce rights under a contract, be reformed by way of legislation. Having carefully considered the LRC's recommendations and the views of the relevant stakeholders, the Administration introduces the Bill to implement LRC's recommendations.

Key Features of the Bill

The key features of the Bill can be outlined as follows:

Who is a Third Party

The Bill provides that a third party, that is a person who is not a party to the contract, must be expressly identified in the contract by name, as a member of a class or as answering a particular description. Rights may also be conferred on a third party who is not in existence, for example, an unborn baby, when the contract is entered into.

Test of Enforceability

The Bill provides for a two-limb test and the satisfaction of either limb will permit a third party to enforce the relevant term of the contract:

- (1) a third party may enforce the contract if the contract contains an express term to that effect; or
- (2) if a contract contains a term which purports to confer a benefit on a third party, that party may enforce that term unless on a proper construction of the contract, parties to the contract do not intend that the third party may do so.

Besides, parties to a contract can expressly exclude the application of this new statutory scheme in their contract.

Recession and Variation of Contract

In order to strike a balance between the protection of the freedom of contracting parties to vary the terms of a contract on the one hand and the protection of the interests of a third party who may suffer as a result of the variation to the contract on the other, the Bill provides for the circumstances in which a third party's rights are "crystallised" such that the contracting parties may not rescind the contract or vary it in a way that affects the third party's rights.

Defences Available to Promisor and Protection Against Double Liability

Subject to the provisions of the Bill, a third party may enforce

a term of the contract against the promisor of the contract. The Bill provides for defences, set-offs and counterclaims to be available to a promisor in proceedings brought by a third party and also protects a promisor against double liability.

Arbitration Clauses

The Bill deals with two situations in relation to arbitration. The first situation is that if a third party's right to enforce a term of a contract is subject to an arbitration agreement, the third party must enforce the term by way of arbitration and be treated as a party to the arbitration agreement, unless on a proper construction of the contract, the third party is not intended to be so treated.

The second situation is where a third party is given an enforceable procedural right under a contract, for example, by way of an express provision providing for arbitration of disputes where a promisor brings a non-contractual claim (such as tortious or statutory claim) in connection with a contract against a third party, then the third party may enforce the procedural right to submit the disputes to arbitration.

Scope of Application

As to the scope of application, the new statutory scheme does not apply to contracts entered into before the commencement of the scheme so that existing rights, obligations or remedies of contracting parties and a third party will not be affected.

In addition, the Bill excludes two major types of contracts:

(1) The first type of contracts excluded is: contracts where a third party has no enforceable right under existing rules but there are sound policy reasons for maintaining that position (for example, the articles of a company having effect as a contract under the Companies Ordinance).

(2) The second type of contracts excluded is: contracts where a third party already has an enforceable right under existing rules reflecting international conventions or where allowing third parties to claim a right of enforceability would contradict or prejudice the underlying policies of certain areas of law. For example, a bill of exchange,

a contract for the carriage of goods by sea, and a covenant relating to land, including a deed of mutual covenant as defined in section 2 of the Building Management Ordinance.

Views from the Public and Legislative Council's Panel

The Administration has consulted the legal profession and other stakeholders on the Bill. The legal professional bodies did not raise any objection to the legislative proposal. The Administration has carefully considered various technical comments and drafting suggestions raised by the legal professional bodies and the academia, and has taken on board the suggestion of the Hong Kong Bar Association by excluding land covenants (including deeds of mutual covenant) from the new statutory scheme. The Legislative Council's Panel on Administration of Justice and Legal Services has also indicated its support to the policy objectives of the Bill.

Concluding Remarks

President, as I mentioned at the beginning of this speech, the common law doctrine of privity has long been considered as giving rise to injustice or inconvenience on third parties' rights and not fully reflecting contracting parties' intention. Various common law jurisdictions including England have reformed the doctrine of privity by way of legislation. The Administration believes that the Bill would enhance Hong Kong's contractual law regime and align it with those of the other major common law jurisdictions.

With these remarks, I would like to appeal to Members to support the Bill.

Ends/Wednesday, March 26, 2014