

Consultation Paper on Contracts (Rights of Third Parties) Bill 2013

Objectives

The Law Reform Commission of Hong Kong (LRC) published the report on “Privity of Contract” (Report) in September 2005 recommending a reform of the doctrine of privity of contract. The LRC further recommends that the reform should be achieved by a detailed legislative scheme.

2. After careful consideration of the views and recommendations of the LRC, the Department of Justice (DoJ) has prepared the proposed Contracts (Rights of Third Parties) Bill with a view to implementing the recommendations of the LRC in full. The Bill would enable a third party, i.e. a person not a party to a contract, to enforce the contractual terms subject to contracting parties’ manifest intention.

3. Following the recommendations of the LRC, the proposed Bill does not completely abolish the doctrine of privity but reforms the general rule that only parties to a contract may enforce rights under the contract. To reflect the recommendation that contracting parties should have the freedom to adhere to the doctrine of privity if they so choose, provisions have been included allowing parties to contract out of the new statutory provisions giving rights of suit to a third party. DoJ wishes to seek the views of the professional bodies, business communities and other interested parties on the proposed Bill.

Background

4. In December 2002, the Secretary for Justice and the Chief Justice directed the LRC to examine the doctrine of privity of contract and its exceptions and to make recommendations for reform as appropriate. A Sub-committee was formed under the LRC which consisted of members from the legal profession, insurance and banking industries, academic bodies and the Consumer Council.

The Privity Doctrine

5. The doctrine of privity is also known as the “third party rule”. It has two aspects:

- (a) a person cannot acquire and enforce rights under a contract to which he is not a party; and
- (b) a person who is not a party to a contract cannot be made liable under it.

Criticism

6. The second aspect is generally regarded as just and sensible. However, the first aspect has been criticised in a number of common law jurisdictions. The anomaly of the first aspect of the doctrine can be illustrated by an example. If A has an agreement with B that A would do something for C and A subsequently does nothing, C cannot enforce the contract against A because C is not a party (or “privity”) to the contract. This first aspect of the doctrine of privity frustrates contracting parties’ intention to benefit a third party and can lead to unfairness. The LRC Report was therefore concerned with this first aspect of the doctrine.

7. The privity doctrine has long been criticised as artificial and contrary to parties’ intention to benefit a third party. As a result, the courts have sometimes needed recourse to devices such as agency and trust to allow a third party to enforce a right conferred on him. Further, legislation has made incremental inroads to circumvent the privity rule. It is not surprising that various common law jurisdictions, such as England, Canada (New Brunswick), Australia (Western Australia, Northern Territory and Queensland), New Zealand and Singapore, have reformed the rule by legislation.

8. The questions for the LRC Sub-committee were whether the anomalies of the privity doctrine were serious enough to warrant its reform and, if so, whether ad hoc reforms, either by the courts on their own initiative or by legislation, were adequate in the modern

Hong Kong context, or whether an issue of this magnitude called for comprehensive legislative reform.

LRC's Recommendations

9. A consultation paper was published by the LRC Sub-committee in June 2004. The recommendations in the consultation paper were in general supported by the majority of respondents. Some respondents, in particular members involved in the construction industries, however had specific comments and reservations on the recommendations and issues discussed in the paper. The LRC report dealt with their concerns at length and concluded that there were no strong reasons for automatically excluding the construction industry from the ambit of the recommended legislation.

10. After careful consideration of the responses, the LRC concluded that if parties to a contract wished to confer a benefit on a third party, they should have the freedom to do so and their wishes should be respected and be given legal effect. It recommended that a clear and straightforward legislative scheme be enacted whereby, subject to the manifest intentions of the parties to an agreement, the parties could confer legally enforceable rights or benefits on a third party under that agreement.

11. A summary of the detailed recommendations of the LRC is set out at Annex A (Recommendations).

The Contract (Rights of Third Parties) Bill (the Bill)

12. A working draft of the Bill is attached at Annex B which may be subject to change after public consultation. The main provisions of the Bill are outlined below with reference to the Recommendations.

Scope of Application

13. Clause 3 of the Bill provides for the scope of application of the Bill. It excludes from the application of the Bill contracts entered

into before the commencement of the Bill so that existing rights or remedies of a third party will be not affected by the Bill. (See Recommendation 16)

14. In addition, Clause 3 excludes certain classes of contracts where:

- (a) a third party already has an enforceable right under existing rules reflecting international conventions. This includes a bill of exchange, a promissory note, a contract on a negotiable instrument, a contract for the carriage of goods by sea and by air and a contract on a letter of credit;
- (b) a third party has no enforceable right under existing rules but there are sound policy reasons for maintaining that position. This includes the memorandum and articles of a company having effect as a contract under section 23 of the *Companies Ordinance*¹ and a contract of employment against an employee. (See Recommendations 17 and 18)

Right of Third Party to Enforce Contractual Term

15. Clause 4 sets out the circumstances under which a third party has a right to enforce a term of a contract. The third party has that right if the contract contains an express term to that effect. Alternatively, if the contract contains a term which purports to confer a benefit on the third party, that party has that right unless on a proper construction of the contract, the parties to the contract do not intend that party to have that right. (See Recommendation 4)

16. In line with Recommendation 3 of the Report, Clause 4 provides that a third party should be expressly identified 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 when the contract is entered into.

¹ That section is similar to section 86 of the new Companies Ordinance (Cap.622) which has yet to come into operation. It is assumed that the Bill will be enacted before the commencement of the new Companies Ordinance (Cap.622).

17. Clause 4 further provides that a third party's right to enforce a contractual term is subject to other relevant terms of the contract. Clause 5 provides that in enforcing a term of a contract under Clause 4, a third party is entitled to any remedy that would have been available to him in any action for breach of contract if he had been a party to the contract. (See Recommendation 5)

Rescission and Variation of Contract

18. To strike a balance between the contracting parties' freedom to alter the terms of the contract in accordance with their intentions and the interests of a third party who may suffer as a result, Clause 6 provides for the circumstances in which a third party's rights are "crystallised", thereby putting an end to the contracting parties' rights to rescind or vary the contract. (See Recommendation 6) The restriction to rescind or vary the terms can be overridden by an express term under which a party to the contract can rescind or vary the contract without the third party's consent, or an express term that specifies the circumstances in which the third party's consent is required. However, for such an express term to have effect, before the third party's rights are crystallised, the third party must be aware of it or reasonable steps have been taken to notify the third party of the express term. (See Recommendation 7)

19. Clause 7 provides the court with a wide discretion to authorise rescission or variation of the contract without the consent of the third party if it is just and practicable to do so. The court may make an order with such conditions, including a condition requiring the payment of compensation to the third party, as it may think fit. (See Recommendation 8)

Defences Available to Promisor

20. Clause 8 provides for the defences available to a promisor in proceedings brought by a third party to enforce a term of the contract under Clause 4. The promisor may rely on (a) any defence or set-off which arises from or in connection with the contract and is relevant to

the term, and would have been available to the promisor had the proceedings been brought by another party to the contract by whom the term is enforceable (promisee); or (b) any defence, set-off or counterclaim not arising from the contract, which would have been available to the promisor had the third party been a party to the contract. (See Recommendation 10)

Right of Promisee

21. Clause 9 states that a promisee's rights to enforce any term of the contract are not affected by Clause 4 of the Bill. (See Recommendation 11)

Protection of Promisor from Double Liability

22. The provisions under Clause 10 protect a promisor against double liability. If a promisor has performed his obligations, wholly or partly, to the third party, the promisor will be discharged, to the extent of that performance, from his obligations to the promisee. (See Recommendation 12)

23. Clause 10 also provides that if the promisee has recovered from the promisor a sum in respect of the third party's loss or the promisee's expense in making good the promisor's default, in any subsequent proceedings brought by the third party, the court must reduce any award to the third party to an appropriate extent. (See Recommendation 13)

Arbitration and Exclusive Jurisdiction Clauses

24. Clause 11 provides that if a third party's right to enforce a term of the contract is conditional upon the third party enforcing that term by arbitration or in a specified jurisdiction, the third party is bound to enforce the term by arbitration or in the specified jurisdiction, unless on a proper construction of the contract, the third party is not intended to be so bound. (See Recommendations 14 and 15)

Assignment of Rights by Third Party

25. Under Clause 12, a third party may assign a right under a term of a contract which is enforceable by the third party under Clause 4 in the same way as a party to the contract may assign a right under the contract unless the contract expressly provides otherwise or on a proper construction, the right is not intended to be assignable. (See Recommendation 21)

Consultation

26. Before taking the matter forward, DoJ would like to seek the views of the professional bodies, business communities and other interested parties on the proposed Bill outlined above.

27. Please address your views or comments on the proposed Bill to the following on or before 31 December 2012-

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personal data provided will only be used by DoJ and/or other government departments/agencies for purposes which are directly related to the consultation.

Summary of Recommendations of Law Reform Commission
("LRC")

1. The LRC recommended reform of the general rule that only the parties to a contract may enforce rights thereunder, but not the complete abolition of the rule. (Recommendation 1)

2. The LRC recommended that a clear and straightforward legislative scheme (the "recommended legislation") be enacted whereby, subject to the manifest intentions of the parties to an agreement, the parties can confer legally enforceable rights or benefits on a third party under that agreement. (Recommendation 2)

3. The LRC recommended that a third party should be expressly identified by name, as a member of a class or as answering a particular description. It should be possible to confer rights on a third party who was not in existence at the time of contracting. (Recommendation 3)

4. The LRC recommended that a third party should be able to enforce a contractual term if:

- (a) the contract expressly provides that he may; or
- (b) the term purports to confer a benefit on him unless on a proper construction, the parties did not intend the term to be enforceable by him;

and where a contractual term excludes or limits liability, references to the third party's enforcement of the term should be regarded as references to his availing himself of the exclusion or limitation. (Recommendation 4)

5. The LRC recommended that:

- (a) a third party's right to enforce a contractual term should be subject to, and in accordance with, other relevant terms of the contract; and
- (b) in enforcing the promisor's duty, a third party should be entitled to any remedy that would have been available to him

in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief should apply accordingly). (Recommendation 5)

6. The LRC recommended that the contracting parties' right to vary or rescind their contract by agreement should come to an end once:

- (a) the third party has communicated to the promisor his assent by word or conduct to the provision conferring benefit on him, or
- (b) the third party has relied on that provision and the promisor
 - (i) is aware of that reliance, or
 - (ii) could reasonably be expected to have foreseen that the third party would so rely.

An assent sent to the promisor is not to be regarded as communicated to the promisor until received by him. (Recommendation 6)

7. The LRC recommended that the contracting parties should be allowed by an express provision added before crystallisation:

- (a) to reserve the right to rescind or vary the contract unilaterally or bilaterally without the third party's consent; and
- (b) to set their own criteria or tests for determining when and how their rights to vary or rescind their contract will end (ie when and how the third party rights will crystallise),

provided that the provision would not be enforceable against the third party unless he knew of the existence of that provision, or reasonable steps have been taken to bring it to his notice, before his rights are crystallised. (Recommendation 7)

8. The LRC recommended that the court should be given a wide discretion to authorise variation or rescission of the contract without the consent of the third party upon the application of any of the contracting parties where it is just and practicable to do so. Although the application may be made by a single party to the contract, the other contracting party would need to have consented to the variation. In authorising variation or rescission, the court may

impose such conditions as it thinks fit, including compensation to a third party. (Recommendation 8)

9. The LRC recommended that the recommended legislation should expressly provide that, as against the promisor, the third party can be a volunteer, provided the promisee has given consideration for the contract. (Recommendation 9)

10. The LRC recommended that

- (a) a promisor can avail himself of any defence or set-off that
 - (i) arises from, or in connection with, the contract and is relevant to the term being enforced by the third party; and
 - (ii) would have been available to him if the proceedings had been brought by the promisee, subject to any express contractual term that expands or restricts the scope of defences or set-offs;
- (b) a promisor can avail himself of any defence, set-off or counterclaim (not arising from the contract) that would have been available to him if the third party had been a party to the contract, subject to any express contractual term that restricts the scope of defences, set-offs or counterclaims; and
- (c) where in any proceedings brought against him a third party seeks to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability) under the recommended legislation, he may not do so if he could not have done so (whether or not by reason of any particular circumstances relating to him) had he been a party to the contract. (Recommendation 10)

11. The LRC recommended that a third party's rights under the recommended legislation should not affect any right of the promisee to enforce any term of the contract. (Recommendation 11)

12. The LRC recommended that the recommended legislation should specifically provide that a promisor who performs his obligations, wholly or partly, to the third party will obtain discharge, to

that extent, from his obligations to the promisee. (Recommendation 12)

13. The LRC recommended that where a promisee has recovered substantial damages (or an agreed sum) representing the third party's loss or the promisee's expense in making good the promisor's default, the court or arbitral tribunal should in any subsequent proceedings by the third party reduce any award to the third party to the extent appropriate to take account of the amount already recovered by the promisee. (Recommendation 13)

14. The LRC recommended that:

- (a) where (but only where) a contractual term conferring substantive rights on a third party is conditional upon the third party enforcing that term by arbitration, and
- (b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Ordinance (Cap 341)²,

the third party should be treated for the purposes of that Ordinance as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive right by the third party, subject to the contracting parties' contrary intention. (Recommendation 14)

15. The LRC recommended that where a contractual term conferring substantive rights on a third party is conditional upon the third party enforcing that term in a specified jurisdiction, the third party should be treated as a party to the exclusive jurisdiction clause as regards disputes between himself and the promisor relating to the enforcement of the substantive rights by the third party, subject to the contracting parties' contrary intention. (Recommendation 15)

16. The LRC recommended that nothing in the recommended legislation should affect any right or remedy of a third party that exists or is available apart from the recommended legislation. (Recommendation 16)

² Which was repealed and replaced by the Arbitration Ordinance (Cap 609)

17. The LRC recommended that a third party should not have any rights under the recommended legislation in respect of:

- (a) a bill of exchange or promissory note, whether negotiable or not;
- (b) a contract for the carriage of goods by sea governed by the Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440), except that a third party should be able to enforce an exclusion or limitation clause in such a contract;
- (c) a contract for the carriage of goods by air governed by the Carriage by Air Ordinance (Cap 500); and
- (d) a letter of credit.

The recommended legislation should not affect existing rights in respect of (a) to (d) above. (Recommendation 17)

18. The LRC recommended that the recommended legislation should confer no right on a third party to enforce (a) any term of a contract binding on a company and its members under section 23 of the Companies Ordinance (Cap 32); and (b) any term of a contract of employment against an employee. (Recommendation 18)

19. The LRC recommended that actions brought by third parties under the recommended legislation should be treated as "actions founded on simple contract" or "actions upon a specialty" under section 4(1)(a) and section 4(3) of the Limitation Ordinance (Cap 347) respectively. (Recommendation 19)

20. The LRC recommended that a third party should not be treated as a party to the contract for the purposes of other statutory provisions merely because of the reference to treating him as if he were a party to the contract in some provisions in the recommended legislation. (Recommendation 20)

21. The LRC recommended that a third party's rights should be assignable unless the parties have expressly agreed otherwise or circumstances at the time of contracting indicate that the benefit to the third party is personal to him and is not intended to be assignable. (Recommendation 21)

Contracts (Rights of Third Parties) Bill

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A BILL

To

Make provision for the enforcement of contractual terms by third parties and related matters.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Contracts (Rights of Third Parties) Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

2. Interpretation

In this Ordinance—

promisee (), in relation to a term of a contract enforceable by a third party under section 4, means a party to the contract by whom the term is enforceable against the promisor;

promisor (), in relation to a term of a contract enforceable by a third party under section 4, means a party to the contract against whom the term is enforceable by the third party;

third party (), in relation to a contract, means a person who is not a party to the contract.

3. Application

- (1) This Ordinance applies to a contract entered into on or after the commencement date of this Ordinance.
- (2) This Ordinance does not apply to—

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- (a) a bill of exchange, a promissory note and any other negotiable instrument;
 - (b) subject to subsection (3), a contract of carriage within the meaning of the Bills of Lading and Analogous Shipping Documents Ordinance (Cap. 440);
 - (c) a contract for the carriage of goods by air governed by the Carriage by Air Ordinance (Cap. 500);
 - (d) a letter of credit; and
 - (e) the memorandum and articles of a company having effect as a contract under seal under section 23 of the Companies Ordinance (Cap. 32).
- (3) A third party may invoke section 4 to enforce a term of a contract referred to in subsection (2)(b) that excludes or limits liability.
- (4) This Ordinance confers no right on a third party to enforce any term of a contract of employment against an employee.
- (5) In this section—

bill of exchange (匯票) means a bill of exchange within the meaning of section 3 of the Bills of Exchange Ordinance (Cap. 19);

contract of employment (僱傭合約) has the meaning given by section 2(1) of the Employment Ordinance (Cap. 57);

negotiable instrument (可流轉票據) includes any instrument embodying a monetary obligation and transferable by delivery, or by delivery and indorsement, whether or not the instrument is capable of being transferred free from equities;

promissory note (承付票) means a promissory note within the meaning of section 89 of the Bills of Exchange Ordinance (Cap. 19).

4. Right of third party to enforce contractual term

- (1) A third party who is expressly identified by name, as a member of a class or as answering a particular description in a contract may enforce a term of the contract (including a term that excludes or limits liability) if—
 - (a) the contract expressly provides that the third party may;
or
 - (b) the term purports to confer a benefit on the third party.
- (2) Subsection (1)(b) does not apply if, on a proper construction of the contract, the term is not intended to be enforceable by the third party.
- (3) Subsection (1) applies to a third party who is not in existence when the contract is entered into.
- (4) The enforcement of a term of a contract under subsection (1) is subject to and must be in accordance with any other term of the contract relevant to the term being enforced.
- (5) Subsection (1) applies irrespective of whether the third party has given to the promisor consideration for the term, as long as the promisee has given consideration to the promisor for the contract or the contract is made by deed.

5. Remedy available to third party

- (1) There is available to a third party who enforces a term of a contract under section 4 any remedy that would have been available to the third party in an action for breach of contract had the third party been a party to the contract, and any rule of law relating to the remedy applies accordingly.
- (2) Nothing in this Ordinance affects any right or remedy of a third party that exists or is available apart from this Ordinance.

6. Rescission and variation of contract

- (1) If a third party has a right under section 4 to enforce a term of a contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in a way that extinguishes or alters the third party's entitlement under that right without the third party's consent if—
 - (a) the third party has by words or conduct assented to the term and communicated the assent to the promisor; or
 - (b) the third party has relied on the term and—
 - (i) the promisor is aware of the reliance; or
 - (ii) the promisor can reasonably be expected to have foreseen that the third party would rely on the term.
- (2) For the purposes of subsection (1)(a), an assent is communicated to the promisor when it is received by the promisor.
- (3) Subsection (1) is subject to any express term of the contract under which—
 - (a) the contract may be rescinded or varied by a party or the parties to the contract without the consent of the third party; or
 - (b) the third party's consent to the rescission or variation is required in circumstances specified in the contract instead of those set out in subsection (1)(a) and (b).
- (4) Subsection (3) applies only if, before the circumstances referred to in subsection (1)(a) or (b) occur—
 - (a) the third party is aware of the express term referred to in subsection (3); or
 - (b) reasonable steps have been taken to bring that term to the notice of the third party.

7. Power of court to dispense with third party's consent to rescission or variation of contract

- (1) If the consent of a third party is required under section 6(1) or (3)(b) for the rescission or a variation of a contract, the court may, on an application by a party to the contract, make an order dispensing with the consent if—
 - (a) the other party to the contract agrees to, or if there is more than one other party to the contract, all those other parties agree to, the rescission or variation; and
 - (b) the court thinks it just and practicable so to do.
- (2) An order under subsection (1) may be made subject to any condition that the court may impose as it thinks fit, including a condition requiring the payment of compensation to the third party.

8. Defences etc. available to promisor

- (1) Subsections (2), (3) and (4) apply if proceedings for the enforcement of a term of a contract are brought by a third party under section 4.
- (2) The promisor may raise any one or more of the following matters by way of defence or set-off—
 - (a) a matter that—
 - (i) arises from or in connection with the contract and is relevant to the term; and
 - (ii) would have been available to the promisor by way of defence or set-off had the proceedings been brought by the promisee;
 - (b) a matter in respect of which the following conditions are met—
 - (i) an express term of the contract provides for the matter to be available to the promisor by way of

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- defence or set-off in proceedings brought by the third party; and
- (ii) the matter would have been available to the promisor by way of defence or set-off had the proceedings been brought by the promisee;
 - (c) a matter that would have been available to the promisor by way of defence or set-off had the third party been a party to the contract.
- (3) The promisor may raise, by way of counterclaim, a matter not arising from the contract that would have been available to the promisor by way of counterclaim against the third party had the third party been a party to the contract.
 - (4) Subsections (2)(a) and (c) and (3) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.
 - (5) In any proceedings brought against a third party, the third party may not seek to enforce under section 4 a term of a contract (including a term purporting to exclude or limit liability) if the third party could not have done so (whether by reason of any particular circumstances relating to the third party or otherwise) had the third party been a party to the contract.

9. Enforcement of contract by promisee

Section 4 does not affect any right of the promisee to enforce any term of the contract.

10. Protection of promisor from double liability

- (1) If a third party has a right under section 4 to enforce a term of a contract, and the promisor has performed the promisor's obligations to the third party under the term in whole or in

part, the promisor is, to the extent of that performance, discharged from the same obligations owed by the promisor to the promisee.

(2) If a third party has a right under section 4 to enforce a term of a contract, and the promisee has recovered from the promisor a sum in respect of—

- (a) the third party's loss in respect of the term; or
- (b) the expense to the promisee of making good to the third party the default of the promisor in relation to the term,

then, in any proceedings brought under that section by the third party in respect of the term, the court or arbitral tribunal before which the proceedings are brought must reduce any award to the third party to the extent that it thinks appropriate to take account of the sum.

11. Arbitration clause and exclusive jurisdiction clause

(1) If a third party has a right under section 4 to enforce a term of a contract, and the contract contains an arbitration clause or exclusive jurisdiction clause, the third party is to be bound by the clause as regards a dispute between the third party and the promisor relating to the enforcement of the term by the third party.

(2) Subsection (1) does not apply if on a proper construction of the contract, the third party is not intended to be so bound.

(3) In subsection (1)—

arbitration clause () means a clause—

- (a) requiring that a dispute relating to the term enforceable by the third party under section 4 be resolved by arbitration; and
- (b) constituting an arbitration agreement within the meaning of the Arbitration Ordinance (Cap. 609);

exclusive jurisdiction clause () means a clause requiring that a dispute relating to the term enforceable by the third party under section 4 be resolved only in a particular jurisdiction.

12. Assignment of third party right

- (1) A third party may assign to another person a right under a term of a contract enforceable by the third party under section 4 in the same way as a party to the contract may assign a right under the contract.
- (2) Subsection (1) does not apply if—
 - (a) the contract expressly provides otherwise; or
 - (b) on a proper construction of the contract, the right is personal to the third party and is not intended to be assignable.

13. Third party not to be treated as party to contract

Despite sections 5(1), 8(2)(c), (3) and (5) and 12(1), a third party is not to be treated as a party to the contract for the purposes of any other enactment or any instrument made under any other enactment.

14. Application of Limitation Ordinance

In section 4(1)(a) and (3) of the Limitation Ordinance (Cap. 347), the references to actions founded on simple contract and an action upon a specialty respectively include references to an action relating to a simple contract and an action relating to a specialty brought under section 4.

Explanatory Memorandum

The object of this Bill is to make provisions to enable a person who is not a party to a contract (*third party*) to enforce a term of the contract. The Bill is based on the recommendations made in the Report on Privity of Contract published by the Law Reform Commission of Hong Kong in 2005. The Bill would bring about a variation in the common law rule of privity of contract as regards third party rights under a contract.

2. Clause 3 provides for the scope of application of the Bill. It excludes from the application of the Bill contracts entered into before the commencement date of the Bill and several other classes of contracts set out in the clause.
3. Clause 4 sets out the circumstances in which a third party has a right to enforce a term of a contract. The third party has that right if the contract contains an express term to that effect. Alternatively, if the contract contains a term which purports to confer a benefit on the third party, the third party has that right unless on a proper construction of the contract, the parties to the contract do not intend the third party to have that right.
4. Clause 5 provides that the remedies available to a third party who enforces a term of a contract under clause 4 are the same as those available to a party to the contract who brings an action for breach of the term.
5. Clause 6 restricts the right of the parties to a contract to rescind or vary the contract by agreement without the consent of a third party if the third party has the right to enforce a term of the contract under clause 4. However, the restriction can be overridden by an express term under which a party to the contract can rescind or vary the contract without the third party's consent, or an express term that specifies other circumstances in which the third party's consent is required for the rescission or variation.

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6. Clause 7 provides for the power of the court to intervene, on application by a party to a contract, in circumstances where the consent of a third party is required to rescind or vary the contract. The court may make an order dispensing with the third party's consent.
 7. Clause 8 provides for the defences, set-offs and counterclaims available to a party to a contract in proceedings against the party brought by a third party under clause 4.
 8. Clause 9 makes it clear that a third party's right to enforce a term of a contract under clause 4 does not affect the right of a party to the contract to enforce any term of the contract.
 9. Clause 10 makes provision to avoid any double liability owed by a party to a contract to both a third party and another party to the contract.
 10. Clause 11 provides that if a third party has a right to enforce a term of a contract under clause 4, a clause in the contract requiring a dispute relating to the term to be resolved by arbitration, or to be resolved only in a particular jurisdiction, is binding on the third party, unless on a proper construction of the contract, the parties to the contract do not intend the third party to be so bound.
 11. Clause 12 provides that a third party who has a right to enforce a term of a contract under clause 4 may assign to another person the third party's rights under the term unless the contract expressly provides otherwise or on a proper construction of the contract, those rights are not intended to be assignable.
 12. Clause 13 makes it clear that a third party who has a right to enforce a term of a contract under clause 4 is not to be treated as a party to the contract for the purposes of any other enactment or an instrument made under any other enactment.
 13. Clause 14 provides that section 4(1)(a) and (3) of the Limitation Ordinance (Cap. 347) (which specifies the limitation periods for an

action founded on a simple contract and an action upon a specialty) applies respectively to an action founded on a simple contract or upon a specialty brought by a third party under clause 4.