

**立法會**  
**Legislative Council**

Ref : CB4/BC/2/12

LC Paper No. CB(4)686/13-14  
(These minutes have been seen  
by the Administration)

**Bills Committee on Contracts (Rights of Third Parties) Bill**

**Minutes of the first meeting**  
**held on Thursday, 24 April 2014, at 8:30 am**  
**in Conference Room 2A of the Legislative Council Complex**

**Members present** : Hon Kenneth LEUNG (Chairman)  
Hon TAM Yiu-chung, GBS, JP  
Hon Paul TSE Wai-chun, JP  
Hon Dennis KWOK  
Hon Tony TSE Wai-chuen

**Members absent** : Hon James TO Kun-sun  
Hon Andrew LEUNG Kwan-yuen, GBS, JP  
Hon Ronny TONG Ka-wah, SC  
Hon Cyd HO Sau-lan  
Hon Starry LEE Wai-king, JP  
Hon Alan LEONG Kah-kit, SC  
Ir Dr Hon LO Wai-kwok, BBS, MH, JP

**Public Officers attending** : Item II

Mr Peter WONG  
Deputy Solicitor General  
Department of Justice

Ms Deneb CHEUNG  
Senior Assistant Solicitor General  
Department of Justice

Mr Sunny CHAN  
Senior Assistant Law Draftsman  
Department of Justice

Ms Peggy AU YEUNG  
Senior Government Counsel  
Department of Justice

Ms Angie LI  
Senior Government Counsel  
Department of Justice

**Clerk in attendance** : Miss Mary SO  
Chief Council Secretary (4) 2

**Staff in attendance** : Mr Timothy TSO  
Assistant Legal Adviser 2

Ms Cindy CHAN  
Senior Council Secretary (4)2

Ms Sandy SZETO  
Administrative Assistant I (4)2

Miss Vivian YUEN  
Legislative Assistant 4(2)

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Action

**I. Election of Chairman**

Mr TAM Yiu-chung, the member present who had the highest precedence, presided at the meeting and called for nominations for the chairmanship of the Bills Committee. Mr Dennis KWOK nominated Mr Kenneth LEUNG. Mr Tony TSE seconded the nomination. Mr Kenneth LEUNG accepted the nomination. As there was no other nomination, Mr TAM Yiu-chung declared that Mr Kenneth LEUNG was elected Chairman of the Bills Committee.

**II. Meeting with the Administration**

(LC Paper Nos. CB(4)599/13-14(01)-(02))

2. The Bills Committee deliberated (index of proceedings attached at **Annex**).

## Discussion

### *Test of enforceability*

3. Members noted that under the Contracts (Rights of Third Parties) Bill ("the Bill"), a third party who was not a party to the contract might enforce a term of a contract if (a) the contract expressly provided that the third party might do so, or (b) the contract contained a term which purported to confer a benefit on the third party, unless on a proper construction of the contract, the term was not intended to be enforceable by the third party.

4. In view of the fact that a third party could presently seek to enforce a contract from the court through devices such as agency and trust, Mr Tony TSE asked whether the right of the third party to enforce a contract would be adversely affected or diminished following the implementation of the Bill.

5. Deputy Solicitor General ("DSG") responded that the legislative intent of the Bill was to allow the contracting parties the freedom to confer a right on a third party to enforce the contract or otherwise as they so wished. If it was the contracting parties' intention to permit a third party to enforce the contract, the Bill, if implemented, would provide the third party with additional channel, which was more convenient, to enforce the contract. DSG further said that as provided for under Clause 4(5) of the Bill, a third party might enforce a term of a contract whether or not the third party had given consideration for the term (Clause 4(5) of the Bill).

6. Responding to the Chairman's enquiry as to whether the remedy that would be available to the third party under the Bill was limited to, say, specific performance of the contract, DSG said that Clause 5 of the Bill provided that a third party was entitled to any remedy that would have been available to the third party, including a remedy under the rules of equity, if the third party had been a party to the contract.

### *Rescission and variation of contract*

7. Members noted that to strike a balance between the contracting parties' freedom to alter the terms of the contract in accordance with their intention on the one hand and the interests of a third party who might suffer as a result of the alteration on the other, Clause 6 provided for the circumstances in which a third party's rights were "crystallized", so that when those circumstances existed, the contracting parties might not rescind the contract or vary it in a way that affected the third party's rights.

8. Responding to the Chairman's enquiry on when the third party's rights were "crystallized", DSG said that this was spelt out in Clause 6(2) of the Bill which provided that the contracting parties might not, without the third party's consent, rescind or vary the contract if (a) the third party had assented to the term and the promisor had received notice of the assent, or (b) the third party had relied on the term and the promisor was aware of the reliance or the promisor could reasonably be expected to have foreseen that the third party would rely on the term. DSG however pointed out that such restriction could be overridden by an express term of the contract under which one or more parties to the contract might rescind or vary the contract without the third party's consent, or an express term that specified other circumstances in which the third party's consent was required in order to rescind or vary the contract (Clause 6(3) of the Bill).

#### *Scope of application of the Bill*

9. Mr TAM Yiu-chung asked whether the rights and interests of employees would be enhanced arising from the implementation of the Bill.

10. DSG responded that the implementation of the Bill would not vary or alter the contractual agreements entered into between employers and employees in the capacity of parties to an employment contract. However, the Bill provided the contracting parties' freedom to include a term in the contract to protect the employees of a party to the contract who were third parties to the contract by, say, exempting the employees of that party from any legal liability arising from the performance of the contract, if the contracting parties so wished. DSG further said that whilst the Bill did not deal with employees' rights and interests where the employees were parties to the contract, Clause 3(4) of the Bill provided that a third party might not enforce a term of a contract of employment against an employee.

#### *Implementation of the Bill*

11. The Chairman asked whether consideration would be given to devising guidelines for contracting parties to give effect to the test of enforceability after the passage of the Bill, so as to ensure that the contract would reflect the intention of the contracting parties to benefit or not to benefit a third party. DSG responded that the Administration did not see the need to do so, as lawyers representing the contracting parties should be in the best position to advise their clients on how the contract should be drafted to fully reflect the intention of the contracting parties, taking into account all relevant considerations.

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12. Mr Paul TSE expressed concern that the Bill might not always benefit third parties, particularly those who were from the grassroots and/or were not legally represented. In this regard, Mr TSE enquired about the operation of the Contracts (Rights of Third Parties) Act 1999 in the United Kingdom ("the UK Act") and similar legislation in other common law jurisdictions. DSG undertook to provide the relevant case law after the meeting.

### Clause-by-clause examination of the Bill

#### *Clause 1 - Short title and commencement*

13. DSG advised that subject to members' views, the Administration planned to bring the Bill into force six months after the Bill was passed by the Council.

#### *Clause 3 - Application*

14. Members noted that Clause 3(2)(a)-(f) of the Bill set out certain classes or terms of contracts excluded from the application of the Bill. Mr Paul TSE asked whether such exclusions were recommended in the report of the Law Reform Commission of Hong Kong ("LRC") on "Privity of Contract" published in September 2005.

15. DSG responded that notwithstanding the LRC's recommendation not to exclude deeds of mutual covenants ("DMCs") as defined in section 2 of the Buildings Management Ordinance (Cap. 344) from the new statutory regime, the Hong Kong Bar Association ("the Bar Association") suggested that these DMCs and land covenants should be so excluded because third parties' right of enforceability under the Bill would contradict or prejudice the existing regime on DMCs as defined in section 2 of Cap. 344 and land covenants. The Administration agreed with the suggestions of the Bar Association which had been reflected in the Bill.

16. Mr Paul TSE asked whether DMCs on building property were excluded from the application of the UK Act. DSG replied that the UK Act did not exclude DMCs on building property. DSG surmised that this might be due to the fact that the number of such DMCs drawn up in the UK was not high because of the relatively small number of multi-storey buildings in the UK.

17. Mr Paul TSE further asked whether legislation similar to the UK Act in Singapore also excluded DMCs on building property from the application of the legislation. DSG replied that the Contracts (Rights of Third Parties) Act 2001 of Singapore ("the Singapore Act"), which was broadly similar to the UK Act, did not exclude such DMCs from the application of the Singapore Act. DSG further said that although many buildings in Singapore were multi-storey

ones, the circumstances of Hong Kong and Singapore were different.

18. The Chairman enquired about the rationale for excluding a company's articles having effect as a contract under seal from the application of the Bill (Clause 3(2)(f)).

19. DSG responded that as a contract created between a company and its members under section 23 of the Companies Ordinance (Cap. 32) (equivalent to section 86 of the new Companies Ordinance (Cap. 622)) was not intended to confer rights upon third parties, the LRC therefore recommended that the new statutory regime should not apply to contracts under section 23 of Cap. 32.

20. The Chairman enquired about whether a member of the company who was a party to a contract under section 86 of Cap. 622 could transfer/assign his/her shares in the company to a third party, in order to allow the third party to enforce a term of the contract on the company. DSG replied in the positive, as that third party would become a member of the company by virtue of his/her ownership of the shares of the company.

21. Assistant Legal Adviser 2 ("ALA2") said that he had sought explanation from the Administration on why Clause 3(3) of the Bill, which stated that a third party might enforce a term that excluded or limited liability under a contract, only referred to contracts of carriage within the meaning of the Bills of Lading and Analogous Shipping Documents Ordinance (Cap. 440) (Clause 3(2)(c)) but not also contracts under the Carriage by Air Ordinance (Cap. 500) (Clause 3(2)(d)).

22. Senior Assistant Solicitor General ("SASG") explained why Clause 3(3) did not include Clause 3(2)(d), details of which were set out in paragraphs 5 to 10 of the Administration's reply dated 22 April 2014 to ALA2 (LC Paper No. CB(4)599/13-14(01)).

#### *Clause 4 – Third party's right to enforce contractual term*

23. As there might be more than one third party expressly identified in a contract under Clause 4(1)(a) or (b) of the Bill, the Chairman enquired about whether there might be different competing interests amongst third parties.

24. DSG responded that it would be possible to have competing interests amongst third parties and how different third parties might enforce their respective rights under a contract would be a matter of construction of the terms of the contract. Clause 4(4) of the Bill provided that the enforcement of the term by a third party was subject to any other term of the contract relevant to the term. Hence, enforcement of a contractual term by a third party or third

parties would be subject to the relevant conditions provided by the terms of the contract.

25. Mr Paul TSE enquired about whether a party to a contract could raise counterclaims against a third party if the third party had been a party to the contract.

26. SASG responded that a promisor could only raise counterclaims on matters not arising from the contract in proceedings brought by a third party (Clause 8(3) of the Bill), so as to ensure that the burden of the contract would not pass to the third party as recommended by the LRC.

### **III. Any other business**

27. The Chairman sought members' view on whether stakeholders should be invited to give views on the Bill. Members agreed. Mr Dennis KWOK suggested to invite the Construction Industry Council. Members further agreed to next meet on 7 May 2014 at 8:30 am to meet with deputations and the Administration.

28. Due to a lack of a quorum, the meeting adjourned at 9:50 am.

Council Business Division 4  
Legislative Council Secretariat  
20 May 2014

**Proceedings of the first meeting of the  
Bills Committee on Contracts (Rights of Third Parties) Bill  
on Thursday, 24 April 2014, at 8:30 am  
in Conference Room 2A of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
000317 – 000421	Mr TAM Yiu-chung Mr Dennis KWOK Mr Kenneth LEUNG Mr Tony TSE	Election of Chairman	
000422 – 000628	Chairman	Invitation of deputations to give views on the Bill	
000629 – 002305	Chairman Administration Mr Tony TSE	Briefing by the Administration on the Bill  Test of enforceability	
002306 – 002610	Chairman Administration	Rescission and variation of contract	
002611 – 003300	Chairman Administration Mr TAM Yiu-chung Mr Dennis KWOK	Scope of application of the Bill	
003301 – 004439	Chairman Administration Mr Paul TSE	Implementation of the Bill	<b>Admin</b> (paragraph 12 of the minutes)
<b>Clause-by-clause examination of the Bill</b>			
004440 – 004723	Chairman Administration	Clause 1 - Short title and commencement	
004724 – 005012	Chairman Administration	Clause 2 - Interpretation	
005013 – 010732	Chairman Administration Mr Paul TSE Assistant Legal Adviser 2	Clause 3 - Application	
010733 – 011732	Chairman Administration Mr Paul TSE	Clause 4 – Third party's right to enforce contractual term	
011733 – 011820	Chairman	Date of next meeting	