

**立法會**  
**Legislative Council**

Ref : CB4/BC/2/12

LC Paper No. CB(4)1002/13-14  
(These minutes have been seen  
by the Administration)

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

**Minutes of the second meeting**  
**held on Wednesday, 7 May 2014, at 8:30 am**  
**in Conference Room 3 of the Legislative Council Complex**

- Members present** : Hon Kenneth LEUNG (Chairman)  
Hon James TO Kun-sun  
Hon TAM Yiu-chung, GBS, JP  
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  
Hon Dennis KWOK
- Member in attendance** : Hon CHAN Kin-por, BBS, JP
- Members absent** : Hon Paul TSE Wai-chun, JP  
Ir Dr Hon LO Wai-kwok, BBS, MH, JP  
Hon Tony TSE Wai-chuen
- Public officers attending** : Items I and II  
  
Mr Peter WONG  
Deputy 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

**Attendance by  
invitation** :

Item I

Construction Industry Council

Ms Miranda YEAP  
Senior Manager – Council Services

Faculty of Law of The University of Hong Kong

Mr Lee MASON  
Assistant Professor

The Hong Kong Confederation of Insurance Brokers

Mr Patrick CHAN  
Chairman

The Chartered Institute of Arbitrators (East Asia  
Branch)

Dr YANG Fan  
Committee member

The Life Underwriters Association of Hong Kong  
Limited

Mr Lewis TSE  
Vice President (Industry Affairs Steering Committee)

The Chartered Institute of Building (Hong Kong)

Mr LAM Wai-choi  
Vice President

Hong Kong Construction Association

Mr Peter CLAYTON

**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. Meeting with deputations and the Administration**

[LC Paper Nos. CB(4)623/13-14(01), CB(4)629/13-14(01) and CB(4)644/13-14(01)]

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

Views of deputations

2. The Bills Committee noted the submissions from the Consumer Council [LC Paper No. CB(4)629/13-14(01)] and the Hong Kong Federation of Insurers [LC Paper No. CB(4)644/13-14(01)].

3. The Bills Committee received views from the following deputations on the Contracts (Rights of Third Parties) Bill ("the Bill") –

- (a) Construction Industry Council ("CIC");
- (b) Mr Lee MASON, Assistant Professor of the Faculty of Law of The University of Hong Kong [LC Paper No. CB(4)672/13-14(01)];
- (c) The Hong Kong Confederation of Insurance Brokers;

- (d) The Chartered Institute of Arbitrators (East Asia Branch) [LC Paper No. CB(4)652/13-14(01)];
- (e) The Life Underwriters Association of Hong Kong Limited;
- (f) The Chartered Institute of Building (Hong Kong); and
- (g) The Hong Kong Construction Association ("HKCA") [LC Paper No. CB(4)652/13-14(02)].

#### The Administration's response

4. At the request of the Chairman, Deputy Solicitor General ("DSG") undertook to respond in writing to the views of the depositions on the Bill before the next meeting.

*(Post-meeting note: The Administration's response to the views of the depositions on the Bill was issued to members vide LC Paper No. CB(4)710/13-14(01) on 23 May 2014.)*

#### Discussion

##### *Test of enforceability*

5. Mr Dennis KWOK noted that the proposed two-limb test of enforceability under clause 4 would not enable consumers to have direct and convenient remedies for damages, injury or loss suffered due to a breach of a contract to which he was not a party. He enquired whether consideration could be given to relaxing the test of enforceability specifically for consumers, i.e. a third party might enforce a contract on which he justifiably and reasonably relied, regardless of the intention of the parties; or a third party might enforce a contract which actually conferred a benefit on him, regardless of the purpose of the contract or the intention of the parties.

6. DSG advised that the Law Reform Commission ("LRC") had considered a similar view expressed by the Consumer Council and considered it not appropriate to adopt such a relaxation. The Administration shared the view of the LRC that the underlying principle of the Bill was to respect contracting parties' freedom of contract and to give effect to parties' intention to confer legally enforceable right on a third party. A more relaxed or lenient test of enforceability might enable a consumer third party to enforce a right even when it was inconsistent with the parties' intention and this would contradict the principle of freedom of contract.

*Mediation agreement*

7. Members noted that under clause 12(1) to (3), if a third party's right to enforce a term of a contract under clause 4 of the Bill was subject to an arbitration agreement, the third party would be treated as a party to the arbitration agreement for the purposes of the Arbitration Ordinance (Cap. 609), unless on a proper construction of the contract, the third party was not intended to be so treated. Members however noted that no specific provision had been made to deal with the question whether a third party would be bound to enforce his rights by way of mediation if the contract contained a mediation agreement.

8. DSG responded that by virtue of clause 4(4), enforcement by a third party of a term of the contract was subject to any other term of the contract relevant to that term. This would include procedural conditions such as enforcement by way of arbitration or other means of alternative dispute resolution including mediation. The Administration took the view that a specific provision on mediation was not necessary.

*Exclusive jurisdiction clause*

9. Members also noted that under clause 13, even if the contracting parties included in their contract an exclusive jurisdiction clause requiring that a dispute relating to the term enforceable by the third party be resolved only in a particular jurisdiction, there might be uncertainty in the application of an exclusive jurisdiction clause in the context of exemption clauses when the promisor brought an action in tort against the third party.

10. DSG advised that clause 13 reflected the recommendation of the LRC that where a contractual term conferring substantive rights on a third party was conditional upon the third party enforcing that term in a specified jurisdiction, the third party should be subject to the exclusive jurisdiction clause as regards the 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. Clause 13 would not operate to pass a pure burden on a third party.

*Application of the Bill*

11. Mr CHAN Kin-por noted that although insurance contracts would not be excluded from the application of the Bill, it would be possible for parties to an insurance contract to exclude the operation of the Bill in their contract through proper construction of the policy wording if the parties so intended. Mr CHAN referred to a letter from the Hong Kong Federation of Insurers to the

Bills Committee dated 7 May 2014 (LC Paper No. CB(4)644/13-14(01)) and requested the Administration to provide a written response to the letter.

12. DSG said that the Bill would enable contracting parties to confer an enforceable right on a third party if they so wished. If the contracting parties would otherwise like to exclude the enforcement of rights under the contract by a third party, they would be free to expressly state so in their contract. However, the Administration would encourage the contracting parties to carefully consider the purpose of the proposed legislation and customize the terms of their contract, in order to fully reflect their intention, taking into account all relevant considerations.

*(Post-meeting note: The Administration's response to the views of the Hong Kong Federation of Insurers was issued to members vide LC Paper No. CB(4)710/13-14(01) on 23 May 2014. The Administration's reply to the Hong Kong Federation of Insurers dated 14 July 2014 incorporating the same response was copied to the Bills Committee.)*

13. In anticipation of the complexity involved in the drafting of an insurance agreement, the Chairman was concerned that after the commencement of the proposed legislation, an insured would have greater difficulty in making informed choices when entering into an insurance agreement.

14. Members noted that there were different views amongst various stakeholders in the construction industry as to whether the construction sector should be excluded from the application of the Bill. In particular, the HKCA considered that the introduction of the Bill was not right or necessary for the construction industry as the industry already had tried and tested methods for benefiting third parties and providing them with enforceable rights when the contracting parties so intended. On the other hand, the CIC expressed in-principle support for the Bill as the Bill would provide a more straight-forward route to allow third parties to enforce the rights conferred on them.

15. DSG responded that:

- (a) the views of the HKCA had been given due consideration by the LRC and the Administration. The Administration shared the view of the LRC that the Bill would enable contracting parties to incorporate terms in collateral warranties into their contract without the burden of entering into separate contracts and identifying classes of third parties by the assignment of collateral warranties to them; and
- (b) as rightly pointed out by the CIC, the Bill would not in itself

increase liabilities to contracting parties (e.g. contractors and sub-contractors) but would provide a third party with a more convenient channel to enforce his rights under a contract as opposed to collateral warranties.

16. The Chairman sought clarification as to whether a third party would be able to enforce a term of a contract of employment against an employer, albeit the third party could not do so against an employee (clause 3(4)).

17. DSG replied in the positive. The LRC took the view that in the circumstances where an employer and an employee entered into a contract of employment and the employee was then seconded to work for a third party, it would be unfair to the employee if the third party (on whom the benefit of the employment contract was conferred) could sue on the contract (paragraph 4.177 of the LRC Report on Privity of Contract ("LRC Report") refers). The Administration shared the view of the LRC and considered it undesirable for the proposed legislation to jeopardize the position of an employee in an employment contract. However, if an employee entered into a tripartite agreement with an employer to work for a third party, the employee would be treated as a party to the contract and clause 3(4) would not apply.

*Third party's right to enforce contractual term*

18. Mr Alan LEONG pointed out that there might arise a situation wherein a contract contained an express provision providing for a third party's right to enforce a term of the contract on the one hand and another express provision excluding the application of the proposed legislation on the other. Specifically, he asked whether the court would enforce a contract where the contracting parties provided expressly for a certain third party ("Third Party A") to enforce a term of the contract and the contracting parties then provided in the same contract that Third Party A could not enforce the contract.

19. DSG advised that the court would apply clause 4(1) and (3) to decide whether the contracting parties intended the third party to enforce a term of the contract.

20. Mr Alan LEONG suggested that consideration could be given to consolidating the latest development in the law of contract in other common law jurisdictions with a view to identifying any helpful guidance on the operation of the Bill. He considered that such an exercise could also help the Department of Justice ("DoJ") to take a closer look at any potential problems that might arise after the implementation of the proposed legislation and make timely improvement to the drafting of the Bill.

21. DSG said that the DoJ had taken into account other similar legislation and jurisprudence developed in other common law jurisdictions when preparing the Bill.

22. Noting that contracting parties would be free to exclude the enforcement of third party's rights under a contract through proper construction of the contract, Ms Starry LEE asked whether government departments would take the lead to include in their building and service contracts an express provision to confer enforceable rights on a third party.

23. DSG responded that it was a matter for contracting parties to decide whether they wished to confer a benefit on a third party and the DoJ would not be in a position to comment in this regard on behalf of other relevant policy bureaux/departments. Nonetheless, the LRC had pointed out that the Government, as the sole supplier of land in Hong Kong and a major employer in construction development, might, together with major property developers and building contractors in Hong Kong, take the lead in adopting a code of practice and standard forms of contract whereby building contractors agreed to certain of their covenants being enforceable by consumers (paragraph 4.45 of the LRC Report refers).

#### Date of next meeting

24. Members agreed to hold the next meeting on 26 May 2014 at 8:30 am to meet with the Administration.

## **II. Any other business**

25. There being no other business, the meeting adjourned at 10:10 am.



**Proceedings of the second meeting of the  
Bills Committee on Contracts (Rights of Third Parties) Bill  
on Wednesday, 7 May 2014, at 8:30 am  
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
Agenda item I – Meeting with deputations			
000505 - 000630	Chairman	Opening remarks	
000631 - 000810	Ms Miranda YIP, Construction Industry Council ("CIC")	Presentation of views	
000811 - 001402	Mr Lee MASON, Faculty of Law of The University of Hong Kong ("HKU")	Presentation of views [LC Paper No. CB(4)672/13-14(01)]	
001403 - 001606	Mr Patrick CHAN, The Hong Kong Confederation of Insurance Brokers	Presentation of views	
001607 - 001634	Dr YANG Fan, The Chartered Institute of Arbitrators (East Asia Branch)	Presentation of views [LC Paper No. CB(4)652/13-14(01)]	
001635 - 001932	Mr Lewis TSE, The Life Underwriters Association of Hong Kong Limited	Presentation of views	
001933 - 002154	Mr LAM Wai-choi, The Chartered Institute of Building (Hong Kong)	Presentation of views	
002155 - 002823	Mr Peter CLAYTON, Hong Kong Construction Association	Presentation of views [LC Paper No. CB(4)652/13-14(02)]	
002824 - 003845	Chairman Administration	The Administration's response to the views expressed by deputations	<b>Admin</b> (paragraph 4 of minutes)
003846 – 004855	Chairman Administration Mr Dennis KWOK Mr Lee MASON of HKU	Test of enforceability  Mediation agreement  Exclusive jurisdiction clause	
004856 – 013510	Chairman Administration Mr CHAN Kin-por Ms Starry LEE Ms Miranda YEAP of CIC Mr Alan LEONG	Application of the Bill	

<b>Time marker</b>	<b>Speaker</b>	<b>Subject</b>	<b>Action required</b>
013511 – 013709	Chairman	Date of next meeting	

Council Business Division 4  
Legislative Council Secretariat  
14 August 2014