

**立法會**  
**Legislative Council**

Ref : CB4/BC/2/12

LC Paper No. CB(4)1003/13-14  
(These minutes have been seen  
by the Administration)

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

**Minutes of the third meeting**  
**Monday, 26 May 2014, at 8:30 am**  
**in Conference Room 2A 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 Starry LEE Wai-king, JP  
Hon Paul TSE Wai-chun, JP  
Hon Alan LEONG Kah-kit, SC  
Hon Dennis KWOK  
Ir Dr Hon LO Wai-kwok, BBS, MH, JP  
Hon Tony TSE Wai-chuen

**Member absent** : Hon Cyd HO Sau-lan

**Public Officers attending** : Item I

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

**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

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Action

**I. Meeting with the Administration**

[LC Paper Nos. CB(4)710/13-14(01)-(02) and CB(4)328/13-14(01)]

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

2. Senior Assistant Solicitor General ("SASG") briefed members on the Administration's response to the views expressed by deputations at the meeting on 7 May 2014 on the Contracts (Rights of Third Parties) Bill ("the Bill"), details of which were set out in LC Paper No. CB(4)710/13-14(01).

3. The Bills Committee noted the submissions from the Hong Kong Association of Banks [LC Paper No. CB(4)698/13-14(01)], Mr Lee MASON of the Faculty of Law of the University of Hong Kong [LC Paper No. CB(4)672/13-14(01)] and The Law Society of Hong Kong [LC Paper No. CB(4)658/13-14(01)].

4. At the request of the Chairman, Deputy Solicitor General ("DSG") undertook to provide a response in writing to the views of the Hong Kong Association of Banks, Mr Lee MASON of the Faculty of Law of the University of Hong Kong and The Law Society of Hong Kong on the Bill before the next meeting of the Committee.

*(Post-meeting note: The Administration's response to the submissions from the Hong Kong Association of Banks, Mr Lee MASON of the Faculty of Law of the University of Hong Kong and The Law Society of Hong Kong on the Bill was issued to members vide LC Paper No. CB(4)815/13-14(01).)*

## Discussion

### *Who is a third party*

5. Ir Dr LO Wai-kwok noted that under clause 2, a third party was defined as, in relation to a contract, a person who was not a party to the contract, whereas a promisee and a promisor were defined respectively with reference to clause 4 of the Bill. To avoid misunderstanding on who the third party was, he suggested that consideration could be given to defining "a third party" with reference to clause 4(2) so that a reader could easily realize that the term referred to a third party who was expressly identified in the contract to have a right to enforce a term of the contract.

6. DSG undertook to consider the suggestion and provide a written response.

*(Post-meeting note: The Administration's response to the issue relating to the definition of "third party" was issued to members vide LC Paper No. CB(4)815/13-14(02).)*

### *Third party's right to enforce contractual term*

7. Mr Ronny TONG noted that it was possible for D to be involved in a chain of contracts wherein D, as a third party to a contract between A and B ("head contract"), had been conferred a benefit greater than that in a contract between D and C. Mr TONG sought clarification as to whether D would be allowed under the proposed legislation to enforce his right under the head contract which would result in a larger remedy; and if so, what the justifications were.

8. DSG advised that under clause 5(4), the new legislative regime would not affect a right or remedy of a third party that existed or was available apart from the Bill. Further, the object of the Bill was to enable a third party to enforce a term of the contract, if this was the intention of the contracting parties. Where the contracting parties A and B had agreed that D would be entitled to such a greater benefit (or larger remedy) and to confer such enforceable rights on D, such intention should be given effect to. As long as the relevant conditions including the test of enforceability under clause 4 were satisfied, D would be able to enforce the rights conferred on him under the head contract.

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

9. Mr Ronny TONG noted that under clause 3(2)(b), a deed of mutual

covenant ("DMC") would be excluded from the application of the Bill. He was concerned that if this was the case, tenants of private buildings and users of common parts of private buildings, who were not owners of private buildings, would not be able to rely on the proposed legislation to enforce a term of the DMC. Mr TONG asked about the policy consideration behind the exclusion of DMCs from the application of the Bill.

10. DSG responded that under the current legal regime, a successor-in-title or a person deriving a title from the original parties to a DMC or a successor-in-title could enforce his rights under a DMC. The Administration agreed with the comments of the Hong Kong Bar Association that allowing a third party to a DMC a right of enforceability under the Bill would contradict the underlying policies of the existing legal mechanism for enforcing a DMC by a third party. The Administration agreed to explain further in writing the reasons for excluding DMCs from the application of the Bill.

*(Post-meeting note: The Administration's response to the issue relating to DMCs was issued to members vide LC Paper No. CB(4)815/13-14(02).)*

11. Mr James TO noted that the enforceability of a contractual term by a third party was not possible before the proposed legislation came into operation even though the third party was expressly conferred a benefit in the contract. Assuming that, after the commencement of the proposed legislation, the parties to the contract which purported to confer a benefit on the third party entered into a supplemental agreement to alter the term of the contract, Mr TO sought clarification as to whether the third party would be allowed under the proposed legislation to enforce the relevant term under the supplemental agreement. The Chairman asked about the effect on the right of the third party in the circumstance that the contracting parties had made an express provision in their original contract to contract out of the proposed legislation.

12. DSG said that the underlying principle of the Bill was to respect and give effect to the manifest intention of contracting parties should they wish to confer a legally enforceable right on a third party under an agreement. Under general contract law, a supplemental agreement entered into between the contracting parties was to be read together with the original contract. If the original contract contained an express provision excluding the application of the proposed legislation and the supplemental agreement did not alter this express provision, the enforceability of the relevant term by a third party would not be possible even though the supplemental agreement was entered into after the proposed legislation came into operation.

### *Test of enforceability*

13. Assistant Legal Adviser 2 ("ALA2") noted that although clauses 4(1) and (3) set out the circumstances under which a third party might enforce a term of a contract, parties to a contract were allowed to expressly exclude their contract from the application of the Bill. Supposing a contract contained both an express provision on a third party's right to enforce a term of the contract and an express provision excluding the application of the Bill, he sought clarification as to which provision should prevail under such circumstances and the legislative intent.

14. DSG responded that if a term of a contract purported to confer a benefit on an expressly identified third party, the third party would have the right to enforce the relevant term unless on a proper construction of the contract, the term was not intended to be enforceable by the third party. If there were other inconsistent terms in the contract, it would be a matter for contractual interpretation and the court would generally take into account all relevant circumstances.

### *Chinese text of clause 4(3)*

15. ALA2 noted that the English text of the sentence "[s]ub-section (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" in clause 4(3) was rendered as "如按經恰當解釋的有關合約，可由上述第三者強制執行有關條款，並非立約用意，則第(1)(b)款不適用" in the Chinese text of the same clause. He sought clarification as to whether the plain meaning of the sentence was simply: "如按經恰當解釋的有關合約，立約用意並非是可由上述第三者強制執行有關條款，則第(1)(b)款不適用". The Chairman asked whether consideration could be given to improving the Chinese text of clause 4(3) to make it more easily understood.

16. Senior Assistant Law Draftsman ("SALD") advised that the Chinese text of the clause had been carefully worded to reflect the policy intent appropriately. Furthermore, the Chinese text of the clause was drafted to give the same communication effect as that of the English text of the same clause. SALD agreed to review the wording of the clause and to revert to members in writing before the next meeting.

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

#### *Clause 6 – Rescission and variation of contract*

17. The Chairman enquired about the operation of clause 6(1) and (2)(a). In

particular, he asked whether the third party's right under the contract could only be crystallized when the third party had sent to the promisor his assent to the contractual term conferring benefit on him in writing and the promisor had received the notice of the third party's assent in writing.

18. DSG replied in the positive. He explained that the Bill provided that contracting parties' right to vary or rescind their contract by agreement should come to an end when a third party had communicated to the promisor his assent to the term conferring benefit on him in writing or otherwise and the promisor had received notice of the third party's assent in writing or otherwise. That said, if a contractual term conferring benefit on a third party was not made known to the third party and that rendered the third party unable to give consent, clause 6(1) would not apply.

19. Mr Alan LEONG asked about the effect on the right of a third party if the contractual term conferring benefit on him had not been made known to the third party by the contracting parties and the third party could not have communicated to the promisor his assent by word or conduct to the term conferring benefit on him.

20. DSG advised that if a contractual term conferring benefit on a third party was not made known to the third party, clause 6(1) would not apply. In addition, the Bill also provided that if the promisor was aware of or could reasonably be expected to have foreseen the third party's reliance on the term, clause 6(1) would apply.

21. Mr Alan LEONG sought clarification as to whether contracting parties had the freedom to allow themselves by a contractual clause to vary or rescind the contract even after the third party had assented to, or relied on, the benefit.

22. DSG replied in the positive. Under clause 6(3) and (4), contracting parties could, by virtue of a contractual term, vary or rescind the contract so long as the promisor had taken reasonable steps to bring the term to the notice of the third party before his right under the contract crystallized. In other words, the proviso was that a third party was made known of the existence of that contractual term, or reasonable steps had been taken to bring it to his notice, before his right was crystallized.

#### *Committee Stage amendments*

23. The Bills Committee examined clauses 5 and 6 of the Bill. Members also completed examination of the draft Committee Stage amendments ("CSAs") proposed by the Administration as of 22 May 2014 (LC Paper No. CB(4)710/13-14(02)):

- (a) to amend clause 3(2) so as to clarify that all provisions in a DMC as well as a covenant relating to land were to be excluded from the application of the Bill. This would address the concern raised by the Hong Kong Bar Association that a DMC might contain terms not relating to land (paragraphs 9 and 10(c) of LC Paper No. CB(4)328/13-14(01) refer); and
- (b) to amend the English text of clause 8(2) to improve the presentation of that sub-clause.

#### Follow-up actions required of the Administration

24. The Administration was requested to respond in writing to the following issues raised by members on the Bill:

- (a) whether consideration could be made to making clearer the interpretation of "third party" under clause 2, by making reference to clause 4(2) which stipulated that "[t]he third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description";
- (b) what were the policy considerations for excluding a DMC from the application of the Bill (clause 3(2)(b) refers);
- (c) assuming that there was a chain of contracts and D, as a third party to a contract between A and B, had been conferred a benefit by the contract between A and B which was greater than what D would have got from the contract between C and D, whether it was the legislative intent of the Bill to allow D to enforce the term of the contract which had a larger remedy; and if so, what the justifications were; and
- (d) whether consideration could be given to improving the Chinese text of clause 4(3) to make it more easily understood.

#### **II. Any other business**

- 25. Members agreed to hold the next meeting on 16 June 2014 at 4:30 pm.
- 26. There being no other business, the meeting adjourned at 10:30 am.

Council Business Division 4  
Legislative Council Secretariat  
14 August 2014



**Proceedings of the third meeting of the  
Bills Committee on Contracts (Rights of Third Parties) Bill  
on Monday, 26 May 2014, at 8:30 am  
in Conference Room 2A of the Legislative Council Complex**

<b>Time marker</b>	<b>Speaker</b>	<b>Subject</b>	<b>Action required</b>
000700 – 002600	Chairman Administration	Opening remarks by the Chairman  Briefing on the Administration's response to the views of deputations made at the previous meeting (LC Paper No. CB(4)710/13-14(01))	
002601 – 004305	Chairman Administration Ir Dr LO Wai-kwok Mr Ronny TONG	Who is a third party  Scope of the application of the Bill	<b>Admin</b> (paragraph 24 of the minutes)
004306 – 005630	Chairman Administration Mr Ronny TONG	Third party's right to enforce contractual term	
005631 – 010615	Chairman Administration	Administration's response to the view of The Law Society of Hong Kong	<b>Admin</b> (paragraph 4 of the minutes)
010616 – 011500	Chairman Administration Mr James TO	Scope of the application of the Bill	
011501 – 013330	Chairman Administration	Administration's response to the views of Mr Lee MASON of the Faculty of Law of the University of Hong Kong and the Hong Kong Association of Banks	<b>Admin</b> (paragraph 4 of the minutes)
013331 – 014715	Chairman Administration Assistant Legal Adviser 2 Mr Alan LEONG	Briefing by the Administration on the draft Committee Stage amendments to clauses 3(2) and 8(2)  Test of enforceability  Chinese text of clause 4(3)	<b>Admin</b> (paragraph 24 of the minutes)
<b>Clause-by-clause examination of the Bill</b>			
014716 – 014805	Chairman Administration	Clause 5 - Remedy available to third party	
014806 – 020125	Chairman Administration Mr Alan LEONG	Clause 6 - Rescission and variation of contract	
020126 – 020430	Chairman	Date of next meeting	

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