

立法會
Legislative Council

Ref : CB4/BC/2/12

LC Paper No. CB(4)1004/13-14

(These minutes have been seen
by the Administration)

Bills Committee on Contracts (Rights of Third Parties) Bill

Minutes of the fourth meeting
Monday, 16 June 2014, at 4:30 pm
in Conference Room 2B 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 Starry LEE Wai-king, JP
Hon Paul TSE Wai-chun, JP
Hon Dennis KWOK
Ir Dr Hon LO Wai-kwok, BBS, MH, JP
Hon Tony TSE Wai-chuen
- Members absent** : Hon Ronny TONG Ka-wah, SC
Hon Alan LEONG Kah-kit, SC
- 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

Miss Vivian YUEN
Legislative Assistant 4(2)

Action

I. Meeting with the Administration

[LC Paper Nos. CB(4)815/13-14(01)-(02), CB(4)623/13-14(01)]

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

2. The Chairman informed members that Ms Cyd HO had given notice to withdraw membership from the Bills Committee vide her letter dated 16 June 2014.

3. Senior Assistant Solicitor General ("SASG") briefed members on the Administration's response to the comments 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 Contracts (Rights of Third Parties) Bill ("the Bill"), details of which were set out in LC Paper No. CB(4)815/13-14(01).

4. Deputy Solicitor General ("DSG") briefed members on the Administration's response to issues raised at the previous meeting in LC Paper No. CB(4)815/13-14(02). The Bills Committee did not raise any further queries.

5. Senior Government Counsel ("SGC") of Department of Justice ("DoJ") briefed members on the Administration's paper entitled "Case law on United Kingdom's Contracts (Rights of Third Parties) Act 1999 ("the UK Act") and

case law in other common law jurisdictions on the application of similar legislation" [LC Paper No. CB(4)623/13-14(01)].

6. The Chairman enquired about whether the drafting of the Bill had taken into account overseas experience in implementing similar reform of privity of contract with a view to obviating any foreseeable uncertainty in the enforcement of a third party's rights under a contract.

7. SGC said that the two United Kingdom cases illustrated, amongst others, the operation of the test of enforceability under section 1 of the UK Act which was identical to the test adopted under clause 4 of the Bill, as well as provided helpful guidance on the application of section 8(1) of the UK Act regarding when a third party would be regarded as being bound to enforce his right by arbitration. The New Zealand case dealt with the test for identification of the third party whilst the Singapore case illustrated the application of the second limb of the test of enforceability, as well as the application of the test for rescission and variation of a contract by contracting parties. DSG indicated that the Administration had taken into account the jurisprudence of other common law jurisdictions in preparing the Bill.

Clause-by-clause examination of the Bill

Clause 6 – Rescission and variation of contract

8. The Chairman noted that to strike a balance between the freedom of contracting parties to change the contract in accordance with their intentions, and the interests of the third party, who might suffer injustice as a result of variation or rescission, clause 6 provided for the circumstances in which the parties might not rescind or vary the contract in a way that affected the third party's rights, i.e. when the third party's rights under a contract crystallized. As spelt out in clause 6(2), 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. He enquired as to what constituted an assent to the term given by a third party to the promisor under clause 6(2)(a) and what constituted a reliance on the term by a third party under clause 6(2)(b).

9. DSG advised that under clause 6(2)(a), if a third party had communicated his assent by word or conduct to the promisor, the third party's right under the contract could not be rescinded or varied without the third party's consent. As for reliance, once a promise had been made by a promisor to the promisee, it was possible for the third party to have expectations that the

promise would be performed and, in relying on the promise, regulate his affairs accordingly. Under clause 6(2)(b), where a promisor was aware that the third party had relied on the promise, or a promisor could reasonably be expected to have foreseen that the third party would rely on the promise and the third party had indeed relied on it, the parties could not rescind or vary the contract without the consent of the third party.

10. Responding to the Chairman's further enquiry about the operation of clauses 6(2)(b)(i) and 6(2)(b)(ii), DSG explained that generally, it would be a matter for the third party to assert that the contracting parties' right to vary or rescind the contract had come to an end. The burden was thus on the third party to prove that the promisor was aware of the third party's reliance or could reasonably be expected to have foreseen that reliance. In deciding whether he could vary or rescind the contract, a promisor would have no difficulties in deciding whether he was actually aware of the third party's reliance. As for the "can reasonably be expected to have foreseen" limb of the reliance test, this issue could be left to the courts to determine. The courts routinely carried out such types of objective assessment.

11. Assistant Legal Adviser 2 ("ALA2") asked whether, under clause 6(2)(a), an assent sent to the promisor would only be regarded as communicated to the promisor after actual receipt by him.

12. DSG replied in the positive. He said that the postal rule would not apply under clause 6(2)(a) and that the promisor should have actually received the third party's assent.

13. On the policy intent of clauses 6(3) and 6(4), DSG advised that clauses 6(3) and 6(4) provided that the parties could by virtue of a contractual term vary or rescind the contract so long as the third party knew of the existence of that contractual term, or reasonable steps had been taken to bring the term to the notice of the third party before his rights crystallized.

14. In reply to ALA2's enquiry about the use of "[i]n addition" at the beginning of clause 6(3) of the Bill, Senior Assistant Law Draftsman ("SALD") advised that clause 6 had been drafted in a narrative style to present the substance of the clause in the following manner:

- (a) subclause (1) set out a general rule;
- (b) subclause (2) qualified the operation of the rule;
- (c) subclause (3) set out a further qualification; and

- (d) subclause (4) limited the operation of the further qualification.

Under the above drafting approach, the whole clause consisting of four subclauses could be read as one narrative. The expression "[i]n addition," was added at the beginning of subclause (3) to promote the linkage between the subclauses and to give the reader a sense of continuity within clause 6. The Administration believed that the presence of the expression would be conducive to the reader's comprehension of the clause. This kind of narrative style, being a recent trend in the drafting of legislation, was commonly adopted in other jurisdictions such as Australia.

Clause 7 – Power of court to dispense with third party's consent to rescind or vary contract

15. Members noted that under clause 7, the court would be given a wide discretion to authorize rescission or variation of the contract without the consent of the third party upon application of any of the contracting parties where it was just and practicable to do so. The Chairman enquired about if the Administration had consulted the view of the Judiciary in this regard.

16. DSG advised that consultation with the Judiciary had been made through the Judiciary Administrator. Besides, members of the Sub-committee of the Law Reform Commission ("LRC") which was appointed to study the subject of privity of contract included the then Chief Justice. Although clause 7 was modelled on the UK Act, subclause (3)(b) was not entirely the same as section 2(4) and (5) of the UK Act because the latter did not give residual power to the court and such an approach was not adopted by the LRC. The Administration considered it appropriate to grant the court a wide discretion to order a rescission or variation of the contract.

Clause 8 – Proceedings brought by third party

17. The Chairman asked whether a promisor might, in an action brought by a third party, raise a defence which questioned the validity or enforceability of the contract because the contract was voidable for misrepresentation.

18. DSG replied in the positive. He pointed out that clause 8(2)(c) provided that a promisor might raise a matter that would have been available to him by way of defence or set-off if the third party had been a party to the contract. The subclause covered not only situations where misrepresentation was made by the promisee, but also by the third party.

Clause 11 – Protection of promisor from double liability

19. Members noted that clause 11 sought to protect a promisor against double liability when the promisee and the third party were allowed to enforce the contract. There were two situations where double liability for the same loss might arise. The first situation was where a promisee had recovered a sum representing the third party's loss (clause 11(3)(b)(i)). The second was where the promisee had recovered a sum for the expense in making good to the third party the promisor's default (clause 11(3)(b)(ii)). In either situation, the court or arbitral tribunal must in any proceedings brought by the third party reduce any award to the third party to the extent to which it thought appropriate to take account of the sum. The Chairman questioned why there was no specific provision under which a promisee would be under a duty to account to the third party for the amount recovered by the promisee.

20. DSG said that where a promisee sued the promisor for the third party's loss and recovered damages for that loss, the promisee would in general be under a duty to account for the damages to the third party. The LRC considered that it should be for the courts and arbitral tribunals, rather than the legislature, to determine the circumstances under which a promisee might be under a duty to account to the third party for the sum that the promisee had recovered. To this end, the objective of clause 11(3)(b) was to implement the recommendation of the LRC to protect a promisor against the possible double liability.

Clause 12 – Arbitration agreement

21. Members noted that clause 12(1) to (3) concerned with the enforcement of a substantive right by a third party subject to a procedural condition of being bound to enforce that right by arbitration. Clause 12(4) to (5) allowed the contracting parties to give a third party an enforceable procedural right which the third party might choose to exercise. Clause 12(6) to (7) provided a linkage to the Arbitration Ordinance (Cap. 609).

22. Responding to the Chairman's enquiry about the definition of an arbitration agreement under clause 12, DSG advised that the arbitration agreement was an agreement in writing for the purposes of the Arbitration Ordinance (Cap. 609). The term "in writing" was given a broader scope and included electronic format.

Clause 13 – Exclusive jurisdiction clause

23. Members noted that clause 13 provided 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 bound by the exclusive jurisdiction clause as regards disputes between himself and the promisor relating to the enforcement of the substantive rights by the third party. The Chairman asked about the operation of clause 13 in the case of a non-exclusive jurisdiction clause.

24. DSG said that if contracting parties intended the third party to enforce the right conferred on him in a particular jurisdiction, the parties should be free to impose such a "condition". The third party, if he chose to enforce the right, might do so in that jurisdiction specified in the non-exclusive jurisdiction clause or the third party might bring an action in any other jurisdiction in accordance with the relevant jurisdiction rules.

Clause 14 – Assignment of third party right

25. Members noted that under clause 14, a third party's rights would be assignable unless the contracting parties had expressly agreed otherwise or circumstances at the time of contracting indicated that the benefit to the third party was personal to him and was not intended to be assignable.

26. DSG advised that as a third party's right under the proposed legislation was closely analogous to a contractual right, standard common law contractual principles would in general apply. As such, a third party's right would be assignable in the same way as a contracting party's rights under the contract, unless the contract provided otherwise or the circumstances indicated otherwise. In relation to the question whether notice of assignment should be brought to the promisor, DSG advised that the Bill would not seek to amend principles of contract law in this aspect and such question would be determined in accordance with the relevant provisions of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) and other applicable common law rules.

Clause 16 – Application of Limitation Ordinance

27. Members noted that actions brought by third parties under the proposed legislation could 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. A six-year time limit and a twelve-year time limit would be adopted for "actions founded on simple contract" or "actions upon a specialty" respectively.

28. The Chairman asked how the period of limitation for actions brought by a third party found on simple contract or upon a specialty would be calculated under the proposed legislation. DSG advised that the Bill would not alter the prevailing legal principles in this regard and under the current law, the

limitation period would run from the date on which the contract in question was in breach.

Resumption of Second Reading debate on the Bill

29. The Bills Committee completed the clause-by-clause examination of the Bill.

30. Members agreed that the Bills Committee would report its deliberations on the Bill to the House Committee in the next session of the Legislative Council, supporting the resumption of the Second Reading debate on the Bill at a meeting of the Council in the next session.

II. Any other business

31. There being no other business, the meeting adjourned at 6:05 pm.

Council Business Division 4
Legislative Council Secretariat
14 August 2014

**Proceedings of the fourth meeting of the
Bills Committee on Contracts (Rights of Third Parties) Bill
on Monday, 16 June 2014, at 4:30 pm
in Conference Room 2B of the Legislative Council Complex**

Time marker	Speaker	Subject	Action required
000501 – 001825	Chairman Administration	Briefing on the Administration's response to the views of deputations (LC Paper No. CB(4)815/13-14(01))	
001826 – 002655	Chairman Administration	Briefing on the Administration's response to issues raised by members at the previous meeting (LC Paper No. CB(4)815/13-14(02))	
002656 – 004550	Chairman Administration	Briefing on the Administration's paper entitled "Case law on United Kingdom's Contracts (Rights of Third Parties) Act 1999 and case law in other common law jurisdictions on the application of similar legislation" (LC Paper No. CB(4)623/13-14(01))	
Clause-by-clause examination of the Bill			
004551 – 005820	Chairman Administration Assistant Legal Adviser 2 ("ALA2")	Clause 6 – Rescission and variation of contract	
005821 – 010205	Chairman Administration	Clause 7 – Power of court to dispense with third party's consent to rescind or vary contract	
010206 – 010800	Chairman Administration	Clause 8 – Proceedings brought by third party	
010801 – 011200	Chairman Administration	Clause 9 – Proceedings brought against third party	
011201 – 011215	Chairman Administration	Clause 10 – Enforcement of contract by promisee	
011216 – 011735	Chairman Administration ALA2	Clause 11 – Protection of promisor from double liability	
011736 – 012130	Chairman Administration	Clause 12 – Arbitration agreement	
012131 – 012445	Chairman Administration	Clause 13 – Exclusive jurisdiction clause	
012446 – 012755	Chairman Administration	Clause 14 – Assignment of third party right	
012756 – 012840	Chairman Administration	Clause 15 – Third party not to be treated as party to contract	

Time marker	Speaker	Subject	Action required
012841 – 013040	Chairman Administration	Clause 16 – Application of Limitation Ordinance Completion of clause-by-clause examination of the Bill	
013041 – 013410	Chairman Clerk	The Bills Committee would report its deliberations on the Bill to the House Committee in the next session of the Legislative Council, supporting the resumption of the Second Reading debate on the Bill at a meeting of the Council in the next session. Closing remarks by the Chairman	

Council Business Division 4
Legislative Council Secretariat
14 August 2014