

立法會

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Bills Committee on Contracts (Rights of Third Parties) Bill

Background brief prepared by the Legislative Council Secretariat for the meeting on 24 April 2014

Purpose

This paper gives an account of the deliberations of the Panel on Administration of Justice and Legal Services ("the Panel") on the Administration's legislative proposal to implement the recommendations of the report on "Privity of Contract" published by the Law Reform Commission of Hong Kong ("LRC") in September 2005 so as to reform the doctrine of privity of contract.

Background

2. The doctrine of privity 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.
3. Whilst the second aspect is generally regarded as just and sensible, the first aspect prevents effect from being given to the contracting parties' intention to benefit a third party. As such, the courts may need recourse to devices such as agency and trust to allow a third party to enforce a right conferred on him, or in some other cases, a third party may have to resort to a large number of separate contracts with extra cost, complexity and inconvenience.
4. According to the Administration, various common law jurisdictions, including Australia (Western Australia, Northern Territory and Queensland), Canada (New Brunswick), England, New Zealand and Singapore, have reformed the doctrine of privity by way of legislation to effectuate contracting

parties' intention so that a third party should be able to enforce a contract where the contracting parties intended to create a legal obligation enforceable by the third party. In October 2012, the proposed Contracts (Rights of Third Parties) Bill which sought to enable a third party, i.e. a person not a party to a contract, to enforce a contract where the contracting parties intended to create a legal obligation enforceable by the third party ("the Consultation Bill") was sent to various stakeholders for consultation, including the legal professional bodies, academics, political organizations, business associations as well as the banking, insurance, shipping and construction sectors.

Deliberations of the Panel

5. The Administration consulted the views of the Panel at its meeting held on 26 November 2013 on the Consultation Bill. Major views expressed by Members are set out in the ensuing paragraphs.

Test of enforceability

6. Members noted that under the Consultation Bill, a third party who was not a party to a contract might enforce a term of the 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.

7. Question was raised as to whether a decoration worker, who was a third party to a contract signed between the property owner and the decoration contractor, could initiate legal proceedings against one of the contracting parties for his injuries inflicted in the course of carrying out decoration work at the property concerned.

8. The Administration explained that existing rights of third parties under the current laws in Hong Kong would not be affected under the Consultation Bill. Claims for negligence brought by decoration workers against property owners in relation to construction works in properties could be handled under the existing tort law. That said, under the Consultation Bill, if it was the intention of the property owner and the decoration contractor to benefit the decoration worker under certain circumstances and this was expressly provided for in the contract, the decoration worker could enforce the relevant term.

Defences available to promisor

9. On the availability of defences to a party to a contract against whom a third party might enforce the term, i.e. a promisor, under the Consultation Bill, the Administration advised that defences, set-offs and counterclaims were available to a promisor. Furthermore, a promisor was protected against double liability in that a promisor was discharged from the obligations owed by the promisor to the promisee to the extent of having performed the same obligations to the third party.

Who is a third party

10. The Administration advised that the Consultation Bill provided that a third party should be expressly identified by name, as a member of a class or as answering a particular description. Rights might also be conferred on a third party who was not in existence when the contract was entered into.

11. A member was of the view that as different people might have different views on who a third party was, concern was raised that the enactment of the Consultation Bill might prompt unnecessary multi-party claims. In order to avoid misunderstanding on who had a right to enforce the terms of a contract, the Administration was urged to exercise vigilance in drafting the interpretation of the term "third party".

Scope of application

12. Members noted that the new statutory scheme would not apply to contracts entered into before the commencement of the scheme when enacted so that existing rights or remedies of a third party would not be affected. In addition, the Consultation Bill sought to exclude certain classes of contracts where:

- (a) a third party already had an enforceable right under existing rules reflecting international conventions. This included 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; and
- (b) a third party had no enforceable right under existing rules but there were sound policy reasons for maintaining that position. This included the memorandum and articles of a company having effect as a contract under the Companies Ordinance and a contract of employment against an employee.

13. The Administration was urged to carefully consider the views from various stakeholders, especially the view expressed by the Hong Kong Bar Association ("the Bar Association") that consideration be given to excluding contractual obligations contained in the Deeds of Mutual Covenants ("DMCs") and land covenants from the scope of application of the Consultation Bill because allowing third parties' right of enforceability under the proposed legislative scheme would contradict or prejudice the existing regime on DMCs and land covenants. A member was of the view that if the Administration was inclined to include DMCs in the scope of application of the proposed legislative scheme, a study on the possible policy and social implications should be conducted before making the final decision.

14. The Administration advised that a few industry sectors also raised technical comments on the application and operation of the Consultation Bill. The Administration pointed out that some of the questions raised by the industries could be resolved by building in clear provisions in their contracts, such as provisions explicitly stating the class of insurance contracts to be excluded from the application of the Consultation Bill. Whilst one respondent from the construction sector suggested that the whole construction industry should be excluded from the application of the new statutory scheme, another respondent from the same sector had another view. The Administration considered that it would be best to allow contracting parties the freedom to contract out of the new statutory scheme if they so wished.

Implementation arrangements

15. The Administration was requested to ensure that the public would be well informed of the new statutory scheme and allow sufficient time for various stakeholders to make due preparations for the changes.

Relevant papers

16. A list of the relevant papers available on the website of the Legislative Council (<http://www.legco.gov.hk>) is in the **Appendix**.

Appendix

Bills Committee on Contracts (Rights of Third Parties) Bill

List of relevant papers

Meeting	Date of meeting	Paper
Panel on Administration of Justice and Legal Services	26.11.2013 (Item IV)	CB(4)157/13-14(04) CB(4)176/13-14(01) CB(4)157/13-14(05) CB(4)176/13-14(02) CB(4)511/13-14 (Minutes of meeting)