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

1. In the Bills Committee meeting on 24 April 2014, members requested the Administration to provide case law on the application of the United Kingdom's Contracts (Rights of Third Parties Act) 1999 ("UK Act") and case law in other common law jurisdictions on the application of similar legislation.

UK case law

2. We set out below a summary of two UK cases explaining, among others, the operation of the test of enforceability under Section 1 of the UK Act which is identical to the test adopted under Clause 4 of the Bill.

Nisshin Shipping Co Ltd v Cleaves & Co Ltd [2003] EWHC 2602, [2004] 2 All ER (Comm) 481

3. ***Nisshin Shipping v Cleaves*** was the first case concerning the application of the UK Act that came before the English High Court. The key facts of the case are as follows:

- Cleaves & Co Ltd ("**Cleaves**") was a firm of chartering brokers. It negotiated charterparties between Nisshin Shipping Co Ltd ("**Nisshin Shipping**"), the shipowner, and various charterers.
- Cleaves was not a party to any of the charterparties.
- In each charterparty, Nisshin expressly agreed to pay a commission to Cleaves. The relevant wording of the term was as follows:
  "A commission of 2 per cent for equal division is payable by the vessel and owners to Messrs Ifchor SA Lausanne and Messrs Cleaves and Company Ltd, London on hire earned and paid under this Charter, and also upon any continuation or extension of this charter." ("**relevant terms**")
- Each charterparty contained an arbitration agreement.
- Nisshin subsequently declined to pay the commissions to Cleaves.
- Cleaves commenced arbitration against Nisshin, purportedly under the arbitration agreements in the charterparties, seeking to recover the unpaid commissions.

- The arbitral tribunal decided that it had jurisdiction to determine the dispute as under section 1 of the UK Act, Cleaves had a right to enforce the relevant terms in the charterparties under which Nisshin agreed to pay Cleaves commission; and also under section 8 of the UK Act, Cleaves had a right to enforce the relevant terms of the charterparties through arbitration under the arbitration agreement in each charterparty.
- Nisshin applied to the court under section 67 of the Arbitration Act 1996 to challenge both grounds of the tribunal's decision, seeking a declaration that the arbitral tribunal would have no jurisdiction to Cleaves' claims.

4. Nisshin Shipping argued that the relevant terms did not purport to confer a benefit on the brokers alone because they referred to a second broker, and that accordingly section 1(1) of the UK Act could not apply. The court rejected this argument on the basis that there was no indication in the charters that the obligation to pay commission can only be enforced jointly by both firms of brokers.

5. Nisshin Shipping also argued that there was no positive indication in the charters that the owners and charterers had agreed that the brokers should be entitled to claim against the owners as if they were parties to the contract. The court held that:

(a) There was no need for a contract to contain a positive indication that the parties intended a third party to benefit. It was sufficient that the charters were neutral in the sense that they did not express any intention contrary to the brokers' entitlement to enforce the commission term.
(b) Whether the contract does express a mutual intention that the third party should not be entitled to enforce the benefit conferred on him or is merely neutral is a matter of construction having regard to all relevant circumstances.

The court concluded that Cleaves was entitled to enforce the relevant terms in its own right under section 1 of the UK Act.

6. In respect of the issue whether the enforcement of the relevant terms were subject to the arbitration agreements in the charterparties under section 8 of the UK Act, the court made reference to the assignment analogy adopted in the Explanatory Notes on the UK Act issued by the Lord

Chancellor's Department and held that:

(a) Although Cleaves was not expressed to be party to the arbitration agreements, it had in effect become a statutory assignee of the charterers' right of action against the ship owner and because of the underlying policy of the UK Act expressed in section 1(4), Cleaves was confined to the means of enforcement provided by the contract to the charterers, namely arbitration. Cleaves was to be treated as standing in the shoes of that of the charterers for the purpose of enforcement of the relevant terms.

(b) The scope of the disputes covered by the arbitration agreements was wide enough to embrace a dispute between owners and charterers about payment of the brokers' commission and Cleaves was entitled and, indeed, obliged to refer those disputes to arbitration and that the arbitrations had jurisdiction to determine those disputes.

7. ***Nisshin Shipping v Cleaves*** was important as the ruling had clarified the interpretation of section 1 of the UK Act as to when a contractual term, in the absence of an express indication that the contracting parties intend to benefit a third party, would be regarded as having conferred a benefit on a third party under section 1(1)(b) of the UK Act and that the third party has a right directly to enforce that term. It has also 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 its right by arbitration.

Peter Crowson v HSBC Insurance Brokers Ltd. [2010] EWHC B26

8. ***Crowson v HSBC Insurance Brokers*** concerns the question of whether a person who is not in a contractual relationship with an insurance broker would have rights of action in contract and/or tort against the broker where the insurance in question was for that person's benefit. The relevant facts of the case are summarised as follows:

- Crowson was a director of Hughes Brickwork Limited ("**HBL**").
- HBL had entered into an arrangement with HSBC Insurance Brokers Ltd ("**HSBC**") who agreed to put into effect insurance policies identical to policies that had been arranged by HBL's previous brokers. The previous insurance policies had included a directors and officers liability insurance policy which HSBC failed to renew or replace.

- Crowson, who had sought to rely on the policy, brought a claim against HSBC in his own name for negligence and breach of contract, arguing that it was a term of the contract between HBL and HSBC that the HSBC would effect a directors and officers policy and that the term conferred a benefit on Crowson within the meaning of section 1(1)(b) of the UK Act.
- HSBC applied to have the claim struck out on the grounds that it did not owe Crowson a duty of care at common law and that it was not in a contractual relationship with him.

9. Since it was HSBC's application for striking out, the issue before the English High Court was whether the court would agree with HSBC that the case disclosed no reasonable grounds for bringing the claim. The court dismissed HSBC's application to strike out Crowson's claim. As far as the contractual claim was concerned, the court held that Crowson had a right to enforce the contract between HBL and HSBC on two grounds:

(a) Under section 1(1)(b) of the UK Act, the contract conferred a benefit on Crowson, namely insurance as a director; and

(b) Under section 1(3) of the UK Act, Crowson was expressly identified as a member of a class or answers to a particular description.

10. ***Crowson v HSBC Insurance Brokers*** is helpful in illustrating the English court's approach in interpreting section 1 of the UK Act. This case shows that a third party may claim under the UK Act against insurance brokers for insurance coverage designed to confer benefits on such a third party. In addition to the circumstances concerning directors and officers policies, other similar scenario could be personal injuries policies whereby the policy benefits both the insured company as well as its directors and employees; or accident or health policies which benefit family members of the insured.

New Zealand case law

11. The following New Zealand case deals with the test for identification of the third party. Section 4 of the Contracts (Privity) Act 1982 of New Zealand ("**New Zealand Act**") allows a third party to be "designated by name, description, or reference to a class", a test which is substantially the same as the one adopted in the UK Act as well as the Bill.

12. In ***Laidlaw and Anor v Parsonage and Anor*** [2009] NZSC 98, the Supreme Court of New Zealand held in September 2009 that the description of a purchaser in a sale and purchase agreement as "X and/or nominee" was sufficient identification for the nominee to take the benefit of the warranties under an agreement for the sale and purchase of a property. The facts of the case are as follows:

- The Laidlaws, as vendors, entered into a sale and purchase agreement with Mr. Parsonage "and/or nominee" for the sale of a residential property in Auckland.
- Parsonage and Mr. Goulding, as trustees of a family trust, became the nominee under the agreement.
- The description of the purchaser as "Mr. Parsonage and/or nominee" was used to avoid having to obtain Goulding's signature on the offers and counter-offers leading to the final agreement.
- After Parsonage moved into the property, it was discovered that the property leaked.
- The trustees sued the Laidlaws with one of the claims based on a warranty contained in the sale and purchase agreement.

13. The Supreme Court of New Zealand agreed with the reasoning of the Court of Appeal in rejecting previous authorities on the issue which took a narrower approach in interpreting section 4 of the New Zealand Act. The Supreme Court held that designation by description required no more than a sufficient identification of the person who may take the benefit and given that once nominated, the nominee was identifiable with certainty, the nominee would be a person designated by description for the purpose of section 4 of the New Zealand Act.

Singapore case law

14. The Contracts (Rights of Third Parties) Act 2001 of Singapore ("**Singapore Act**") is broadly similar to the UK Act. The following case illustrates the application of section 2(b) of the Singapore Act which concerns the second limb of the test of enforceability, as well as section 3(1) which relates to the variation and rescission of a contract.

CLAAS Medical Centre Pte Ltd (formerly known as Aesthetics Associates Pte Ltd) v Ng Boon Ching [2010] SGCA 3

15. ***CLAAS Medical v Ng Boon Ching*** relates to, among others, the effect of restrictive covenants in the context of a sale of business. The key facts of the case are summarised below:

- Dr Ng Boon Ching ("**Dr. Ng**") was a doctor who ran a successful aesthetic medical practice. Dr. Ng also owned a sole proprietorship which carried on the business of the import, distribution and sale of aesthetic laser and intense pulsed light machines and skin care products.
- CLAAS Medical Centre Pte Ltd ("**CLAAS**") was a company set up by six other doctors who had no previous experience in aesthetic medicine.
- The six other doctors subsequently decided to acquire Dr. Ng's medical practice and sole proprietorship. To this end, CLAAS was incorporated by them in 2005.
- Dr. Ng subscribed for shares in CLAAS and incorporated BCNG Holdings Pte Ltd ("**BCNG Holdings**") to which he transferred his clinic and sole proprietorship. The parties agreed that the value of BCNG Holdings be fixed at S$3.2million.
- On 6 April 2005, Dr. Ng, the six doctors and CLAAS duly entered into a Shareholders Agreement which set out the rights, duties and liabilities of all the parties relating to their participation in and the running of BCNG Holdings ("**April Agreement**").
- The April Agreement contained a restraint of trade covenant which provided, inter alia, each of the six doctors would have to pay a sum of S$700,000 by way liquidated damages to BCNG Holdings if they breached the covenant and Dr. Ng would have to pay BCNG Holdings a sum of S$1 million as liquidated damages if in breach.
- In November 2005, CLAAS exercised its right to purchase Dr. Ng's remaining 40% shareholding in BCNG Holdings.
- The April Agreement provided that upon the CLAAS' purchase of the 40% of the shares, all the existing shareholders of CLAAS would enter into and execute a Shareholders Agreement in the form as annexed to the April Agreement.

- A Shareholders Agreement dated 15 November 2005 ("**November Agreement**") was entered into by Dr. Ng and the six doctors in the terms of the said appendix.
- Unlike the April Agreement, CLAAS was not a party to the November Agreement which set out the terms and conditions under which Dr. Ng and the six shareholders of CLAAS would participate in the management of CLAAS.
- A restraint of trade provision similar to the one in the April Agreement was included in the November Agreement which provided, inter alia, that in the event of breach, Dr. Ng shall pay to CLAAS the sum of S$1 million by way of liquidated damages.
- In December 2006, Dr. Ng advanced interest-free loans amounting to S$286,500 to CLAAS to fund its operational expenses and expansion plans.
- By mid-2006, differences surfaced between Dr. Ng and the other shareholders of CLAAS. In March 2007, Dr. Ng transferred all his shares in CLAAS to one of the six doctors and resigned as a director of both CLAAS and BCNG Holdings.
- Subsequently, Dr. Ng set up his own practice which started to operate in May 2007.

16. Dr. Ng sued CLAAS for the repayment of the loan of S$236,500. The claim was admitted by CLAAS who sought to set off the debt against its counterclaim of S$1 million for breach of the non-competition clause in the November Agreement. CLAAS alleged, among others, to be entitled to enforce the non-competition clause against Dr. Ng pursuant to section 2(1)(b) of the Singapore Act.

17. The High Court of Singapore decided against CLAAS on the issue relating to the Singapore Act. It held that the presumption under section 2(1)(b) of the Singapore Act was rebutted by the presence of inconsistent terms in the November Agreement.

18. The Court of Appeal disagreed with the High Court's ruling on the Singapore Act. The appellate court ruled that:

(a) The first question needed to be addressed was whether the mere fact that the parties had expressly reserved to themselves the right to terminate the contract meant that the presumption that the parties intended CLAAS to be able to enforce the benefits under the contract

was rebutted.

(b) The provisions of section 3 of the Singapore Act, by spelling out the circumstances which would restrict the liberty of the contracting parties to rescind or vary their contact, would suggest that the mere fact that a term in the contract permits the parties to terminate it does not *ipso facto* mean that benefits conferred therein on a third party is not intended to be enforced by the third party.

(c) If the mere presence of a reservation of a right to the contracting parties to terminate or vary the contract would amount to there being no intention to confer on a named third party a right to sue for the benefits conferred thereunder, then there would not have been any need to have those elaborate provisions in section 3.

(d) Since the terms of the November Agreement were set out as an appendix to the April Agreement and CLAAS was a party to the April Agreement, the court could not see how it could be argued that CLAAS had not assented to what was set out in the November Agreement and it was a case where section 3(1)(a) of the Singapore Act applied. It was patently clear that CLAAS had worked out what were to be the terms of the November Agreement and had agreed to them. Since there existed no express provision in the November Agreement in terms of what was required under section 3(3) of the Singapore Act (section 3(3) provides that contracting parties may by express term in the contract set out their own "crystallization test"), the parties were no longer at liberty to take away the benefits provided in favour of CLAAS under the relevant restrictive covenant in the November Agreement without the consent of CLAAS.

(e) The court also ruled that the mere existence of a general provision against assignment of a party's rights under the November Agreement did not have the effect of rebutting the parties' intention to confer enforceable rights on CLAAS. *If* the assignment clause had specifically referred to the restrictive covenant and stated that the parties not in breach of the restrictive covenant could only sue to recover the specified sums with the written consent of all the parties, or of only the party in default, then that would have been considered as a rebuttal of the parties' intention to confer an enforceable right on CLAAS.