

Ref: Lv036/14

7 May 2014

Hon Kenneth Leung  
Chairman  
Bills Committee on Contracts (Rights of Third Parties) Bill

Dear the Hon Leung

**Views of the Hong Kong Federation of Insurers on the Contracts (Rights of Third Parties) Bill**

Thank you for inviting the Hong Kong Federation of Insurers (HKFI) to provide written submission on the captioned bill. We would like to share our observations as listed below.

**Observations**

As a background in England and Wales, there has since 1999 been enacted the Contact (Rights of Third Parties) Act 1999 which applied to contracts enacted after 11 May 2000.

That act provides that a third party can enforce a contractual term if the contract provides that they can do so or the contract purports to confer a benefit on the third party, unless on a true construction of the contract it appears that the parties did not intend the term to be enforceable by a third party.

The third party can only enforce the contract term if they are expressly identified in the contract by name or they belong to a general class of persons identified in the contract.

It should be noted that the England and Wales act supplements the existing law and does not remove or replace any of the existing exceptions to the doctrine of Privity.

Those contracts which are excluded from the England and Wales act appear to include Bills of Exchange, Contracts of Employment, Contracts of Carriage by Sea amongst others. Insurance Contracts are not excluded from the England and Wales act.

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From an England and Wales perspective, notwithstanding that insurance contracts have not been excluded, it is perfectly possible for parties to an insurance contract to exclude the operation of the act through the proper construction of policy wording.

Of the proposed Bill, s.(3) and (4) is more or less analogous to those features indicated above. In a similar fashion insurance contracts have not been excluded from the proposed Bill.

Our concerns under our letter of 2 January 2013 in respect of s.(6) can be addressed through the careful construction of policy wording, our concerns under S(12) have been addressed under s. (12) subsection (2) (a) and (b).

In respect of our concern under Scenario 2 involving reinsurance, reinsurers would have to ensure suitable construction of policy wording to avoid the cut through scenario described.

### Conclusion

As it stands there appears to be enough scope within the proposed Bill to allow insurers to exclude the operation of the Act altogether. We hope the Government will be able to explicitly confirm their intention to do so in writing for our ease of administration.

Yours truly



Peter Tam  
Chief Executive

c.c. Mr K P Chan, Member of Legislative Council (Insurance)  
Governing Committee of HKFI

Your Ref : LP 5019/11C II  
Our Ref : Lv005/13

**BY FAX (2110 9788) AND BY MAIL**

2 January 2013

Ms Deneb Cheung  
Senior Assistant Solicitor General  
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Hong Kong

Dear Ms Cheung

**Consultation Paper on the Contracts (Rights of Third Parties) Bill 2013**

Thank you for your letter dated 31 October 2012, inviting us to comment on the subject matter.

We have consulted our member companies, and their comments are set out as follows:

**A. Consultation Paper on contracts (Rights of Third Parties) Bill 2013**

Scope of Application

Paragraph 14:

If the provisions are not drafted clearly, the exemption will become an exhaustive list which may not be practicable in real life situations particularly in such a rapidly changing business environment. Hence, the classes of contracts to be exempted have to be clearly defined.

Right of Third Party to Enforce Contractual Term

Paragraph 16:

What will happen if the third party as named under the contract no longer exists at the time when the relevant contract is enforced? Please address this under the proposed legislation.

Rescission and Variation of Contract

Paragraph 18:

Details of disposal of the benefits/payments have to be spelt out specifically in cases where the third party does not claim the relevant benefits/payments. This makes the process simpler to administer, thus saving cost and enhancing administrative efficiency in the long run.

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### Protection of Promisor from Double Liability

Paragraph 23:

On top of dealing with award, the court should also consider the legal costs to be borne by the promisor, if any, as well as the potential amount to be reduced where applicable.

## **B. Annex B – Contracts (Rights of Third Parties) Bill**

### Clause 6: Rescission and variation of contract

In a life insurance policy, it is quite common for a policyholder to name a specific beneficiary (i.e. the third party) on a voluntary basis. Clause 6 sets out restrictions on the policyholder in rescinding or varying the beneficiary's rights, one of which is to seek the third party's consent to such rescission or variation. ~~This requirement will be impractical because the beneficiary (i.e. the third party) may not be a local Hong Kong resident and the life insurer may not have the relevant contact details.~~

Please clarify if the Bill is intended to cover a life insurance policy situation.

### Clause 12: Assignment of third party right

Pursuant to Clause 12 of the Bill, the third party may further assign a right under a contract, which is enforceable by the third party, to another third party.

If an appointed beneficiary of a life insurance policy is allowed to further assign his or her rights, the insurer will have difficulties in verifying the authenticity and validity of such an assignment. Clause 12(2) appears to allow the contract-out of Clause 12(1), yet it might be more practical if the Bill adopts an opt-in approach rather than an opt-out approach.

In addition to our comments above, the draft definitions looks somewhat ambiguous. On this point, we would like to cite two scenarios for your reference:

### **Scenario 1**

An employees' compensation policy provides cover to an employer against liability towards its employees. Under the definition of a "third party" in Section 2 of the Bill, an employee would fall within such a definition and be deemed a third party to such a policy; and such an employee has a "benefit" under the policy in a broad sense pursuant to section 4 of the Bill. As such, the

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Bill appears to allow an employee to enforce the policy by suing an insurer direct under the policy. The legislative intent does not seem to cover such a scenario. But it would be helpful to have this point clarified by, for example, providing a clear definition of "benefit".

For the sake of clarity, it would be beneficial if your Department could confirm any potential impact on the Third Parties (Rights against Insurers) Ordinance, Cap.273.

### **Scenario 2**

In the context of a reinsurance agreement, all original insured as described by way of a class of policies are third parties also have benefits under the agreement. Would such original insured be able to enforce a reinsurance agreement against a reinsurer? In other words, the Bill would enable the original insured the right to enforce the agreement in the absence of a cut-through clause, and such right under the Bill is even wider than a standard cut-through clause (which normally applies where the ceding insurer becomes insolvent).

We look forward to receiving your response to our comments.

Yours truly,



Peter C H Tam  
Chief Executive

c.c. Governing Committee Members

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