



The Chartered Institute of Arbitrators (East Asia Branch)  
SUBMISSION TO THE LEGISLATIVE COUNCIL  
BILLS COMMITTEE ON CONTRACTS (RIGHTS OF THIRD PARTIES) BILL

The Chartered Institute of Arbitrators (East Asia Branch)  
c/o The Hong Kong International Arbitration Centre  
38/F Two Exchange Square  
Central  
Hong Kong

Telephone: (852) 2525 2381

Fax: (852) 2524 2171

Website: [http://www.ciarbasia.org/en\\_index.php](http://www.ciarbasia.org/en_index.php)

7 May 2014

The Honourable Kenneth Leung

Chairman

Bills Committee on Contracts (Rights of Third Parties) Bill

Dear Mr Chairman

**Written submission of the Chartered Institute of Arbitrators (East Asia Branch) on the Contract (Rights of Third Parties) Bill**

On behalf of the Chartered Institute of Arbitrators (East Asia Branch) (“CI Arb EAB”), I am writing to thank you for inviting the CI Arb EAB to attend the meeting on 7 May 2014. As a recently elected committee member of the CI Arb EAB, I am honoured to attend the meeting on behalf of the CI Arb EAB and provide some comments on the captioned bill.

The CI Arb EAB generally supports the Bill. In particular, we welcome section 12 of the Bill, which clarifies the third parties’ rights in arbitration agreements.

In addition, at the above-mentioned meeting, I also commented on a couple of issues. Upon your committee’s request, I hereby provide this written submission to further elaborate on those issues for your reference.

**Section 4(4) of the Bill**

Section 4(4) of the Bill provides that “[T]he enforcement of the term by a third party under this section is subject to any other term of the contract relevant to the term.” It is observed that the scope of this provision is so broad that it encompasses, but is not limited to, mediation agreements, for example. It is proposed to limit the scope of this provision by adding the following qualification at the end of the provision, words to the effect that “unless those terms are grossly unfair or unconscionable.”

## Cases on “direct benefits” decided in England and Wales

In response to the discussions about whether the Bill can further benefit from some recent cases decided in England and Wales, the following is observed:

In its Report (September 2005), the Law Reform Commission of Hong Kong adopted a presumption in favour of a third party's right to enforce a contractual term which purports to confer a benefit on him. Although the Law Reform Commission addressed the concern of what amounts to "purports to confer a benefit" in s.4(1)(b) of the Bill briefly in its Report, it does not seem to have explicitly settled on whether such a presumption is only triggered where a third party is to receive a benefit from the promisor directly, and whether this must not be just a consequential or incidental benefit stemming from the promisor's performance.<sup>1</sup>

In addition to the cases and commentaries cited in the Report, the distinction between a direct and incidental beneficiary was recently examined by Clarke J in *Dolphin Maritime & Aviation Services Ltd v. Sveriges Angfartygs Assurans Forening* (2009),<sup>2</sup> who said that a ‘contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed’, and ‘purporting to “confer” a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party.’ Therefore, he distinguished<sup>3</sup> between an arrangement (i) whereby A was obliged to pay B, or to make payment to B’s agent, and (ii) a situation where A and B agreed that A should pay C. In situation (i), B’s agent is not a beneficiary under limb 2 of the English 1999 Act, but merely a conduit for possible payment, for the pecuniary benefit of B, the principal.<sup>4</sup>

The Dolphin case above was decided in 2009, after the publication of the Law Reform Commission of Hong Kong’s Report (2005). It is recommended that section 4(1)(b) of the Bill can indeed benefit from the recent development of case law in this topic by explicitly clarifying that “benefit” in this Bill refers to a direct benefit to be received by the third party from the promisor directly, and it must not be just a consequential or incidental benefit stemming from the promisor's performance.

---

<sup>1</sup> The Law Reform Commission of Hong Kong Report on Privity of Contract, September 2005, at paragraphs 4.34-4.35

<sup>2</sup> [2009] EWHC 716 (Comm); [2010] 1 All ER (Comm) 473; [2009] 2 Lloyd's Rep 123; (2009) 1 CLC 460, at [74].

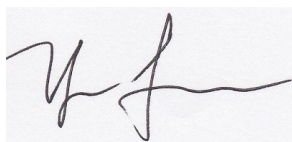
<sup>3</sup> *ibid*, at [76]

<sup>4</sup> ANDREWS Neil and YANG Fan, *Contract Law in Hong Kong: A Concise Analysis*, Chapter 5 Third Party Rights and Assignment (forthcoming)

I hope the above helps.

Please do not hesitate to contact me if I could be of any further assistance in this matter.

Yours truly

A handwritten signature in black ink, appearing to read 'Y. Fan', written on a light-colored background.

YANG, Fan

Committee member of the CI Arb EAB

Dr. YANG Fan

LLB, LL.M, PhD, FHEA, FCI Arb, Arbitrator (HKIAC), CEDR and HKMAAL Accredited Mediator, Barrister (England & Wales, non-practising), Assistant Professor, School of Law, City University of Hong Kong, Tat Chee Avenue, Kowloon Tong, Hong Kong SAR, Mobile: +852 9806 3521 Office: +852 3442 8008 Direct: +852 3442 7366

cc. Mr. YEUNG Man Sing, Chairman of the CI Arb EAB