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21 May 2014

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Ms Mary So
Clerk to the Bills Committee on Contracts (Rights of Third Parties) Bill
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Ms So

Contracts (Rights of Third Parties) Bill

We refer to our email dated 29 April 2014 and would like to comment on the provisions of the draft Bill as follows:-

1. Clause 1 – It is important to our Members that adequate lead in time be allowed so that they can vary standard terms of contracts and systems to take into account the enactment of the Bill. As stated, it is unpredictable as to when the Ordinance will be brought into operation and quite possibly this might be done quickly because there is no need to draft any subsidiary legislation. May we suggest that consideration being given to this clause providing that the Ordinance comes into effect immediately but only applies to contracts entered into 6 months after the enactment of the Bill? This reflects the approach adopted in the UK.

2. Clause 3(2)(a) – May we suggest that this includes specific reference to a cheque which is by far the most important and widespread negotiable instrument?

3. Clause 3(5) – The way in which the definition of "negotiable instrument" has been drafted has the effect that the wording "whether or not the instrument is capable of being transferred free from equities" may only apply to "other negotiable instruments" in Clause 3(2)(a). May we suggest a revision to the effect that the "whether or not" wording should apply to cheques, bills of exchange, promissory notes and other negotiable instruments? This is because each of these types of document has the possibility of not being transferable free from equities.

4. Clause 5(4) (previously 5(2)) – We raised a concern about this provision at the earlier Consultation Stages and we still have a concern about it. For ready reference, our comment made in August 2004 was follows:-

> "This recommendation is appropriate to the conclusion reached in paragraph 4.134 of the Consultation Paper but does not address the discussion referred to in paragraph 4.135 of the Consultation Paper. Our view is to prefer the academics' opinions mentioned in paragraph 4.135 such that once the legislature has provided for the ability of contracting parties to grant rights in favour of third parties, it should not be open to the courts to allow third parties to have rights which they do not have under the legislation."

We believe this provision should be deleted.

5. Clauses 6(1) and (2) – These provisions have been revised since the previous draft of the Bill so that they no longer require the third party to communicate assent (whether or not in writing) to the promisor. As assent may be by conduct it is arguable that notice of the conduct on the part of the third party may amount to notice of it thereby creating an obligation not to vary the contract or rescind it simply by notice of the existence of conduct. We prefer the requirement of communication of the assent which we consider to be more equitable.

6. Clause 6(4) – We believe that this should be deleted. It was not included as part of the Consultation and neither is it included in the UK legislation. It applies in cases where a contract does not contain a provision excluding the application of the Ordinance to the contract and the effect of it is to vary the express terms agreed between the parties such that notwithstanding that the parties have agreed to the basis on which a contract may be varied or rescinded that may under certain circumstances be not given effect to. The whole purpose of the legislation is to give effect to the intentions of the parties and this provision, it seems to us, is not consistent with that approach.

7. Clause 7(3) (previously 7(1)) – We think the ability of the Court to dispense with the third party's consent to a rescission or variation should also include:-

(a) where consent cannot be obtained because the whereabouts of the third party cannot be ascertained;

(b) where the third party is mentally incapable of giving consent;

(c) where it cannot reasonably be ascertained whether or not the third party has in fact relied on the term.

These are all provisions which are included in the UK legislation and it seems to us to be appropriate for the Hong Kong legislation.

8. Clauses 11(3) and (4) (previously 10(2)) – We had a concern over the drafting of this clause in the 2004 Consultation in respect of which our response was as follows:-

> "This recommendation should also make specific provision under which the promisee may be under a duty to account to the third party for the sum that the promisee has recovered. This is mentioned in the last sentence of paragraph 4.115 of the Consultation Paper but is said to be in the discretion of the court. No such provision, however, is made in Recommendation 13.
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> Further, Recommendation 13 should cover the situation where the third party recovered damages from the promisor first to protect the promisor from dual liability at the suit of the promisee. This is mentioned in paragraph 4.116 of the Consultation Paper but the conclusion is reached that the promisee would be left with no loss and there would be no prospect of dual liability on the part of the promisor. In line with the approach adopted in Recommendation 12, a "for the avoidance of doubt" provision should be included in the recommendation to protect the promisor from dual liability."

We remain of this view.

9. Clauses 12(3) and 13(3) (previously 11(2)) – These clauses state that arbitration agreements and exclusive jurisdiction clauses in a contract will not bind a third party if on a proper construction of the contract the third party is not intended to be bound by it. The consequence of this carve out is that the result could be a muddle of Court and arbitration proceedings and the possible mismatch of jurisdictions in which the Court or arbitration proceedings should be brought. This provision does not apply in the parallel UK legislation and we suggest that consideration should be given to deleting it. In any event, it seems to us a remote likelihood that a contract would have a proper construction to the effect that the arbitration agreement was intended to apply to the parties to the contract but not to any third parties.

10. Clause 13 (previously 12) – We think that consideration should be given to Clause 13 applying to non-exclusive jurisdiction clauses as these are far more common than exclusive jurisdiction clauses.

If you have any questions on the above, please let us know.

Yours sincerely

Eva Wong
Secretary