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12 June 2014

Ms Mary So  
Clerk to Bills Committee  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong

By Fax (No. 2840 0716)

Dear Ms So,

Bills Committee on  
Contracts (Rights of Third Parties) Bill  
Meeting on 16 June 2014

Thank you for your letter dated 26 May 2014. Please note that the following representatives will attend the Bills Committee meeting scheduled for 16 June 2014:

Mr Peter Wong 黃慶康先生	Deputy Solicitor General 副法律政策專員
Ms Deneb Cheung 張秀霞女士	Senior Assistant Solicitor General 高級助理法律政策專員
Mr Sunny Chan 陳元新先生	Senior Assistant Law Draftsman 高級助理法律草擬專員
Ms Peggy Au Yeung 歐陽慧儒女士	Senior Government Counsel 高級政府律師

2. As requested, we attach a paper setting out our responses to the submissions from Mr Lee MASON, Assistant Professor of the Faculty of Law of the University of Hong Kong, the Law Society of Hong Kong and the Hong Kong Association of Banks.

3. We also set out below our responses to the following issues raised by Members at the meeting on 26 May 2014:

(a) **Definition of “third party” under Clause 2 of the Bill**

- (1) A definition in a piece of legislation serves to clarify the meaning of a term used in the legislation. Generally, wherever the term appears in the legislation, it has the same meaning as defined.
- (2) It has been suggested that the definition of “third party” in the Bill should be defined with reference to Clause 4(2) so that the reader can easily realise that the term refers to a third party who is expressly identified in the contract to have a right to enforce a term of a contract. We do not consider that it is an appropriate approach for the following reasons.
- (3) While the Bill deals with a third party’s rights under a contract, it does not confer those rights on all third parties to a contract automatically and unconditionally. Instead, the Bill provides that a third party may be entitled to those rights only if the specific conditions and requirements set out in the Bill are fulfilled. The Bill also sets out the circumstances under which a third party is not entitled to those rights. For example, Clause 3(4) of the Bill provides that “[t]his Ordinance does not confer a right on a third party to enforce a term of a contract of employment against an employee”. Therefore, it is not possible to define “third party” in the Bill with reference to Clause 4(2) of the Bill.
- (4) The second reason for not adopting the suggested approach relates to a general rule for drafting definitions in legislation. A reader expects a definition to stipulate a meaning and is entitled to assume it does no more. Therefore, it is a practical rule for drafting definitions that a definition should not include substantive matters.
- (5) In the Bill, the circumstances and conditions relating to the

enforcement of a contractual term by a third party are substantive rules, and are set out immediately after the application clause. It is not a normal practice to include those matters in Clause 2 as part of the interpretation provisions.

(b) **Exclusion of a deed of mutual covenant from the application of the Bill (Clause 3(2)(b))**

- (1) Clause 3(2)(b) seeks to exclude, among others, a deed of mutual covenant (“DMC”) from the application of the Bill. We consider that to allow a third party to a DMC a right of enforceability under the Bill would contradict the underlying policies of the existing legal mechanism for enforcing a DMC by a third party.
- (2) The law relevant to building management and enforcement of rights under a DMC consist of a range of applicable legal provisions under the Building Management Ordinance (Cap. 344), the Conveyancing and Property Ordinance (Cap. 219) and the common law. These applicable legal principles create a unique and intricate legal regime which sets clear limits on the enforceability of land covenants.
- (3) In general, the original parties to a DMC are the developer, the assignee of the first unit of the development and the management company (“original parties”). A successor-in-title or a person deriving title from the original parties or a successor-in-title is a third party to the DMC.
- (4) Moreover, under a DMC, owners regulate the use of their land by granting rights over the land to each other and by imposing obligations on each other.
- (5) Under the current law, a co-owner in a building (being a successor-in-title) can enforce his rights under a DMC against another co-owner (another successor-in-title). However, it would not be possible to do so under the Bill as the Bill would not enable third parties to enforce rights against each other.
- (6) Further, the Bill only enables contracting parties to confer enforceable rights on a third party but does not impose any burden on a third party. This is also different from the existing legal regime of a DMC which entails rights as well as burden.
- (7) The current legal regime for the enforcement of a DMC has over

the years developed specifically in response to the needs of regulating the occupation and management of multi-storey buildings or estate developments in Hong Kong. We share the view of the Bar Association that any change to the DMC regime will affect a large number of people and it would be inappropriate for the Bill to alter or relax the legal regime of the DMC without full consultation specifically aimed at reform of this branch of the law (see para. 8 of the Bar Association's paper of 15 January 2014 (LC Paper No. CB(4)328/13-14(01))). We therefore agree with the suggestion of the Hong Kong Bar Association that a DMC should be excluded from the application of the Bill.

- (8) As explained in para. 2 of our letter to the Bills Committee dated 22 May 2014 (LC Paper No. CB(4)710/13-14(02)), we propose to amend Clause 3(2) so as to clarify that all provisions in a DMC as well as a covenant relating to land are to be excluded from the application of the Bill. This would address the issue that a DMC may contain terms not relating to land. We agree with the comments of the Bar Association that for the purpose of exclusion from the application of the Bill, no sensible distinction can be drawn between non-land related provisions of a DMC (such as manager's duties or owners' meetings) and land-related provisions; or between covenants in a DMC and other covenant relating to land contained in other types of instruments.
- (9) Regarding the question whether the proposed exclusion of DMC from the Bill would render tenants of private buildings and users of common parts of private buildings who are not owners of private building not able to rely on the Bill to enforce a term of the DMC, these categories of persons are generally not entitled to bring an action under a DMC as they are not owners in the building. As such, the proposed exclusion of the DMC does not add to or diminish their rights under the DMC. Neither does the exclusion preclude contracting parties, if they so intend, from conferring an enforceable right of action upon a tenant or a user of common parts so long as the requirements under other applicable laws are complied with.

(c) **Issues relating to a chain of contracts**

- (1) Regarding the scenario involving a chain of contracts wherein D, as a third party to a contract between A and B (“head contract”), has been conferred a benefit greater than that in a contract between D and C. We are asked if D would be allowed under the Bill to enforce his right under the head contract which would result in a larger remedy and if so, what the justifications are.
- (2) We consider that under the Bill, as long as the relevant conditions including the test of enforceability under Clause 4 are satisfied, D would be able to enforce the rights conferred on him under the head contract.
- (3) The object of the Bill is to enable a third party to enforce a term of the contract, if this is the intention of the contracting parties. Therefore, where contracting parties A and B have agreed that D would be entitled to such a greater benefit (or larger remedy) and to confer such enforceable rights to D, such intention should be given effect to.

(d) **Chinese text of Clause 4(3)**

- (1) We are asked if the Chinese text of Clause 4(3) could be improved to make it more easily understood.
- (2) We have carefully reviewed the wording of the clause. We maintain the view that the existing version, which consists of two lines and four short syntactic units, reflects the policy intent appropriately. We do not see a genuine need to change the version.

Yours sincerely,



( Peggy AU YEUNG )

Acting Senior Assistant Solicitor General

Encl.

Copy: Mr. Sunny Chan, Senior Assistant Law Draftsman  
Ms. Angie Li, Senior Government Counsel