

Which party gets the benefit? December 2014

The *Contracts (Rights of Third Parties) Ordinance* ("Ordinance") was gazetted on 5 December.

The Ordinance reforms the longstanding doctrine of privity of contract by allowing third parties who are not parties to a contract to enforce their rights in it, subject to the intention of the contracting parties.

This reform brings Hong Kong law in line with certain other common law jurisdictions, notably the UK and Singapore. Although now passed into law, the commencement date of the Ordinance has yet to be appointed.

The doctrine of privity

The doctrine of privity, also known as the 'third party rule', is the idea that only parties to a contract can be bound by its terms; a contract cannot confer rights or impose obligations on third parties. This has two aspects:

- a) a person (third party) who is not a party to the contract cannot acquire or enforce rights in the contract.
- b) a person who is not a party to the contract cannot be made liable under it.

Aspect (a) has often been criticised as being unfair to a third party where the parties to the contract intended to confer a benefit upon the third party.

A typical situation would be when "A" and "B" enter into a contract agreeing that "A" would do something to benefit a third party, "C". If "A" fails to fulfil his promise, "C" has no rights to enforce the contract against "A". Further, "B" cannot sue "A" because he has not suffered any damage¹.

The Ordinance

The Ordinance unwinds the doctrine of privity by providing that a third party may enforce a term of a contract if:

- a) the contract expressly provides that the third party may do so, or

- b) the term purports to confer a benefit on the third party.

The Ordinance allows parties the freedom to expressly contract out of these new statutory provisions. It also excludes certain types of contracts from its application, including bills of exchange, deeds of mutual covenant and company's articles of association.

Impact on businesses

Parties may expressly contract out of the new statutory provisions.

Accordingly, when entering into an agreement, parties should consider carefully whether they intend for the contract to confer any benefit upon any third parties. That intention should be expressly set out in the contract.

Businesses should also consider whether to review and revise any standard terms and conditions to include boilerplate clauses to exclude application of the Ordinance.

Click [here](#) for our previous note.

If you would like further information on any aspect of this note, please contact a person mentioned below or the person with whom you usually deal:

Chris Dobby, Partner

chris.dobby@hoganlovells.com
+852 2840 5629

Timothy Hill, Partner

timothy.hill@hoganlovells.com
+852 2840 5023

Allan Leung, Partner

allan.leung@hoganlovells.com
+852 2840 5061

Mark Lin, Partner

mark.lin@hoganlovells.com
+852 2840 5091

Patrick Sherrington, Partner

patrick.sherrington@hoganlovells.com
+852 2840 5088

Damon So, Partner

damon.so@hoganlovells.com
+852 2840 5018

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, see www.hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney Advertising.

© Hogan Lovells 2014. All rights reserved. HKGLIB01#1180672