

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

Views of the Hong Kong Bar Association

1. By a letter dated 31st October 2012 from the Department of Justice, the Hong Kong Bar Association (“the Bar”) was invited to give its views on the proposed legislation to implement the recommendations of the Law Reform Commission (“the LRC”) on reform of the doctrine of privity of contract regarding third parties’ rights under a contract. The Bar takes it that it is being asked to consider the proposed legislation solely from a legal policy point of view and hence, it will not be commenting on matters of drafting.
2. It is noted that under clause 3 of the draft Bill, no rights of enforcement would be conferred on third parties in certain classes of contracts. The rationale for excluding certain contracts from the application of the proposed legislation seems to be based on the recognition that in a number of areas the existing law has already developed a special set of rules governing the rights of third parties and that it is undesirable for the proposed legislation (the scope of which is intended only to cover ordinary types of contracts) to impinge upon those classes of contracts where there may be special policy considerations which call for a different treatment (see paragraph 14(b) of the Consultation Paper on Contracts (Rights of Third Parties) Bill 2013).
3. If the above understanding of the rationale behind clause 3 of the draft Bill is correct, then it is difficult to see why the contractual obligations set out in Deeds of Mutual Covenants governing the use of multi-storeyed buildings should not also be excluded from the application of the proposed legislation. The obligations contained in a Deed of Mutual Covenants, which is a unique feature in Hong Kong’s system of conveyancing with its own special rules on enforcement by third parties (see Kung Ming Tak Tong v. Park Solid Enterprises (2008) 11 HKCFAR 403 at pp. 415G – 422C) is a paradigm case for exemption from application of the proposed legislation, as it is an area where a refined body of special rules have already evolved through development in the case law as further underpinned by statute to cater for policy considerations applicable to the regulation of co-ownership of landed property which are distinct from the considerations which apply generally to ordinary types of contracts. Under the current law, enforcement by third parties is already allowed but it is restricted by the rules of equity governing the transmission of benefits and burdens of covenants which run with land as further supplemented by section 41 of the Conveyancing and Property Ordinance, Cap. 219, and a case has not been made out for changing that position.
4. In the circumstances, it is regrettable that the Law Reform Commission appears not to have given any consideration to whether Deeds of Mutual Covenants is a category which calls for special treatment, and notwithstanding such oversight, the Bar would urge those promoting the draft Bill to give serious consideration to including Deeds of Mutual Covenants in the classes of contracts to which the proposed legislation should not apply.

Hong Kong Bar Association

14th January 2013