Cayman Islands: The Contracts (Rights of Third Parties) Law, 2014

Introduction

The Contracts (Rights of Third Parties) Law, 2014 (the “Law”) was published in the Cayman Islands Gazette on 21 May 2014 and comes into force with immediate effect. Subject to certain exceptions, the Law allows for the enforcement of contractual rights by a third party. Accordingly, the Law permits a variation of the pre-existing position under Cayman Islands law based upon the common law doctrine of privity of contract. The Law is similar to the United Kingdom’s Contracts (Rights of Third Parties) Act (“the Act”) and to legislation enacted in several other common law jurisdictions.

Rights of a Third Party

The doctrine of privity of contract provides that a person (a “third party”) may not acquire and enforce rights or have obligations imposed upon it by a contract to which it is not a party (even where it is the parties’ clear intention that a contractual right should benefit a third party, including, for example, indemnification/exculpation provisions).

Pursuant to the Law, a third party may in its own right enforce a term of a contract if:

- the third party is expressly identified in the contract by name, as a member of a class or as answering a particular description (and a third party may include a person not in existence when the contract is entered into); and
• the contract expressly provides in writing that the relevant third party may enforce the relevant term.

If such conditions are satisfied, the third party, in exercising its right to enforce the relevant term of the contract, will have available to it any remedy that would have been available in an action for breach of contract.

**Opt-In**

While the Law is largely based upon the Act, a significant difference is that, under the Law, a third party can enforce a contract term only when the contract expressly so provides.

**Limitations on the Third Party**

For the purposes of exercising its right to enforce a term of the contract, a third party will have available to it any remedy that would have been available to it in an action for breach of contract if it had been a party to the contract.

Thus, if the contract legitimately excludes or limits the right of the contract parties to make claims, then the third party will also be subject to the same exclusions and limitations.

**Variation and Rescission of a Contract**

The Law restricts the contract parties’ ability to rescind or vary the third party’s right to enforce a term of a contract without its consent in circumstances where the third party has:

(a) communicated its assent (by word or conduct) to the term to the party against whom the term is enforceable (the “promisor”);
(b) relied on the contract, and the promisor is aware of such reliance; or
(c) relied on the contract, and the promisor can reasonably be expected to have foreseen that the third party would rely on the same.

In these cases, the consent of the third party is required to any variation or rescission of the relevant contract term, unless the contract itself expressly provides that the contract may be rescinded or varied without the consent of the relevant third party or that the consent of such third party is otherwise required in circumstances other than those set out above.
Exceptions to the Rights of a Third Party

The Law does not confer rights on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument; rights under memorandum and articles of association; a contract of employment; a contract for the carriage of goods by sea, contract for the carriage of goods by road or for the carriage of cargo by air; or letters of credit.

It also does not apply to contracts entered into before the commencement of the Law.

Defences and Protection Against Double Liability

The Law provides that, with respect to any proceedings brought against it by a third party in connection with a term of the relevant contract by virtue of the Law, the “promisor” of the contractual term shall have available to it by way of defence or set-off any matter that, in essence, would have been available to it if the proceedings had been brought by a “promisee” party to the contract.

The Law provides protection to the “promisor” of a contractual term from double liability, such that, in essence, that promisor cannot be liable for the same obligation to the same extent both to a “promisee” party to the contract and to the relevant third party.

Arbitration

The Law also provides that where the parties to the relevant contract have entered into an arbitration agreement pursuant to the contract, the third party will be treated as being a party to such arbitration agreement with respect to disputes arising in connection with the third party’s enforcement of the relevant term of the contract.

Application

If the parties to a contract intend for a third party to be able to enforce a term of that contract, then the Law provides a convenient mechanism for the third party to be able to do so without itself either having to become a party to the relevant contract or the requirement for the parties to enter into additional documentation. As mentioned, we would envisage that this mechanism will be particularly helpful in the context of indemnification/exculpation provisions.
If, on the other hand, the parties do not wish the Law to apply, then they need simply do nothing - as described, the Law will not apply to a contract unless the contract expressly provides for its application.

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