

The Contracts (Rights of Third Parties) Law

The new Contracts (Rights of Third Parties) Law (“Law”) was enacted on 21 May 2014 and is now in full force and effect in the Cayman Islands.

This briefing paper has been prepared as a summary of the law as at 6 June 2014 and is for general guidance only. It is not intended to be, nor should it be used as, a substitute for specific legal advice on any particular transaction or set of circumstances.

Rights of Third Parties to enforce contractual terms (Section 4)

The Law seeks to address the general legal principle of ‘privity of contract’. This general principle provides that a person who is not a party to a contract may not enforce the terms of that contract.

The Law provides that a person who is not a party to a contract (“third party”) *may* enforce rights expressly granted to them in the contract if:

- the person is expressly identified in the contract by name, as a member of a class or as answering a particular description, including persons nominated or otherwise identified in the terms of the contract; and
- the contract expressly provides in writing that the third party may enforce such a term.

The Law is similar to the United Kingdom’s Contracts (Rights of Third Parties) Act but differs significantly in that it only applies if the parties “opt in” and grant enforcement rights to a third party. The Law will not apply, and will not confer any right on a third party to enforce a term of a contract, if the parties do not expressly state that it should apply. The Law also expressly provides that the third party need not be in existence at the time the contract is entered into.

When enforcing rights, there is available any remedy that would be available in an action for breach of contract as if the third party had been a party to the contract. Where a term of the contract excludes or limits liability in relation to any matter the third party may also rely on such limitation or exclusion.

Certain contracts are excluded from the Law. These exceptions are set out in Section 9 and identified below.

Examples of where the Law will be helpful

Some specific examples of when in future the Law will, subject to the 'opt-in', be helpful include:

- Allowing a third party (such as a director or an employee) to enforce an indemnity or exculpation (release from liability) rather than having to rely on a party to the contract to do so on his behalf.
- Ensuring that the provisions of a side letter for an investment fund are enforceable, despite the fact that the shareholder of record (typically a nominee/custodian) is not a party to a side letter, which is entered into by the beneficial (rather than the legal) owner of shares.
- Allowing a third party, such as a realtor or broker, to enforce a right to commission directly when he is not party to the sale contract.

Existing Contracts (Section 3)

The Law only applies to the rights of a third party created on or after the date the Law came into force (21 May 2014). In the case of existing contracts containing third party rights and the opt-in language, the third party can only enforce such a contract after the date the Law came into force. The Law allows a contract to be amended after 21 May 2014 to satisfy the 'opt-in requirement' and allow a third party to enforce the contract, but the third party will only be able to enforce such rights after the contract has been amended.

Variation and Rescission of the Contract (Section 5)

Unless the contract specifically (and expressly) provides otherwise, parties to a contract may not, by agreement, rescind the contract or vary it in a manner that would extinguish or alter the third party's entitlement under the right without his consent if:

- the third party has communicated his assent to the term to the promisor (by words or conduct, or post/other means);
- the promisor is aware that the third party has relied on the term, or
- the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

The terms of the contract may expressly provide for the contract to be rescinded or varied by the agreement of the parties without the consent of the third party, or specify circumstances in which the third party's consent is required instead of those set out in the Law.

Defences (Section 6)

A third party will not have rights, which are greater than a contracting party. Where a third party enforces a term of a contract relying on the Law the defences and any submission to arbitration are the same as for any

contracting party.

Protection against Double Liability of Promisor (Section 8)

The Law disallows any double recovery. If a contract may be enforceable by a contracting party and a third party then the Cayman Islands Court may reduce any award to the third party to the extent it deems appropriate to take account of the recovery by a contracting party.

Exceptions (Section 9)

The Law does not confer any rights on a third party in respect of any of the following:

- the memorandum and articles of association of a company;
- a contract on a bill of exchange, promissory note or other negotiable instrument;
- a contract of employment against an employee;
- a contract for carriage of goods by sea, goods by rail or road, or for the carriage of cargo by air; and/or
- a letter of credit.

Should you have any queries regarding the above, or if we can be of any assistance, please do not hesitate to contact your usual Campbells contact or any of the following:



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