The Contracts (Rights of Third Parties) Bill, 2014

The Contracts (Rights of Third Parties) Bill 2014 has been Gazetted and is expected to be passed into law by mid-March 2014 (the “Law”).

Currently, under common law, a person must be party to a contract in order to be able to enforce the provisions of that contract. This applies even where the parties clearly intended that a person who is not party to such contract (a “third party”) be given rights under the contract.

The Law, when passed, will enable the parties to a contract to give persons who are not direct parties to that contract the ability to enforce rights expressly granted to them in the contract. This is anticipated to be particularly helpful to enable indemnities and exculpation provisions in fund documents in favour of third parties to be enforceable without the need for a separate agreement.

The Law is very similar to the English position where the parties can “opt in” to its application.

As with the English position, it will therefore be necessary to ensure that all Cayman Islands governed contracts going forward expressly apply or disapply the Law depending on the intentions of the parties.

**Right of third party to enforce contractual terms**

To enforce a third party right under the Law, the following will need to apply:

(a) the third party is expressly identified in the contract by name, as a member of a class or as answering a particular description, which may include a third party not in existence when the contract is entered into; and

(b) the contract expressly provides in writing that the third party may enforce the relevant term.

Any such third party will have any remedy that would have been available to him for breach of contract as if he had been a party to the contract.

If a term of a contract excludes or limits liability in relation to any matter, the relevant exclusion or limitation of liability will also apply to the third party.

The Law will only apply to third party rights created on or after the date the Law comes into force or, in the case of existing contracts that contain third party rights, the third party can only enforce such contract on or after the date the Law comes into force.
Amendment and rescission of contracts

If third parties are given rights under a contract, the parties to the contract will need to consider at the time of contracting such third party rights and how they may be affected if the contract is rescinded or amended. Unless there is an express term of the contract that provides that the contract may be rescinded or varied without the consent of the third party, then such third party’s consent may be required.

In light of this, the parties will need to consider whether they should be revising the amendment and termination clauses of their Cayman Islands law governed contracts to expressly exclude any third party consents.

Exceptions

The Law will not affect certain types of instruments, most notably promissory notes and memoranda and articles of association.

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