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GENERAL'S
CHAMBERS

**THE CONTRACTS
(RIGHTS OF THIRD PARTIES)
BILL 2001**

LAW REFORM AND REVISION DIVISION
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THE CONTRACTS (RIGHTS OF THIRD PARTIES) BILL 2001

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REPORT ON THE PROPOSED CONTRACTS (RIGHTS OF THIRD PARTIES) BILL 2001

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EXECUTIVE SUMMARY

CONTRACTS (RIGHTS OF THIRD PARTIES) BILL 2001

Background

1 The Attorney-General's Chambers began work on the draft Bill soon after the UK Contracts (Rights of Third Parties) Act 1999 came into force in the UK on 11 Nov 99. Comments were received from the Ministry of Finance, the Monetary Authority of Singapore and Mr Lucien Wong and, through the Law Reform Coordinating Committee of the Ministry of Law, from Mr VK Rajah and the Senior District Judge's Secretariat (Subordinate Courts). The parties consulted were unanimously in favour of the draft Bill though they raised some important issues for further consideration. The Law Reform and Revision Division of the Attorney-General's Chambers subsequently consulted Professor Andrew Phang and Assoc Professor Hans Tjio on the draft Bill generally and on specific issues raised during the consultations.

2 The draft Bill is modelled on the UK Act except for amendments made by the Law Reform and Revision Division of the Attorney-General's Chambers arising from our consultations.

3 **Afternote** : This Report was subsequently considered by the Ministry of Law and the Law Society. The Contracts (Rights of Third Parties) Bill 2001 which was passed in Parliament on 5 Oct 2001 differs in several minor respects from the proposed Bill set out in this Report. The main alteration was made in clause 3 of the Bill. (See paras 3.7.11 and 4.15 below). The Contracts (Rights of Third Parties) Act (Cap.53B) came into operation on 1 Jan 2002 vide S547/2001.

Need for Reform

4 The draft Bill enables third parties to enforce contractual terms made for their benefit. It reforms the rule of privity of contract under which a person can only enforce a contract if he is a party to it (i.e. the third party rule).

5 The third party rule has frequently been criticised throughout the common law world by academics, law reform bodies and the judiciary as it prevents effect being given to the intentions of the contracting parties and causes injustice to a third party who may have reasonable expectations of having the legal right to enforce the contract and may even have relied on the contract to regulate his affairs.

6 The unsatisfactory effects of the third party rule have given rise to the development of numerous non-comprehensive statutory and common law exceptions in order to give third parties enforceable rights. These exceptions

continue to evolve and to be the subject of extensive litigation. This gives rise to uncertainty and is commercially inconvenient.

7 The third party rule has already been abrogated throughout much of the common law world e.g. the United States, New Zealand, parts of Australia and in England. Most member states of the European Union also recognise and enforce the rights of third party beneficiaries under contracts.

Scheme of the Bill

8 The draft Bill brings certainty to the law through a detailed legislative scheme which enables contracting parties to confer a right on the third party to enforce the contract i.e. (1) a right to all remedies given by the courts for breach of contract (with the standard rules applicable to those remedies applying by analogy) that would have been available to the third party had he been party to the contract and (2) a right to take advantage of a promised exclusion or restriction of the promisor's rights as if the third party were a party to the contract. It deals with the test of enforceability (clause 2 of Bill), the rights of contracting parties to vary or cancel the contract (clause 3 of Bill) and the defences open to the promisor (clause 4 of Bill).

9 The draft Bill does not abolish the common law doctrine of privity of contract. The existing exceptions to the third party rule, some of which give third parties more secure rights than do the reforms, are allowed to co-exist with the new wide-ranging legislative exception. Some of these exceptions and artificial techniques will probably fall into disuse where they give third parties no advantages over the legislative reforms.

10 The draft Bill differs from the UK Act in the following respects:

- (a) **Consideration** Clause 2(5) has been amended to make it clear that no remedy shall be refused on the ground that, as against the promisor, the third party is a *volunteer*. This amendment (based on section 8 of the New Zealand Contracts (Privity) Act 1982) deals both with the argument based on the common law rule that a person is precluded from enforcing a term of a contract unless he has given consideration¹ in respect of the contract, as well as the argument based on the maxim that equity will not assist a volunteer². (See para. 3.4 of Report)
- (b) **Material reliance** The right of the third party to enforce a term of the contract under the draft Bill crystallises³ when he has *materially* relied on

¹ i.e. conferred a benefit or suffered a loss in exchange for the benefit of the contract.

² i.e. equitable remedies such as injunctions or specific performance are not available to a person who has not given valuable consideration.

³ i.e. the parties may not, by agreement, rescind the contract, or vary the contract in such a way as to extinguish or alter the third party's entitlement under that right without his consent.

the term of the contract: Clause 3(1). This is consistent with the position under New Zealand and US law. Under the UK Act, *mere* reliance by the third party will crystallise his rights. (See para. 3.7 of Report)

- (c) **Notice of Contents of Contract** Clause 3(1) has also been amended (based on section 5(1)(a) of the New Zealand Contracts (Privity) Act 1982) to make it clear that the third party need not have *knowledge* of the precise terms of the contract in order to rely upon it. (See para. 3.9 of Report)

11 **Commencement Provision** The draft Bill adopts a commencement provision (modelled on the UK Act) which will apply to contracts entered into during the 6-month period after its commencement only if the contract expressly provides for it to do so. This will allow contracting parties who wish to take advantage of the new law to do so immediately upon the commencement of the Act. At the same time, it will enable parties who are in the midst of negotiations to arrange their affairs so that they will not be taken unawares by the new law and also allow time for publicity on the new law to reach the legal profession, the business community and the public.

REPORT ON THE PROPOSED CONTRACTS (RIGHTS OF THIRD PARTIES) BILL 2001

1. INTRODUCTION AND BACKGROUND: DRAFTING AND CONSULTATION PROCESS

1.1 The draft Bill¹ seeks to make provisions for the enforcement of contractual terms by third parties. It reforms the rule of privity of contract under which a person can only enforce a contract if he is a party to it (i.e. the third party rule). The rule means that, even if a contract is made with the purpose of conferring a benefit on someone who is not a party to it, that person (a “third party”) has no right to sue for breach of contract.²

1.2 The Legislation Division of the Attorney-General’s Chambers began work on the Bill soon after the UK Contracts (Rights of Third Parties) Act 1999³ (referred to in this Report as “the UK Act”) came into force in the UK on 11 November 1999.

1.3 In January 2000, a draft Bill was sent to the Ministry of Finance (MOF), the Monetary Authority of Singapore (MAS) and the Law Reform Co-ordinating Committee (LRCC) of the Ministry of Law and Mr Lucien Wong of Allen and Gledhill in his personal capacity for the purposes of consultation. Comments were received from MOF, MAS and Mr Lucien Wong and, through the LRCC, from Mr VK Rajah and the Senior District Judge’s Secretariat (Subordinate Courts). The parties consulted were unanimously in favour of the Bill though they raised some important issues for further consideration.

1.4 With the inauguration of the Law Reform and Revision Division (LRRD) of the Attorney-General’s Chambers on 1 April 2000, LRRD took over the work on the Bill. We consulted Professor Andrew Phang on the draft Bill generally and on specific issues raised during the consultations. We are indebted to Prof Phang for his expert advice (which we have adopted in large measure in this Report) and for drawing to our attention some of the academic discussions on the subject. We are also grateful to Associate Professor Hans Tjio for his useful comments on the issue of assignment of third party rights.

¹ See Annex A.

² It is generally agreed that the modern third party rule was conclusively established in 1861 in *Tweddle v Atkinson* (1861) 1 B & S 393; 121 ER 762.

³ The UK Act was the result of the recommendations of the UK Law Commission Report on “Privity of Contract: Contracts for the Benefit of Third Parties” (Law Com. No. 242) 1996.

1.5 The draft Bill¹ annexed to this Report is modelled on the UK Act except for amendments made by the Law Reform and Revision Division of the Attorney-General's Chambers arising from our consultations.

1.6 **Afternote :** This Report was subsequently considered by the Ministry of Law and the Law Society. The Contracts (Rights of Third Parties) Bill 2001 which was passed in Parliament on 5 Oct 2001 differs in several minor respects from the proposed Bill set out in this Report. The main alteration was made in clause 3 of the Bill. (See paras 3.7.11 and 4.15 below)

2 NEED FOR REFORM

2.1 The third party rule has, during its history, frequently been criticised throughout the common law world as it prevents effect being given to the intentions of the contracting parties and causes injustice to a third party who may have reasonable expectations of having the legal right to enforce the contract and may even have relied on the contract to regulate his affairs. This criticism has come from academics⁴, law reform bodies⁵ and the judiciary^{6,7}.

2.2 The third party rule produces the perverse and unjust result that the person who has suffered the loss of the intended benefit (the third party) cannot sue, whilst the person who has suffered no loss (the promisee) can sue.⁸ Further, in many situations where contracts are made for the benefit of third parties, factors such as the stress and strain of litigation and its cost may deter the promisee from suing even if he can obtain a satisfactory remedy for the third party. Or the promisee may be ill or outside the jurisdiction or have died (and his personal representatives may reasonably take the view that it is not in the interests of the estate to seek enforcement for the benefit of the third party).⁹

⁴ See UK Law Com. No. 242 para 2.63, footnote 163.

⁵ Including the UK Law Commission (Law Com. No. 242, Part III), the English Law Reform Committee (Sixth Interim Report (1937) Cmd 5449, paras 41-49), and the New Zealand Contracts and Commercial Law Reform Committee (Report on "Privity of Contract" (1981) paras 6.2-6.3)

⁶ Per Steyn LJ in the Court of Appeal in *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 "But there is no doctrinal, logical, or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

Also Lord Reid in *Beswick v Beswick* [1968] AC 58 at 72, Lord Salmon and Lord Scarman in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1WLR 277 at 291 and 300 respectively, Dillon J in *Forster v Silvermere Golf and Equestrian Centre Ltd* (1981) 125 SJ 397, Lord Diplock in *White v Jones* [1995] 2 AC 207 at 262-263 and the High Court of Australia in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

⁷ See UK Law Com. No. 242 paras 3.1-3.2.

⁸ E.g. the situation in *Beswick v Beswick* [1968] AC 58.

⁹ See UK Law Com. No. 242 paras 3.3-3.4.

2.3 The unsatisfactory effects of the third party rule have given rise to the development of numerous non-comprehensive statutory¹⁰ and common law exceptions in order to give third parties enforceable rights e.g. trusts of the promise¹¹, covenants concerning land¹², the tort of negligence¹³, agency¹⁴, assignment¹⁵, collateral contracts¹⁶, Himalaya clauses¹⁷, as well as the extension of the promisee's remedies assisting the third party¹⁸. These exceptions continue to evolve and to be the subject of extensive litigation. The third party rule, together with its exceptions, has resulted in a complex body of law and the use of elaborate and often artificial stratagems to circumvent the rule. This gives rise to uncertainty and is commercially inconvenient.¹⁹

2.4 It is notable that the third party rule has already been abrogated throughout much of the common law world e.g. the United States²⁰, New Zealand²¹, parts of Australia²² and, most recently, in England²³. Most member states of the European Union also recognise and enforce the rights of third party beneficiaries under contracts.²⁴

¹⁰ e.g. Bills of Exchange Act (Cap.23) s.38, Companies Act (Cap.50) s.39, Conveyancing and Law of Property Act (Cap.61) s.73, Motor Vehicles (Third Party Risks and Compensation) Act (Cap.189) s.4, Marine Insurance Act (Cap.387) s.14.

¹¹ See UK Law Com. No. 242 paras 2.8-2.9.

¹² See UK Law Com. No. 242 paras 2.10-2.15.

¹³ See UK Law Com. No. 242 paras 2.13-2.14. The leading Singapore case allowing tort liability for pure economic loss (to claimants who were in effect third parties to an underlying contract), *RSP Architects v Ocean Front Pte Ltd* [1996] 1 SLR 115, takes a similar approach to the English and Australian authorities e.g. *Caparo Industries plc v Dickman* [1990] 2 AC 398 (England) and *Perre v Apand* (1999) 73 ALJR 1190 (Australia) in adopting a 'proximity approach' i.e. whether the loss was within reasonable contemplation. Canada recognises 5 specific heads of availability of tort liability for pure economic loss: *Canadian Railway Co v Norsk Pacific SS Co* [1992] 1 SCR 1021.

¹⁴ See UK Law Com. No. 242 para 2.15.

¹⁵ See UK Law Com. No. 242 paras 2.16-2.17. *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at p 105 *et seq.*

¹⁶ See UK Law Com. No. 242 para 2.18.

¹⁷ See UK Law Com. No. 242 paras 2.19-2.35. The *Erymedon* [1975] AC 154 i.e. clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by sea to servants, agents and independent contractors engaged in the loading and unloading process, to be enforced by those servants, agents or independent contractors.

¹⁸ See UK Law Com. No. 242 paras 2.36-2.51. The *Albezzero* [1977] AC 774; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85; *Darlington B.C.v Whilshier Northern Ltd* [1995] 1 WLR 68, *Alfred MacAlpine v Panatown* [2000] 3 WLR 946.

¹⁹ See UK Law Com. No. 242 paras 3.5-3.6.

²⁰ It has generally been accepted since the decision of the New York Court of Appeals in *Lawrence v Fox* 20 NY 268 (1859) that a third party is able to enforce a contractual obligation made for his benefit. Clarification in sections 302 and 311 of the Restatement (Second) of Contracts (1981).

²¹ New Zealand Contracts (Privy) Act 1982

²² Western Australia Property Law Act 1969, section 11; Queensland Property Law Act 1974, section 55. See comments in UK Law Com. No. 242 paras 4.5-4.7 and 4.8 respectively.

²³ UK Contracts (Rights of Third Parties) Act 1999

²⁴ Interpretation by French courts of Art 1121 of the Civil Code. Also Germany (Art 328, *Bürgerliches Gesetzbuch*), Italy (Art 1411, Italian Civil Code 1942), Austria (Art 881, Austrian Civil Code 1811), Spain (Art 1257 par 2, Spanish Civil Code 1889), Portugal (Art 443, Portuguese Civil Code 1966), Netherlands (Book 6 art 253, Dutch Civil Code 1992), Belgium and Luxembourg (modelled on the French Civil Code), Greece (Art 411, Greek Civil Code 1941) and Scotland. See UK Law Com. No. 242 para 3.8.

2.5 For all of these reasons, we recommend that the common law rule whereby a third party to a contract may not enforce it should be reformed so as to enable contracting parties to confer a right to enforce the contract on a third party under Singapore law.²⁵ The reform of such a central doctrine of contract law, of course, raises wide-ranging issues which we discuss in the next section.

3 ISSUES CONSIDERED IN CONSULTATIONS

3.1 *Model for Reform: Detailed Legislative Scheme vs Judicial Development of Exceptions to Privity*

3.1.1 The draft Bill is modelled on the UK Contracts (Rights of Third Parties) Act 1999 which (in turn) was modelled, in part, on the New Zealand Contracts (Privity) Act 1982. The UK Act was enacted after extensive and careful review and consideration of the legal and practical implications by the UK Law Commission.³ The New Zealand Act, which has been in existence for almost two decades now, has worked relatively smoothly and seen little controversy.²⁶

3.1.2 The draft Bill adopts a detailed legislative scheme to enable contracting parties to confer a right to enforce the contract on the third party i.e. (1) a right to all remedies given by the courts²⁷ for breach of contract²⁸ (with the standard rules applicable to those remedies applying by analogy²⁹) that would have been available to the third party had he been party to the contract and (2) a right to take advantage of a promised exclusion or restriction of the promisor's rights as if the third party were a party to the contract. It deals with the test of enforceability³⁰, the rights of contracting parties to vary or cancel the contract³¹ and the defences open

²⁵ We are indebted to Prof Phang for bringing to our attention the contrary line of thought that views any legislative reform that seeks to confer benefits on third parties as being *totally contrary or anathema to the very essence of contract law itself* and the responses to that argument. The most prominent exponent of this view is Professor Peter Kincaid of McQuarie University (see his note in (2000) 116 LQR 43; "Privity and Private Justice in Contract" (1997) 12 JCL 47 and "The UK Law Commission's Privity Proposals and

Contract Theory" (1994) 8 JCL 51; also Coote, "Consideration and the Joint Promisee" [1978] CLJ 301). The counter-argument, in short, is that far from undermining the law of contract, the proposed reform actually gives effect to the bargain between the original contracting parties by honouring their intention (to benefit the third party).

²⁶ See generally Todd, "The Contracts (Privity) Act 1982" in *Contract Statutes Review* (New Zealand Law Commission Report No.25, 1993), pp 217-228.

²⁷ This includes damages, awards of an agreed sum, specific performance and injunctions, but not termination or discharge. The UK Law Commission believed that the third party should not be entitled to terminate the contract for breach as this may be contrary to the promisee's wishes or interest. UK Law Com. No. 242 para 3.33(i).

²⁸ This would exclude restitutionary remedies, such as the recovery of money had and received for total failure of consideration. The UK Law Commission took the view that the third party cannot establish that the promisor had been unjustly enriched *at his expense* (in the sense of "by subtraction from the third party"). UK Law Com. No. 242 para 3.33(ii).

²⁹ E.g. rules as to remoteness of damage, the duty to mitigate his own loss, the doctrine of laches in the case of specific performance, etc.

³⁰ Clause 2 of Bill

³¹ Clause 3 of Bill

to the promisor³². Such a legislative solution will bring certainty to the law and avoid the cost and delay of awaiting further judicial reform of privity.³³

3.1.3 The draft Bill does not abolish the common law doctrine of privity of contract. The existing exceptions to the third party rule, some of which give third parties more secure rights than do the reforms, are allowed to co-exist with the new wide-ranging legislative exception. It is anticipated that some of the exceptions and artificial techniques which have evolved to by-pass privity will fall into disuse where they give third parties no advantages over the legislative reforms. This may be welcomed as it will render the law simpler.³⁴

3.2 *Intended or incidental beneficiary*

3.2.1 The draft Bill enables a third party to enforce a term of the contract in his own right if (a) the contract expressly provides that he may (clause 2(1)(a)) or (b) the term purports to confer a benefit on him unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by him (clause 2(1)(b) and 2(2)).

3.2.2 Clause 2(1)(a) presents no problem in determining if a person is an intended beneficiary since the intended beneficiary is expressly designated. Where there is no such express designation, clause 2(1)(b) read with clause 2(2) distinguishes between intended and incidental beneficiaries by way of a *rebuttable presumption* in favour of the third party where the term purports to confer a benefit on him.³⁵ The rebuttable presumption shifts the onus of proof onto one or more of the parties to prove, on a proper construction of the contract, that the parties did not intend the term concerned to be enforceable by the third party.

3.2.3 The UK Law Commission pointed out that a merit of this reform is that it “achieves a satisfactory compromise between the aims of effecting the intentions of the contracting parties while not producing an unacceptable degree of uncertainty in the law”.³⁶ Including the wider limb (as in clause 2(1)(b)) inevitably results in a certain level of uncertainty since the court will have to consider the terms of the contract concerned in the light of the surrounding circumstances as a

³² Clause 4 of Bill

³³ For this reason we prefer the approach taken in UK and New Zealand to the suggestion of the Ontario Law Reform Commission (see Ontario Law Reform Commission “Report on Amendment of the Law of Contract” (1987), pp 68-70) that the doctrine of privity of contract precluding the enforceability of contracts for the benefit of third parties should be legislatively abolished and the courts be allowed to develop various exceptions accordingly. See also support for detailed legislative reform in Burrows “Reforming privity of contract: Law Commission Report No. 242” [1996] LMCLQ 467, at 471 and observations by the Manitoba Law Reform Commission (Report on “Privity of Contract”, p 57, 1993).

³⁴ UK Law Com. No. 242 paras 5.11-5.18 and Burrows, *ibid*, pp 479-480.

³⁵ It may be argued that this criterion is an improvement over that embodied in s 302(1)(b) of the US Restatement of Contracts (Second) as it does *not* leave the court *totally at large* to infer from the surrounding circumstances whether the promisee intends to give the third party the benefit of the proposed performance in situations where there is no express designation. See Annex C.

³⁶ UK Law Com. No. 242 para 7.17

whole in order to arrive at a final decision on the construction of the contract. However, to confine beneficiaries only to those expressly designated (as in clause 2(1)(a)) would result in an unduly narrow reform.

3.2.4 As to the fear that parties who do not intend that third parties be benefitted will be burdened to preclude the implication that third parties are intended to be benefitted by relevant contractual terms, they can easily state in the contract *that no third parties are to be benefitted or even exclude the operation of the Act altogether*.³⁷

3.2.5 There remain, however, a couple of issues raised in the literature: **first**, to what extent would a contracting party's failure to provide for a direct right to enforce in favour of the third party (under clause 2(1)(a) of the draft Bill) figure in the court's decision as to whether or not the presumption under clause 2(1)(b) has been rebutted (by virtue of clause 2(2))? It has been argued that some weight was probably intended by the UK Law Commission to be given to such a failure but that "[i]f, however, the ... intention was that the contractors' failure explicitly to declare that the third party is intended to have the right to enforce³⁸ is never to count against the third party (ie is never to assist the defendant in rebutting the presumption under the second limb³⁹), then the Bill should make this clear".⁴⁰

3.2.6 We agree that in appropriate circumstances the court may, in deciding whether there was any intention to confer a right on the third party, give weight to the fact that the third party was given no express right to enforce the contract. No legislative clarification is therefore required.

3.2.7 A **second** point pertaining to clause 2(2) of the draft Bill is that "[t]ransparency ... might be promoted if the Bill were to provide that the existence of an alternative contractual recourse will normally count *against* any presumption in favour of the third party (although, on [the commentator's view], the right to enforce must remain, at the very least as a last resort)".⁴¹

3.2.8 We do not wish to fetter the discretion of the courts to decide on the implications of the availability of an alternative recourse in any particular case by making a legislative pronouncement on the matter. As in paragraph 3.2.6 above, we prefer to leave it to the courts to apply the law and to construe the contract in an appropriate way based on the facts of each case.

³⁷ See para 3.16.2 of Report

³⁸ See clause 2(1)(a)

³⁹ Clause 2(1)(b) read with clause 2(2)

⁴⁰ *Butterworths Common Law Series — The Law of Contract* (1999) at p 943

⁴¹ *Ibid*, p 945

3.3 *Ascertainability of the third party*

3.3.1 The draft Bill requires the third party to be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.⁴² The UK Law Commission considered that to require the third party to be expressly identified by name only might be overly strict.⁴³

3.3.2 A specific difficulty has arisen in relation to the interpretation of section 4 of the New Zealand Contracts (Privity) Act 1982 as to whether a beneficiary designated by the use of the words “or his nominee” can enforce the contract.⁴⁴ The majority view from the New Zealand case law appears to be that a bare nominee does *not* have enforceable rights, particularly on the reasoning that such a bare nominee is not designated by name, description or reference to a class (as required by statute) but is, rather, designated solely by the will of the party making the actual nomination itself (i.e., that until the nomination is in fact made, no person is identified: identification requires the further act of nomination itself).

3.3.3 The UK Law Commission however endorsed the contrary view that such designation is sufficient identification by description (or class). This view is embodied in Tipping J’s New Zealand High Court decision in *Rattrays Wholesale Ltd v Meredyth-Young & A’Court Ltd*.⁴⁵

3.3.4 We are inclined toward the UK Law Commission’s view. However we do not propose to attempt a legal resolution of this issue as we recognise that nominee cases pose complicated problems and it would be best to leave it to be resolved by the courts on the facts in specific cases.⁴⁶

3.3.3 Clause 2(3) stipulates that the third party need not be in existence at the time of the contract or at the time of acceptance by another third party. This is in order to accommodate various categories of beneficiaries who might otherwise be

⁴² Clause 2(3)

⁴³ UK Law Com. No. 242 para 8.2

⁴⁴ See UK Law Com. No. 242 paras 8.3—8.4 and Burrows, Finn and Todd, *Law of Contract in New Zealand — A Successor to Cheshire & Fifoot’s Law of Contract*, 8th New Zealand edition (1997) at pp 486—487 and 489—490, and the relevant precedents cited therein.

⁴⁵ [1997] 2 NZLR 363. The learned judge was of the view that section 4 of the New Zealand Act (Clause 2 of our draft Bill) “should be given such fair, large and liberal interpretation as will best ensure its remedial purpose. To say that a nominee does not get a benefit under the contract but only pursuant to the nomination is in any event unconvincing. In reality the nominee gets the benefit from both the contract and the nomination”). Further, he was of the view that a bare nominee was not really “conceptually different from the non-existent person expressly contemplated by section 4 as being within its terms”. The learned judge also observed that the case law to the contrary did not pay sufficient attention to the words “by description” in section 4 (Clause 2 of our draft Bill); he was of the view that the words “or his nominee” and the like would in fact be a person designated by description for the purposes of the statute. (*ibid* at pp 382—383)

⁴⁶ Todd, “The Contracts (Privity) Act 1982” in *Contract Statutes Review* (New Zealand Law Commission Report No 25, 1993), pp 217—228 at p 224. Further, in the context of a particular contract, a nominee may otherwise fail to satisfy the test of enforceability e.g. this was an alternative ground of the decision in *Field v Fitton* [1988] 1 NZLR, per Bisson J at p 494.

left outside the ambit of the legislation itself.⁴⁷ If there is concern that the third party must be ascertainable at the time the right accrues for obvious practical reasons, this issue will fall to be settled under the fundamental and general rule of contract law that in order for there to be a valid contract and/or contractual provision, the contract and/or contractual provision must be sufficiently *certain*.⁴⁸

3.4 *Consideration*

3.4.1 The intent of the proposed Bill is to make a limited reform to the rule that consideration must move from the promisee only so far as it relates to third party rights. Clause 2 of the proposed Bill, in giving a third party the right to enforce the contract, has this effect. The UK Law Commission was satisfied that an identical clause in the UK draft would automatically serve this intention.⁴⁹ ⁵⁰ In any case, the proposed amendment to clause 2(5) set out in paragraph 3.4.2 below provides confirmation that consideration is not required from the third party to enforce his rights under the proposed Act.⁵¹ There is also a statement to that effect in the explanatory statement of the Bill which, by virtue of section 9A of the Interpretation Act (Cap.1), will serve as an aid to the interpretation of the Bill.⁵²

3.4.2 A promisor might seek to raise the objection that the third party is a volunteer to defeat an action for injunction, specific performance or other equitable relief.⁵³ We have added the following clarification in clause 2(5) to ensure that such an objection would not succeed (amendments in *italics*):⁵⁴

“(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other *remedies* shall apply accordingly) *and such*

⁴⁷ E.g. an unborn spouse or future spouse or company that has not yet been incorporated. UK Law Com. No. 242 paras 8.5-8.7

⁴⁸ See UK Law Com. No. 242 paras 8.17 and 8.18 and generally *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at p 105 *et seq.*

⁴⁹ UK Law Com. No. 242 para 6.8, footnote 8.

⁵⁰ Note the Supreme Court of Western Australia case of *Westralian Farmers Co-operative Ltd v Southern Meat Packers Ltd* [1981] WAR 241, especially at pp 245—246 and 251, where the court rejected the attempt to raise (in the context of the relevant Western Australian legislation) the argument based on consideration which (if successful) would have significantly undermined the whole thrust of the provision itself. Per Kennedy J (at p 251), “I do not think that Parliament intended a beneficiary to escape the Scylla of the doctrine of privity only to encounter the Charybdis of consideration.”

⁵¹ The following clause was considered for inclusion in the draft Bill: “For the avoidance of doubt, the common law rule that consideration must move from a promisee shall not preclude a third party from enforcing a term of a contract in accordance with the provisions of the Act.” See also clarification in section 55 of Queensland Property Law Act 1974 (esp subsections (1) and (3)(a)) and section 8 of the New Zealand Contracts (Privity) Act 1982.

⁵² See para.4.1 of Report

⁵³ i.e an objection based on the maxim that “equity will not assist a volunteer”. See Andrews, “Reform of the Privity Rule in English Contract Law: The Law Commission’s Report No 242” [1997] CLJ 25 at p 27.

⁵⁴ Cp Queensland Property Law Act 1974 s.55(1) and (3)(a) and New Zealand Contracts (Privity) Act 1982 s.8.

remedy shall not be refused on the ground that, as against the promisor, the third party is a volunteer.”

3.5 *Joint promisees*

3.5.1 The draft Bill does not treat a joint promisee who has not provided consideration as a third party within the meaning of the Bill. We agree with the UK Law Commission (1) the joint promisee ought to have (compared to other third parties) “a more secure entitlement to sue” since the promise concerned was directly addressed or given to him⁵⁵ and (2) because the promisee is a joint promisee, “and is therefore closely connected with the other joint promisee vis-à-vis the promise – it is arguable that traditional rules on joint creditors should apply and some of these rules⁵⁶ differ from the ... proposals for third parties”⁵⁷.

3.5.2 It is hoped that the courts would apply the “joint promisee doctrine” (laid down in Australia in *Coulls v Bagot’s Executor and Trustee Co Ltd*⁵⁸ and allow a joint promisee to enforce a contractual promise made to him and another joint promisee.⁵⁹ Indeed the case for the “joint promisee doctrine” is strengthened by the proposed legislative reform. As the position of joint promisees is somewhat peripheral to the central focus of the present reforms, it would be preferable to leave it to the courts to resolve the precise rights of joint promisees who have not provided consideration.⁶⁰

3.5.3 We do not consider it necessary to insert any express provision in the proposed Bill to clarify the above position.⁶¹ It is unnecessary to specifically exclude joint promisees from the draft Bill as the Bill, by its terms, would not

⁵⁵ The UK Law Commission therefore suggested that “the joint promisee should not have to satisfy the test of enforceability laid down in [its] proposals ... and ought not to be caught by the provisions allowing variation or cancellation without his consent” UK Law Com. No. 242 para 6.10.

⁵⁶ For example, requiring joinder of the other joint creditor to any action and allowing one joint creditor to release the promisor provided not in fraud of the other.

⁵⁷ UK Law Com. No. 242 para 6.11.

⁵⁸ (1967) 119 CLR 460

⁵⁹ For arguments that the joint promisee doctrine should not be accepted, see Coote, “Consideration and the Joint Promisee” [1978] CLJ 301.

⁶⁰ UK Law Com. No. 242 para 6.11.

⁶¹ We note that the UK Law Commission originally inserted the following clause in their draft Bill:

“(1) Where the persons to whom a contractual promise is made include a person who does not provide consideration for the promise, that person shall not be treated as a third party for the purposes of this Act.

(2) Subsection (1) above is without prejudice to any right or remedy of such a person in relation to the contract which exists or is available apart from this Act.”

However, the above clause was omitted when the UK Bill was presented to Parliament on its First Reading.

In our consultations, the following clause was also considered for inclusion in the draft Bill:

“For the avoidance of doubt, the common law rule that consideration must move from the promisee shall not –

- (a) prevent a third party from enforcing a contractual term in accordance with the term of this Act; and
- (b) prevent any joint promisee from enforcing a contractual term which confers a benefit on him.”

affect the position of joint promisees. We have explained this in the Explanatory Statement to the Bill.^{61a}

3.6 *Misrepresentation*

3.6.1 Another issue relates to whether or not the third party beneficiary ought to have a right of action with regard to a *misrepresentation* inducing the contract under which he or she is claiming. Clause 2 of the draft Bill, as presently worded, would not avail the third party to bring an action for the misrepresentation unless the misrepresentation has become a term of the contract.⁶²

3.6.2 One legal text suggested that “[p]erhaps it would be desirable for promises inducing, as well as contained in, a deed or contract to be included within the ambit of section 4 [of the New Zealand Contracts (Privity) Act 1982]”.⁶³ It pointed to the fact that in New Zealand, the Contractual Remedies Act 1979⁶⁴ allows the promisee to maintain an action in the same way whether the statement is a term or representation and suggested that a third party should be able to do likewise. The provision was aimed at ending the “artificial and uncertain exercise” of drawing a distinction between representations and terms.

3.6.3 There is no similar provision in England or Singapore. The distinction between a term and a representation is therefore still relevant in English and Singapore law. The Misrepresentation Act⁶⁵ allows the court to refuse rescission and to grant damages in lieu in the case of innocent misrepresentation. Since rescission is still the primary remedy for misrepresentation, it may be argued that the remedy should remain in the hands of the promisee rather than the third party.⁶⁶ We therefore do not recommend any extension of the rights of the third party beyond the right to enforce the terms of the contract as provided by clause 2 of the draft Bill.⁶⁷

3.7 *Reliance on a term*

3.7.1 The draft Bill (based on the UK Act) originally provided that parties to a contract may not, by agreement, vary or rescind the contract in such a way as to

^{61a} See para. 4.1 of Report.

⁶² Clause 2(1) permits the third party to “enforce a term of the contract” and clause 2(5) gives makes available to him all the remedies “in an action for breach of contract”. See UK Law Com. No. 242 para 3.33(i). Similarly, references to parties to the contract in the Misrepresentation Act (Cap.380) would not include a third party.

⁶³ Burrows, Finn and Todd, *Law of Contract in New Zealand — A Successor to Cheshire & Fifoot’s Law of Contract, 8th New Zealand edition* (1997) at p 486. Note that the relevant section of the New Zealand Act uses the words “promise contained in a deed or contract”.

⁶⁴ Section 6

⁶⁵ Chapter 380, applying the UK Misrepresentation Act 1967 pursuant to the Application of English Law Act (Cap.7A)

⁶⁶ The UK Law Commission stated “We believe that the third party should not be entitled to terminate the contract for breach as this may be contrary to the promisee’s wishes or interests.” (UK Law Com. No. 242 para 3.33(i)) The same rationale applies to rescission for misrepresentation.

⁶⁷ See para 3.1.2 of Report on remedies available to third party under the draft Bill.

extinguish or alter the third party's right to enforce a term of the contract without his consent if (a) he has communicated his assent to the term to the promisor⁶⁸ or (b) the promisor is aware that he has relied on the term⁶⁹ or (c) the promisor can reasonably be expected to have foreseen the third party would rely on the term and the third party has in fact relied on it⁷⁰.

3.7.2 Our consultations brought up the issue whether the limbs (b) and (c) referred to above should require *material* or *detrimental reliance*, instead of *mere reliance*, by the third party for the purposes of clause 3(1) (which requires the consent of the third party to vary his rights under the contract). The UK Law Commission favoured the mere reliance test as it was stated that the essential injustice caused to a third party was that his reasonable expectations of promised performance were disappointed. To require detrimental reliance would shift the focus from protecting his expectation interest to his reliance interest. This would make it difficult to explain why the third party was entitled to performance of the promise or its monetary substitute, i.e. expectation damages, rather than damages for reliance loss.

3.7.3 The UK Law Commission considered that setting a stricter requirement of reliance would be a recipe for litigation. They were of the view that the concept of "*material reliance*" serves no real purpose and may create interpretative difficulties.⁷¹ In contrast, the US and New Zealand require material reliance ie that the third party must have materially changed his position in justifiable reliance on the promise.⁷²

3.7.4 Mr VK Rajah made the converse argument in our consultations that setting a low requirement of reliance might lead to increased litigation as third parties would be more confident that their rights will be enforced and there would be little impetus to negotiate a settlement. Further, he commented that it serves little purpose to require only mere reliance if third parties would only be given nominal damages where no tangible loss has been suffered.

3.7.5 Prof Phang pointed out that the word "material" confirms, in an *explicit* fashion, the element of *reasonableness as ascertained on an objective basis*. To argue, as the UK Law Commission does, that it is impossible to draw the line between trivial and non-trivial reliance trivialises the ability of the courts to exercise their discretion to arrive at a decision in this regard in a reasoned and reasonable fashion. He saw no grave objections to the inclusion of the concept of "material reliance" which is to be found in the relevant New Zealand and US legislation.

⁶⁸ Clause 3(1)(a)

⁶⁹ Clause 3(1)(b)

⁷⁰ Clause 3(1)(c)

⁷¹ UK Law Com. No. 242 para 9.31.

⁷² US Restatement of Law (Second) Contracts 1981 section 311(3) and New Zealand Contracts (Privity) Act 1982 section 5(1).

3.7.6 Prof Phang however agreed with the UK Law Commission’s rejection of the concept of “*detrimental* reliance” as it is not crucial that the third party should have also suffered detriment before his or her rights are immune from variation or rescission by the original contracting parties. He recognised however, in *practice*, there would be no real difference in any event as, where the third party has indeed relied on the term, he would, in most cases, have conducted his affairs so that any attempt at variation or rescission would probably cause detriment to the third party.

3.7.7 In order to give the maximum latitude to the rights of third parties, we recommend that the concept of “*detrimental* reliance” should not be utilised. We however accept the arguments raised in consultation in favour of the material reliance test. We therefore depart from the UK model in adopting a material reliance requirement in clause 3(1)(b) and (c) of the draft Bill.⁷³ This would be a further incentive for a third party to communicate his assent to the term conferring rights upon him to the promisor in order to rely on clause 3(1)(a).

3.7.8 We have not adopted the suggestion that the reasonable foreseeability test in clause 3(1)(c) should be removed and to require actual reliance⁷⁴ alone. It was commented that the reasonableness test has to be interpreted by the courts on a case-by-case basis and there may be situations in which contracting parties should have reasonably foreseen that a party would rely on a term even though they did not intend to benefit that party. For these reasons, it was argued, the test gives rise to too much uncertainty and extends beyond the initial aim of the Bill to give effect to the intentions of contracting parties.

3.7.9 We are confident that the foreseeability test in clause 3(1)(c) will not extend beyond the intentions of the contracting parties since clause 3 only applies “where a third party has a right under section 2 to enforce a term of the contract” and clause 2(2) makes it clear that the parties must on a proper construction of the contract have intended the term to be enforceable by the third party. The problem of an unintended third party relying on clause 3(1) can easily be avoided by proper contractual drafting.⁷⁵

3.7.10 The UK Law Commission observed that the promisor generally ought to check with the third party before varying or rescinding the contract simply because, *ex hypothesi*, the promisor ought to realise that the third party might have indeed relied on the contract (or a term thereof). The only situation where a significant difficulty arises is where the promisor could not reasonably have been expected to check with the third party because the promisor did not realise that the

⁷³ We use the words “materially relied” in clauses 3(1)(b) and (c). See amendments set out in para 3.9.3 of Report.

⁷⁴ On a somewhat different note, it has been queried why actual reliance is required if the intention is to protect the third party’s expectation interest. The same query is raised in the light of the “crystallisation test” turning on acceptance by way of the third party communicating his or her assent (see *Butterworths Common Law Series — The Law of Contract* (1999) at pp 948—949).

⁷⁵ See para 3.16.2 of Report.

third party knew of the contract or indeed, in some cases at least, that the third party had even come into existence.⁷⁶ The requirement from reasonable foreseeability seeks to meet these situations. Further, as the UK Law Commission points out, the qualification (from reasonable foreseeability) “will create some incentive for a third party, who knows the law, to ‘accept’ the promise by communicating its assent. For if the third party goes ahead and relies without acceptance it runs some risk in certain circumstances of falling foul of the qualification”.⁷⁷

3.7.11 **Afternote:** The Contracts (Rights of Third Parties) Bill 2001 which was passed in Parliament on 5 Oct 2001 differs from the above proposal. The Bill adopts the UK test of mere reliance, instead of material reliance. The Ministry of Law decided that, given the subtle differences between the two tests, any advantage to be gained from adopting the material reliance test was unlikely to be substantial enough to justify deviating from English law. There may also be attendant difficulties with the material reliance test.

3.8 *Reliance by another person*

3.8.1 Section 5(1)(a) of the New Zealand Contracts (Privity) Act 1982 makes reliance by *any other person* relevant if it materially altered the position of the third party.

3.8.2 The UK Law Commission rejected the New Zealand formulation because (a) this would make the reform unattractive to contracting parties as they would effectively become “insurers for any loss that the third party may suffer as a result of fourth party actions”, (b) it would not sit well with their analogy with promissory estoppel, and (c) while it would not be unreasonable to expect the contracting parties to check whether the third party has actually relied, “it would be unreasonable to expect [them] to check whether *any other party* has relied in such a way as to alter the third party’s position”.⁷⁸

3.8.3 We agree that the New Zealand formulation would place too great a burden upon contracting parties. Clause 3 of the draft Bill therefore only refers to reliance by the *third party*.

3.9 *Notice of contents of contract*

3.9.1 One commentator questioned whether or not the UK Bill required some clarification of the concept of “reliance” with regard to the related concept of *notice of the contents* of the contract.⁷⁹ In the context of exemption clauses, for

⁷⁶ UK Law Com. No. 242 para 9.28.

⁷⁷ UK Law Com. No. 242 para 9.39.

⁷⁸ UK Law Com. No. 242 para 9.35-9.36. (Emphasis added.)

⁷⁹ Andrews, “Reform of the Privity Rule in English Contract Law: The Law Commission’s Report No 242” [1997] CLJ 25 at p 27

example, it was pointed out that the third party may reasonably suppose that a standard exemption clause will avail him without first checking the contents of the contract between the promisor and the promisee.

3.9.2 Section 5(1)(a) of the New Zealand Contracts (Privity) Act 1982 includes a clarification that the promise and obligation may not be varied or discharged without the consent of the beneficiary if the beneficiary's position has been materially altered by reliance of that beneficiary or any other person on the promise (*whether or not that beneficiary or that other person has knowledge of the precise terms of the promise*).

3.9.3 We have included a similar clarification (in respect of the third party only) in clause 3 of the draft Bill:⁸⁰

“3.—(1) Subject to the provisions of this section, where a third party has a right under section 2 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if:

(a) [no change]

(b) the promisor is aware that the third party has *materially* relied on the term (*whether or not the third party has knowledge of its precise terms*);
or

(c) 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 *materially* relied on it (*whether or not the third party has knowledge of its precise terms*).”

3.10 *Rescission and variation*

3.10.1 Section 2(1) of the UK Act (equivalent to clause 3(1) of our draft Bill) applies to rescission⁸¹ and variation *by agreement* between the contracting parties.

⁸⁰ Amendments in *italics* cp New Zealand Contracts (Privity) Act 1982 s.5(1)(a). Also includes amendments proposed in para 3.7.7 of Report.

⁸¹ The word “rescind” was deliberately used instead of “cancel” or “terminate” (cf see clause 2(1) of the Law Commission’s draft Bill set out in the next footnote). The effect of rescission is to make the contract void from the beginning i.e. rescission *ab initio*. “[Agreement for termination] will generally discharge both the primary and secondary obligations of the parties... However, where the subsequent agreement is intended to release one party from a liability (or an alleged liability), the general principle is that the party in default is released from those accrued obligations or liabilities only if consideration has been given for the release... The principal distinction between an agreement for termination and an agreement for rescission is the impact on secondary obligations. Provided that point is borne in mind, it is generally unnecessary, when considering the legal requirements, to draw any distinction between an agreement for termination and an agreement for rescission” *Butterworths Common Law Series – The Law of Contract* (1999) para 7.4.

The reason given by the Lord Chancellor in moving the amendment⁸² which substituted these words was that “[c]ancel” ... is not a legal term of art. It could be construed to cover one party’s acceptance of the other’s repudiation, because the effect of such an acceptance is to terminate the contract. We would not want a contracting party to be prevented from accepting a repudiation because of the interests of the third party.”⁸³ The same reasoning applies to the right of the promisee to terminate the contract for breach⁸⁴. The UK Act also probably intended to preserve the promisee’s right to rescind (*unilaterally*⁸⁵) the contract on grounds of misrepresentation, mistake or duress^{86 87}. A justification for taking this position might be that the promisee has not received what he bargained for, and he should therefore be free to terminate or rescind the contract in these situations, notwithstanding the third party’s interests.

3.10.2 A commentator has further pointed out that the section seems inapt to embrace the situation where the promisee *unilaterally* (*viz.*, estoppel) releases the promisor from his or her undertaking after the third party has accepted or relied upon the contract.⁸⁸ The related doctrines of estoppel and waiver are a complex area of law which is still developing.⁸⁹ Generally (at the risk of over-simplifying) they involve a representation by the promisee that he will not require performance of a term of the contract, which the promisor relies on, with the result that the court will not afterward enforce a demand by the promisee (and consequently the third

⁸² Clause 2(1) of the Law Commission’s draft Bill was worded as follows:

“2.-(1) Subject to the provisions of this section, where a contract is enforceable by a third party by virtue of section 1 above the parties to the contract may not *without his consent vary or cancel the contract if...*”

The words “by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent” were substituted at the motion of the Lord Chancellor in the House of Lords on 27 May 1999.

⁸³ <<[<http://www.parliament.the-stationery-office.co.uk/>>](http://www.parliament.the-stationery-office.co.uk/)

⁸⁴ An election to terminate a contract for breach discharges the parties from the obligation to perform their respective contractual duties with effect from the time of the promisee’s election. See *Butterworths Common Law Series – The Law of Contract* (1999) para 7.9 et seq, especially para 7.38.

⁸⁵ A party rescinds a contract by notifying the other party of his wish to rescind or, in the case of fraudulent misrepresentation, by taking reasonable steps to notify the representor. *Butterworths Common Law Series – The Law of Contract* (1999) para 4.49.

⁸⁶ On rescission for misrepresentation see section 3.6 above and Misrepresentation Act (Cap.380). See generally *Butterworths Common Law Series – The Law of Contract* (1999) para 4.46-4.60 (misrepresentation), 4.92 (mistake) and 4.153 (duress).

⁸⁷ A right of rescission may be barred if the rescission would prejudice a third party. See *Butterworths Common Law Series – The Law of Contract* (1999) para 4.59. But the examples involve third parties who have given value. Quere whether the court will apply the principle in favour of a third party volunteer claiming a right to enforce under the proposed Act.

⁸⁸ Andrews, “Reform of the Privity Rule in English Contract Law: The Law Commission’s Report No 242” [1997] CLJ 25 at p 27

⁸⁹ On estoppel, and the related doctrine of waiver, see *Butterworths Common Law Series – The Law of Contract* (1999) paras 2.96 et seq. These doctrines are derived from the decisions in *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439 and *Central London Property Trust v High Trees House* [1947] 1 KB 130. Distinctions are drawn between “election”, “common law estoppel”, “promissory (or equitable) estoppel”, “proprietary estoppel”, “forbearance”, “waiver” and “variation”. Waiver may in certain circumstances be revocable. It may sometimes be difficult to distinguish between unilateral variation and variation by agreement as reliance may be construed as acceptance.

party⁹⁰) for the promisor to perform that term. We also recognise that, in such circumstances, the promisor may have a legitimate interest (as underlined by the equitable basis of these doctrines) not to be required to perform a term of the contract, which will have to be balanced against the third party's interests. In view of the complexity of these legal concepts and the multitude of ways in which the doctrines may come into play⁹¹, we are inclined to leave the development of this area of the law to the courts. We therefore propose that the Bill should not try to restrict such unilateral release by the promisee.

3.10.3 The consequences of attempted rescission or variation without the third party's consent is that the purported rescission or variation will be ineffective i.e. the third party can enforce the term in question against the promisor. However such enforcement may, because of the rescission, become a practical impossibility (e.g. because the promisor has in consequence of the rescission put it out of his power to perform). One textbook writer has suggested that it is arguable that the purported rescission is wrongful, so as to give the third party a remedy in damages against the promisee on the analogy of liability for wrongful interference with contractual rights.⁹² Again we would leave this area to development by the courts.

3.11 *Adequacy of quantum of compensation*

3.11.1 The concern was raised in our consultations whether the interests of a third party who is an infant or is mentally incapacitated (and would not be party to proceedings to dispense with his consent to variation or rescission of a contract under clause 3(6) of the draft Bill) will be adequately safeguarded. It was suggested that a mechanism is required to assist the court in assessing the adequacy of the quantum of compensation.

3.11.2 We do not think this would pose a problem in practice as it is likely that the infant or person who is mentally incapacitated would be represented by a guardian and/or legal counsel. In any event, under clause 3(6) itself, the court or arbitral tribunal will make the final decision and we must assume that they would decide both logically as well as fairly. In the circumstances, we take the view that no additional mechanism is necessary.

3.12 *Joinder of promisee*

3.12.1 The reasons for requiring the promisee to be joined as a party to the litigation when a third party sues to enforce a contract are:

- (a) the promisor (defendant) may have a defence or set-off against the promisee;

⁹⁰ Since the third party's claim is subject to defences the promisor has against the promisee: clause 4(2)

⁹¹ See footnote 89.

⁹² Chitty on Contracts (27th Ed., 1994) paras 19-087 and 19-117.

- (b) the promisor and promisee may have varied or cancelled the contract;
- (c) mandatory joinder will prevent the promisor from being sued twice;
- (d) mandatory joinder will prevent different outcomes in two different suits.

Section 11(2)(b) of the Western Australia Property Law Act 1969 requires joinder of the promisee and promisor in litigation by the third party to enforce a contract made for his benefit.⁹³

3.12.2 The reasons for not requiring mandatory joinder of the promisee are:

- (a) it would often be unnecessary (in the case of a contract to benefit a third party) to join the promisee and to do so would only increase costs unnecessarily;
- (b) difficulties in service and the resulting unnecessary expense;
- (c) it may be impracticable to join the promisee because of death, dissolution or absence abroad.

Mandatory joinder of the promisee was rejected in UK and New Zealand on these grounds.⁹⁴

3.12.3 The draft Bill creates a new and independent cause of action in favour of the third party. For the reasons given in paragraph 3.12.2, we do not favour mandatory joinder in every case⁹⁵. We agree that, as a matter of principle, if the promisee's rights would be affected by the suit, he should be joined as a party or at least be given notice of the suit so that he may include himself as a party if he so wishes.⁹⁶ The existing Rules of Court are wide enough to allow the court on its own motion (or at the application of the promisor, promisee or third party) to make the necessary order for joinder of the promisee in the appropriate circumstances. Where suit is brought against a promisor by the third party or promisee alone, the promisor would be well advised to join all the parties if there is a danger of re-litigation.

⁹³ Under common law, the practice has long been that the assignee must join the assignor as co-defendant in an action to enforce an assignment of a legal chose in action. Similarly, the assignor would not be allowed to sue in his name alone. *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at p 855 – 856

⁹⁴ UK Law Com. No. 242 paras 14.1-14.3; New Zealand Contracts and Commercial Law Reform Committee, "Privity of Contract" (1981), para 7.1.

⁹⁵ Order 15 rule 4(2), which requires joinder of persons who are entitled *jointly* to relief in an action, would not in our view apply to the promisee and third party. (Similar provision in UK Civil Procedure Rules r.19.3)

⁹⁶ Andrews, "Reform of the Privity Rule in English Contract Law: The Law Commission's Report No 242" [1997] CLJ 25 at pp 27—28

3.12.4 Under the existing Rules of Court⁹⁷:

- (a) the promisee can be joined as of right in an action by the third party pursuant to the draft Bill since that action would involve questions of law or fact which would be common to the promisee's action (if he were to bring one) and the rights to relief claimed arise out of the same transaction (Order 15 rule 4(1)(a) and (b));
- (b) the court may on its own motion (or on application) order the promisee to be joined as a party where his presence is necessary to ensure that all matters in the cause may be effectually and completely determined and adjudicated upon, or where in the opinion of the court it would be just and convenient to determine an issue relating to relief claimed as between the promisee and the parties to the action (Order 15 rule 6(2)(b));
- (c) the promisor can make the promisee a third party to the action brought against the promisor by the third party to the contract so that any question relating to the original subject-matter of the action may be determined as between them all (Order 16 rule 1(1)(c)).

3.13 *Assignment of third party rights*

3.13.1 The UK Law Commission stated that a third party's right under the draft Bill, though not a "full contractual right" is clearly analogous to a contractual right and therefore standard common law contractual principles should in general apply to it.⁹⁸ The Commission concluded that there was no good reason why the third party's right should not be assignable in the same way as a contracting party's right under a contract.^{98a} They recommended that no legislative provision was necessary.

3.13.2 However it might be argued that the draft Bill stops short of making the third party a party to the contract and that the third party's right is merely a right to enforce the contract. The assignment of a right of action may, in certain circumstances, be void for being champertous. However this objection will not succeed if the court finds that the assignor had a genuine commercial interest in taking the assignment and the court will look at the totality of the transaction in so deciding.⁹⁹

⁹⁷ See Annex D for relevant provisions of the Rules of Court (Cap.322, R5) and UK Civil Procedure Rules. See generally *Singapore Court Practice 1999: Preliminary Matters to Withdrawal and Discontinuance*, Jeffrey Pinsler (Butterworths Asia) 1998, pp. 579ff, 598ff and 683ff. On UK Civil Procedure Rules, see *Civil Procedure 2000* Volume 1 (Sweet ad Maxwell) paras 19.2 – 19.4

⁹⁸ UK Law Com. No. 242 paras 14.6-14.7

^{98a} The third party should not be treated as an intermediate assignee c.f. UK Law Com. No.242 paras. 2.16 and 2.17.

⁹⁹ *Trendtex Trading Corp v Credit Suisse* [1982] AC 679, [1981] 3 AER 520, which was followed by the Singapore Court of Appeal in *Lim v Rebecca Ong* [1997] 2 SLR 320. This case also applied the test of champerty in *Giles v Thompson* [1994] 1 AC 143 at 164 that "there is wanton or officious intermeddling with the disputes of others where the meddler has no interest whatsoever". Also *Brownnton Ltd v Edward*

3.13.3 We do not favour the view that assignment of the third party's rights should be treated as an assignment of a bare right of action as described in the previous paragraph. We incline to the view of the UK Commission that a third party should be able to assign its rights under the proposed Act in a way analogous to that in which a contracting party can assign his rights i.e. as a chose in action.¹⁰⁰ There is a statement to this effect in the Explanatory Statement to the Bill.¹⁰¹ We agree that no legislative provision on the subject is necessary.

3.14 *Promisee's remedies*

3.14.1 The proposed Act does not affect the rights of the promisee to enforce a contract term which is for the benefit of a third party.¹⁰² However, as the recent English House of Lords decision in *Alfred McAlpine Construction Ltd v Panatown Ltd*¹⁰³ demonstrates, the law is unclear as to when the promisee may recover substantial, as opposed to nominal, damages if he does so.¹⁰⁴ The UK Act does *not* address this issue¹⁰⁵ and the UK Law Commission thought it best to leave that to development at common law¹⁰⁶.

3.14.2 As judicial development of this area of law is obviously not completed and further consideration of this complex area of law will delay the enactment of the draft Bill, we decided not to address the issue in the draft Bill.

3.15 *Unfair Contract Terms Act*

3.15.1 The UK Contracts (Rights of Third Parties) Act 1999¹⁰⁷ provides that section 2(2) of the Unfair Contract Terms Act 1977 (UCTA 1977) (restriction on exclusion etc. of liability for negligence) is not to apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce it is the third party acting in reliance on the right to enforce given by the 1999 Act. The position is that (1) UCTA 1977 s 2(1)

Moore Inbucon Ltd [1985] 3 AER 136. On assignment of rights of action generally see 6 Halsbury's Laws 4th Ed paras 15, 86 & 87.

¹⁰⁰ On assignment of contractual rights generally see *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (1998) at p 850 *et seq.* The law on assignment of contractual rights in Singapore is similar to the English position. Civil Law Act (Cap.43) s.4(8) is identical in substance to UK Law of Property Act 1925 s.136 (which governs statutory assignments). The third party's rights under the proposed Act would fall squarely within the classic description of a chose in action in *Torkington v Magee* [1902] 2 KB 427 at 430, per Channell J: " 'Chose in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession".

¹⁰¹ See para 4.2 of Report

¹⁰² Clause 5 of the draft Bill

¹⁰³ [2000] 3 WLR 946

¹⁰⁴ See discussion in Wallace "Third Party Damage: No Legal Black Hole" (1999) 115 LQR 394 and Treitel (1999) 114 LQR 527.

¹⁰⁵ One commentator observed that this is "something of a missed opportunity" (see Dean, "Removing a Blot on the Landscape — The Reform of the Doctrine of Privity" [2000] JBL 143 at p 151).

¹⁰⁶ UK Law Com. No. 242 para 5.15

¹⁰⁷ Section 7(2)

(prohibition of exclusion or restriction of liability for death or personal injury resulting from negligence) is available in a third party contractual claim, (2) the rest of UCTA 1977 remains unavailable to third party contractual claimants¹⁰⁸, and (3) UCTA 1977 s 2(2) will remain available to plaintiffs who plead their action in the tort of negligence¹⁰⁹.

3.15.2 This gives effect to one of the UK Law Commission's most contentious recommendations.¹¹⁰ This approach has been criticised as it gives rise to some anomalies.¹¹¹ The question is whether this approach is defensible in principle. The key to the UK Law Commission's thinking was that the contracting parties' intentions must govern whether or not the third party has a right to enforce the agreement. A corollary of this principle is that, if the parties do not intend to create rights in favour of a third party, they must also remain free to set conditions upon or limits to the liability that goes with such rights. To allow a third party to run arguments based on UCTA 1977 might encourage litigation on the distinction between 'exclusions that are mere UCTA-type defences' and 'exclusions that serve to preclude, rebut or qualify a third party's presumptive right to enforce' and potentially invite further extension of the scope of UCTA 1977.¹¹²

3.15.3 One textbook commentary¹¹³ argues that this side-lining of the UCTA 1977 is not really necessary to keep faith with the principle of respect for contractual intention and protection of legitimate expectation.

3.15.4 First, it is argued that "it seemingly defeats the principle of protection of legitimate expectation that the Commission should allow the defendant to set up against the third party what would otherwise be 'bad' defences".¹¹⁴

3.15.5 Second, the principle of respect for contractual intentions implies respect only for the *joint* intentions of the contracting parties. In the ordinary course of consumer dealing (e.g. with the use of standard form exclusions by the seller) intended to be regulated by UCTA, it is a nonsense to suppose that the exclusions

¹⁰⁸ As the Act leaves the rest of UCTA 1977 unamended and, as presently understood (and implicit in the Law Commission's recommendations), the provisions do not apply to third parties.

¹⁰⁹ As the question of whether the plaintiff is party to the contract or a third party is irrelevant in a tort action.

¹¹⁰ The Commission confessed to agonising about this difficult issue. UK Law Com. No. 242 paras 13.7, 13.9-13.13.

¹¹¹ Section 3.15 of this Report to large part summarises the detailed critique found in *Butterworths Common Law Series – The Law of Contract* (1999) pp 950-955.

¹¹² *Ibid.*, pp 950-951. Macdonald "Exclusion Clauses: the Ambit of s 13(1) of the Unfair Contract Terms Act 1977" (1992) 12 LS 277, and "Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts: (1994) JBL 441; Adams and Brownsword *Key Issues in Contract* (1995) pp 269 ff.

¹¹³ *Butterworths Common Law Series – The Law of Contract* (1999) pp 951-955

¹¹⁴ *Ibid.*, para 6.67. The general approach to defences in s.3 of the UK Act is that the defendant contractor should have available against the third party such defences as would have been available against the other contracting party plus any defences specifically available against the third party. These defences are in themselves 'good' defences. An exclusion clause judged unreasonable under UCTA 1977 would not be a good defence (i.e it would be a 'bad' defence) against a contracting party but, by virtue of s.7(2) of the UK Act, would be available against the third party in a contractual claim under the UK Act.

would have been jointly agreed by the contracting parties. “[W]here UCTA 1977 strikes down a contractual provision as unreasonable, this usually signifies that the provision has not been freely agreed – in which case it would be a distortion to treat such a provision as representing the contractors’ intentions... Seen in this light, UCTA 1977 can be understood not only as running with the grain of the Commission’s policy, but as one of the best resources that we have for checking whether defences advanced in the name of contractual intention actually reflect the contractors’ joint intentions.”¹¹⁵

3.15.6 Third, “whilst there might be an argument for disapplying UCTA 1977 in relation to the question whether the contractors intended to confer a benefit on the plaintiff third party, there seems no good reason for denying the third party the protection of UCTA 1977 (at least in relation to clauses that purport to exclude liability¹¹⁶) once it is established that the contractors *intended* to confer a benefit on the third party”.¹¹⁷

3.15.7 While we find these arguments to be cogent, the extension of the Unfair Contract Terms Act (Cap.396)¹¹⁸ to claims by third parties raises complex issues which will need further study. As the UK Law Commission recognised, reform of the UCTA would raise difficult questions of policy as to the precise extent and form of amendments.¹¹⁹ We agree with the UK Law Commission that “[g]iven that we are departing from a long-established common law doctrine ... there is much to be said for allowing a period of time for the effect of our reform to ‘settle down’ before pursuing consumer protection measures in relation to claims by third parties”.¹²⁰ Rather than delay the enactment of the draft Bill, we follow the approach of the UK Act.

3.16 *Contract drafting practice*

3.16.1 The enactment of the proposed Act will entail the need for changes in contract drafting practice. The proposed Act will significantly simplify the

¹¹⁵ *Ibid*, para 6.69. “It is important, therefore, to distinguish between those cases where the contractors genuinely agree that the third party’s right to enforce shall be excluded and those cases where the contract purports to contain an exemption clause but it cannot be equated with the genuine agreement (or intention) of the parties.”

¹¹⁶ *Ibid*, para 6.70, fn 1. “The argument is more complex in relation to limitations of liability. It is arguable that UCTA 1977 should be disappplied not only where the issue is whether the parties intended to confer a benefit but also where the question is whether they intended to limit their liability to a third party.”

¹¹⁷ *Ibid*, para 6.70

¹¹⁸ Applying the UK Unfair Contract Terms Act 1977, pursuant to the Application of English Law Act (Cap.7A)

¹¹⁹ UK Law Com. No. 242 para 13.9(vii) e.g. whether the notion of ‘dealing as a consumer’ can be sensibly applied to third parties and whether certain contracts for the benefit of third parties can be classified as ‘contracts of sale’.

The UK Lord Chancellor also cited the example in the House of Lords Debate on 2 Feb 1999 of the reasonableness test in the UCTA; he pointed out that it would be necessary to decide whether the test was to be applied as between the promisor and the promisee or as between the promisor and the third party. Available at <<<http://www.parliament.the-stationery-office.co.uk/>>>

¹²⁰ UK Law Com. No. 242 para 13.9(ix)

drafting of contracts where it is intended to confer a benefit on third parties. Whereas lawyers presently have to resort to complicated legal devices such as deeds and trusts to achieve the desired intention, a straightforward contract will suffice to confer a benefit on a third party after the enactment of the proposed Act.¹²¹ However, the experience in other jurisdictions which have adopted such legislation is that lawyers have been slow to replace their tried and tested devices with the legislative solution. To promote the use of the solutions provided by the Act, it is hoped that the appropriate institutions will carry out adequate publicity and educational efforts to familiarise legal professionals, the business community and the general public with the workings of the Act. It will also help to ensure that contracting parties are not taken unawares or disadvantaged by the changes in the law. With the appropriate passage of time, standard practices will evolve in the industries most significantly affected by the reforms and this will in turn help the court in its deliberations. We highlight below a few areas to which parties drafting contracts will need to pay special attention.

3.16.2 The clearest way to confer a benefit on a third party will be for the contract to provide expressly that the third party may enforce the relevant term of the contract.¹²² The clearest way to avoid any implication¹²³ that the contract is intended to confer a third party right will be to state that no third parties are to be benefited or that the proposed Act is not to apply to the contract. Identification of the third party may be by name, as a member of a class or as answering a particular description. The third party need not even be in existence when the contract is entered.¹²⁴ The right of the third party to enforce a term of the contract is also subject to the terms of the contract¹²⁵ e.g. the parties may make it a condition that the third party, if he wishes to enforce the term, must do so by arbitration instead of litigation.

3.16.3 If contracting parties wish to preserve their right to rescind or vary the contract¹²⁶ without the consent of the third party, they should include an express term as provided in clause 3(3). In order to rely on clause 3(3)(a), contracting parties would be well advised to state that they may rescind or vary the contract *with or without the consent of the third party*.¹²⁷ In order to rely on clause 3(3)(b),

¹²¹ It is envisaged however that the use of devices such as trusts, deeds, collateral contracts, agency, assignments, promisee's remedies, tort actions etc will continue to be relevant where they give more secure rights to the third party or serve the purposes of parties in specific contexts. See para 2.3 of Report and footnotes.

¹²² Clause 2(1)(a)

¹²³ Clause 2(1)(b) and (2)

¹²⁴ Clause 2(2). As to whether it is sufficient that the third party is ascertainable at enforcement, see section 3.3 of Report.

¹²⁵ Clause 2(4)

¹²⁶ We do not mean by 'variation' those variations which are allowed for in the contract e.g. variation orders for works in construction contracts etc.

¹²⁷ Professor GH Treitel raised this issue (with regard to the UK equivalent of clause 3(3)(a) of our Bill) thus: "It is not entirely clear whether it is enough for the express term to provide that [the contracting parties] may rescind or vary the contract or whether it must go on to say in so many words that they may do so without the consent of [the third party]; but to be sure of achieving the desired result, [the contracting

the contract must expressly provide that the consent of the third party is required in circumstances specified in the contract *instead of* (not *in addition to*) those set out in clause 3(1)(a) to (c).

3.16.4 The contracting parties may by an express term restrict the defences, set-offs and counterclaims which the promisor may have in proceedings brought by the third party.¹²⁸ Contracting parties would be well advised to consider including an appropriate term in the contract to restrict such defences etc especially where they may not be aware of the defences, set-offs and counterclaims in respect of the third party. Although clause 4 does not affect the promisee's right to sue the promisor for breach of *their* contract and claim substantial damages accordingly (since clause 4 does not purport to impact on the situation between the promisor and promisee as such), the promisee may be disadvantaged in his claim if the promisee becomes insolvent.¹²⁹

3.17 *Commencement of legislation*

3.17.1 The proposed Act adopts a commencement provision (modelled on the UK Act) which will apply to contracts entered into during the 6-month period after its commencement only if the contract expressly provides for it to do so¹³⁰. This will allow contracting parties who wish to take advantage of the new law to do so immediately upon the commencement of the Act. At the same time, it is intended to allow parties who are in the midst of negotiations to arrange their affairs so that they will not be taken unawares by the new law. It will also allow time for publicity to reach the legal profession, the business community and the public.

3.17.2 In the UK Parliament, at Committee stage in the House of Lords, a question was raised whether an agreement entered into after the commencement but pursuant to an obligation in an earlier agreement could confer rights on a third party. The Parliamentary Secretary, Lord Chancellor's Department, "confirm[ed] that where an agreement is entered into after the commencement but pursuant to an obligation in an earlier agreement, the Bill will not normally apply to the later agreement so as to confer rights on a third party. Normally, the parties will not intend to confer rights of enforceability on a third party where it would not have been possible for them to do so under the law applying at the time of their pre-Act contract. However, that is not to deny that parties entering into a contract now, who will know that the Bill will make it possible for them to confer enforceable rights on a third party if and when it becomes law, might choose to bind

parties] would be well advised to use the latter form of words." (See *Chitty on Contracts* (28th Ed, 1999) p 1011)

We have adopted the UK wording as we do not see how the legislative wording may be made clearer short of prescribing the actual words which must be used.

¹²⁸ Clause 3(5).

¹²⁹ For example P2 contracts with P1 for P1 to pay P3 \$1000 because P2 wants to discharge his debt of \$1000 to P3. Unknown to P2, P3 already owes P1 \$600. P1 has a set-off to P3's claim so that P1 is only bound to pay P3 \$400. P2 is still liable to pay P3 the balance of \$600. P2 may be put to the trouble and expense of suing P1 and he may be unable to recover the \$600 from P1 if P1 becomes insolvent.

¹³⁰ Clause 1(2) and (3).

themselves in that contract to confer such rights in a later contract entered into after the commencement of the Act. That will be a matter of the contracting party's intentions, and the proper construction of the later contract in the light of the earlier contract."¹³¹

3.17.3 This was illustrated in the earlier debate¹³² in the House of Lords relating to the issue whether the Act would apply to an option which has been granted before the Act takes effect and is later exercised when the Act applies. The Lord Chancellor there noted "[I]f that option were to be characterised as a contract for sale ... conditional on the purchaser's unilateral exercise of the option, it would qualify as a contract made before the end of the statutory period; whereas, if it were categorised as an irrevocable offer by the vendor requiring an act of acceptance by the purchaser after the statutory six-month period, the Act would apply to the contract constituted by that acceptance because the contract would have come into being after that six-month period".

3.17.4 In the UK, a court at first instance had addressed the issue in *Spiro v Glencow Properties Limited* [1991] Ch.D 537 and categorised such an arrangement as a conditional contract and this is generally regarded as the correct interpretation. It will however be open to a Singapore court to hold otherwise. We leave it to the courts to construe the contract on the facts of each case.

4 EXPLANATORY NOTES ON BILL

4.1 This Bill seeks to make provisions for the enforcement of contractual terms by third parties. This Bill reforms the rule of privity of contract under which a person can only enforce a contract if he is a party to it. The rule means that, even if a contract is made with the purpose of conferring a benefit on someone who is not a party to it, that person (a "third party") has no right to sue for breach of contract. *The Bill also reforms the rule that consideration must move from the promisee insofar as it relates to the third party's right to enforce a contract under the Bill. The Bill, by its terms, does not affect the position of joint promisees.*

4.2 *Although the Bill does not make the third party a party to the contract, the right of the third party to enforce the contract under the Act is analogous to a contractual right e.g. the third party can assign the benefits of the contract to another person.*

4.3 The Bill sets out the circumstances in which a third party is to have a right to enforce a term of the contract (clause 2), the situations in which such a term

¹³¹ Mr Keith Vaz, as reported in UK Commons Hansard, Standing Committee D, Thursday 15 July 1999. Available at <<<http://www.parliament.the-stationery-office.co.uk/>>>

¹³² House of Lords Hansard, 2 Feb 1999, column 1435. Available at <<<http://www.parliament.the-stationery-office.co.uk/>>>

may be varied or rescinded (clause 3) and the defences available to the promisor when the third party seeks to enforce the term (clause 4). It makes it clear that clause 2 does not affect the promisee's rights, or any rights that the third party may have which are independent of the Bill (clauses 5 and 8(1)). The Bill does not apply to certain contracts (whether wholly or partially) (clause 7).

Short title and commencement

4.4 **Clause 1** relates to the short title and commencement and the extent of application of the Bill. The Bill will only apply to contracts which are entered into during the 6-month period after its commencement if the contract expressly provides for it to do so. Where there is no such express provision, it will not apply to contracts entered into before the end of that 6-month period.¹³³

Right of third party to enforce contractual term

4.5 **Clause 2** gives effect to the central purpose of the Act. It sets out the circumstances in which a third party would have the right to enforce a term of the contract.

4.6 Sub-clause (1) sets out a two-limbed test for the circumstances in which a third party may enforce a term of a contract. The first limb is where the contract itself expressly so provides. The second limb is where the term purports to confer a benefit on the third party unless it appears on a true construction of the contract that the contracting parties did not intend him to have the right to enforce it (sub-clause (2)).

4.7 Sub-clause (3) requires that, for clause (1) to apply, the third party must be expressly identified in the contract by name, class or description, but establishes that the third party need not be in existence when the contract is made. This allows contracting parties to confer enforceable rights on, for example, an unborn child or a future spouse or a company that has not yet been incorporated.

4.8 Sub-clause (4) clarifies sub-clause (1). The third party's right of enforcement is subject to the contract's terms and conditions. It is open to the parties to limit or place conditions on the third party's right; for example, if he wishes to enforce the right he is to do so by way of arbitration and not litigation.

4.9 Sub-clause (5) makes it clear that the courts may award all the remedies which are available to a person bringing a claim for breach of contract to a third party seeking to enforce his rights under sub-clause (1). The normal rules of law applicable to those remedies, including the rules relating to causation, remoteness and the duty to mitigate one's loss, apply to the third party's claim. *It clarifies that*

¹³³ See section 3.17 of Report.

such remedies shall not be refused on the ground that the third party is a volunteer i.e. has not furnished consideration.

4.10 Sub-clause (6) makes it clear that the Bill is to apply so as to enable a third party to take advantage of an exclusion or limitation clause in the contract, as well as to enforce “positive” rights. The Bill, for example, allows a term of a contract which excludes or limits the promisee’s liability to the promisor for the tort of negligence and expressly states that the exclusion or limitation is for the benefit of the promisee’s “agents or servants or subcontractors” to be enforceable by these groups.

Variation and rescission of contract

4.12 **Clause 3(1)** provides that in certain circumstances, where a third party has a right under clause 2, the contracting parties may not by agreement, rescind or vary the contract in a way which affects the third party’s right without his consent. This section uses the term variation in its legal sense to mean a variation of the terms of an agreement by further agreement between the parties to the original agreement. It does not, for example, affect the terms of a construction contract which allow one of the parties to that contract unilaterally to alter, or “vary”, the details of the work; such a variation is not to the contract but only to the work.

4.13 Sub-clause (3) provides that sub-clause (1) is subject to an express term of the contract, that the contract can by agreement be rescinded or varied without the third party’s consent or that the third party’s consent is to be required in specified circumstances different to those which are set out in sub-clause (1).

4.14 Sub-clauses (4) and (5) give the court or arbitral tribunal the power to dispense with the requirement for the third party’s consent where it cannot be obtained because his whereabouts are unknown or he is mentally incapable of giving his consent or where it cannot reasonably be ascertained whether he has in fact relied on the contractual term.

4.15 **Afternote:** The Contracts (Rights of Third Parties) Bill 2001 which was passed in Parliament on 5 Oct 2001 differs from the above proposal. The Bill adopts the UK test of mere reliance, instead of material reliance. (See para 3.7.11 above.) Clause 3 of the Bill reads as follows:

“3(1) ...

- (b) the promisor is aware that the third party has *relied* on the term (whether or not the third party has knowledge of its precise terms); or
- (c) 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 the term (whether or not the third party has knowledge of its precise terms).

(5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if it is satisfied that it cannot reasonably be ascertained whether or not the third party has in fact *relied* on the term of the contract.”

Clause 3(7) also differs from the proposed draft in omitting the reference to the Magistrate’s Court. The jurisdiction of the court to dispense with the consent of the third party is limited to the High Court and a District Court.

Defences etc., available to promisor

4.16 **Clause 4** enables the promisor, in a claim by the third party, to rely on any defence or set-off arising out of the contract and relevant to the term being enforced, which would have been available to him had the claim been by the promisee. He may also rely on any defence or set-off, or make any counterclaim, where this would have been possible had the third party been a party to the contract.

4.17 Sub-clause (2) can be illustrated as follows —

- (I) a third party can no more enforce a void, discharged or unenforceable contract than a promisee could;
- (II) P1 (the promisor) and P2 (the promisee) contract that P2 will sell goods to P1, who will pay the contract price to P3 (the third party). In breach of contract, P2 delivers goods that are not of the standard contracted for. In an action for the price by P3 (just as in an action for the price by P2) P1 is entitled to reduce or extinguish the price by reason of the damages for breach of contract.

4.18 Sub-clause (3) can be illustrated as follows —

P1 and P2 contract that P1 will pay P3 if P2 transfers his car to P1. P2 owes P1 money under a wholly unrelated contract. P1 and P2 agree to an express term in the contract which provides that P1 can raise against a claim by P3 any matter which would have given P1 a defence or set-off to a claim by P2.

4.19 Sub-clause (4) makes it clear that the promisor also has available any defence or set-off, and any counterclaim not arising from the contract, which is specific to the third party. It can be illustrated as follows —

- (I) P1 contracts with P2 to pay P3 \$1000. P3 already owes P1 \$600. P1 has a set-off to P3’s claim so that P1 is only bound to pay P3 \$400.

- (II) P3 induced P1 to enter into the contract with P2 by misrepresentation, but P2 has no actual or constructive notice of that misrepresentation. P1 may have a defence (or a counterclaim for damages) against P3 which would not have been available had the action been brought by P2.

4.20 Sub-clause (5) makes sub-clauses (2) and (4) subject to any express term of the contract which narrows the defences or set-offs available under clause 4(2) or narrows the defences, set-offs or counterclaims available under clause 4(4). For example —

- (I) in relation to sub-clause (2), P2 agrees with P1 to purchase a painting, the painting to be delivered to P3, who is expressly given a right to enforce the delivery obligation. P2 owes P1 considerable sums for other art works purchased. P2 wishes to ensure that P3's right is not affected. P1 and P2 expressly agree that P1 may not raise against P3 defences and set-offs that would have been available to P1 in an action by P2.
- (II) in relation to sub-clause (4), P1 agrees with P2 to pay \$5000 to P3 if P2 will transfer a number of cases of wine to P1. P3 is in dispute with P1 over a prior contract and P1 alleges that P3 owes P1 money. P2 is concerned that P1 may seek to withhold part of the \$5,000 payable to P3 by raising a set-off or counterclaim against P3 in relation to the prior contract. Consequently P1 and P2 include an express term that P1 may raise no defences, set-offs or counterclaims of any nature whatever against a claim by P3 to enforce P1's obligation to pay the \$5,000.

4.21 Sub-clause (6) ensures that an analogous approach to that set out in sub-clauses (2) to (5) applies where the proceedings are brought against the third party and he seeks to avail himself of, for example, an exclusion clause.

Enforcement of Contract by Promisee

4.22 **Clause 5** provides that the right conferred by clause 2 is additional to any right the promisee has in relation to the enforcement of a contract term which benefits a third party.

Protection of Promisor from Double Liability

4.23 **Clause 6** provides that where the promisee has recovered damages (or an agreed sum) from the promisor in respect of either the third party's loss or the promisee's expense in making good that loss, the court or arbitral tribunal shall reduce any award to the third party enforcing a term under clause 2 to take account of the sum already recovered.

Exceptions

4.24 **Clause 7(1)** ensures that the Act does not undermine the existing law on who can enforce negotiable instruments.

4.25 Sub-clause (2) excepts the contract under section 39(1) of the Companies Act (Cap.50) which states —

“Subject to this Act, the memorandum and articles when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.”.

4.26 Sub-clause (3) prevents a third party (for example, a customer of an employer) acquiring a right under the Bill to enforce a term of a contract of employment, against an employee.

4.27 Sub-clause (4), which excludes certain contracts relating to the carriage of goods, nevertheless does not prevent a third party from taking advantage of a term excluding or limiting liability. In particular, this enables clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by sea to servants, agents and independent contractors engaged in the loading and unloading process, to be enforced by those servants, agents or independent contractors (so called “Himalaya” clauses).

4.28 Sub-clauses (5) and (6) set out the definition of a “contract for the carriage of goods by sea”. The purpose of this definition is to exclude from this Act not only those contracts already covered by the Bills of Lading Act (Cap. 384) but also those to which the Bills of Lading Act could be applied under section 1(5) of that Act (e.g. a contract for the carriage of goods by sea evidenced by an electronic bill of lading). Section 1(5) of the Bills of Lading Act states —

“The Minister may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to —

- (a) the issue of a document to which this Act applies;
- (b) the indorsement, delivery or other transfer of such a document;
or
- (c) the doing of anything else in relation to such a document.”

No such regulations have yet been made.

Supplementary provisions relating to third party

4.29 **Clause 8** ensures that the Act does not affect any existing right or remedy of the third party and allows for the judicial development of a third party's rights.

4.30 Sub-clause (2) prevents a third party from invoking section 2(2) of the Unfair Contract Terms Act (Cap. 396) to contest the validity of a term excluding or limiting the promisor's liability under the Act to the third party for negligently caused loss or damage (other than personal injury or death). Section 2(2) of the Unfair Contract Terms Act (in which "other loss or damage" means loss or damage other than death or personal injury), states —

“In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness”.

4.31 Sub-clause (3) applies the standard limitation periods for actions for breach of contract in section 6 of the Limitation Act (Cap. 63) to actions by third parties under the Act.

4.32 Sub-clause (4) ensures that those references in the Act to the position “if the third party had been a party to the contract” are not to be interpreted as meaning that the third party should be treated as a party to the contract for the purposes of any other written law.¹³⁴

Arbitration provisions

4.33 **Clause 9** ensures that, where appropriate, the provisions of the Arbitration Act 2001¹³⁵ or the International Arbitration Act (Cap. 143A) apply in relation to third party rights under this Act. Without this section, the main provisions of the Arbitration Act 2001 or the International Arbitration Act (Cap. 143A) would not apply because a third party is not a party to the arbitration agreement between the promisor and the promisee.¹³⁶

4.34 Sub-clause (1) deals with what is likely to be the most common situation. The third party's substantive right (for example, to payment by the promisor) is conferred subject to disputes being referred to arbitration (see clause 2(4)). This

¹³⁴ One example is section 3 of the Unfair Contract Terms Act (Cap.396) which applies “as between contracting parties where one of them deals as a consumer or on the other's written standard terms of business”. This subsection makes it clear that nothing in sections 1(5) or 3(4) or 3(6) means that “contracting parties” in section 3 of the Unfair Contract Terms Act includes a third party with a right under section 2 of this Bill.

¹³⁵ A new Arbitration Act 2001 is expected to be enacted shortly.

¹³⁶ This clause is based on section 8 of the UK Act, the result of a Commons Amendment, agreed to by the House of Lords on 10 Nov 1999. Available at <<[<http://www.publications.parliament.uk/pa/ld199899/ldhansard/vo991110/text/91110-06.htm#91110-06-head0>>](http://www.publications.parliament.uk/pa/ld199899/ldhansard/vo991110/text/91110-06.htm#91110-06-head0)

section is based on a “conditional benefit” approach. It ensures that a third party who wishes to take action to enforce his substantive right is not only able to enforce effectively his right to arbitrate, but is also “bound” to enforce his right by arbitration (so that, for example, a stay of proceedings can be ordered against him under the Arbitration Act 2001 or the International Arbitration Act (Cap. 143A)).¹³⁷

4.35 Sub-clause (2) is likely to be of rarer application. It deals with situations where the third party is given a right to arbitrate under clause 2, but the “conditional benefit” approach underpinning sub-clause (1) is inapplicable. For example, where the contracting parties give the third party a unilateral right to arbitrate or a right to arbitrate a dispute other than one concerning a right conferred on the third party under sub-clause (1). To avoid imposing a pure burden on the third party (in a situation where, for example, the contracting parties give the third party a right to arbitrate a tort claim made by the promisor against the third party) the sub-clause requires the third party to have chosen to exercise the right. The timing point at the end of the sub-clause is designed to ensure that a third party who chooses to exercise his right to go to arbitration by, for example, applying for a stay of proceedings under the Arbitration Act 2001 or the International Arbitration Act (Cap. 143A), can do so. Under the Arbitration Act 2001 or the International Arbitration Act (Cap. 143A), the right to apply for a stay of proceedings can only be exercised by someone who is already a party to the arbitration agreement.

¹³⁷ This approach is analogous to that applied to assignees who may be prevented from unconscionably taking a substantive benefit free of its procedural burden (see, for example, *DVA v Voest Alpine, The Jaybola* [1997] 2 Lloyd’s Rep 279). “Disputes relating to the enforcement of the substantive term by the third party” is intended to have a wide ambit and to include disputes between the third party (who wishes to enforce the term) and the promisor as to the validity, interpretation, existence or performance of the term; the third party’s entitlement to enforce the term; the jurisdiction of the arbitral tribunal; or the recognition and enforcement of an arbitration award. But to avoid imposing a “pure” burden on the third party, it does not cover, for example, a separate dispute in relation to a tort claim by the promisor against the third party for damages.

**THE CONTRACTS (RIGHTS OF THIRD PARTIES)
BILL 2001**

(No. 999 of 2001)

A BILL

intituled

An Act to make provision for the enforcement of contractual terms by third parties.

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1.—(1) This Act may be cited as the Contracts (Rights of Third Parties) Act 2001 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

(2) Subject to subsection (3), this Act shall not apply in relation to a contract entered into before the end of the period of 6 months beginning with the date of commencement of this Act.

(3) The restriction in subsection (2) shall not apply in relation to a contract which —

- (a) is entered into on or after the date of commencement of this Act; and
- (b) expressly provides for the application of this Act.

Right of third party to enforce contractual term

2.—(1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a “third party”) may in his own right enforce a term of the contract if —

- (a) the contract expressly provides that he may; or
- (b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) shall not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section shall not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other remedy shall apply accordingly) and such remedy shall not be refused on the ground that, as against the promisor, the third party is a volunteer.

(6) Where a term of a contract excludes or limits liability in relation to any matter, references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.

(7) In this Act, in relation to a term of a contract which is enforceable by a third party —

“the promisor” means the party to the contract against whom the term is enforceable by the third party, and

“the promisee” means the party to the contract by whom the term is enforceable against the promisor.

Variation and rescission of contract

3.—(1) Subject to the provisions of this section, where a third party has a right under section 2 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if —

- (a) the third party has communicated his assent to the term to the promisor;
- (b) the promisor is aware that the third party has materially relied on the term (whether or not the third party has knowledge of its precise terms); or
- (c) 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 materially

relied on it (whether or not the third party has knowledge of its precise terms).

- (2) The assent referred to in subsection (1)(a) —
 - (a) may be by words or conduct; and
 - (b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.
- (3) Subsection (1) is subject to any express term of the contract under which —
 - (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party; or
 - (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).
- (4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied —
 - (a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained; or
 - (b) that he is mentally incapable of giving his consent.
- (5) The court or arbitral tribunal may, on the application of the parties to a contract, dispense with any consent that may be required under subsection (1)(c) if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact materially relied on the term.
- (6) If the court or arbitral tribunal dispenses with a third party's consent, it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.
- (7) The jurisdiction conferred on the court by subsections (4) to (6) is exercisable by the High Court, District Court or a Magistrate's Court.

Defences, etc., available to promisor

4.—(1) Subsections (2) to (5) shall apply where, in reliance on section 2, proceedings for the enforcement of a term of a contract are brought by a third party.

- (2) The promisor shall have available to him by way of defence or set-off any matter that —
 - (a) arises from or in connection with the contract and is relevant to the term; and
 - (b) would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.
- (3) The promisor shall also have available to him by way of defence or set-off any matter if —

- (a) an express term of the contract provides for it to be available to him in proceedings brought by the third party; and
 - (b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.
- (4) The promisor shall also have available to him —
- (a) by way of defence or set-off any matter; and
 - (b) by way of counterclaim any matter not arising from the contract,

that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.

(5) Subsections (2) and (4) are subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.

(6) Where in any proceedings brought against him a third party seeks in reliance on section 2 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

Enforcement of contract by promisee

5. Section 2 shall not affect any right of the promisee to enforce any term of the contract.

Protection of promisor from double liability.

6. Where under section 2 a term of a contract is enforceable by a third party, and the promisee has recovered from the promisor a sum in respect of —

- (a) the third party's loss in respect of the term; or
- (b) the expense to the promisee of making good to the third party the default of the promisor,

then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee.

Exceptions

7.—(1) Section 2 confers no rights on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument.

(2) Section 2 confers no rights on a third party in the case of any contract binding on a company and its members under section 39 of the Companies Act (Cap. 50).

(3) Section 2 confers no right on a third party to enforce any term of a contract of employment against an employee.

(4) Section 2 confers no rights on a third party in the case of —

- (a) a contract for the carriage of goods by sea; or
- (b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention,

except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract.

(5) In subsection (4) —

“contract for the carriage of goods by sea” means a contract of carriage —

- (a) contained in or evidenced by a bill of lading, sea waybill or a corresponding electronic transaction; or
- (b) under or for the purposes of which there is given an undertaking which is contained in a ship’s delivery order or a corresponding electronic transaction;

“the appropriate international transport convention” means —

- (a) in relation to a contract for the carriage of cargo by air the Convention which has the force of law in Singapore under section 3 of the Carriage by Air Act (Cap.32A);
- (b) in relation to a contract for the carriage of goods by rail, such Convention which has the force of law in Singapore under such written law as the Minister may by order prescribe; and
- (c) in relation to a contract for the carriage of goods by road, such Convention which has the force of law in Singapore under such written law as the Minister may by order prescribe.

(6) For the purposes of subsection (5) —

- (a) “bill of lading”, “sea waybill” and “ship’s delivery order” have the same meaning as in the Bills of Lading Act (Cap.384); and
- (b) a corresponding electronic transaction is a transaction within section 1(5) of the Bills of Lading Act (Cap. 384) which corresponds to the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship’s delivery order.

Supplementary provisions relating to third party

8.—(1) Section 2 shall not affect any right or remedy of a third party that exists or is available apart from this Act.

(2) Section 2(2) of the Unfair Contract Terms Act (Cap.396) (restriction on exclusion etc. of liability for negligence) shall not apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce it is a third party acting in reliance on section 2.

(3) In section 6 of the Limitation Act (Cap.163) the references to an action founded on a contract shall respectively include references to an action brought in reliance on section 2 relating to a contract.

(4) A third party shall not, by virtue of section 2(5) or 4(4) or (6), be treated as a party to the contract for the purposes of any other written law.

Arbitration provisions

9.—(1) Where —

- (a) a right under section 2 to enforce a term (referred to in this section as “the substantive term”) is subject to a term providing for the submission of disputes to arbitration (referred to in this section as the arbitration agreement); and
- (b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2001 or Part II of the International Arbitration Act (Cap.143A),

the third party shall be treated for the purposes of that Act as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.

(2) Where —

- (a) a third party has a right under section 2 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration (referred to in this section as “the arbitration agreement”);
- (b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2001 or Part II of the International Arbitration Act (Cap.143A); and
- (c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,

the third party shall, if he exercises the right, be treated for the purposes of that Act as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and be treated as having been so immediately before the exercise of the right.

EXPLANATORY STATEMENT

EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.

DERIVATION TABLE OF DRAFT BILL

Clause from draft Bill	Section of UK Contracts (Rights of Third Parties) Act 1999	Other legislation and comments
1	10	-
2	1	Sub-clause (5) amended cp New Zealand Contracts (Privity) Act 1982, s.8
3	2	Sub-clause (1)(b) and (c) amended cp New Zealand Contracts (Privity) Act 1982, s.5(1)(a)
4	3	
5	4	
6	5	
7	6 (Omitting subsections (3)(b) and (c), and (4))	
8	7	
9	8	

Foreign Legislation Referred to in Report

New Zealand Contracts (Privity) Act 1982

Interpretation

2. In this Act, unless the context otherwise requires —

“benefit” includes —

- (a) any advantage; and
- (b) any immunity; and
- (c) any limitation or other qualification of —
 - (i) a obligation to which a person (other than a party to the deed or contract) is or may be subject; or
 - (ii) a right to which a person (other than a party to the deed or contract) is or may be entitled; and
- (d) any extension or other improvement of a right or rights to which a person (other than a party to the deed or contract) is or may be entitled;

“beneficiary”, in relation to a promise to which section 4 of this Act applies, means a person (other than the promisor or promisee) on whom the promise confers, or purports to confer, a benefit;

“Contract” includes a contract made by deed or in writing, or orally, or partly in writing and partly orally or implied by law;

“Court” means —

- (a) the High Court; or
- (b) a District Court that has jurisdiction under section 10 of this Act; or
- (c) a Small Claims Tribunal that has jurisdiction under section 11 of this Act;

“promisee”, in relation to a promise to which section 4 of this Act applies, means a person who is both —

- (a) a party to the deed or contract; and
- (b) a person by whom the promise is made or given.

“promisor”, in relation to a promise to which section 4 of this Act applies, means a person who is both —

- (a) a party to the deed or contract; and
- (b) a person by whom the promise is made or given.

Deeds or contracts for the benefit of third parties

4. Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:

Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

Limitation on variation or discharge of promise

5.—(1) Subject to sections 6 and 7 of this Act, where, in respect of a promise to which section 4 of this Act applies —

- (a) the position of a beneficiary has been materially altered by the reliance of that beneficiary or any other person on the promise (whether or not that beneficiary or that other person has knowledge of the precise terms of the promise); or
- (b) a beneficiary has obtained against the promisor judgment upon the promise; or
- (c) a beneficiary has obtained against the promisor the award of an arbitrator upon a submission relating to the promise,

the promise and the obligation imposed by that section may not be varied or discharged without the consent of that beneficiary.

(2) For the purposes of paragraph (b) or paragraph (c) of subsection (1) of this section —

- (a) an award of an arbitrator or a judgment shall be deemed to be obtained when it is pronounced notwithstanding that some act, matter, or thing needs to be done to record or perfect it or that, on application to a Court or on appeal, it is varied;
- (b) an award of an arbitrator or a judgment set aside on application to a Court or on appeal shall be deemed never to have been obtained.

Variation or discharge of promise by agreement or in accordance with express provision for variation or discharge

6. Nothing in this Act prevents a promise to which section 4 of this Act applies or any obligation imposed by that section from being varied or discharged at any time —

- (a) by agreement between the parties to the deed or contract and the beneficiary; or
- (b) by any party or parties to the deed or contract if—
 - (i) the deed or contract contained, when the promise was made, and express provision to that effect; and
 - (ii) the provision is known to the beneficiary (whether or not the beneficiary has knowledge of the precise terms of the provision); and
 - (iii) The beneficiary had not materially altered his position in reliance on the promise before the provision became known to him; and
 - (iv) the variation or discharge is in accordance with the provision.

Power of Court to authorise variation or discharge

7.—(1) Where, in the case of a promise to which section 4 of this Act applies or of an obligation imposed by that section —

- (a) the variation or discharge of that promise or obligation is precluded by section 5(1)(a) of this Act; or
- (b) it is uncertain whether the variation or discharge of that promise is so precluded,

a Court, on application by the promisor or promisee, may, if it is just and practicable to do so, make an order authorising the variation or discharge of the promise or obligation or both on such terms and conditions as the Court thinks fit.

(2) If a Court —

- (a) makes an order under subsection (1) of this section; and
- (b) is satisfied that the beneficiary has been injuriously affected by the reliance of the beneficiary or any other person on the promise or obligation,

the Court shall make it a condition of the variation or discharge that the promisor pay to the beneficiary, by way of compensation, such sum as the Court thinks just.

Enforcement by beneficiary

8. The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer.

Availability of defences

9.—(1) This section applies only where, in proceedings brought in a Court or an arbitration, a claim is made in reliance on this Act by a beneficiary against a promisor.

(2) Subject to subsections (3) and (4) of this section, the promisor shall have available to him, by way of defence, counterclaim, set-off, or otherwise, any matter which would have been available to him —

- (a) if the beneficiary had been a party to the deed or contract in which the promise is contained; or
- (b) if —
 - (i) the beneficiary were the promisee; and
 - (ii) the promise to which the proceedings relate had been made for the benefit of the promisee; and
 - (iii) the proceedings had been brought by the promisee.

(3) The promisor may, in the case of a set-off or counterclaim arising by virtue of subsection (2) of this section against the promisee, avail himself of that set-off or counterclaim against the beneficiary only if the subject-matter of that set-off or counterclaim arises out of or in connection with the deed or contract in which the promise is contained.

(4) Notwithstanding subsections (2) and (3) of this section, in the case of a counterclaim brought under either of those subsections against a beneficiary —

- (a) the beneficiary shall not be liable on the counterclaim, unless the beneficiary elects, with full knowledge of the counterclaim, to proceed with his claim against the promisor; and
- (b) if the beneficiary so elects to proceed, his liability on the counterclaim shall not in any event exceed the value of the benefit conferred on him by the promise.

Savings

14.—(1) Subject to section 13 of this Act, nothing in this Act limits or affects —

- (a) any right or remedy which exists or is available apart from this Act; or
- (b) the Contracts Enforcement Act 1956 or any other enactment that requires any contract to be in writing or to be evidenced by writing; or
- (c) section 49A of the Property Law Act 1952; or
- (d) the law of agency; or
- (e) the law of trusts.

(2) Notwithstanding the repeal effected by section 13 of this Act, section 7 of the Property Law Act 1952 shall continue to apply in respect of any deed made before the commencement of this Act.

United States

Restatement of the Law (Second), Contracts, 1981

302.—(1) Unless otherwise agreed between a promisor and a promisee, a beneficiary of the promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the proposed performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

311.—(1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between the promisor and promisee is ineffective if a term of the promise creating the duty so provides.

(2) In the absence of such a term, the promisor and promisee retain power to discharge or modify a duty by subsequent agreement.

(3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.

(4) If the promisee receives consideration for an attempted discharge or modification of the promisor's duty which is ineffective against the beneficiary, the beneficiary can assert a right to the consideration so received. The promisor's duty is discharged to the extent of the amount received by the beneficiary.

Western Australia

Property Law Act 1969

Persons taking who are not parties

11.—(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.

(2) Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but

(a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;

(b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and

- (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.

(3) Unless the contract referred to in subsection (2) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the person referred to in that subsection has adopted it either expressly or by conduct.

Queensland Property Law Act 1974

Contracts for the benefit of third parties

55.—(1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.

(2) Prior to acceptance the promisor and promisee may, without the consent of the beneficiary, vary or discharge the terms of the promise and any duty arising from it.

(3) Upon acceptance —

- (a) the beneficiary shall be entitled in the beneficiary's own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor, and relief by way of specific performance, injunction or otherwise shall not be refused solely on the ground that, as against the promisor, the beneficiary may be a volunteer; and
- (b) the beneficiary shall be bound by the promise and subject to a duty enforceable against the beneficiary in the beneficiary's own name to do or refrain from doing such act or acts (if any) as may by the terms of the promise be required of the beneficiary; and
- (c) the promisor shall be entitled to such remedies and relief as may be just and convenient for the enforcement of the duty of the beneficiary; and
- (d) the terms of the promise and the duty of the promisor or the beneficiary may be varied or discharged with the consent of the promisor and the beneficiary.

(4) Subject to subsection (1), any matter which would in proceedings not brought in reliance on this section render a promise void, voidable or unenforceable, whether wholly or in part, or which in proceedings (not brought in reliance on this section) to enforce a promissory duty arising from a promise is available by way of defence shall, in like manner and to the like extent, render void, voidable or unenforceable or be available by way of defence in proceedings for the enforcement of a duty to which this section gives effect.

(5) In so far as a duty to which this section gives effect may be capable of creating and creates an interest in land, such interest shall, subject to section 12, be capable of being created and of subsisting in land under any Act but subject to that Act.

(6) In this section —

“acceptance” means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on the promisor’s behalf, in the manner (if any), and within the time, specified in the promise or, if no time is specified, within a reasonable time of the promise coming to the notice of the beneficiary;

“beneficiary” means a person other than the promisor or promisee, and includes a person who, at the time of acceptance is identified and in existence, although that person may not have been identified or in existence at the time when the promise was given;

“promise” means a promise —

(a) which is or appears to be intended to be legally binding; and

(b) which creates or appears to be intended to create a duty enforceable by a beneficiary; and includes a promise whether made by deed, or in writing, or,

subject to this Act, orally, or partly in writing and partly orally;

“promisee” means a person to whom a promise is made or given.

“promisor” means a person by whom a promise is made or given.

(7) Nothing in this section affects any right or remedy which exists or is available apart from this section.

(8) This section applies only to promises made after the commencement of this Act.

Provisions Relating to Joinder of Parties

Singapore Rules of Court (Cap.322, R5)

Joinder of parties (O. 15, r. 4)

4.—(1) Subject to Rule 5(1), 2 or more persons may be joined together in one action as plaintiffs or as defendants with the leave of the Court or where —

- (a) if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and
- (b) all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.

(2) Where the plaintiff in any action claims any relief to which any other person is entitled jointly with him, all persons so entitled must, subject to the provisions of any written law and unless the Court gives leave to the contrary, be parties to the action and any of them who does not consent to being joined as a plaintiff must, subject to any order made by the Court on an application for leave under this paragraph, be made a defendant.

This paragraph shall not apply to a probate action.

(3) Where relief is claimed in an action against a defendant who is jointly liable with some other person and also severally liable, that other person need not be made a defendant to the action; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in an action in respect of that contract, the Court may, on the application of any defendant to the action, by order stay proceedings in the action until the other persons so liable are added as defendants.

This paragraph shall not apply to any relief claimed under section 15 of the Civil Law Act (Cap.43).

S 551/99, wef 15/12/1999

Misjoinder and nonjoinder of parties (O. 15, r. 6)

6.—(1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

(2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Court may, on such terms as it thinks just and either of its own motion or on application —

- (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
- (b) order any or the following persons to be added as a party, namely:
 - (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon; or
 - (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

(3) An application by any person for an order under paragraph (2) adding him as a party must, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

(4) No person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

Third party notice (O. 16, r. 1)

1.—(1) Where in any action a defendant who has entered an appearance —

- (a) claims against a person not already a party to the action any contribution or indemnity;
- (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,

then, subject to paragraph (2), the defendant may issue a notice in Form 22 or 23, whichever is appropriate (referred to in this Order as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

(2) A defendant to an action may not issue a third party notice without the leave of the Court unless the action was begun by writ and he issues the notice before serving his defence on the plaintiff.

(3) Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (referred to in this Order as a third party) with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued.

UK Civil Procedure Rules

Changes in parties – general

19.2—(1) This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).

(2) The court may order a person to be added as a new party if —

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

[paragraphs (3) and (4) omitted]

Provisions applicable where two or more persons are jointly entitled to a remedy

19.3—(1) Where the claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise.

(2) If any person does not agree to be a claimant, he must be made a defendant, unless the court orders otherwise.

(3) This rule does not apply to probate proceedings.

Procedure for adding and substituting parties

19.4—(1) The court's permission is required to remove, add or substitute a party, unless the claim form has not been served.

(2) An application for permission under paragraph (1) may be made by —

(a) an existing party; or

(b) a person who wishes to become a party.

[paragraph (3) omitted]

- (4) Nobody may be added or substituted as a claimant unless —
- (a) he has given his consent in writing; and
 - (b) that consent has been filed with the court.
- (5) An order for the removal, addition or substitution of a party must be served on —
- (a) all the parties to the proceedings; and
 - (b) any other party affected by the order.
- (6) When the court makes an order for the removal, addition or substitution of a party, it may give consequential directions about —
- (a) filing and serving the claim form on any new defendant;
 - (b) serving relevant documents on the new party; and
 - (c) the management of the proceedings.