

BERMUDA'S CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 2016

The enactment of the Contracts (Rights of Third Parties) Act 2016 (the "Act") brings Bermuda into line with other common law jurisdictions, such as the United Kingdom. Its provisions mark a significant departure from the existing common law rule of privity of contract whereby only the parties to the contract are able to enforce the terms of the contract. The Act sets out the circumstances where a person who is not a party to the original contract may be entitled to enforce a term of the contract.

Third party rights

The Act provides that a third party may in its own right, subject to certain limitations, enforce a contractual term if that third party is expressly identified in the contract (either by name, as a member of a class, or answering to a particular description) and the contract expressly provides in writing that the third party may enforce such a contractual term. Provided the contract contains these certain terms, the third party need not even be in existence when the contract is entered into. By expressly identifying the third party and agreeing that it may rely on the terms, parties to a contract are thereby able to "opt-in" to the Act's provisions.

Exceptions

Some contracts are expressly excluded from the provisions of the Act and third party rights are not capable of being enforced under specific contracts such as bills of exchange, promissory notes or other negotiable instruments, employment contracts, a company's memorandum of association or bye-laws, letters of credit, or contracts for the carriage of goods by sea, by road, or for the carriage of cargo by air.

Enforcement

Third parties do not acquire any better rights or remedies than those available to the contracting parties, and contractual provisions that exclude or limit a right of a contracting party apply equally to a third party.

Where the right to enforce a term is conferred on a third party under the Act, any remedy that would be available to the contracting parties in an action for breach of contract will be available to the third party, and the rules relating to damages, injunctions, specific performance and other relief will apply accordingly.

Application to existing and future contracts

The Act applies to any contract, on or after 28 March 2016, which complies with the requirements under the Act, however the Act does not have retroactive effect. Any contract whenever made may be amended by the contracting parties to include terms granting third party rights, but that third party may only enforce a right accruing on or after the date on which the contract is amended. Where, prior to 1 April 2016, an existing contract includes the necessary terms providing for third party rights then those terms are automatically deemed enforceable by the third party as of 28 March 2016.

Assignment and variation

Under the Act a third party may assign its third party rights to another person in the same way a contracting party may assign its rights under the contract. Third party rights will not be assignable if assignment is expressly excluded in the contract or if under a proper construction of the contract the right is personal to the third party.

After third party rights have been permitted under a contract, subject to an express term to the contrary, the contracting parties (the “promisor” and “promisee”) are prevented from rescinding or varying the contract so as to extinguish or alter the third party’s rights, without the third party’s consent, where:

- (a) the third party has communicated its assent (by words or conduct) to the term to the promisor; or
- (b) the promisor is aware that the third party has relied on the term; 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 it.

The Act also provides specific defences for a promisor in enforcement proceedings brought by a third party.

Double liability protection

The Act explicitly protects contracting parties from incurring double liability. Where a promisee has recovered a sum in respect of the third party’s loss or claim, then in proceedings brought by the third party a court must reduce any award to the third party to the extent it thinks fit to account for any sum that has already been recovered by the promisee.

Arbitration

Where a third party’s right to enforce a contractual term is subject to an arbitration clause, then with respect to disputes relating to enforcement of that contractual term between the third party and the promisor, the third party shall be treated as a party to the arbitration agreement for the purposes of the Arbitration Act 1986.

Supplementary provisions

The Act includes supplementary provisions which retain existing common law and statutory exceptions to the privity of contract rule, so that in certain circumstances a third party may still rely on these. Time limits for an action brought by a third party under the Act are transposed from those applicable to actions founded on a simple contract and an action upon a specialty under the Limitation Act 1984.

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