

Summary of Hong Kong Construction Association's Oral Submission to Bills Committee on Contracts (Rights of Third Parties) Bill on 7 May 2014

1. Introduction of the legislation is not right or necessary for the construction industry which should be excluded from the legislation. If applied to the construction industry it will cause confusion, uncertainty and potentially chaos. It will not benefit the end users and procurers of construction projects and buildings.
2. One of the distinguishing features of the construction industry is that large and complex contractual chains are often needed to deliver projects. These typically start with a procurer such as a developer or Government department which appoints a main contractor which in turn employs subcontractors and suppliers. Consultants are likely to be employed to provide design and supervision of the works. The end result may be many tiers of contracts with the work of all parties ultimately benefiting the procurer and end users but also others in the contractual chain.
3. The industry already has tried and tested methods for benefiting third parties and providing them with enforceable rights where this is intended. Collateral warranties and transferrable guarantees are used so that, for example, end users can gain rights against main contractors and key subcontractors and designers. The documentation used is fairly short and standardised and the costs of execution are not significant.
4. If the legislation applies to construction contracts then it will be necessary for industry participants to consider all their contracts, identify where rights are to be provided or not to be provided and then amend their contracts accordingly. This process creates a significant new burden for the industry. In practice, most larger and more sophisticated participants are likely to amend their contracts to exclude the effect of the legislation and continue using the current collateral warranty approach – this has been the experience in the UK for example. Even where parties use the legislation to create express rights for third parties they are unlikely to provide additional rights to those which would have been provided by collateral warranties before introduction of the legislation. Consequently, a burden is imposed on the industry in addressing the legislation and amending contracts, and work will be generated for lawyers, but in the vast majority of cases no additional rights or benefits will be given to third party end users.
5. In the construction industry the legislation is therefore only likely to be relevant where smaller and less sophisticated industry participants are involved who are not aware of the legislation or who have failed to take account of it in their contractual arrangements. A third party end user experiencing defects looking for a remedy in such a case would have to rely on clauses 4(1)(b) and (2) of the Bill by identifying terms in contracts which purport to confer benefits on them as being a member of a class or fitting a particular description identified in a contract. In theory, they could try and identify the various parties such as main contractor, subcontractors, consultants etc involved in construction or design and ascertain whether there are any relevant terms in those contracts which they might be able to rely on. This is an uncertain and difficult process and could also lead to multiple proceedings against different parties involved with arguments over the effect of particular provisions relied on which again increases costs and legal work and does not ultimately benefit third parties.

6. The HKCA accepts and agrees that contractors who undertake defective work should be responsible for such work - as they are currently under their contracts. However, if there are concerns over the ability of end users to seek redress then a more effective approach would be to take steps to ensure developers and procurers are unable to avoid and limit their obligations to provide buildings to contractually agreed standards. This provides a more certain remedy and reduces the need for multi party proceedings.
7. In summary, the proposed legislation is highly unlikely to provide any meaningful benefits or additional rights for end users of construction projects and buildings but will create confusion, uncertainty, potential chaos and increased legal costs for the construction industry. The industry already has an evolved practice for providing enforceable rights to third parties where that is expressly intended. The legislation is not right or necessary for the construction industry which should be excluded.