



BERMUDA

CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 2016

2016 : 8

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WHEREAS it is expedient to make provision for the enforcement of contractual terms by third parties in certain circumstances;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act may be cited as the Contracts (Rights of Third Parties) Act 2016.

Interpretation

2 (1) In this Act, unless the context otherwise requires—

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“arbitral tribunal” has the meaning assigned to that expression in section 2 of the Bermuda International Conciliation and Arbitration Act 1993;

“commencement date” means the date on which this Act comes into force;

“contract of employment” has the meaning assigned to that expression under section 3 of the Employment Act 2000;

“Court” means the Supreme Court;

“employee” has the meaning assigned to that expression under section 4 of the Employment Act 2000;

“Minister” means the Minister responsible for economic development;

“set-off” includes netting of claims;

“third party” means a person who is not a party to a contract.

(2) In relation to a term of a contract which is enforceable by a third party—

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

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

Application

3 (1) This Act shall apply to any contract which, on or after the commencement date, includes terms which comply with section 4.

(2) A contract (whenever made) may be amended to include terms which comply with section 4.

(3) If, after this Act comes into force, a contract is amended to include terms which comply with section 4, a third party may only enforce a right which accrues on or after the date on which the contract is amended.

(4) If, immediately before the commencement date, an existing contract includes terms which are in accordance with the provisions of section 4—

(a) those terms shall be deemed to comply with section 4; but

(b) a third party may only enforce a right which accrues on or after the commencement date.

(5) In this section, “existing contract” means a contract that was entered into prior to the commencement date.

Rights of third party to enforce contractual term

4 (1) Subject to this Act, a third party may in its own right enforce a term of a contract if—

(a) the third party is expressly identified in the contract—

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- (i) by name;
 - (ii) as a member of a class; or
 - (iii) as answering a particular description,
but the third party need not be in existence when the contract is entered into; and
- (b) the contract expressly provides in writing that the third party may enforce such term of the contract.

(2) This section does 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.

(3) For the purpose of exercising its right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to it in an action for breach of contract if it had been a party to the contract and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly.

(4) 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 the third party availing itself of the exclusion or limitation.

Variation and rescission of contract

5 (1) Where a third party has a right under section 4 to enforce a term of a contract, the parties to the contract may not, by agreement, rescind the contract, or vary it so as to extinguish or alter the third party's entitlement under that right, without the third party's consent, if—

- (a) the third party has communicated its assent 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.
- (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 the promisor.
- (3) Subsection (1) is subject to any express term of the contract under which—
- (a) the contract may be rescinded or varied 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).

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(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 one or more of the parties to the contract, dispense with its consent if satisfied that it is just and equitable to do so having regard to all the circumstances.

(5) The Court or arbitral tribunal may, on the application of one or more 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.

(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.

Defences

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

(2) There shall be available to the promisor 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 the promisor by way of defence or set-off if the proceedings had been brought by the promisee.

(3) There shall also be available to the promisor by way of defence or set-off any matter if—

- (a) an express term of the contract provides for it to be available to the promisor in proceedings brought by the third party; and
- (b) it would have been available to the promisor by way of defence or set-off if the proceedings had been brought by the promisee.

(4) There shall also be available to the promisor—

- (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 the promisor 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 a third party, such third party seeks in reliance on section 4 to enforce a term of a contract including, in particular, a term purporting to exclude or limit liability, it may not do so if it could not have done so (whether

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by reason of any particular circumstances relating to it or otherwise), had it been a party to the contract.

Enforcement of contract by promisee

7 Section 4 does not affect any right of the promisee to enforce any term of the contract.

Protection of promisor from double liability

8 Where under section 4 a term of a contract is enforceable by a third party and a 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 shall reduce any award to the third party to the extent it thinks appropriate to take account of the sum recovered by the promisee.

Exceptions

9 (1) Section 4 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 4 confers no rights on a third party in the case of any contract binding on a company and its members under section 16 of the Companies Act 1981.

(3) Section 4 confers no rights on a third party to enforce any term of a contract of employment against an employee.

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

- (a) a contract for the carriage of goods by sea;
- (b) a contract for the carriage of goods by road, or for the carriage of cargo by air; or
- (c) letters of credit.

(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 way bill 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; and

“contract of carriage” in relation to—

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- (a) a contract to which the Carriage of Goods by Sea Act 1926 applies has the meaning assigned to that expression in that Act;
- (b) a contract to which the Merchant Shipping Act 2002 applies has the meaning assigned to that expression in that Act.

Supplementary provisions relating to third parties

10 (1) Section 4 does not affect any right or remedy of a third party that exists or is available apart from this Act.

(2) In sections 7 and 10 of the Limitation Act 1984, the references to an action founded on a simple contract and an action upon a specialty shall respectively include references to an action brought in reliance on section 4 relating to a simple contract and an action brought in reliance on that section relating to a specialty.

(3) Except to the extent provided in section 11(1) or (2), a third party shall not, by virtue of section 4(4), 6(4), 6(6), 11(1) or 11(2), be treated as a party to the contract for the purposes of any other Act (or any instrument made under any other Act).

Arbitration provisions

11 (1) Where a right under section 4 to enforce a term is subject to an arbitration agreement, the third party shall be treated for the purposes of the Arbitration Act 1986 as a party to the arbitration agreement as regards disputes between itself and the promisor relating to the enforcement of the term by the third party.

(2) Where—

- (a) a third party has a right under section 4 to enforce a term subject to an arbitration agreement; and
- (b) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,

the third party shall, if it exercises the right, be treated for the purposes of the Arbitration Act 1986 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.

(3) In this section, “arbitration agreement” has the meaning assigned to that expression under section 2 of the Arbitration Act 1986.

Assignment of third party right

12 (1) A third party may assign to another person a right under a term of a contract enforceable by the third party under section 4 in the same way as a party to the contract may assign a right under the contract.

(2) Subsection (1) does not apply if—

- (a) the contract expressly provides otherwise; or

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- (b) on a proper construction of the contract, the right is personal to the third party and is not assignable.

Regulations and orders

13 (1) The Minister may make such regulations as are considered expedient to give effect to the provisions of this Act.

(2) The Minister may by Order amend or otherwise vary section 9.

(3) Regulations or an Order made under this section shall be subject to the negative resolution procedure.

[Assent Date: 28 March 2016]

[Operative Date: 28 March 2016]