



## New Bermuda Legislation: Contracts (Rights of Third Parties) Act, 2016

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*The Contracts (Rights of Third Parties) Act, 2016* (the “Act”) was recently enacted by the Bermuda Legislature and is now fully operative. The Act is significant in that, subject to its terms, it permits parties to vary the common law doctrine of “privity of contract” which provides that only parties to a contract may enjoy the benefits and enforce the provisions of that contract.

Under the Act, persons not specifically party to a contract may now be entitled to benefit from and enforce the terms of the contract, subject to certain restrictions. The Act will be of significant interest to investment managers, investment funds, third party service providers and delegates who traditionally may not be parties to an agreement but may be impacted by its specific terms and provisions. In particular, the Act should assist in the area of indemnification and exculpation provisions of agreements intended to benefit a wider class of beneficiaries beyond just the contracting parties.

The Act is also of importance to Bermuda’s insurance industry in that it removes all doubt as to the legal enforceability and effectiveness of so-called “cut-through” clauses or endorsements in insurance and reinsurance contracts. These clauses will typically provide the underlying insured with a direct right of action under the corresponding reinsurance contract entered into between an insurer and a reinsurer, thereby providing further security to the insured by enabling him to “cut through” to a reinsurer for payment of a claim, in the event the insurer becomes unable to meet its obligations.

The Act is similar to third party rights legislation enacted in the United Kingdom and several other common law jurisdictions.

### **Applications and Exceptions**

While the doctrine of privity of contract may now be varied in Bermuda, it has not been abolished as contracting parties are required to “opt in” to the Act’s provisions. In order for the Act to apply, the contracting parties must (within the body of their agreement) expressly identify the third party (either by name, as a member of a class or as answering a particular description) and agree that the third party may enforce the applicable terms of the agreement. The third party does not necessarily have to be in existence as of the date of the contract; all that is required is that they be clearly identified.

The Act generally applies to all contractual provisions, including indemnities and exculpations and other limits of liability, but there are certain contracts which are specifically excluded including bills of exchange,



employment agreements, promissory notes and other negotiable instruments, rights conferred by a company's memorandum of association or bye-laws, contracts for the carriage of goods by sea or roads or for the carriage of cargo by air and letters of credit.

The Act does not have retroactive effect; however, where a contract is entered into prior to the Act and provides for third party rights in accordance with the Act, those rights will automatically become enforceable by the third party on the commencement date of the Act without further action by the parties. After commencement, parties may also of course amend the terms of their prior agreement to include third party rights.

### **Enforcement by Third Parties**

Where the Act's requirements have been met, a third party can enforce the terms of the contract and can avail itself of any remedy that would be available to the contracting parties, including those related to breach of contract, damages, injunctions and specific performance. However, a third party will not have any better rights or remedies than those available to the contracting parties. Thus, if a contract limits recovery or otherwise limits a right of a contracting party, the third party will similarly be limited in terms of what actions or recoveries are available to it. There is protection against double liability so that where complete or partial recovery has been made by a contracting party, the Court may reduce any award to a third party by the amount recovered by the contracting party.

### **Arbitration**

Where a right to enforce a term of a contract is subject to an arbitration agreement, the third party will be treated as being a party to the arbitration agreement with respect to disputes between itself and a contracting party relating to enforcement of the contractual term.

### **Variation of Contract and Assignments**

Once rights have been extended to a third party, the contracting parties are restricted in their ability to vary such rights as between themselves and the third party where: (i) the third party communicated its assent to the term to the party against whom the term is enforceable (a "promisor"); (ii) the promisor is aware that the third party has relied on the term; or (iii) 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. In these situations the third party must consent to any variation or rescission of the contract unless it has contractually agreed otherwise.

Finally, the Act permits a third party to assign its third party rights under a contract to another person in the same way as a contracting party may assign its rights, unless the contract specifically provides otherwise or on a proper construction of the contract, the rights are personal to the third party

### **Conclusion**

In sum, under this new Bermuda law, contracting parties may now extend rights to third parties where desired, thus reducing the burden of entering into multiple agreements to effect the same result. The Act further enhances Bermuda's commercial laws and again demonstrates the Island's responsive legislative framework for business.



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