

Rights of Third Parties in the Cayman Islands

The Contracts (Rights of Third Parties) Act (the **Act**) gives third parties the ability to enforce contractual rights expressly granted to them in Cayman Islands law governed contracts to which they are not a party, subject to certain exceptions.

Rights of a third party

The general position in the Cayman Islands is that only parties entering into a contract are bound by its terms and persons who are not parties to a contract do not have rights and obligations under that contract. The general position arises from the English common law principle known as 'privity of contract'. The Act was introduced in 2014 to provide an 'opt in' regime, to allow parties to a contract to confer rights on persons specifically intended to benefit from it.

Under the Act, a third party may enforce a contractual term in its own right if:

- the third party is expressly identified in the contract by name, as a member of a class or as answering a particular description, and a third party may include a person not in existence when the contract is entered into, and
- the contract expressly provides in writing that the relevant third party may enforce the relevant term.

Subject to any express term in a contract to the contrary, the Act restricts the contract parties' ability to rescind or vary a third party's right so as to extinguish or vary it, without the third party's consent. The Act also allows a contract party to apply to court to dispense with any third party consent needed if it is just and equitable to do so in the circumstances.

Application and exceptions

The Act applies to contractual benefits capable of being enforced by third parties, including indemnification and exculpation provisions.

Without using the powers granted by the Act, standard indemnity provisions in contracts governed by Cayman Islands law which seek to provide indemnification from one party to persons who are not parties to the contract are ineffective because only the parties will have enforcement rights under privity of contract principles.

Under the Act, parties can choose to opt in and grant non-parties to the contract specific enforcement rights. For example, in limited partnership agreements standard indemnity and limitation of liability coverage can be extended to cover third parties (such as an investment manager, its employees and owners) without having to make them a party to the limited partnership agreement.

As noted above, depending on the commercial requirements, unless the intention is to seek consent from third parties for any changes to the contract, wording must be included to provide that third parties can enforce the rights granted to them under the contract but that their consent is not required to amend or rescind the terms of the relevant agreement.

Under the Act, a third party has the same remedies as would have been available to it for breach of contract as if it had been a party to the contract. If the contract validly excludes or limits the right of the parties to make claims, the third party will be bound by the same exclusions or limitations. The Act also sets out that if the contract includes an arbitration clause, then the third party is bound by that arbitration agreement regarding any disputes in connection with the third party's enforcement of the relevant term of the contract.

The Act does not confer rights on certain contracts and instruments and specifically excludes the following: bills of exchange, promissory notes and other negotiable instruments, rights under memorandum and articles of association, contracts of employment, contracts for carriage of goods by sea, road or air and letters of credit.

Third party rights are also included in the Exempted Limited Partnership Act, which specifically provides for members of committees established by a partnership agreement to be entitled to the benefit of the provisions regarding committees in the relevant agreement, including indemnity and exculpation rights, where they are not a party to it.

Impact on existing contracts

The Act applies to contracts containing the relevant terms which are made on or after the Act came into force in May 2014. Contracts entered into before the Act came into force are capable of being enforced by third parties directly if:

- the contract is amended after the Act came into effect to include the relevant terms, or
- the contract already contained the relevant terms and 'opt in' language for effect when the Act came into force.



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