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## BILLS SUPPLEMENT

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**Notification No. B 36** — The Contracts (Rights of Third Parties) Bill is hereby published for general information. It was introduced in Parliament on the 25th day of September 2001.

# **Contracts (Rights of Third Parties) Bill**

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**Bill No. 36/2001.**

*Read the first time on 25th September 2001.*

## **THE CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 2001**

**(No.     of 2001)**

### **ARRANGEMENT OF SECTIONS**

#### Section

1. Short title and commencement
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A BILL

*i n t i t u l e d*

An Act to make provision for the enforcement of contractual terms  
by third parties.

Be it enacted by the President with the advice and consent of the  
Parliament of Singapore, as follows:

**Short title and commencement**

**1.**—(1) This Act may be cited as the Contracts (Rights of Third  
5 Parties) Act 2001 and shall come into operation on such date as the  
Minister may, by notification in the *Gazette*, appoint.

(2) Subject to subsection (3), this Act shall not apply in relation to a contract entered into before the end of the period of 6 months from the date of commencement of this Act.

(3) The restriction in subsection (2) shall not apply in relation to a contract which —

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(a) is entered into on or after the date of commencement of this Act; and

(b) expressly provides for the application of this Act.

### **Right of third party to enforce contractual term**

2.—(1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, enforce a term of the contract if —

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(a) the contract expressly provides that he may; or

(b) subject to subsection (2), the term purports to confer a benefit on him.

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(2) Subsection (1) (b) shall not apply if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party shall be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

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(4) This section shall 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.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other remedy shall apply accordingly) and such remedy shall not be refused on the ground that, as against the promisor, the third party is a volunteer.

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(6) 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 his availing himself of the exclusion or limitation.

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(7) In this Act, in relation to a term of a contract which is enforceable by a third party —

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

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

### **Variation and rescission of contract**

3.—(1) Subject to this section, where a third party has a right under section 2 to enforce a term of the contract, the parties to the contract  
10 may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter the third party’s entitlement under that right, without his consent if —

(a) the third party has communicated his assent to the term to the promisor;

15 (b) the promisor is aware that the third party has relied on the term (whether or not the third party has knowledge of its precise terms); or

(c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third  
20 party has in fact relied on it (whether or not the third party has knowledge of its precise terms).

(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  
25 be regarded as communicated to the promisor until it is received by him.

(3) Subsection (1) is subject to any express term of the contract under which —

(a) the parties to the contract may by agreement rescind or vary  
30 the contract 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), (b) and (c).

(4) Where the consent of a third party is required under  
35 subsection (1) or (3), the court or arbitral tribunal may, on the

application of the parties to the contract, dispense with his consent if it is satisfied that —

- (a) his consent cannot be obtained because his whereabouts cannot reasonably be ascertained; or
- (b) he is mentally incapable of giving his consent.

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(5) The court or arbitral tribunal may, on the application 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 of the contract.

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(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.

(7) The jurisdiction conferred on the court by subsections (4), (5) and (6) shall be exercisable by both the High Court and a District Court.

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### **Defences, etc., available to promisor**

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

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(2) The promisor shall have available to him, 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 him by way of defence or set-off if the proceedings had been brought by the promisee.

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(3) The promisor shall also have available to him, by way of defence or set-off, any matter if —

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

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(4) The promisor shall also have available to him —

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- (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 him by way of defence or set-off or by way of counterclaim against the third party, as the case may be, if  
5 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 him, a third party  
10 seeks to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability) in reliance on section 2, he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.

### 15 **Enforcement of contract by promisee**

5. Section 2 shall not affect any right of the promisee to enforce any term of the contract.

### **Protection of promisor from double liability**

6. Where under section 2 a term of a contract is enforceable by a  
20 third party, and the 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,

25 then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee.

### **Exceptions**

30 7.—(1) Section 2 shall not confer any right on a third party in the case of a contract on a bill of exchange, promissory note or other negotiable instrument.

(2) Section 2 shall not confer any right on a third party in the case of any contract binding on a company and its members under  
35 section 39 of the Companies Act (Cap. 50).

(3) Section 2 shall not confer any right on a third party to enforce any term of a contract of employment against an employee.

(4) Section 2 shall not confer any right on a third party in the case of —

(a) a contract for the carriage of goods by sea; or 5

(b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air, which is subject to the rules of the appropriate international transport convention,

except that a third party may in reliance on that section avail himself of an exclusion or limitation of liability in such a contract. 10

(5) In subsection (4) —

“appropriate international transport convention” means —

(a) in relation to a contract for the carriage of cargo by air, the Convention which has the force of law in Singapore under section 3 of the Carriage by Air Act (Cap. 32A); 15

(b) in relation to a contract for the carriage of goods by rail, such Convention which has the force of law in Singapore under such written law as the Minister may by order prescribe; and 20

(c) in relation to a contract for the carriage of goods by road, such Convention which has the force of law in Singapore under such written law as the Minister may by order prescribe;

“contract for the carriage of goods by sea” means a contract of carriage — 25

(a) contained in or evidenced by a bill of lading, sea waybill 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. 30

(6) For the purposes of subsection (5) —

(a) “bill of lading”, “sea waybill” and “ship’s delivery order” have the same meanings as in the Bills of Lading Act (Cap. 384); and 35

(b) a corresponding electronic transaction is a transaction within section 1 (5) of the Bills of Lading Act which corresponds to



the issue, indorsement, delivery or transfer of a bill of lading, sea waybill or ship's delivery order.

### **Supplementary provisions relating to third party**

8.—(1) Section 2 shall not affect any right or remedy of a third  
5 party that exists or is available apart from this Act.

(2) Section 2 (2) of the Unfair Contract Terms Act (Cap. 396) (exclusion of or restriction on liability for negligence) shall not apply where the negligence consists of the breach of an obligation arising from a term of a contract and the person seeking to enforce  
10 it is a third party acting in reliance on section 2.

(3) In section 6 of the Limitation Act (Cap. 163), the references to an action founded on a contract shall include references to an action brought in reliance on section 2 relating to a contract.

(4) A third party shall not, by virtue of section 2 (5) or 4 (4) or (6),  
15 be treated as a party to the contract for the purposes of any other written law.

### **Arbitration provisions**

9.—(1) Where —

(a) a right under section 2 to enforce a term (referred to in  
20 this section as the substantive term) is subject to a term providing for the submission of disputes to arbitration (referred to in this section as the arbitration agreement); and

(b) the arbitration agreement is an agreement in writing for  
25 the purposes of the Arbitration Act 2001 or Part II of the International Arbitration Act (Cap. 143A),

the third party shall be treated for the purposes of the Arbitration Act 2001 or the International Arbitration Act, as the case may be, as a party to the arbitration agreement as regards disputes between  
30 himself and the promisor relating to the enforcement of the substantive term by the third party.

(2) Where —

(a) a third party has a right under section 2 to enforce a term providing for one or more descriptions of dispute between  
35 the third party and the promisor to be submitted to

arbitration (referred to in this section as the arbitration agreement);

(b) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2001 or Part II of the International Arbitration Act (Cap. 143A); and 5

(c) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,

the third party shall, if he exercises the right, be treated for the purposes of the Arbitration Act 2001 or the International Arbitration Act, as the case may be, as a party to the arbitration agreement in 10 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.

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#### EXPLANATORY STATEMENT

This Bill seeks to make provisions for the enforcement of contractual terms by third parties. The Bill reforms the rule of privity of contract under which a person can only enforce a contract if he is a party to it. The rule means that, even if a contract is made with the purpose of conferring a benefit on someone who is not a party to it, that person (a third party) has no right to sue for breach of contract. The Bill also reforms the rule that consideration must move from the promisee insofar as it relates to the third party's right to enforce a contract under the Bill. The Bill, by its terms, does not affect the position of joint promisees.

Although the Bill does not make the third party a party to the contract, the right of the third party to enforce the contract under the Bill is analogous to a contractual right (for example, the third party can assign the benefits of the contract to another person).

The Bill sets out the circumstances in which a third party will have a right to enforce a term of the contract (clause 2), the situations in which such a term may be varied or rescinded (clause 3) and the defences available to the promisor when the third party seeks to enforce the term (clause 4). The Bill makes it clear that clause 2 does not affect the promisee's rights, or any rights that the third party may have which are independent of the Bill (clauses 5 and 8 (1)). The Bill does not apply to certain contracts (whether wholly or partially) (clause 7).

Clause 1 relates to the short title and commencement and the extent of application of the Bill. The Bill will apply to contracts made more than 6 months after the commencement of the Bill. The Bill will apply to contracts made within 6 months of the commencement of the Bill only if the contract expressly provides for the application of the Bill.

Clause 2 gives effect to the central purpose of the Act. The clause sets out the circumstances in which a third party would have the right to enforce a term of the contract.

Sub-clause (1) sets out a two-limbed test for the circumstances in which a third party may enforce a term of a contract. The first limb is where the contract itself expressly so provides. The second limb is where the term purports to confer a benefit on the third party unless it appears on a true construction of the contract that the contracting parties did not intend him to have the right to enforce it (sub-clause (2)).

Sub-clause (3) requires that, for sub-clause (1) to apply, the third party must be expressly identified in the contract by name, class or description, but establishes that the third party need not be in existence when the contract is made. This allows contracting parties to confer enforceable rights on, for example, an unborn child or a future spouse or a company that has not yet been incorporated.

Sub-clause (4) clarifies sub-clause (1). The third party's right of enforcement is subject to the terms and conditions of the contract. It is open to the parties to limit or place conditions on the third party's right (for example, if he wishes to enforce the right, he is to do so by way of arbitration and not litigation).

Sub-clause (5) makes it clear that the courts may award all the remedies which are available to a person bringing a claim for breach of contract to a third party seeking to enforce his rights under sub-clause (1). The normal rules of law applicable to those remedies (including the rules relating to causation, remoteness and the duty to mitigate one's loss) apply to the third party's claim. The sub-clause clarifies that such remedies cannot be refused on the ground that the third party is a volunteer (that is, has not furnished consideration).

Sub-clause (6) makes it clear that the Bill will apply to enable a third party to take advantage of an exclusion or limitation clause in the contract, as well as to enforce "positive" rights. For example, the Bill allows a term of a contract which excludes or limits the promisee's liability to the promisor for the tort of negligence and expressly states that the exclusion or limitation is for the benefit of the promisee's "agents or servants or subcontractors" to be enforceable by these groups.

Clause 3 (1) provides that in certain circumstances, where a third party has a right under clause 2, the contracting parties may not by agreement, rescind or vary the contract in a way which affects the third party's right without his consent. The clause uses the term variation in its legal sense to mean a variation of the terms of an agreement by further agreement between the parties to the original agreement. For example, the terms of a construction contract which allow one of the parties to that contract unilaterally to alter, or "vary", the details of the work are not affected; such a variation is not to the contract but only to the work.

Sub-clause (3) provides that sub-clause (1) is subject to an express term of the contract, that the contract can by agreement be rescinded or varied without the

third party's consent or that the third party's consent is to be required in specified circumstances different to those which are set out in sub-clause (1).

Sub-clauses (4) and (5) give the court or arbitral tribunal the power to dispense with the requirement for the third party's consent where it cannot be obtained because his whereabouts are unknown or he is mentally incapable of giving his consent or where it cannot reasonably be ascertained whether he has in fact relied on the contractual term.

Clause 4 enables the promisor, in a claim by the third party, to rely on any defence or set-off arising out of the contract and relevant to the term being enforced, which would have been available to him had the claim been made by the promisee. He may also rely on any defence or set-off, or make any counterclaim, where this would have been possible had the third party been a party to the contract.

Sub-clause (2) can be illustrated as follows:

- (a) a third party can no more enforce a void, discharged or unenforceable contract than a promisee could;
- (b) P1 (the promisor) and P2 (the promisee) contract that P2 will sell goods to P1, who will pay the contract price to P3 (the third party). In breach of the contract, P2 delivers goods that are not of the standard contracted for. In an action for the price by P3 (just as in an action for the price by P2) P1 is entitled to reduce or extinguish the price by reason of the damages for breach of contract.

Sub-clause (3) can be illustrated as follows:

P1 and P2 contract that P1 will pay P3 if P2 transfers his car to P1. P2 owes P1 money under a wholly unrelated contract. P1 and P2 agree to an express term in the contract which provides that P1 can raise against a claim by P3 any matter which would have given P1 a defence or set-off to a claim by P2.

Sub-clause (4) makes it clear that the promisor also has available any defence or set-off, and any counterclaim not arising from the contract, which is specific to the third party. The sub-clause can be illustrated as follows:

- (a) P1 contracts with P2 to pay P3 \$1,000. P3 already owes P1 \$600. P1 has a set-off to P3's claim so that P1 is only bound to pay P3 \$400;
- (b) P3 induced P1 to enter into the contract with P2 by misrepresentation, but P2 has no actual or constructive notice of that misrepresentation. P1 may have a defence (or a counterclaim for damages) against P3 which would not have been available had the action been brought by P2.

Sub-clause (5) makes sub-clauses (2) and (4) subject to any express term of the contract which narrows the defences or set-offs available under sub-clause (2) or narrows the defences, set-offs or counterclaims available under sub-clause (4). For example —

- (a) in relation to sub-clause (2), P2 agrees with P1 to purchase a painting, which is to be delivered to P3 who is expressly given a right to enforce

the delivery obligation. P2 owes P1 considerable sums for other art works purchased. P2 wishes to ensure that P3's right is not affected. P1 and P2 expressly agree that P1 may not raise against P3 defences and set-offs that would have been available to P1 in an action by P2;

- (b) in relation to sub-clause (4), P1 agrees with P2 to pay \$5,000 to P3 if P2 will transfer a number of cases of wine to P1. P3 is in dispute with P1 over a prior contract and P1 alleges that P3 owes P1 money. P2 is concerned that P1 may seek to withhold part of the \$5,000 payable to P3 by raising a set-off or counterclaim against P3 in relation to the prior contract. Consequently, P1 and P2 include an express term that P1 may raise no defences, set-offs or counterclaims of any nature whatsoever against a claim by P3 to enforce P1's obligation to pay the \$5,000.

Sub-clause (6) ensures that an analogous approach to that set out in sub-clauses (2) to (5) shall apply where the proceedings are brought against the third party and he seeks to avail himself of, for example, an exclusion clause.

Clause 5 provides that the right conferred by clause 2 is additional to any right the promisee has in relation to the enforcement of a contract term which benefits a third party.

Clause 6 provides that where the promisee has recovered damages (or an agreed sum) from the promisor in respect of either the third party's loss or the promisee's expense in making good that loss, the court or arbitral tribunal will reduce any award to the third party enforcing a term under clause 2 to take account of the sum already recovered by the promisee.

Clause 7 (1) ensures that the Bill does not undermine the existing law on who can enforce negotiable instruments.

Sub-clause (2) excepts the contract under section 39 (1) of the Companies Act (Cap. 50) which states —

“Subject to this Act, the memorandum and articles shall when registered bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.”.

Sub-clause (3) prevents a third party (for example, a customer of an employer) acquiring a right under the Bill to enforce a term of a contract of employment, against an employee.

Sub-clause (4), which excludes certain contracts relating to the carriage of goods, nevertheless does not prevent a third party from taking advantage of a term excluding or limiting liability. In particular, this enables clauses which seek to extend an exclusion or a limitation of liability of a carrier of goods by sea to servants, agents and independent contractors engaged in the loading and unloading process, to be enforced by those servants, agents or independent contractors (so called “Himalaya” clauses).

Sub-clauses (5) and (6) set out the definition of a “contract for the carriage of goods by sea”. The purpose of this definition is to exclude from the Bill not only those contracts already covered by the Bills of Lading Act (Cap. 384) but also those to which that Act could be applied under section 1 (5) of that Act (for example, a contract for the carriage of goods by sea evidenced by an electronic bill of lading). Section 1 (5) of the Bills of Lading Act states —

“The Minister may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to —

- (a) the issue of a document to which this Act applies;
- (b) the indorsement, delivery or other transfer of such a document; or
- (c) the doing of anything else in relation to such a document.”.

No such regulations have yet been made.

Clause 8 ensures that the Bill does not affect any existing right or remedy of a third party and allows for the judicial development of a third party’s rights.

Sub-clause (2) prevents a third party from invoking section 2 (2) of the Unfair Contract Terms Act (Cap. 396) to contest the validity of a term excluding or limiting the promisor’s liability under the Bill to the third party for negligently caused loss or damage (other than personal injury or death). Section 2 (2) of the Unfair Contract Terms Act (in which “other loss or damage” means loss or damage other than death or personal injury) states —

“In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.”.

Sub-clause (3) applies the standard limitation periods for actions for breach of contract in section 6 of the Limitation Act (Cap. 163) to actions by third parties under the Bill.

Sub-clause (4) ensures that those references in the Bill to the position “if the third party had been a party to the contract” are not to be interpreted as meaning that the third party should be treated as a party to the contract for the purposes of any other written law.

Clause 9 ensures that, where appropriate, the provisions of the Arbitration Act 2001 or the International Arbitration Act (Cap. 143A) apply in relation to third party rights under the Bill. Without the clause, the main provisions of the Arbitration Act 2001 or the International Arbitration Act would not apply because a third party is not a party to the arbitration agreement between the promisor and the promisee.

Sub-clause (1) deals with what is likely to be the most common situation. The third party’s substantive right (for example, to payment by the promisor) is conferred subject to disputes being referred to arbitration (see clause 2 (4)). This sub-clause is based on a “conditional benefit” approach. The sub-clause ensures that a third party who wishes to take action to enforce his substantive right is not

only able to enforce effectively his right to arbitrate, but is also “bound” to enforce his right by arbitration (so that, for example, a stay of proceedings can be ordered against him under the Arbitration Act 2001 or the International Arbitration Act).

Sub-clause (2) is likely to be of rarer application. The sub-clause deals with situations where the third party is given a right to arbitrate under clause 2, but the “conditional benefit” approach underpinning sub-clause (1) is inapplicable. For example, where the contracting parties give the third party a unilateral right to arbitrate or a right to arbitrate a dispute other than one concerning a right conferred on the third party under sub-clause (1). To avoid imposing a pure burden on the third party (in a situation where, for example, the contracting parties give the third party a right to arbitrate a tort claim made by the promisor against the third party), the sub-clause requires the third party to have chosen to exercise the right. Under the Arbitration Act 2001 or the International Arbitration Act, the right to apply for a stay of proceedings can only be exercised by someone who is already a party to the arbitration agreement. The timing point at the end of the sub-clause is designed to ensure that a third party who chooses to exercise his right to go to arbitration by, for example, applying for a stay of proceedings under the Arbitration Act 2001 or the International Arbitration Act, can do so.

#### EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.

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## TABLE OF DERIVATIONS

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| Right of third party to enforce contractual term         | 2             | 1  | Sub-clause (5) amended cp New Zealand Contracts (Privity) Act 1982, s. 8                     |
| Variation and rescission of contract                     | 3             | 2  | Sub-clause (1) (b) and (c) amended cp New Zealand Contracts (Privity) Act 1982, s. 5 (1) (a) |
| Defences, etc., available to promisor                    | 4             | 3  | —  |
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