**SUBMISSIONS BY THE LAW SOCIETY OF HONG KONG ON THE LAW REFORM COMMISSION OF HONG KONG'S CONSULTATION PAPER "PRIVITY OF CONTRACT"**

The Law Society has the following comments on the Consultation Paper:

## 1. Chapter 2 "Should the privity doctrine be reformed?"

**The Law Society agrees with the recommendations of the Sub-Committee (or where applicable, the majority view) to reform the privity of contract rule by legislation.**

One member has expressed the following view in relation to "*abolition"* of the rule:

"In fact, the Law Reform Committee might profit from further consideration of the option of wholesale abolition of the privity rule. The sub-committee expresses the view that the rule is "*fundamentally flawed*" and refers to longstanding academic and judicial criticism of its very foundations. One might have expected that to lead logically to a recommendation of wholesale abolition, but that is not the case. The Consultation Paper does not make it clear precisely what the disadvantages of abolition would be."

## 2. Chapter 4 "The Elements of the New Legislative Scheme"

### 4.117 Should arbitration clauses and exclusive jurisdiction clauses be binding on third parties?

This should be left in the first instance to the intention of the contracting parties. However, the slight uncertainties about the effect of section 8 of the English Act are noted. These uncertainties have been alleviated by the decision in ***Nisshin Shipping***, but the Hong Kong legislature may wish to avoid the need for similar litigation in Hong Kong. Any proposed legislation should clarify whether, for a third party to be treated as bound by an arbitration clause, it is sufficient for the substantive term to be generally subject to an arbitration clause, or whether it is necessary for the substantive term to specifically state that its enforcement by the third party is conditional on the third party using arbitration.

## 3. Additional Comments

### Issues Arising In Practice

Hong Kong is in the enviable position of being able to build its proposed reform on the foundations of the reforms in other common law jurisdictions. In the Consultation Paper, the sub-committee has provided a detailed analysis of the various legislative provisions in other common law jurisdictions. The sub-committee has also identified issues that have arisen from the legislation in those jurisdictions, such as the lack of clarity over the definition of a designated third party in New Zealand It would therefore be desirable to take the analysis further, by looking more closely at reported cases in the other jurisdictions, to identify problems that have arisen and the solutions that have been found by the courts. This might deal with the desire of the dissenting member of the sub-committee that "the effects of change [to the law of privity] should be ascertained in those jurisdictions where the doctrine has been reformed". It would then be possible to decide how Hong Kong should deal with each problem, and whether the solutions found in other jurisdictions should be adopted here. For example, it is open to the LRC to analyse the conclusions in ***Nisshin Shipping v Cleaves & Co Ltd.***, and to decide whether legislation in Hong Kong should spell out the conclusions reached there, so as to avoid the need for the same points to be litigated in Hong Kong. On the other hand, the LRC may consider it preferable to leave such matters to the Hong Kong courts.

### Law on Recoverable Loss

On a related matter, there have been cases with facts similar to ***Alfred McAlpine v Panatown***. It is clear from academic and industry commentary on that case, and from the experience of practitioners, that the law on recoverable loss and the so-called "*lacuna*" are matters of some long-term concern. It is worth considering what effect the reform of the privity doctrine will have on such cases, and whether at some point in the future, the LRC should address that area of law.

**The Law Society of Hong Kong**
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