

## RESPONSE FORM

### DISCUSSION PAPER ON THIRD PARTY RIGHTS IN CONTRACT

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gsi.gov.uk](mailto:info@scotlawcom.gsi.gov.uk). Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH91PR.

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# Summary of Proposals

## Impact assessment

1. Do consultees know of any information or statistical data, or have any comments on any potential economic impacts of either the current law relating to the third party rights or any proposed reform of that law?

(Paragraph 1.29)

### Comments on Proposal 1

«No.»

## Company groups

2. Are there other situations involving company groups beyond those identified in paragraphs 3.4-3.19 in which third party rights might be of use to contracting parties?

(Paragraph 3.19)

### Comments on Proposal 2

« Not known.»

## Construction projects and collateral warranties

3. Do consultees agree that collateral warranties are currently relied on rather than third party rights in Scots law? If so, is this problematic in practical terms? Would a modern set of rules on third party rights be utilised in place of collateral warranties should such rules be introduced?

(Paragraph 3.28)

### Comments on Proposal 3

« Not known.»

## Community of interest cases

4. Do consultees agree that, while parties to “community of interest” transactions should continue to be free to make use of third party rights law, there is no need to make special provision for such cases in any reform of the law?

(Paragraph 3.47)

**Comments on Proposal 4**

«Yes»

**Concepts and terminology**

5. Should any legislation on third party rights that may follow from this Discussion Paper and any subsequent Report be expressed in terms of rights or benefits or both?

(Paragraph 4.6)

**Comments on Proposal 5**

« Rights would be enough.»

6. Do consultees agree with the suggested terminology for the parties and for the right, and that these might be suitable for use in any legislation on third party rights in Scots law? Would these terms be easily understood in practice? Are there better alternatives?

(Paragraph 4.13)

**Comments on Proposal 6**

«Yes. Yes. No.»

7. Do consultees agree it is preferable for any legislation dealing with third party rights to avoid as far as possible any explicit juristic characterisation of the right?

(Paragraph 4.14)

**Comments on Proposal 7**

«Clearly the right is a right arising from a contract but it is unnecessary to spell this out.»

8. Is it a correct perception that a requirement that third party rights be constituted in formal writing (ie subscribed by the grantor(s)) is undesirable in the interests of maintaining flexibility?

(Paragraph 4.15)

**Comments on Proposal 8**

«Yes.»

9. Should any legislation on third party rights make clear that formal writing is not required for their constitution?

(Paragraph 4.15)

#### **Comments on Proposal 9**

«This would seem unnecessary if the proposed legislation is framed sensibly.»

10. Is it useful in the interests of legislative economy to draw analogies as may be appropriate with other legal institutions such as the unilateral promise (eg to define without elaborating the remedies available to the third party)?

(Paragraph 4.18)

#### **Comments on Proposal 10**

«Yes - but probably better to use contractual remedies as the model rather than the remedies of a promisee as these are less familiar and may indeed be described by reference to contract.»

11. Should there be any general or more specific provision to the effect that a third party right may be conditional upon some performance by the third party or some other uncertain future event?

(Paragraph 4.20)

#### **Comments on Proposal 11**

«This would not seem to be necessary but, if there were thought to be a need to remove doubts, then a provision like DCFR II. - 9:301(2) would do no harm.»

#### **Identification and intention**

12. Do consultees agree that the third party must be identified by or identifiable from the contract, in particular as a member of a particular class of persons or as a person fulfilling or meeting conditions laid down in the contract?

(Paragraph 5.11)

#### **Comments on Proposal 12**

«The third party should have to be identifiable as the person on whom the contracting parties intended to confer the right. No need for the "in particular" bit.»

13. Do consultees agree that a right in favour of a third party who is not in existence at the time that the right is set up should continue to be valid and enforceable by any such third party which subsequently comes into existence?

(Paragraph 5.11)

#### **Comments on Proposal 13**

«Yes»

14. Should it be provided for the avoidance of doubt that when a third party right is drawn in favour of a class, a person who was in existence at the time the relevant contract is formed, but was not then a member of the intended class, may become so upon joining the class if the contracting parties so intended?

(Paragraph 5.11)

#### **Comments on Proposal 14**

«This should not be necessary if the main provisions of the proposed legislation are framed sensibly - e.g. as in the CESL.»

15. Subject to the over-arching requirement that the existence of any third party's right must depend upon the contracting parties' intention, should the identification or identifiability of the third party come from the contract only, or should it be possible to refer to extra-contractual evidence by which a third party can be identified?

(Paragraph 5.15)

#### **Comments on Proposal 15**

«No need to go into this in the legislation. If the right is conferred on members of a class then surely external evidence would always be necessary to determine whether a particular person was a member of that class. Indeed even a claimant named in the contract might have to produce evidence that he or she was the person named.»

16. If so, what kinds of evidence might be allowed?

(Paragraph 5.15)

**Comments on Proposal 16**

«No need to go into this in the proposed legislation. This could cause more problems than it might resolve.»

17. Do consultees agree that the current rule in Scots law, that the intention of contracting parties to create a right by their contract for an identified or identifiable third party can be express or implied, should be continued?

(Paragraph 5.21)

**Comments on Proposal 17**

«Yes. Probably no need to specify this in the legislation.»

18. Do consultees agree that it should be expressly provided that an exclusion or limitation of the third party's liability to one or more of the contracting parties can be an example of a third party right?

(Paragraph 5.25)

**Comments on Proposal 18**

«Yes»

**Irrevocability**

*NB Respondents may wish to note the discussion in paragraph 6.3 of some of the terms which are used in the questions in this section*

19. Do consultees agree that any requirement that a third party right cannot be constituted in a contract unless the right has first been made irrevocable by the contracting parties should be abolished?

(Paragraph 6.6)

**Comments on Proposal 19**

«Yes. It makes no sense to say that only an irrevocable right can be conferred on a third party.»

20. Do consultees agree that it should be specifically provided that where a contract provides for a third party right while reserving the entitlement of the contracting parties to vary or cancel the right, that entitlement may only be defeated by (i) the

fulfilment of any conditions for the third party's entitlement to enforce the right before any variation or cancellation is completed, or (ii) the operation of personal bar against the contracting parties' exercise of their entitlements?

(Paragraph 6.9)

### **Comments on Proposal 20**

«I found para 6.8 of the DP rather confusing. I don't see why a revocable right should not be conferred on the third party. This could include one which was revocable even after it had vested in the third party. I favour the solution of the DCFR II. - 9:303. The CESL art. 78 reflects the same policy but leaves more to the general law.

There are two questions here. First, when do the contracting parties lose their normal freedom to change their contract by agreement - in particular in this situation to remove or change the term of the contract conferring the right (whatever its nature) on the third party? Secondly, what is the nature of the right provided for the third party under the contract (e.g. fixed or variable)? The first is a question for the law to resolve: the answer might e.g. be as soon as the contract is concluded, or on intimation to the third party, or on intimation or an equivalent "externalising" event such as registration, or only on acceptance by the third party. This is a question of policy for the law. The second question - as to the nature of the right conferred, depends on the terms of the contract. Normally the right of a creditor in an obligation is not revocable by the debtor in the obligation. So, if nothing is said in the contract the normal rule will be that the nature of the right conferred is that it is not revocable.

To put this another way, there is a distinction between the revocability of the grant of the right and the revocable content of the right. So, if we assume that the grant of the right becomes irrevocable on intimation (not, of course, the only possible policy choice), there can be four situations:

1. an irrevocable grant of an irrevocable right (the normal situation after intimation)
2. an irrevocable grant of a revocable right (the situation after intimation if the contract provides for the right to be revocable - e.g. a pension which can be stopped if the recipient is convicted to more than 12 months in prison)
3. a revocable grant of an irrevocable right (the normal situation before intimation)
4. a revocable grant of a revocable right (the situation before intimation if the contract provides for the right to be revocable, as with the pension case mentioned above).»

21. Do consultees agree that an express contractual statement that a third party right conferred by the contract is irrevocable should be given effect, at least if delivered, intimated or otherwise communicated to the third party?

(Paragraph 6.11)

### **Comments on Proposal 21**

«I think that the right, once there has been intimation or the equivalent, should be irrevocable unless made revocable by the contract. An express declaration of irrevocability should be unnecessary. It would be confusing to put this in the proposed legislation.»

22. Do consultees agree that, where a contract sets up a third party right without any provision for an entitlement of the contracting parties to vary or cancel the right, either:

- (i) the fulfilment of any conditions for the third party's entitlement to enforce the right will prevent any variation or cancellation by the contracting parties; or
- (ii) representations of irrevocability or unmodifiability made to the third party by the contracting parties (or any one of them?) and detrimentally relied upon by the third party will lead to the operation of a personal bar against any attempt by the contracting parties to revoke or modify the third party's right?

(Paragraph 6.17)

#### **Comments on Proposal 22**

«No. The parties should remain free to change their minds until intimation to the third party or the equivalent (see below). Suppose that A and B conclude a contract one evening whereby B is to pay a named third party (X) a certain sum. A contractual document is signed by both but remains in A's hands. X, by existing, has fulfilled the only condition for his or her entitlement but knows nothing of the right or the contract. Overnight A and B have second thoughts and think of a better way of conferring a benefit on X. Surely they should be able to tear up their contract and start again or, if they prefer, to vary the contract so as to give effect to the better solution they have devised. The principle of party autonomy should at this stage prevail over X's expectation interest, given that X has no expectation interest at all as he or she knows nothing of what is in the contract..»

23. Do consultees agree that a post-contract promise to the third party by the contracting parties that a third party right conferred by the contract is irrevocable or unmodifiable should be given effect if the steps needed for the constitution of an enforceable promise have been met by the contracting parties?

(Paragraph 6.18)

#### **Comments on Proposal 23**

«This seems to be a separate question, outside the scope of this exercise. It should be left to the general law on promises.»

24. Do consultees agree that where a contract provides for a third party right without any provision about an entitlement of the contracting parties to vary or cancel the right,

there will be no such entitlement if the term conferring the right upon the third party has been delivered or intimated to that party?

(Paragraph 6.21)

#### **Comments on Proposal 24**

«Yes. This is the key policy decision. Practically everything else flows from this.»

25. Do consultees further agree that the contracting parties may at the time of the delivery or intimation mentioned in the previous question reserve an entitlement to vary or cancel the third party's right?

(Paragraph 6.21)

#### **Comments on Proposal 25**

«This is puzzling. The nature of the right would depend on the contract. It could be one which was subject to variation or cancellation by the contracting parties - e.g. an annuity which could be cancelled if the annuitant commits a serious crime. Proposal 25 seems to envisage a contract which confers a normal irrevocable right on a third party (X) followed by an attempt by the contracting parties to change the nature of X's right at the time of intimation to X. This seems odd. Would the parties be varying their contract at precisely the same moment as intimating it to X? I would not support any such provision. If the parties want to confer a revocable or variable right they can easily ensure that the contract provides that the right is to be of that nature. There is no need for a provision enabling them to change the nature of the right at the precise moment of intimation or delivery - not a moment before or a moment later.»

26. Do consultees also agree that any purported acceptance of the right by the third party should not by itself have the effect of making the right irrevocable or unmodifiable?

(Paragraph 6.21)

#### **Comments on Proposal 26**

«Yes. Intimation is a more useful and flexible crystallising event than acceptance.»

27. Should registration of a contract conferring a third party right, whether for preservation only or also for execution, make that right irrevocable or unmodifiable unless the contract expressly provides the contracting parties with an entitlement to vary or cancel the right?

(Paragraph 6.23)

### **Comments on Proposal 27**

«Yes, but the drafting should be general and not limited to Scottish registers. The principle is that putting the contract into the public domain "externalises" it sufficiently to give the third party expectation interests which should be respected. What about publishing it on the web?  
»

28. Should the third party's detrimental reliance (perhaps defined along the lines found in sections 1(3) and (4) of the Requirements of Writing (Scotland) Act 1995), based upon informal knowledge of its right and known to and acquiesced in by the contracting parties, make a third party right irrevocable or unmodifiable?

(Paragraph 6.27)

### **Comments on Proposal 28**

«Yes»

29. In addition, should third party reliance that is reasonably foreseeable by the contracting parties (although they had no actual knowledge of it at the time it happened) have the same effect?

(Paragraph 6.27)

### **Comments on Proposal 29**

«It is difficult to see how this situation could arise if the contract has not been "externalised" in any way but just remains known to the contracting parties alone. How could the contracting parties reasonably foresee that the third party would rely on a term which they have not intimated or made public in any way? Perhaps the situation to be covered is where e.g. they have told a friend of the third party about the right and could reasonably anticipate that the third party would hear of it and act in reliance on it. Maybe this should be covered, at least if the reason for the reliance is something done by the contracting parties and not e.g. spying by the third party. It might solve the publication on the web kind of case. Maybe the answer to this question depends on what "equivalents to intimation" are provided for in the legislation.»

30. Do consultees agree that a third party right should not become irrevocable simply because the third party has informally acquired knowledge of the existence of the right?

(Paragraph 6.30)

### **Comments on Proposal 30**

«Yes»

31. Should the third party's death prior to any cancellation or variation of the contract containing its right have the effect of making the right irrevocable or unmodifiable so that it becomes enforceable by the deceased's executors?

(Paragraph 6.31)

**Comments on Proposal 31**

«No»

32. Should there be some provision about the effects of assignation in relation to making a third party right irrevocable or unmodifiable? If so, which direction should that provision take on the matter?

(Paragraph 6.37)

**Comments on Proposal 32**

«Not necessary.»

33. In relation to making a third party right irrevocable or unmodifiable, should there be some provision about the effect of the third party declaring a trust over its right? If so, which direction should that provision take, and, in particular, should it take account of the identity of the trust beneficiary?

(Paragraph 6.38)

**Comments on Proposal 33**

«Not necessary.»

34. Do consultees agree that there is no need in the present exercise to deal with competing claims between the third party and the contracting parties, and that these should be left as matters for the interpretation of the contract and/or the application of other relevant rules of law such as donation?

(Paragraph 6.43)

**Comments on Proposal 34**

«Yes.»

### **Renunciation or rejection of its right by the third party**

35. Would a statutory mechanism allowing third parties to renounce rights conferred in their favour be useful?

(Paragraph 7.8)

#### **Comments on Proposal 35**

«Yes, as in the DCFR.»

36. Should it be provided that such renunciation of a third party right may be express or implied from the third party's conduct?

(Paragraph 7.8)

#### **Comments on Proposal 36**

«I would prefer the certainty of requiring notice. The contracting parties should be enabled to know where they are in relation to the right.»

37. Is it necessary to make any provision to protect the contracting parties against unfair exercise of the third party's power to renounce the right, for example to require the return of any benefit already conferred and reimbursement of expenses incurred by the contracting parties?

(Paragraph 7.8)

#### **Comments on Proposal 37**

«No.»

38. Should it be made possible to renounce a right in part if it is divisible?

(Paragraph 7.8)

#### **Comments on Proposal 38**

«A provision to this effect is probably unnecessary and might be unfair on the contracting parties. In practice they would normally agree to a partial renunciation but a variation of this nature should not be forced on them.»

### **Remedies available to the third party**

39. Should it be provided that third parties have at their disposal all remedies which are appropriate to the enforcement of their right? If not, how (if at all) should the issue of remedies be addressed in any legislation on third party rights?

(Paragraph 7.13)

#### **Comments on Proposal 39**

«The "appropriate" formula is too vague. The solution in the CESL art. 78(3)(a) seems a good one.»

40. Would it be useful to make clear in legislation the availability of (i) a damages claim; (ii) a right to a cure in appropriate cases, possibly as an aspect of specific implement; (iii) a right to rescind for material breach?

(Paragraph 7.13)

#### **Comments on Proposal 40**

«The CESL solution would make all this unnecessary. To legislate specifically on these issues could give rise to undesirable difficulties and complications. E.g. care would have to be taken to identify what was being rescinded. It would only be the relationship with the party who was to render the performance which would be terminated..»

41. Should third parties be entitled to exercise the remedy of rectification in relation to the contract under which rights are claimed?

(Paragraph 7.14)

#### **Comments on Proposal 41**

«Yes, but it is probably not necessary to provide for this.»

### **Defences**

42. Are specific provisions required regarding the enforceability of third party rights arising from contracts which fail as a result of invalidity, illegality, or frustration?

(Paragraph 7.19)

#### **Comments on Proposal 42**

«The solution in the DCFR seems appropriate.»

43. Would a specific provision, to the effect that compensation under the Compensation Act 1592 arising from or in connection with the contract and relevant to the third party's right under the same contract could be used in extinction of the third party's claim if liquid, be appropriate and useful?

(Paragraph 7.24)

**Comments on Proposal 43**

«No. This can be left to the general law.»

**Prescription**

44. Should a specific provision be inserted into paragraph 1 of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 to make clear that the short negative prescription applies to third party rights arising from a contract?

(Paragraph 7.26)

**Comments on Proposal 44**

«Not necessary.»

**Liability of one contracting party if the other defaults on the contract**

45. If one of the contracting parties defaults on the contract so that the other contracting party is unable to perform to the third party as required by the latter's right under the contract, should the third party have a remedy against the initially defaulting party?

(Paragraph 7.27)

**Comments on Proposal 45**

«No. The third party's remedies should be against the party who is the debtor in the obligation to the third party. Many of the difficulties mentioned could be avoided by the contract.»

**Contracting out of liabilities to third parties**

46. Do consultees agree that no express provision is needed to deal with the possibility that contracting parties may exclude or limit a liability to third parties (such as damages) that would otherwise arise?

(Paragraph 7.30)

**Comments on Proposal 46**

«Yes.»

**Other points arising from the 1999 Act**

47. Do consultees agree that it should be clear on the face of any legislation arising from this Discussion Paper that the third party can enforce only its own rights under the contract?

(Paragraph 7.33)

**Comments on Proposal 47**

«Yes.»

48. Would an equivalent to section 4(1) of the 1999 Act serve any useful purpose in Scotland?

(Paragraph 7.34)

**Comments on Proposal 48**

«No»

49. Do consultees agree that the third party need not involve any of the contracting parties in its action beyond the one from whom it seeks a remedy?

(Paragraph 7.35)

**Comments on Proposal 49**

«Yes»

50. Do consultees agree that there is no need in Scots law for a provision equivalent to section 5 of the 1999 Act?

(Paragraph 7.38)

**Comments on Proposal 50**

«Yes»

## **Relationship with specific rules**

51. (a) Do consultees agree that, in principle, the general reforms proposed in this Discussion Paper should be without prejudice to the specific third party rights under the current law (for example, in the areas listed in paragraphs 8.3 and 8.4)?

(b) Do consultees consider that any of the specific third party rights should be amended in the light of the general reforms which are proposed? Would it be desirable to provide that those reforms should not extend to employment contracts relating to employees, workers and agency workers?

(Paragraph 8.6)

### **Comments on Proposal 51**

«(a) Yes.

(b) No to first question: competency problems. Yes to second.»

## **Methods of reform**

52. (a) Are there advantages in having a comprehensive statutory statement of the law on third party rights?

(b) Alternatively, should any legislation seek only to amend the common law so far as is necessary to achieve the desired reforms?

(Paragraph 9.17)

### **Comments on Proposal 52**

«(a) Yes - but not too comprehensive. It can cause more problems than are solved if the legislation attempts to achieve results which follow from the background law already. Please keep it simple. Something on the lines of the DCFR or CESL would be admirable. The 1999 Act is very long-winded.

(b) No. This would probably perpetuate confusion.»

### **General Comments**

«This is an excellent Discussion Paper - an example of what a good DP should be.»

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.