

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.

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Name:

Senators of the College of Justice

Organisation:

Court of Session

Address:

Parliament House, Parliament Square, Edinburgh, EH1 1RQ

Email address:

lppo@scotcourts.gov.uk

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

This branch of Scots law is ripe for reform. It is difficult to expound with clarity and is based upon a Latin term (*'jus quaesitum tertio'*) that is unfamiliar to most business people. Any new legislation should promote simplicity and certainty. Both contracting and third parties must be able to arrange their affairs with confidence.

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

We are not aware of any such situations.

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

Collateral warranties are frequently used in the construction industry. They can give rise to the practical difficulties identified in the discussion paper. Our impression is that the principle of *jus quaesitum tertio* is only relied upon as a fall-back position. We believe that new rules on third party rights will be used in place of collateral warranties. Whether the business community adopts the new regime, however, will depend on the views of those drafting construction contracts.

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

We agree that there is no need to make special provision for ‘community of interest’ cases, given that they are now largely regulated by the Title Conditions (Scotland) Act 2003.

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

We favour the use of the term “rights”, because it clearly identifies the nature of the third party’s interest in the transaction. Contrary to the DCFR commentary, we believe that the term “benefits” adds a degree of imprecision.

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

We agree that the terms proposed by the SLC in para. 4.13 should be adopted. They are clearer than the alternatives.

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

We agree with this proposal, but our answer is linked to our comment on proposal 8 below.

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

While we agree that the parties should not require to constitute a third party right in formal writing, we wish to enter a caveat. In most instances, it will be preferable for the parties to create a written record. That is no doubt obvious to commercial persons and their advisors. The proposed approach may yield a small class of cases where the court will have to scrutinise and evaluate extensive evidence on whether (a) a third party right was created, and (b) if so, its scope.

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

See our answer to proposal 8.

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

Unilateral promises are rare creatures in Scots law. Many people would be uncertain about the nature of the right accorded to a promisee. The wording employed in Article 78 of CESL most clearly conveys the scope of the right granted to a third party.

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

It is preferable if the law is to be found in one place, rather than in a mixture of statute and common law. We believe that the legislation should include a provision similar to 9:301 of the DCFR.

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

Yes

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

In our view, if there is to be 'stand alone' legislation on third party rights, it would be useful to spell this out.

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

Identification of the third party should be determined by the terms of the contract. Allowing other evidence would tend to generate too much uncertainty.

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

(Paragraph 5.15)

Comments on Proposal 16

This is not applicable in light of our answer to proposal 15.

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. Framing the legislation in terms of the intention of the contracting parties should remove the uncertainty feared by the commercial world.

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. This seems to us to be uncontroversial.

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. In our view this is the necessary springboard for the proposed revision of the law.

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

This formulation appears unduly complex. We see some force in the simpler approach adopted by the PICC, but modified by a requirement of notification rather than acceptance by the third party.

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

We answer this question Yes, on the basis that the third party has received notification.

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

We agree with both branches of this proposal, which are firmly based on equitable considerations. We would add the rider, however, that any legislative provision should avoid reference to personal bar, because of the imprecision of that principle.

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

Yes. This seems straightforward.

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. Notifying the term to the third party should be seen as an important step.

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

Yes. That is consistent with the rationale underpinning the proposals.

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. The law should focus on the intention of the contracting parties at this stage.

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. This maintains the integrity of the public registers.

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

We answer this and the next question in the affirmative. Once the parties have expressed their intention to confer a right on a third party, their entitlement to revoke or modify that right should be lost if the third party acts in the described manner.

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

See the last answer.

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

We agree that something more is required before the third party's right becomes irrevocable.

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. Why should the estate be in a better position than the deceased?

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

This is a difficult point that would require complex drafting. We conclude that it would be better to leave it to the courts to develop the jurisprudence on the matter.

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

Our answer is the same as for Proposal 32.

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

In the interests of certainty, it would be preferable to include such a provision.

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

Yes

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

It would be better for the legislation to remain silent on this matter. Questions of unjust enrichment and the like would be better dealt with on a 'case by case' basis.

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

(Paragraph 7.8)

Comments on Proposal 38

This is potentially a complex issue. What constitutes divisibility? Should the third party be able to pick a particular cherry or cherries as it wishes? We suggest that this point is also

better left to be dealt with on a 'case by case' basis.

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

We answer the first question yes. That is consistent with the whole approach taken by the SLC in the Discussion Paper.

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

We have no strong views on this point, but are inclined to think it is unnecessary.

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

This remedy is only likely to be used in exceptional circumstances, but we agree that it should be open to the third party.

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

It would probably be useful to set out these matters in the legislation.

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)

We think that a provision regarding compensation would be useful, but wonder whether a reference to the 1592 Act might be thought to be archaic.

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

Yes. Making such provision would avoid any doubt on the matter.

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

Yes. It should be competent for the third party to sue the initially defaulting party, although the normal remedy will lie against the other contracting party.

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

We agree that such a provision is unnecessary.

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

We believe that such a provision is unnecessary.

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

The third party should not require to convene the other contracting party or parties, but the Rules of Court should require it to serve the summons on them.

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

We agree that no such provision is required.

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) We agree that any reform should be without prejudice to the rules relating to such specific categories of third party rights.
- (b) We think that there should be a specific exclusion in relation to employment contracts.

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

'Piece-meal law' is never satisfactory. So far as reasonably practicable, we therefore favour a comprehensive statutory statement of the law.

General Comments

We do not wish to make any further comments.

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.