

## **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

The old general rule was that only a party to a contract could enforce its terms; anyone else (a “third party”) could not. The Contracts (Rights of Third Parties) Act 1999 (“the Act”) changed this by enabling third parties, in certain cases, to enforce terms in contracts made in their favour.

### **Which contracts does the Act apply to?**

The Act applies automatically to most contracts. Some contracts are excluded from the Act - certain carriage of goods contracts, negotiable instruments, and the articles of association of a company. Also, third parties may not enforce terms in employees’ or other workers’ contracts against the employee or worker.

### **How do third party rights arise?**

A third party right will arise in a contract if:

- the contract **expressly gives** the right to a third party - for example, if the contract states that XYZ Ltd (the third party) has the right to enforce certain warranty provisions; or
- a term **“purports to confer a benefit”** on a third party - for example, if a supply contract between manufacturer and dealer states that consumers (third parties) are protected by a product guarantee. However, in this case, a right will not arise if it is clear that the parties do not intend the term to be enforceable by the third party.

The Act applies to any sort of rights including a right to rely on the limits on liability in a contract - where the parties may agree, for example, that a subcontractor should benefit.

Any rights which a third party may have under the Act will be in addition to any other rights of the third party which exist independently: eg by virtue of a trust having been made or if a

third party is able to establish a claim in tort, such as a negligence action, or under any other legislation or even another contract, these claims are not affected.

### **Individual or class rights**

For any right to be enforceable, it must be clear who the intended third party is. This can be a named individual or company, but can also be a whole class of persons; the third party does not even need to exist when the contract is made. For example, in a case that came before the High Court, certain limitations of liability in an agreement which were expressed to extend to "any previous tenants" were capable of being relied on by those previous tenants, pursuant to the Act.

### **Can a third party right be cancelled?**

Unless the contract expressly provides a right to cancel or vary without that third party's consent, it will generally not be possible for the contracting parties simply to agree to cancel the contract or vary a third party's right without the prior consent of that third party, if the third party had communicated his assent (by words or conduct) to the term in question or has otherwise relied on it. The Court of Appeal recently clarified that it was not necessary for the third party to have communicated such assent before performance of the contractual obligation to which the right relates, so long as he communicates it before cancellation or variation of the relevant right.

### **Third parties' obligations**

The third party right can be made subject to conditions, but the Act cannot be used to place positive obligations on a third party. For example, a right for the third party to receive warranty services may be made subject to the third party keeping the product properly maintained. In one instance, the court found that a third party's right had to be enforced through arbitration, as this was the method of dispute resolution which the contracting parties had chosen under the contract.

## **Practical issues for businesses**

The most commonly-adopted approach to the Act taken by businesses and their advisers seems to be simply to exclude its application by including an express clause to that effect in contractual documentation. Such an express clause will ensure that any third party rights are not unintentionally created. Whilst this may indeed be the best approach for either one or all of the contracting parties, it is worth considering whether it may be beneficial to confer rights under the Act on certain third parties.

For example, some corporate groups structure their group supply agreements (such as central purchasing contracts) by enabling all relevant group members directly to enforce against the supplier any warranties, indemnities and other relevant terms. Similarly, businesses performing services often seek to use the Act to enable their sub-contractors and/or employees to take advantage of the benefit of any exclusion clauses contained in the services agreement.

However, particularly where a contracting party does wish to use the Act to confer certain rights on a third party, it is important to get the drafting right to ensure that the scope of the grant of the right is not wider than intended and does not unintentionally hinder the ability of the contracting parties to vary or rescind the contract.

For more specific advice in relation to the Act, please contact **Beverley Whittaker** or **Beverley Flynn** on 01483 302264.

*This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.*