Contract (Third Party Rights) (Scotland) Act 2017

2017 asp 5

1 Creation of a third-party right

(1) A person who is not a party to a contract acquires a third-party right under it where—

(a) the contract contains an undertaking that one or more of the contracting parties will do, or not do, something for the person's benefit, and

(b) at the relevant time it was the intention of the contracting parties that the person should be legally entitled to enforce or otherwise invoke the undertaking.

(2) The third-party right is the right to enforce or otherwise invoke the undertaking.

(3) The person who is to acquire a third-party right under a contract must be identifiable from the contract by being either named or described in it.

(4) A third-party right may be acquired by a person despite the fact that at the relevant time the person—

(a) was not in existence, or

(b) did not fall within the description of persons (if any) whom the contracting parties intended should benefit from, and be legally entitled to enforce or otherwise invoke, the undertaking.

(5) In subsections (1)(b) and (4), "the relevant time" means—

(a) the time when the contract was constituted, or

(b) if the undertaking was added to the contract by a modification of its terms, the time when the modification was made.

Commencement Information

I1 S. 1 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

2 Creation: further provision

(1) This section makes provision elaborating on section 1.

(2) The undertaking referred to in section 1(1)(a) may be one which depends on something happening or not happening (whether or not it is certain that that thing will or will not happen).

(3) The intention of the contracting parties referred to in section 1(1)(b) may be express or implied.

(4) A person may acquire a third-party right to enforce or otherwise invoke an undertaking despite the fact that—
   (a) the undertaking may be cancelled or modified,
   (b) there has been no delivery, intimation or communication of the undertaking to the person.

(5) The reference in section 1(1)(a) to an undertaking to do something includes an undertaking to indemnify a person.

(6) The reference in section 1(1)(a) to an undertaking not to do something includes an undertaking—
   (a) not to hold a person liable in a matter,
   (b) not to enforce, or not to enforce in full, a person's liability in a matter.

(7) This Act is without prejudice to any other enactment, or rule of law, that imposes requirements which must be fulfilled if an enforceable obligation is to be created.

Commencement Information
I2 S. 2 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

3 Contracting parties' freedom to alter third party's entitlement

(1) An undertaking contained in a contract which has given rise to a third-party right may be cancelled or modified by the contracting parties.

(2) Nothing in this Act precludes a contract from providing that an undertaking, which is contained in the contract and in relation to which a third-party right has arisen, will not be cancelled or modified by the contracting parties.

(3) Subsection (1) is subject to sections 4 to 6.

Commencement Information
I3 S. 3 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

4 Protection of third party's entitlement from retroactive change

(1) No account is to be taken of the cancellation or modification of an undertaking contained in a contract where and in so far as the undertaking is being enforced or otherwise invoked—
   (a) by virtue of a person's third-party right to do so, and

(b) in consequence of something happening or not happening prior to the undertaking being cancelled or (as the case may be) the modification being made.

(2) Subsection (1) does not apply in relation to a cancellation or modification if the contract provided that it may be made with retroactive effect.

Commencement Information
I4 S. 4 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

5 Protection of third party's entitlement after notice given

(1) Subsection (2) applies (subject to subsections (3) and (4)) where—

(a) a person who has a third-party right arising from an undertaking contained in a contract is given notice of the undertaking by a contracting party, and

(b) the undertaking is subsequently cancelled or modified.

(2) No account is to be taken of the cancellation or (as the case may be) modification of the undertaking when it is being enforced or otherwise invoked by virtue of the third-party right.

(3) Subsection (2) does not apply if—

(a) the undertaking is one which depends on something happening or not happening, and

(b) it remained uncertain whether that thing would happen or not at the time when the notice mentioned in subsection (1)(a) was given.

(4) Subsection (2) does not apply in relation to the cancellation or modification of the undertaking if—

(a) at the time when the notice mentioned in subsection (1)(a) was given, the person given the notice was told by the contracting party that the undertaking may be cancelled or (as the case may be) that the modification may be made, or

(b) the person who has the third-party right has given assent to the cancellation or (as the case may be) modification of the undertaking.

Commencement Information
I5 S. 5 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

6 Protection of third party's entitlement after undertaking relied on

(1) Subsection (2) applies (subject to subsections (3) and (4)) where—

(a) a person has a third-party right to enforce or otherwise invoke an undertaking contained in a contract,

(b) the person has done something, or refrained from doing something, in reliance on the undertaking,

(c) doing or (as the case may be) refraining from doing the thing has affected the person's position to a material extent,

(d) either—

(i) the contracting parties acquiesced in the person doing or (as the case may be) refraining from doing the thing, or

(ii) the person's doing or (as the case may be) refraining from doing the thing in reliance on the undertaking could reasonably have been foreseen by the contracting parties, and

(e) subsequent to the person doing or (as the case may be) refraining from doing the thing mentioned in paragraph (b), the undertaking has been cancelled or modified.

(2) Where the person is enforcing or otherwise invoking the undertaking by virtue of having the third-party right, no account is to be taken of the cancellation or modification of the undertaking if the person's position would be adversely affected to a material extent were the undertaking treated as having been cancelled or (as the case may be) modified.

(3) Subsection (2) does not apply in relation to the cancellation or modification of the undertaking if—

(a) the contract provides—

(i) that the contracting parties are entitled to cancel or (as the case may be) modify the undertaking, and

(ii) that their entitlement to do so will not be affected by the person doing, or refraining from doing, something in reliance on the undertaking, and

(b) the person knew or ought to have known about that provision of the contract before the person did, or refrained from doing, the thing mentioned in subsection (1)(b).

(4) Subsection (2) does not apply in relation to the cancellation or modification of the undertaking if the person has given assent to it.

(5) In legal proceedings, a person seeking to enforce or otherwise invoke an undertaking by virtue of having a third-party right to do so may not plead that a contracting party—

(a) is personally barred from cancelling or modifying the undertaking, or

(b) has waived any right to cancel or modify the undertaking.

Commencement Information

I6 S. 6 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

7 Remedies available to third party

(1) This section applies where a person has a third-party right to enforce or otherwise invoke an undertaking contained in a contract.

(2) The person has available, as a remedy for breach of the undertaking, any remedy for breach which a contracting party would be entitled to were the undertaking one in favour of the contracting party.

(3) Subsection (2) is subject to any contrary provision made in the contract.

Commencement Information
I7 S. 7 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

8 Defences available against third party

(1) This section applies where a person has a third-party right to enforce or otherwise invoke an undertaking contained in a contract.

(2) A contracting party has available, as a defence against a claim by the person that the undertaking has been breached, any defence which is both—
- (a) a defence that a contracting party would have against any other contracting party, and
- (b) relevant to the undertaking.

(3) Subsection (2) is subject to any contrary provision made in the contract.

Commencement Information
I8 S. 8 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

9 Arbitration

(1) In relation to a dispute to which subsection (2) or (3) applies, the person who has the third-party right mentioned in subsection (2) or (as the case may be) (3) is to be regarded as a party to the arbitration agreement mentioned in that subsection.

(2) This subsection applies to a dispute if—
- (a) the dispute concerns an undertaking being enforced or otherwise invoked by virtue of a person's third-party right to do so, and
- (b) an arbitration agreement provides for a dispute on the matter under dispute to be resolved by arbitration.

(3) This subsection applies to a dispute if—
- (a) subsection (2) does not apply to the dispute,
- (b) an arbitration agreement provides for a dispute on the matter under dispute to be resolved by arbitration,
- (c) a person has a third-party right to enforce or otherwise invoke an undertaking to resolve a dispute on the matter by arbitration under the agreement, and
- (d) the person who has the third-party right has—
  - (i) submitted the dispute to arbitration, or
  - (ii) sought a sist of legal proceedings concerning the matter under dispute on the basis that an arbitration agreement provides for a dispute on the matter to be resolved by arbitration.

(4) For the purpose of subsection (3)(d)(i), the person who has the third-party right is to be regarded as having submitted the dispute to arbitration if the person has done whatever a party to the agreement would need to do in order to submit the dispute to arbitration.

(5) A person is not to be regarded as having renounced a third-party right to enforce or otherwise invoke an undertaking to resolve a dispute by arbitration by bringing legal proceedings in relation to the dispute.

(6) In this section—

"arbitration agreement" has the meaning given by section 4 of the Arbitration (Scotland) Act 2010, and

"dispute" is to be construed in accordance with section 2(1) of that Act.

Commencement Information

I9 S. 9 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

10 Prescription

(1) An undertaking contained in a contract which is capable of being enforced or otherwise invoked by virtue of a third-party right is an obligation arising from the contract for the purposes of the Prescription and Limitation (Scotland) Act 1973.

(2) In subsection (1), "third-party right" means a right which has arisen by virtue of either—

(a) section 1, or

(b) the rule of law mentioned in section 11.

Commencement Information

I10 S. 10 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

11 Abolition of common-law rule: *jus quaesitum tertio*

(1) The rule of law by which a person who is not a party to a contract may acquire a right to enforce or otherwise invoke the contract's terms does not apply in relation to contracts constituted on or after the day this section comes into force.

(2) If a contract constituted before this section comes into force is modified so that an undertaking it contains gives rise to a third-party right under section 1, a person who may enforce or otherwise invoke the undertaking by virtue of that right may not do so by virtue of any right acquired by operation of the rule of law mentioned in subsection (1).

(3) A right rendered unenforceable by subsection (2) remains incapable of being enforced or invoked notwithstanding—

(a) its transfer to another person, or

(b) the third-party right under section 1 referred to in that subsection being relinquished (whether by transfer, waiver or otherwise).

Commencement Information

I11 S. 11 in force at 26.2.2018 by S.S.I. 2018/8, **reg. 2**

12 Application

Nothing in sections 1 to 9 applies in relation to an undertaking constituted before the day on which section 1 comes into force, unless the contract containing the undertaking provides otherwise.

13 Commencement

(1) This section and sections 12 and 14 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

14 Short title

The short title of this Act is the Contract (Third Party Rights) (Scotland) Act 2017.

Changes to legislation:
There are currently no known outstanding effects for the Contract (Third Party Rights) (Scotland) Act 2017.