

CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

EXPLANATORY NOTES

COMMENTARY

Section 6: Exceptions

23. *Subsection (1)* ensures that the Act does not undermine the existing law on who can enforce negotiable instruments.

24. *Subsection (2)* excepts the contract under section 14(1) of the Companies Act 1985 which states-

"Subject to the provisions of this Act, the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles".

25. *Subsection (3)*, which prevents a third party (for example, a customer of an employer) acquiring a right under the Act to enforce a term of a contract of employment, or similar contract, against an employee or worker uses various expressions which are defined in the National Minimum Wage Act 1998 or are defined by reference to that Act. The definitions, which are referred to in *subsection (4)*, are as follows.

(1) By section 54-

"*contract of employment*" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

"*employee*" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment;

"*worker*" (except in the phrase "*agency worker*" or "*home worker*") means an individual who has entered into or works under (or, where the employment has ceased, worked under)-

(a) a *contract of employment*, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

"*worker's contract*" is to be read in accordance with the definition of a worker.

(2) By section 35(2)-

These notes refer to the Contracts (Rights of Third Parties) Act 1999 (c.31) which received Royal Assent on 11 November 1999

an individual is a "*home worker*" if he contracts with a person for the purpose of that person's business, for the execution of work to be done in a place not under the control or management of that person.

(3) By section 34(1)-

an individual is an "*agency worker*" if he-

- (a) is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but
- (b) is not, as respects that work, a worker, because of the absence of a worker's contract between the person and the agent or the principal; and
- (c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

((IV) As to the definition of "*relevant contract*", the reference to the case where section 34 applies is to the circumstances in which, under subsection (1) of that section, an individual is an agency worker. The work falling within paragraph (a) of that subsection is the work which the agency worker is supplied to do for the principal.

26. *Subsection (5)*, which excludes certain contracts relating to the carriage of goods, nevertheless does not prevent a third party from taking advantage of a term excluding or limiting liability. In particular, this enables clauses which seek to extend an exclusion or limitation of liability of a carrier of goods by sea to servants, agents and independent contractors engaged in the loading and unloading process, to be enforced by those servants, agents or independent contractors (so called "*Himalaya*" clauses).

27. *Subsections (6) and (7)* set out the definition of a "contract for the carriage of goods by sea". The purpose of this definition is to exclude from this Act not only those contracts already covered by the Carriage of Goods by Sea Act 1924 but also those to which the 1924 Act could be applied under section 1(5) of that Act (e.g. a contract for the carriage of goods by sea evidenced by an electronic Act of lading). Section 1(5) of the 1924 Act states-

"The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to -

- (a) the issue of a document to which this Act applies;
- (b) the indorsement, delivery or other transfer of such a document; or
- (c) the doing of anything else in relation to such a document."

No such regulations have yet been made.