

# CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

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## EXPLANATORY NOTES

### COMMENTARY

#### *Section 1: Right of third party to enforce contractual term*

6. *Section 1* gives effect to the central purpose of the Act. It sets out the circumstances in which a third party would have the right to enforce a term of the contract.
7. *Subsection (1)* sets out a two-limbed test for the circumstances in which a third party may enforce a term of a contract. The first limb is where the contract itself expressly so provides. The second limb is where the term purports to confer a benefit on the third party unless it appears on a true construction of the contract that the contracting parties did not intend him to have the right to enforce it (*subsection (2)*).
8. *Subsection (3)* requires that, for subsection (1) to apply, the third party must be expressly identified in the contract by name, class or description, but establishes that the third party need not be in existence when the contract is made. This allows contracting parties to confer enforceable rights on, for example, an unborn child or a future spouse or a company that has not yet been incorporated.
9. *Subsection (4)* clarifies subsection (1). The third party's right of enforcement is subject to the contract's terms and conditions. It is open to the parties to limit or place conditions on the third party's right; for example, if he wishes to enforce the right he is to do so by way of arbitration and not litigation.
10. *Subsection (5)* makes it clear that the courts may award all the remedies which are available to a person bringing a claim for breach of contract to a third party seeking to enforce his rights under subsection (1). The normal rules of law applicable to those remedies, including the rules relating to causation, remoteness and the duty to mitigate one's loss, apply to the third party's claim.
11. *Subsection (6)* makes it clear that the Act is to apply so as to enable a third party to take advantage of an exclusion or limitation clause in the contract, as well as to enforce "positive" rights. The Act, for example, allows a term of a contract which excludes or limits the promisee's liability to the promisor for the tort of negligence and expressly states that the exclusion or limitation is for the benefit of the promisee's "agents or servants or subcontractors" to be enforceable by these groups.