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International Institute for the Unification of Private Law

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WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Meeting of the Drafting Group in Freiburg, 17-20 January 2001

Chapter [...]

THIRD PARTY RIGHTS

(Revised draft prepared by Professor M. Furmston in the light of the discussions of the  
Working Group at its 3<sup>rd</sup> session held in Cairo, 24-27 January 2000)

Rome, December 2000

## CHAPTER 99

### THIRD PARTY RIGHTS

- 99.1 If the parties to a contract expressly or impliedly state that the contract, or some obligation under it, is intended to benefit a third party that third party shall be entitled to enforce the contract or obligation.
- 99.2 The third party must be ascertained with adequate certainty by the contract but need not be in existence at the time the contract is made.
- 99.3 For the purposes of this chapter, enforcement by the third party shall be treated as including reliance by way of defence on a clause in the contract which excludes or limits the liability of the third party.
- 99.4 The promisor may rely against the third party on any defence that could have been validly raised against the promisee unless the contract otherwise provides.
- 99.5 The contracting parties (or one of them if the contract so provides) may revoke the rights granted by the contract to the third party until the third party has accepted them or relied on them.

## COMMENTS

At the moment, the comments are addressed both to the members of the drafting group and to the future users of the Conditions.

In the light of the discussion at Freiburg they will be further refined for public consumption.

99.1 In the version discussed in Cairo, 99.1 stated "Subject to the provisions of this chapter, a contract creates rights and duties only between the parties to the contract" and the present 99.1 was 99.2. This change reflects a decision by 8 votes to 7 to delete the General Statement and put it into the Comments.

I think that the comments will need to make it clear both that third parties cannot routinely enforce contracts because it would suit them to do so and that modern contract law does make significant inroads into privity of contract. The question remains how one is to state concisely and accurately where the line is to be drawn. There is, I think, no real difficulty where the contract expressly says that the third party is to have contractual rights but the present text relies heavily on the decision taken in Cairo to rely on implied agreement. I do not myself feel at all confident where implied agreement will be held to exist. I think this view is widely held in England since the most obvious lawyer response to our 1999 Act has been a rapid growth in contractual clauses saying that the contract is not intended to confer rights on third parties. I do not find it at all easy to see where the line is drawn in the American cases either.

I have addressed this problem by means of a number of examples. I invite all members of the group to decide, without consultation with colleagues, whether the third party has contractual rights in these cases. This will provide a useful first test as to how easy the rule is to apply in practice.

### 99.4 Defences

The original draft simply said that the promisor could rely on any defence that could have been relied on against the promisee. Hartkamp suggested that under Dutch law it was acceptable to give an abstract guarantee by way of stipulation in favour of the third party. It is of course the case that in a letter of credit the liability of the bank may exist where the buyer is not liable to the seller but this is, I think, not a case of third party enforcement. The addition to the text is designed to meet Hartkamp's point,

### 99.5 Revocation

The original text met criticism on the ground that it should provide for unilateral revocation. I have no problem about contractually providing for unilateral revocation but I do have problems about permitting unilateral revocation where the contract is silent. In the case, for instance, of

insurance contracts in favour of third parties, I cannot see why the insurance company should be able to revoke because it is the promissor.

Should one deal with repudiation of benefit by third party?

Should one deal with joint obligations?

**EXAMPLES**

Please tick YES box if you consider third party (T) should be able to sue in contract and NO box if not. (Tick NO box if you think that T should be able to sue in tort but not in contract.) I realise that not all of the examples are international and/or commercial.

1. Professor A makes a contract with the University of Utopia under which he agrees to give forty 1-hour lectures comparing the Utopian and Ruritanian laws of contract. Professor A only appears for twenty lectures and does not mention Ruritanian law in the lectures. T, a student who has failed the examination in this course, is aggrieved.

YES NO

<input type="checkbox"/>	<input type="checkbox"/>
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2. A buys a new car, which is the subject of warranties both by the manufacturer and by the dealer. After he has had the car a month without any problems, he allows his wife T to drive it. Without warning the brakes fail and T is seriously injured.

YES NO

<input type="checkbox"/>	<input type="checkbox"/>
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3. A goes to an expensive furrier and selects and buys a coat. He tells the assistant (truthfully) that he is buying it for his wife T. By the side of the coat is a prominent card saying "it looks like mink, it feels like mink but is guaranteed man made." A gives the coat to his wife. In fact, owing to a mistake by the store, the coat is a real mink coat and T is ostracised by her friends.

YES NO

<input type="checkbox"/>	<input type="checkbox"/>
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4. The facts are as in 3 except that A does not tell the assistant for whom he is buying the coat.

YES NO

<input type="checkbox"/>	<input type="checkbox"/>
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5. A takes out a policy of insurance on the family car which is regularly driven by his wife, his two daughters and himself. The contract provides that the insurance company will cover anyone driving the car with A's consent. A's wife, T, has an accident while driving the car.

YES NO

<input type="checkbox"/>	<input type="checkbox"/>
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6. A sells his business to B on the terms that B will pay A £1000 a month for the rest of his life and will pay A's wife, T, £500 a month if A predeceases her. A dies. B refuses to pay T anything.

YES	NO
<input type="checkbox"/>	<input type="checkbox"/>

7. A instructs his lawyer, X, to prepare a will, the main effect of which will be to divide his property equally between his wife and his sister, T. By gross professional incompetence X prepares a will which is invalid. The effect is that A dies intestate and under the relevant succession law, all his property goes to his wife.

YES	NO
<input type="checkbox"/>	<input type="checkbox"/>

8. A hospital buys blood from a blood centre, which pays members of the public to supply blood. The blood is used by the hospital to give a transfusion to T but it turns out to be infected with HIV.

YES	NO
<input type="checkbox"/>	<input type="checkbox"/>

9. A, the owner of goods, makes a contract with a sea carrier to carry them from Zenda to Xanadu. The bill of lading is subject to the Hague Rules and purports to exclude the liability of

- (a) the master and crew;
- (b) stevedores employed in loading and unloading the cargo;
- (c) the owners of ships onto which the goods may be transhipped.

Are these exclusions effective?

	YES	NO
(a)	<input type="checkbox"/>	<input type="checkbox"/>
	YES	NO
(b)	<input type="checkbox"/>	<input type="checkbox"/>
	YES	NO
(c)	<input type="checkbox"/>	<input type="checkbox"/>

10. A married man with children but no grandchildren makes a contract with the XYZ insurance company under which A pays £10 a month to the insurance company and they promise to pay £10,000 to each of his grandchildren on his death.

YES      NO  
     

11. A, a company with a large factory, makes a contract with a company operating the local sewage system. Under the contract, A is entitled to discharge its waste into the sewer but undertakes not to discharge certain types of waste. In breach of this undertaking, A discharges waste which blocks the sewer and causes damage to T, another user of the sewer.

YES      NO  
     

12. T, the International World University, wishes to build a new law library. For legitimate tax reasons the contract for the erection of the library is made by Denning Ltd, a company wholly owned by the University, although the contractor well knows that when completed the library will be occupied and used by T. The building has been badly done and it will cost US \$ 5,000,000 to complete it satisfactorily.

YES      NO  
     

13. The facts are as in 12 except that there is a collateral warranty and guarantee executed between T and the contractor under which the contractor promises to pay T, US \$1,000,000 if there are defects in the building, whatever the extent of the defects.

YES      NO