FACULTY OF ADVOCATES

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COMMENTS ON SCOTTISH LAW COMMISSION'S DRAFT BILL

ON

CONTRACT (THIRD PARTY RIGHTS) (SCOTLAND) BILL

Introduction

1. The Faculty is grateful for the opportunity to comment upon the Contract (Third Party Rights) (Scotland) Bill (the "**Bill**"). In broad terms, the Faculty supports the proposals contained in the Commission's *Discussion Paper on Third Party Rights in Contract* (SLC DP, No 157, 2014). The Faculty considers that codifying and clarifying the common law of *ius quaesitum tertio* in modern language will be an important improvement for Scots contract law. We seek to offer, in what follows, comments on each substantive section of the draft Bill.

Sections 1 & 2

2. We observe that the core concept in the Bill is that of the "undertaking": s 1(1)(a) and (b). It is not otherwise defined. We do not see that lack of a definition as, *per se,* problematic but we do observe that it gives rise to a number of uncertainties. The obvious uncertainty is that of requirements of writing. The Requirements of Writing (Scotland) Act 1995, s 1(2)(a) sets out those juridical acts for which writing (or electronic writing in terms of s 9B) is a constitutive formal requirement. One of these is the "gratuitous unilateral obligation, except an obligation undertaken in the course of business". The use of the verb "undertaken" appears to have a different shade of meaning in s 1(2)(a)(ii) of the 1995 Act than it does in s 1 of the Bill. There may be, therefore, something to be said for the use of the word "stipulation" used in Art II.-9:301 DCFR instead of "undertaking". The DCFR wording would be consistent with the terms of s 10 which, in somewhat convoluted language, states that "an undertaking contained in a contract" is an "obligation arising from the contract" for the purposes of the 1973 Act.

3. There is the fundamental question of whether the third party's right is to enforce terms of the contract or only the "undertaking". Section 1(2) appears to permit only enforcement of the undertaking not particular terms of the contract. That has important implications for the construction of, for instance, section 7 (for which see below). It is not immediately clear to us whether an "undertaking" in terms of sections 1 and 2 of the Bill requires to be in writing where the benefit conferred upon the third party is conferred gratuitously by one of the contracting parties not acting in the course of business. We understand that the legislation is intended to allow for the creation of third party rights in contracts which are created without the use of formal writing. We understand too that the idea of including a statement to this effect within it has been considered but rejected. We observe, however, that the terms of section 2(7) seem to us to invite consideration of an argument that the rules regarding constitution of a gratuitous unilateral obligation, except an obligation undertaken in the course of business, is one of the requirements of "any other enactment" which must be fulfilled before an enforceable obligation is created.

4. We observed at the outset that we understood that the Bill is intended to codify and clarify the Scots law of third party rights. We refer to the opening paragraph of the Explanatory Notes which state that the Bill "seeks to reform that rule of contract law and to replace it with a statutory version". We would observe, however, that the terms of s 2(7), on an extended interpretation, leave the entire law of *ius quaesitum tertio* in force in so far as not inconsistent with the Bill.

Sections 3, 4 & 5

5. In section 3(1), we observe that the words "No account is to be taken of the cancellation or modification…" (emphasis added) may lead to some confusion because they contemplate a situation where a cancellation or modification might be said to "exist" albeit that no account is to be taken of it. We observe that a similar result could be achieved, without the potentially confusing "existence" of an ineffective cancellation or modification, by the following wording:-

> *"Any purported cancellation or modification of an undertaking contained in a contract shall be void and of no effect where and in so far as the undertaking is being enforced or otherwise invoked - …"*

6. In section 5(1)(d)(ii), we observe that, as drafted, there is no requirement of reasonableness. We respectfully suggest that the subsection be modified as suggested in bold below:-

"(ii) the person's doing or (as the case may be) refraining from doing the thing ought ***reasonably*** *to have been foreseen by the contracting parties."*

Section 6: Remedies

7. We observe that s 6(2) appears to confer a remedy in favour of the third party only in a case of breach. But the secondary remedies for breach presuppose a primary remedy to perform. We merely observe that it is curious that the primary remedy for performance is contained within the definition of s 1(2) rather than in section 6. We observe too that the formulation of s 6(2) proceeds on the analysis that a third party is not thereby a party to the contract, but is rather someone whose position is to be equated to a contracting party for defined purposes. The position in s 10 is, at least for prescription purposes, to treat a stipulation in favour of a third party as a contractual obligation.

Section 7: Defences

8. Section 7(1) proceeds on the basis that all the third party may enforce is an "undertaking" rather than a term of the contract. Section 7(2) refers to the third party's "claim", but that claim is again formulated in terms of a breach of the undertaking. There is presumably no difficulty with the basic idea that the party liable to perform in favour of the third party should be entitled to raise relevant defences against the third party who demands performance in terms of s 1(2).

9. We did not immediately understand the terms of s 7(2)(b): given the "claim" in s 7(2)(a) arises only on breach of the undertaking, if a defence to that claim exists under s 7(1)(a) it is not at all clear what s 7(1)(b) adds. For our part we see much in the simplicity of the general principle expressed in Art 5.2.4 PICC: "the promissor may assert against the beneficiary all defences which the promissor could assert against the promisee". This formulation could be adopted for s 7 by altering the preferred vocabulary of the Bill for the various participants.

Section 8: Arbitration

10. Section 8 of the draft Bill is described as following the divisions in section 8 of the 1999 Act and the Commission's policy approach is described as empowering contracting parties to provide for disputes with third parties in relation to third-party rights to be subject to arbitration without binding the third party to arbitration and allowing contracting parties to provide third parties

with a right to have claims against them arising other than under the contract to be subject to arbitration.

11. The Faculty notes, however, that whereas the scheme of section 8 of the 1999 Act is to make a third party a party to the arbitration agreement by reference to the "right under section 1 to enforce a term", the scheme chosen in the Bill to bring about the same result is by reference to the 'dispute'. Whether a "dispute" falls within the terms of an arbitration agreement is a matter of construction of that agreement in light of sections 4 and 5 of the Arbitration (Scotland) Act 2010 and Articles 19 and 20 of the Scottish Arbitration Rules. Following the simpler structure of the English provision would remove an element of complexity from section 8 of the draft Bill which is designed to appear user-friendly to parties considering arbitrating in Scotland.

Section 9: Renunciation

12. There is the slow-burning question of whether the "renunciation" is unilateral or bilateral. Given that the right is conferred, exceptionally, without the third party's consent, there is much to be said for the view that renunciation may be unilateral and that the effect of renunciation should be retrospective (cf DCFR Art II.-9:303). It might be thought too that some provision should be made for the method by which renunciation is to take place if it occurs expressly, e.g., by communication to the party who would otherwise be bound to perform to the third party. There is also the question of the extent to which the right to renounce may be lost if the third party has conducted itself in such a way as to give rise to reliance on the part of the debtor, who has acted to his detriment, that the performance will be required. Ordinarily it might be thought that the common law of personal bar would still apply. But the express reference to personal bar in other areas of the Bill could support the interpretation that the law of personal bar does not apply so as to bar the third part from renouncing.

Section 10: Prescription

13. The only observations which the Faculty would offer in relation to this provision relate to the drafting. First, given that section 10 of the Bill is to be contained in primary legislation, the "for the avoidance of doubt" is undesirable and unnecessary. If the section is clear there is no "doubt" to be avoided. Secondly, if an "undertaking" by one of the parties is to be considered for prescription purposes to be an "obligation" arising from the contract for the purposes of the 1973 Act, it might be thought that contractual vocabulary (obligation or stipulation) would be better than "undertaking".