Contract (Third Party Rights) (Scotland) Bill: Responses to Delegated Powers and Law Reform Committee’s Call for Evidence

1. What are the benefits of moving from a common law approach to a statutory footing?

   We agree with the points set out in the Introduction to chapter 3 of the Scottish Law Commission’s Discussion Paper on Third Party Rights in Contract.

   The existing common law in this area is somewhat antiquated in both terminology and utility, and is accordingly seldom used or relied upon by lawyers in Scotland. By eliminating uncertainty and the limitations of the current regime, we consider that the new statutory proposal, effectively codifying while discarding deficiencies of the common law, will be beneficial for Scots law and Scottish business.

2. What impact will this Bill have on third party rights?

   The proposed Bill will enable contracting parties to create rights for third parties who are not directly party to or signing the contract in question, with the comfort and certainty that clear statutory provisions confer.

   This will be useful in many commercial contexts, as highlighted in the SLC report. At its most basic, it removes the necessity for multipartite agreements in several contexts with all the attendant difficulties of multi-party execution, in circumstances where the majority of the parties have no interest in the relevant contract other than to see it performed in some respect or to obtain information, for example.

   From the perspective of a company lawyer, the new Bill usefully permits rights to be created in favour of parties whose names are not yet known, or which are not even in existence (yet), provided that they fall within a category that can be clearly defined. This means, for example, that rights can be conferred on separate individual companies within a wider corporate group of companies, without any necessity to either make all of the (then existing) individual companies party to the contract or to identify them by name – accordingly, new companies thereafter incorporated and forming part of the group can still have the benefit of rights/indemnities conferred by the original contract on the wider defined group. Similarly, in the private equity context, ‘follow-on’ investors in a company who subscribe for shares later than the original investor group, may be given rights under the ‘original’ investment or shareholders’ agreement, even where the identity of these later investors is not known at the outset when the agreement is entered into.

3. Do you think the Bill will increase the use of Scots Law?

   The Bill should remove any incentive to switch the governing law of otherwise ‘Scottish’ agreements to the law of England for no reason other than the greater certainty which English law provides at the moment in relation to third party rights.

4. Do you have any concerns about the approach taken in the Bill?

   No. The SLC has already consulted widely and it is clear that the Bill is an ‘evolved product’.

5. What are the financial implications of the Bill?

   There should be few, if any, direct financial implications for business. If businesses do not wish to engage with the new law, the most that should be required is an exclusionary clause in contracts, clarifying that no third party has any rights under the contract – along the same lines as that currently seen in English law contracts. Other businesses will wish to take advantage of the opportunities offered by the new legislation, which may involve taking legal advice to ensure that contracts contain appropriate provisions.