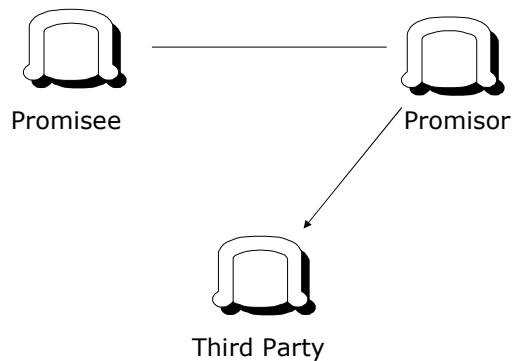


Recent Developments in European Contract Law  
Winter term 2007/08  
Prof. Dr. Grothe

## Contracts for the Benefit of Third Parties

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IntroductionSituation in the national laws:**German Law****§ 328 Contract for benefit of third party**

- (1) Performance towards a third party can be stipulated for by contract with the effect that the third party acquires the right directly to demand performance.
- (2) In the absence of a special provision, it must be deduced from the circumstances, in particular from the purpose of the contract, whether the third party is to acquire the right, whether the third party's right is to arise immediately or only subject to certain prerequisites, and whether power should be reserved to the persons concluding the contract to cancel or amend the third party's right without his consent.

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German law does not require the third party to participate in order to acquire the right in his own name.

The right to demand performance vests only in the third party, but he may decline it (§ 333 BGB).

The BGB draws up presumptions for particular cases (§§ 329, 330).

**§ 331 Performance after death**

- (1) If performance towards a third party is to take place after the death of the person to whom it is promised, in case of doubt the third party acquires the right to the performance on the death of the recipient of the promise.  
(...)

⇒ no formal requirements regarding wills

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**Case**

A tenant contracted with the defendant firm for the repair of a gas stove, which he had installed, the stove exploded through the negligence of the firm's engineer, and the tenant's cleaning woman was injured. The Reichsgericht allowed her to claim damages *in contract* on the ground that the repair contract between the firm and the tenant "contained a contract for the benefit of the plaintiff as well".

(RGZ 127, 218, 221)

⇒ Contract with protective effect for third parties

**Contract with protective effect for third parties**

- the third party must come in contact with the performance
- one party has a special interest in the third party`s protection
- both conditions must be evident to the promisor

**French Law****Art. 1165**

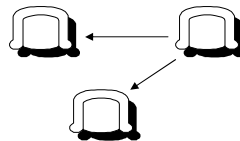
Agreements produce effect only between the contracting parties; they do not harm a third party, and they benefit him only in the case provided for in Article 1121.

**Art. 1121**

One may likewise stipulate for the benefit of a third party, where it is the condition of a stipulation which one makes for oneself or of a gift which one makes to another. He who made that stipulation may no longer revoke it, where the third party declares that he wishes to take advantage of it.

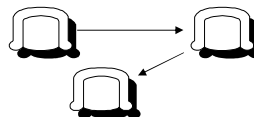
The benefit of a third party is only possible,

- if the promising person simultaneously promises something to the other contractor as well



Today: any *profit moral* is adequate

- if the contracting party makes the promisor some gift in connection with the transaction



Today: any economic transfer will suffice

**Action directe**

Third party right determined by **law**, not inferred from the will of the parties

- Art. 1994 par. 2, Art. 1705 par. 2, 1753 , 1595, 1798, 1676 code civil
- Art. 12 Law of 31 Dec. 1975
- Law of insurance

**English Law****Case *Tweddle v. Atkinson***

Mr Tweddle and Miss Guy were married rather young, and in order to contribute to the young couple's living expenses both fathers entered a written contract in which each bound himself to pay a named sum of money to Mr Tweddle. They further agreed "that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified". The bride's father, Mr. Guy, died without paying, so Mr Tweddle raised a claim against his executor, Atkinson.

The claim was dismissed: the court could not bring itself to accept that the plaintiff, a third party and a stranger to the contract, had any right to sue on it.

(*Tweddle v. Atkinson* (1861) 121 Eng. Rep. 762)

**Doctrine of privity of contract**

"A person who is a not party to a contract cannot enforce it or any of its terms. Even if the person can show that one of the parties to the contract was acting as his agent, he will still be unable to enforce it if he has not provided consideration."

*Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* (1915) AC 847

**Relevant Cases:**

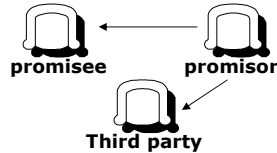
- *Morris v. C.W. Martin & Sons Ltd* [1966] 1 QB 716
- *Smith and Snipes Hall Farm LD v. River Douglas Catchment Board* [1949] 2 KB 500, 514
- *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446, 483

**Case *Beswick v. Beswick***

A written contract was made between a septuagenarian coal merchant in Lancashire and his nephew: the old man was to transfer his coal business to the nephew and the nephew was to pay him £ 6 per week for the rest of his life and then £ 5 per week to his widow. When the old man died, the nephew refused to pay the widow anything, and she sued him both in her own right and in her quality as administratrix of her deceased husband's estate.

The House of Lords decided the widow could not acquire rights under the contract. In the end she won all the same as the administratrix of her husband's estate.

(*Beswick v. Beswick* [1966] Ch 538, 557)

**The Contracts (Rights of Third Parties) Act 1999****Section 1:**

- (1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if –
  - (a) the contract expressly provides that he may, or
  - (b) subject to subsection (2), the contract purports to confer a benefit on him.
- (2) Subsection (1)(b) above does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.
- (3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

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**Contracts (Rights of Third Parties) Act 1999****Section 2:**

- (1) Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if-
  - (a) the third party has communicated his assent to the term to the promisor,
  - (b) the promisor is aware that the third party has relied on the term, or
  - (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

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### Recent Cases

▪ **Austrian *Oberster Gerichtshof* v. 9. July 2002, *Ecolex* 2002, 810:**

A third party can benefit from a contract if one of the parties recognisably wishes to bestow the performance on that third person or that this party is obviously obliged to care for this third person by law or by contract. Further, the third party must not have a contractual claim against any of the parties.

▪ **Austrian *Oberster Gerichtshof* v. 28. November 2002, *JB1* 2003, 279:**

The protective effect of a contract for the benefit of a third party only extends to those legal interests of the third party that are absolutely protected by law, such as his property (*absolute Rechtsgüter*). As the legal relationship to the third party is weaker than to a contracting partner, pure economic loss is not compensated under this title.

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### Principles of European Contract Law

**Article 6:110 PECL: Stipulation in Favour of a Third Party**

- (1) A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded.
- (2) If the third party renounces the right to performance the right is treated as never having accrued to it.
- (3) The promisee may by notice to the promisor deprive the third party of the right to performance unless:
  - (a) the third party has received notice from the promisee that the right has been made irrevocable, or
  - (b) the promisor or the promisee has received notice from the third party that the latter accepts the right.

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**Illustration 1**

P opens a bank account in his own name and pays regularly € 800 per month to the account. The bank promises to pay this sum to P's son B on B's demand. B may claim performance.

**Illustration 2**

The landlord L gives P permission to erect high voltage lines over a quarry which is worked by T, his tenant. P has promised L to pay an indemnity for damage done to T's property. T has a direct claim against P when damage is done.

**Illustration 3**

When taking a lease P, which intends to carry on production of inflammables, promises the landlord L that it will compensate the other tenants for any increase of their household insurance premiums which is caused by P's dangerous activity. The tenants who are informed by L about P's promise have a direct claim against P to have the increase of their premiums reimbursed.

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**Illustration 4**

The purchaser B has promised the seller V that B will pay the price to F which has financed V's acquisition of the goods. Later B and V agree that B should pay the price to V. F cannot claim the purchase price.

**Illustration 5**

P has made B his beneficiary of a life insurance which he has taken out with C. P may agree with C that C shall surrender the insurance to P and thereby annul B's right.

**Illustration 6**

The facts are the same as in Illustration 1 except that after having in May transferred € 800 to the account, P gives the bank order to withdraw € 500 and transfer them back to his other account. B may then only claim the remaining € 300.

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**Illustration 7**

The facts are the same as in Illustration 6 except that, before the bank received notice of withdrawal from P, his son B has claimed the € 800. P's order of withdrawal is then inoperative and the bank must pay the money to B.

**Illustration 8**

B buys goods from S and S promises that it will deliver the goods to C, to whom B has sold goods of that quantity and description. Having learned from B that it will get the goods from S, C resells the goods to D and asks S to deliver them to D. C has thereby accepted a right in the goods of which neither S nor B can deprive it.

**Illustration 9**

P has made B a beneficiary of a life insurance policy P has taken out with C, on terms that P may change the intended beneficiaries. P may alter the beneficiary from B to D, but after P's death his executors cannot do so.

**Unidroit Principles****Article 5.2.1**

- (1) The parties (the "promisor" and the "promisee") may confer by express or implied agreement a right on a third party (the "beneficiary").
- (2) The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.

**Illustration 1**

Professor A makes a contract with the University of Utopia under which he agrees to give forty one-hour lectures comparing the Utopian and Ruritanian laws of contract. A only appears for twenty lectures and does not mention Ruritanian law in the lectures. T, a student, does not acquire rights under the contract between A and the University.

**Illustration 2**

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. T is entitled to the € 500 a month.

**Article 5.2.2**

The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.

**Article 5.2.3**

The conferment of rights in the beneficiary includes the right to invoke a clause in the contract which excludes or limits the liability of the beneficiary.

**Illustration**

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; and (c) the owners of ships onto which the goods may be transhipped. These exclusions will be effective.

**Article 5.2.4**

The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.

**Illustration**

Company C takes out a policy of fidelity insurance with insurance company D to cover dishonest employees. The insurance policy provides that D will indemnify in full customers (T) who are defrauded by employees of C and that it will indemnify C only if C has not been negligent in the selection or supervision of the employees. Clearly in such a contract D will have defences against C which it cannot raise against T.

**Article 5.2.4**

The promisor may assert against the beneficiary all defences which the promisor could assert against the promisee.

**Article 5.2.5**

The parties may modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them.

**Article 5.2.6**

The beneficiary may renounce a right conferred on it.

*Thank you for your attention!*