

## EFFECT OF CONTRACTS IN REGARD TO THIRD PARTIES

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**Abstract:** The writing of the article is motivated by the insufficient commitment on the question of the effect of the agreements in the Republic of Macedonia. The article should contribute to better regulation of the rights and obligations of the agreement. The aim is to encourage contracting parties to the contract shall become in relationships and benefit from contracting parties. The effect of the agreements has meaning for the contracting parties which uphold their mutual rights and obligations, as well as the rights agreed in favor of a third party and thus exempt them courts.

**Keywords:** contract, obligation, contracting parties, effect, benefit.

### INTRODUCTION

According to the general rule, contracts cause relative effects so by means of contracts, rights and obligations between the contracting parties are created. For a long time this rule applied with no exceptions, hence the contracts wherewith the contracting parties would stipulate a right or an obligation for a third party, not only they were without an effect for that third party, they were also without effects for the very contracting parties. For third parties, the contracts cannot create any rights and obligations.

The development later on, that is, the requirements of the rapid legal turnover in modern legal systems led to a change i.e. abandoning of the strict principle of relativity in the obligations and provision of a more extensive effect of contracts beyond the structure of parties. Today contracts can be concluded in favor of a third party, and an effect can be promised in favor of a third party.

### CONTRACT IN FAVOR OF A THIRD PARTY

In ancient law it was not be possible to conclude a contract in favor of a third party. In Roman law, the following principle applied: *alteri stipulari nemo potest* (nobody can contract for another). Later on, in the period of Justinian, there was a deviation from this rule, and contracts emerged where in an indirect manner some rights and obligations were created in favor of a third party. It was possible to conclude a contract for a gift with an order (*donatio sub modo*), wherewith the donee obliged that he will transfer to a third party some property benefit that he received from the issuer of the order. In a contract of sale, one could agree for a part of the sale price to belong to a third party. In the law of pandect, the circle was spread to contracts that one was able to conclude in the benefit of a third party: succession agreement with an order, insurance agreement in favor of a third party, purchase and sale contract by debt assumption etc.

Some legislations today, guided by the principle of Roman law, have a negative attitude towards contracts in favor of a third party. This is the case with French law which being an exception, it provides an opportunity to contract in favor of a third party. Also the Austrian Civil Code in its initial preparation, has a negative attitude in this regard, and later when some provisions of this code were amended, contracts in favor of a third party became allowed. Unlike them, modern civil codes of Switzerland, Hungary and Poland had a positive attitude in regard to the possibility to conclude contracts in favor of a third party. This attitude is also shared by the General Property Code of Montenegro. In German law, a contract in favor of a third party is called a contract in favor of a third party (or a contract for the benefit of a third party).

In the pre-war Hungarian law, the contract in favor of a third party is a contract wherewith a person who did not participate directly in the conclusion of the contract, directly acquires a right from such a contract.

A contract in favor of a third party exists when a person promises (promisor) and obliges towards another person (promisee), to fulfill a prestation in favor of a third party – beneficiary. At the conclusion of the contract in favor of a third party, only two parties participate. These are the contracting parties (promisor and promisee, and on the basis of their agreement, such contract is created). A promisee is the person who agrees on a benefit of a third party. In the contract he has the position of a creditor (he may also be a debtor, if a bilateral obligatory contract is concluded). A promisor is the person who promises that he will do something for a third party. In the contract he has the position of a debtor (although in a bilateral obligatory contract he may also have the position of a creditor).

A third party is a person who does not participate in the conclusion of the contract, rather only has a benefit from the contract. His consent is not required for the validity of the contract. In order to have the right to a benefit, it is sufficient only to remain silent and not to oppose to the contract. He acquires an independent and immediate right to request the promisee (the debtor) to fulfill the prestation in his benefit.

A third party, beneficiary, can be any person who did not participate in the conclusion of the contract, neither a universal successor of the contracting parties, however still has some benefit from the concluded contract. Since the third party does not participate in the conclusion of the contract, he does not necessarily have to possess special qualities, that is, he does not have to possess business ability. According to an old view, a beneficiary cannot be a future person, that is, a person who does not exist at the moment of conclusion of the contract between the promisor and the promisee. However this is no longer a view, and there is a generally accepted attitude according to which a beneficiary can also be a person in the future. For example, a parent can conclude a contract on a life insurance in favor of his/her future unborn child, however for the contract to have a legal effect, it is necessary that the third person exists at the moment of performance of the contract, that is, the child should be already conceived at the commencement of the protection of his interests.

A contract in favor of a third party primarily emerged in the field of life insurance. With the conclusion of a life insurance contract, the right to payment of the insured amount is acquired by a third party (spouse, children of the deceased etc.). In the domain of insurance, a contract in favor of a third party is also transferred to other fields as well: purchase and sale contract, contract for a gift, lease contract. All these contracts are subjected to specific changes because the prestation is not fulfilled towards the other contracting party, rather towards a third party.

A contract in favor of a third party is usually concluded in a form of the separately named contract, however it may also be concluded in a form of a legacy between living persons (which is not a hereditary-legal, rather an obligatory institution).

A contract in favor of a third party usually can be concluded in any manner. If a specific form is stipulated for the basic contract, that the contract in favor of a third party should be concluded in this form as well.

A contract is considered concluded at the moment when consent of will has been reached between the promisor and the promisee, and it produces all stipulated legal effects, including the benefit for a third party, even when this will not be indicated at all.

The legal effect of the contract in favor of a third party is manifested through different relations that emerge between the third parties: a relationship between the promisor and the promisee, a relationship between the promisor and the beneficiary and a relationship between the promisee and the beneficiary.

1). The relationship between the promisor and the promisee is regulated entirely with the contract they conclude. This can be a lease contract, purchase and sale contract, contract for a gift etc. The clause in favor of a third party gives the promisee the right to ask the promisor to perform a specific prestation in the benefit of the beneficiary, which is something that the beneficiary can also ask from the promisor. On the basis of this clause, the promisee may ask the promisor to perform also the other obligations that arise from the contract. He may use all available legal remedies in an event when the promisee does not perform his obligations. If the beneficiary refuses the benefit, the promisee can ask for the benefit to be performed for himself. In German legal literature, such relationship is denoted as a legal coverage.

2). The relationship between the promisor and the beneficiary is perceived in the obligation of the promisor to fulfill the promise he gave to the promisee and to perform the prestation in the benefit of the beneficiary. The beneficiary acquires the immediate right to performance of the obligation taken over by the promisee. In such an event, the beneficiary has the position of a creditor and an authorized person by the promisor to request for a fulfillment of the obligation. This is a basic characteristic of the contract in favor of a third party, that on the basis of the contract between the promisor and the promisee, an authorization is created in favor of a third party.

The beneficiary may ask for the promisor to fulfill for him only what is promised on the basis of the contract with the promisee. The beneficiary does not have the right to ask for fulfillment of the contract as a whole, although only partial fulfillment has been stipulated in his benefit. He does not have the right to ask for fulfillment of the other contractual clauses in the contract, except for the ones that have been stipulated in his benefit.

The promisor may give to the beneficiary all the objections he may use also towards the promisee: objection for non-performance, objection due to nullity of the contract, objection that the obligation is not due yet. The promisor may also use an objection he personally has towards the beneficiary from a legal relation he has with him, however he may not use objections he has towards the promisee from some other legal relationship with him (for example, objection for a compensation).

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3). Between the promisee and the beneficiary there is a legal relationship that provides the explanation why the promisee agreed with the promisor something in favor of a third party. The relationship between the promisee and the beneficiary may be diverse. This primarily can be a payment of a debt that the promisee has towards the beneficiary from a former relationship. For example, the buyer will agree for the purchased book to be given to a third party, because the child of the promisee who has borrowed such same book, had destroyed it. It may also be a gift that the promisee gives to the beneficiary. For example, it would be the case when the buyer agreed to hand over the purchased item to the beneficiary as a birthday gift. Ultimately, it may also be a loan that the promisor gives to the beneficiary. For example, the buyer will pay the price to the beneficiary and this payment is considered a loan agreement.

Regardless of the cause in the specific case, the relationship between the promisee and the beneficiary remains with no effect on the other two relationship that are created on the basis of the contract in favor of a third party. This relationship between the promisor and the beneficiary is an internal relationship between them and refers to them only.

The promisee is authorized to revoke the agreed benefit intended for a third party, however this may also be done to the moment of provision of a statement by the beneficiary for the reception of the benefit that has been agreed for him. This authorization of the promisee belongs to his personal rights, so his successors cannot use it.

The statement of the contractor for the revocation of the benefit of a third party, as a unilateral legal act, leads to change of the content of the contract in favor of a third party. The revocation can be directed towards change personally to the beneficiary or towards revocation of the benefit as such. In the first case, this further remains a contract in favor of a third party, (another person takes the position of the previous person), and in the second case it is transformed into a contract that produced legal effect between parties.

In collective agreement, the legal effect of the contract extends not only to the contractual parties (unions and employers), but also to all employees (even potential employees) who did not participate in the conclusion of the contract. The extended effect of the collective agreements is in the fact that the content of collective agreements between these entities is mostly used for protection of employees' interests.

In regard to the issue of the legal nature of the contract in favor of a third party, there is no unique view in legal theory. Usually four opinions are distinguished. Three opinions try to bring contract in favor of a third party to an existing legal institute, one opinion to an institute of contract law, and the other two opinions to an institute of non-contract law. The fourth opinion points out that the contract in favor of a third party has special features that distinguish it as a separate legal category.

According to the first opinion, in contracts in favor of a third party, two operations are undertaken: the first one, wherewith the promisee concludes an agreement with the promisor and acquires a right form himself, and a second one, wherewith the promisee offers to transfer this right to a third party. According to this opinion, it is necessary to conclude two contracts when it is a matter of a contract in favor of a third party. This opinion is known as a theory of an offer. According to this theory, the contract emerges when a third party will accept the bid of the promisee. This theory has been abandoned today because an array of inaccuracies that is contains.

- According to the second opinion, the contract in favor of a third party is the performance of someone else's affairs without a call – leadership with no order / management of business (negotiorum gestio). According to this opinion, the position of the promisee relies only on a representative of a third party without an order and this party is treated as negotiorum gestor – the one who undertakes to act for another with an invitation to do so. He concludes a contract in his own name with a clause in favor of a third party. He has the right to revoke a benefit agreed for a third party, as long as this person does not accept it. In uninvited performance of someone else's affairs, the master of the affairs cannot revoke the benefit that was once received. The role of the third party in the contract in favor of a third party is far smaller than the role of the master of affairs in an uninvited performance of someone else's affairs.

- According to the third opinion, the contract in favor of a third party should be understood as a case of a unilateral statement of will. The promisor concludes a contract with the promisee and simultaneously gives a unilateral statement that he will perform the prestation of the contract in favor of a third party.

- According to the fourth opinion, the contract in favor of a third party should not be put within the limits of the already existing legal categories. This contract should be treated as a separate type of contract. In this regard, it is pointed out that for the emergence of this contract it is not necessary to undertake some other act beyond the ones that have been stipulated for some other contract. The most important thing is that the rights of a third party emerge directly from the contract concluded between the promisor and the promisee.

From what is indicated above, it arises that a contract in favor of a third party can be concluded and a contract for placing a burden to a third party cannot be concluded. The conclusion of a contract for placing a burden to a third party would be opposite to the principle of freedom of contracting.

## CONCLUSION

The obligations that arise from the contract are of relative nature and they are in the interest of the very parties, that is, they have an immediate (direct) effect. In regard to third parties, the contract is someone else's thing. In addition to a consent, the contract must contain also the intention to enter into an obligatory relationship, because it may also produce an effect towards persons who did not have any intention to conclude a contract.

Contracts are not extinguished by default with the death of the title bearer, rather they obliged the successors, however there are exceptions from this rule as well. The first exception exists if the contract is related to the personality of the title bearer (temporary service contract, partnership contract), and the second exception exists when the effect of the contract is limited to the life on one contracting party and when the contract was not concluded considering the traits of the personality. The contract is extinguished for the future, and what was in the past, is transferred to the heirs. (for example, lease agreement, when the lessor did not collect rent for the last month, the successors can do this).

Such a possibility is not extended to singular successors. The effect of the contract also refers to the singular successors when the transferor of the transferred item established, expanded or limited some rights.

There is no exception in some legislations, that refer to the appropriate singular successors, who may acquire more rights that the very transferor had in regard to a specific item.

3. The development of contracts later on led to abandoning of the strict principle of relativity in contractual relations. Thereby, a more extensive effect was provided beyond the structure of parties in favor of third parties, hence such contracts have a general effect.

Even in ancient Roman law, contracts in favor of third parties could not be concluded, however this principle changed in the period of Justinian and the law of pandect when the conclusion of several such contracts was found.

However, the French law has a negative attitude on this issue, (where also an exception exists), and the same negative attitude was accepted by the Austrian law with the initial preparation of the code and later on it was allowed to conclude such contracts, while the other codes have a positive attitude for a possibility to conclude contracts in favor of a third party.

A contract in favor of a third party exists when a person, a promisor – obliges towards another person, a promisee, to fulfill a prestation in favor a third party (beneficiary).

Such a contract was primarily used in the field of life insurance, and later in other fields as well, and it was concluded in a form of separately named contract, however it was possible to conclude it also in a form of a legacy.

Special relations are also created between the promisor and the promisee, the promisor and the beneficiary, and the promisee and the beneficiary, which are regulated by law, and they are more specifically elaborated in the article.

In regard to the legal nature of contracts in favor of third parties, there are four opinions: one according to which they are an institute of contract law, the other two are that they are institutes beyond contract law, such as uninvited performance of someone else's affairs and unilateral statement of will) and the fourth opinion that it is a matter of a separate legal category.

The conclusion of a contract in favor of a third party implies that a contract for placing a burden to a third party cannot be concluded, which would be opposite to the principle of freedom of contracting.

From everything that is indicated, we consider that contract have an important and a huge effect in the entire legal life and that this reflects their role in the modern society where we are constantly surrounded by contracts, even during the everyday supply of basic products we need in our life.

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