Scottish Court Rules on the Impact of the Trust Convention on the Distinction between Contractual and Proprietary Rights

On March 23rd, 2012, Lord Hodge issued an interesting opinion in Clark and Whitehouse Joint Administrators of the Rangers Football Club on the impact of the Hague Trust Convention and the distinction between contractual and proprietary rights for choice of law purposes.

Clark and Whitehouse were appointed administrators of the Rangers Football Club after the club met serious financial difficulties. The administrators sought directions from the Scottish court as to whether they could terminate contracts concluded with two English Ticketus companies by which Rangers sold to Ticketus large numbers of season tickets for seats in the Ibrox stadium in each of the seasons from 2011-2012 to 2014-2015.

The administrators wondered whether they could get back the rights they had granted to Ticketus so that they could design an interesting offer for any potential buyer of the majority of shares in Rangers. The contracts concluded with Ticketus were governed by English law. According to the advice of an English QC, the rights transferred to Ticketus were irrevocable.

> *they conferred an intermediate right which was not a property right in the conventional sense but was more than a mere personal right, and they could be enforced by the grant of equitable relief which could include an order for specific performance of the rights attaching to the tickets.*

Nobody disputed, however, that Scottish law would govern any proprietary rights over property situated in Scotland.

> *[19] English law governs the meaning of the two Ticketus agreements and it is to that legal system that the court must look to interpret those agreements. But it is Scots law that determines the nature of the proprietary rights (if any) which the agreements confer in the tickets or the stadium seats.*

Ticketus submitted that the issue was not so much the law governing the property, but rather the law governing the trust which had been created by the transaction. It was further argued that

> *under Article 6 of the Hague Convention on Trusts, (…) a trust was governed by the law chosen by the settlor. Thus, (…) under Article 8 the validity of the trust, its construction and its effects were governed by English law. Article 11 provided that a trust created by the law chosen by the settlor be recognised as a trust and that meant in this case that the trust assets did not form part of Rangers' estate on its insolvency.*

Lord Hodge rejected the argument:

> *[23] (…) I note (…) that two other texts (…) assert that the lex situs applies to determine whether any property right has passed from a settlor. See Underhill and Hayton, "Law of Trusts and Trustees" (17th ed.) section 102.122, and Harris,*

"The Hague Trusts Convention" at p.19. But there is also support for the latter view in the Explanatory Report of Professor von Overbeck (http://www.hcch.net), which discusses Article 4 in paras 53-60. Professor von Overbeck, using the analogy of a launcher and a rocket, distinguishes between the act with legal effects which creates the trust (i.e. the launcher), which does not fall within the Convention, and the trust itself (i.e. the rocket) which does. He states (in para 55):

"Article 4 is intended to exclude from the Convention's scope of application both the substantive validity and formal validity of transfers which are preliminary to the creation of the trust."

He records (in para 57) concerns whether the words "assets are transferred to the trustee" covered the case of a declaration of trust by a truster-trustee and the unanimous view of the Special Commission that such acts were envisaged by Article 4. In the event, no change was made to Article 4 as it appears that it was thought that Article 4 when read with Article 2 covered the creation of a trust in that way. See also paragraph 43 of the von Overbeck report.

[24] I am therefore persuaded that the Recognition of Trusts Act 1987 does not have the effect of making the law chosen by the settlor the governing law of the steps needed to create the trust. Were it otherwise, the results would be startling as a settlor would be able to alienate property which he could not dispose of under the lex situs. It would create significant problems for the operation of insolvency law in the jurisdiction in which the asset was located. Additionally by virtue of section 1(2) of the 1987 Act it might be argued that a constructive trust arising from a judicial decision in one legal system would prevail over the lex situs if a foreign settlor could be identified.

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