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.

Many thanks to Richard Frimston for the tip-off.

Conference on European Contract Law: A Law-and-Economics Perspective

On April 27 and 28 the University of Chichago's Law School will host a Conferecen on European Contract Law (University of Chicago Law School, 1111 E. 60th Street, Chicago, Il 60615 – Room V).

The annoucement on the conferece's homepage reads as follows:

The movement to harmonize European contract law generated various proposals for uniform statutes and optional instruments, culminating by the recent Draft Common European Sales Law. This ambitious reform envisions a

uniform Sales Law for Europe with strong consumer protections, enacted by every member nation. Transactors will be able to choose this law to govern their transaction in place of existing contract law.

The Chicago conference brings together a group of leading scholars from Europe and from the University of Chicago, exploring the law and economics perspectives of the proposed harmonization. Is such an optional statute a desirable regulatory tool? What economic goals might it serve? Are the protections enacted in it suitable? What can be learned from the American experience with uniform commercial laws?

The conference will be hosted by the Institute for Law and Economics at the University of Chicago Law School and will take place on Friday and Saturday, April 27-28, 2012, in Chicago. It is open to the public and attendance is free. Please contact Marjorie Holme (mholme@uchicago.edu) for more details.

The conference will be published in the Common Market Law Review (2013).

The conference schedule reads as follows:

Friday, April 27

9:00 – 9:15 **Opening Remark**

9.15 – 12:30 **Panel I: The Law and Economics of an Optional Instrument**s

- **Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law?,** *Thomas Ackermann,* Ludwig?Maximilians University, Munich
- **Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law**, *Fernando Gomez*, Pompeu Fabra University, Barcelona
- **Contract Law as Optional Law: On the Potential and Limits of Choice,** *Jan Smits,* Maastricht University
- **What Can Be Wrong with an Option? The Proposal for an Optional Common European Sales Law,** *Horst Eidenmüller*, Ludwig?Maximilians University, Munich
- **Identifying Legal Costs of the Operation of the Common European Sales Law: Legal Framework, Scope of the Uniform Law and**

National Judicial Evaluations, *Simon Whittaker*, Oxford University

12:30 – 1:45 **Lunch**

1:45 – 5:15 **Panel II: A Law and Economics Critique of the CESL**

- **Regulatory Techniques in Consumer Protection: A Critique of the Common European Sales Law**, *Oren Bar?Gill*, New York University, and *Omri Ben?Shahar*, University of Chicago
- **Mistake under the Common European Sales Law**, *Ariel Porat*, University of Chicago and Tel Aviv University
- **Buyers' Remedies under the CESL: Rejection, Rescission, and the Seller's Right to Cure**, *Gerhard Wagner*, University of Bonn
- **Custom and the CESL,** *Lisa Bernstein*, University of Chicago
- **Another Look at the Eurobarometer Contract Law Survey Data,** *William Hubbard*, University of Chicago

Saturday, April 28

9:00 – 12:00 **Panel III: Harmonization and Regulatory Competition**

- **Harmonization, Heterogeneity, and Regulation: Why the Common European Sales Law Should Be Scrapped**, *Richard Epstein*, New York University, Hoover Institute, and University of Chicago
- **The Desirability of an Optional European Contract Law ? and the Impact of a Particular Code Design on this Question,** *Stefan Grundmann*, Humboldt University, Berlin
- **Harmonization, Preferences, and Convergence**, *Saul Levmore*, University of Chicago
- **The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition,** *Eric Posner*, University of Chicago
- **Response,** *Chantal Mak*, University of Amsterdam

12:00 – 1:00 **Lunch**

1:00 – 2:30 **Panel IV: Precontractual Liability**

- **Precontractual Disclosure Duties under the Common European Sales Law**, *Douglas Baird*, University of Chicago

- **CESL and Precontractual Liability from a Status to a Transaction?Based Approach**, *Fabrizio Cafaggi*, European University Institute, Florence

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Max Planck Conference on CISG and Regional Sales Law Unification

On 11 and 12 May 2012 the Max Planck Institute for Comparative and International Private Law Hamburg hosts a conference on the United Nations Convention on the International Sale of Goods (CISG). It discusses CISG vs. Regional Sales Law Unification.

More information is available here. The programme reads as follows:

FRIDAY, 11 MAY 2012

- 14.30 **Welcome,** *Prof. Dr. Jürgen Basedow*
- 14.35 **Introduction,** *Prof. Dr. Ulrich Magnus*

CISG and USA

- 14.45 **CISG vs. UCC: the positive side**, *Prof. Harry Flechtner*
- 15.15 **CISG vs. UCC: the negative side,** *Prof. Dr. Larry A. DiMatteo*
- 15.45 **Discussion**
- 16.15 **Coffee Break**

CISG and Australia

- 16.45 **CISG vs. Australian Common Law,** *Prof. Dr. Bruno Zeller*
- 17.15 **Discussion**
- 17.45 **End of Session**

SATURDAY, 12 MAY 2012

CISG and Africa

- 9.30 **CISG vs. OHADA Sales Law,** *Prof. Dr. Franco Ferrari*

CISG and Europe

- 10.00 **CISG vs. CESL,** *Prof. Dr. Ulrich Magnus*
- 10.30 **Discussion**
- 11.00 **Coffee Break**
- 11.30 **CISG, CESL and Private International Law,** *Prof. Dr. Peter Mankowski*
- 12.00 **CISG, CESL, PICC and PECL,** *Prof. Dr. Robert Koch LL.M. (McGill)*
- 12.30 **Discussion**
- 13.00 **End of Conference**

And the winner is … West Tankers (again)

Another win for the West Tankers' team in the latest round of the long running litigation. In a decision delivered on 4 April 2012 ([2012] EWHC 854 (Comm)), Flaux J held that EU law (specifically, the decision of the CJEU in West Tankers (Case C-185/07)) did not exclude the jurisdiction of the arbitral tribunal to award damages (specifically, equitable damages) for breach of an arbitration agreement by the bringing of proceedings before a national (Italian) court.

In his Lordship's view (para. 68):

> "In my judgment, arbitration falls outside the Regulation and an arbitral tribunal is not bound to give effect to the principle of effective judicial protection. It follows that the tribunal was wrong to conclude that it did not have jurisdiction to make an award of damages for breach of the obligation to

arbitrate or for an indemnity."

SEC Issues Study on Cross Border Scope of Private Right of Action after Morrison

The staff of the U.S. Securities and Exchange Commission (SEC) has issued a Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934.

After the *Morrison* case and the reform of the 1934 Act for the purpose of indicating that the Act applies extraterritorially for actions involving transnational securities frauds brought by the SEC and the U.S. Department of Justice, the Dodd-Frank Act directed the SEC to solicit public comment and then conduct a study to consider the extension of the cross-border scope of private actions in a similar fashion, or in some narrower manner, and to consider and analyze the potential implications on international comity and the potential economic costs and benefits of extending the cross-border scope of private actions.

The study eventually advances the following options regarding the cross-border reach of section 10(b) private actions:

> ***Options Regarding the Conduct and Effects Tests****. Enactment of conduct and effects tests for Section 10(b) private actions similar to the test enacted for Commission and DOJ enforcement actions is one potential option. Consideration might also be given to alternative approaches focusing on narrowing the conduct test's scope to ameliorate those concerns that have been voiced about the negative consequences of a broad conduct test. One such approach (which the Solicitor General and the Commission recommended in the Morrison litigation) would be to require the plaintiff to demonstrate that the plaintiff's injury resulted directly from conduct within the United States. Among other things, requiring private plaintiffs to establish that their losses were a direct*

result of conduct in the United States could mitigate the risk of potential conflict with foreign nations' laws by limiting the availability of a Section 10(b) private remedy to situations in which the domestic conduct is closely linked to the overseas injury. The Commission has not altered its view in support of this standard.

Another option is to enact conduct and effects tests only for U.S. resident investors. Such an approach could limit the potential conflict between U.S. and foreign law, while still potentially furthering two of the principal regulatory interests of the U.S. securities laws – i.e., protection of U.S. investors and U.S. markets.

***Options to Supplement and Clarify the Transactional Test**. In addition to possible enactment of some form of conduct and effects tests, the Study sets forth four options for consideration to supplement and clarify the transactional test. One option is to permit investors to pursue a Section 10(b) private action for the purchase or sale of any security that is of the same class of securities registered in the United States, irrespective of the actual location of the transaction. A second option, which is not exclusive of other options, is to authorize Section 10(b) private actions against securities intermediaries such as broker-dealers and investment advisers that engage in securities fraud while purchasing or selling securities overseas for U.S. investors or providing other services related to overseas securities transactions to U.S. investors. A third option is to permit investors to pursue a Section 10(b) private action if they can demonstrate that they were fraudulently induced while in the United States to engage in the transaction, irrespective of where the actual transaction takes place. A final option is to clarify that an off-exchange transaction takes place in the United States if either party made the offer to sell or purchase, or accepted the offer to sell or purchase, while in the United States.*

Many thanks to Maria João Matias Fernandes for the tip-off.

Call for Papers

ASIL-ESIL International Legal Theory Workshop Call for Papers

ASIL's International Legal Theory Interest Group, in partnership with the European Society of International Law (ESIL) Interest Group on International Legal Theory, will hold a joint works-in-progress workshop at the University of Cambridge's Lauterpacht Centre for International Law September 27–28, 2012.
The workshop's theme is "Transatlantic Debates in International Legal Theory." On many levels, the interaction between North American international legal scholarship and its European counterpart(s) is working very well. Time and again, however, one finds that the underlying theoretical or philosophical framework is radically different. In this workshop we would like to explore that difference without letting ourselves be defined by it. Contributions analyzing, criticizing, denying or celebrating the difference are welcome, as well as papers exemplifying the various theoretical approaches to international law, be they "American," "European," or neither. The most important function of this workshop is to intensify the transatlantic theoretical debate by bringing together scholars with diverse disciplinary, philosophical, and methodological perspectives to discuss cutting-edge research on international legal theory.
Up to 12 papers will be selected for presentation. Although discussants will be assigned to introduce the papers, all workshop participants will be expected to read all of the contributions in advance and come prepared to contribute to the discussion. Interested participants should submit an abstract (1,000 words maximum) summarizing the ideas they propose to develop for presentation at the workshop. Submissions on all topics related to international legal theory are encouraged, but preference will be given to proposals that engage the workshop's theme. Papers that have been accepted for publication prior to the workshop are eligible for consideration, provided that they will not appear in print before the workshop.

Abstract submissions should be sent to asil.esil.theory@gmail.com by **April 20, 2012**. Successful applicants will be notified by May 11, 2012. Papers must be fully drafted and ready for circulation to participants by August 31, 2012. Questions regarding the workshop may be directed to Evan Criddle (ecriddle@law.syr.edu) or Jörg Kammerhofer (joerg.kammerhofer@jura.uni-

freiburg.de).

Desautels-Stein on Race as a Legal Concept

Justin Desautels-Stein (University of Colorado Law School) has published Race as a Legal Concept in the last issue of the *Columbia Journal of Race and Law* (it is also available on SSRN here). The paper proposes to use a conflict of laws approach to address a problem which has traditionally been considered as beyond the scope of conflict of laws. It builds on the article of Knop, Michaels and Riles which did the same with respect to feminism and culture.

> *Race is a legal concept, and like all legal concepts, it is a matrix of rules. Although the legal conception of race has shifted over time, up from slavery and to the present, one element in the matrix has remained the same: the background rules of race have always taken a view of racial identity as a natural aspect of human biology. To be sure, characterizations of the rule have oftentimes kept pace with developments in race science, and the original invention of race as a rationale for the subordination of certain human populations is now a rationale with little currency. The departure from this "classic liberal" conception of race, and its attendant and disturbing view of the function of race, did not, however, depart from the idea that race is a natural and organic part of being a human being. As this Article argues, this seminal background rule—that race is natural, neutral, and necessary—is deeply problematic and a substantial obstacle in the fight against the Supreme Court's ascending anticlassification jurisprudence. Not to mention, it is also false. In an effort to make some headway against the idea that race is a natural idea, as opposed to a legal concept, the Article attacks the background rules of race via the unlikely field of Conflict of Laws. Taking the Supreme Court's decision in Parents Involved in Community Schools v. Seattle School District No. 1 as a benchmark, the discussion first suggests an early functionalist view of voluntary*

school integration by way of an analogy to the early twentieth-century transformations occurring in Conflicts of Laws. Second, and in the alternative, the discussion then situates the facts of Parents Involved as literally a problem of Conflict of Laws. In both instances, the hope is to focus legal discourse on the background rules of race so as to empower a new and emancipatory anti-subordination jurisprudence.

Max Planck Post-Doc Conference on European Private Law

On **7** and 8 May 2012 the Max Planck Institute for Comparative and International Private Law Hamburg hosts the forth Max Planck Post-Doc Conference on European Private Law**.** It invites European Junior Scholars to present and discuss their research work.

Further information is available here. The programme reads as follows:

MONDAY, 7 MAY 2012

- 8.30 **Accreditation**
- 8.50 **Opening Statement,** *Reinhard Zimmermann*
- 9.00 **Error communis facit ius. Application and Distortion of a Roman Law Principle in Western and Eastern European Private Law Codifications**, *Péter Bónis*
- 9.30 **Unwinding of Failed Contracts**, *Joke Baeck*
- 10.00 **Discussion**
- 10.45 **Coffee Break**
- 11.00 **Roman Law in Comparative Perspective: Acquisitive Prescription**, *Jelle Erik Jansen*
- 11.30 **Functionalism in Personal Property Security**, *Hano Ernst*
- 12.00 **Discussion**
- 12.45 **Lunch**

- 14.00 **Estonia – a Test-Country for Common European Sales Law**, *Karin Sein*
- 14.30 **Discussion**
- 14.55 **New Developments as to Internet Related Infringements – Interest Analysis within the Frames of the Brussels I Regulation**, *Ulf Maunsbach*
- 15.25 **Discussion**
- 15.50 **Coffee Break**
- 16.05 **Law Applicable to Cross Border Defamation**, *Justyna Balcarczyk*
- 16.35 **The Country of Origin Principle after eDate Advertising**, *Jan-Jaap Kuipers*
- 17.05 **Discussion**
- 19.00 **Dinner at the Max Planck Institute**
- 20.30 **Closing Discussion**

TUESDAY, 8 MAY 2012

- 9.00 **Private International Law and Federalism. A Comparative Perspective (EU / US),** *Jeremy Heymann*
- 9.30 **Party Autonomy in the Field of Non-Contractual Liability Covered by Motor Vehicle Compulsory Insurance**,*Georgina Garriga*
- 10.00 **Discussion**
- 10.45 **Coffee Break**
- 11.00 **Exitprocedures for Minority Shareholders in Private Companies**, *Claartje Bulten*
- 11.30 **Is Corporate Law a Catalyst for Hedge Fund Activism? A Cross-Border Empirical Analysis**, *Dionysia Katelouzou*
- 12.00 **Discussion**
- 12.45 **Lunch**
- 14.00 **The Duty of Loyalty and the Corporate Opportunity Doctrine**, *Corrado Malberti*
- 14.30 **Risk and Regulation of Share Ownership: Different Kinds of Shares and Control-Enhancing Mechanisms (CEMs)**, *Veikko Vahtera*
- 15.00 **Discussion**
- 15.45 **Coffee Break**
- 16.00 **Enforcement of Stock Exchange Rules: Highlightening the**

Interplay between Civil Law, Administrative Law and Penal Law, *Nina Reiser*

- 16.30 **Discussion**

Brussels Conference on Cross Border Class Actions

On Friday 27 April 2012, an international symposium will be held in Brussels on "Cross-Border Class Actions: The European Way". The symposium is part of an inter-university research project on judicial cooperation in regulatory matters and consumer protection. The event will be held at the Stanhope hotel, within a walking distance from the European Commission headquarters. Full details and registration form can be found online.

The programme is as follows:

9:00- 9:15: **Welcome Speech**

Andrée Puttemans, Dean of the Law Faculty of Université Libre de Bruxelles

Introduction to the conference

Arnaud Nuyts, Université Libre de Bruxelles

Part I – Aggregate Litigation as a New Regulatory Technique

Chair: George Arestis, Judge, European Court of Justice

9:15- 9:40: **A Model Typology of Class Actions**

Michael Karayanni, Hebrew University

9:40- 10:20: **Introducing a EU Regime for Collective Redress Litigation – The State of Play**

- *Maciej Szpunar, Ministry of Foreign Affairs (PL), University of Silesia,*
- *Lukasz Gorywoda, Université Libre de Bruxelles*

10:20-10:45: **Collective Redress in the Post-Regulatory State**

Horatia Muir Watt, Science-Po Paris

Part II – EU Cross-Border Collective Redress Litigation

Chair: Alexander Layton QC, 20 Essex Street, London

11:25-11:50: **Collective Redress and the Brussels I Jurisdictional Model**

Burkhard Hess, University of Heidelberg

11:50-12:15: **The Consolidation of Collective Claims under Brussels I**

Arnaud Nuyts, Université Libre de Bruxelles

12:15-12:40: **Recognition, Enforcement and Collective Judgments**

Richard Fentiman, University of Cambridge

Luch time: **Keynote Speech**

Salla Saastamoinen, European Commission

14:10-14:50: **The Worldwide Reach of US Class Actions**

- *Ralf Michaels, Duke University*
- *Louise Ellen Teitz, Roger Williams University, Hague Conference*

14:50-15:10: **Collective Redress and Arbitration**

Luca Radicati di Brozolo, Catholic University of Milano

Part III – Cross-Border Collective Redress in Specific Fields

Chair: Hakim Boularbah, Université Libre de Bruxelles

15:30-16:10: **Collective Redress and Competition Policy**

- *Michael Hellner, University of Stockholm*
- *Lia Athanassiou, University of Athens*

16:10-16:50: **Collective Redress and Consumer Protection**

- *Cristina González Beilfuss, University of Barcelona*
- *Malgorzata Posnow, Université Libre de Bruxelles*

16:50-17:30: **Collective Redress and Financial Markets**

- *Anna Gardella, Catholic University of Milano*
- *Charalambos Savvides, University of Cyprus*

18:00: **Conclusions – Collective Redress and Global Governance**

Nikitas Hatzimihail, University of Cyprus,

Max Planck Encyclopedia on European Private Law released

The Max Planck Institute for Comparative and International Private Law in Hamburg has released the English-language working of its Encyclopedia on European Private International Law. Published by Oxford University Press and featuring more than 120 authors the publication follows the 2009 release of the German-language version. The information on the institute's website reads as follows:

> *The creation of a private law applicable for all Member States of the European Union represents one of the most significant developments of our time. The*

legislature of the EU has, however, primarily limited itself to short-term considerations driven by the politics of the day. The framework of regulations that has been promulgated in the past two decades is, as a result, fragmentary and has failed to follow an over-arching systematic approach. Responding to this development, the Max Planck Institute for Comparative and International Private Law published in 2009 the Handwörterbuch des Europäischen Privatrechts. Now, the Oxford University Press has released the Max Planck Encyclopedia of European Private Law. More than merely a translation, it stands as an independent work tailored to the varying legal backgrounds of international readers. Consistent with the format of an encyclopedia, the core of the work is comprised by the approximately 500 keyword entries which are presented alphabetically. Yet on account of the complexity of the material, the Encyclopedia offers far more information than a simple dictionary. With an editorial focus on the foundational content and principles of European private law, the work may serve to orient scholarship and legal practice within the context of the legal unification increasingly pursued by the European legislator. The work has been edited by Institute Director Jürgen Basedow, Institute Director Reinhard Zimmermann and former Institute Director Klaus J. Hopt, with Andreas. The authors of the keyword entries are primarily current or former fellows of the Institute but include also a number of external scholars having a close and special affinity to the Institute.

More information is available on the publisher’s website.