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Transatlantic Comparisons in Contract Law at Edinburgh Law School

Posted on September 6, 2013 by lmacgregor

From 30 August to 1 September a contract law conference took place at Edinburgh Law School. Entitled “Transatlantic Perspectives on Commercial Contract Law II”, this was the second such conference on this theme, the first having resulted in a book of the same name (available here: <http://www.cambridge.org/es/academic/subjects/law/contract-law/commercial-contract-law-transatlantic-perspectives>)

The editors Martin Hogg (University of Edinburgh) and Larry Di Matteo (University of Florida) had invited guest speakers from the US and the UK. Speakers were grouped into twos, and were encouraged to take a comparative approach, commenting on their partner’s legal system in addition to their own. This allowed many of the speakers to make interesting observations on the approach of their counterparts: we don’t “do” law in the same way. An obvious difference lay in the use of case law. The US speakers noted how useful it was for UK lawyers to identify one or two high level authoritative cases. This was more difficult to do in a US context. The sheer number of cases on a given issue at State level was also a challenge for US lawyers. By contrast, many of the Scots lawyers lamented the lack of decided case law in their own system, looking with admiring eyes at some of the useful and interesting US cases. The conference also provided the opportunity for the all contributors to find out more about the UK’s European context, the Common European Sales Law being a significant point of reference.

Many excellent papers were given, not all of which can be commented on here. One of the interesting themes which emerged was the role of consent in a modern context. This was explored in several thought-provoking papers including “The Death of Consent?” by Peter Alces (The College of William and Mary School of Law) and “Offer and acceptance in modern contract law: a needless concept?” Shawn Bayern (FloridaStateUniversity of Law).

A particular highlight for this blogger was the way in which certain speakers took a classic case from the other legal system and provided their own “foreign” perspective. This was the approach of Mark Gergen (Berkley Law School, University of California) who analysed the Scottish case, *White and Carter (Councils) Ltd v McGregor* ([1962] AC 413). Interestingly, it seems likely that this case would have been decided in the same way in the US. Mark’s analysis of the “legitimate interest” and “not wholly unreasonable” tests was particularly thought-provoking, providing food for thought for the UK lawyers who have tended to criticise the outcome in this case.

Catherine Mitchell (HullLawSchool) and Blake Morant (Wake Forest University School of Law) provided excellent papers on interpretation of commercial contracts, Blake focussing his attention on the impact on the small business industry. The themes which emerged following discussion of these two papers were taken up later in the conference, when the participants were addressed by the Right Honourable Lord Hodge, UK Supreme Court. Lord Hodge provided his own thoughts on the reasons for continuing to exclude both prior communings and post-formation conduct in the interpretative exercise. It was clear that he was highly sensitive to one of the main criticisms levelled at the contextual approach, i.e. the increase in costs, identifying ways in which Scottish court procedure operated to help keep costs to a minimum. Almost every participant took up the opportunity to question Lord Hodge, both at the event and later over dinner.

Professors Hogg and DiMatteo are to be congratulated on their well-organised conference. The method adopted, of pairing contributors, worked well. Not only did participants learn about the “foreign” legal system, but also had

cause to reflect on the merits and demerits of their own. Discussions were intensive, and much was achieved over the two days. The conference book which will finally emerge will undoubtedly be as valuable as the previous one.

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