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Reviews

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PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW. DRAFT COMMON FRAME OF REFERENCE (DCFR). FULL EDITION.

Ed by Christian von Bar and Eric Clive

Oxford: Oxford University Press (www.oup.com), 6 vols, 2010. xxi + 6,563 pp. ISBN 9780199573752. £750.

Volume 1 (Book I, General provisions; Book II, Contracts and other juridical acts)

Volume 2 (Book III, Obligations and corresponding rights; Book IV, Specific contracts and the rights and obligations arising from them)

Volume 3 (Book IV contd; Book V, Benevolent intervention in another's affairs)

More than 20 years in the making; the collaboration between hundreds of legal academics throughout Europe; the picture of what, one day, might be the law of the European nations, the multi-volume product has now landed: the Full Edition of the DCFR. Many reasonable people have many reasonable views on European integration and legal harmonisation. Often such views colour perceptions of the DCFR. But whatever one's *Europaanschauung*, the appearance of the DCFR Full Edition is a watershed. The Full Edition, encompassing a commentary to each article, together with national notes, is a colossal achievement. We cannot know what the future holds, but the DCFR gives as good an indication as any. That is why it is so important. The European Commission's rather odd Green Paper on European Contract Law (COM(2010)348 final) – the content of which only sometimes appears connected to the title – contains a full spectrum of suggestions for the future: from “do nothing” to full-blown harmonisation under a European civil code. Only two suggestions, however, does anyone take seriously: (1) to use the DCFR as a “tool-box” for use by legislators, European and national, when framing future legislation; or (2) for the DCFR to form the basis of an Optional Instrument of European Contract Law.

Perhaps the most important achievement of the DCFR is that we now have *de facto*, if not (yet) *de iure*, a sketch map for getting our bearings in the varied topography of European private law. Where else does one look to find a concise statement, in English, of how a particular DCFR provision relates to the law of a national legal system? The DCFR's utility for comparative law is considerable. Admittedly, of course, for the specialist mountaineer, a sketch map is never enough: a snap-shot of a legal system, a bald statement or a single case reference, can sometimes mislead. But detailed cartography is, for the specialist, available elsewhere. The Zimmermann-inspired projects are consistently the best. (And the best of the best is the peerless *Historisch-Kritischer Kommentar zum BGB* which, despite its title, is the most useful work in European private law: see the review by Lord Rodger at (2005) 9 EdinLR 176). To develop the climbing metaphor, however, no matter how good the maps are, maps don't get boots on the summit. If the national notes in the Full Edition are a sketch map of European

private law, the DCFR text is a suggested route. The perceived difficulties with the DCFR route, however, are many. I will mention only two. First, as with any suggested route, until some pioneer is willing to venture his reputation on it, the route remains untested, unproven and unloved. The second difficulty comes with many, perhaps most, harmonisation projects, but is particularly pronounced for the DCFR: a “suggested” route looks rather like a “mandatory” one. And lawyers, like climbers, tend to prefer to pick their own route under their own law.

Whether these perceptions of the DCFR project are fair is another matter entirely. But it is clear that it is because of the perceived link between the DCFR project and forced harmonisation that, from respectable quarters, we have seen protest in the rarefied pages of European private law journals reach Egyptian intensity. I have no strong view about these criticisms of the DCFR. Some have merit, others less so. From a pragmatic perspective, however, it is only to be expected that, after many lawyers have pored over a text, any text, arguments will rage on structure, formulation and syntax. That is part and parcel of legal science. Others argue there are deeper conceptual problems. That is the fundamental business of legal science. Sometimes the DCFR is damned for being too dogmatic – an English translation of the BGB – only to be damned again, elsewhere, for being not dogmatic enough. But, however all of this may be, it is important to observe that the fact this debate is being had at all, and with such vigour, is itself a reflection of the great strides that have been taken in European private law in the last twenty years. No one person could realistically review even one book of the DCFR in short order. That being so, and in order to keep the review within reasonable bounds, the remainder of the review will deal briefly with some select provisions in Books I-V.

Book I: General provisions. First, although one can follow the logic, modelled to some extent on the Dutch civil code, the numbering of the DCFR takes some getting used to: Roman numerals, Arabic numerals, dashes, colons. Citations look like severe mathematical propositions. But, in the grand scheme of things, this is a minor quibble, for one can well understand why, in an evolving text, such a system was conducive to keeping track of an evolving text. Secondly, good faith. A classic argument against any European harmonisation project from British lawyers is the irrational fear that European concepts of “good faith” will bring Anglo-American capitalism to its knees. For those of such a nervous disposition, they should not open Book I, for there we find that “good faith and fair dealing” is a general principle of all contracts (Art I-1:103); moreover, there are positive pre-contractual information duties on businesses (Art II-3:102), with heightened pre-contractual duties on those businesses dealing with consumers (Art II-3:102). But quite why British lawyers still find good faith difficult to deal with appears psychological rather than legal. For our law is infused with good faith: in consumer contracts generally, in commercial insurance contracts; and, even where it is not implied, it is sometimes expressed in financial markets contracts, such as the ISDA Master Agreement. And, even under English law, it is clear that the judges, on occasion, have discretion effectively to re-write, for example, default interest rates which, as drafted, are unenforceable penalties (e.g. *Fernhill Properties (Northern Ireland) Ltd v Mulgrew* [2010] NICH 20). Thirdly, terminology: one can only imagine how difficult it must have been to develop a neutral terminology in English (for other languages, such as Latin, are eschewed). This does mean that some English words are used in unusual technical senses in the DCFR. One is “merger”: this is the term given to what is generally known as an “entire agreement” clause in English (Art II-4:104), as well as to the doctrine of *confusio* (Art III-6:201). The latter is the technical term of English law, the former an innovation. Sometimes there can be merit in retaining widely understood terms from other languages. English words have a tendency to be overworked. Fourthly, “general part” issues. It is both refreshing and invigorating to leaf through the general provisions of Book I (and, indeed, many of the provisions of Book II) which cover general part issues: quite a change from the prevailing front-end, back-end – conceptual wasteland in between – approach

to modern UK legislative drafting. Perhaps it is in these areas where a comparison between the DCFR and the un-codified systems places the DCFR in its most favourable light. For systems like Scotland (or, for that matter, England or Ireland), ever focussed on the cut and thrust of litigation, all too often fail to stop to ask the basic, most fundamental, questions. The difficulty in most Common Law systems is one of both cause and effect: no case law on fundamentals means little consideration of the fundamentals; and, because there is little consideration of the fundamentals, there is little case law. Still, the transactional lawyer, in particular, must wrestle day and daily with such fundamental questions. It is just that, whereas, in Common Law systems, he flies by the seat of his pants, in a Civil Law system he can, at least, reach for a concise axiom on his own desk. For this reason alone, I see considerable attractions in the DCFR as an optional instrument.

Book II: Contracts and other juridical acts. The DCFR deals with commercial and consumer contracts alike. That is a departure from the *Principles of European Contract Law* (PECL) and the Unidroit *Principles of International Commercial Contracts* (PICC) which were generally concerned only with commercial contracts. It is this aspect of the contractual provisions that has caused the most consternation among practitioners in the UK. Ironically, however, as has been seen in areas such as sale, there is often no reason, in principle, why the detailed rules should be different. And, as some of the more vocal critics of the DCFR project have accepted, “by . . . attempting to integrate the *acquis commun*, that has gradually evolved over many centuries of European legal history, and the *acquis communautaire*, relating primarily to consumer contract law, the draftsmen of the DCFR have tackled one of the great tasks of our time in the field of private law” (H Eidenmüller et al, “The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems” (2008) 28 OJLS 659 at 668). The concern is rather whether the existing *acquis communautaire* is ripe for integration. To this point we will return. One core concept which has been the subject of some critical analysis is that of the “juridical act” (Art II.1:101(2)). A developed *Rechtsgeschäftslehre* is one of the most important contributions of German legal science (although, in the same way as French lawyers have fallen out of love with their native jurisprudence on the *patrimoine*, some German lawyers are unenthusiastic about their home-grown doctrine on juridical acts which is now sometimes considered to be overblown with the conceptual dogmatism of another age). My own view is that the concept is useful and one that could have been more fully developed. Indeed, it is because of this failure to develop the concept that others have questioned why it was included at all.

Book III: Obligations and corresponding rights. My random selection from Book III is the provisions on assignment. I would draw attention to three specialities from the provisions of the DCFR: first, a contractual prohibition on assignment (*pactum de non cedendo*) is not generally effective to prevent assignment (Art III-5:108(1)); second, priorities are regulated by the rule in *Dearle v Hall* (Art III-5:121); and, finally, proceeds paid by the *debitor cessus* to the assignor are held, to Common Law eyes, in a trust (although there is no reference to a trust) for the benefit of the assignee (Art III-5:122), for the assignee’s claim to the proceeds takes priority over other creditors. The first rule – on contractual prohibitions – though an innovation is perhaps not contentious drawing, as it does, on other international provisions; the second is, with respect, to adopt one of the most impractical rules of English law; while the third does not provide any justification for the introduction of a provision which looks, to all intents and purposes, like a constructive trust.

Book IV: Specific contracts. Book IV contains provisions on special contracts: Sale (IV A); Leases of Goods (IV B); Services (IV C); Mandates (IV D); Commercial Agency, Franchise and Distributorship (IV E); Loan contracts (IV F); Personal Security (IV G); and Donation (IV H). I will mention here only sales. The DCFR provisions largely reflect the provisions in

the Consumer Sales Directive (“CSD”) and, for that matter, the content of CISG. There is no duality of provisions – as in the UK Sale of Goods Act (“SOGA”) – between traditional SOGA remedies (like “rejection”) and the CSD provisions. For this reason alone the DCFR provisions are preferable to the present UK position. But the reference to the CSD highlights one of the difficulties with all the contractual provisions of the DCFR: the extent to which they seek to incorporate the *acquis communautaire*. This is not the fault of the drafters. The major difficulty is the moving target of the proposed Consumer Rights Directive (“CRD”). It is difficult to see how the Full Edition of the DCFR can contain the final word on European Contract Law until the content of the CRD has been agreed. Alas, the difficulties encountered in finding consensus on the scope and content of the CRD may also give as good an indication as any as to the practicality of taking the DCFR project forward.

Book V: Benevolent intervention in another’s affairs. This is the book on *negotiorum gestio*: what in European English is now universally known as “benevolent intervention in another’s affairs”. Perhaps the most striking aspect of this book is the number of examples and the length of the national notes – no fewer than 34 worked illustrations and 116 paragraphs to describe the scope of the principle in national laws. Book 5 of the Full Edition will be a valuable resource to any Scottish development of the law of *negotiorum gestio*.

In conclusion, “an essential work of reference” is normally a back-handed compliment in the book review sections, being more often than not a bland euphemism implying that the reviewer has not read the book, or that he doesn’t recommend anyone else reads it, or both. But a modern European law library without the DCFR is like a reference library without a dictionary. As its title suggests, it will be a crucial “frame of reference” for scholars of European private law for years to come. The burning question, however, is: where do we go from here? I would make four general points. In the first place, the provisions in the first three books are among the least controversial of the whole project. Most build on PECL: differences generally, but not entirely, reflect the need to integrate the *acquis communautaire*. The second point relates to the position with the *acquis*: how will the CRD relate to the DCFR? The third point is one that has emerged only recently and in informal discussions: any Optional Instrument on European Contract Law, as embodied in the first five books of the DCFR, is likely to have an application in only two situations. It will apply either to consumer contracts or to the contracts concluded by small businesses. The scope of any optional instrument in practice, therefore, is likely to be limited. There is therefore a deficit between perceptions of what the DCFR is about and its realistic impact and scope. This brings me to my final point. Contracts, for commercial parties, embody the law applicable to the parties’ relationship: *la convention fait la loi des parties*, as they say in Jersey; or, for those who remember their Latin, *pacta dant legem contractui*. Fundamental changes to the basis on which parties enter into these agreements, therefore, are for lawyers, consumers and commercial parties, of an importance equivalent to the European constitution itself. Yet few lawyers in the UK, outside of the universities, have even heard of the DCFR. Such is the exorbitant cost of the Full Edition, almost none have ever seen a copy of it. If the EU is serious about the DCFR as an optional instrument, it must properly fund the dissemination of its content.

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Volume 4 (Book VI, Non-contractual liability arising out of damage caused to another)

In contrast with the contract-law part of the DCFR, Book VI (“non-contractual liability arising out of damage caused to another”) does not incorporate and build upon the prior harmonisation

project in the area. Though the preparation of Book VI was undertaken by Christian von Bar, who was a member of the European Group on Tort Law in the early stages of its work, which culminated in the publication of the *Principles of European Tort Law* (PETL) in 2005, von Bar had already left the Group by that date. It is the provisions that he drafted with his Study Group on a European Civil Code that provide the content of the DCFR's law of tort (delict). The reasons for rejecting the PETL as a model are nowhere explained in the DCFR's six volumes; indeed, the PETL appears not to be mentioned at all. The author of the present review hopes that it is not just because he has been a member of the European Group on Tort Law since 2009, and engaged from that time in updating, reviewing and extending the PETL, that he regrets the absence from the DCFR of any reasoned justification for its preference of the one approach over the other.

In fact, the PETL and Book VI of the DCFR present interestingly contrasted conceptions of what a future European law of tort (delict) might look like. Whereas the former is explicitly built on the idea of a "flexible system", eschewing strict boundaries in favour of an ad hoc balancing of relevant considerations, the DCFR approach is to identify eleven paradigm instances of non-contractual liability for damage (e.g. personal injury, infringement of dignity, liberty and privacy, and loss upon reliance on incorrect advice or information) and to subject them individually to quite detailed regulation (Arts VI-2:101(a) and 2:201 ff). The outcome bears some resemblance to the torts-based structure of the Common Law (and Scots law's delict). A measure of flexibility is retained by means of a residual clause allowing for the imposition of liability outside the eleven paradigm cases where the claimant has suffered the violation of a right or interest worthy of protection and it would be fair and reasonable for there to be a right to compensation, having regard to the ground of accountability, the nature and proximity of the damage, the reasonable expectations of the victim, and public policy (Art VI-2:101(1)(b) and (c), (2) and (3)).

In the DCFR taxonomy, the eleven paradigm situations—and indeed the residual clause—address the question of when the victim has suffered legally-relevant damage. Pure economic loss, for example, is recoverable if it falls into one of the prescribed categories (e.g. reliance on incorrect advice or information, unlawful impairment of business, fraudulent misrepresentation, or inducement of non-performance of an obligation) but not usually otherwise, it being specified that purely contractual rights are not as a rule protected (Art VI-2:101 Comments, C). By contrast, under the PETL there is no general exclusion of contractual expectations and other purely economic interests, but they occupy a subordinate place in the hierarchy of protected interests, and it is provided that liability for interference with them may be more limited (e.g. to intentional harm) than it is for personal injury or property damage (Art 2:102)—a nice illustration of the PETL flexible system.

Under the DCFR, the question of legally-relevant damage forms the first part of a tripartite inquiry, which is completed by asking whether there is a ground for holding the defendant accountable, and whether there is a causal link between the damage and the conduct or thing for which the defendant is responsible. Numerous comparisons may be drawn between the PETL and DCFR approaches to these matters. For now, however, it must suffice to contrast the general strict liability for abnormally dangerous activities in the PETL (Art 5:101) with the DCFR's more fragmented treatment of "accountability without intention or negligence"—with separate provision in respect of dangerous substances and emissions, unsafe immovables, animals, defective products, and motor vehicles (Art VI-3:101 ff)—and to note the DCFR's generally conservative treatment of causation. It retains the all-or-nothing principle for alternative defendants, albeit with a reversed burden of proof (Art VI-4:103), and excludes liability where a non-tortious cause cannot be ruled out, except insofar as "loss of a chance" may come to be regarded as an interest worthy of protection (Art VI-2:101

Comments, D). By contrast, the PETL solution (Arts 3:103 and 3:106) is proportional liability, both for alternative defendants and where there is a possible non-tortious cause – in line with, and to some extent anticipating, contemporary judicial developments across the continent, e.g. *Barker v Corus (UK) plc* [2006] 2 AC 572.

The publication of the full edition of the DCFR, with its copious comments, illustrations and comparative notes, facilitates further comparisons of this nature, and undoubtedly enriches the debate about the shape that a future European law of tort might take. Book VI alone constitutes a monumental achievement. As a work of scholarship, its very considerable merits far outweigh any quibbles one might raise, e.g. the comparatively sketchy treatment of English tort law relative to Scots delict – which readers of this review might in any case view as fair pay-back for English law's appropriation of *Donoghue v Stevenson* [1932] AC 562 as its leading case. As the basis for a “political” CFR, however, it suffers from being the work of (effectively) a single group of scholars, rather than the product of broad academic consensus, and it is to be hoped that a wider discussion will now ensue as political consideration of an optional instrument embracing tort (delict) as well as contract law, and indeed of a possible European Civil Code (see European Commission, “Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses”, COM(2010)348 final, 1 July 2010), is taken forward.

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Volume IV (Book VII, Unjustified enrichment)

The rules contained in Book VII offer, first, a taxonomy of the subject of unjustified enrichment and then, in the individual rules themselves, the mechanisms for the solution of the problems of this area of the law. These rules have a particular resonance connected with developments in Scotland. In the 1990s there was considerable debate on how Scots law could accommodate itself to the facts of the English appeal, *Woolwich Building Society v IRC* [1993] AC 70, concerning mistake of law and the recovery of a payment made in response to an *ultra vires* demand. Scots law seemed archaic and the Scottish debate was prolix and informed by “cultural” preferences, whether civilian or from Common Law. The weighty documents produced by the Scottish Law Commission offered no clear solutions. Against this background Eric Clive, who at the time was a Scottish Law Commissioner, produced a draft code on unjustified enrichment for Scotland (referred to as “Clive’s Code”) that was an attempt to cut through the fog by formulating a set of rules based upon an understanding solely of what was *functionally* better. Clive’s code was a personal project but it was published under the auspices of the Scottish Law Commission. In the end result, in *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151, the solution to “Woolwich” was found in established Scots law; in particular in the *condictio indebiti*, as one of the special applications of the general principle derived from Roman law that what is retained without a legal basis is recoverable. Scots law therefore moved on from the Clive Code because it did not seem to be needed. The code had also attracted some criticism and it was not obviously organic in the sense of being a natural expression of the Scottish legal tradition, at least in the manner in which its central tenet of what is “unjustified” was expressed.

In the DCFR, co-edited by Eric Clive, we have a re-working of the Clive Code. The projected is directed now to Europe. A central provision is that an enrichment is unjustified unless the enriched person is entitled to the enrichment by virtue of a contract or other judicial act, a court order or a rule of law (VII–2:101). Noteworthy features are: (1) the approach

founds upon presence or absence of a legal basis; and (2) the provision that “an enrichment is unjustified unless ...” reverses the traditional Scottish, indeed European, approach to the principled formulation of the cause of action. Thus, for example, Stair expresses Scots law in the terms that (only) those benefits *quae cadunt in non causam* are recoverable, i.e. benefits are recoverable *if* held without a legal basis (*Institutions* I,7,7). Each approach (i.e. unless/ff) has its advantages and disadvantages. What is particularly attractive in the DCFR formulation is that it cuts out extra factors that have grown up over the centuries but which have tended to obscure the proper function of unjustified enrichment, for example “error” (or is it “mistake”?), ignorance, doubt, compulsion, excusability etc. The “unjustified unless” formulation presents the onus in favour of recovery by P of a benefit that D holds at P’s expense on the single ground that D is not entitled to it. The proposition is simple and efficient and in fact organic to the civilian tradition. It just cuts out the front-ended factors that have been/are the source of immense confusion. It is also wholly comprehensible to the ordinary man and woman, even those on the Morningside omnibus.

The statement of the rules, followed in the book by a comprehensive commentary and the discussion of useful illustrative examples does, however, come at a cost. They are very abstract indeed. If we look to the history of European codification and scholarship it has seemed that there was a progressive refinement, over time, of the idea of unjustified enrichment. In the last century the insights offered by Wilburg and von Caemmerer of the understanding of the provisions of the German civil code were, seemingly, a large step forward. In place of the unitary understanding of unjustified enrichment in the German Code these two scholars took seriously the more nuanced testimony of Roman law and distinguished different cases according to the manner in which the enrichment was acquired. This helped to explain different sorts of cases (e.g. deliberate (agreed) enrichment/imposition/interference) and why they might be treated differently. But in the DCFR at this level of “causes of action” we find a unitary treatment of unjustified enrichment. Is this wise? It certainly comes at the expense of importing very considerable abstraction. Unjustified enrichment is presented in the DCFR (perhaps it must be so?) as law as science, lawyers’ law *par excellence* that, at the end of the day, actually is not easily accessible to the man and woman on the street ... or even, one might suspect, to the average Scots lawyer. A lot of unjustified enrichment will need to be re-learned. But does that matter if it works?

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Volume 5 (Book VIII, Acquisition and loss of ownership of goods)

Volume 6 (Book IX, Proprietary security in movable assets; Book X, Trusts)

In its last three books, the DCFR moves from the law of obligations into property law. Book VIII deals with acquisition and loss of ownership of goods, Book IX with proprietary security rights in movable (as opposed to the Scottish “moveable”) assets and Book X with trusts. As is well known, the main precursor of the DCFR was the Principles of European Contract Law Project (PECL) and indeed many of the rules in Books II and III are revised versions of those in PECL. It might be wondered why (some) property law is now covered. The answer is seemingly twofold and found in the Outline Edition at para 40. First, there is a desire to regulate consumer law at a European level and this field extends beyond consumer contracts into private law more generally, including property law. Second, “some aspects of property law are of great relevance to the good functioning of the internal market”. A classic example is a security right being extinguished through the application of the *lex situs* rule, where the encumbered corporeal moveable property is taken to another country which does not recognise

the security in question. Of course these arguments could be taken further. Consumer law is relevant, for example, to mortgages over land, yet the DCFR is in principle confined to moveables. (This is not entirely true, because Book X regulates trusts where the assets include land. Indeed it also applies to testamentary trusts, yet succession law is also outwith the ambit of the DCFR.) Thus the inclusion of Books VIII to X mean that the DCFR goes some way along the road to being a model for a European Civil Code, but not the whole distance. Whether it should have gone so far or whether it has not gone far enough is a matter on which there are of course different opinions. The extent to which European private law should be harmonised is ultimately a political question, but commercial need must be an important factor.

It is of course absolutely impossible in a review of this length to do justice to the considerable efforts which have gone into drafting Books VIII to X. The full version, including the comments, runs in two volumes to over 1500 pages and the comments on Book X are not complete. (They will be published later by Oxford University Press in S Swann (ed), *Principles of European Law: Trust Law*, expected October 2011). There is a considerable amount of value here to anyone teaching the subjects in question, not least in a jurisdiction like Scotland where there is no civil code.

Book VIII was drafted by a team led by the Austrian scholars Professor Brigitta Lurger and Dr Wolfgang Faber. They prepared a questionnaire for completion by academics in each EU jurisdiction. This led to a series of national reports, which have now been published in six volumes. The first two were reviewed at (2010) 14 EdinLR 535, and the present reviewer has to declare an interest as one of the team that wrote the Scottish report. The Austrian team then used the reports as their basis for preparing Book VIII, doing so within a fairly tight timeframe. The central rule is surely VIII–2:101. It provides that ownership of goods is transferred at the moment when the transferor or transferee intend, or in the absence of an express intention, upon delivery or an equivalent to delivery. The default rule is thus that delivery (which can include constructive delivery) is required, in contrast to that under the Sale of Goods Act 1979 s 18 rule 1 where there is no need for this. While many other European jurisdictions currently insist on delivery, they generally admit *constitutum possessorium* (delivery by act of mind alone). Thus in enabling the parties to agree to transfer without delivery, rule 2:101 gives effect to that reality. One advantage of the rule is that it provides a unitary law on transfer, unlike the Scottish position where gift and barter have a different rule to sale.

A striking feature of Book VIII is a myriad of new terminology, such as “owner-possessor”, “limited-right possessor”, “possession-agent”, “production” (specification), “combination” (accession) and “commingling” (commixtion and confusion). Some of these are easier to grasp than others. Acquisition by good faith purchasers is permitted by chapter 3 in line with many European countries but not England and Scotland. Moreover, chapter 4 provides for acquisitive prescription; “acquisition of ownership by continuous possession”. The two basic periods are ten years where the acquirer is in good faith and thirty years where this is not the case. The Scottish Law Commission has made reference to chapter 4 in its recent *Discussion Paper on Prescription and Title to Moveable Property* (Scot Law Com DP No 144, 2010) and this shows in just one way how Book VIII is proving useful and influential.

The headline point about Book IX is that it takes a functional approach to security rights, influenced by Article 9 of the Uniform Commercial Code of the USA. The team behind this book was led by Professor Ulrich Drobnig in Hamburg who has a long and distinguished record in this area. Following the Article 9 model, Book IX draws a distinction between “creation” of security rights (chapter 2) and “effectiveness as against third persons” (chapter 3). This is a departure from the civilian approach where a security only comes into being when it becomes a real right and is thus enforceable against third parties. See e.g. *Bank of Scotland v Liquidators of Hutchison Main & Co Ltd* 1914 SC (HL) 1. This reviewer has yet to

be persuaded that such an approach will work well against a general civilian property law background. Sensibly, registration is key to third party effectiveness, thus permitting non-possessory security. Since, however, a functional approach is taken this means that retention of title devices used in sales contracts will require to be registered (rule 1:103). So too will sale and leaseback transactions (rule 1:102(4)(c)) and trusts used for security purposes (rule 1:101(1)(b)). Once again the DCFR will be of great assistance to the Scottish Law Commission, which is currently considering the reform of security over moveables. It will be conscious, however, that the recent proposals of its English counterpart, the Law Commission, to adopt a functional approach were not ultimately accepted by the government following lobbying. Thus the model provided by Book IX, at least for the time being, may be a step too far.

Book X, on trusts, is of great interest for the fact that many European countries currently do not recognise this legal institution (or “legal relationship” as per rule 1:201), but may wish to introduce it. The trust can be stereotyped as a creature of English equity, but of course the truth is not so straightforward. Scotland has long recognised it, this being explained in recent times by the dual patrimony theory. The team working on Book X was led by Dr Stephen Swann of Osnabrück, originally an English lawyer. Understandably there is noticeable English influence, given the developed state of trusts law in that legal system. A particular difference from Scots law as currently understood is that the trust property must be transferred to a trustee before the trust can come into being (rule 2:102), rather than there merely being a declaration of trust. The Scots rule is arguably more flexible. A number of the provisions in Book X link to other books of the DCFR, so some adaptation would be required for it to be used by a particular jurisdiction as a model for a stand-alone trusts code. Of course it is possible to disagree with some of the policy choices made both here and elsewhere in the DCFR, but all those involved with the project deserve great credit for producing principles, definitions and model rules which will provoke academic discussion for years to come as we argue over the future development of private law in Europe.

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NON-CONTRACTUAL LIABILITY ARISING OUT OF DAMAGE CAUSED TO ANOTHER, prepared by Christian von Bar

Oxford: Oxford University Press (www.oup.com), Principles of European Law, Study Group on a European Civil Code, 2009. lvii + 1,384 pp. ISBN 9780199229413. £150.

This volume contains text and commentary prepared for Book VI of the Draft Common Frame of Reference (DCFR). The contents are reviewed in substance in the preceding review in this issue. The background to this separate volume is that the DCFR was prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). The Study Group began work in 1998, but alongside preparation of the final integrated edition of its work in the DCFR it has published component parts along the way with Oxford University Press in a separate series called “Principles of European Law” (PEL). This volume appears in that series, alongside similar volumes on Sales, Lease of Goods, Commercial Agency, Franchise, and Distribution Contracts, Service Contracts, Personal Security, Unjustified Enrichment, and Benevolent Intervention in Another’s Affairs. Further volumes yet to appear include those on Trust Law, Donation, Mandate Contracts, Loan Agreements, Transfer of Title in Movables, and Security Rights in Movables. The main

difference (in terms of content) from the DCFR itself is that the individual PEL volumes contain comparative introductions to individual chapters and translations of the Articles themselves from English into the other 16 languages of the Member States. In this volume such introductions are provided for the first three chapters (“Fundamental provisions”, “Legally relevant damage”, “Accountability”), though not for subsequent chapters (on “Causation”, “Defences”, “Remedies” or “Ancillary rules”). In his Foreword to this volume, Professor von Bar also notes more generally that there are “occasionally small discrepancies between the model rules published in this series and those of the Draft Common Frame of Reference” (xi), explained by him as primarily a consequence of the PEL volumes having been conceived as self-contained treatments, and also because the drafting of the final DCFR text was able to take account of earlier criticisms made of the model rules in the PEL series (the relationship of the PEL to the history of the DCFR project is also narrated at paras 45-47 of the Introduction in volume 1 of the DCFR itself).

Although the PEL volumes are far from inexpensive, they provide to a very limited extent a (relatively) more affordable way of acquiring select parts of the full DCFR with commentary than purchasing the DCFR itself, which few are likely even to consider, given its exceptionally high price of £750. That said, the DCFR edition is still better value than it would be to purchase all the PEL volumes individually, and the reality is that the marketing of both the DCFR and PEL seems to be directed towards institutional purchase. However, even for institutional purchase these prices are high. The marketing and publishing strategy behind the wider dissemination of the DCFR thus seems puzzling, except perhaps from the commercial point of view of the publishers. It is surely legitimate to feel some consternation about this.

This reviewer has not tried to establish whether there are any of the occasional “small discrepancies” between the DCFR and the PEL in the volume under review, and perhaps Professor von Bar could have addressed the matter by offering some more detailed guidance on these discrepancies, and whether any feature in this volume. It is also confusing that the Oxford University Press catalogue does very little to explain helpfully the difference between the DCFR and the PEL volumes, and this can only really be gleaned from reading the Foreword in the case of the volume under review. Given that the two projects and their publications could hardly be more intimately related and yet are not identical, this is regrettable. It should also be explained (though not easily apparent from the book itself or the publisher’s catalogue) that the books in this series are published simultaneously (but with different ISBN numbers) by Sellier (Germany), Bruylant (Belgium) and Stämpfli (Switzerland), though it is worth noting that the Oxford version seems by a significant margin the least expensive. Overall, this volume is clearly an impressive achievement. The PEL series should help with the important task of disseminating the DCFR and its commentaries. Moreover, the availability of the individual PEL volumes will be welcome to those who wish to work from a personal copy in their own areas of interest and are prepared to pay.

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Brian Coote, CONTRACT AS ASSUMPTION

Oxford: Hart Publishing (www.hartpub.co.uk), 2010. xxviii + 217 pp. ISBN 9781849460293. £29.99.

This work brings together a number of essays on contract law (prefaced by a newly written introductory chapter) which were previously published by the author as separate journal

articles between 1964 and 2006. The essays are linked thematically by the central thesis that contract is best explained as an act by which the contracting parties mutually assume obligations towards each other. To grasp this thesis the reader could simply confine him- or herself to reading chapter 1, where Coote's theory is fully expounded and differentiated from pre-existing theories of contract law. However, a reading of the later chapters provides illumination of the theory within the context of specific aspects of contract law, aspects shown in a new light by the idea of contract as assumption. The essays included cover a range of topics: the doctrine of consideration (chs 3-5), exception clauses (ch 6); fundamental breach (ch 7); damages and the performance interest (ch 8); transferred loss claims and the performance interest (ch 9); third party rights (ch 10); and assumption of responsibility and pure economic loss in New Zealand (ch 11), a jurisdiction with which Coote is well familiar, being an emeritus professor of law at the University of Auckland.

Coote states, by reference to Charles Fried's famous work, *Contract as Promise* (1981), that he "accepts that contracts are made up of promises and that promises involve assumptions of obligation" (1). However, the focus of Coote's own work is not, as with Fried's, the foundation of contract law upon the morality of promising, but rather upon the idea of the voluntary assumption of obligations, of which Coote sees promise as merely an expression or form. Contract law is, for Coote, a facility which parties may choose to use, the liabilities achieved using this facility not being imposed or incurred but rather intentionally assumed (intention is a "central requirement" of contract law for Coote, rather than a peripheral matter). The focus on intention and assumption allows the requirement of consideration to be cast in a new light by Coote—it is the exchange of mutual assumption of contractual obligation which is (or at least ought to be, on Coote's view) the consideration of a contract (3). Coote is not so radical as to jettison consideration altogether (such reticence arguably resulting in some problems discussed below), but his equating of consideration and assumption of responsibility is radical enough to take Coote's theory of the Common Law of contract some way towards that of the other great Western legal families. Lawyers from both "mixed system" and Civil Law traditions would be likely to recognise more of their own systems in an English contract law built upon Coote's theoretical approach than upon traditional Common Law theories. The Scots lawyer, for instance, would be likely to agree with Coote that the basis of contract law lies in an assumption of legal duties—such, after all, was Stair's understanding of the essence of contract as resting upon the voluntary undertakings of the parties—and the German lawyer could easily accommodate Coote's central idea within a Germanic understanding of contract as based upon the declarations of will (*Willenserklärungen*) of the parties to the contract.

Coote's theory leads him to reach a number of conclusions which, for many common lawyers, will seem radical. In chapter 4, for instance, Coote argues that his theory, dispensing as it does with a requirement for consideration other than the intention of the parties, would solve the difficulties which the Common Law traditionally encounters with contractual variations. No longer would convoluted arguments of the type seen in *Williams v Roffey* [1991] 1 QB 1 be required to justify variations to contracts unsupported by traditional forms of consideration: a clear intention by the parties to undertake an effectual variation of the contract would suffice, an idea which, Coote explains, the New Zealand courts are already moving towards. Such a development would be a most welcome one, though I have argued elsewhere that the more radical step of dispensing entirely with the requirement and language of consideration would be the simplest and most decisive way of, among other things, enforcing all seriously intended contractual variations in English law (see Hogg, "Promise: The Neglected Obligation In European Private Law" (2010) 59 ICLQ 461).

Coote's central thesis is certainly a breath of fresh air for the Common Law of contract, and takes a commendable approach to the importance of personal liberty and freedom of action,

stressing as it does the voluntary intention of the parties as the constitutive means of assuming an obligation. The thesis also has the attraction of building on what has gone before. Thus, Coote does not reject out of hand promissory ideas about contract law, but rather suggests that what is crucial to a legally relevant promise is that the promisor is assuming an obligation in the act of promising. In so suggesting, however, Coote controversially rejects the idea that promises are confined to undertakings concerning future acts or abstentions from acting: on his view, one can make promises about past facts, these being none other than assumptions of obligations about those past facts (39). Many will feel that this stretches the idea of promise beyond long-standing and culturally ingrained notions of the institution of promising, the present writer among them. Contrary to Coote's view, I argue in a forthcoming work (*Promises and Contract Law*, Cambridge University Press, forthcoming, 2011) that it is central to the idea of promise that A is pledging a future performance in favour of B; the assertion of a past or present fact is per contra a warranty, the making of which, while it may give rise to an obligation, can be distinguished from a promise.

Given the breadth of time over which the various chapters forming Coote's book were originally published in article form (some forty-two years between first and last), the thesis of contract as assumption inevitably comes over more clearly and in a more developed fashion in the chapters which were published more recently, reflecting the author's development as a thinker. Thus, for instance, in the chapter (on exception clauses) first published in 1964, there is a much more muted exposition of Coote's central thesis than one finds in his introductory chapter, though the message of the chapter – that exception clauses are intentional limitations on the rights arising at the outset of the contract, rather than mere shields to claims based on accrued rights – is clearly consistent with a theory of contract as a voluntary assumption of obligation, and of contracting parties as free agents able to determine which obligations they assume. Some might feel that the inclusion of this chapter, written four decades before the later material, somewhat interrupts the overall flow of the work, given the relatively undeveloped nature of the central thesis within it; on the other hand, as the work is explicitly a collection of essays on a theme, the fact that the chapter fits within Coote's overall theory seems a defensible reason for its inclusion, and its inclusion can be argued to help demonstrate the development of Coote's ideas over the extended period of his academic writing.

Reference was made earlier to Coote's equivalence between assumption of obligation and consideration. This allows him to avoid some traditional Common Law problems (such as those associated with variations of contract unsupported by valid consideration), but the rejection of the alternative and simpler argument that consideration should be dispensed with altogether produces some awkward results for Coote's approach. One such result is Coote's fondness for the idea, developed in the Common Law of torts, of an "assumption of responsibility" by a party as a ground for imposing tortious liability for pure economic loss. Coote's idea of contract as based on an assumption of obligation, and the judicial idea of a tortious assumption of responsibility, have evident parallels. To most this would be worrying, as an acceptance of the validity of both Coote's thesis as well as of the idea of assumption of responsibility in tort must lead inevitably to a blurring or merger of contract and parts of tort. Coote acknowledges that the idea that tortious liability can be assumed voluntarily "may appear counter-intuitive" (193), as indeed it does, but he nonetheless defends the idea rather than attack it (as the present writer would have). Why? Because, Coote argues, it allows tort law to fill gaps in the Common Law resulting from the doctrine of privity of contract, something which "might even lead to the eventual development of what, in effect, if not in theory, would be a new form of contract for which consideration was unnecessary" (203). This is a worrying defence of assumption of responsibility in tort: rather than simply argue for the abolition of consideration as a formal requirement of contract law, thus allowing all seriously intended voluntary undertakings to

constitute contracts rather than force them into the tort box, Coote has instead led himself into defending a blurring of the fundamental division between voluntary and involuntary obligations in order to try and work round the problems caused by a consideration requirement. Despite promising signs of a willingness to embrace fully the radical agenda of contract as assumption, in the end he seems unable fully to throw off the shackles of consideration. The result is an endorsement of the distorted solutions the Common Law employed to deal with the unwelcome results of a doctrine of consideration that Coote might so easily have jettisoned when advancing his new theory of contract.

There is much to commend in this work. The idea of contract as assumption is an attractive one, not least of all because it can accommodate the notion of promise (though not all would agree in precisely the way defined by Coote) as a means to effect such assumption, as well because it supports personal freedom and responsibility, values much underplayed in contract theory in the 1970s and 1980s. If Coote's thesis has a principal weakness, it has been argued to be that it is not radical enough. Coote clings to consideration, albeit in a recast form, when a theory focusing on seriously intended assumption of obligation is surely one in which the idea of consideration is superfluous. Consideration appears to offer nothing of use to contract theory once the focus has rightly been found in the serious intentions of the parties to be bound to an obligation. It may be that Coote's view is that an outright rejection of consideration would simply be too radical, and that for any contract theory to stand a chance of receiving judicial approbation it must at least attempt to meet the courts half way. If that is so, it is a pity; the elegance of Coote's theory is somewhat distorted by the need to accommodate consideration within it, and to argue that consideration ought to be abolished would hardly be the shocking argument that it once may have been. Despite this arguable weakness, this collection of essays remains a stimulating and worthwhile read. Its publication serves as a reminder that there are those within Common Law academic circles willing to think radically about contract theory, in ways which offer the genuine possibility of fashioning a theory which might serve not just the Common Law but the other legal families also.

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Catharine MacMillan, MISTAKES IN CONTRACT LAW

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The doctrine of mistake continues to perplex, frustrate and fascinate contract lawyers in equal measure. When, in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, the Master of the Rolls, Lord Phillips, was driven to remark that “[i]t has been a fertile source of academic debate, but in practice it has given rise to a handful of cases that have merely emphasised the confusion of this area of our jurisprudence” (at 725), he could have been talking about the doctrine of mistake more generally and not just the distinction between common mistake in Law and Equity. Catherine MacMillan seeks to address some of these problems or, as she puts it, why “the form of the common law doctrine of mistake is itself largely a mistake” (2) by taking a long view. The doctrine of mistake in its modern form was a Victorian invention. But it was one with a complex pedigree.

MacMillan begins the story of mistake in Ancient Rome with enough contextual information to be accessible to readers without any grounding in Roman law. The tale is continued through the Glossators, Neo-Scholastics and finally the Natural lawyers. Chapter 2 concentrates on

the role played by legal philosophers. Chapter 3 then shows the practical side of mistake through the workings of Equity. This aspect of Equity has been largely overlooked before now. Equitable relief was premised on the grounds that conscience would not allow an advantage obtained by a mistake to be retained. MacMillan makes the crucial point that mistake was better developed in Equity than at Common Law because the parol evidence rules were more relaxed. The theme of legal procedure is continued into Chapter 4. This is not the first time that a legal historian has drawn attention to the role of procedural change in the rise of the so called classical model of contract but it is the first attempt to explore this hypothesis in such detail using a specific example. The changes in legal procedure in the nineteenth century hardly set the pulse racing but, nevertheless, “set the necessary conditions for the development of a substantive doctrine of mistake” (95). Chapters 5 and 6 return to the influence of legal literature which emerged in the early nineteenth century and helped to shape the substantive contours of mistake. Some of these writers like Pothier, Pollock, Anson and Benjamin are very well known, others, like Macpherson, an Anglo-Indian disciple of Pothier, less so. The great value of this discussion is the way in which it highlights some of the struggles faced by those seeking to reconcile theory and practice, and at the same time, construct a workable framework for mistake.

The remainder of *Mistakes in Contract Law* shifts the spotlight onto judges rather than writers. MacMillan carefully examines the leading nineteenth century cases on mistake. Having done so she concludes that *Couturier v Hastie* (1856) 5 HLC 773, *Raffles v Wichelhaus* (1864) 2 H & C 906, *Kennedy v The Panama Mail Co.* (1867) LR 2 QB 580 and *Smith v Hughes* (1871) LR 6 QB 597 were not, in fact, decided on the basis of a general doctrine of mistake at all. That they came to stand for such a proposition owed more to the textbook writers than anything that was actually said by the judges deciding them. At least some are better explained as cases of misrepresentation than mistake. As a result, from the outset it can be said of mistake that the fact that “its creation was imperfect and its judicial acceptance less than complete only served to confuse rather than clarify English contract law” (215). Mistake of identity was, as she shows, more secure, albeit heavily influenced by shifts in the criminal law as well as the law of contract. The main section of the book concludes with a discussion of the tricky problem of mistake after the fusion of Law and Equity.

MacMillan uses the final chapter in order to comment on the two major decisions in mistake of the last decade, *The Great Peace* and *Shogun Finance v Hudson* [2004] 1 AC 919. She also uses developments in mistake to draw some broader conclusions about the nature of legal change and legal transplants, concluding somewhat pessimistically that “[t]here is only so much tinkering that can be done within an existing edifice and this has ramifications for the reception of ideas and for the development of private law on a pan-European scale” (311). Whether one agrees with these conclusions will, in part, depend on how attached the reader is to the *status quo* – many are not. It will be more difficult to dissent from the view that MacMillan has produced a stimulating and, at times refreshing account of mistake. Devoting over three hundred pages to one small area of legal doctrine was a brave thing to do. Such an approach is the antithesis of the big legal histories of contract that appeared more than thirty years ago. Works of this sort – and it is to be hoped that others on aspects of private law doctrine will follow – allow a more nuanced picture to emerge. But it would be a shame if the readership was confined to legal historians. This book will be of interest to any modern lawyers and law students curious to know what caused all the confusion in the first place. Those watching the pennies will be pleased to know that a paperback version is promised in 2011.

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Matthew Conaglen, FIDUCIARY LOYALTY. PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES

Oxford: Hart Publishing (www.hartpub.com), 2010. xliv + 287 pp. ISBN 9781841135830. £50.

Disagreements and questions about the fundamental nature of fiduciary liability have been extant for a good number of years now in academic circles. In the world of practice, lawyers and judges have traditionally been less concerned about conceptual and taxonomical explanations of what really underpins the fluctuating rules concerning the identification and regulation of this class of legal persons known as “fiduciaries”. That stance has been changing in recent times, however, and this text provides ample justification, alongside a cultivated and critical account of the importance of taxonomy generally, for the importance that is to be accorded to the search for conceptual certainty.

Another relatively recent development has been the central emphasis placed upon the concept of “loyalty” as the core normative driver of the law regulating fiduciaries. As intuitively attractive as the idea of “loyalty” is, as a base value for a body of laws, it is one which lacks a sharpness required for more detailed doctrinal rule building. This carefully argued monograph takes a novel and conceptually subtle approach to explaining the significance of fiduciary loyalty. It represents a sophisticated attempt to explain how more detailed rules can be synthesised in an approach that focuses on fiduciary law’s underlying normative imperative of loyalty, both in terms of its content and its systemic significance.

In examining the nature of fiduciary loyalty, and thereby seeking broader instruction, the text subjects certain rules of equity to sustained analysis. It does so not just by pondering the content of disparate rules that attach to commonly identified fiduciary offices. Rather, the exercise is a more ambitious one – by aggregating the individual rules in pursuit of their underlying basis the text moves towards explaining why fiduciary duties exist – and hence advances a more profound argument. This is that the concept of fiduciary loyalty conveniently denotes a juridical reservoir for a discrete and interstitially connected series of principles that serve a broader instrumental purpose. They exist to ensure that a fiduciary will fulfil his *non-fiduciary* duties appropriately. In other words, fiduciary duties, derived from the concept of loyalty, are symbiotically linked to non-fiduciary duties – their very existence is to ensure that a fiduciary complies with their existing legal duties.

The argument which underpins Dr Conaglen’s auxiliary theory of fiduciary duties is tightly made from the outset, with an impressively well-considered second chapter that diagnoses the traditional weaknesses of previous theories of fiduciary law. More particularly, the text is sensitive to the occasional tendency to treat Common Law jurisdictions as sharing a monolithic approach, itself a misunderstanding not made clearer by leading decisions of the Privy Council in the area. The approaches are often similar, but cannot be said to be uniform, and some jurisdictions differ more markedly than others. This is an area of law that is particularly policy-loaded, given the importance of how obligations are classified as regards remedial options among other things, and hence differences should not come as a surprise.

The scope for difference between apparently similar jurisdictions carries as much, or as little, weight in relation to Scots law as it does for more traditional Common Law jurisdictions. Dr Conaglen’s text seeks to subject English and Australian law to sustained analysis, and to make incidental references to other jurisdictions. Thus, a Scottish lawyer using the book cannot be heard to complain about the lack of a specifically Scottish analysis as the text makes no claim to consider Scottish law. The extent to which Scottish law could follow the analysis set

out by Dr Conaglen is unclear to an extent, though one must say that any such ambiguity would in practical terms be one of degree. It is clear that many of the practically functional rules relating to fiduciaries in Scotland and England are extremely similar if not identical, with the (possibly diminishing) exception of remedial responses. In terms of the theoretical fit of Dr Conaglen's theory of fiduciary duties to Scottish law there is arguably more tension as a result of the absence of an intellectually distinct equity jurisdiction. Yet, that appears not to be necessarily fatal to a potential Scottish reception of Dr Conaglen's auxiliary theory of fiduciary relations – the fact that fiduciary rules in England arose within the Court of Chancery does not mean that Scots law, if it should be so inclined, could not recognise *sui generis* an ex lege collection of duties that would perform a similar auxiliary role in relation to the classical categories of legal duty. The fundamental nature of such ex lege duties, and indeed where they came from, would present a more ticklish question but not an insurmountable obstacle to following Dr Conaglen's analysis.

The text is not only concerned with situating fiduciary law within the broad vista of private law at a taxonomical level. One of the greatest strengths of the text is the way that analysis of the operation of rules in discrete and specific situations simultaneously sustains and is subsumed within the broader classificatory objective. Chapter 5 in particular is permeated by clarity of analysis in the way it teases out conceptual differences between prohibitions on making a profit, conflicts of interest and the fair dealing rule. Furthermore, chapter 6 reflects upon the manner in which a fiduciary's potentially multiple duties interact with each other, thus providing a useful account of potential difficulties that may arise in such situations.

As ever with monographs from Hart, the text is handsomely presented at a reasonable price, and a paperback edition is due to appear in August 2011 at an even more reasonable price. This monograph is a superb example of doctrinal private law writing, a fact recognised by the award of the SLS Peter Birks Second Prize for Outstanding Legal Scholarship 2010. It will be of interest to academics and some practitioners seeking a deeper understanding of the formative forces of fiduciary law, and it would be a strong addition to a reading list for advanced students. For academics with an interest in fiduciary law, whether they agree with Dr Conaglen's thesis or not (there are those who do not: Rebecca Lee, Lionel Smith, and Joshua Getzler for example) it is a *sine qua non* to which we must all respond.

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SET-OFF LAW AND PRACTICE: AN INTERNATIONAL HANDBOOK. Ed by William Johnston and Thomas Werlen

Oxford: Oxford University Press (www.oup.co.uk), 2nd edn, 2010. lxxi + 576 pp. ISBN 9780199579716. £165.

"Set-off", it is commonly said, is not a term of art in Scots law. The result has been a focus on particular types of set-off. Compensation, for instance, is covered in the commendably concise – contemporary law reformers, take heed – Compensation Act 1592 (APS, III, 573, c 61; RPS 1592/4/83). "A just and positive statute," Lord Cunninghame remarked of it, "most creditable to the wisdom and sound views of the ancient Scottish legislature" (*Donaldson v Donaldson* (1852) 14 D 849 at 855). But the focus on compensation is to some extent unfortunate, not least because compensation is relatively unusual. Although it may be fair to say that compensation is a doctrine of the substantive law, compensation under the 1592

Act has to be pled and sustained in court. It is thus a doctrine for litigators and, in practical terms, expensive.

Other types of set-off, in contrast, are much more important. The Scots law of insolvency set-off (“balancing of accounts in bankruptcy”) is one area of daily practical importance which has been rather neglected by modern scholarship, although it has been the subject of a very useful recent decision by Lord Hodge: *Integrated Building Services Engineering Consultants Ltd v Pihl UK Ltd* [2010] CSOH 80, which confirms that it does apply on administration. One direct consequence of the lack of development of balancing of accounts in bankruptcy was that a recent gallant attempt to persuade the Royal Court of Guernsey that it should develop its law of insolvency set-off on the basis of the Scots law of balancing of accounts, failed: *Flightlease Holdings (Guernsey) Ltd v Flightlease (Ireland) Ltd* [2009] GLR 38 (a case involving two insolvent Swiss Air subsidiaries whose outstanding liabilities amounted to almost US\$690m).

The book under review collects together national reports which each concisely describe the nature of the different types of set-off in that jurisdiction. Alas, there is no national report for Scotland (unlike in the companion volume, also edited by William Johnston, *Security over Receivables: An International Handbook* (2008); the Scottish chapter in the latter work is contributed by Mr Bruce Stephen of Brodies LLP). The Scots law of contractual set-off has been all but ignored in modern literature. But if Lord Rodger’s judgment in *Inveresk plc v Tullis Russell Papermakers Ltd* [2010] UKSC 19 has given renewed impetus to this area of the law in general, this book may provide a helpful summary in English of the developments in other jurisdictions.

There is one area on which the book is particularly strong: consideration of the “cash-pooling” agreement whereby a corporate group seeks to ensure that different debits and credits in group banking arrangements are treated as efficiently as possible. It is generally accepted that it is possible to contract-out of, say, compensation. But is it possible to contract-in? And, if so, is it possible to provide contractually for set-off on a wider basis than that available under the 1592 Act? Can such agreements, irrespective of the substantive rights they seek to confer, be concluded by all companies in a corporate group, thus creating what the US courts have referred to as “mutuality by contract”? And how will such agreements fair on insolvency?

The present volume contains very useful tables (at lxii-lxxi) which allow the reader to determine at a glance whether, for any particular jurisdiction covered in the book, set-off is statutory; mandatory within insolvency; whether there are claw-backs of pre-insolvency set-offs; whether set-off agreements encompassing all the debts owed by corporate affiliates are possible outside insolvency; and whether such affiliate set-off agreements are effective within insolvency. It may be imagined, therefore, that this book would be of particular use to practitioners: whether to those dealing with cross-border insolvency set-off issues, or to those drafting composite corporate guarantees and set-off agreements. To such practitioners this user-friendly volume, on a subject often considered arcane, is warmly commended. To those with academic concerns, there is much to be gained from the practical focus on the types of agreements to which practitioners regularly have to bring their knowledge of set-off (such as the “cash-pooling” agreement), but which are not, in the Scottish sources at least, much considered. This volume thus brings with it too a challenge: to develop our own law to justify – if any justification were needed – inclusion in the next edition.

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Richard Fentiman, INTERNATIONAL COMMERCIAL LITIGATION

Oxford: Oxford University Press (www.oup.co.uk), Oxford Private International Law Series, 2010. lxiii + 766 pp. ISBN 9780199265435. £175.

Readers of books about private international law will be familiar with the traditional manner of arrangement of the rules and principles which comprise this area of law. Just as all Gaul was divided into three parts, so too expositions of private international law customarily deal with, in turn, the constituent elements of jurisdiction, choice of law, and judgment enforcement. In this impressive new addition to the Oxford Private International Law series, Richard Fentiman has chosen to move away from the conventional framework (if not from the traditional topics), examining the subject of international commercial litigation in a more holistic fashion, through the prism of risk. In viewing the subject from this perspective, and in making a “cradle to grave” risk assessment of commercial transactions, the author displays his immense academic and practical expertise, and provides important and original insights.

The author’s opening premise is that commercial activity depends on the assessment and management of risk: *financial risk* (a contracting party’s credit-worthiness or solvency) and *legal risk* (the effectiveness of transactions, available remedies in the event of default, and the enforcement of remedies). In multistate cases, legal risk tends to be higher, and presents in two particular guises: *transaction risk* (the risk that the parties’ expectations will be defeated by application of a law which does not give effect to the object of the transaction) and *litigation risk* (the risk to a claimant that he may be required to resort to litigation to vindicate his rights, and the risk to a defendant that he may be required to defend proceedings).

Under the heading of *litigation risk* – which the author perceives to be the primary threat to a commercial transaction – the subjects of *venue risk* (issues pertaining to jurisdiction) and *enforcement risk* (judgment enforcement) are examined. The main jurisdictional risk to any commercial party is the risk that a dispute arising will not be resolved in his preferred forum, or worse, in an unfavourable forum (one aspect of the uncongeniality thereof being that its choice of law regime heightens transaction risk). Against this hazard, the author considers the role and validity of jurisdiction agreements and the danger posed by (negative) pre-emptive proceedings which are capable of undermining the effectiveness of such agreements, and he proposes strategies which may be employed to manage the risk of the pre-emptive strike.

Under the heading of *transaction risk*, the author outlines the risk that a transaction will fail because it cannot be implemented according to its terms, and suggests (principally, but not exclusively, through the lens of choice of law) how that risk can best be managed by means of prior agreement. Part of managing transaction risk seems to be ensuring that disputes are resolved in a forum which is likely to give effect to the parties’ choice of law. Whilst recognising that transaction risk can never be eliminated altogether (for the applicable law is not frozen as at the moment of choice), the author advises on how transaction risk can be kept to a minimum through the making of a valid and effective choice of law, and by “choice” of a forum with a choice of law regime which respects party autonomy, and only exceptionally gives effect to overriding mandatory rules and public policy.

With regard to choice of law rules, the book includes in Section III (“The Laws Governing Multistate Transactions”), detail on the law governing contractual issues, the law governing transfers of title, and the law governing assignment of debts (including a most helpful section comparing article 12 of the Rome I Convention with its successor, article 14 of the Rome I

Regulation), before providing a more general commentary on the dynamics of the choice of law process (covering the traditional themes of characterisation, the realm of the *lex fori*, the doctrine of *renvoi*, and proof of foreign law). Treatment of the law governing non-contractual issues is not to be found, as might have been expected, adjacent to the chapter on the law governing contractual issues, but rather appears, in Section VI (“Recovery and Enforcement”), chapter 16 (“Recovering Transaction Loss”), in the context of the recovery of loss directly or indirectly related to the failure of a commercial transaction.

The author requires the reader to consider the subject in a particular way. Having addressed in Section II (“Legal Risk and Multistate Transactions”), chapter 2 (“Managing Litigation Risk”) the subject of venue risk, and the operation and effectiveness of jurisdiction agreements, followed by, in Section III (“The Laws Governing Multistate Litigation”), consideration of the mechanics and detail of choice of law in contract and property, the reader perhaps is surprised to return in Section IV (“Commencing Proceedings”) to the theme of forum selection, and the detail of European harmonised rules of jurisdiction and residual national (English) rules of jurisdiction.

The book is set against the backdrop of the evolving European regime and landmark cases such as *Owusu v Jackson* (C-281/02) [2005] QB 801, *Erich Gasser GmbH v MISAT* (C-116/02) [2005] QB 1, and *Allianz SpA v West Tankers Inc* (C-185/07) [2009] 1 Lloyd’s Rep 413 (ECJ), and their less well known progeny. Although the law is stated as at 1 October 2009, there is very helpful comment on what lies ahead for jurisdiction and judgment enforcement, namely, the proposed reform of the current Brussels regime, as initiated by the EU Commission Green Paper on the Review of Regulation 44/2001 (and now advanced by the Commission Proposal for a recast Brussels I Regulation), and the role to be played by the Hague Convention on Choice of Court Agreements, signed by the European Community on 1 April 2009, but not yet in force. It might be said that the author’s valuable insight regarding the future framework of the European regime of jurisdiction would have been better dispersed through Sections IV (“Commencing Proceedings”) and V (“Preventing Proceedings”) rather than by way of entrée in Section I (“Introduction”), but the difficulty of incorporating and placing the most recent changes in a subject area is fully appreciated; in the author’s words, the “vitality of the subject is bane as much as boon” (x).

Under the heading of *enforcement risk*, the author considers the risk that the rights of the claimant, even if validated by proceedings, cannot be effectively enforced, by reason of the fact that the judgment debtor’s assets have been concealed, or distributed beyond the territory of the court of origin, and examines the interlocutory remedies (“provisional, including protective, measures”) by which assets may be preserved and recovered.

Fentiman’s analysis of international commercial litigation, based on the anatomy of risk, is fresh and interesting, rich in scholarship, and motivated and deeply informed by practical considerations and by the author’s complete engagement with the subject. As Lord Mance writes in the Foreword to the book, “parties to international commercial transactions need to know how private international law addresses the legal risks involved in their transactions” (vii). Evidently private international law and rules of international civil procedure operate best when they enable parties effectively to manage and to minimise the risks inherent in commercial activity. This admirable volume will help commercial actors and advisers plan for, and preferably avoid, the legal risks inherent in international commerce – if parties know of a risk, and yet, informed, take it or endeavour to circumvent it, one hopes at least that, if things should turn out against them, the risk has been managed as well as can be.

This book is principally concerned with high-value disputes originating in the English Commercial Court, and with the rules of private international law and international civil procedure mechanisms which regulate such cases. The Scots lawyer cannot help but observe

the prominence of London as a centre for the resolution of international commercial disputes, and should reflect upon the status of the English Commercial Court as a truly international forum.

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John Macdonald, Ross Crail and Clive Jones, THE LAW OF FREEDOM OF INFORMATION

Oxford: Oxford University Press (www.oup.com), 2nd edn, 2009. lxxxviii + 1,212 pp. ISBN 9780199544356. £235.

A substantive law of freedom of information is something of a newcomer in the United Kingdom. The Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002 created new rights of access to information held by public bodies. Although it has taken a few years for these respective statutes to generate interpretative case law there is now a significant corpus of case law prompting analysis. In addition to the tangible legal development of freedom of information law, political attitudes to freedom of information law in the last year or so suggest a dilution of political commitment. Former British Prime Minister Tony Blair's recent memoir contained the following colourful reflection upon his decision to introduce freedom of information laws: "You idiot. You naive, foolish, irresponsible nincompoop. There is really no description of stupidity, no matter how vivid, that is adequate. I quake at the imbecility of it." In addition, there have been two ministerial vetoes under section 53 of the 2000 Act barring disclosure of Cabinet Minutes relating to Devolution, and the Iraq War. It is against this backdrop of increased legal development and political retrenchment that the appearance of a second edition of *The Law of Freedom of Information* is to be welcomed as a safe guide through the more complicated aspects of its subject matter.

The new edition, like the first, is very much a child of New Square Chambers—all the contributors are members, or former members, of the set (a characteristic shared by its main, and considerably cheaper, competitor: P Coppel, *Information Rights* (3rd edn, 2010), which hails from 4-5 Gray's Inn Square). Yet, while the spawning ground of the text may be the same, the second edition has shed a slightly speculative air that (necessarily) pervaded the first edition because the Freedom of Information Acts were *not* then in force. This second edition retains the prescient strengths of the first edition, but at the same time structural changes and comprehensive digestion of recent developments provides a more refined product.

Understandably, there is less historical narration concerning the agitation for freedom of information laws within the United Kingdom at the outset of the text—that they are now a clear and present reality diminishes the importance of that story. Helpfully, a historical narrative is retained later in the text as a useful contextualisation of the ideals underpinning the legislation. However, the introductory fundamentals of the text are, appropriately, directed towards the fact that there are multiple intersections between information law regimes, and the text deals with this point with an admirable balance of accessibility and depth. This balance is important but difficult to strike in the realm of information law, where the technicalities of different statutes can become eye-wateringly complex. By setting out in a clear and accessible manner the core anatomy of the Freedom of Information Act 2000—the right to information under section 1 of the Act, the broadly correlative duty on the part of the public body to confirm or deny, and

the operation of different types of exemptions from the generalised right to information – the text achieves an admirable clarity of expression. In terms of depth the treatment is equally impressive. In particular chapters 4 and 5, dealing with potentially labyrinthine statutory provisions, sacrifice no detail regarding the operation of the Freedom of Information Act 2000, without losing the reader in an intellectual morass. The coverage of environmental information laws and data protection laws in chapters 9 and 10 is well digested and authoritative, as is chapter 11 dealing with freedom of information in European Union. These three chapters are conceptually interlinked somewhat by the importance of European Union activity in the sphere of environmental information and data protection law – something underlined by the decision in *Office of Communications v The Information Commissioner* [2010] UKSC 3, where the United Kingdom Supreme Court made a reference to the European Court of Justice to ascertain whether the exceptions regime under the Environmental Information Regulations 2004, SI 2004/3391 should be considered cumulatively when considering the public interest in disclosure.

Beyond the mechanical operation of different information law regimes, later chapters utilise a user-friendly structure based upon broad themes, which are informed by instances of factual application. This should render the text particularly useful for the practitioner. The chapters dealing with the implications of freedom of information in the commercial world are particularly illuminating. One might also be forgiven for suggesting at this point that the title of the text seems rather modestly restrictive. A number of chapters dealing with other important information laws under the heading “Related Statutes” are of considerable interest, and one would suspect they would be readily appreciated by practitioners, particularly those dealing with the vexed subjects of money laundering and medical records.

The law of Scotland’s place in the text is somewhat uneasily positioned at the rear of the substantive text alongside Wales and Northern Ireland, and in close proximity to a comparative analysis of other members of the Common Law family’s information laws. This is of course not an unusual location for a treatment of Scotland’s system of law in many texts dealing with law throughout the United Kingdom. In the sphere of information law it is even less surprising given the complexity of the plurality of information law regimes which operate within the jurisdiction – the Freedom of Information Act 2000 and the Freedom of Information (Scotland) Act 2002 are both capable of applying within the jurisdiction. That is before taking into account the complications of what are, at least formally, different environmental information rules. The text’s explanation of the interface between the United Kingdom and Scottish legislation is thoughtful and thorough. In dealing with the substance of the Scottish rules the text is accurate and pretty comprehensive, though it might have been helpful to include greater reference to decisions of the Scottish Information Commissioner, and to have given more discursive attention to some of the difficulties posed by the Scottish Information Commissioner’s lack of jurisdiction with respect to data protection issues.

This new edition of the text comfortably maintains the text’s status as one of the market leaders, especially for practitioners, and its attention to detail and accuracy should also commend it to an academic audience seeking a succinct and comprehensive statement of the law. For students, and freedom of information officers in organisations who are not legally trained, the text will also be of use as a reference text, though the quantity and quality of legal analysis would perhaps require it to be used in conjunction with a more elementary introductory text.

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Hilary Patrick and Nicola Smith, ADULT PROTECTION AND THE LAW IN SCOTLAND

Hayward's Heath: Bloomsbury Professional, 2009. xxxvi + 227 pp. ISBN 9781847664877. £38.

The Adults with Incapacity (Scotland) Act 2000, the first bill to be passed into law by the Scottish Parliament, launched a period of significant reform in the area of adult protection in Scotland. Two further pieces of new legislation, the Mental Health (Care and Treatment) (Scotland) Act 2003 and the Adult Support and Protection (Scotland) Act 2007, have combined with the remnants of the earlier provisions on local authority powers to act, and the influence of domestic and international human rights obligations, to create an innovative structural framework for dealing with vulnerable adults. The rapid pace of reform and the intricacies of the new legislation are likely, however, to prove bewildering both to practitioners of various stripes in the field and, most importantly, to the adults who may find themselves the subject of the law. Hilary Patrick and Nicola Smith seek, in this text, to offer a clear roadmap to the new legislative landscape, an aim which they achieve with considerable success.

The authors lay the foundations of their guide to the law in chapters 2, 3 and 4 of the book. Chapter 2 provides a concise and easily comprehensible overview of the three key pieces of legislation, in each case defining which adults are covered by the statute and then addressing the scope of the Act, the potential uses of the provisions and the information needs of relevant parties where the provisions apply. Chapter 3 identifies and explains the roles of the key organisations and individuals in the area. Chapter 4, perhaps most importantly, sets out the shared principles which underpin the overall picture of the reformed law of adult protection. An understanding of these principles is likely to be critical in determining how the legislation will operate in practice, and the concise summary offered by the authors here offers a solid basis for their examples of the law in practice elsewhere in the text.

Subsequent chapters use these foundations to deal with a range of key topics, such as harm and abuse, the parameters of the powers of local authorities and other parties, and the provisions applying in emergency situations. Each topic draws on more than one of the relevant statutes, but the principle-focused approach to the law adopted by Patrick and Harris allows for the details to be constructed into a whole with a minimum of confusion. Good use is made of text boxes clarifying how the underlying principles operate in each topic area, and practical examples serve to keep the explanations clear. The content is book-ended by an opening chapter on the history of adult protection law and a closing chapter on potential future developments in the area. These help to place the detailed consideration given to the legislative materials in a broader context, in addition to flagging up issues of concern for the future.

The book is clearly targeted towards practitioners in this field, including lawyers, social workers, medical health professionals and care workers, and the highly practical approach taken in the text suggest it will be a valuable resource in this regard. It is also encouraging to see a foreword in the text from Henry Simmons, Chief Executive of Alzheimer's Scotland, along with a note of thanks to ENABLE Scotland in the authors' foreword, which suggests the needs and interests of the most important people in this arena – adults affected by the legislation – have remained uppermost in the minds of the authors throughout. Overall this text provides a much needed practical guide to a complex and important area of the law. Those working in the area of adult protection would benefit from having a copy close to hand.

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ESSAYS IN CRIMINAL LAW IN HONOUR OF SIR GERALD GORDON. Ed by James Chalmers, Fiona Leverick and Lindsay Farmer

Edinburgh: Edinburgh University Press (www.euppublishing.com), 2010. Edinburgh Studies in Law vol 8. xvi +356 pp. ISBN 9780748640706. £60.

In June 2009, a conference was held to celebrate the 80th birthday of Sir Gerald Gordon QC. This Festschrift collects together the papers presented there (together with some extra contributions) and is an excellent tribute to a man who has done so much to improve the study and practice of the criminal law of Scotland. The list of authors in this Festschrift reads like a “Who’s Who” of contemporary criminal law commentators from Scotland and beyond. This ensures both that the quality of the chapters is consistently high and that comparative perspectives are emphasised throughout. This is fitting given Gordon’s own groundbreaking, and utterly cosmopolitan, academic work. His publications have proved extremely influential (a full bibliography of his work appears at the end of the Festschrift), as Lord Rodger’s foreword and Christopher Gane’s appreciation demonstrate. These are useful glimpses into the reception of Gordon’s work over the last fifty years, and emphasise just how important his endeavours – in particular, his *The Criminal Law of Scotland* – have proved.

The substantive chapters cover a dauntingly wide range of topics. The editors of this Festschrift must be congratulated for arranging them somewhat thematically. It is not possible in a review of this length to engage with many matters of substance. Instead, the themes of the book and the manner in which the various chapters explore them will be outlined. Suffice it to say that each chapter is likely to stir intense, lively debate, and this makes the book an important addition to the existing literature.

The first three chapters raise key questions of principle with which any system of criminal law must grapple. Lord Hope’s chapter on the value of the complainant’s distress as corroboration of a sexual assault describes excellently the difficulty in adopting rules that protect the accused (such as requiring two pieces of evidence for every essential fact) when these might well push some cases (particularly those involving sexual offences) beyond the reach of the criminal justice system. Andrew Ashworth’s chapter on child defendants is characteristically clear and engaging, drawing interesting parallels and distinctions between the Scottish and English systems of youth justice. More specific to Scotland is Eric Clive’s discussion of codification of Scots criminal law. The *Draft Criminal Code for Scotland* (2003) appears to have drifted into obscurity, but it is important for the development of the law that this topic is kept alive. Clive’s articulation of the case for codification is compelling and it is hoped that it reignites interest in this area.

The next few chapters are avowedly normative and theoretical. R A Duff and S E Marshall’s contribution builds on their previous work in defining “public wrongs”, an important step towards understanding criminalisation (a topic which, to date, has not been scrutinised in Scotland). With customary attention to detail, Lindsay Farmer’s chapter compares and contrasts the work of Scottish writers (and, in particular, Hume and Gordon) with regard to the use of “principle” in adjudication. Finally, in the theoretical vein, Victor Tadros presents a developed case for a human right to a “fair criminal law”. It is important – and laudable – that this Festschrift includes these theoretical contributions. In a sense, they show just how much the situation has changed since Gordon began writing – before *The Criminal Law of Scotland* was first published in 1967, it was rare to find much in the way of theoretical nous in Scots

academic writing. That this has changed is both an important part of Gordon's legacy and offers hope for future debates about Scots criminal law.

After the high theory of these chapters, the next theme to be explored relates to specific issues concerning Scots criminal law. Demonstrating the range of topics discussed in this Festschrift is Sharon Cowan's piece on the criminal law's response to sadomasochistic practices. Scots criminal law has yet to face this issue in practice, and Cowan provides a provocative account of the path the courts should take when they do. More frequently-encountered matters are discussed in Peter Ferguson's chapter on the mental element in crime and Stuart Green's interesting treatment of theft by omission. Again emphasising the value of comparative approaches, Finbarr McAuley's account of developments in sexual offences involving children and teenagers in Ireland is helpful, particularly in comparison with the provisions of the Sexual Offences (Scotland) Act 2009.

The chapters by Claire McDiarmid and Gerry Maher continue the focus on specific issues. McDiarmid presents a strong normative and empirical case for limiting—rather than extending—the ambit of the partial-defence of provocation. The most convincing case for keeping provocation is probably the mandatory life sentence for murder, a topic which is considered in Maher's overview of the structure of homicide in Scots law. Maher's discussion is wide-ranging and uses recent Law Commission proposals on homicide to good effect to illustrate his points.

Although the chapters above are primarily concerned with the substantive law, Gordon's work has also touched on the law of evidence and procedure, which is the focus of the chapters by Ian Dennis and Peter Duff. These concern very contemporary issues (witness anonymity and disclosure of Crown evidence, respectively) and will thus be of great interest to those with their fingers on the pulse of Scottish criminal justice. Although not included with Duff and Dennis's chapters, J R Spencer's discussion of the codification of criminal procedure is similarly engrossing. Codification of procedure is, of course, something which has succeeded in Scotland but failed—for various reasons which Spencer explains exceptionally well—to take a significant hold south of the border. The remaining chapters are not thematically linked, but are nonetheless interesting. Robert Shiels details the historical development of the role of advocates depute, whilst Sheriff T Welsh provides an insightful account of potential human rights difficulties for the law on contempt of court.

Simply offering the above overview of the themes and topics in this book can hardly do justice to the fascinating range and variety of its seventeen substantive chapters. This is a well-produced book which anybody interested in criminal law, evidence or procedure will find a worthwhile investment. The chapters are also all accessible enough to be of interest to academics, students and practitioners of all levels.

Findlay Stark

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Andy Wightman, THE POOR HAD NO LAWYERS: WHO OWNS SCOTLAND AND HOW THEY GOT IT

Edinburgh: Birlinn (www.birlinn.co.uk), 2010. xii + 339 pp. ISBN 9781841589077. £20.

This is not a law book. Nor is it precisely a book about law. It is a book about land, viewed through the periscopes of economics, history, geography sociology and law. Mr Wightman, though not a lawyer, knows much about land law, and his concerns about land usually involve

questions of law. He is no novice. His best-known work, *Who Owns Scotland?*, appeared in 1996, but there have been other publications too, such as *Community Land Rights: A Citizen's Guide* (2009). His website at <http://www.andywightman.com> is full of interest. The title of the new book is taken from an exclamation of one of the author's heroes, a name respected by everyone interested in Scottish legal historiography, Cosmo Innes, in that fascinating work published near the end of his life, *Lectures on Scotch Legal Antiquities* (1872) at page 155.

The new book has 32 chapters, largely self-contained. It could thus be described as a set of essays. The themes are too varied to be summarised. But the author has a tale to tell about grasping landowners, incompetent (or worse) burgh councillors, and flawed politics, leading to the concentration of landownership in too few hands, and the loss of community land rights. The word "reform" is ever-present, and the last chapter is a wish-list of future legal reforms. They include the scrapping of the law of positive prescription, the banning of *a non domino* dispositions, the extension of legal rights of succession (legal share) to heritable property, the recovery of common land, the restriction of land ownership to persons or entities based in the EU, "the ultimate ownership of all corporate owners should be declared", the promotion of community ownership, enhanced purchase rights for tenant farmers, a "one farmer, one farm" rule, a reduction in agricultural subsidies, the abolition of council tax and business rates coupled with the introduction of a land value tax, chargeable on all land including rural land, and the restoration of burghs as units of local government, and the reform of burghal common good law.

Over the past quarter of a century or so Scots property law has been transformed, partly by legislation, but partly by an academic revolution. But some specialist areas remain insufficiently developed. When a ship is sold, just how and when does ownership pass? Do we really know? There are comparable problems for at least some types of intellectual property. Reading the present book reminded me that, even for land law, there are dark hollows that would benefit from the flares of academic research. How much do we really know about commonities? About common good land? And so on. There has indeed been some useful recent work. Andrew Ferguson's *Common Good Law* (2006) comes to mind, as does Andrea Loux Jarman's "Customary Rights in Scots Law: Test Cases on Access to Land in the Nineteenth Century" (2007) 28 *Journal of Legal History* 207. But more is needed. Perhaps one of the hurdles is that some of these areas belong to public as much as, or more than, to private law. For the public lawyers they smack too much of property law, and to the property lawyers they smack too much of public law. Mr Wightman's interest in these dark hollows will communicate itself to all readers, and ideally would stimulate research.

Academic research aspires to be objective, neutral, and fully researched. Mr Wightman's book, for all its merits, is not in the style of a PhD. It is tract for the times, seeking not only to inform but also to persuade. While I enjoyed it immensely, and admired the range of the information presented—I wish I had been able to read it before signing off the Scottish Law Commission's *Report on Land Registration* (February, 2010)—I was sometimes left with the dissatisfied feeling that one has after hearing a speech by an able politician. This is the feeling that one has heard one side of the story, but that there may be another side too. To justify this comment would take more space than is available in a short review, but I will mention a couple of examples. One is about the law of succession. Mr Wightman is concerned about the way that land can pass down the generations intact. He recommends that legal rights (legal share), currently based only on the moveable side of the estate, should be extended to land. Personally I would agree. But there are those who, far from extending the legal share of issue to land, would abolish it completely. There is a legitimate debate here that is not reflected in the book. Or take the law of positive prescription. The author attributes the introduction of positive prescription in 1617 to the self-interest of the class that dominated Parliament. Let that be so (though

one might remark in passing that the period chosen by the legislators of 1617 was a *long* one, namely forty years). Does that somehow subvert the justification of positive prescription in the 21st century? What of the fact that prescription is to be found in so many other modern legal systems? Perhaps a coherent case could be put together for making prescription – both negative and positive – more difficult, and even for abolishing it. But one would need to weigh the arguments on both sides, the benefits that flow from the law of prescription as well as the drawbacks. Balanced debate of this sort is too often lacking in this book. Nevertheless this is a most valuable work: well-written, provoking, extensively researched, often persuasive. It deserves a wide readership, and that readership should include all those interested in Scots property law.

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George Joseph Bell, PRINCIPLES OF THE LAW OF SCOTLAND, FOURTH EDITION, with an introduction by Kenneth G C Reid

Edinburgh: Edinburgh Legal Education Trust, Old Studies in Scots Law, vol 1, 2010. xxviii + xx + 910 pp. ISBN 9780955633225. £30.

One of the distinguishing features of Scots law, and of Scots private law in particular, is the role played by the works of the institutional writers. These texts, now all rather aged, continue to be regarded as formal sources alongside case law and statute. Needless to say, this means that they are very valuable to the student, the academic and the practitioner.

Sadly, with the exception of Stair's *Institutions*, access to them has been somewhat limited in recent years. The last editions of Bell's *Principles* and *Commentaries* and of Erskine's *Institute* were reprinted in 1989 and 1990 by Butterworths in conjunction with the Law Society of Scotland but these editions are themselves out of print. Publication of older Scottish legal texts has not kept pace with the advances in access to historic case law through the Justis and Westlaw databases. The Edinburgh Legal Education Trust's reprint of the fourth edition of Bell's *Principles* (published in 1839) is therefore particularly welcome. The text remains a key authority for many areas of private law, perhaps most notably in relation to common property and the law of error. This edition was the last to be prepared by Bell himself and the editorial updates in later editions are not recognised as having the same authority as Bell's text. Modern textbooks now provide an up to date statement of the law. Therefore, it is helpful to have Bell's thoughts without later accretions.

As well as being an important source for contemporary law, Bell's *Principles* mark a significant stage in the development of Scots law. While reflecting the institutional tradition in seeking to present the law in a systematic fashion with reference to continental European writers, it is also the first attempt to integrate reference to Common Law materials into a comprehensive treatment of Scots private law. Bell's works are therefore key sources for any attempt to understand the development of a mixed legal system in Scotland. The *Principles* are a substantial intellectual achievement, remarkable in covering a wide range of topics in a clear, coherent and economical manner which wears its learning lightly. As Professor Reid notes, their influence was not limited to Scotland. Foreign lawyers, notably the great American writers Kent and Story, also relied on them for Scots law.

Scotland is a small jurisdiction which has produced few legal thinkers of Bell's stature. Full advantage must therefore be taken of his contribution. It is perhaps unfortunate that he has

not received the same level of academic attention as Stair. A substantial step has been taken towards addressing this deficit by Professor Reid's introduction, which gives extensive analysis of Bell's career, the nature and role of the work and its impact at home and abroad. The volume is also the first in the series Old Studies in Scots Law. As such it represents the first step in a very welcome attempt to make key texts from Scotland's legal heritage available to a much wider audience. Further volumes are awaited with great anticipation.

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Karen Alter, THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS
Oxford: Oxford University Press (www.oup.com), 2009. xxviii + 332 pp. ISBN 9780199558353. £40.

"Law is not autonomous from Politics." This assertion, made by Karen Alter, permeates her work, and this collection of essays. Alter considers and analyses the reasons for the transformation of the European Court of Justice (ECJ) from its initial status, in the early days of the (then) EEC as a "weak and fairly ineffective court", to, as Alter puts it (and many would agree) "a constitutional court in all but name". Alter, a political scientist working in US mainstream political science (self-described as "one of the first political scientists to study the ECJ") proceeds by careful fieldwork and analysis of empirical studies (such as the litigation strategies of those using the ECJ) to analyse "how the ECJ over time managed to invent for itself a political role that was far beyond what its founders anticipated". However, she acknowledges (in the Preface) that a crucial inspiration for her interest in the ECJ came from two lawyers – Federico Mancini, former judge and Advocate General at the ECJ, and Joseph Weiler, a leading European law scholar.

The European Court's Political Power is a compilation of fifteen years of articles and book chapters by Alter on the role of the ECJ – some co-authored with others. Most of these have been left unchanged for this publication. Only three of the chapters are newly written for this book – the Introduction, Conclusion and chapter 4. Thus, this collection spans a range of Alter's writings on the ECJ, in which she considers crucial questions such as the following: how did the ECJ succeed in introducing changes, through its decisions, that the member states often did not want; although the ECJ has often been influential, why was it sometimes sidelined (as in the role it played in the – now defunct – ECSC); although often expansionist, why has the ECJ sometimes eschewed opportunities to expand the law; and why has the ECJ only sometimes asserted itself against member state governments?

These questions, and others, are pursued in 13 chapters divided into four parts. Part I is a general introduction to studying the ECJ. Part II comprises more specific issues confronting the ECJ during the founding period of legal integration (taken to be 1952-1980). This part includes, as chapter 5, one of Alter's most well known publications – "The European Court's Political Power", originally published in 1995 – in which she argues that competition between different levels and branches of national courts facilitated the penetration of the EC supremacy doctrine into national legal orders. Part II also contains an interesting chapter, co-written with David Steinberg in 2007 and entitled "On the Theory and Reality of the ECSC", in which they argue that the ECJ's role was sidelined in the context of the ECSC (despite the fact that the ECSC possessed the most muscular legal enforcement mechanisms of supranational measures of its time) because neither national governments, nor companies nor workers had any interest

in actually building a common market in coal and steel. Chapter 6 of Part II contains Alter's significant contribution arguing against Garrett's controversial claim that the ECJ acted at the behest of some of the most powerful member states, a claim which Alter has continued to rebut throughout her work.

Part III continues with chapters that consider the ECJ and its varied influence on policy and politics in the more recent period 1980-2005. This includes as chapter 7 another well-known article, co-authored with Sophie Meunier in 1994, on "Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* decision". In this piece Alter and Meunier argue against a common belief that the *Cassis* ruling became significant because it created a European policy of Mutual Recognition, instead suggesting that its influence was mediated through the political response it received from the European Commission which itself tried to create such a policy, prompting reaction from member states. The thesis that legal rulings are influential because of "political follow through" – i.e. *Cassis* as an example of the coupling of a legal victory with political strategies – is a point made again in chapter 8 in which Alter considers EU gender equality policy.

Part IV shifts the focus somewhat to consider the ECJ in comparison with other international courts (chapters 11 and 12). Alter points out that the ECJ is in some ways not exceptional – it is not the only such court that can act independently of powerful member states. And yet she still sees it as an "outlier", as it has been nonetheless far more active and influential than other international courts. She attributes this influence in part to the fact that the ECJ has been linked more closely to a larger ideological agenda in which the ECJ has been perceived as useful or supportive by politically powerful actors, namely governments or social movements within the EU.

Alter states in her Preface that her approach was unfamiliar to European law scholars, whose scholarship had been castigated by Martin Shapiro as a stone age "constitutional law without politics". However, while it is true that in the earlier days of the ECJ's existence, European law scholarship tended to be overly doctrinal, this is hardly the case now, where there exists a plethora of legal scholarship willing to embrace inter-disciplinarity and eschew legal formalism (the recent collection, co-edited by Miguel Poiares Maduro and Loïc Azoulay, *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (2010), which combines a variety of approaches to the ECJ, is a good such example). Although acknowledged in chapter 2 that European law scholarship has moved on beyond this earlier doctrinal approach, such scholarship is nevertheless somewhat ignored by Alter, whose references on the whole tend toward North American political science, or North American European law scholarship, with less attention paid to more recent writings on law by Europeans.

Indeed, one might turn Shapiro's quip on its head to suggest that Alter's work sometimes veers towards a "constitutional politics without law". Whilst Alter's writing is undoubtedly informative, and well researched, to cast many of the ECJ's important decisions as influential due to "political follow through" is to minimise the import and impact of the ECJ's rulings *in themselves* – for example a case like *Kadi* (concerning violations of fundamental rights by UN terrorist listing: Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int'l Found. v Council & Comm'n*, 2008 ECR I-6351) was influential and controversial from the very date the ruling was handed down.

While the very welcome, fresh light shone by political science writers such as Alter revealed the weakness of legal formalism and the inadequacy of purely doctrinal scholarship, thereby opening up the field to a broader contextual approach, too little focus on law and politics *within* the Court itself (as opposed to political reactions to it) misses out critical features. Alter stresses that legal interpretation usually has a political element – a statement that only the most

hardened legal formalist might disagree with. The political element in legal interpretation is also highly salient to those interpretations engaged in by the judges of the ECJ *themselves*, as well as by those who interpret their judgements. Yet for a work entitled *The European Court's Political Power*, there is a curious lack of engagement with the particular contexts of the judges and their reasoning – for example their backgrounds, their appointments, their legal training, their nationality, their own power struggles within the Court. It would also have been useful if Alter, in the newly added chapters, had updated and followed through on more recent developments which pose significant – undoubtedly political – challenges for the ECJ, such as those of terrorism, or enlargement of the EU, which are largely ignored throughout the book.

The ECJ is a political being, and not merely in virtue of the use that others such as governments and litigants make of it. In an age in which the ECJ is comprised of a great many members from varied backgrounds – historically, geographically, and politically – the politics within the ECJ *itself* have never been more relevant. Alter's reflections on these issues would have been very welcome.

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Morten Broberg and Niels Fenger, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE

Oxford: Oxford University Press, 2010. lxii + 486 pp. ISBN 9780199565078. £125.

Before the entry into force of the Lisbon Treaty, "Article 234 EC" tripped off the tongue with its inherent suggestion of logic. This mechanism (now Article 267 TFEU) – whereby a national court or tribunal may send a reference to the Court of Justice on any question(s) of the interpretation or validity of EU law – is a central feature of the Treaty's "complete system of legal remedies and procedures" (e.g. Case C-50/00 P, para 40). The case law developed through it has contributed strongly to the evolution of EU law in substantive terms, often delivering results for national applicants that would not have been possible under domestic law; but it has also solidified legal relations within the EU legal order, enabling national lawyers and national courts and tribunals to access the Court of Justice at any stage of domestic proceedings and, through that process, weaving EU law more organically into national legal reasoning – in theory, at least.

The basic tenets of Article 267 are set out in the provision itself; any national court or tribunal may make a reference on either the interpretation or validity of EU law; only courts or tribunals "against whose decisions there is no judicial remedy under national law" *must* send a reference; other courts and tribunals need do so only if they consider that "a decision on the question is necessary" to enable them to give judgment. But the deceptive simplicity of this structure belies the dense complexity of the procedure in practice, a complexity to which Broberg and Fenger's extraordinarily rich monograph brings clarity where possible and astute alertness to relevant uncertainties otherwise. This book achieves the elusive "something for everyone": it is clear enough to recommend to and engage students; practical enough to be truly useful to lawyers, and judges; and yet it does not shy away from grappling with the more convoluted or conjectural questions for which neither we nor the Court itself yet has answers. The authors' scientific approach to uncovering their subject – case law tends first to be outlined in a sequential manner, but conclusions and broader implications are then brought together and discussed – is a strong feature of this wide appeal: the rules are as clear as they

can be, but their hazier origins and uncertain edges are presented too, for those who want to know more.

The book's structure is, essentially, perfect. The opening chapters set the contextual scene, providing, first, an overview of the procedure itself and, second, an overview of its use in the different EU Member States. Subsequent chapters then address, broadly, "who" may refer; "what" questions can be referred; "when" a reference can be made; "how" references should be crafted, addressing form, content and procedure (including an outline of the expedited – accelerated and urgent – procedures at 385-395); and, finally, the application and effects of the ruling itself. The volume concludes with a brief chapter on costs. An especially good example of the authors' blending of clarity with sophisticated discussion is provided by their analysis of the definition of "court or tribunal" (at 60-71). From a mosaic of difficult case law, the authors distil the issues into a series of practical questions, but without avoiding any of the conceptual intricacy underpinning the issues. The discussion on admissibility in chapter 5 similarly sees the authors impose a helpful framework around case-by-case determinations as to when the Court will *not* answer questions. In the same chapter, the analysis of both the obligation and discretion to refer, including clear presentation of the often-misunderstood *acte clair* doctrine, is particularly strong.

The only note of caution relates to the timing of the book's publication, which was just before the adoption of the Lisbon Treaty. This means that, in formal terms, the Treaty referencing used throughout the book does not reflect the revised TEU and new TFEU numbering and, in substantive terms, some restrictions formerly placed on the Court's jurisdiction (in the fields of asylum and immigration, and police and judicial cooperation in criminal matters) have now been revoked (or will be, in the case of police and judicial cooperation, after a transitional period of five years). Full details can be found in the Court's recently published Information Note (2009 OJ C297/01). The book does outline the (then potential) impact of the Lisbon Treaty, however; there is also an especially interesting discussion on the future of the procedure itself (at 25-36), centred primarily on difficult choices that may need to be made in order to manage the Court's workload.

In 2008 and 2009, the Court of Session sent three requests for preliminary rulings to Luxembourg, all on the interpretation of the Sixth VAT Directive, and bringing the total number of references from Scottish courts and tribunals just into double figures. This is a particularly low instance of references, not only relative to other EU jurisdictions but also bearing in mind overall UK figures (from 1952-2009, UK courts and tribunals sent 476 references in total; see the Court's 2009 Annual Report, available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/ra09_stat_cour_final_en.pdf). Interestingly, the authors address the consequences of failure to make a reference (at 265-272); beyond infringement proceedings within the EU legal order, it is worth noting that those consequences might even, conceivably, have ECHR implications too. It is also worth remembering that any Member State can submit observations regarding *any* preliminary reference sent to the Court (see 349-351, a process requiring clear channels of internal communication if Scotland is to engage effectively in this discourse), a privilege tied later (443) to the fact that judgments delivered under the Article 267 TFEU procedure have *general* binding effect beyond both the case and the State which triggered the reference. Recent developments in Luxembourg jurisprudence, especially the growing relevance and application of general principles of law in employment discrimination cases, will surely change things. If lawyers in the Scottish courts begin to engage more fully with these powerful tools of EU law, this volume will rightly prove an indispensable guide to the procedures, substance, and nuances, of Article 267.

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MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD. Ed by **Christophe Hillion and Panos Koutrakos**

Oxford: Hart Publishing (www.hartpub.co.uk), 2010. xxi + 396 pp. ISBN 9781841139548. £75.

The Treaty of Lisbon introduces some profound changes with regard to the EU's external relations and emphasises the role of the European Union as an international actor. Although mixed agreements are one of the most important instruments used by the European Union to organise and carry out its relations with international organisation and third states, the Treaty of Lisbon remains silent on this issue. Coming nearly thirty years after the publication of David O'Keeffe and Henry G Schermers (eds), *Mixed Agreements* (1983), this new volume returns to the phenomenon of mixity and not only investigates evolving practice and legal developments but also puts mixity in the context of the new treaty regime.

As a corollary of the limited scope of the EU's competence, mixed agreements in a classical sense are signed and concluded by the European Union and its member states and another party when parts of the agreements fall within the EU's competence but other parts do not. Their advantage is the overcoming of the division of competences, but this creates a variety of legal and practical challenges. One of them relates to the management of mixity between the member states and the European Union, one of the recurring themes of this volume. Analysing the case law of the European Court of Justice, Christophe Hillion discusses the changing views on the function of the duty of cooperation between the member states and the EU away from the requirement of unity in the international representation of the EU towards the more dynamic concept of ensuring coherence and consistency of the Union's external action. In "Mixity and Coherence in EU External Relations" (ch 5), he argues that the specific duty of cooperation stemming from the general principle of loyal cooperation would not only include procedural obligations of consultation and information and an obligation of conduct, but could also involve an obligation of result. The importance of the duty of cooperation is furthermore visualised by Joni Heliskoski (ch 7) who points out that rules and principles regarding the implementation of mixed agreements are developed rather incrementally by the Court of Justice, a topic that is also scrutinised by Panos Koutrakos (ch 6).

Addressing the phenomenon of so called new- or cross-pillar mixity, Ramses A Wessel examines agreements concluded by the European Union with a legal basis in two distinct Union pillars before the entry into force of the Lisbon Treaty (ch 3). In line with Alan Dashwood in "Mixity in the Era of the Treaty of Lisbon" (ch 18), Wessel shows that although the Lisbon Treaty abolished the need for cross-pillar mixity, the special status of the common foreign and security policy will continue to ask for cross-sector agreements, making his conclusions with regards to their domestic legal effects and possible restraints on member states' external actions even more valuable.

Located at the interface between international law and European law, mixed agreements create problems not only for the EU legal order itself but also for third parties. Internally, the EU faces the challenge to preserve the autonomy of the Union legal order. Marise Cremona illustrates in "Disconnection Clauses in EU Law and Practice" (ch 8) that one way of addressing the question of hierarchy between international and European norms is the inclusion of a disconnection clause into a mixed agreement providing that as between European member states provisions of EU law should apply rather than the provisions of the international agreement. The procedural counterpart to a disconnection clause as a choice of law clause that embodies the principle of the primacy of Union law within an international agreement

has been analysed by Inge Govaere. In “Beware of the Trojan Horse: Dispute Settlement in (Mixed) Agreements and the Autonomy of the EU Legal Order” (ch 9), Govaere argues that the reasoning of the Court of Justice would be aimed at safeguarding the autonomy of the EU legal order from being affected by dispute settlement mechanisms created under international agreements in favour of the EU’s own procedures.

The assessment of mixed agreements would not be complete without raising the issue of the international responsibility for mixed agreements. Adopting an inductive approach to international law, Pieter Jan Kuijper discusses the case law of international courts including the *Behrami and Saramati* decision of the European Court of Human Rights (ECtHR, joined cases *Behrami and Behrami v. France*, Application No.71412/01, and *Saramati v. France, Germany and Norway*, Application No. 78166/01, 2 May 2007) and the *Draft Articles on the Responsibility of International Organizations* of the International Law Commission. Kuijper not only encourages the EU to take on the challenge to organise itself with regard to the responsibility for mixed agreements, but he also suggests that this could positively influence the general law of the responsibility of international organisations.

Mixed Agreements Revisited addresses the multitude of practical and legal challenges mixed agreements create when they are negotiated, concluded, implemented and interpreted. The variety of perspectives with which the phenomenon of mixity is addressed, including amongst others academic scholars, practitioners, judges, the view from European institutions, European member states as well as third party countries enhances awareness of the complex nature of mixity and highlights the interconnectedness of many unresolved questions that have not lost their relevance after the entry into force of the Treaty of Lisbon. Like its predecessor 28 years ago, *Mixed Agreements Revisited: The EU and its Member States in the World* is therefore likely to become an indispensable guide to mixity for scholars, practitioners and students of EU external relations.

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PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS. Ed by Simon Chesterman and Angelina Fisher

Oxford: Oxford University Press (www.oup.com), 2009. xiv + 247pp. ISBN 9780199574124. £70.

Privatisation has been a central theme of public policy worldwide since the 1980s and, in this new age of austerity, seems likely to remain so. This edited volume concerns what might be regarded as the extreme instance of privatisation: outsourcing of military and security functions to private companies. Extreme, first, because it impinges upon the state’s monopoly over the legitimate use of force and hence strikes at the core of what most people would regard as its basic function: to provide collective security. Secondly, it involves particularly high risks, not merely of inefficiency, lack of accountability, corruption and subversion of public policy, but also serious human rights abuses and even threats to security itself. Although the book focuses primarily on the United States, both supply and use of private military and security services are global phenomena, driven by common pressures to reduce the size of armed forces following the end of the Cold War, and sometimes also by the desire to avoid full accountability for military actions.

There have been occasional high profile controversies involving private military and security companies (PMSCs), such as Sandline's role in supplying arms to Sierra Leone in breach of a UN embargo, and Blackwater's involvement in prisoner abuse and civilian deaths in Iraq. Mostly, however, privatisation of military and security functions has occurred below the political and regulatory radar. Unlike other privatised functions, increased reliance on PMSCs has not been accompanied by new regulatory regimes, either domestic or international. Indeed, the most substantial regulatory efforts to date have resulted from self-regulation.

Outsourcing of military and security functions has also largely been ignored in academic discussions of privatisation. This book seeks to remedy that by situating PMSCs within the broader context of private actors performing public functions, and addresses three sets of questions, which supply its organising structure: (1) How do PMSCs fit within that broader context, and what implications does this have for the possibility of holding them to account? (2) What lessons can be learned from other cases of privatisation? (3) Should there be limits on governments' ability to outsource traditional "public" functions?

Part I opens with an interesting and wide-ranging essay by Michael Likosky exploring the history and contours of what he terms the "privatisation of violence" in both military and civilian contexts. He argues that to devise effective means of accountability for PMSCs requires an understanding of how they resemble other forms of privatisation, which in turn suggests embracing a broader approach to accountability, including market and political, as well as legal mechanisms. The other chapters in this part do, nevertheless, focus on legal accountability. Olivier De Schutter asks whether international law obliges PMSCs' "home" states to control their activities, particularly by allowing domestic courts to adjudicate claims for violation of international norms, while Angelina Fisher considers whether PMSCs can and should be held legally accountable in the territories in which they operate. Both conclude that there are significant accountability gaps, especially to the extent that liability is premised upon a close relationship between corporations and states.

Part II has an explicitly comparative focus. Daphne Barak-Erez locates the privatisation of military functions at the extreme end of a continuum of security-related public functions, notably policing and prisons, many of which have been privatised for some time. Alfred Aman's chapter then focuses specifically on the lessons to be drawn from prison privatisation in terms of the limits of outsourcing policies, while Mariana Mota Prado considers the difficulties of ensuring effective regulation of PMSCs in light of regulatory experience in privatised infrastructure sectors. In a particularly illuminating chapter, Rebecca DeWinter-Schmitt examines the potential for effective self-regulation by PMSCs by comparison with self-regulation in the apparel industry; an industry which, like PMSCs, operates in a globalised market in which states have largely forfeited any regulatory role. Part III, finally, explores three extreme cases which, it is suggested, represent the limits of outsourcing policies: Jacqueline Ross discusses the use of private informants in criminal cases; Simon Chesterton considers the role of private contractors in gathering and analysing intelligence; and Chia Lehnardt examines the growing involvement of PMSCs in United Nations peacekeeping operations.

In truth, the question of limits preoccupies most of the contributors to this volume. This is unsurprising. The legitimacy of privatisation depends upon the appropriateness and effectiveness of the alternative governance regimes that are available, and these essays provide ample evidence of the very severe accountability and regulatory challenges that PMSCs pose, with few concrete suggestions as to how they might be overcome. Unfortunately, clear answers as to where the limits of outsourcing should be drawn are similarly elusive. In their conclusion, the editors suggest that legal accountability concerns militate against outsourcing where secrecy and the potential for abuse operate together, as in the cases of intelligence and police informants, while political accountability demands require the formulation of government

policy to remain in government hands, and would prohibit privatising the conduct of hostilities. Nevertheless, as they and other contributors acknowledge, the question of what functions should remain public is ultimately political rather than conceptual.

So far, politicians have been unwilling to set clear limits to privatisation. US legislation prohibits outsourcing of “inherently governmental” functions, but this remains undefined. The UK’s Deregulation and Contracting-Out Act 1994 does identify specific functions that cannot be contracted-out under its provisions, but the list is very narrowly drawn and, interestingly, does not expressly include military functions. It is, of course, still possible that privatisation might be deemed unacceptable in particular cases. Nevertheless, on the evidence presented in this book, it seems unlikely that outsourcing military and security functions will cease any time soon. The political reality appears to be that domestic audiences do not care enough to press for change, even in the face of revealed abuses, while international organisations are too weak to do so, and anyway, subject to the same pressures as states to engage in more and more operations with insufficient personnel. In fact, the strongest moves to distinguish legitimate from illegitimate activities have come from within the industry itself, but there must be serious doubts about the adequacy of self-regulation in this regard. In conclusion, this book casts valuable light on a neglected aspect of privatisation. However, it might have been more successful in advancing understanding of its general themes if the contributors had made more reference to the highly sophisticated, but largely non-US, theoretical literature on privatisation, regulation and accountability that already exists.

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Jan Klabbers, Anne Peters and Geir Ulfstein, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW

Oxford: Oxford University Press (*www.oup.com*), 2009. xx + 393 pp. ISBN 9780199543427 (hb). £63. ISBN 9780199693542 (pb). £24.99.

There has been no shortage of publications on the constitution of the international community, or on the constitutionalization of international law or of specific “sectors” of international law (e.g. trade law) for that matter. Any number of international documents, sets of documents, or sets of rules has been claimed as constituting the international (legal) community, from the United Nations Charter to *jus cogens* norms to the judicialisation of international trade law to human rights obligations. And, to make matters worse (or at least more confusing) various understandings and conceptions of the terms “constitution” and “constitutionalization”, not to mention “international community”, have been offered. As a result, it becomes hard to disagree with a contention that x or y is the “constitution of the international community”, when “constitution” is understood in this way and “international community” in that. All this on top of more or less cognate projects to demonstrate the emergence of a global administrative – rather than constitutional – law.

In the midst of this burgeoning discussion on the potential existence of an international constitutional order, the book by Klabbers, Peters, and Ulfstein seeks to sketch what shape the constitutionalization of international law might possibly take (rather than showing definitively what the constitution of the international community is). In this, the tone of the book is decidedly normative, setting out what *should happen* for international law to become constitutionalized. Constitutionalization represents, in the authors’ view, an appropriate (if not

the most appropriate) response to what *is actually happening* on the ground: globalisation, fragmentation of international law, verticalisation of its organisation, and privatisation of previously public (state) functions, all this in a clearly pluralist legal environment. The authors have resolved to offer the constitutionalist response to these developments, and they have elected a unique way for doing so: not through an edited collection, nor through a typical co-authored book, but rather through a book that was “conceived and written as a joint undertaking” (vi), yet a book where each chapter bears the name (and the distinctive style) of its author.

The outcome reads surprisingly well—the book is coherent, despite the aforementioned distinctive styles and despite the wide variance in the length of the various chapters (Anne Peters, for example, has written more than half the book in terms of pages, even though she is responsible for only two substantive chapters and the conclusions), and the argument is tight and provocative. The book is structured in six substantive chapters and a concluding chapter. The first chapter (Klabbers) “sets the scene” in a particularly helpful manner, explaining what the authors actually mean by “constitutionalization” and what current problems the concept is supposed to help international law respond to, all the while defining and linking together every term used. Chapter 2 (Ulfstein) deals with the international institutional aspect, complemented by chapter 4 (Ulfstein) which focuses on the international judiciary, while chapters 3 (Klabbers) and 5 (Peters) could be summarised as dealing with a constitutionalist view of the sources and the subjects of international law. Chapter 6 (Peters) picks democracy as the one substantive aspect of the global constitutionalist endeavour that merits special examination, justifying the choice on the basis that democracy is most conspicuously absent in international law, as compared to, for example, the rule of law.

Chapter 7 (Peters) concludes the book, taking up challenges to the international constitutionalist project and responding to them, underlining the central thesis of the book that the “constitutionalization” of international law is a method of inquiry, a way to highlight deficiencies in the international legal system, and a normative agenda for international law’s future development. In so doing, it provides a fitting ending to this coherent book whose well structured argument keeps the reader engaged throughout the almost 400 hundred pages, and which helps put the whole constitutionalist debate in international law in clear perspective.

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THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS. Ed by Ruth Mackenzie, Cesare Romano and Yuval Shany, with Philippe Sands

Oxford: Oxford University Press (www.oup.com), 2010. xxvi + 547 pp. ISBN 9780199545278. £95.

The introduction to this book describes four different phases in the development of international dispute settlement. Early in the history of this subject, most international disputes were settled between states themselves or submitted to *ad hoc* bodies created for the sole purpose of settling a particular dispute. The second phase started with the establishment of the Permanent Court of Arbitration in 1899. At this time, states recognized the need for a standing body which was available to settle international disputes peacefully. The end of the second world war marked the beginning of the third phase when the number of international courts and tribunals gradually expanded. They included general courts, such as the International

Court of Justice, as well as specialist courts and tribunals dealing with specific areas of international law, such as trade, investment and human rights. In the fourth phase, starting in the 1990s, a number of judicial bodies were created with compulsory jurisdiction, such as the International Tribunal for the Law of the Sea and the World Trade Organization's dispute settlement system. As a result, today we have a patchwork of institutions which are potentially available to settle international disputes.

The purpose of the *Manual on International Courts and Tribunals* is to map out the various courts and tribunals involved in international dispute settlement in order to provide a reliable source of basic information concerning their composition and procedures. It has been prepared by a group of experts acting within the framework of the Project on International Courts and Tribunals (<http://www.pict-pecti.org>). The Manual is designed to provide easily accessible information aimed at academics, journalists, practitioners, and legal advisers, in particular from developing countries and non-governmental organizations.

The Manual is divided into seven themed sections covering global courts; arbitration institutions; international criminal courts and tribunals; regional economic integration bodies; human rights bodies; inspection, review and compliance mechanisms in international financial institutions; and compliance procedures in multilateral environmental agreements. As can be seen from this list, despite its title, the Manual is by no means confined to international courts and tribunals. Rather, it discusses a range of dispute settlement mechanisms. For instance, the compliance mechanisms in Multilateral Environmental Agreements considered in section seven of the Manual are not in any sense judicial institutions. Rather they are designed to incorporate political judgments into the dispute settlement process, allowing contracting parties to respond pragmatically and flexibly to breaches of environmental treaties. Nor can the inspection, review and compliance mechanisms of the international financial institutions be truly classified as courts or tribunals, but, as the Manual asserts, "they offer an opportunity for communities or persons adversely affected by projects financed by development banks to hold those institutions to account" (461). Given the important role that these institutions play in dispute settlement, they therefore warrant inclusion in the Manual.

The Manual is structured so that the same basic information is presented in each chapter. Generally, each chapter describes the composition of a particular institution, and gives a description of its jurisdiction and its procedures, and a short evaluation of its efficiency and effectiveness. One theme that arises throughout the Manual is transparency. This is not surprising given that non-governmental organizations are one of the target audiences. It is clear that the record of international courts and tribunals on this issue is mixed. Whilst the International Court of Justice (ICJ) sits in public and all of its decisions are published, there are limited opportunities in practice for non-parties to participate in the proceedings of the ICJ. The chapter on the World Trade Organization (WTO), on the other hand, notes that transparency has been "one of the major bones of contention among WTO members" (96). Whilst some progress has been made on this issue in the WTO, this has largely been as a result of the parties in particular cases consenting to greater transparency. There has been no agreement at the institutional level on this key issue. Progress has been made in other fora, however. For instance, the arbitration rules of the International Centre for Investment Disputes (ICSID) were amended in 2006 to allow for greater participation of non-disputing parties in ICSID proceedings. Such initiatives are generally to be welcomed. However, as the Manual also reminds us, lack of transparency can also be a reason why claimants choose a particular dispute settlement option. Noting the increasing trend for investment disputes to be submitted to arbitration under the auspices of the Permanent Court of Arbitration (PCA), the Manual suggests that "the fact that PCA-administered proceedings may be confidential, unless the parties agree otherwise, may be an attraction for certain disputants, but might be

of concern to those who would wish to see a greater degree of transparency in the field of investment arbitration” (122).

The Manual is a reference book. It presents basic information about the most significant international dispute settlement mechanisms in existence today. However, anyone wanting a more in-depth understanding of a particular dispute settlement mechanism or a more thorough analysis of the practice of courts and tribunals will not find everything they want in this book. To assist them, however, the Manual helpfully provides a succinct bibliography of more further materials at the end of each chapter. It therefore provides a good starting point for any non-specialist with an interest in the work of various international dispute settlement institutions.

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