Foreword

Fall 2016 Symposium: Divergence and Reform in the Common Law of Contracts

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My service as a 2011 Visiting Fellow at University College Oxford afforded the opportunity to engage with scholars throughout the United Kingdom. Of particular note in this distinguished cadre of academics was Sir Guenter Treitel, one of the most noted scholars of contract law in Europe,[1] who befriended me in the most collegial manner. This association prompted what has become my fascination with the interrelationship between common law contracts in the United States and the United Kingdom. Sir Guenter confirmed the distinct linkage of contract doctrine in our respective countries through his lectures—which I was privy to witness during my visiting fellowship—and his pedagogy, which he demonstrated through his years of teaching at Southern Methodist University's law school.

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1 Sir Guenter Treitel is a retired Vinerian Professor of English Law and Fellow of All Souls College, Oxford, and the author of *The Law of Contract*, a seminal text on English contract law. *See* Edwin Peel & G.H. Treitel, The Law of Contract (13th ed. 2011); Guenter Treitel, *Some Comparative Notes on English and American Contract Law*, 55 SMU L. Rev. 357, 357 n.* (2002). Sir Treitel was knighted in 1997 for his contributions to the law, was a Fellow of Magdalen College, Oxford, from 1954 to 1979, a Fellow of the British Academy in 1977, and Queen's Counsel in 1983. *See* Trietel, *supra* note 1, at 357 n.*.

The George Washington University Law School Law Review's Fall Symposium, "Divergence and Reform in the Common Law of Contracts," manifested Sir Guenter's appreciation of the comparative similarities and distinctions of contract law and doctrine established in the United Kingdom and the United States.[2] The event featured noted scholars from both countries, exploring the nuanced distinctions in such subjects as economic symmetry, remedies, interpretation and good faith, and consumer law.[3] This Symposium followed a similar program to a series of biennial conferences that last occurred in 2013 at the University of Edinburgh, Scotland.[4] It seemed both fitting and appropriate to continue this comparative exercise here in the United States. The global nature of commercial transactions requires scholars and practitioners to appreciate the international nexus of contractual doctrine, exploring commonalities and distinctions that reveal its analytical depth.

It would be perhaps a truism to state that American contract law has its genesis in British common law.[5] Many of the fundamental cases taught in contract classes today confirm this notion. For example, any discussion of contractual interpretation generally commences with a discussion of *Krell v. Henry*,[6] a 1903 case that centers on a defendant's claim that a contract to rent a flat in London to witness the king's coronation became frustrated once the event was canceled due to the king's illness.[7] Likewise, a discussion of foreseeability in the possible award of damages regularly includes a discussion of *Hadley v. Baxendale*,[8] where an Englishman who owned a miller business was required to prove that damages associated with the defendant's failure to deliver in a timely fashion a shaft used in the milling process could "fairly and reasonably be considered either arising naturally . . . from

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2 *See generally* Symposium, *Divergence and Reform in the Common Law of Contracts*, 85 GEO. WASH. L. REV. 1581 (2017).

3 *See id.*

4 *See* COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES 3 (Larry A. DiMatteo & Martin Hogg eds., 2016).

5 *See, e.g.*, ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES, AND A TREATISE ON BILLS OF EXCHANGE, AND PROMISSORY NOTES vii (1810) ("The Common Law, [which] has usually been called the Common Law of England, to designate its origin . . . may with equal propriety be called the Common Law of America: for our progenitors brought it with them from England, and made it, by adoption, their own, as much as the language they spoke."); KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 176–77 (1990).

6 [1903] 2 KB 740.

7 *Id.* at 745–46.

8 (1854) 156 Eng. Rep. 145.

such breach of contract itself, or . . . as may reasonably . . . have been in the contemplation of both parties, at the time they made the contract."[9]

Of course, a number of other cases involving U.K. parties and choice of law issues have also dotted the landscape of common law contract doctrine in the United States. For example, the rather undistinguished case of *Prime Start Ltd. v. Maher Forest Products Ltd.*,[10] centers on a British Virgin Islands corporation that sued a Washington state manufacturer of customized wood products for producing nonconforming goods that failed in construction in Russia.[11] Though resolution of this dispute became grounded in domestic law, the citizenship of the parties compelled the court to discuss the applicability of international law and doctrine.[12]

The timeliness of this Symposium relates to the international fluidity of bargaining transactions in the twenty-first century. The world and its economy have become increasingly more global in perspective.[13] Gone are the days when entrepreneurs and businesspeople would confine their enterprises to more local markets.[14] Technology has broadened the market landscape, therefore affording entrepreneurs a clientele that is worldwide.[15] In addition, the interdependency of markets has never been more pronounced and evident.[16] The maximization of profits, notwithstanding the need to ensure the efficient production and distribution of goods, now leads manufacturers to produce goods in locales that offer competitive pricing with regard to sup-

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9 *Id.* at 151.

10 442 F. Supp. 2d 1113 (W.D. Wash. 2006).

11 The court in *Prime Start* held that Washington law, rather than Canadian, Russian, or British Virgin Islands law, applied to the dispute, because Washington was the forum state and no party "affirmatively asserted specific rules of law from any foreign country that should be applied in lieu of Washington law." *Id.* at 1120; *see also, e.g.*, Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992) (holding forum selection, choice of law, and arbitration provisions in contract between American and British parties required resolution of dispute in England, because "the parties' undertaking [was] truly international in character," all but two parties were British, and "virtually all activities giving rise to the suggested claims occurred in England"); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1349–50 (E.D. Tex. 1993) (finding, where contract does not include choice of law clause, "Kazakhi [sic] law" likely governed dispute between American and British corporations over rights to develop mineral resources located in the Republic of Kazakhstan).

12 *See Prime Start*, 442 F. Supp. 2d at 1120.

13 WILLIAM J. DUIKER & JACKSON J. SPIELVOGEL, WORLD HISTORY 1088 (7th ed. 2013).

14 *Id.*

15 *See id.*

16 *See generally, e.g.*, EMIRATES, EMIRATES AND THE US (2017), https://cdn.ek.aero/downloads/ek/pdfs/Emirates_and_the_US_Mar_2017.pdf.

plies and labor.[17] Goods can be produced in markets where costs for production are low.

Similarly, international workers compete with domestic job seekers to perform even the most customary of services.[18] This phenomenon contrasts somewhat with the state of affairs in the manufacturing industry.[19] Despite the political fallout from the effects of such international interdependence,[20] globalism appears to be an indelible reality. Indeed, contract law recognizes this now salient element in modern day transactions. UNIDROIT[21] and the United States Con-

17 Jan Hendrik Fisch & Miriam Zschoche, *The Role of Operational Flexibility in the Expansion of International Production Networks*, 33 STRATEGIC MGMT. J. 1540, 1551 (2012).

18 *See* Press Release, U.S. Bureau of Labor Statistics, Labor Force Characteristics of Foreign-Born Workers Summary (May 19, 2016) (noting growth in share of U.S. civilian labor force composed of foreign-born individuals from 16.5% in 2014 to 16.7% in 2015, and greater likelihood of foreign-born workers than native-born workers to be employed in service, production, transportation, material moving, natural resources, construction, and maintenance occupations); *see also, e.g.*, Alexia Elejalde-Ruiz, *Foreign Workers Waiting to Win the H-1B Lottery*, CHI. TRIB. (Apr. 15, 2016, 6:26 PM), http://www.chicagotribune.com/business/ct-h1b-visa-applications-0417-biz-20160415-story.html (describing rise in employer-sponsored H-1B visa applications for skilled employees from 124,000 in 2013 to 233,000 in 2015); Erin Kelly, *U.S. Employers Can Now Bring in More Foreign Workers for Seasonal Jobs*, USA TODAY (Jan. 5, 2016, 10:24 AM), http://www.usatoday.com/story/news/2016/01/05/us-employers-can-now-bring-more-foreign-workers-seasonal-jobs/78258802/ (noting 2016 expansion of H-2B visa program allowing thousands more seasonal visas for low-skilled workers).

19 *See Imports of Goods and Services (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/NE.IMP.GNFS.ZS [https://perma.cc/84KP-G99N] (last visited Oct. 13, 2017) (showing the percentage of imported goods and services as a percentage of U.S. GDP increasing from 4.2% in 1960 to 15.4% in 2015). It appears that manufacturing is actually on the rise in the United States. Several sources cite to the increase in manufacturing jobs in the United States. *See, e.g.*, *Made in America*, CONSUMER REP. (May 21, 2015, 6:00 AM) http://www.consumerreports.org/cro/magazine/2015/05/made-in-america/index.htm ("[B]etween 2009 and the end of 2014, U.S. manufacturing output grew by 45 percent, 646,000 jobs were added between February 2010 and May 2014, and another 243,000 positions are waiting to be filled.").

20 *See* Richard Ashcroft & Mark Bevir, *Pluralism, National Identity and Citizenship: Britain After Brexit*, 87 POL. Q. 355, 355–56 (2016); Scott Detrow, *From 'Brexit' to Trump, Nationalist Movements Gain Momentum Around World*, NPR (June 25, 2016, 5:00 AM), http://www.npr.org/2016/06/25/483400958/from-brexit-to-trump-nationalist-movements-gain-momentum-around-world (discussing nationalist movements as a result of people feeling unable to control political systems in part due to globalization); Amanda Taub, *Trump's Victory and the Rise of White Populism*, N.Y. TIMES (Nov. 9, 2016), http://www.nytimes.com/2016/11/10/world/americas/trump-white-populism-europe-united-states.html (crediting Trump's victory and Brexit to "the dramatic rise of a new kind of white populism").

21 Joseph M. Perillo, *Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 318 (1994). UNIDROIT is the International Institute for the Unification of Private Law which produced the *Principles of International Commercial Contracts*. *Id.* at 282. The UNIDROIT Principles apply not only to sales but to all international commercial contracts. Michael Joachim Bonell, *The CISG, European Contract Law and the Development of World Contract Law*, 56 AM. J. COMP. L. 1, 17 (2008).

vention on Contracts for the International Sale of Goods ("CISG")[22] have become *de riguer*, not only in the regulation of international transactions, but also in the pedagogy of contract law and theory.[23]

Contemporary transactions, many of which have international dimensions, confirm the importance of comparative analysis. There remains, however, a more fundamental premise supporting this exercise. As my scholarship in the area has continually maintained, contract law, despite its façade of objectivity based upon formalized rules of engagement, remains an interpersonal exercise influenced by the context in which bargains are formed.[24] A contract's context, whether defined by the expertise, experience, or location of the parties or the place where formation or performance takes place, constitutes a fundamental interpretative element in bargain formation and adjudication.[25] Thus, context constitutes an essential predicate that includes consideration of international and comparative notions impacting bargaining transactions. At a fundamental level, this Symposium, which explores contract doctrine from both a U.K. and U.S. perspective, further establishes the salience of context as a dominant concept in contract law.

Contextualism permeates the scholarship in this Symposium. The first panel of the event addressed the new sharing economy and how it has tested—and continues to test—the bounds of contract law from both American and European perspectives. The second panel of the Symposium featured a robust discussion on contractual remedies. The third panel framed and explored the complexities of contract interpretation and good faith. The final panel of the Symposium assessed the future of consumer contract law in the United States, the United Kingdom, and the European Union. The thoughtful and significant contributions of our outstanding scholars from both sides of the Atlantic demonstrates the interrelation of legal norms in the United Kingdom and the United States, and confirms the salience of context as an inescapable element in contractual interpretation.

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22 The CISG is a widely accepted treaty that governs all transactions for the international sale of goods. Bonell, *supra* note 21, at 4–5; *see also* RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK 85 (12th ed. 2015).

23 Bonell, *supra* note 21, at 1–5.

24 *See* Larry A. DiMatteo & Blake D. Morant, *Contract in Context and Contract as Context*, 45 WAKE FOREST L. REV. 549, 550–51 (2010); Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233, 256 (2003); Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 107–11 (1998).

25 *See* DiMatteo & Morant, *supra* note 24, at 550–51.

It gratifies me greatly to have chaired this timely Symposium that confirmed the synergy of analytical thought among contract scholars from the United Kingdom and the United States. Of course, the scholars in the Symposium adroitly explore the depths and comparative nuances of individual doctrines. In my view, however, these scholars have more profound objectives. They demonstrate the indelible nexus of contract doctrine practiced internationally, and confirm the salience of context as an inescapable norm in the formation and interpretation of contracts.