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Contracts with Network Effects - For Competitors, for Consumers, for Commerce?

6 July 2009, 2.30pm – 5.00pm

Mediation Chamber 1, Level 2, Supreme Court Building

Introduction

Although it is not yet a feature of mainstream contract thinking, there has been, for some time, an interest in the idea of network contracts, or of contracts with network effects (most recently, see Marc Amstutz and Gunther Teubner (eds), *Networks: Legal Issues of Multilateral Contracts* 2009). For some, the attraction of the idea is that it develops contract doctrine in a way that brings it more closely into alignment with networking forms of economic organisation and business practice; for others, it is the opportunity to specify distinctive network legal effects—particularly effects that tend towards the heightening of cooperative contractual obligations and the recognition of connected third party interests—that makes this idea an appealing one.

However, if we are to take the idea of network contracts seriously, it is of fundamental importance that we should be clear about whether the relevant legal effects are to arise by way of regulatory imposition (including occasional judicial declaration) or by virtue of adoption by the contracting parties. To clarify our thoughts, we can focus on three test cases: first, a competition between private contractors of the kind litigated in the famous case of *Clarke v Dunraven: The Satanita* (where there were difficulties in constructing contractual relationships between the competitors); secondly, a case of consumer protection such as that in *OFT v Lloyds TSB Bank plc* (in which the House of Lords held that the protection given to credit card holders by section 75(1) of the Consumer Credit Act 1974 extends to more complex modern credit networks as well as to transactions made with overseas suppliers); and, thirdly, a typical commercial case involving, say, construction or carriage or franchising (where the commercial purpose will be effected through a cluster of contracts).

Stated summarily, my conclusions are the following. First, given that the consumer marketplace is nowadays a densely regulated zone (where transactional obligations are contractual only in a severely attenuated sense), the relevant question is whether the regulatory purposes (whatever they might be) are likely to be advanced by introducing particular network effects. Accordingly, so far as consumer contracts are concerned, network effects arise by way of regulatory imposition. Secondly, in the heartland of commercial contracting, we are in a zone that remains largely self-regulated. Here, the function of the law of contract is to support the self-regulated order and to offer contractors a range of governance options. It follows that contract law should be flexible enough to permit such contractors to opt for transactional rules that have network effects; and, in the absence of explicit adoption, such effects should be recognised where they are implicitly embedded in business practice. Finally, in the zone of purely private contracting (where explicit adoption of network effects is unlikely to occur), we can entrust judges with a residual discretion to declare a group of contracts as having network effects where this is necessary in order to give effect to the implicit reasonable expectations of the parties.

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Speaker



Professor Roger Brownsword

Roger Brownsword, who is a graduate of the London School of Economics, is Professor of Law at King's College London and Honorary Professor

in Law at the University of Sheffield. At King's College, Professor Brownsword lectures in Contracts as well as acting as Director of TELOS, a specialist group that researches the interfaces between law and emerging technologies.

As a commentator on contract law, Professor Brownsword's work is well-known in both the common law and the civilian world. The ideas of "market individualism" and "consumer welfarism" that he first articulated (with John Adams) in *Understanding Contract Law* (1987) are now part of the lexicon of contract law; and his analysis of the shaping on the modern law of contract – particularly his analysis of good faith and of the protection of reasonable expectations – in *Contract Law: Themes for the Twenty-First Century* (2nd ed 2006) is a standard point of reference. In addition to contributing to *The Law of Contract* (in the Butterworths Common Law Series), Professor Brownsword has recently completed work on the Twelfth Edition of *Smith and Thomas: A Casebook on Contract*.

For the best part of twenty years, Professor Brownsword served as a member of the editorial committee of the *Modern Law Review*; he is the general editor of the *Understanding Law* series of books; and he is now the founding editor (with Han Somsen) of the new journal, *Law, Innovation and Technology*.

Programme

- 2:00pm Registration
- 2:30pm Presentation I
- 3:30pm Tea Break
- 3:50pm Presentation II
- 4:50pm Q&A
- 5:00pm End of Session

Registration Form

(Closing date: 3 July 2009)

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