

## COMMERCIAL LAW AFTER 1992: LEARNING FROM THE SCOTTISH EXPERIENCE

David Edward

What will life after 1992 really be like? In the legal field at least, the Scots of all people in Europe should best be able to answer that question since we have lived in a common market with England for nearly 30 years. But we tend to overlook the relevance of our own experience and it is certainly not well known to others.

At a recent conference a German civil servant said that total removal of frontier controls would require harmonisation of criminal law, criminal procedure and the prosecution system, as well as co-ordinated control of the police. It seemed to come as a surprise to him and others in the audience to learn that there already is a land border in the Community where there are no frontier controls of any sort but on either side of which the legal systems are radically different. If PanAm 103 had crashed 30 miles south of Lockerbie and thus in England rather than in Scotland, different authorities would have been responsible and different procedures would have applied; yet the terrorist who planted the bomb could have driven from Carlisle to Lockerbie without passing a single customs post or being interviewed by a single immigration official. We do not find this surprising because we are used to it. Others are not.

In spite of 300 years of co-existence, there are still significant differences in the laws, procedures and practices of Scotland and England to which we are well used and of which (in Scotland at least) we are rather proud. If put to it, we would probably say that our national common market is untidy and incomplete, but it works.

Nevertheless, legal differences may complicate and sometimes obstruct the free flow of economic activity. Business transactions would be similar if two legal systems did not have to be reconciled. A perfect common market would be one in which such problems do not arise.

Some Scots lawyers say that any such theoretical imperfection is beneficial to Scotland. The Scottish legal system is designed for a small country of about five million inhabitants, and it works well in its own context; there is no reason to change it. There are even those who might say (perish the thought) that Scots lawyers do quite well out of the present arrangement. Fear of

the hidden differences between the two legal systems is the only effective deterrent to marauding barristers, solicitors and accountants from the City of London.

Others in Scotland, including some noted members of the legal profession, say that we can no longer afford the luxury of a separate legal system. Whatever its sentimental attractions, businessmen do not want to use Scots law. They want to use laws, lawyers and court systems with which they are familiar and whose merits and defects they know. The proof is in the pudding. A great deal of "Scottish" legal work,





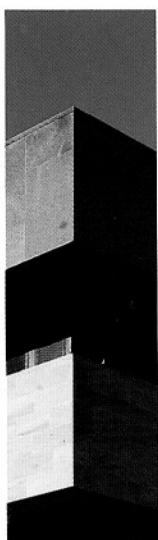
*The District  
Courts,  
Glasgow*

including work originating in Scotland, is done in London by English lawyers using English methods. In spite of the independence of Scots law, Scotland is a branch economy, and the true effect of having a different system is only to make it more difficult for Scots lawyers to compete with English lawyers on equal terms.

Each of these competing points of view probably has some justification and some substance in fact.

Certainly, as we move towards a global economy, there is a perceptible drawing together of the legal systems, in the Western world at any rate. It would be foolish and economically counter-productive to try to maintain differences for their own sake. On the

other hand, experience shows how difficult and time-consuming it actually is to make radical changes in the structure and workings of a legal system. The Law Commissions in Scotland and England have been beaver-ing away for some 25 years but serious problems remain even where there has been a conscious attempt to harmonise the two laws. Floating charges are not easy to apply in Scotland, not because Scots lawyers are stubborn, but because the way in which they grew up in England was dependent on features of English law — notably the distinction between law and equity — which do not exist in Scots law or in the civil law systems to which it is related. ►►



In short, Scots and English law remain different after 300 years partly because, for good reasons or bad, people prefer that it should be so, and partly because change is difficult and takes a long time.

Applying our experience to Europe and 1992, it is clear that completion of a European “single market” does not *require* complete legal uniformity. Some people (like the German civil servant) will continue to hanker after total harmonisation. But we know that considerable differences — and even inconsistencies — can be accommodated within a workable arrangement which ensures freedom of movement for goods, persons, services and capital for most, if not all, purposes. The inconveniences are tolerable, albeit at a certain theoretical and sometimes practical cost. This applies as much to the market for financial services as it does to the market in other sectors.

Moreover, the history of the European Community shows that those who tried to build a single market through a painstaking process of harmonisation failed because, apart from anything else, the process took far too long. Attempts to ride roughshod over national differences and susceptibilities, or to pretend that they didn't exist, provoked opposition even amongst those who sympathised with the aim.

The British believe they are different. They should remember that the motto of the Grand-Duchy of Luxembourg is *Mir Wellen Bleiwen Wat Mir Sin* — we want to remain as we are.

The Community's new approach is called “mutual recognition”. This allows for national differences but says that we must be prepared to treat the results as “equivalent”. To the perfectionist, this is an untidy and theoretically unsatisfactory solution. But it is a more realistic approach to the problem and we might say, too, that it is more in keeping with British attitudes and British experience. Certainly, if there is to be any hope of completing the internal market by the end of 1992, it is a solution we are going to have to accept.

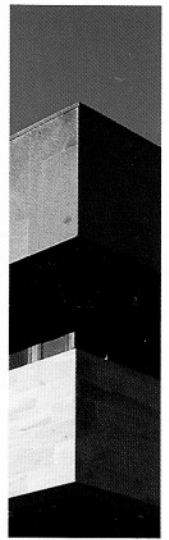
If this new approach does indeed fit our own attitudes and our own experience, then we should be particularly alive to the consequences. Those who seek to operate in the new internal market cannot afford to behave as if national differences do not exist or are unimportant. After 1992 there will still be substantial differences in the laws and legal systems of the Member States. As businessmen become accustomed to treating the Community as a domestic market, they will cease to regard other member states as foreign countries and their law as foreign law. But this, as we know, is precisely the point at which legal differences become traps for the unwary. Many people in England and elsewhere assume that Scots and English law are the same, not because of invincible ignorance, but simply because they do not expect them to be different.

The arrival of 1992 will certainly encourage the development of a uniform commercial law for the Community. No-one who has worked in a Community institution, even for only a few months, could fail to be conscious of the process of osmosis by which common solutions emerge from common problems. In most Community countries and certainly in Scotland, lawyers of all kinds know far more about the laws and legal systems of other countries than they used to do. ►►

But 1992 will not, of itself, produce perceptibly dramatic changes. A cautious awareness of the relevance of other peoples' law and of the way in which it differs from his own will be the mark of the good lawyer and the successful businessman.

There is a tendency in some quarters to equate a free market (or a market where there is free competition) and an unregulated market. Again, as we know from our own experience, this is not so. Deregulation is not the same thing as no regulation at all, and the so-called "level playing field" will not be one on which the players can score points by ignoring the rules or kicking the ball into their own goal. National methods of regulation and national regulatory laws will continue to exist after 1992, and those who aim to offer financial services in other member states are likely to need more, rather than less, advice about the law of other countries. ■

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*Victorian buildings in central Glasgow*