law, raising its importance because of its constitutionally existing rights.

The scope for contributing EC and ECHR points offers further defining characteristics for the jurisdiction. It is not uncommon for the courts to confront the Court of Justice with issues of state immunity. The Court, however, will not commit that it applies, indeed the asylum seekers have to know far more about the European Court of Human Rights than just its geographical location. Before long, however, it will have as great a familiarity with the principles of the Convention as does the ECJ. The fact that the 1987 Annual Conference of the Bar European Group was held in Strasbourg, on the subject of human rights, is attributable to more than the high quality of that city’s restaurants.

In conclusion, practice in Community law and before the European Court of Justice provides those barristers who have taken the trouble to learn the different legal techniques an environment where a certain degree of overlap, does appear in the challenging environment of a multi-national court with judges coming from different backgrounds, different legal traditions and different political and social philosophies. The skills of the common law advocate are easily adaptable (albeit to the detriment of the future of the development of Community law) to increase the impact of the common law in law (in substantive legal terms as well as in more practical terms) upon the Community system. The growing importance of the European Convention on Human rights adds an additional but related dimension. Eurocracy may be the political flavour of the day, Europe in the lawyer’s ear.

3. Views from the European Courts

Judge David Edward
Judge of the Court of Justice of the European Communities

Judge Christopher Bellamy
Judge of the Court of First Instance of the European Communities

3.1 The Court of Justice of the European Communities – Advocacy before the Court of Justice: Nitsa for the unlimited

Judge David Edward

3.1.3 The basic rules of advocacy apply as much in pleading before the European Court of Justice as before any court of appeal in the United Kingdom. Know your court, know your procedure, and know what you are trying to achieve. The technique of pleading before the Court of Justice needs to be different because the nature of the court is different, the procedure is different and the basis of action law different.

1 The author would like to thank his Legal Co-ordinator, Zanaria Nangania, Nicola Ludford, and particularly William Harkess for reading the manuscript of this article and making a wealth of helpful suggestions. Errors and omissions are solely the sole responsibility of the author.

2 The author gratefully acknowledges the help given by the Research Assistant, Annette Turner, in preparing the various footnotes to this article. The author is also grateful to Lionel Barber, whose article "The Court of Justice of the European Communities" (1993) 13 Eur J Comp Law 263, 267 (footnote 7) and "Gross et al: 1995 (5th ed)" (1995) 107 (1) and "European Patent Office" (1995) 54 (1) for assistance in preparing the footnotes to this article.

3 The author gratefully acknowledges the help given by the Legal Secretary, Lorna Martin, and the Research Assistant, Annette Turner, in preparing the various footnotes to this article. The author is also grateful to Lionel Barber, whose article "The Court of Justice of the European Communities" (1993) 13 Eur J Comp Law 263, 267 (footnote 7) and "Gross et al: 1995 (5th ed)" (1995) 107 (1) and "European Patent Office" (1995) 54 (1) for assistance in preparing the footnotes to this article.
Name your Court

3.2.2.1 The Court of Justice is to be considered as the only court in the world, which works on a truly national level. Its judgments have precedence over all other courts, and the citizens of the European Union are subject to its jurisdiction. The Court's decisions are binding on all member states, and any decision that is appealed is subject to the Court's final judgment. The Court's jurisdiction covers all matters relating to the interpretation and enforcement of European Union law.

3.2.2.2 In order to apply for leave to appeal, one must file a written application with the Court, setting out the grounds for appeal. The Court will then consider the application and either grant or deny leave to appeal. If leave is granted, the Court will hear the case and deliver its final judgment.

3.2.2.3 The right to appeal is a fundamental right guaranteed by the European Convention on Human Rights. Any decision of the Court that is appealed is subject to the Court's final judgment. The Court's jurisdiction covers all matters relating to the interpretation and enforcement of European Union law.

Name your procedure

3.2.1 The procedure of the Court is set down partly in the Treaty, partly in the Rules of Procedure. The Rules of Procedure are very little aids for the exercise of discretion. None of them can be changed without the unanimous consent of all the Member States. But they can be supplemented by practice, if any such action is required at any time. Even if it is doubtful whether such action would conform with the Treaty and the Court of Justice, nothing in these Rules is mandatory, except in so far as they are required by the Treaty or are in accordance with the rules of the Court of Justice.

1. From the records of the EEA, the Court has had to take account of all matters relating to the interpretation of the Treaty, and in order to protect the rights of the parties to the Treaty, and in order to protect the rights of the parties to the Treaty, the Court has had to take account of the Treaty.

2. A preliminary ruling on the interpretation of the Treaty may be sought by the Court of Justice, which may have been referred to the Court of Justice by a question referring to the interpretation of the Treaty. Any such question must be in accordance with the Rules of Procedure, and any such question must be in accordance with the Rules of Procedure.

3. For a full explanation of the EEA see "The Court of Justice: Working" (Economica 1981).
The reference procedure

2.12.7 This reference procedure is not really a 'form of action'. There cannot be a reference to the Court of Justice except in the context of a complaint proceeding before a national court. The reference is merely a step in those proceedings and must take place outside the national judge's initial judgment on the merits of the case.

2.12.8 It is true that in some cases the judgment of the Court of Justice will in practice determine the outcome of the case. But it is the national judge and not the Court who must ultimately decide whether the EC is in fact involved in the proceedings.

2.12.9 The reference procedure is not, as the title implies, a request for a form of appeal to Luxembourg. It is a process of judicial cooperation - judges helping judges. Parties have no right to require a national court to make a reference, even if the court is one to which Article 177 EC (the EC Treaty applies (see below). Not so. They cannot simply dictate the terms of the order for reference or of the questions referred.

2.12.10 The procedure essentially involves three steps. The national court must first identify a question on Community law on which a decision is necessary to enable it to give judgment. Next, the Court of Justice must give a ruling on that question. Finally, the national court must apply the ruling. The Court of Justice is involved only at the second stage, but the other two are as important.

2.12.11 The task of the Court of Justice at the second stage is to answer two objectives which may - and often are - conflict. On the one hand, its ruling must be capable of being applied, not only by the referring court in the single case, but also by any other court in the EC (or, where appropriate, in the EEA) faced with a similar problem. On the other hand, the Court must not usurp the legislative function of the referring court to determine that the reference is appropriate and to determine its decision.

2.12.12 With this in mind, counsel should approach the issue, and plan the strategy, to be deployed on these lines: these are the proceedings in the national court which turn to the second phase of the case:

- the proceedings in the national court before any reference is made;
- the proceedings before the Court of Justice which turn to the second phase of the case;
- the written phase; and
- the oral phase.

In any event, counsel must also consider the question of the jurisdiction of the Court of Justice and whether it has jurisdiction in the case referred.
point were opened last year if so, as immediate reference is probably appropriate, provided that the parties and the judge in the position to come to an agreed statement of facts, a basis as to whether there are any. These are the matters in which the court is able to consider whether there is or not the court's further assistance of the legal and factual issues as required to enable an appropriate reference to be addressed.

(5) As the national court should make a different decision because then will not be no judicial remedy against then decision then will not be no judicial remedy against then decision. To conclude, only to be decided in the Community law will be made. The decision of the courts or some part of it. This decision is that the national courts are entitled to differing national courts, and to be open to appeal or revision on that point. As the Advocate General's reasoning, the national court is held to be the required decision of the Community law to apply.

3.1.3. If the Community system is to work, it is clear that the rules must be the same for everyone and applied in the same way. It is the key point in the case in the text and their application. If the text and their application will allow them one country to another, then there are at least unclear rules to be observed.

3.1.4. On the other hand, it would be absurd to insist that every court against which decision there is no judicial remedy except that it is available at the point of Community law to effect any of the manner of the Advocate General — that, before deciding that there is no appeal on the point so decided as not to be decided on the national court. However, national courts should be in mind that the Community law contains a range of languages, legal systems, and legal traditions, so that what may appear obvious to a judge in one country may be far from obvious to a judge in another.

Spoken this Community law over.

3.1.5. Points of Community law do not come nearly wrapped up in Scotland. In some field, it may be, in some fields that there is Community law, but not in other fields, such as those of environments, eastern railways or road transportation. Points of Community law can be expected to have Community law at their discretion.

3.1.6. Similarly, a case whose facts involve legislation in Scotland, for the movement of goods, persons, services or capital across the internal border is the LCA, may apply to a point of Community law. The problem practitioners will at least consider this possibility.

Counsel should consider the following:

1. The nature and purpose of the proceeding.
2. The likely outcome of the case.
3. The potential impact on the client.
4. The client's financial situation.
5. The availability of alternative dispute resolution options.

In addition, Counsel should:

1. Conduct a thorough investigation of the facts.
2. Review relevant case law and statutes.
3. Consult with experts if necessary.
4. Prepare a strong opening statement.
5. Conduct effective cross-examination.

Counsel should also:

1. Maintain communication with the client throughout the proceeding.
2. Keep detailed records of all communications and actions taken.
3. Ensure that all legal obligations are met.
4. Be prepared to negotiate a settlement if appropriate.
5. Present a clear and concise argument to persuade the judge or jury.

Finally, Counsel should:

1. Be aware of any potential conflicts of interest.
2. Ensure that all communications are confidential.
3. Be professional and respectful at all times.
4. Be prepared to handle any unexpected developments.
5. Have a contingency plan in case of an adverse outcome.
ensuring that the matter for reference reaches the Court Registry in proper form with the minimum delay and, secondly, for writing documents that are short, easy to translate and easy to understand.

How should a reference be drafted?

3.1.3.2 Assuming that a reference is appropriate and the judge is prepared to make it, drafted for the purpose of being submitted to the Court, the draft for the reference must be that it must, at some stage, set out the following:

- The Court has issued the Guideline for References by National Courts for Preliminary Rulings and those should be followed carefully.

3.1.3.11 The crucial point to bear in mind is that the purpose of the procedure is to enable the national judge to solve a problem. It is more likely to be achieved if the Court of Justice is placed in the position of the national judge so as to understand what the problem is. Paragraph 6 of the procedure works best where the order for a reference grasps clearly and simply why the judge considers the reference to be necessary. It is the problem and, what, in broad terms, are the questions that need to be answered to enable judgment to be pronounced?

3.1.3.2 It is not helpful to present the Court of Justice with a situation of facts and arguments, followed by a complex series of questions and sub-questions intended to cover every conceivable aspect of the hypothesis which the Council of State must decide, as from being unnecessarily complicated, and therefore unreadable. The approach that the Court will be able to gain a satisfactory understanding of each of the questions is to specify them as far as they are put. This is likely to be much more.

3.1.3.2 The reference should ideally consist of a single document which can be translated and filed with the Court. The Court's Notes for the Guidance of National Courts set out in italic detail the points to be known in mind in writing written pleadings and oral submissions. What follows is intended to supplement that advice.

3.1.3.2 As a general rule, the purpose of pleading is to influence the mind of the judge. Reading this does not mean the mind of the judge (as a fact, however, so that the pleadings will be subject to a number of the advocate's time and the client's money).

3.1.3.2 Two additional points are important in placing before the Court of Justice. One, written submissions will have to be in English, and oral submissions interpreted into one or more other languages. The Court's external written-language will be seen, and for that purpose, the procedure may be required. Pleadings should be written in a style that is likely to be understood and easily to understand. Second, the procedure before the Court is by means of a conciliatory or summary. Written submissions and oral pleadings must not only have to be seen in the reference, and oral pleadings need not repeat what has already been said in the written pleadings.

3.1.3.2 It is difficult — and in civil address it may be impossible — to take a new point at a late stage in the proceedings. Rulings of the Court are likely to affect a very wide range of interests, apart from those of the parties to the national proceedings. The Rules of
8.1.5.17 Council will therefore have to consider whether to ask for an oral hearing. An unnecessary oral hearing can and should be avoided.

8.1.5.18 The Procedure Report and the Report for the Hearing are submitted to the whole Court (Judges and Advocates General) in general assembly, the Advocate General, the Judge Registrar, and other consultations with the Advocate General. The President will then inform the Advocate General of the case and make arrangements for an oral hearing to be heard.

8.1.5.19 The Procedure Report is an internal working document submitted to the whole Court (Judges and Advocates General) in general assembly, the Advocate General, the Judge Registrar, and an oral hearing to be heard.

8.1.5.20 Parties are not consulted about the date for the hearing but the Court does try to accommodate the parties' request where possible. If the Judge Registrar gives a date, the Court will ensure that the Registrar's deadlines are met.

8.1.5.21 The Report for the Hearing will be sent to parties three weeks before the hearing. When there is no oral hearing, the Report for the Hearing will be sent to the parties for comment before the Advocate General defers it to the Registrar. Being a report by the Judge Registrar to the other judges, parties cannot require it to be altered prior to a decision being taken in the case. Minor points can be mentioned in the course of the oral presentation.
concerning the principles of efficacy in damages of a Member State for breach of Community law, hence necessary in consequence of the Kommerzbank and others v the Federal Republic of Germany decision in the second case.1

(19) National courts may conclude that the Court's initial reply is unclear, and may seek clarification. The Sunday Times saga is a good example. In those cases, foreign courts sought to challenge the compatibility at the stage of requesting an opinion on Sundays with the principles of the free movement of goods. 2 In Tancrex, 3 the first such case, the Court considered itself with an abstract answer and referred the question of partiality to the national court. Further proceedings were returned to the Court on the point because the national court did not, first of all, take into account the possibility of primary legislation. The Court, in 2A.12.18, reversed the issue, by declaring that Article 26 did not apply.

(44) There are three cases in which a national court is not satisfied with an abstract judgment of the Court, and seeks to challenge this ruling through a further reference on materials where an identical matter. The Court has sometimes dealt rather gently with such cases, upholding the obligation of national courts to request judgments. In other cases, the Court has simply accepted the abstract judgment.4

3.1.8.3 In the vast majority of cases, national courts find no difficulty in applying the Court's judgment. The Court based the application of its judgment in the present case, and the conclusion is based on national doctrine. Counsel of the Court no difficulty in sending a copy of the judgment to the Court.