THE MARKET FOR COMMERCIAL LITIGATION

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No Seminar organised by Alan Peacock and The David Hume Institute would be complete without an analysis of the market. Like other markets, the market for commercial litigation has its demand side and its supply side, its costs and its benefits. On the demand side are the commercial litigants: those who want to litigate and those who are forced to litigate. On the supply side are the courts, the judges and the law they administer.

Operating to some extent on both sides of the market are the lawyers for the parties. They operate on the demand side to the extent that they advise their clients to go to law, and to the extent that they conduct their cases for them. They operate on the supply side because they are themselves, in the French phrase, auxiliaries of justice. They are part of the system. The advice they give and the way they conduct cases are circumscribed by rules of law and rules of professional ethics. Without them, it is hardly conceivable that a sophisticated system of commercial litigation could be made to work. Without them, equally, there might be less demand for such a system.

A full analysis of the market involves many interrelated questions:
(i) Why do commercial men resort to litigation — because they’re forced to do so, because they’re advised to do so or because they want to do so?
(ii) Should the courts make special arrangements for commercial litigation and, if so, how? Should there be special courts and specialist judges, or should businessmen wait in the queue like everyone else?
(iii) Is our law adequate to deal with commercial disputes? Why, as anecdotal evidence suggests, do businessman prefer to write their contracts under English law and go to England to litigate? Is the substance of Scots law defective, or our procedures, or both?
(iv) Are our lawyers properly trained and sensibly organised? If not, what should we be doing about it?

I propose to address myself principally to two aspects of the subject. My first concern is to offer some words of caution to those who say, without really arguing the point, that we must at all costs set out to create a market for commercial litigation in Scotland. My second concern is to deal with the suggestion that we must strengthen the position of Scots law as an autonomous system and the opposing suggestion that we ought to abandon Scots law and adopt English Law.

So let me begin with the demand side of the market — the commercial litigant.
The conventional, or polite, view of the commercial litigant is that he is a robust, practical businessman faced with a commercial problem to which he needs a quick, practical and commercially realistic answer. The author of the Aspect column in this month's Journal of the Law Society puts it this way:

"In commerce and industry recourse to litigation takes place only after all avenues of negotiation have been explored and exhausted. Litigation may therefore be joined some considerable time after the events leading to the dispute have occurred. By that stage what is required above all is a speedy answer. Indeed there are those who believe that a speedy answer is perhaps more important than the right answer."

In fact, those who are most in need of a speedy answer are probably those, like receivers and liquidators, who are in no position to negotiate because the nature of their position forces them to look for the legally correct answer, rather than the commercially convenient one.

Otherwise the picture of the unwilling commercial litigant, driven to the courts after all other options have failed, seems to me to be somewhat rosy. The reality surely is that the market for commercial litigation exists, like the market for other types of litigation, because people (including the human beings who manage corporations) cannot agree.

Other societies, notably the Japanese, prefer that those who cannot agree should contribute to the peace of society by resolving their disputes as quickly as possible. It is a matter of honour and social obligation for them to do so.

We don't take that view. We accept that the courts exist to provide a normal and honourable way of resolving disputes. All the same, it's perfectly legitimate to argue that the courts should not be too accessible, since there will then be no incentive to negotiate and settle.

Indeed, if we look at what is happening down South, where the facilities for commercial litigation are said to be better, there is ample evidence of a tendency to sue first and negotiate later. This may be symptomatic of a society that is increasingly influenced by transatlantic habits, including the habit of litigation. But where America leads, we do not always or necessarily want to follow.

Furthermore, it takes two to litigate. When the pursuer says that he wants a quick answer to the question, he frequently means that he wants a quick answer to his question. For a variety of reasons the defender may not agree with the question, and he will almost certainly disagree with the pursuer's version of the facts on which that question is based.

Litigation, as a way of deciding who has the better of the argument, is bound to be fairly expensive; particularly in our system when fact-finding is involved, and the threat of litigation can be an unfair weapon in the hands
of the party with economic clout. Even in that odd new corner of the market place which seems to be known as the level playing field, the resources spent on litigation might sometimes be more profitably deployed elsewhere.

As well as the obvious costs such as lawyers' fees, litigation has hidden costs in terms of the management time that litigants need to devote to it. It has hidden costs, too, for the taxpayer who pays the judges and provides the court facilities. So, even in purely economic terms, use of the law-courts to settle commercial disputes involves a range of costs as well as benefits.

There are social costs as well. If special arrangements are made for the speedy disposal of commercial litigation, other litigants will probably have to wait. There is evidence that they have had to do so in England, and we have a particular problem in Scotland since we must, to some extent, choose between speed in civil litigation and the 110 day rule which ensures that no-one is kept in prison for longer than necessary before trial.

I've stressed these points at the beginning, not to denigrate commercial litigation (from which, after all, I made much of my living) but because I hope this discussion will help us to define what the demand is, and how far it is justified, before we try to decide whether adequate steps have been taken to meet it.

I think we also have to consider whether there are other ways of meeting the demand apart from litigation in the courts — for example, by developing conciliation and arbitration services at less economic and social cost. Without necessarily sharing the current rage for privatisation, it is reasonable to suggest that, in some cases at least, private arbitration at the cost of the disputants is preferable as a way of resolving commercial disputes than the publicly-funded arena of the courts.

Having said that, there are obviously some commercial problems which can only be resolved by the courts, and that brings me to the difficult question of Scots law in commercial litigation.

Most of us have been taught to believe in the inherent merits of Scots law. The leader writer in the Law Society Journal treats it as self-evident that commercial contracts, to be performed in Scotland by at least one Scottish party, should be interpreted in accordance with Scots law.

But an important characteristic of commercial law is that the parties frequently have a choice — a choice of forum (Scotland, England or elsewhere) and a choice of law (Scots law, English law or Islamic law). In others, when it comes to choice of law and choice of forum, businessmen can vote with their feet and there is fairly reliable evidence that they are doing so.

This has prompted one of our Senators to argue that we should harmonise our mercantile law with that of England before our system becomes moribund. There is nothing new in that. If I remember rightly, James
Sutherland (later President of the Law Society and of the International Bar Association) made the same point many years ago when he was Dean of the Faculty of Procurators in Glasgow.

Over-enthusiastic votaries at either shrine would do well to read Bell's Preface to his Commentaries because we have passed this way before. Writing at the beginning of the nineteenth century, Bell tells us:-

"Towards the end of the century before last, there was some appearance of a growing attention to (mercantile law), proceeding partly from the influence of foreign example, chiefly, perhaps, from the circumstances of the country . . . But this dawning of Mercantile Jurisprudence was soon overcast. The failure of the Darien Expedition . . . and the Union with England . . . (were) . . . soon followed by two rebellions, which not only disturbed the tranquillity and interrupted the natural advancement of industry, wealth and commerce, but produced a similar effect on the progress of law. The numerous forfeitures which followed the rebellions of 1715 and 1745 gave rise to a multitude of difficult questions of high interest relative to the connection of superior and vassal, the nature and efficacy of destinations in deeds of entail, and the force of real securities over land. All the learning of the Feudal Law came more immediately to be called into use, and the professional success, as well as the character of a lawyer, was estimated chiefly according to his skill in the law of heritable property. The jurisprudence of mercantile dealings, fitted for times of a different complexion, was almost entirely abandoned . . . The merchants were left to struggle with all the evils of our old law, little suited to the occasions of commercial intercourse; and a proposal, made by merchants, to introduce a system of Bankrupt Law similar to that of England met with the most determined opposition from our lawyers . . ."

Can the Scots lawyers present here put their hands on their hearts and say that they find no echo there of what has been happening in our own day? Bell goes on to contrast the position in Scotland with that in England:

"During the troubles which agitated and depressed this country, England was triumphantly proceeding in her great career of commercial prosperity; and the progress of her jurisprudence, which might naturally be expected to accompany that of her trade, was happily directed by the successive wisdom and learning of many great men . . . Lord Mansfield . . ., who has been called the father of the Commercial Law of England, devoted his splendid talents, during an uninterrupted period of thirty years, to the great duty of constructing . . . a system of Mercantile Jurisprudence . . ."

The message, I think, is clear. Development of the law to meet the contemporary needs of industry and commerce depends partly on the economic condition of the country and partly on the skills and attitudes of lawyers, including academic lawyers and judges. Conditions favourable to the
development of mercantile law are an active economy, imaginative judges, good legal writing and an appropriate attitude of mind amongst lawyers generally. A stagnant economy and stagnant attitudes to legal practice produce stagnant law.

We are not responsible for the state of the Scottish economy, but we are responsible, each of us, for the attitude to legal practice in Scotland. And we shouldn’t fall for the false dichotomy between those who would force Scots law like castor oil down the throats of businessmen who don’t want it, and those who say we should adopt English law holus-bolus, warts and all.

Bell’s approach was different. He treated the development of mercantile law as an attempt to deduce general principles of natural equity from the way businessmen behave in their dealings with each other — illustrated, but not fixed, by the decisions of courts and the writings of lawyers in different countries. In short, mercantile law is not a single indivisible package of national law. You don’t have to have all of it as it stands, or none of it — like a fly fixed in amber. On the contrary, mercantile law is, and ought to be, a constant exercise in comparative law.

In a relatively small country like ours, with a relatively small domestic economy, we cannot hope to have everything. We do, however, enjoy one particular advantage which the lawyers of big countries do not share. Almost from his first day in law classes, the Scots lawyer is taught that there are other systems of law besides his own. Every Scots lawyer — at least every good Scots lawyer — is a comparative lawyer. Furthermore, we share a common system of legal education based on a system of law which, for all the strengths of English law, will be the majority system in the internal market of 1992. As a basis for creating a vigorous market for commercial litigation, that is not a bad start. Have we anything to lose but the chains of our past attitudes?