

## **The European Circuit Inaugural Conference**

### **Transnational Practice in Europe for Advocates**

**Brussels, 1<sup>st</sup> December 2001**

#### **Session I: the Legal Framework**

Chairman: Judge Nicholas Forwood QC, Court of First Instance of the EC

#### **Welcome and introduction**

David Vaughan QC, Leader of the European Circuit

- This is the first conference of the European Circuit though it has already had its first meeting back in London. I am very glad that delegates have come from so many countries
- We aim to widen the range of Circuit numbers from England & Wales thus we are very pleased to have the leaders of the specialist bars here
- It should be stressed that everyone who engages in this work does so within the context of the 'laws' here –the Belgian bars have representatives here today
- In addition we will be hearing about some of the important aspects of transnational practice today e.g. EC Lawyers' directives and professional conduct issues.

#### **Marc Wagemans, Bâtonnier de l'Ordre français des Avocats du Barreau de Bruxelles**

- The objects of the European circuit are also concerns of the Brussels bar e.g. increasing transnational practice
- The Brussels bar has a 'D' list on which foreign lawyers may be mentioned in the Bar in Brussels and called 'associate members of the Brussels bar and allowed to practice on certain conditions
- The Brussels bar incorporated the Establishment Directive into its rules on 14.3.00 (before the vote of the act incorporating the Directive into Belgian law). It thus created a new list of 'D' European advocates which is called the 'E' list 'liste des avocats Européens'
- There is a controversy on the direct effect of the Directive (is the directive immediately applicable as to rights and obligations?)
- When the Directive is implemented in Belgian law, European lawyers practicing in Belgium will be required to register on the 'E' list . Inscription is reserved to advocates who can establish that they have finished the requisite training period in their own country. They will practice under their own country title (with a translation into French) and have this

on their letterhead. They may participate in the Belgian elections to the Bar Council and be elected to the Bar Council themselves

- They will have to be covered by professional liability but if their original insurance is equivalent to that of Brussels lawyers (minimum coverage is 1 250 000 euro), they need not subscribe to Belgian insurance – though the premium for this is only 300 euro
- They may give advice on Belgian law and appear in court with a Belgian lawyer – though this is only a formality. They must pay a duty which is ½ of their professional income worldwide – subject to a maximum of 1800 euro
- They must undertake to apply Brussels professional rules and submit to Brussels bar requirements

### **The practical problems of implementing the European Directive on Establishment**

Luc Vangeeswijk, representing de Stafhouder, Nederlandse Order van Advocaten, bij de Balie te Brussel

- This may take longer in Belgium because there are some practical problems, as illustrated by the following three examples:
  - 1) A Belgian lawyer wanted to establish an office in Berlin– he was required to take an oath on the German constitution – he had to ask if this was compatible with his oath on the Belgian constitution. This is not at problem if you're on the E list – only if you're on the non-European list. There are only 3 non-Belgian lawyers on the A list at the moment
  - 2) the Language problem – we have 4 languages for registration at the moment – Dutch, French, German and English – no others. The Directive has not imposed the requirement to know the local language. However, this should be a requirement
  - 3) the Brussels bar has to inform the bar of origin that the lawyers has taken up office in Brussels – they confirm to us that he's fully qualified etc but then they charge for this information! This is a problem.

### **The EC Lawyers directives: services, diplomas and establishment**

Jonathan Stoodley, EC Commission

- We welcome news of some comments that the Directive hasn't done enough – the Commission is usually accused of being too interventionist

- on the language issue, this has arisen in a number of places in other directives: it is not formally part of the Directive, but is considered under the general Treaty provisions. The ECJ has said that minimum requirements of language in order to be able to exercise a profession can be justified
- The Establishment Directive is extraordinary and totally exceptional – it provides authorisation to be established immediately and start practising in another Member State. The Commission never thought possible such a striking example of liberalisation previously. The Approach up until now has been that if you were established professionally in your home country, in principle you have the right of establishment in another Member State but only under the rules of that Member State. You should from then on have the full range of activities authorised to local practitioners
- The Commission thus had to identify common essential elements in professions on which to base automatic establishment in another Member State – e.g. doctors, dentists – who deal with the same subject matter
- It was difficult to get agreement on those directives. The nature of EC decision making then was that it could take 10 – 15 years to adopt directives e.g. the architects directive
- Lawyers are different because of the different legal system in different Member States – but their directive was extraordinary because the profession was interested enough to take this important step
- The fluid nature of the Directive lies in the way in which a home state lawyer can evolve to obtain the host state title – normally under Dir 89/48, for those seeking recognition of title without establishment, the rules of the general system apply i.e. one is subject to an exam in the other Member State covering local law elements necessary to practice in that system
- The difference with the present system is that it is a very flexible and open system for developing lawyers' careers in Europe – it is a unique example of that facility
- The Commission is looking to other professions and considering how it can extend this system but this is proving to be more difficult

**Specific aspects of the Lawyers Establishment Directive:**

- Reservation by local legal systems of the right to defend clients in court according to the local bar
- Local rules apply even to lawyers practising under home state's law – especially when justified by public interest
- Some scope for local rules to limit home rules only when objectively justifiable

- Multidisciplinary practice: A.11.5 of the Directive is clear that "in so far that the home state prohibits (it)... that host member state may refuse to allow the home Member State practitioner to practice (...)"
- Code of conduct: the e-commerce directive includes a provision in relation to professional services encouraging professions to organise themselves together to overcome obstacles so as to enable them to provide services via e-commerce
- This is appropriate because it allows professions to organise themselves where possible: only through a dynamic system can we meet the challenge of being competitive internationally

### **Enlargement**

- Enlargement is progressing steadily – Common Positions were adopted last summer
- The final picture is to be taken at the end of 2002 so that by 2004 European Parliament elections, candidate countries can be participating in an enlarged Union
- Lawyers: there may be problems where new legislation introduces restrictions on use of professional titles or re-registration requirements – these issues are being pursued but we have to respect the huge political impetus towards enlargement – the details have to be ironed out under EU law but do not justify a transitional period
- If we look at the traditional way of implementation, the Directive hasn't been implemented in some countries e.g. Luxembourg, Ireland, Portugal...this is being actively pursued by the Commission in the normal way
- May I offer congratulations to lawyers for this extraordinary step

### **Chairman**

- I would remark that this is more freedom than exists at present in the US or in the UK (between north and south of the border): there are some interesting questions before the CFI on the matter at the moment
- As to the national rules on the compulsory involvement of a local lawyer, I wonder if this is an area of particular concern?

### **Jonathan Stoodley replying**

- it is a little early for indications on how the Directive works on the ground – the complaints from the Member States are not related to the issue

- the Directive may not touch on all issues of national implementation but it is more detailed than many of the other directives
- this issue depends on the way it's implemented in national law – so we need to wait for answering the question

**Q Question from the floor:**

- what does the 3-year practice requirement necessitate?

**A Jonathan Stoodley replying**

- there needs to be some element of local law in the practice to be fully qualified locally – not just EU law – especially local procedure. This wouldn't usually be a huge obstacle for the applicant, and there is some discretion involved
- the requirements of local law would have to be objectively justified – e.g. a commercial lawyer should not need to know divorce law
- at the moment we are not considering changes to the Lawyers' Directive – it is a new system so we need to wait and see how it works

**The CCBE Code of Conduct**

**Heinz Weil, Senior Partner, Weil & Associés, Former President of the Council of the Bars and Law Societies of the European Union ('CCBE')**

- the Code of Conduct is published by the Councils of the Bars of the European Union and can be found on <http://www.ccbe.org>
- the regulatory environment in which Code is situated is called deontology of lawyers
- the first European Law on lawyers in Europe was the 1977 Directive on the provision of occasional services by lawyers which sets up the principle of 'double deontology' – a lawyer rendering services in another Member State has to take into account the rules of conduct of both the host and home state
- it was slightly different for court work and giving legal advice – for court work, a lawyer shall observe the rules of professional conduct of the host state without prejudice to those of the home state; for legal advice – lawyer shall remain subject to professional conduct rules of the home state without prejudice to those of the host Member State
- this was mitigated by its final provision: in any event rules of conduct have to be observed only as much as objectively justified to ensure proper activity in the host Member State – this comes from an ECJ ruling which states that rules of

- professional conduct must be objectively justified in the public interest
- these are not rules of substance but rules of conflict

### **The Lawyers' Establishment Directive 1998:**

- Includes rules of indemnity insurance – lawyers must underwrite insurance in accordance with the rules of the host Member State, but if they are already insured in the home Member State this shall be sufficient
- As against 1977 Directive 'double deontology', the 1998 Directive states that a lawyer established in a Member State has to obey rules of the host Member State
- It also includes disciplinary proceedings provisions: the 1998 Directive introduces a new provision which is considerable progress – that is, the obligation of 2 Bars/Law Societies to closely work together in disciplinary proceedings. As well as and the obligation to inform and give the other body the opportunity to express its views in disciplinary proceedings

### **History of Code of Conduct:**

- There was a need for the legal profession to express a view about what could be common principles of conduct for lawyers all over the EU
- In 1977, the CCBE adopted the declaration of Perugia stating general principles of professional conduct of lawyers – these were very broad and very difficult to make use of in concrete cases
- In 1982, the CCBE set up a subcommittee on ontology with the mission to prepare a code of conduct. This took 6 years and I was the Chairman over the last years
- It appointed a rapporteur for each substantive item who came up with a draft provision
- one of the major achievements of the CCBE that this code was unanimously adopted in 1988
- In 1998, amendments were made to the Code also by unanimous vote
- this Code isn't applicable to individual lawyers but is implemented by the competent authority in each Member State
- it has been implemented in most areas of Europe today, however there are certain Member States where the authority to adopt rules of professional conduct lies with local bars, so there may be some local bars where it has not been implemented

### **Overview of the contents of the Code:**

- the Preamble is followed by general principles of the legal profession, and then deals with lawyers' relations with clients, courts and fellow lawyers
- the Preamble expressed some basic common views of European legal profession which have influenced the vision of our profession with respect to members and the members of the outside world
- It is clearly stated that:
  - the lawyer plays a special role in society and is a part of the public service of justice 'l'État de droit' which is common to all Member States
  - the legal profession is a free, independent and self-regulating profession there is a tension in Europe between national traditions and a common foundation of rules and principles which exist in all Member States it is the expression of consensus of all Bars/Law Societies that they take the engagement to adopt this Code as enforceable rules and that the principles of the Code shall be taken into account with a view to the gradual harmonisation of national codes of conduct
- the field of application of the Code is cross-border activities of lawyers. This is defined as when a lawyer in Member State A has some professional conduct with a lawyer in Member State B even if they remain in their respective Member States; and, when lawyer moves to another Member State to provide services there

### **General Principles of the Code:**

- 1) Independence with respect to his/her own personal interest
- 2) The personal integrity of the lawyer
- 3) Confidentiality: the Code states that this is a right and duty of the lawyer
  - in the beginning this wasn't acceptable to everybody because in some Member States it was thought (especially in Common Law states) that the 'right' of confidentiality belongs to the client not to the lawyer
  - in view of the role played by the lawyer in society, it was decided that this confidentiality belongs to the lawyer because he is an officer of the court
  - the duty of confidentiality is not limited in time
- 4) Incompatible occupations: in some Member States there is a strict prohibition on exercising another profession when a lawyer
  - in the Code there is a conflict of law rule: the lawyer must obey the rule of the host Member State

- 5) Rules of personal publicity (the Code says that lawyer should not advertise where it is not permitted i.e. the host State rule)
  - on the question of where the publicity is deemed to take place, the Code says that the publicity is deemed to take place where the main publication takes place, not where it is incidental – this can be very difficult taking the example of the Financial Times
- 6) Lawyers' relations with clients – the Code states that a lawyer must act promptly, conscientiously and diligently; it also states that a lawyer shall not handle a matter which he knows or ought to know that he is not competent to handle without co-operating with a lawyer who is competent to handle it
  - this has played a big role in the debate on the right of establishment – it is easier to allow a lawyer to establish in another Member State because the lawyer is professionally obliged not to deal with a matter which he is not competent to handle except with another lawyer
  - so the established lawyer progressively gets familiar with the law of the host Member State
- 7) Rules of conflict of interest – these are strict in the Code, for example a lawyer representing 2 clients in legal proceedings has to cease to act for 1 in the event of a conflict
- 8) Fee sharing with non-lawyers
  - the Code states that there is a strict prohibition on this except with the heirs of a deceased lawyer over a certain period of time
- 9) Detailed provisions on professional indemnity insurance and clients' funds
- 10) Relations of the lawyer with the court – in the Code this is a conflict of law rule: when a lawyer appears before a court of another Member State, the host State's rules apply
- 11) Rule prohibiting lawyers giving false and misleading provisions to a court/arbitral proceedings
- 12) Relations between lawyers:
  - there must be relationship of trust and cooperation between lawyers – each lawyer must be considered as a professional colleague
  - correspondence between lawyers: these rules are very different among Member States – the Latin tradition has a strict rule of confidentiality prohibiting the lawyer sending a copy of the correspondence to his own client; whereas in Germany and Austria, agency rules apply and a lawyer is obliged to give full disclosure; and, in between is the common law 'without prejudice' regime

- it is impossible to reconcile these: so if a lawyer wants correspondence to be confidential he must expressly state so on the correspondence
  - if the receiving lawyer believes he is not capable of respecting that confidentiality, he must return the correspondence informing the other lawyer thereof
- 13) Fees: A successor to a case must ascertain that arrangements have been made for the payment of the fees of the predecessor – successor shall not remain passive when he takes over a case
- if a lawyer asks another lawyer to initiate case on behalf of the first's client: the instructing lawyer bears responsibility for fees unless he makes clear that he will not do so
- the Code already is significant in Europe: it mitigates the difficulties of 'double deontology' principle; it influences review of national Codes of Conduct (in particular in France); it influences the jurisprudence of the European Court and of national courts
  - the ECJ in its judgment on the validity of the lawyers' Establishment Directive made explicit reference to the Code – so it is not just a theoretical exercise

**Q Question from the floor**

What does 'confidentiality' mean, given that legal professional privilege belongs to client in England?

**A Heinz Weil answering**

A lawyer cannot waive this confidentiality even though he is the owner of it – this implies that, even as a witness in proceedings before a court and even if the client agrees to the disclosure, he cannot disclose it. This consideration has played a role in money laundering negotiations recently.

**Chairman**

Though a client can himself say what his lawyer told him – and so is in a better position than his lawyer!

**Q Question from the floor**

Does the Code apply to employed lawyers?

**A Heinz Weil answering**

The Code does not address this question – some Member States do not recognise them as able to practice

**Q Question from the floor**

Has there been any change in confidentiality after September 11?

### **A Heinz Weil answering**

Though I'm no longer a member of the CCBE, as far as I know even after that, the position of the Bar still was that the relation of trust between the lawyer and the client is so important that the principle should not be changed – though if the lawyer participates in money laundering activities or knows that the client is so participating, there is an obligation to inform

### **Q Question from the floor**

Is competence determined objectively or left to the professional conscience of the practitioner?

### **A Heinz Weil answering**

It is left to the conscience of the practitioner subject to the control of his Bar

## **Justice and Home Affairs ('JHA') – relevant Commission initiatives**

Evanna Fruithof, Bar Council of England and Wales, Brussels Office

### **From where does the EU's JHA derive its competence?**

- The idea gained momentum in the Single Market days – people thought that closer integration of EC at that point was inevitable – this led to the Maastricht Treaty
- This divided the Treaty into 7 Titles – 1<sup>st</sup> Pillar (EC pillar) was supranational EC competence, 2<sup>nd</sup> Pillar CFSP, 3<sup>rd</sup> Pillar JHA
- The concept of Community citizenship was introduced – many considered it to be overly ambitious
- Next came the Treaty of Amsterdam ( entered into force in 1999) – 1<sup>st</sup> Pillar has large parts that were previously in the 3<sup>rd</sup> Pillar i.e. part of Community competence – 3<sup>rd</sup> Pillar now only has cooperation in criminal matters
- Its instruments mirror those of 1<sup>st</sup> Pillar but using different methodology to put them into place
- Under Amsterdam, 'Judicial Co-operation in civil matters' (Title 4 of EC Treaty) has a transitional period of 5 years whereby the Council can act to adopt decisions or proposals that come from Member States – this makes it more difficult to track such affairs
- The Tampere European Council in September 1999 set out an ambitious and detailed program for the next 4 years – the office of the Bar Council in Brussels opened at the same time

## **Main developments at the moment:**

### Civil:

- Lots of immigration and asylum measures – Commission is disappointed that Member States haven't been quicker to implement this legislation
- Brussels 2 Regulation 2000: Recognition/Enforcement of Decisions in matrimonial matters/parental responsibility
- Choice of Law contract/non-contract matters
- Charter of Fundamental Rights September 2000
- Legal Aid in Civil and Commercial matters
- The Commission this year has created a European Judicial Network on Civil and Commercial matters
- European Judicial training network
- Network of Alternative Dispute Resolution coordinates bodies from each of the Member States

### Criminal:

- down 5 priority cross border crimes: trafficking human beings, drug trafficking, terrorism, money laundering and cybercrime
- Money Laundering directive has just been adopted
- Mutual Recognition of judgments in Criminal Matters – a program was adopted last year
- Framework convention mutual assistance in criminal matters
- Criminal European Judicial Network – non-centralised forum
- EuroJust network – EU body with members from each Member States
- Europol – the police equivalent
- The Brussels office of Bar Council has been following developments very closely, --for instance we were involved in the Charter of Fundamental Rights; and, the Mutual Recognition of Decisions on Criminal Matters,
- On the Money Laundering Directive: we weren't as concerned – this was because under the Drug Trafficking Act, the Bar is already subject to rules, and we are not as exposed to it due to the structure of the English profession. The Directive does allow protection of legal professional privilege but this is only an option for Member States – this is an issue that the Bar Council is very aware of and CCBE will be coordinating a strong lobby at national level so we are not left exposed on cross-border matters
- On Mutual Recognition in Matrimonial Matters/children born outside of wedlock, Pamela Scriven QC is dealing with developments
- On the Draft Hague Convention, 2 papers have been submitted on behalf of the Bar and the Intellectual Property association of the Bar

### **3 current hotspots:**

- 1) Legal Aid in Civil Matters: Green Paper of the Commission May 2000
  - Bar Council put in a paper supporting this; we met with the Commission official in charge of the proposal along with the Lord Chancellor's department
  - In August, a proposal existed in French for the Directive – the Commission has gone way beyond the original ambit for the Directive, so it applies not just to cross-border cases
  - The Bar supported this; the UK government was not in favour of it though they have an opt out under this pillar but it is unlikely that they will be politically able to opt out
  - The Directive was delayed by September 11 as criminal matters took priority – it may be next year now before it appears
  
- 2) European Contract Law – Commission communication July 2001
  - There have been attempts to initiate a European Civil Code over the years
  - before JHA existed the Commission had to do it under Single Market provisions; they are now trying to do it 'by another door' though there are issues as to the correct legal basis
  - the Communication is presently being shared by 4 Directorates-General
  - the Law Reform Committee of Bar Council did a strong paper against it and favouring the possibility of choosing different options; COMBAR has also put in a paper – this has been reported in the Financial Times; the German Bar agrees
  - DG Health and Consumer Protection has posted a response to this on its website
  
- 3) European arrest warrants
  - The Bar was invited to attend the JHA conference; the Commission was thinking of having a fast track extradition procedure based on single criminality
  - After September 11 (September 21 European summit) many called upon the Council to adopt measures in relation to this and to extradition
  - The Council is fighting about issues – it has left it to its A.36 Committee to come up with solutions for next week's meeting of the Council, but it is not expected that agreement will ensue
  -

- This means that it's likely there will be a JHA special summit coinciding with the Laeken summit
- There is lots going on the civil and criminal side of JHA; the Tampere Council asked for review after 2 years at the Laeken summit (marking the end of the Belgian presidency) in 2 weeks time
- The Commission will ask to apply the Tampere timetable and be even more ambitious
- So in the next 2 weeks many of these issues will be highlighted.

### **Q Comment from the floor**

The Contract Law proposals of Bar Council Committee weren't anti – EU, but were concerned that this rigid structure would possibly impinge on litigation being held within Europe and result instead in it being held outside Europe

### **Q Comment from the floor**

The Bar Council's Brussels office is doing a terrific job – there is great feedback to London due to Evanna Fruithof's constant liaison with the Committee and due to Hugh Mercer's committee

### **A Chairman of Bar**

I endorse that!

## **Session II**

Chairman: David Vaughan QC, Leader of the European Circuit

### **Criminal Law**

Bruce Houlder QC, Chairman of the Criminal Bar Association

- on behalf of the Criminal Bar Association can I welcome the European Circuit – every possible congratulation is to be given to David Vaughan QC and the others involved
- thank you to Evanna Fruithof for her work on Brussels news
- back home at the Criminal bar there is a widespread tendency to see Criminal law as domestic: we have seen from Evanna that anyone who closes his eyes to Europe will be left swiftly behind
- there is a need for careful scrutiny for the kind of measures we use to combat terrorism
- it is no longer enough to sign up to Human Rights instruments and to say that Europe is an area of freedom security and justice – if we pass laws too quickly without proper debate, we do it at a possible cost to the way other countries view us and our human rights record e.g. when we criticise other countries for their human rights records

- before we get carried away I would urge us to go a little more slowly
- I hope that we will still retain some rules for domestic criminal law: that is not to say that the Criminal Bar Association is remotely against change - quite the opposite is true
- International agreements on cooperation are for the good
- EP Thomson said that the English common law rests on a bargain between the law and the people. The same is true for European criminal law: we must carry the people with it. I welcome this new forum and will do my level best so that the Criminal Bar Association does more in the area

### **Helen Malcolm**

- There have been an enormous series of developments in the international criminal field in the last few years
- I give best wishes and welcome to the European Circuit – it is precisely this kind of forum that provides for cross-fertilisation of different fields
- after 11 September, the UN Security Council produced Resolution 1373 encompassing many of the existing changes in criminal law (which is binding on all Member States), providing that UN members should prevent and suppress terrorist acts, refrain from providing active or passive support to terrorists, afford the greatest measure of assistance between Member States, prevent the movement of terrorists across borders, and take appropriate measures 'in conformity with national and human rights law' that asylum and refugee status is not abused by terrorists...
- there is a very fast paced requirement to respond by Member States – looking at money laundering, freezing orders, arrest and extradition of offenders...
- in some of those areas, UK is ahead of the game in term of legislation (e.g. with the fast track extradition procedure); in others it is not (thus resulting in the Anti-Terrorism, Crime and Security Bill)

### **International criminal courts**

- there are more of these than ever before. On the whole, these are governed by Public International Law and so rely on established offences of international law e.g. genocide.....
- There is an increasing willingness to extend this to terrorism
- the International Criminal Court was established in 1998 at the Rome Conference – 42 States have signed up to it, but 60 are needed to make it operational
- Prosecution of terrorism is not retrospective; and in any case terrorism is in fact excluded from its jurisdiction

- There are also Tribunals set up under Chapter 7 of the UN Charter by the UN Security Council e.g. the Ex- Yugoslavia and Rwanda Tribunals
- Other tribunals have been set up under Chapter 6 of the UN Charter but cooperation with these tribunals is not binding on the Member States (e.g. the East Timor tribunal). The advantage of this is that it involves national judges much more than Chapter 7 Tribunals – so it may be that these have more legitimacy
- Tribunals in Sierra Leone and Cambodia are also intended to be set up in this way
- The Lockerbie tribunal was a one-off in terms of international law, as Scottish law was being conducted in an international setting – the judges focused almost entirely on factual matters although this may change on appeal
- Another type of tribunal may be found in the tendency to use extra-territorial jurisdiction in domestic courts (for instance in Belgium)
- A final option is international military tribunals – this is rare now, and is no longer really necessary due to Chapter 7 of the UN Charter

**European arrest warrant:**

- On 19 September, the Commission published a proposal which overtakes previous ideas on fast track extradition procedures
- In summary, all formal extradition proceedings between Member States will be abolished in favour of European arrest warrant
- it will be possible to arrest a fugitive on a warrant issued by another Member State and thus bypass all courts
- a vast swathe of trafficking (summary) offences will become un-extraditable; plus the rule of specialty will be abolished between Member States on the basis that we all recognise and enforce each other's legal sanctions
- In extradition, the length of the process is the usual complaint – it takes a long time to get listed so this is not really the fault of the extradition law
- The new procedure will have 4 tiers: countries will be divided into 'tiers' – Tier 1 will be EU Member States with very few protections on behalf of the Defendant; Tier 2 will be those others who are signatories to the European Convention on extradition plus Australia, USA, etc.; Tier 3 will still have a requirement for some prima facie evidence and will consist of countries we presently have bilateral treaties with; and, with Tier 4 countries, extradition relations are looser

- who decides which country is in each tier and can representation be made as to the Tier? This is up for grabs in the Home Office, who are aware that this is an issue
- It is inevitable that the political defence in extradition will be wiped away – it has always been an exception for a defendant i.e. there is a provision to plead that your acts were motivated by politics
- This is removed under the European Arrest Warrant proposals and will also be under UN Resolution – after September 11
- There is a limited amnesty provision retained under the European Arrest Warrant proposals which would apply only for people who could have been tried in the requested state and where that state chose not to prosecute
- One of the difficulties in the Pinochet case was that a commission had reported on events in Chile; Chile was concerned that they had reached a status quo including giving amnesty which was overturned by other states – so the question was whether some states should be able to give amnesty to their own despite other states’ opposition
- The 2000 Terrorism Act gives an all-encompassing definition of terrorism – including extra-territorial activity, focusing on Northern Ireland
- The Anti-Terrorism Bill is much broader, and deals with terrorist property, freezing orders, race and religion, weapons of mass destruction, police powers, retention of information data, bribery and corruption
- There is scope for saying that there has been a slight overreaction in particular in provisions that require us to derogate from Article 5 of the European Convention on Human Rights
- The Anti-terrorism fight is aimed to protect human rights not to undermine them
- The Bill will allow British government to bring into force new criminal offences by secondary legislation – though the Home Office says that this will be limited

**Michael Brindle QC – Chairman of the Commercial Bar Association**

**Q** What are the ways in which the commercial bar can extend its ambit into Europe?

- A lot of this practice will be in the English courts – the English commercial court is probably the best known in Europe; it’s very important for the Bar and England

1) Arbitration

- London has been for a long time an important centre particularly in maritime work but we have not done as well in the European arbitration context
  - As to the ICC (International Chamber of Commerce), the English bar has done inadequately well in being involved – it is very important that we extend our involvement in the ICC
  - Alternative dispute resolution is also a huge area of progress for the English bar through CEDA and otherwise and represents a vast opportunity for the English bar to become involved, not necessarily in England
- 2) Advisory work
- A huge number of contracts governed by English law – it is important to disseminate the message that the English bar is an important source of expertise in English law and not just in advocacy
- 3) Expert witness work
- There is a need for a foreign court applying English law to know what English law is – this is usually done on paper
- 4) The possibility of advocating cases in other Member States' domestic courts
- where English law is involved, I hope that this is possible
  - a problem is that the court would need to be educated as to what English law is by evidence
- 5) The development of commercial law in Eastern European states e.g. Russia, Czech Republic
- this gets English law a good name and ingrains English law concepts in other laws; it creates goodwill abroad
  - as to the practicalities of carrying these things forward: a concentration of resources from different organisations are needed e.g. COMBAR, Bar Council, Bar European Group, etc.COMBAR has found it more difficult to maintain the initiative of a European Committee. We must find a way of targeting European law firms who are in a position to refer work to the English bar – we must let it be known that the Bar is able to provide this service. We could also target in-house lawyers in European organisations
  - I am hoping for further ideas on ways in which these initiatives can be put into practice

**The proposed harmonisation of European Contract law  
Commission Proposal 11.7.01**

## **Barbara Dohmann QC, immediate past Chairman of the Commercial Bar Association**

- In the Proposal, the Commission asks whether the proper functioning of the Internal market may be hindered by conclusion of cross border contracts
- The UK Government responded. The 4 options are:
  - 1) no action at EC level
  - 2) promoting common contract law principles
  - 3) improving inconsistencies in legislation at present
  - 4) propounding an EC wide code
- The UK Government concluded that there needs to be a careful study to see if there are really obstacles to internal market created by contract law, and that a case by case approach is preferable
- many contracts are governed by English law e.g. standard swap contracts; financial derivatives contracts
- there is no support in financial markets for a new contract legislation at EC level at present – COMBAR also goes for the pragmatic approach
- in any case, the *acquis communautaire* creeps in by osmosis e.g. consumer contracts; systems of payments; copyright and related rights; public procurement, etc.
- there is also a Commission on European Contract law that has developed an enormous amount of learning and have made recommendations
- I could not as a practitioner agree with all they say: e.g. that diverging contract law makes it impossible to engage on an informed basis in the European market – this is surprising given that there is a huge amount of trans-border work going on and presupposes that the typical business man knows his own system of law. So one must not assume that we need harmonisation of laws or that it would solve disputes that go on
- Their Joint Response has also included: the Preparation of a Restatement of European Private Law – they say no one Member State has a model which could be used for this
- They also say that they will be presenting a Restatement on e.g. sales and services contracts, and recommend that the Rome Convention be extended so as to enable the contracting party to select not merely the law of a state, but also the Restatement. This is more like the situation in Arbitration e.g. section 46 of the UK Arbitration Act
- German law has a concept of 'good faith' – this doesn't govern in the common law but it may be creeping in through European law (at the moment in consumer law) – so I too

subscribe to the approach of the incremental and the pragmatic

## **The impact of European law concepts on the English common law**

Julian Flaux QC: Chairman of the London Common Law and Commercial Bar Association

- Product liability in tort, the change has been most stark. Product liability triggered by negligence was necessarily a fault-based concept in which the burden is on the consumer (*Donoghue v Stephenson*)
- In the European context, there was discussion of a possible directive in the '60's after the Thalidomide disaster – in fact it was not implemented until 1985
- It introduced an obligation of strict liability on producers – it left an 'escape clause' for those jurisdictions who wanted it based on the state of scientific and technical progress which was called the 'scientific risk' defence
- The UK enacted the Directive in 1987. The Parliamentary draftsman decided to use different rules thus leading to the UK being brought before the European Court of Justice (ECJ) in the 90's. The ECJ stated that the wording did not necessarily conflict with the Directive but that the English courts had an obligation to interpret the Act in accordance with the Directive
- In the Hepatitis B cases, blood products were found to be products within the meaning of the Act; the National Blood Authority was sued; and the Act was interpreted in the light of the Directive. At the time when most of the claimants were infected the possibility of infection was known to the medical profession but it was not known how to avoid it
- The claimants argued that the blood was defective under Article 6 of the Directive and that the escape clause did not apply; they said that consideration of the conduct of the producers was irrelevant and inadmissible given that the standard was 'strict liability'; they also said that the escape clause did not apply where the risk was known whether or not the defect could be detected
- The Defendants argued that the risk was known to those that mattered i.e. the medical profession, and that avoidability was one of the circumstances to be taken into account under Article 6. They argued that the most that the public was entitled to expect was reasonably clean blood; in so far that this is analogous to negligence, it wasn't as such negligence. In relation to the escape provision, their argument was that this protects those who at the time could not detect the defect prior to supply

- Burton J looked at UK, ECJ, German, French court decisions and European commentators and approached the matter in a way which abandoned the common law approach. He found that the reference to 'circumstances' in Article 6 was to all relevant circumstances. In considering the legitimate expectations of the public, unavailability was irrelevant save in circumstances where the public knew there was a risk
- As a common law lawyer, it would seem to me that the judge was really grasping the nettle and saying that this is a Community wide Directive and we must not import common law concepts into it – he recognised that this was counter-intuitive to a common law lawyer
- As to Article 7.d of the Directive, he concluded that the defect did not have to be a defect in a particular product (i.e. if the defect is known or should be known in the light of all the accessible information known), so protecting the producer against the *inconnu*
- It is interesting and instructive to see how far English law has moved along since *Donoghue v Stevenson* – it demonstrates a way forward and a new approach to the application of EC law in our courts and which I hope that this new European Circuit will also go towards

### **The contributions of the Bar of England and Wales to EU law**

James Goudie QC, Chairman of the Bar European Group

The main contributions are as follows:

- 1) The Bar European Group (BEG) and other specialist bar associations
  - As to BEG, some of its activities take place overseas through the Lord Slynn foundation and through its Annual Conference (to be held next year in June in Toarmina)
- 2) by the giving of evidence to parliamentary committees especially that chaired by Lord Scott in the House of Lords (BEG contributes to this also)
- 3) UK lawyers come to Brussels and attend Commission hearings e.g. one on the Draft Hague Convention which I attended
- 4) The Bar Council's own Brussels office
- 5) Advocacy (oral and written) in the ECJ and CFI – a number of the leading cases in European law have been argued by members of the English bar e.g. *Marshall 1 and 2*, *Factortame*, *Barber*, *Preston* relating to key question of EU law
  - The preliminary reference system has provided the means to do this

- 6) Advocacy in the UK itself – there are many such cases especially concerning social and employment policy in which the courts have shaped domestic law by reference to EC obligations – most employment and environmental law is shaped by EC law
- national courts are taking it upon themselves to apply EC law; the UK courts have sometimes been more prepared to take this mantle on than some other jurisdictions

**The types of work of a lawyer based in Brussels; the extent to which the Bar model provides a framework for doing so**

**Clive Stanbrook QC, Stanbrook & Hooper**

The Bar can:

- 1) make it clear what an attractive jurisdiction the UK is for litigating
- 2) be a base for work outside the UK e.g. Brussels
  - the sort of work that I do is Luxembourg/ECJ work (which is increasing all the time). A successful practitioner will not be there for more than 5/6/7 cases per year - ECJ court work is an important part of the process but the fact that you can go is almost as important as actually going – there will be no purely 'Luxembourg' bar
  - the Luxembourg process consists of a quasi-judicial hearing (after hearing the evidence). The problem for barristers is that the process is intimately linked to the hearing; the growing tendency of the last 20 years is that law firms that do the whole process up to then will continue at that stage
  - one of the objects of the Bar will be to promote themselves from this stage onwards
  - e.g. in the trade sector (which is what I was interested in doing when I came to Brussels): anti-dumping investigations and procedures took me all over the world; we were developing the law in each case. In addition, in the competition sector, the most obvious role for barristers is in cartel defence; it is just like what I used to do in white collar crime cases; developing arguments more on paper than orally
  - barristers are uniquely qualified for this job
  - the world is becoming more global and so do these proceedings e.g. repercussions from a cartel in the US may be felt here and vice versa – this area of activity will be of fundamental importance to a large number of people
  - complaint procedures are also interesting because they are often associated with a litigation strategy e.g. do you want the Commission to go in and prove the breach for you; plus

- where do you want to bring your claim – the UK is not a good option for less-well-off complainants
- State Aids is another area where the procedure is important
  - regulatory advocacy is also important: e.g. arguing for your client according to its commercial interest, expressing your client's interest in the formulation of block exemptions
  - general advisory functions are also important, not always in relation to UK law, but giving the EC law input to a variety of national courts
  - there is no reason why barristers should not be doing this
  - WTO work is important as well: we can represent countries in WTO panels; plus in dispute resolution
  - This work comes from:
    - 1) local firms who don't have the advocacy skills in cartel defence cases
    - 2) foreign firms when we are acting as a referral firm – the problem with this is that we also have to supply secretarial support which is not typically the chambers' job – this is why our structure is a partnership
  - though we are doing a referral type of service, we are having to perform a wider range of services
  - the Bar is a referral profession and should concentrate on its service – otherwise you may squeeze yourself out of a process which produces very interesting work
  - the opportunities for the Bar to develop its practice are huge; I have been here since 1978 and am delighted that the tide has at last brought in the European Circuit

**Denis Waelbroeck, Liedekerke Wolters Waelbroeck Kirkpatrick & Cerfontaine**

- I am a Belgian lawyer established in Belgium but rather an EU lawyer with a transnational practice – this does not involve litigation before national courts really
- Will the practice of advocates change? Yes – more and more I get involved in litigation before national courts and national competition authorities; the more we get precedents from the ECJ, the more we will see this phenomenon develop along with the decentralisation of EC law and direct effect of EC law
- I believe it will be a very slow process – it will not change by magic even in competition law. Continental courts are very badly equipped to do this – you have no discovery and no cross-examination, and establishing the evidence is certainly a challenge
- This may be very different looking at English courts: if decentralisation of competition law can work it will be rather

- first before English courts – in certain continental systems competition law is hardly ever before the courts
- There are however linguistic problems when trying to argue a case abroad; plus problems of procedure and problems of local tradition which should not be underestimated
  - The main challenge arguing a case before the Belgian or EC courts is to say as much as possible in as short as possible a time – you would never get to go through all the evidence and cases such as is the case in the UK orally and through a dialogue with the judge (which is a better system than the judge sitting passively)
  - The way of reading precedents is also very different on the continent/ECJ: in the UK, the judgments are dissected much more which is a completely different approach to the reading of precedent than we are used to
  - The downside to being in a UK procedure is being away from your office for weeks to argue in the English High Court
  - European practice opens the mind and I fully support this initiative today

**Q Comment from the floor**

Barristers are also needed for the 'accelerated appeal procedure' in merger cases which will be coming in now; barristers also have a skill in advocacy which is more honed than on the continent

**A Chairman**

English courts are a very attractive forum if one has a choice because of speed.

Thank you all for attending this inaugural conference of the European Circuit today.