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## THE ROLE OF THE JUDGE IN DEVELOPING CONTRACT LAW

Lord Hope of Craighead

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*In this article Lord Hope approaches the issue of contract law from two perspectives: one as a Scots lawyer, the other as a Judge. As a Scots lawyer, he comments on the problems and opportunities that Scotland has encountered as a mixed jurisdiction which shares a common market with England. As a Judge, he stresses the need for clarity as to what the present state of contract law actually is in the Islands and a careful assessment of how any proposed changes will work out in practice.*

### **Scotland is a mixed jurisdiction too**

1 The position examined at the Institute of Law's conference—"Contract Law of the Channel Islands at the Crossroads"—is one which Scots lawyers have occupied with equanimity for more than three centuries. We too know what it is like to live in a mixed jurisdiction in close proximity to a much larger common law jurisdiction. And we too know what is like to live in a civilian system without a civil code to guide us as to what the law is.

2 If one had dared to visit Scotland in the early 13th century one would have been hard put to it to find any system of law there at all. When King James VI of Scotland became King of England in 1603, and the Crowns of the two Kingdoms were united, he made it his practice to address Parliament on the occasion of its annual State Opening. It was on one such occasion, in 1607, that he declared of the system of law with which he had become familiar that it was "the best of any Law in the World".<sup>1</sup> It was the common law of England of which he was speaking. Scotland still had no clearly established law of its own, so it was vulnerable to the King's wish that there should be a general union of laws for the whole land so that, as both countries already had one Monarch, they might both be governed by one law. Fortunately for us, that did not happen. Huge progress was made in the development of a system of Scots law during the following decades. So it was that when the Parliaments of England and Scotland were united in 1707 there was an established system that could stand on its own feet. One of the essential conditions of the Union was that Scots law and the Scots judicial system were to retain their separate identities.<sup>2</sup>

3 The law that had been developed was, at heart, the product of the system of education that those who wished to practise as advocates in Scotland were expected to undergo. Rather than move south to the Inns of Court, where English law was taught and practised and where they were likely to remain if they did so, they went to the universities in Italy, France and the Netherlands, and latterly in Germany, too where the law that was taught was the civil law that had been developed by the jurists. They brought back to them to

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<sup>1</sup> King James VI and I, *Political Writings* (ed JP Somerville, 1994), p 162.

<sup>2</sup> Acts of Union 1707, arts XVIII, XIX.

Scotland the textbooks which they had been studying, and they placed them in the Advocates Library in Edinburgh where they still are today. This was the raw material on which Scots jurists in their turn could base their analysis of how a system suitable for use in Scotland should be organised. By 1707 this system, based on principles extracted from the work of the civilian jurists, had been written and published.<sup>3</sup> The foundations which were thus laid by the Scottish institutional writers remain in place today.

4 Some aspects of Scots contract law, like the law of the Channel Islands, were and still are essentially civilian in character. They can be traced back to the *ius commune* which was developed from Roman law, to the customary laws of France and to jurists such as Domat and Pothier. They were developed before the Napoleonic code, so they are indeed the product of jurists rather than code-makers. As such they are capable of being developed by the judges, as is the common law system. That is what has happened in Scotland, as the gaps left by the institutional writers were filled in and, step by step, the law was modernised. But the modern law of contract in Scotland remains, in some significant respects, distinct from English contract law. As Mr Jonathan Faull, of the Directorate General of Justice, Freedom and Security of the European Commission, said when he was giving evidence to Sub-Committee E of the European Union Committee of the House of Lords as part of its scrutiny of the Commission's programme of work in the area of contract law,<sup>4</sup> we in the United Kingdom are living in a country where there is a common market with different legal systems each of which seems to have survived and prospered—as the Sub-Committee observed in its report,<sup>5</sup> without anyone being bold enough to suggest that they need to fuse or amalgamate. These different systems live together in an economically friendly environment. Perhaps this is because cross-border trade may often depend on considerations other than those relating to the law or to the legal issues or remedies arising if contractual expectations are disappointed. The stability and efficiency of the systems for resolving disputes, should they arise, may be just as important.

5 There is, however, an important qualification that must be added to these observations. It has long been recognised that in questions of mercantile law, which is based after all largely on international practice, it is desirable to have uniformity of rules.<sup>6</sup> A series of statutes were enacted towards the end of the 19th century by the United Kingdom Parliament to meet this requirement. Indeed there appears to have been some enthusiasm during this period, especially among Scottish businessmen, for codifying this branch of the law by statute.<sup>7</sup> Although Scots, they were really British businessmen who happened to work in Scotland. They were practical men, who wanted the laws which governed their transactions to be helpful for their trade in the larger English and Empire

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<sup>3</sup> See especially Viscount Stair, *Institutions of the Law of Scotland* (1681; 2nd ed, 1692).

<sup>4</sup> 12th Report of Session 2008–09, “European Contract Law: the Draft Common Frame of Reference”: HL Paper 95, 10 June 2009, Question 148.

<sup>5</sup> *Ibid.*, para 51.

<sup>6</sup> TB Smith, *Studies Critical and Comparative* (W Green & Son, 1962), p 121.

<sup>7</sup> See AF Rodger, *Codification of Commercial Law in Victorian Britain* (1992) 108 LQR 570.

markets.<sup>8</sup> Notable among these enactments were the Bills of Exchange Act 1882, the Partnership Act 1890, the Sale of Goods Act 1893 and the Merchant Shipping Act 1894.

6 On the whole the codification process, which was never completed,<sup>9</sup> did not affect the separate identity of Scots Law. Only in the case of sale of goods was it necessary for it to give up a fundamental civilian principle in the interests of uniformity. *Traditionibus, non nudis pactis, transferuntur rerum dominia* was the rule of Roman law which Scots law had adopted. That was not the English rule. Under its system title to goods could pass by agreement, it not being necessary for this purpose to effect delivery. The rule which the Sale of Goods Act laid down, following English law, was that where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.<sup>10</sup> Some technical rules of Scots law were preserved by the Act, and the law of England as to market overt was not extended to Scotland.<sup>11</sup> But the alteration of the principle that property cannot pass without delivery, which is still necessary to create an effective security over moveables in Scotland, was a significant concession to the need for cross-border uniformity in contracts of sale. Despite the misgivings of some Scots academic lawyers,<sup>12</sup> this was an area of contract law in which two different systems could not sensibly be accommodated.

#### **The wider perspective: codification**

7 There may be lessons for the Channel Islands in the way Scotland has learned to live with its neighbours. But the purpose of this paper is to discuss the way Scots law operates within the common market of the United Kingdom. In contrast to the movement towards more uniformity between English and Scots law which was current there in the 1890s,<sup>13</sup> there is now a much wider perspective. A wholesale incorporation of English law into the laws of Jersey and Guernsey is not the only option which is open. My task is to offer some reflections, from a judge's perspective, on the question whether the Channel Islands should retain what they have or whether there are useful lessons to be learned from the various European Contract Code projects.

8 Codification of the law does not, of course, have to be a cross-border exercise. When in 1802 Jeremy Bentham published a treatise on codification of the civil and criminal law<sup>14</sup>—a massive task, which in the event he was incapable of putting into practice—he was concerned only with the current state of English law. And the enthusiasm for codification in

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<sup>8</sup> *Ibid.*, pp 571–572.

<sup>9</sup> Unlike several leading lawyers who were not really in active practice, most legal practitioners in Scotland were, it seems, against codification: *ibid.*, p 589.

<sup>10</sup> See now Sale of Goods Act 1979, s 17(1).

<sup>11</sup> See 1979 Act, ss 22, 40, 49, 52(4), 53(5) and 61.

<sup>12</sup> Especially Professor TB Smith: see *A Short Commentary on the Law of Scotland* (1962), p 27; *Property Problems on Sale* (1978), p 14; see also fn 4.

<sup>13</sup> It has been suggested that, in contrast to the enthusiasm among Scottish businessmen, English lawyers were relatively indifferent to the idea of codification: AF Rodger, *Codification of Commercial Law in Victorian Britain*, pp 587–588.

<sup>14</sup> *Traites sur les Principes de Legislation Civile et Penale* (Paris 1802).

Victorian Britain was driven primarily by the perception that English and Scots mercantile law was in need of it. Scots law was drawn into the process by an appreciation that in this field the two systems could not reasonably remain apart from each other. More recently there have been projects both in England and in Scotland to codify the criminal law. In 1989 the Law Commission published a draft criminal code Bill for England and Wales.<sup>15</sup> In 2003, the Scottish Law Commission, in its turn, published a draft criminal code for Scotland which had been produced by a small group of professors based in the Scottish Universities.<sup>16</sup> The Law Commission's project was supported by several eminent judges, including the late Lord Bingham of Cornhill when he was Chief Justice.<sup>17</sup> But the support that they gave was by no means universal, and neither of these drafts has yet reached the statute book. There is no sign that they are likely to do so in the near future.

9 Support for the idea of codification in principle is one thing. Agreement on all the details is quite another. Legislation to give effect to these drafts was bound to be a controversial and extremely time-consuming exercise, and it is not surprising that Parliamentary time has not been found for this. It has however been possible, without too much difficulty, to codify—to “consolidate” is perhaps a more accurate way of putting it, as the raw material was already available in a variety of statutes—the whole of the law of criminal procedure in Scotland within a single statute.<sup>18</sup> Various other similar examples could no doubt be cited. The rules of procedure, which are invariably written down, are much easier to deal with in this way than the substantive law.

10 When, in the late 1960s, Harvey McGregor, QC produced a Code of Contract Law for the English and Scottish Law Commissions, he attempted to capture within a single system the essential requirements of both English and Scots contract law. But this rather ambitious project was not undertaken with a view to the promotion of a unitary contract code within the domestic systems. I do not think that this was ever in prospect. There was not much support for this idea in England and Wales, and the devolution of the whole of Scots private law to the Scottish Parliament has made the adoption of such a scheme even more unlikely.<sup>19</sup> The project had a much wider perspective, as it was undertaken with a view to providing a platform for engagement in discussions with colleagues in the European Union about developing a European system of private law. The work that has been done by the Lando Commission and others is very well known, and I do not need to dwell on it here. But I think that it is worth quoting a passage from the English text of the European Code of Contract, the first edition of which was published in Milan in 2001. This is the product of work done by a group of lawyers headed by Professor Giuseppe Gandolfi of the University of Pavia, later enlarged and formalised as the Academy of European

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<sup>15</sup> A Criminal Code for England and Wales (Law Com No 177, 1989).

<sup>16</sup> A draft Criminal Code for Scotland with Commentary (Scot Law Com 2003): [http://www.scotlawcom.gov.uk/downloads/cp\\_criminal\\_code.pdf](http://www.scotlawcom.gov.uk/downloads/cp_criminal_code.pdf).

<sup>17</sup> For a brief history of the project, see *Fifty Years of the Criminal Law Review* [2004] Crim LR 1, 13.

<sup>18</sup> Criminal Procedure (Scotland) Act 1995, as amended.

<sup>19</sup> Scotland Act 1998, ss 29, 126(4).

Private Lawyers of which Harvey McGregor too is a member. An English text of this Code, refined and revised by him, was published in 2004.<sup>20</sup>

11 The passage which I wish to quote is taken from Chapter V, which deals with the interpretation of a contract. I have selected this passage because it deals with an aspect of contract law which was discussed recently in the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*,<sup>21</sup> shortly before its appellate business was transferred to the UK Supreme Court. There is a sharp contrast between what the Code provides and the position that was adopted by the appellate committee in that case. This is as good an aspect of contract law as any on which to focus in order to demonstrate the gulf that is likely to exist between the judiciary in England and Wales on the one hand and non-practising lawyers on the other as to whether concepts which are familiar in English law should be given up in the interests of achieving uniformity across the European Union.

12 Article 39 of the Code begins with a proposition that, taken on its own, is unlikely to be controversial. It states that when statements in the contract are of such a kind as to reveal clearly and unambiguously the intention of the contracting parties, the content of the contract must be taken from the literal sense of the terms used, considering the contract as a whole and connecting the various terms of the contract one with another. It also states that in place of the meaning commonly given to the words used, the meaning expressly declared by the contracting parties shall prevail or, failing that, the meaning, technical or current in commercial usage, which is in accordance with the nature of the contract. The problem lies in the elaboration of these propositions in paras 3 and 4 of the article. They state—

“3. In case of doubts arising on examination of the text which cannot be resolved by a comprehensive evaluation of that text, which doubts may be in connection with *the statements or conduct of the contracting parties even after the conclusion*, but compatible with the text, of the contract, the contract shall be interpreted in conformity with the common intention of the parties which can also be ascertained by recourse to extrinsic elements concerning the parties.

4. In any event the interpretation of the contract shall in no way produce effects *contrary to good faith or reasonableness*.” [Emphasis added.]

13 The rule of English law, as explained in *Prenn v Simmonds* by Lord Wilberforce,<sup>22</sup> is that pre-contract negotiations are inadmissible. He said that earlier authorities contained little to encourage, and much to discourage, evidence of negotiation or of the parties' subjective intentions. In *A & J Inglis v John Buttery & Co*<sup>23</sup> Lord Blackburn adopted Lord

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<sup>20</sup> *European Code of Contract*: Edinburgh Law Review 2004, Special Issue.

<sup>21</sup> [2009] AC 1101.

<sup>22</sup> [1971] 1 WLR 1381, 1384.

<sup>23</sup> (1878), App Cas 552, 577.

Gifford's proposition in the Court of Session,<sup>24</sup> that where parties agree to embody their agreement in a formal written contract, in determining what the contract means, a court must look to the formal deed and to the formal deed alone. This approach was disputed in *Chartbrook*, where it was submitted for *Persimmon* that evidence of pre-contractual negotiations should be admitted to provide confirmation of their arguments on construction.

14 The rule was not without its critics, as Lord Hoffmann noted.<sup>25</sup> Among them was Lord Nicholls of Birkenhead, who pointed out in his 2005 Chancery Bar Association lecture<sup>26</sup> that in exceptional cases a rule that prior negotiations are always inadmissible would prevent the court from giving effect to what a notional reasonable man in the position of the parties would have taken them to have meant. As Lord Hoffmann also noted, systems such as the *Unidroit Principles of International Commercial Contracts* (1994 and 2004 revision) and the *Principles of European Contract Law* (1999) and the United Nations Convention on Contracts for the International Sale of Goods (1980) seem to have had little difficulty in taking pre-contractual negotiations into account. That, indeed, was the point that was made by Lord Nicholls. Referring also to the US Restatement (Second) Contracts,<sup>27</sup> he said that adherence to the exclusionary rule as an absolute rule would risk English law becoming isolated on this point in the field of commercial law—the very area of the law where it was said by its supporters that relaxation of the rule would be undesirable.<sup>28</sup> Professor David McLaughlan of New Zealand has also joined in this debate on the side of those who favour relaxation of the exclusionary rule. In his opinion there is much to be said for the view that, unless there are compelling reasons for doing otherwise, domestic contract law should be guided by international practice in our increasingly global economy.<sup>29</sup>

15 But Lord Hoffmann rejected this approach. He said that it reflected the French philosophy of contractual interpretation, which was altogether different from English law. As he put it<sup>30</sup>—

“French law regards the intentions of the parties as a pure question of subjective fact, their *volonté psychologique*, uninfluenced by any rules of law. It follows that any evidence of what they said and did, whether to each other or to third parties, may be relevant to establishing what their intentions actually were. There is in French law a sharp distinction between the ascertainment of their intentions and the application of legal rules which may, in the interests of fairness to other parties or otherwise, limit the extent to which those intentions are given effect.”

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<sup>24</sup> (1877), 5 R 58, 64.

<sup>25</sup> [2009] AC 1101, para 32.

<sup>26</sup> Delivered when he was the Second Senior Lord of Appeal in Ordinary: *My Kingdom for a Horse: The Meaning of Words* (2005) 121 LQR 577, 583.

<sup>27</sup> See the Restatement, paras 202(4) and 214.

<sup>28</sup> *My Kingdom for a Horse: The Meaning of Words*, p 586.

<sup>29</sup> *Contract Interpretation: What is it about?* (2009) 31.5 Sydney Law Review 5, 35.

<sup>30</sup> [2009] AC 1101, para 39.

16 He contrasted this approach with that of English law, which depersonalises the contracting parties and asks not what their actual intentions are but what a reasonable outside observer would have taken them to be. He said that one could not simply transpose rules based on one philosophy of contractual interpretation to another, or assume that the practical effect of admitting such evidence under the English system of civil procedure will be the same as that under a continental system. His conclusion,<sup>31</sup> with which the other members of the committee agreed, was that there was no clearly established case for departing from the exclusionary rule. Baroness Hale of Richmond confessed to seeing some attraction in counsel's invitation to reconsider the rule in *Prenn v Simmonds* especially as the parties' pre-contract negotiations, of which the committee had been made aware, made their position crystal clear.<sup>32</sup> But she said that her experience on the Law Commission had shown her how difficult it was to achieve flexible and nuanced reform by way of legislation. The courts, on the other hand, are able to achieve step-by-step changes which can distinguish between cases where evidence of pre-contractual negotiations is helpful from cases where it is not. I echoed those remarks when I said that one of the strengths of the common law is that it can take a fresh look at itself so that it can keep pace with changing circumstances.<sup>33</sup>

17 Lord Hoffmann's reference to the French philosophy of contractual interpretation has been criticised as suggesting a misunderstanding of the nature and genesis of the *Unidroit Principles* and the *Principles of European Contract Law*, which have a much broader base to which the systems of all the member states among others have contributed and with which English law is simply out of line.<sup>34</sup> It has been pointed out too that the French subjective approach has its roots in the ideals of liberty and individualism which are not necessarily strangers to classic English contract law.<sup>35</sup> The point remains however that the appellate committee has declined to abandon the approach which both English and Scots law take to pre-contract negotiations, on what are essentially practical grounds. To admit such evidence, said Lord Hoffmann,<sup>36</sup> would raise practical questions different from those created by other forms of background information.

“Whereas the surrounding circumstances are, by definition objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute. It is often not easy to distinguish between those statements which (if they were made at all) merely reflect the aspirations of one or other of the parties and those which embody at least a

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<sup>31</sup> *Ibid*, para 41.

<sup>32</sup> *Ibid*, para 99.

<sup>33</sup> *Ibid*, para 2.

<sup>34</sup> By Professor Eric Clive, contribution to European Private Law News, Edinburgh Law School (<http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8201>), 22 April 2010.

<sup>35</sup> Stefan Vogenauer, *Interpretation of contracts: concluding comparative observations*, in A Burrows and E Peel (eds), *Contract Terms* (2007), 123 at 129.

<sup>36</sup> [2009] AC 1101, para 38; contrast Lord Nicholls's view that the answer to the problem lies in case management: *My Kingdom for a Horse: The Meaning of Words*, p 588.

provisional consensus which may throw light on the meaning of the contract which was eventually concluded.”

18 Moreover art 39(3) of the European Contract Code does not hold the line at things said and done before the contract was entered into. Contrary to the position that English law has adopted,<sup>37</sup> it would admit the evidence of statements and conduct of the parties even after the contract was concluded which, to adopt Lord Hoffmann’s words, are likely to be even more drenched in subjectivity. Lord Reid’s objection was that it might have the result that a contract meant one thing the day it was signed but something different a month or a year later.<sup>38</sup> Then reference is made in art 39(4), as a controlling factor, to the concepts of good faith and reasonableness.<sup>39</sup> Good faith—*la bonne foi*—is a principle of the civil law which is, of course, familiar in Jersey law<sup>40</sup> and has occasionally been recognised in Scots law too.<sup>41</sup> But is not part of English contract law, which has no overarching principle of good faith and would not even recognise an express agreement of the parties to negotiate in good faith.<sup>42</sup> There is no general duty of good faith in the bargaining process.<sup>43</sup> The idea of using it and its cousin reasonableness as an aid to interpretation is open to the objection in that jurisdiction that it risks opening the door to an uncertain, wide-ranging and possibly fruitless inquiry at the expense of the advantages of economy and predictability which the rule in *Prenn v Simmonds* seeks to preserve. There is also a danger that a general concept of this kind may receive different interpretations in each of the member states.<sup>44</sup>

### The role of the judges

19 Here we are, I think, face to face with the essence of the dispute between the judges and the code-makers. One has to bear in mind what judges can and cannot do. One has to bear in mind too the methods that they use. At the centre lies the adversarial system within which they work. This depends to a large degree on the contribution that is made to

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<sup>37</sup> *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners* [1970] AC 583; *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235, *per* Lord Wilberforce at p 261. Lord Nicholls has suggested, nevertheless, that the parties’ subsequent conduct may be a useful guide: *My Kingdom for a Horse: The Meaning of Words*, pp 588–580.

<sup>38</sup> *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners*, p 603.

<sup>39</sup> See also Draft Common Frame of Reference, art II 8.102(1)(g), which provides that regard is to be had to good faith and fair dealing when interpreting a contract. See also C von Bar and E Clive, *Principles, Definitions and Model Rules of European Private Law: Full Edition* (vol 1, 2010), 563.

<sup>40</sup> See *Snell v Beadle* [2001] 2 AC 304, paras 44–46.

<sup>41</sup> *Smith v Bank of Scotland* 1997 SC (HL) 111, *per* Lord Clyde at 121; *Good Faith in Contract and Property Law*, ed ADM Forte (Hart Publishing, 1999); HL Macqueen, *Delict, Contract and the Bill of Rights; a Perspective from the United Kingdom* (2004) 121 South African LJ 359, 382. It has however been doubted whether the case for its being part of Scots contract law has yet been proven: Martin Hogg, *Perspectives on Contract Theory from a Mixed Legal System* (2009) 29 OJLS 643, 668–670.

<sup>42</sup> Professor Stefan Vogenauer, Professor of Comparative Law, Oxford University, in his evidence to Sub-Committee E of the House of Lords European Union Committee, fn 2, Q 14. See also Edwin Peel, *Agreements to Negotiate in Good Faith*: Burrows and Peel, eds, *Contract Formation and Parties* (2010).

<sup>43</sup> Furmston and Tolhurst, *Contract Formation: Law and Practice* (2010), 12.92.

<sup>44</sup> H Eidenmuller and others, *The common frame of reference for European private law: policy choices and codification problems* (2008) 28 OJLS 659, 677.



the way they think by the advocates. The work that they can do, by researching and presenting written and oral argument, must not be underestimated. This is particularly so in the Channel Islands, as the basic materials are not easily found and identified by those who sit in the Islands' appellate courts.

20 The Scottish system of contract law was developed, as I have said, from the principles of the law of obligations that had been expounded by the jurists. The role of the judges was to fill in gaps where they were found and to develop and apply the basic principles. To some extent they could be creative in carrying out these functions. But their duty was to apply the law as they believed it to be. Their approach is, I think, inevitably, conservative rather than revolutionary. There are limits to the extent that the judges can reform the law. Structural changes must be left to the legislators.

21 Furthermore, as the judges see it, the code-makers do not have the same day-to-day experience as they do of how disputed facts are actually dealt with under our domestic legal systems. One cannot, the judges will say, divorce reforms which may at first sight appear attractive in principle from the way in which they will work out in practice in the event of a dispute which has to come to court for resolution. Rules of procedure and rules as to the admissibility of evidence have been fashioned, mostly by the judges, in the light of experience. They should not be discarded without a careful assessment of the consequences of doing so. There is, of course, much to be said for the harmonisation of laws to promote commerce, especially in the international context. But such a process is bound to lead to the making of compromises, as the Scots found when they were confronted with the proposal to codify the law of sale of goods in the 1890s which led to the 1893 Act. The judges would say that each one needs to be examined critically with a close eye as to how the proposed new rule will work out in practice in each judicial system, having regard to its own rules of evidence and procedure. It would only be if it survives this scrutiny that it would be wise to adopt it.

22 What about the wider perspective, to which the Channel Islands might look for guidance? Although much work has been done both within the European Commission and elsewhere towards large-scale harmonisation of contract law among all the Member States, progress towards that ultimate goal at EU level has been rather slow and tentative. Sub-Committee E of the House of Lords European Union Committee received some evidence on this point during its inquiry into the Draft Common Frame of Reference ("the DCFR").<sup>45</sup> Professor Stefan Vogenauer said that no European contract law regulation or directive was on the horizon in the foreseeable future.<sup>46</sup> Jonathan Faull of the Commission's Directorate General thought that there was currently no political impetus for harmonisation of contract law, the thrust being rather for mutual recognition.<sup>47</sup> As he explained, the Commission's current policy—

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<sup>45</sup> See fn 2, above.

<sup>46</sup> Professor Stefan Vogenauer, Q 25.

<sup>47</sup> *Ibid*, Q 143.

“is not one of codes except where we have built up a sufficient body of legislation to be able to codify it, but more in a sense of consolidation than in the sense of Napoleon.”

23 For the UK Government, the Minister, Lord Bach, said that it was opposed to a harmonisation of contract law across the Member States on either a compulsory or a voluntary basis other than where there is clear benefit of harmonisation.<sup>48</sup> It saw the availability of different contract laws across Europe, which the parties could choose for themselves, as a strength rather than a weakness for the European Union. For its part the Sub-Committee said that it too was opposed to harmonisation of the general law of contract.<sup>49</sup> Commenting on this Report, Professor Hector MacQueen of Edinburgh University observed that it overlooked the possibility that the DCFR could be used as a toolbox or yardstick against which to test existing contract laws in the domestic legal system. This, indeed, is how it is now being used in Scotland by the Scottish Law Commission in its analysis of the law of interpretation as part of its contract law project.<sup>50</sup> He suggested that the Committee’s approach may have been influenced by fears that English law might lose out if the DCFR were to be developed in the alternative as an optional instrument which was to be available to the contracting parties.<sup>51</sup>

24 Since then there has been further progress at EU level towards an optional solution. In March 2010 the Commission suggested in a communication entitled “Europe 2020” that, to make it easier for both businesses and consumers to conclude contracts with trading partners in other EU countries there should be harmonised solutions for consumer contracts, EU model contract clauses and progress towards an optional European contract law.<sup>52</sup> In April it established an expert group to prepare a Common Frame of Reference in the area of European contract law, using the DCFR as starting point.<sup>53</sup> A Green Paper has also been published on the policy options for progress towards a European contract law for consumers and businesses.<sup>54</sup> It rehearses the familiar but controversial argument that divergent national laws prevent full advantage being taken of the internal market, adding for good measure that EU action in this area could help the EU to recover from the economic crisis.<sup>55</sup> So, while there is still much to discuss, something is still firmly on the agenda.

### **Some suggestions**

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<sup>48</sup> *Ibid*, Q 78.

<sup>49</sup> *Ibid*, Report, para 54.

<sup>50</sup> *Eighth Programme of Law Reform* (2010, SLC 220), para 2.16.

<sup>51</sup> European Private Law News, Edinburgh Law School (<http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=7817>), 21 June 2009.

<sup>52</sup> *EUROPE 2020: A strategy for smart, sustainable and inclusive growth* Com (2010) 2020 3.3.2010.

<sup>53</sup> Commission Decision 2010/233 setting up the Expert Group on a Common Frame of Reference in the area of European contract law [2010] OJ L105/109.

<sup>54</sup> Com (2010) 348 final 1.7.2010.

<sup>55</sup> See also European Private Law News, Edinburgh Law School <http://www.law.ed.ac.uk/epln/blogentry.aspx?blogentryref=8289> (Eric Clive 1 July 2010).

25 This leads me to offer these tentative and respectful suggestions. Perhaps most important of all, more work must be done to find out what the law of contract actually is in these Islands. The judges and the Law Commission have a part to play in this process, but so too do the advocates. They can make a significant contribution, by carrying out careful and well directed research of the kind that was presented to the Judicial Committee in *Snell v Beadle*.<sup>56</sup> An appreciation of what the law is seems to be a necessary starting point if one is to assess what needs to be done with it and why in its present state—if indeed this be the case—it is unsatisfactory.

26 It can, I think, be assumed that there is not going to be a compulsory harmonisation of contract law for the European Union in the foreseeable future. But all the other options are open, including those being developed by the Commission's expert group. Things could be left as they are, encouraged by the way the Scots and English laws of contract have co-existed for over 300 years—assisted, of course, by the fact that contracting parties can seek to choose whichever system suits them best. A piecemeal approach could be adopted, reforming only those areas of the law that are seriously out of line with the systems familiar to those with whom the Islands wish to do business, using the Draft Common Frame of Reference or its successor as a toolbox or yardstick. Or the Islands could adopt, in the form of a contract code of their own, the contract law of another jurisdiction with which it was desired to have close commercial relations.

27 But if the Islands wish to go down that road it would seem unwise, if I may say so, to adopt wholesale the entirety of English contract law. In so many respects it is out of keeping with that of most, if not all, of the other jurisdictions who wish to be part of the European project: as to its requirement for consideration, its rejection of the broad notions of good faith and reasonableness and its exclusion of evidence of pre-contractual negotiations, for example. It may look attractive today. That may not be so fifty years on from now, when so much more will have been done to encourage harmonisation along the lines favoured by the current generation of code-makers. But I would say that, wouldn't I? Neutral though I must be as between the various jurisdictions in the United Kingdom as a Justice of the Supreme Court, I am, after all, at heart a Scots lawyer.<sup>57</sup>

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<sup>56</sup> See fn 40.

<sup>57</sup> I am grateful to my judicial assistants, Joseph Barrett and Peter Webster, for their assistance in the preparation of this paper, which is a slightly enlarged version of the paper I presented at the Conference on 15 October 2010.