2003 DENNING LECTURE

THE 2003 Denning Lecture was delivered on 29 September by The Rt. Hon. The Lord Mayor of London, Alderman Gavyn Arthur. His subject was appropriately entitled "The City and the Law".

The Lord Mayor is the first barrister to hold the office and was in many ways the appropriate person for BACFI to invite to give the lecture. It was the third speech or lecture that he had to give that day and we express our thanks for accepting the invitation.

There was the usual good attendance for the lecture at Gray's Inn. The Inn provided refreshments after the lecture up to its usual high standard, a fine finale for those able to stay. The text of the lecture will be printed in the Bulletin in two parts for the benefit of those unable to attend and to remind those who were present of an enjoyable evening.

CHAIRMEN, Ladies and Gentlemen. It is a great privilege for a Lord Mayor to be invited to give this prestigious lecture to such a distinguished audience.

My subject this evening is 'The City and the Law'. And here as Lord Mayor and uniquely as a practising barrister, I can say that the Law has always been absolutely fundamental to workings of the City since it first started as a trading centre during the Roman occupation.

In the medieval City, the so-called Mayor's Court was formed. It became a highly regarded court and it rapidly gained consequence and established itself as the principal court for commercial actions. The Lord Mayor and the Aldermen were again the original judges. And in those days, those sound businessmen grappled with difficult commercial cases in judgements which even now compel our respect.

But as the years passed the Recorder, whose duty it was to record their judgements, developed into the sole judge of the Court.

Evidently, the remuneration attached to the office attracted many brilliant young lawyers, and from the fourteenth century to the nineteenth century, many Lord Chancellors and Chief Justices owed their advancement to their early training in this Court.

The Rt. Hon. The Lord Mayor of London, Alderman Gavyn Arthur

It was a Court in which the law merchant was observed in actions between foreign merchants and citizens. It formed in fact a high court of justice and a Chancery for the City, and owed its renown to its own excellence.

And it is from this medieval system, which was overseen by the Lord Mayor and Aldermen of the City of London that the modern commercial courts and the system of arbitration were born. Today, those courts remain an essential adjunct of the world-wide commercial success of the City. And these modern courts and the new challenges they face today will form the main topic of my address today.

The City of London has endured for so long that we might be forgiven for imagining that its status as a financial and trading centre is a rule of nature.

History and common sense, however, are on hand to teach us that continued commercial success is not an inevitability. Genoa and Pisa were supplying credit finance when London was a shanty town.
The remarkable preservation of these cities attests both to their medieval prosperity and to the sharpness of their decline. We should not deceive ourselves by thinking that the great towers of the City of London could not one day similarly stand in memorial to its past success. The City rests on no firmer foundation than the unfettered choice of businesses to be here, born of their confidence that London provides a benign commercial environment. The City as we know it will only endure so long as that confidence remains.

The importance of the English legal system to

Continued on next page

business confidence in the City should never be underestimated. Trade and capital are cowardly. They will only go where they feel safe, and their ultimate protector is the domestic law of the place of business. We are fortunate that the English judiciary and common law are magnets for trade. Businesses are confident that our judges, and in particular the bench of the Commercial Court, will resolve their disputes impartially and efficiently. Moreover, the common law is universally regarded as having combined contractual certainty with sufficient flexibility to respond to market change.

The close links that exist between London and New York, and the outstanding success of their markets, would be unthinkable if they did not share a common legal heritage.

WE should also bear in mind that legal services form a sizeable proportion of City business and make a substantial, if unsung, contribution to the economy. This income is dependent on the continued vitality of the City and the influx of international litigants who choose London as a forum for resolving their disputes. At the turn of this 21st century, 44 out of 72 trials in the Commercial Court involved foreign parties. There is a market in legal systems just as there is in anything else, and they came here because our legal system is a market leader.

As matters stand, therefore, the success of our legal system is a matter for celebration. But we must not be complacent. Like any institution it is vulnerable and care must be taken if it is to be preserved. And if we are to preserve it, we must have a clear understanding of where its strengths lie and the challenges that it faces.

In part, the high reputation of the court is built on the characteristics that distinguish the English judiciary as a whole — its independence, honesty and efficiency. Without wishing to be oleaginous, the final result of any judicial proceedings in this country — the judgment — is rarely anything other than a model of legal and factual analysis. Those of us who practise law might grind our teeth at the thought of ploughing through a 50-page judgment in the darkly optimistic pursuit of a useful citation on a narrow point. But it is easy to underestimate what a valuable thing an English judgment is from the litigant's perspective. Since it is comprehensively reasoned, the process by which the judge has reached his conclusion is transparent, and any potential grounds of appeal can be identified from its face. It is also a very rare thing in the world at large.

The civilian systems that govern many of our competitor jurisdictions restrict the courts to terse and often uninformative restatements of codified principles. It is for this reason, as Lord Goff has observed, that the House of Lords is the only national European court cited as authority in any other. The bench of the Commercial Court adds to these general attributes an expert and commercially sensitive approach to dispute resolution.

Judicial reform is not the obvious business of a Lord Mayor. However, if my argument is correct that the interests of the City and of business generally cannot be divorced from the form of the governing legal system, then the reforms must be judged by their potential economic consequences. In particular, it is a matter of real concern that the reforms should not have an adverse impact on the continued expertise of the commercial court.

SO may I touch upon the possible introduction of a new class of professional life-long judge along the lines of the civilian systems of many European countries? The City considers it to be one of the strengths and attractions of our system that High Court judges are recruited solely from the ranks of senior practitioners, whether barristers or solicitors. Commercial law, indeed all law, is nothing if not an intensely practical discipline. No amount of study of the workings of trade or finance, or fluency in the theoretical law can compare to the imaginative and instinctive approach that results from a career in practice and the dialogue with businessmen and women that that entails.

This issue also touches upon the esteem of the court. Litigants are aware that the appointments system ensures that the expertise of the judiciary is a stable quality. They are aware that the lawyers, who argue on their behalf with energy and creativity, and with fair play, will one day be judges of similar distinction to those already on the bench, who in their turn once proved their merit in the arena of the court. Would the fact that Mr Justice Smith was placed fourth in the judicial exams

at the age of 25 instil a comparable degree of confidence? I, for one, have my doubts.

The Government's ideas for reform are based upon a classical understanding of the theory of separation of powers and the need for the judiciary to reflect the diversity of modern society. Both of these arguments are valid. However, the business community does not and cannot see judicial reform as a matter of demography or political philosophy. It must be rooted in an appreciation of the linkage between judicial quality and economic success.

A world-class judiciary would profit us nothing if the substantive law were hostile to the practice of business. However, the common law, which was described by the last Lord Chancellor as an 'engine for trade' is perhaps uniquely crafted as a tool of business.

It has been stated on many occasions that the paramount legal concern of a businessman is that he can discern with ease the substantive law and be certain that his transactions will be enforced. If the scope or effect of the law is unclear, the consequences are uniformly malign; either the businessman will be put to the expense of commissioning an expensive and intricate legal opinion (this would almost certainly fail to provide him with a clear answer, notwithstanding the quality of the lawyer consulted), or he will have to procure additional insurance or security for the transaction. He may even take the view that the risk of unforeseen legal problems can be best minimized by doing business in a jurisdiction where the legal system is more user-friendly.

Businesses that operate in this country do not have the kind of legal certainty that is supplied by a uniform commercial statute which seeks to codify the legal rules applicable to a comprehensive range of transactions. I will argue in due course however that this form of legal certainty yields only equivocal benefits, and in any event is something of a will-o-the-wisp.

What the common law does provide is a set of general principles that apply to contracts uniformly and which have been developed with the needs of the commercial community in mind. We are fortunate that there has been a call for commercial dispute resolution in London for longer than in any of our competitor centres. The financial pre-eminence of London in the 18th century, the early onset of industrialisation in the first half of the nineteenth century, and in the second half the access to a world-wide market which resulted from imperial expansion, guaranteed a steady stream of business litigants for one and a half centuries even before the last century began.

THROUGHOUT this period, beginning with the pioneering work of Lord Mansfield, the courts developed a corpus of clear basic principles whose stability was underwritten by the doctrine of stare decesis. Moreover, Parliament has largely left the law of obligations to be developed by the courts. Where it has legislated in the commercial sphere, it has largely been to provide an accessible summary of the common law rules. A businessman can rest assured that while the common law will develop incrementally, there are unlikely to be any judicial or legislative upheavals.

English law undoubtedly provides certainty in the more concrete sense that a commercial man can be confident that the bargain he has made will be enforced — enforced moreover in the way that it was intended to operate. The methodology of contractual construction used by the courts is intended to result in reaching an understanding of the agreement that adheres as closely as possible to the understanding that the parties would have had. Words are given their natural and ordinary meaning and terms are implied sparingly and with the commercial purpose of the contract in mind.

Businesses are also aware that the common law is reluctant to provide parties with fire exits from bad bargains or to find that circumstances justify the release of a party from its obligations. Frustration is a notoriously rigorous doctrine, but there are other examples. To provide just one, it is settled law that a letter of credit imposes, with few exceptions, an unconditional obligation to pay upon demand. Further, the courts have never viewed the law of commerce as an appropriate area for paternalist intervention. Both Parliament and the courts have sought to protect the interests of consumers, and this is only proper in a civilised society. Business undertakings, by contrast, are at liberty to advance or protect their own interests as far as their negotiating leverage and talents will allow. Thus the

Continued on next page

courts have never recognised a defence of inequality of bargaining power and there is no general requirement of good faith, which has a prominent role of course in German law. The law has taken the hard-headed view that unequal deals and self-interested ruthlessness are in the nature of business.

To provide another example, the courts will treat a defence of duress with greater scepticism if the defendant is a business, and are quick to distinguish between unlawful threats on one hand and, on the other, conduct that while doubtlessly aggressive and unsavoury nevertheless constitutes legitimate intimidation.

TOO much certainty and predictability would, however, be a curse. While commercial codes can provide a greater degree of certainty of what is the applicable rule than the common law, they also contain inherent problems. A detailed code can all too easily become an ossified approximation of business realities imposed on a market that never ceases to evolve. Moreover, how certain can codified law realistically be? Not even the most enthusiastic proponents of the civilian systems would claim that the great jurists had the foresight to provide a comprehensive law of business, or that such an achievement is humanly possible. The civilian codes have the problem with idiosyncrasies and shades of grey that is symptomatic of all enlightenment projects. What happens when a case falls in the blank space between the paragraphs of the code? And how is the letter of the law to be applied to living situations?

The common law does not suffer from these design faults for the simple reason that it is not a product of intellectual design, but of judicial reactions to concrete commercial realities. A common law judge does not find the result of a case by reasoning downwards from a set of abstract rules, but reasons upwards from the facts of the instant case. This has implications both for the content of the substantive law, and for the manner in which it is applied to individual disputes.

While businesses must shape their operations so not to fall foul of a common law rule, the common law itself is characterised by the way in which it has consecrated market practices as rules of law. This is a reflection of its underlying ethos in regarding the commercial sphere, which is that legal rules should merely be instruments of trade. The best judge of what is in the interests of trade is not a judge but the members of the business community, and whatever practice is accepted by them as reasonable has commended itself to the judiciary. The upshot of this is that the law does not distort the operations of business. On the contrary, the law responds to market development. We can go to a law library and find banks of volumes covering such subjects as negotiable instruments, letters of credit or bills of lading, but that fact remains that these devices originated in the market and not in a court of law. The mind of a businessman must be fertile and flexible, and the recognition by the law of the creations of the business mind means that the common law incorporates an astonishing range of devices from which a businessman can select the most appropriate legal means of framing or financing his transaction.

NOT only is the substantive law a flexible tool, but it is also flexibly applied. The common law is in essence not a corpus of rules or principles at all, but rather a methodology. In the absence of a body of sharply-defined statutory law, the common law has to create rules empirically by relating the facts of the case to relevant precedent, business practice and principle. It is therefore able to entertain just about any question that can arise. The common law judge does not, like the civilian judge, peruse a code to find a provision that best suits the facts. He reasons outwards from the facts and feels his way towards a just solution, formulating his statement of deciding legal principle to suit that conclusion. Thus, answers to new questions or new answers to old questions can be found by progression from already enumerated rules. The upshot of this is that the common law is never complete; there is no end of justice. It waits only for a signal from reality that it is time to move on.

● *The second part of the lecture will be published in the next edition of the Bulletin.* ■

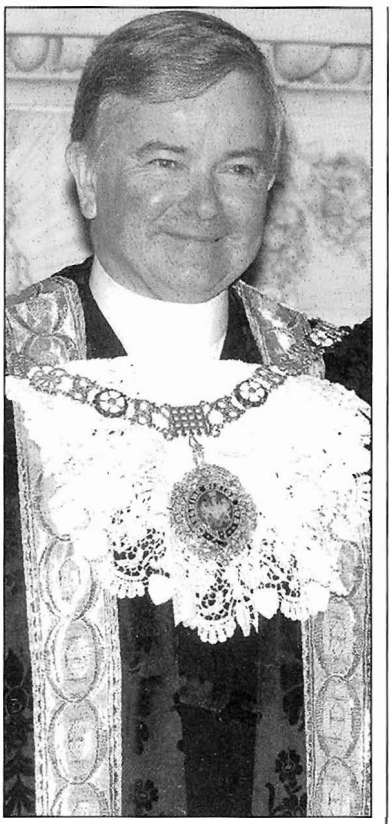
2003 DENNING LECTURE: Part 2

In the second part of his lecture entitled 'The City and the Law' The Rt. Hon. The Lord Mayor of London, Alderman Gavyn Arthur, dealt with the impact of European Union law. The first part of the lecture was published in the December 2003 Bulletin.

European Law

THE summarised description of the common law that I have just provided is in a certain sense out of date, for there are of course not one but two systems of law operating in the UK today. Enactment of the European Communities Act 1972 brought about a quiet revolution in our legal system, which was perhaps not fully appreciated until the House of Lords handed down its judgment in the Factortame case. Parliament is no longer sovereign, and where English law and the law of the EC conflict, it is the European rule that prevails.

For the first decade and a half or so of British membership of the Eurpoean Community, the law of contractual obligations seemed to be insulated from this revolution. This had no grounding in constitutional reality of course, but was merely a reflection of the priority of the Community at that time, which was directed towards the creation of the single market by striking at state-sponsored obstacles to competition. That period has however largely passed, and the EC is now issuing legislation which seeks to harmonise the national laws relating the specific business relationships and which therefore automatically supplant the



The Rt. Hon. The Lord Mayor of London, Alderman Gavyn Arthur

common-law rules in these areas. This legislation affects diverse sectors of commerce, ranging from unfair terms in consumer contracts, the law relating to commercial agents and late payments of commercial debts, to proposed measures on collateral securities and takeover bids. This piecemeal Europeanisation entails problems of its own, since it results in the splintering of the relative unity of the law of contract.

However, my concerns about EC impact on commercial law runs deeper than this. I articulated the view earlier that the common law is commercially attractive because it holds the two virtues of certainty and flexibility in balance. When we judge EC law by this criterion, it is not so much that these qualities are out of balance (which would be unfortunate enough), but that both qualities are disturbingly absent.

Inflexibility

First, the question of flexibility. In those sectors of commercial law which are or will be occupied by EC legislation the ability of a businessman to contract on freely-negotiated terms is severely restricted. He may well also find himself subject to duties that are unknown in the common law in the operation of his contract and the very validity of his contract is likely to be subject to an assessment of good faith.

The source of these interferences in contractual freedom is the essential character of the legislation. Whereas the common law was consciously developed to be merely a tool of business and to facilitate its progress, EC legislation is much more ambitious. Its purpose is very often directed towards a specific social or economic objective, to which end commercial practices must be manipulated or directed. The problem with this approach from a business perspective is immediately apparent. The legislation originates in a generalised opinion on an executive level about the way in which the market currently operates, and takes the form of a series of prescriptive measures designed to combat the perceived mischief. In consequence, it is liable to fail

Continued on next page

to take account of the full range of contingencies that might arise in business life, and impose inflexible and inappropriate rules on inoffensive transactions.

An example of this appears in the controversial proposed directive on takeover bids. Article 11 is directed against defensive measures designed to frustrate a takeover. To this end, it seeks to render unenforceable agreements between shareholders of the target company which restrict the transfer of shares or which specify how the parties should exercise their voting rights. The shortcoming of this provision is that it fails to appreciate that agreements between shareholders can often facilitate takeovers, such as in the common situation where the offeror is a shareholder and has reached agreement with another shareholder to accept his offer and not to sell his shares to another bidder.

Measures of this kind, which focus on a particular contractual area, can have the result of being prohibitive of doing business in that particular way. The Commercial Agents Directive, which was implemented in English law by the Regulations of the same name, was motivated by the perception that commercial agents are particularly vulnerable members of the business community and in need of legislative protection. This assumption itself is obviously questionable; while many agents are poorly-remunerated door-to-door salesmen, many others are highly-trained specialists who deal with their principals at arm's length. In a recent commercial court case on the regulations the claimant was an oil trader and his claim ran to £130 million.

The Regulations seek to tip the balance in the relationship in favour of the agent by making his principal subject to what is in effect a fiduciary obligation to him, and sets out generous rights to commission and to compensation in the event that the contract is terminated. Thus, the agent must be paid commission even on transactions effected after the termination of the relationship, and even where the principal's contract with the third party has not been concluded. Regulation 17 effectively introduces a strict liability regime for compensation on termination of the agreement since the principal is liable to pay notwithstanding that fact that it is not in breach of the agreement. Research suggests that the effect of the Regulations has not been to fortify the position of commercial agents as intended, but has led to their dismissal and the adoption by businesses of legal methods that are less flexible and efficient than agency relationships.

The market can only adjust its practices, so far however, in order to avoid the distorting and damaging effects of prescriptive rules. In those areas where the new concepts are more widespread, there is very little latitude for manoeuvre. The duty of good faith implied by the unfair contract terms Regulations is implied into consumer contracts ranging from the sale of goods to financial services. The assessment of fairness of contract terms relating to the time of payment under the Late Payments Directive is also implied.

Uncertainty

Inflexibility is not however the end of the problems that faces a businessman, since he is in the deeply unhappy position of being bound by rules that are simultaneously inflexible in their application and uncertain in their scope, meaning and effect. This lack of clarity results from inherent problems in the nature of the European legislative and judicial process. Three problems stand out — the multi-lingual aspect of legislation, poor drafting and the purposive approach to construction. I will illustrate these problems primarily by reference to the Commercial Agents Directive, which is one of the oldest and most fiercely litigated of the EC's contractual instruments.

Multi-Lingualism

Each Community legislative instrument is legally effected in all of the official working languages of the Community. Eleven languages are currently recognised as official languages, to which many more will be added as expansion takes place. An outside observer might be forgiven for imagining that the English version would apply in the United Kingdom and the Republic of Ireland, the French version in France and so forth. However, when we turn to the Community case law we find that the multilingual promulgation of legislation is really only a matter of convenience. The ECJ has stated that all the versions are of equal effect across the Community. The text must not therefore be construed on the basis of what any individual version might suggest, but by divining the real intention of its author and the aim he seeks to achieve.

This is clearly a substantial problem. A businessman's legal adviser might not think to consult other language versions of the text, and might not be able to easily obtain accurate

or idiomatic translations of the full range of texts in any event. Thus, it is likely that many businessmen will not be aware that they have stepped into a linguistic snare until the conditions of litigation lead his opponent to pursue every avenue of argument. An example of this occurred in the case of Page v Combined Shipping in the Court of Appeal. The issue for the court was whether the claimant, who had contracted to trade commodities with finance supplied by the defendant, was entitled to compensation under the Commercial Agents Regulations in circumstances where the contract was terminated because of the defendant's parent company's decision to disinvest in its operations. The contract allowed the defendant to perform the contract in any manner of its choosing, to the extent that it was entitled to let the contract run without allowing the claimant to make a penny.

There is a common law presumption that a defendant will, where it has discretion, act so as to minimise its liability, and under the contract in Page, a minimized liability would have been zero. If one reads the English Regulations, it might appear that this presumption had been preserved; the relevant provision states that an agent is entitled to commission which would have resulted from 'proper performance' of the contract. It might be reasonable to assume that this connotes lawful performance.

When the court examined the French and German versions of the directive, however, it discovered that the words used meant 'normal performance.' The court therefore found on the basis of the French and German versions, combined with the principal's obligation of good faith, that the claimant had a theoretical right to compensation calculated on the basis of normal future performance and not abnormal — albeit legitimate — performance.

Inadequate drafting

A further reason for uncertainty is that a great many Community instruments are inadequately drafted. This is partially due to the nature of the lawmaking process, and is unavoidable. Directives and Regulations are issued in all the official languages of the Community, and all but one of these documents is a translation of the French, and occasionally English, original. The purpose of the translator is not to provide a document drafted in the pattern of a domestic statute but to replicate so far as possible the original, and the native idiom must be sacrificed to this end. In addition, the original text will often be the fruit of considerable negotiation at the Council of Ministers and it is clear that for them, securing the national interest is of greater concern than producing an elegant and accessible document. Even so, it is vital that the Community takes greater care in its drafting, which can often be so obscure that the courts themselves, let alone businesses and their legal advisers, are hard pressed to grasp their meaning. In a recent case, the Court of Appeal stated that the schedule to the Commercial Agents Regulations, which goes to define whether an agent is a commercial agent or not was 'an almost impenetrable piece of drafting.' The result is unnecessary litigation, often extending to a referral to the European Court and widespread uncertainty until it has provided a definitive answer.

The example from the Regulations is where opaque drafting has resulted from the nature of the legislative process and mere inadvertence. However, I should add that the European Union is one of the few law-making bodies in the world that deliberately drafts legislation in uncertain terms, typically where the Council of Ministers has been able to reach agreement in principle, but not in practice. A prime example of this appears in the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters when it states that a tortious claim may be made in the courts of a country where the 'harmful event occurred.' This could obviously mean either the place where the act from which the damage resulted was carried out, or the place where the actionable damage was sustained. In the case of this provision, it required a reference to the European Court of Justice tp gain any enlightenment. I should add that this is one of the few provisions that we know was intentionally drafted opaquely only because the Official Journal took the unusual step of reporting the discussions in the Council of Ministers. We can only speculate on the number of troublesome provisions of which the Community was aware at the time that they were made effective. It is unfortunate that litigants and their insurers should be put to the expense of protracted litigation because legislation is knowingly made enforceable despite its inadequacy.

The ECJ

Finally, the European Court

Continued on next page

can be as much an obstacle to legal certainty as the translator, the draftsman and the Council. Since only the ECJ can provide a definitive interpretation of any provision, establishment of any authoritative meaning to European law depends on the vicissitudes of litigation, because we can only be certain of the meaning of those provisions that have been the subject of an ECJ reference.

In addition the teleological interpretation of legislation adopted by the ECJ means that the words of a provision — even if they are clear and consistent across the various language versions — are not necessarily determinative of the issue, since the court looks primarily to the purpose and policy of legislation. Regulation 19 of the Commercial Agents Regulations states that the parties may not contractually exclude the agent's right to compensation before the agency contract expires.

In proceedings before the ECJ, the Advocate-General suggested the wording of the Directive should be ignored, and that prohibition of any derogation from the compensatory provisions should continue, even after termination of the agency relationship, if the purpose of the Directive was to be fulfilled. In the event, the court did not determine the issue, but neither was the Advocate-General's opinion dismissed. As an observer of the court has stated, it is difficult to predict the policy that the bench will choose to pursue, and the effect that this will have on any individual provision.

I would ask whether businesses come to London to be subject to a law that is of the nature that I have just outlined, or whether that is the price they are prepared to pay to gain access to our courts and common law. If as I imagine, the second of these propositions is correct, then the implications of continuing encroachment of EC law on the common law are deeply disturbing, for there could come a point in time when that price is too high to pay.

Contractual code

Looking towards more distant potential developments, I would like to end by briefly adding my voice to the debate about whether a common contractual code should be promulgated for use within the European Community. In my view such a move would only exacerbate the problems we are already facing with the application of EC law to the commercial sphere, and import all the flaws of civilian law into our legal system. It might also bear some flaws unique to itself which are absent from the national civilian codes.

Until now draft European codes have been formulated by jurists, but any binding laws would be the product of political negotiation, with each state arguing for universal application of its domestic law. What is the more likely result — a coherently self-contained body of principles, or an unruly multi-cultural fudge?

At the beginning of this talk, I stated that the City of London could not outlive the confidence of business. I have attempted in the short time I have had to argue that that confidence could not outlive the common law. Our great and only hope for its reservation is that it is more widely recognised as the great national asset that it is.

Ladies and Gentlemen, I hope that I have given you a whistlestop overview of the City of London and the legal profession, its importance to the business cluster here in London and the challenges for the future. It is, I am sure you will agree, ample food for thought. But as the leading members of the legal profession here in London it is vital that we discuss the issues of the day and ensure that we act to maintain London's position of international pre-eminence in the global legal system.

As Lord Mayor, this is a key part of my role and I have emphasised the importance of the English legal system and the business we support here in every one of my foreign visits this year. Throughout my time in office, I have been continually impressed and encouraged by the esteem in which English law is held throughout the world and the respect that our methods and traditions are afforded here. But we cannot afford to be complacent, and we must face the challenges of the future head-on if we are to succeed in our aims for the future and retain London's reputation of excellence in legal counsel and practice.

It only remains for me now to thank Michael Brindle and Paul Casey of Fountain Court for their contribution to my research for this lecture, and the organisers, the Bar Association for Commerce, Finance and Industry. for the organisation of this year's Denning Lecture.

Thank you. ■