EDITORIAL

Adam Smith is best known for his seminal text on economics, The Wealth of Nations, published in 1776. Less known are his Lecture Notes. To these is attributed the notion that one of the desirable foundations for free trade is a predictable legal system.

Until relatively recently, lawyers could confidently tell their clients not only of the incorruptibility of English judges (not a virtue in all eyes) but also of the broad *ex ante* predictability of outcomes. English judges tended to read contracts and, if the meaning was plain, they would adhere to that. It was an approach that was subsequently to be described disparagingly as the "black letter" approach to construction.

But times change. As I dictate this editorial, I can see what looks like a City solicitor, kneepads attached, roller blading along the road with a brief case in one hand and talking into a mobile telephone held in the other. Common Law judges have realised that they are consumers too, and increasingly feel that they wish not merely to decide the law but also to "do justice".

This tendency probably has its origins in the law of Equity, but its effects are now seen both in tort and contract law. In tort law, encouraged by the media, it results in the mind-set that if there is a "victim", someone must be found to blame and to pay compensation. In contract law, if the result of a straightforward construction of a contract does not amount to what a judge sees as "common sense", then, as Lord Diplock put it, the words must yield to judicial ideas of common sense. This led to decisions such as Charter Re v. Fagan and the extended trend discussed in this Journal by William Allison. Someone has to decide what words mean. The judiciary's answer, nowadays, seems to be that words should mean what judges feel they ought to mean given the hindsight with which they have inevitably been blessed - *ex post* construction.

Viewed as an instrument of social policy, this may not be a bad thing. The feeling that all "victims" must be compensated has honourable origins, in the lack of a social security provision in the USA. (This makes it ironic that European States are beginning to recover social security costs through the tort system.) It is equally understandable that if judges think that the parties ought, with hindsight, to have made a different bargain, they will strain to find a way to modify the bargain. But, particularly in a world where legislatures actively concern themselves with social policy and consumer protection, there is a question as to whether it is the role of the judiciary or politicians to impose social policies.

When it comes to the commercial world, however, the ramifications go further. One of the major "selling propositions" of English international lawyers used to be that

English law was reasonably predictable, with judges prepared to enforce bargains as they were understood at the time when they were made. This selling proposition was one of the factors that lay behind the growth of London as the major forum for international commercial litigation.

It is clear from recent cases that the London judiciary is moving away from predictability in contract towards what is in reality construction with hindsight. This makes contracts unpredictable at the time when they are made. Unpredictability is a vice when it comes to business relations. In the short term, it increases the frequency of disputes. In the longer term, it may drive international business away from England to more predictable *fora*.

This change in judicial attitudes is filtering through to the many who can choose whether or not to base their transactions on English law. It will continue to do so with the active encouragement of lawyers keen to promote their local jurisdiction. Those wishing for certainty in their contractual relations will increasingly examine more predictable alternatives.

This is the last Journal that I shall edit, and it is time that I gave a public acknowledgement to my support team at Inces - particularly my Secretary, Jenny Wilson, and Norine Riches. Editing the Journal has been an enjoyable challenge, but could easily have become unmanageable without their reliable and cheerful support. Editing could have been tedious. Fortunately, most contributors nowadays at least try to do as I have asked and write in readable English. I extend my thanks to all contributors past and present. I hope that future contributors will remember that reading the Journal is still not compulsory.

As to this edition, the 101st is a bumper volume. Our own Vice-President has contributed a judicial review of the Woolf Reforms. Other contributions come from our Claims conference earlier in the year and from London, Cardiff, Munich and as far away as Sakhalin, an important island to the north-east of Vladivostock. It all makes exceptionally illuminating reading.

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