The Right Honourable Lord Bingham of Cornhill

Thomas Henry Bingham
(*b.* 13 October 1933)

The Law as the Handmaid of Commerce

Lord Bingham's distinguished contributions to law are demonstrated by his current appointment as the Senior Law Lord, and by his earlier appointments to the highest judicial offices as Master of the Rolls and as Lord Chief Justice.

At Balliol College, Oxford, Lord Bingham took a first degree in modern history. He topped the Bar Finals and was called to the Bar, Gray's Inn, in 1959, becoming a Bencher in 1979. He became a Queen's Counsel in 1972.

He proceeded to serve as a Judge of the High Court of Justice, Queen's Bench Division in 1980, while simultaneously being a Judge of the Commercial Court from 1980–1986. In 1986, he was elevated as a Lord Justice of Appeal of the Court of Appeal before being appointed as the Master of the Rolls in 1992.

In 1996, he was appointed as Lord Chief Justice of England and Wales, and in June 2000, he was made a Lord of Appeal in Ordinary, and at the same time became the Senior Law Lord, succeeding Lord Browne-Wilkinson.

Lord Bingham has been an ardent supporter for changes to be made to the appellate court, having also suggested the establishment of a Supreme Court to replace the Appellate Committee of the House of Lords.

His services to academic institutions have been signal, including chairmanship of the Royal Commission on Historical Manuscripts and the Council of Management of the British Institute of International and Comparative Law. In 2003, he was elected as an Honorary Fellow of the British Academy. Lord Bingham keeps a close relationship with his alma mater, Oxford University: he has been a High Steward of the University since 2001, and a Visitor at Balliol since 1986. He is also a member of the Advisory Council of the Institute of European and Comparative Law, University of Oxford.

Lord Bingham is the author of *The Business of Judging: Selected Essays and Speeches*, 2000, Oxford University Press, London.

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The Law as the Handmaid of Commerce

Lord Bingham of Cornhill
Senior Law Lord, House of Lords

Text of the Sixteenth Sultan Azlan Shah Law Lecture delivered on 5 September 2001 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highness, in giving the Sixteenth Sultan Azlan Shah Law Lecture I am doubly honoured, first by the unique eminence of the jurist whose name the lecture bears, and secondly by the great distinction of the fifteen lecturers who have preceded me. I am most grateful to you for admitting me to this elite company, and for giving my wife and me this opportunity to visit, for the first time, this exciting and beautiful country.

It was an attractive Victorian practice to adorn the entablature of their public buildings with a series of togaed or bedraped figures respectively representing Manufacture, Agriculture, Commerce, Science, Art, Law and perhaps, if the building was big enough, Architecture, Music, Philosophy and so on. The underlying idea was, as I infer, that all these activities are mutually supportive and together contribute towards the creation of a prosperous, progressive, well-governed and civilised society. This evening I seek to touch on the relationship between two of these figures—Commerce and Law. But I do so in a one-sided manner. I shall not consider what Commerce has to offer the Law or the practice of law; many would anyway think these were quite commercial enough. My subject is the contribution which the law, properly developed and wisely applied, can make to the successful conduct of business, using that word in its widest sense.

The suggestion that the law has any contribution to make might surprise those businessmen, of whom there are many, who tell one that their unswerving ambition is to have as little to do with the law and lawyers as they possibly can and that they would rather go to the stake than permit their company to become involved in any litigated dispute. There are two responses to this, apart from an expression of admiring congratulation. The first is that given by Lord Donaldson of Lymington in his Sultan Azlan Shah Law Lecture in 1992:

> Indeed a feature which distinguishes commercial disputes from those between other citizens is that businessmen recognise that bona fide disputes are inherent in business transactions. They accept that their sensible resolution is an integral part of commerce. By contrast, other citizens regard disputes as something which should never have occurred. They regard them as something which are never their fault, but always the fault of the other party. That a dispute should ever have arisen is itself regarded as a personal affront. This fundamental difference in attitude enables special procedures to be developed for the resolution of commercial disputes.[1]

If those engaged in business are able to make and perform contracts and resolve differences without constant resort to lawyers and without plunging into unwelcome litigation, this is likely to be because the legal framework within which they transact their business is well-adapted to its end of achieving clarity and certainty.

The second answer is even more germane to my theme. It is that if those engaged in business are able to make and perform contracts and resolve differences without constant resort to lawyers and without plunging into unwelcome litigation, this is likely to be because the legal framework within which they transact their business is well-adapted to its end of achieving clarity and certainty, and giving effect to what businessmen themselves regard as the common sense commercial answer, the answer which the parties intended, whether they expressed it accurately or not. If the rules are unclear, there is always room for argument. If the rules are subject to constant change it will

1 See chapter 7, *Commercial Disputes Resolution in the 90's*, at page 186, above.

always be tempting to discard the lessons of past practice in the hope that a different answer may be given this time. If the rules are too subtle or too complex they are unlikely to reflect the expectations of those who are market practitioners not metaphysical philosophers. If the rules in one place are significantly different from those in another, the opportunities for misunderstanding and confusion, followed by legal manoeuvring and forum-shopping, are obvious.

Features of a sound commercial law

In thus describing the features of a sound commercial law it may be thought that I am doing little more than repeat what Lord Mansfield, sitting in the court of Queen's Bench, said over 200 years ago. That is quite right. But I would like to linger on the achievement and legacy of that remarkable man, both because of the striking modernity of his utterances and because his vision of what commercial law should be and how it should operate remains as pertinent to us in the 21st century as it was in the 18th.

The striking modernity of Lord Mansfield's utterances and his vision of what commercial law should be and how it should operate remains as pertinent to us in the 21st century as it was in the 18th.

In *Hamilton v Mendes*[2] he said that

> the daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.

In *Vallejo v Wheeler*[3] he declared:

> In all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon.

2 (1761) 2 Burr 1198 at 1214.

3 (1774) 1 Cowper 143 at 153; Lofft 631 at 643.

Thus, if no settled rule had been laid down, evidence of mercantile custom could be received, and if the custom was accepted as reasonable it could be embodied in the law, but once a mercantile custom had been accepted as part of the common law no evidence to prove a contradictory custom could be admitted,[4] and in one case Mansfield admitted that he had been wrong to admit evidence of mercantile practice when the law on the point had already been clearly laid down.[5] In *Pelly v Royal Exchange Assurance Co,*[6] a case concerned with a policy of marine insurance, he observed that

> the mercantile law, in this respect, is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.

Maritime law similarly was not the law of a particular country, but the general law of nations.[7] He regarded good faith as the basis of all dealings.[8] He recognised the proper role of the judge in this very important legal sphere. As Professor Fifoot put it:

> He realised that the merchant was more competent than the lawyer to prescribe the form of a charter-party or to direct the incidence of paper credit. The function of the judge was not to dictate, but to interpret and to sanction.[9]

In Mansfield's day, as in our own, the form of many commercial contracts left much to be desired, among them policies of insurance and charter-parties. Of the former he said:

> The ancient form of a policy of insurance, which is still retained, is, in itself, very inaccurate, but length of time, and a variety of discussions and decisions have reduced it to a certainty. It is amazing when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made which has not created doubts on the construction of it.[10]

4
Holdsworth, *A History of English Law,* volume 12 at 527-528.

5
Edie v East India Company (1761) 2 Burr 1216.

6
(1757) 1 Burr 341 at 347.

7
Luke v Lyde (1759) 2 Burr 882 at 887.

8
Bexwell v Christie (1776) 1 Cowp 395 at 396.

9
Fifoot, *Lord Mansfield* (1936), at 118.

10
Simond v Boydell (1779) 1 Dougl 268 at 270.

But his approach was clear:

> The charter-party is an old instrument, informal and, by the introduction of different clauses at different times, inaccurate and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation. In construing agreements, I know no difference between a Court of Law and a Court of Equity. A Court of Equity cannot make an agreement for the parties, it can only explain what their true meaning was; and that is also the duty of a Court of Law … [11]

Few judicial tributes can have been better deserved than that of Mr Justice Buller to Lord Mansfield in 1787:[12]

> Thus the matter stood still within these 30 years; since that time the commercial law of this country has taken a very different turn from what it did before. We find in *Snee v Prescot* (1743) 1 Atk 245 that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in Courts of Law all the evidence in mercantile cases was thrown together; they were generally left to a jury and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country.

Lord Mansfield—A biographical sketch

Before turning, as with your indulgence I shortly shall, to two fields in which Lord Mansfield's decision-making provides an outstanding

11 *Hotham v East India Company* (1779) 1 Dougl 272 at 277.

12 In *Lickbarrow v Mason* (1787) 2 TR 63 at 73.

role model for commercial courts, judges and practitioners the world over—marine insurance and negotiable instruments—I would like to draw attention to certain biographical features of his career which seem to me to merit a digression.

First, of the 26 years which separated his call to the Bar of Lincoln's Inn from his appointment as Chief Justice of the Queen's Bench, Mansfield spent more than half as a law officer, latterly as Attorney-General, and it was by virtue of holding that office that he was entitled, according to the custom of the day, to demand the Chief Justiceship when it became vacant in 1756. This is a custom now abrogated in England and Wales, and its passing is unmourned.[13] It is nevertheless a sobering reflection that this now discountenanced practice gave England a Chief Justice whom many would consider the greatest ever holder of that office.

Secondly, it is noteworthy that Mansfield's departure from the Bench was so unwelcomed to the government of which he was a member that he was offered the Duchy of Lancaster (a government office) for life, a tellership in reversion for his nephew and pensions of £2,000, £5,000 and £7,000 a year "if he would retain his seat in the House of Commons for a month, a week, nay, even for a day".[14] He was deaf to all offers and all entreaties. It is not unknown today for judges to dilate on the financial sacrifice involved in accepting judicial office. When allowance is made for changed money values over 250 years and the absence of tax, and even allowing for the sources of income open to an 18th century judge, Mansfield's decision puts these lamentations into a somewhat different perspective.

Thirdly, Mansfield (born Murray) was a Scotsman and in his early days of practice argued a number of Scots appeals before the House of Lords,[15] where appeals from Scotland at that time predominated. Scots law, particularly then, drew heavily on civil law sources, and it seems at least possible that Mansfield acquired by this means a breadth of learning denied to his English colleagues. Holdsworth has recorded that:

13
The last Attorney-General to be appointed Lord Chief Justice was Lord Hewart in 1922, if Lord Caldecote (who had been Attorney-General, but briefly served as Lord Chancellor in 1939-1940) is excepted. But Lord Simon of Glaisdale, who had been Solicitor-General, was appointed to be President of the Probate, Divorce and Admiralty Division of the High Court in 1962.

14
Fifoot, above note 9, at 39.

15
Fifoot, above note 9, at 35.

> … his learning was far wider than that of any other English lawyer … he was familiar with the continental treatises on commercial and maritime law; and … he was learned in Scottish law, in international law, and in ecclesiastical law, as well as in the principles of common law and equity.[16]

Fourthly, it is again noteworthy that although Mansfield has left a generally golden reputation behind him, he was in his day the subject of sustained personal vilification perhaps never suffered by any other judge in any place at any time. I refer to the anonymous *Letters of Junius,* some of which were addressed to him personally and attacked in the strongest terms his partial and pro-government approach in particular to libel trials. During the Gordon riots of June 1780 his carriage windows were smashed by the mob, he was hustled as he left the House of Lords, his house in Bloomsbury Square was burned and his library destroyed. In comparison with penalties such as these the strictures of the press to which the modern judge is exposed may seem a somewhat moderate affliction.

Fifthly, Mansfield served as Chief Justice for 32 years. This is not by any means an international record. John Marshall presided in the Supreme Court of the United States for 34 years and Justice McTiernan sat in the High Court of Australia for nearly 46. But Mansfield's tenure of office was longer than that of any other Chief Justice of the Queen's Bench before or since. This prompts a thought perhaps worthy of consideration by those responsible for appointing judges in the modern world: that those who have made the most lasting and beneficial mark on the law have, on the whole, held high judicial office for very long periods. Lord Denning's now unrepeatable 38-year tenure may be seen as another example. It is of course true that if a judge is appointed to high office very young and turns out to be a nonentity or an embarrassment, the community will have to live with the consequences of that mistaken appointment for a very long time. There is no doubt a balance to be struck between a bold appointment which may pay rich dividends but may disappoint and a cautious and safe appointment which is unlikely to prove disastrous but even more unlikely to produce a Marshall or a

16 Holdsworth, above note 4, volume 12 at 526.

Mansfield. Where it is possible to identify a candidate of outstanding intellect, unimpeachable integrity and complete independence there is, I would suggest, much to be said for boldly appointing such a judge at an age young enough for the full potential of his or her genius to be realised.

My sixth point follows from the fifth. Mansfield's exceptional period of service had the consequence that there came before him a huge number of cases, many of them in the fields of law in which he was particularly interested. Taking account of reported cases, cases of which only his manuscript notes survive and cases of which no written record survives, it seems likely that he dealt with well over a hundred cases dealing with insurance (mostly marine insurance) and (it has been calculated) over 450 concerned with bills of exchange and promissory notes.[17] He also had that appetite for business which has characterised all the greatest judges: at the age of 75, presiding at the trial of Lord George Gordon, he sat at 9.00 am and continued to sit until he concluded a two hour summing-up to the jury at 4.30 am the next morning.[18] It may of course be that the fate of his house in Bloomsbury Square gave him a heightened interest in the outcome of this trial. But it is plain that his long tenure of office, his unflagging energy and his intense interest in certain areas of law, commercial law pre-eminent among them, gave him an opportunity denied to all but a very few judges not merely to decide cases but to develop a coherent, rational and principled body of law. As the *Dictionary of National Biography* puts it, "He thus converted our mercantile law from something bordering on chaos into what was almost equivalent to a code." An obvious analogy may be drawn with the constitutional legacy of Chief Justice Marshall in the United States.

This brings me to the seventh and last point in this biographical digression. Just as Marshall's genius could never have had the effect it did save in the early years of the young American republic, so Mansfield's genius was ideally matched to the time in which he flourished. For these were the years in which Britain, hitherto a poor, backward and little-regarded island on the periphery of Europe,

17
See *The Mansfield Manuscripts,* ed. Oldham (1992), volume 1, at 479.610; Samson, "Lord Mansfield and Negotiable Instruments," Dalhousie Law Journal (1988) 11 no. 3 at 931–944.

18
The Mansfield Manuscripts, volume 1 at 42.

moved into the front rank of maritime trading nations. It was an era of unprecedented expansion. Mansfield's outlook fully reflected the expansive optimism of the times. He was a free-trader before Adam Smith. In some respects his attitudes would cause raised eyebrows today. As Solicitor-General, for example, he opposed a bill to "prevent the insurance of French ships and their loading during the war with France", warning the House of Commons that its only effect would be

> to transfer to the French a branch of trade which we now enjoy without a rival; for I believe there is a great deal more of the insurance business done now in England than in all Europe besides. Not only the nations we are in amity with, but even our enemies, the French and Spaniards, transact most of their business here in London.[19]

So Mansfield's judicial work was boosted by a rising tide of mercantile activity and imbued with an internationalist outlook which had become increasingly unusual since the rise of nation states; but it was also fired by a lively sense of the advantage which accrues to a state where the laws are conducive to the effective discharge of business.

Contracts of insurance

Contracts of insurance were not of course a product of Mansfield's time. They had been known in England since before the 16th century.[20] In 1601 the Lord Chancellor had been empowered by statute to appoint a standing commission consisting of the admiralty judges, the recorder of London, two doctors of the civil law, two common lawyers and eight "grave and discreet merchants" "to hear all cases arising upon all policies of insurance entered in the London Office of Insurances".[21] But the effective operation of this tribunal had been thwarted by the jealousy of the common law courts, which by their reliance on general verdicts made it almost impossible to ascertain the grounds on which the case had been decided. As Park, writing in 1787 of the pre-Mansfield period, said,

19
Fifoot, above note 9, at 83.

20
The Mansfield Manuscripts, volume 1, at 451.

21
Ibid, at 452.

> Nay, even if a doubt arose in point of law, and a case was reserved … it was afterwards argued in private at the chambers of the judge who tried the cause, and by his single decision the parties were bound. Thus, whatever his decision might be, it never was promulgated to the world; and could never be the rule of decision in any future case. [22]

If these principles, which it is unnecessary to elaborate, now seem very familiar and very basic, that is a measure of Mansfield's contribution to the conduct of marine insurance business.

Mansfield replaced this inarticulate *in pectore* jurisprudence—if it may charitably be described as jurisprudence at all—by principles which were later, in substance, to be codified in the Marine Insurance Act 1906. Thus the contract of insurance required the utmost good faith, since "the special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only".[23] Non-disclosure of these facts would therefore void the policy. But "either party may be innocently silent, as to grounds open to both, to exercise their judgment upon": [24]

> The question therefore must always be "whether there was, under all the circumstances at the time the contract was underwritten, a fair representation; or a concealment; fraudulent if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run".[25]

Since,

> by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract.[26]

While "a representation may be equitably and substantially answered", he held that "a warranty must be strictly complied with".[27] If the risk is altered by the fault of the ship owner or his master, the insurer is discharged from his obligation,[28] so (for example) an unnecessary deviation avoids the policy.[29] The contract of insurance

22 *Park on Insurances,* xiv.

23 *Carter v Boehm* (1766) 3 Burr 1905 at 1909.

24 Ibid, at 1910.

25 Ibid, at 1911.

26 *Pawson v Watson* (1778) 2 Cowp 785 at 788.

27 *De Wahn v Hartley* (1786) 1 TR 343 at 345.

28 *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr at 341.

29 *Lavabre v Wilson* (1779) 1 Dougl 284 at 291.

is one of indemnity: thus "the insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss: and the insured ought never to gain more".[30] But because the contract is one of indemnity against a risk, the foundation of the contract fails if the risk has, for whatever reason, never been run; if the risk has been run there can be no return of the premium.[31] If these principles, which it is unnecessary to elaborate, now seem very familiar and very basic, that is a measure of Mansfield's contribution to the conduct of marine insurance business. They were not so before.

Negotiable instruments

As with insurance, so with negotiable instruments. By the beginning of the 18th century, bills of exchange and promissory notes were recognised as negotiable instruments, the rights and duties of the parties to these instruments were beginning to be defined and some of the characteristics of negotiability were beginning to emerge.[32] But much was unclear, and it had yet, crucially, to be decided that a bona fide holder for value of a negotiable instrument has a good title, even though he takes it from a person who has none. Building on the decisions of Chief Justice Holt,[33] Mansfield so held in a series of important cases.[34] In *Peacock v Rhodes* in 1781 he said:

> The holder of a bill of exchange or promissory note is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties.[35]

Thus was established the simple principle upon which an infinity of commercial transactions has depended ever since. Nothing could better illustrate the benign role which the law can play in giving effect to the expectations of businessmen, bringing clarity and uniformity to everyday business transactions and facilitating the conduct of business.[36]

30
Hamilton v Mendes (1761) 2 Burr 1198 at 1214.

31
Stevenson v Snow (1761) 3 Burr 1237 at 1240; *Tyrone v Fletcher* (1777) 2 Cowp 666 at 668.

In this brief account I have drawn on the helpful summary given by Holdsworth, above note 4, volume 12, at 536-540.

32
Holdsworth, above note 4, at 529.

33
In *Bullen v Crips* (1703) 6 Mod 29; *Hussey v Jacob* (1696) 1 Com 4; *Clerke v Martin* (1700) 2 Ld Raym 757, 758 and other cases.

34
Including *Grant v Vaughan* (1764) 3 Burr 1516; *Heylin v Adamson* (1758) 2 Burr 669 and *Edie v East India Company* (1761) 2 Burr 1216.

35
(1781) 2 Dougl 633 at 636.

36
This topic is well-discussed by Samson, "Lord Mansfield and Negotiable Instruments", Dalhousie Law Journal (1988) 11 No. 3 at 931-945.

Business practices and legal principles

The methods used by Mansfield to inform himself of market custom and practice, by consulting closely with a corps of special jurymen experienced and expert in commercial matters, did not outlive him. But happily his philosophy did. And, of course, as new business practices grow up, so a new need arises to try and ensure that reputable business practice and legal principle do not diverge. I consider briefly one example of many. A banker advancing money to an importer to finance the purchase of foreign goods ordinarily seeks security for his advance, which may be given by a pledge of the bill of lading, a document of title and therefore equivalent to a pledge of the goods themselves. But the importer will need the bill of lading to deal with the goods when they arrive or to deal with third parties. How can the banker retain his security while enabling the importer to handle the practical side of the transaction? The answer, first used by Baring Brothers' agent in Boston in the 1830s, was for the importer to sign a trust receipt, undertaking that in consideration of the bank releasing the bill of lading to him, he would hold it on trust for the bank, together with the goods and the proceeds of their sale. This arrangement, if legally watertight, appeared to serve the interests of both parties. But would it withstand legal scrutiny? Justice Story, the great American judge, followed the Mansfield approach in holding that it did:

> It was as fair and honest a commercial transaction in its origin and progress, and consummation, as was probably ever entered into. How, then, it is against the policy of the law, I confess myself unable to perceive, unless we are prepared to say, that taking collateral security for advances, upon existing or future property, on the part of a creditor, without taking possession of the property at the same time, or when it comes *in esse*, is per se fraudulent. Possession is ordinarily indispensable at the common law to support a lien; but even at the common law it is not indispensable in all cases.[37]

In due course the House of Lords reached a similar conclusion[38] and lower courts also upheld the commercial efficacy of the transaction.

37 *Fletcher et al v Morey* (1843) 9 Fed Cas 266.

38 *North Western Bank Ltd v John Poynter, Son & Macdonalds* [1895] AC 56.

In one case it was said:

> The object of these letters of trust was not to give the bank a charge at all, but to enable the bank to realise the goods over which it had a charge in the way in which goods in similar cases have for years and years been realised in the City and elsewhere.[39]

Lord Justice Mackinnon in the Court of Appeal put the matter very clearly:

> The truth is that almost every aspect of commercial dealing is not proof against the possible results of the frauds, that a lawyer, thinking of the possibilities of such things, might suppose to be so easy, but which in business in fact occur so rarely … I have no doubt that this very convenient business method will continue, and can do so because the whole basis of business rests upon honesty and good faith, and it is very rarely that dishonesty or bad faith undermines it.[40]

So again market practice was legally validated. But of course this is not always the outcome. There are occasions when transactions entered into in good faith for a legitimate financial purpose are held to be unlawful. Such was the effect of the House of Lords' decision in *Hazel v Hammersmith and Fulham London Borough Council,*[41] a case concerning interest rate swap transactions entered into in the market by a local authority. Some commentators, including myself, thought this an unfortunate decision, but since I was a member of the Court of Appeal with whom the House disagreed my own opinion is not altogether surprising.[42]

A transnational approach

I have lingered for so long in the past not, or not only, out of antiquarian zeal but because I suggest that the lessons of the past—the legal virtues of clarity, simplicity, intelligibility, uniformity, the alignment of sound market practice and legal principle, purposive interpretation, the overriding requirement of good faith—provide

39
In re David Allester Ltd [1922] 2 Ch 211 at 218, per Astbury J.

40
Lloyds Bank Ltd v Bank of America National Trust and Savings Association [1938] 2 KB 147 at 166. In this account I have gratefully drawn on Cranston, "Doctrine and Practice in Commercial Law" in *The Human Face of Law* (1997) at 200-206.

41
[1992] 2 AC 1.

42
[1990] 2 QB 697. This case is interestingly and objectively discussed by McKendrick, "Local Authorities and Swaps: Undermining the Market?" in *Making Commercial Law* (1997) at 201-237.

the surest guide in the rapidly changing commercial world in which, businessmen and lawyers alike, we now live. The rise of truly transnational corporations, the revolution in global communication technology, the massive increase in global financial flows and the creation of global financial and capital markets have made the world a different place.

A European author has pointed to a series of legal developments directly relevant for the transnationalisation of commercial law: the victory of the doctrine of party autonomy; the realisation that in many cases the technicalities of domestic legal rules do not fit for international trade; the informal nature of much law-making in the fields of private and public international law; the increased significance of non-governmental organisations; the success of the UN Convention on Contracts for the International Sale of Goods and other international uniform law instruments; the decreasing significance of private international law; the emphasis on fairness and reasonableness in international contract law; the acceptance of comparative law as an independent legal science; the gradual convergence of civil and common law; the growth of a modern common law of Europe and the development towards a European Civil Code; the transnationalisation of areas which have so far been reserved for domestic legislatures such as antitrust and bankruptcy law; the growth of arbitration and alternative dispute resolution mechanisms in international trade; the equation of arbitration and state courts as genuine adjudication procedures and the emergence of a genuine arbitral case law.[43] The author concludes:

> All of these factors have a basic common denominator: the erosion and irrelevance of national boundaries in markets which can truly be described as global or "transnational" and the decreasing significance of state-sovereignty for rule-making and rule enforcement.[44]

So the challenge is clear. Home-grown solutions and rules, however serviceable in their own day, may no longer serve. A broader transnational approach, drawing on the experience and

43 Berger, "Transnational Commercial Law in the Age of Globalisation" (*Centro di studi e richerche di diritto comparato e straniero*, Rome, 2001), at 4-5.

44 Ibid, at 5.

wisdom of businessmen and lawyers all round the world, is called for. Mansfield's close attention to the laws and customs of foreign countries points the way. And the building blocks are being put into place. Some, like the Uniform Customs and Practice for Documentary Credits, have been in existence for many years and have proved admirably effective. Others, like the International Sales Convention, the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law[45] are of more recent vintage. The Commission on European Contract Law, responsible for formulating these European Principles and liberated from the constraints of any national law, has formulated two propositions dear to the heart of Lord Mansfield. Article 2.101(1) provides that the contract is concluded if the parties intended to be legally bound and have reached a sufficient agreement without any further requirement. So the doctrine of consideration with all its artificialities is discarded. And Article 1.106 simply provides: "Each party must act in accordance with good faith and fair dealing."

The challenge in this new and bracing transnational environment is to ensure that in the future the law acts as the handmaid of commerce and not as an adversary, a fetter or an irritant.

The challenge, for the business community, for legal practitioners, for arbitrators and for courts in this new and bracing transnational environment is, I suggest, immense but clear: to ensure that in the future, as (on the whole) in the past, the law acts as the handmaid of commerce and not as an adversary, a fetter or an irritant.

45 Discussed by Bonell, "The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law", and Lando, "Eight Principles of European Contract Law" in *Making Commercial Law* (1997) at 91, 103.