

THE
HAMLYN
LECTURES

COMMERCIAL LAW IN THE
NEXT MILLENNIUM

Roy Goode



Sweet & Maxwell

COMMERCIAL LAW IN THE NEXT MILLENNIUM

by

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THE HAMLYN TRUST

The Hamlyn Trust owes its existence to the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 at the age of 80. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor and J.P. for many years, and it seems likely that Miss Hamlyn founded the trust in his memory. Emma Hamlyn was a woman of strong character, intelligent and cultured, well-versed in literature, music and art, and a lover of her country. She travelled extensively in Europe and Egypt, and apparently took considerable interest in the law and ethnology of the countries and cultures that she visited. An account of Miss Hamlyn by Dr Chantal Stebbings of the University of Exeter may be found, under the title "The Hamlyn Legacy", in volume 42 of the published lectures.

Miss Hamlyn bequeathed the residue of her estate on trust in terms which it seems were her own. The wording was thought to be vague, and the will was taken to the Chancery Division of the High Court, which in November 1948 approved a Scheme for the administration of the trust. Paragraph 3 of the Scheme, which closely follows Miss Hamlyn's own wording, is as follows:

"The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and Ethnology of the Chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the Intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them."

The Trustees are to include the Vice-Chancellor of the University of Exeter, representatives of the Universities of London,

The Hamlyn Trust

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From the outset it was decided that the Trust's objects could best be achieved by means of an annual course of public lectures of outstanding interest and quality by eminent Lecturers, and by their subsequent publication and distribution to a wider audience. The first of these Lectures were delivered by the Rt Hon. Lord Justice Denning (as he then was) in October and November 1949; details of the subsequent Lectures may be found on pages vii-x. In recent years, however, the Trustees have expanded their activities by setting up a "small grants" scheme to provide financial support for other projects designed to further public understanding of the law. With a view to marking the 50th Series of Hamlyn Lectures, to be delivered in November 1998 by the Hon. Mr Justice Sedley, four special awards were recently made under this scheme, as follows:

- **Coatbridge CAB, North Lanarkshire:** to assist the creation and testing of a pilot scheme in the use of computers for improving the quality of information and advice given in the interview room (in conjunction with Citizens Advice Scotland);
- **Legal Services Agency Ltd, Glasgow:** to provide bursaries to enable social workers, lay advisers and other interested persons to attend seminars and workshops on social welfare, housing and mental health law;
- **Liberty, London:** to facilitate the setting up of a programme of training courses and seminars designed to improve the quality and effectiveness of advice given by advice workers in the public, community and voluntary sectors; and

The Hamlyn Trust

- **Centre for Criminal Justice Studies, The University of Leeds:** to create a world-wide web site designed to promote understanding of the law and the legal system of the United Kingdom by means of accessible formats and non-technical language.

Further information relating to these projects is available from the Trustees.

The forty-ninth series of Hamlyn Lectures consisted of four lectures delivered by Professor Roy Goode on four successive Thursdays in November and December 1997; the first and last of these lectures were given in St John's College, Oxford, and the second and third were given in the Centre for Commercial Law Studies, Queen Mary and Westfield College, London.

March 1998

DESMOND GREER
Chairman of the Trustees

PREFACE

When Professor Desmond Greer, the Chairman of the Trustees of the Hamlyn Trust, approached me with an invitation to deliver the 1997 Hamlyn Lectures, I felt honoured to be asked to join such a long line of distinguished predecessors, headed by that great judge Lord Denning, but daunted by the task. Commercial law, at least in the sense in which I have defined it, is a vast subject, drawing on the law of contract, tort, property, equity and trusts, and on public law; indeed, on all the streams of law that make up the corpus of English jurisprudence; and the Hamlyn Lectures are designed not for lawyers alone but for all those interested in the development of our law and legal institutions. The choice lay between selecting a particular aspect of the subject as my theme or surveying the field as a whole. With some hesitation I opted for the broad sweep, the panoramic view of the balloonist (my critics will no doubt say, a hot-air balloonist!) rather than the focused dig of the archaeologist. My aim has been to convey to a mixed audience and readership the sheer excitement of English commercial law: its history and its vigour; its combination of intellectual subtlety and remarkable responsiveness to the changing needs of the commercial community; the principles and policies that compete for its attention; and its future in an era characterised by technological change and the interdependence of markets and by the growth of what has become known as transnational commercial law.

The task of depicting all this within the confines of this slender volume—and I have consciously sought to keep it short and lightly footnoted so as to preserve the character of the lectures from which it is derived—has proved even more formidable than I had expected. Almost every issue discussed has been the subject of major textbooks and extensive analysis in periodic literature. I have endeavoured—with what success only my readers can judge—to capture the spirit of English

Preface

commercial law and to focus on what seem to me to be its essential characteristics and points of stress.

The product is therefore a distillation of ideas that have undergone a long period of germination and have been garnered from a wide range of sources and from my own experiences in the course of a decidedly eccentric career. At the heart of private law governing commercial transaction lie the tensions between form and substance, between the strictness of contractual obligations and the principles of equity which moderate conduct in business life, between conceptual purity and commercial reality. The picture is no less complex in the field of public law, whose influence on commercial life is becoming all-pervasive, not only because of legislative regulation but because of judicial review of the decisions of public and quasi-public bodies and challenges to the *vires* of local authorities and statutory organisations. The role of public law will become more dominant still with the enactment of the European Convention on Human Rights, a development whose significance for business interests has yet to be appreciated by industry and commerce. Meanwhile, the relative merits of regulation and self-regulation, and of broad standards and detailed rules, continue to be debated. Finally, we have to ask ourselves whether, at the domestic level, our commercial law in general and our statute law in particular are adequate for the tasks ahead as we move towards the 21st century, and whether internationally the United Kingdom is not losing influence by its reluctance to codify its commercial law and to ratify international instruments to the shaping of which it makes such valuable contributions.

The challenges of the future are so much greater than those of the past because of the speed and scale of change: the increasing replacement of paper with electronic records, the problem of regulation in an era of globalisation, the amorphous character of the Internet, which allows contracts to be concluded by the press of a button before the parties are even known to each other, and through channels of communication that are often untraceable. Meanwhile, European Community law will continue to play an increasingly dominant role in the conduct of business.

I have no doubt that our commercial law will rise to these challenges, but if it is to do so successfully we must be much readier than we have shown ourselves in the past to look overseas and to learn from the experiences of lawyers and

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lawmakers in other jurisdictions. Many more of our scholars, even if not themselves comparative lawyers, are developing an interest in comparative law, whilst the House of Lords has, in recent years, set an example in its awareness of the value of resorting on occasion to the doctrine and jurisprudence not only of other common law systems but also of civil law jurisdictions. Of particular interest also is the remarkable impact of recent international and European restatements, such as the Unidroit Principles of International Commercial Contracts and its European counterpart, the Principles of European Contract Law prepared by the Commission on European Contract Law. Perhaps the warm response to these products of international academic collaboration also reflects a growing frustration at the unwillingness of governments to find legislative time to implement international conventions on the private law of international trade. Whatever the reason, we may be witnessing a return to the halcyon days of the medieval *jus commune* when it was left to the scholars, rather than the legislators, to systematise the law, and to courts to anchor that law in practicality through judgments which, in the words of Professor Raoul Van Caenegem, "are concerned with real people and real cases". One thing is certain: that in the future, as in the past, commercial law will be driven by and fashioned from the legitimate needs and practices of the mercantile community; for commercial law, above all, is a users' law, and it is from the creativity of the merchant and the financier in devising new instruments and new business methods that it will continue to evolve.

Roy Goode
St John's College
Oxford
March 29, 1998

ACKNOWLEDGMENTS

My first debt, is, of course, to the Hamlyn Trustees for inviting me to deliver the 1997 Hamlyn Lectures, and to their Chairman, Professor Desmond Greer, for the immense trouble he took over the arrangements and his exemplary patience in dealing with a lecturer all too prone to absent-minded disorder. I should also particularly like to thank Alison Seaman, a law student at the University of Essex, for all her research assistance and her rapid grasp of key issues. Her endeavours saved me a considerable amount of labour.

Every scholar builds on the work of his or her predecessors. Over the years I have benefited greatly from the writings of others, a number of which are referred to in the pages that follow, and from my discussions with academic and practising colleagues and debates with students. They are too numerous to list individually. To all of them I am deeply indebted. Stephen G. Austin, of Fulbright and Jaworski, was good enough to respond rapidly to my urgent request for a copy of his two-part co-authored article on the *Lykes Steamship* decision referred to on page 65.

The first and last of the Hamlyn Lectures took place at St John's College, Oxford, where hospitality was kindly provided by the international law firm Norton Rose and Sweet & Maxwell. The second and third lectures were given at my former academic home, Queen Mary and Westfield College, University of London, through the courtesy of the Principal, Professor Graham Zellick (now Vice-Chancellor of that University) and Professor Ian Fletcher, Director of the Centre for Commercial Law Studies. I am most grateful for the hospitality there extended by Ian Fletcher and the Centre, and by the Trustees of the Hamlyn Trust, and for all the arrangements so efficiently made by Ian Fletcher's personal assistant, Mildred Schofield; while at the Oxford end my secretary, Judith Crowle, was, as always, immensely helpful and hardworking. I should

Acknowledgments

also like to express my thanks to the staff of Sweet & Maxwell for all their work in the editing, indexing and production of this book.

I must also record my deep indebtedness to Norton Rose for supporting the Chair of English Law over the past eight years. By arrangement with the University this support is being transferred to a newly established Chair, the Norton Rose Chair of Commercial and Financial Law, attached to St Hugh's College, while the University will resume responsibility for the funding of the Chair of English Law, to which Professor Paul Craig has been appointed as my successor upon my retirement at the end of the present academic year. So I will have been the first and last Norton Rose Professor of English Law, a post I have been privileged to hold since 1990 at St John's College, where I have spent eight happy years, through the kindness and support of the President, Dr William Hayes, the other Fellows and staff of the college and my friends and colleagues in the Faculty of Law. A special word of appreciation to college and University appears at the conclusion of the lectures. Finally, I must once again express my deep gratitude to my long-suffering wife Catherine, for her constant support and encouragement of a husband who has been all too prone to working at unsocial hours and to mislaying books and papers at crucial moments of authorship and lecturing. *Amantes amentes!*

R.M.G.

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